APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 29902

Plaintiff/Appellee,

v.

RAMON SMITH,

Defendant/Appellant,

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

HONORABLE BRADLEY ZELL
Circuit Court Judge

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Notice of Appeal Filed February 7, 2022

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No. 29902

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PRELIMINARY STATEMENT

Defendant and Appellant, Ramon Smith, will be referred to throughout this brief as "Smith" or "Appellant". The Appellee, State of South Dakota, will be referred to as "State" or "Appellee". The transcript of the Jury Trial will be referred to as "J.T.". The transcript of the Sentencing will be referred to as "S.T.". All transcripts of Motions Hearings will be referred to as "M.H." followed by date of the hearing.

JURISDICTIONAL STATEMENT

An Indictment was filed with the Minnehaha County Clerk of Courts on June 19, 2019 charging Smith with the following, Count I: Murder – 2nd Degree (Depraved Mind), in violation of SDCL 22-16-7, Class B Felony; Count 2: Manslaughter – 1st Degree – Dangerous Weapon, in violation of SDCL 22-16-15(3), Class C Felony; Count 3: Attempted Murder – 1st Degree – in violation of SDCL 22-16-4(1) and SDCL 22-4-1, Class 2 Felony; Count 4: Attempted Murder – 1st Degree – in violation of SDCL 22-16-4(1) and SDCL 22-4-1, Class 2 Felony; Count 5: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 6: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class

3 Felony; Count 7: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 8: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 9: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 10: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 11: Aggravated Assault – Serious Bodily Injury – in violation of SDCL 22-18-1.1(4), Class 3 Felony; Count 12: Aggravated Assault – Serious Bodily Injury – in violation of SDCL 22-18-1.1(4), Class 3 Felony; Count 13: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 14: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 15: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 16: Reckless Discharge of a Firearm – in violation of SDCL 22-14-7(1), Class 1 Misdemeanor; Count 17: Possession of a Firearm by Convicted Felon, in violation of SDCL 22-14-15, Class 6 Felony; Count 18: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony; and Count 19: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony. A Part II Information was filed on June 19, 2019.

On September 19, 2019, Smith was arraigned on the Indictment and entered a Not Guilty plea.

A jury trial was held from August 16, 2021, through August 26, 2021. Prior to the commencement of trial, the State dismissed Counts 3-7, 11, 12, and 16-19 of the Indictment. On August 26, 2021 the Jury found Smith Guilty of Count 1: Murder – 2nd Degree (Depraved Mind); Count 2: Manslaughter – 1st Degree – Dangerous Weapon; Count 8: Aggravated Assault – Dangerous Weapon; Count 9: Aggravated Assault – Dangerous Weapon; Count 10: Aggravated

Assault – Dangerous Weapon; Count 13: Aggravated Assault – Physical Menace; Count 14: Aggravated Assault – Physical Menace; Count 15: Aggravated Assault – Physical Menace.

On January 13, 2022, Smith appeared before the trial court and Admitted to an Amended Part 11 Information. After said Admission, Smith was sentenced as to Count 1: Murder – 2nd Degree (Depraved Mind) to life in prison in the South Dakota State Penitentiary without the possibility of parole and costs of $106.50; Count 2: Manslaughter – 1st Degree (Dangerous Weapon) no sentence with imposed; Count 8: Aggravated Assault – Dangerous Weapon – twenty-five (25) years in the South Dakota State Penitentiary, consecutive to Count 1, credit for nine hundred thirty-eight (938) days served, and costs of $106.50; Count 9: Aggravated Assault – Dangerous Weapon - twenty-five (25) years in the South Dakota State Penitentiary, consecutive to Count 1 and 3, credit for nine hundred thirty-eight (938) days served, and costs of $106.50; Count 10: Aggravated Assault – Dangerous Weapon - twenty-five (25) years in the South Dakota State Penitentiary, consecutive to Count 1, 3 and 4, credit for nine hundred thirty-eight (938) days served, and costs of $106.50; Count 13: Aggravated Assault – Physical Menace – no sentence was imposed; Count 14: Aggravated Assault – Physical Menace – no sentence was imposed; Count 15: Aggravated Assault – Physical Menace – no sentence was imposed. The trial court also found that each Count Smith was convicted of was a separate transaction for purposes of any possible parole. Notice of Appeal was filed on February 7, 2022. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

1. The trial court erred in not allowing a hearing and granting Defendant's Motion to Dismissed based upon Statutory Immunity.

2. The trial court erred in allowing the State to introduce evidence that Smith was precluded under the law from possessing a firearm.

3. The trial court erred in not setting aside the verdict and entering a judgment of acquittal.
4. The trial court erred by not granting a mistrial.

PROCEDURAL STATEMENT

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violation of SDCL 22-14-15, Class 6 Felony; Count 18: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony; and Count 19: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony. A Part II Information was filed on June 19, 2019.

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Penitentiary, consecutive to Count 1, 3 and 4, credit for nine hundred thirty-eight (938) days served, and costs of $106.50; Count 13: Aggravated Assault – Physical Menace – no sentence was imposed; Count 14: Aggravated Assault – Physical Menace – no sentence was imposed; Count 15: Aggravated Assault – Physical Menace – no sentence was imposed. The trial court also found that each Count Smith was convicted of was a separate transaction for purposes of any possible parole. Notice of Appeal was filed on February 7, 2022. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF FACTS

On June 8, 2019, around 1:07 p.m. a 911 call was placed regarding a weapons violation. *Transcript of Jury Trial, Volume 4, pg. 44, lines 16-21.* The call was in regard to an apartment building on 116 North Cliff Avenue, Sioux Falls, South Dakota. *Id. at pg. 47, lines 12-13.* It was apartment building in which Tenessa Carr lived with her husband Larry Carr, Jr. and her son Larry Carr, III (hereinafter "L.J."). *Id. at pg. 48, lines20-22.* Tenessa's daughter, Christina Haney, lived in apartment 120 with her girlfriend, Martece Saddler, and Martece's daughter. *Id. at lines 12-17.* The apartment complex was an "L-shaped" complex with 120 not facing the street, but 116 facing the street. *Id at pg. 47, lines 18-25.* Between the apartment complex where Tenessa Carr and Christian Haney lived was a retaining wall that separated the complex from the other homes in the area. *Id. at pg. 48, lines 3-11.*

Around 10:00 a.m. on June 8, 2019, Tenessa Carr (hereinafter "Tenessa") awoke due to some shouting in the driveway of the apartment complex. *Id. at pg. 49, lines 21-22.* Tenessa looked out the window and saw a girl standing and yelling towards Christina's building. *Id. at pg. 51, lines 21-22.* The girl was very loud and very angry. *Id. at pg. 73, lines 11-14.* After hearing the shouting, Tenessa called her daughter Christina to inform her that she heard some shouting and

heard Christina's name during the shouting. *Id. at lines 23-24.* Tenessa actually thought Christina was outside fighting at the time. *Id. at lines 24-25.*

Around noon, Larry Carr, Jr. and Tenessa got out of bed. *Id. at pg. 52, line 16.* Tenessa called her daughter Olivia and started cooking a meal for the day. *Id. at lines 18-21.*

Around 1:00 p.m., Larry Carr, Jr., looked out the window and saw and individual by the name of Devejuan Brown (hereinafter "Devejuan") at the apartment complex. *Id. at pg. 54, lines 24-25.* Devejuan was a co-worker of theirs at Sequel. *Id. at pg. 55, lines 2-4.* Both Tenessa and Larry Carr, Jr., were surprised to see Devejuan in the parking lot as he was supposed to be at work that day. *Id. at lines 5-8.* Larry Carr, Jr., said he was going out to talk to Devejuan. *Id. at lines 9-10.* Tenessa watched as Larry Carr, Jr., went outside and noticed a bunch of young men, probably six (6) or seven (7) of them in the parking lot sitting on the retaining wall. *Id. at lines 13-24.*

Unknown to Tenessa, the young men had formulated a plan to come to the apartment complex and confront Smith due to an incident that happened between 10:00 a.m. that morning and 1:00 p.m. that afternoon.

Christina Haney testified and gave information as to the incident of the morning of June 8, 2019, and the events leading up to the same. Prior to June 8, 2019, there was a disagreement between Jasmine Allen and Paris McAbee. *Id. at pg. 95, lines 3-5.* Jasmine is a sister to the Allen brothers and Zykey McAbee and Paris is their mother. The disagreement continued on the night of June 7, 2019, when Smith had just gotten to town. Martece, Smith, and Christina went to Pave in downtown Sioux Falls looking for an after party. *Id. at pg. 95, lines 24-25.* There they ran into Darneisha and Deidra Williams. *Id. at pg. 96, lines 1-3.* Darneisha is friends with the Allen's. *Id. at lines 10-11.* There was some trash talking between them. *Id. at lines 14-16.* Darneisha's best

friend is Jasmine Allen. *Id. at lines 19-20.* Martece, Smith, Christina, and Deidra eventually went back to Martece and Christina's apartment for the night. *Id. at pg. 97, lines 6-7.*

The next morning Christina started getting phone calls and texts from her mother Tenessa Carr. *Id. at lines 17-21.* Christina knew it was Jasmine Allen who'd been outside her apartment that morning yelling based upon her mother's description. *Id. at pg. 98, lines 10-23.* She also knew that it was Jasmine as the Facebook feud had been discussed the evening prior with her best friend Darneisha. Christina was upset that Jasmine came to her house and caused such a commotion. *Id. at pg. 99, lines 15-18.* She told Martece, Smith, and Deidra that she was going to Jasmine's house. *Id. at lines 19-21.* Smith went with them but drove separate as he had just gotten a new car and had never been to Sioux Falls before. *Id. at pgs. 99-100, lines 25-3.*

When they arrived at the Allen's (Paris's house), Martece and Christina went inside the apartment complex looking for Jasmine Allen. *Id. at pg. 100, lines 9-13.* They knocked on the door and Joseph Allen answered it. *Id. at lines 18-19.* Martece and Christina were upset which made Joseph mad. *Id. at lines 20-23.* All three of them yelled at each other and called each other various names. *Id. at pg. 101, lines 6-15.* Martece kicked a fan that was sitting in a window allowing air from the outside. *Id. at pg. 102, lines 15-19.* This angered Joe. *Id. at pg. 102, lines 24-25.* Joe started yelling through the window. *Id. at pg. 103, lines 1-2.* During this time, Smith was basically just walking around the building and came to meet them based upon the commotion. *Id. at pg. 103, lines 8-13.* They all then left the area.

Once back at the apartment Smith was helping Christina and Martece put together furniture as they had recently moved into the apartment. *Id. at pg. 104, lines 2-4.* While they were organizing the house and putting together furniture, Christina started receiving calls and messages from the Allen's. *Id. at pg. 105, lines 2-4.* These were from Joshua Allen. *Id. at lines 7-8.* The messages

were "No, bitch. Answer my calls. Come outside." *Id. at lines 10-11.* He also sent a video of a gun with a beam saying he was coming. *Id. at lines 12-13.* Joshua and his brothers were in the video, and they were waiving the gun around being very hype. *Id. at lines 14-17.* Christina showed the video to Martece, LJ, and Smith. *Id. at lines 20-22.*

After a while, people showed up banging on the door as if they were trying to kick it in. *Id. at pg. 106, lines 15-17.* Christina heard a voice, during the banging that said "No, bitch. Come outside." *Id. at pg. 108, lines 6-8.* Christina, Smith and LJ looked out the window and saw the Allen brothers with a couple of extra people. *Id. at pg. 107, lines 11-14.* Joshua was pacing back and forth. *Id. at lines 24-25.* Christina also saw her father, Larry Carr, Jr., outside which concerned her as she had just seen videos of guns and people being aggressive sent to her phone and didn't want her father outside with the people who sent them. *Id. at pg. 108, lines 9-15.* Smith had been laying on the floor during this time as he was scared. *Id. at lines 19-20.*

Since Smith didn't know the people banging on the door, the people outside, nor the people who sent the videos and threatening messages he thought he could go outside and calm the situation down. *Id. at lines 16-18.* Christina watched as Smith went outside. *Id. at lines 21-23.* She testified that he walked out with his hands up and said he just wanted to talk. *Id. at lines 24-25.* During this time, Christina saw Joshua rush Smith. *Id. at pg. 109, lines 1-4.* She then went to tell Martece that Smith was outside and heard shots. *Id. at lines 6-10.* Christina went outside and helped her dad into a vehicle and then went to the hospital. *Id. at lines 11-16.*

Zykey McAbee (hereinafter "Zykey") testified that on the morning of June 8, 2019, he was at his ex-girlfriend's house, Courtney Nelson. *Id. at pgs. 84-85 lines, 23-2.* Her residence was by Roosevelt High School, which is across town from apartment complex where the shooting took place. *Id. at pg. 85, lines 8-16.* Joshua Allen (hereinafter "Josh"), one of Zykey's brothers called

him and then came and picked him up. *Id. at pgs. 85-86, lines 17-2.* Jevon Allen (hereinafter "Jevon") was also in the car. *Id. at pg. 86lines 11-12.* The brothers then traveled to their mother Paris' house at 1000 East Third Street, Sioux Falls. (hereinafter "Paris"). Joseph Allen (hereinafter "Joseph") was also present at Paris' house. *Id. at pg. 87, lines 1-2.* (Zykey, Josh, Joseph, and Jevon are all brothers).

The brothers all discussed an incident that happened at the house earlier that morning. *Id. at pg. 87, lines 3-5.* Some damage was seen at the house and the brothers had decided to meet up with some other young men to form an angry mob and confront the individuals who had done the dames. *Id. at lines 8-24.* They went so far as to meet up with some at a McDonald's on East Tenth Street. *Id. at line 22-24.* There were three (3) or four (4) young men, including Devejuan waiting at the McDonald's to join the brothers. *Id. at pg. 88, lines 7-8.*

Devejuan testified that Jevon called him on June 8, 2019. *Id. at pg. 155, lines 23-25.* Jevon told Devejuan that he, and others, needed to go holler at some people. *Id. at pg. 156, lines 3-5.* Devejuan testified that six (6) or seven (7) guys went in different cars to the address on North Cliff. *Id. at pg. 158, lines 8-12.* He testified that they parked around the block and walked to the parking lot.

Devejuan testified that when Smith came out of the apartment complex at least one person from the mob rushed at Smith. *Id. at pg. 162, lines 5-7.* Devejuan testified that after seeing from the mob rush at Smith is when the shots were fired. *Id. at lines 12-15.* Devejuan testified that's when people scattered and ran in different directions. *Id. at lines 16-22.*

While at McDonald's the men talked about the incident at Paris' house earlier that morning. *Id. at pg. 89, lines 5-7.* They decided to go to Martece's and Christina's. *Id. at lines 8-9.* They drove a couple of cars over to the area of 116/120 North Cliff Avenue and parked around the

block so no one would see them pull into the parking lot of the apartment. *Id. at lines 11-21.* The mob then walking around the corner together to the parking lot of the apartment complex. *Id.at pgs. 89-90, lines 22-2.*

In the adjacent house next to the apartment complex Dominic Doty (hereinafter "Doty") and Tracey Frisby were doing some yard work. *Id. at pgs. 97-98, lines 22-2.* In the backyard Doty had a CONEX (shipping/storage) box. There was also the retaining wall between the yards. *Id. at pg. 99, 12-13.* People started gathering by the retaining wall while they were working on the yard project. *Id. at pg. 101, lines 21-23.* Doty testified that a "half dozen-ish people gathered there". *Id. at lines 24-25.* Frisby also thought there were six (6) males on the retaining wall and maybe ten (10) ran after shots were fired. *Id. at pg. 124, lines 1-2.* At some point Doty and Frisby thought they hear a Bobcat backfiring, but it was actually gunshots and they saw people running. *Id. at pgs. 111-112, lines 3-3.* Doty and Frisby both went to retrieve their guns to protect themselves. *Id. at pgs. 112-113, lines 24-2.* Doty and Frisby both testified that Smith didn't fire a gun at them and wasn't intending on shooting at them.

William Carlson (hereinafter "Carlson"), who owned a house in the area of the incident in 2019 testified that around 1:00 p.m. on June 8, 2019, he was washing his dishes and he looked up and saw a number of people in the parking lot. *Id. at pgs. 135-136, lines 10-6.* He testified that he saw ten (10) to fifteen (15) males in the parking lot; a crew of people. *Id. at pg. 136, lines 5-6.* Carlson also testified that someone in the group was agitated, throwing their arms up, and acting angry. *Id. at pg. 136, lines 8-13.* Carlson testified that he heard shots within seconds of seeing the individual throwing his arms up and around. *Id. at pg. 136, lines 16-20.* Carlson testified that everyone ran after that. *Id. at lines 23-25.* Carlson then called 911. *Id. at pg. 137, lines 1-2.*

After arriving in the parking lot of the apartment building, Josh went into the apartment. *Id. at pg. 90, lines 3-5.* The door to the apartment is usually locked, but on this morning the door was cracked or propped open. *Id. at lines 13-18.* Josh was able to enter the apartment for this reason as he didn't have a key for the door. *Id. at lines 23-25.*

When Josh entered the apartment, he was mad and was pounding on a door inside and yelling loudly for the occupants to "Come outside". *Id. at pg. 91, lines 6-22.* Josh exited the apartment building and was still angry and flailing his arms around and yelling. *Id. at pg. 92, lines 6-11.*

Larry Carr, III (hereinafter "LJ") testified that he woke up from his parent's apartment on the morning of June 8, 2019, and went to his sister, Christina's, apartment. *Jury Trial Transcript, August 20, 2019, pg. 165, lines 2-3.* LJ was talking to Christina, Martece, and Ramon about a Facebook feud that was going on. *Id. at pg. 166, lines 5-22.* They all heard people coming into the parking lot. *Id. at pg. 167, lines 6-9.* At some point, Smith and LJ went over and looked out the window. *Id. at lines 10-12.* Martece and Christina also went to look out the window. *Id. at lines 12-14.* They saw a bunch of people coming into the parking lot; maybe ten (10) to twelve (12) guys. *Id. at lines 15-22.* LJ heard banging on the door to the apartment and a couple of males yelling for Christina or Martece. *Id. at pg. 168-169, lines 1-19.* The yelling by the men was loud, the kicking at the door by the men was loud, and the punching at the door by the men was loud, and LJ could tell the mob outside was angry and trying to get into the apartment. *Id. at pg. 169, lines 1-9.* The attack by the men on the door lasted for a little bit of time. *Id. at pg. 170, lines 1-4.* The men eventually went back outside and Smith, Martece, LJ, and Christina looked out the window to see the men go back outside. *Id. at lines 5-9.* The men were still mad in the parking lot and yelling for them to come out to fight with their arms flailing around. *Id. at lines 10-18.* LJ saw his dad outside and went out to talk to him. *Id. at pg. 171, lines 1-6.* LJ testified

that his father was talking to Devejuan, as was he, and the angry individual in the parking lot came up to him. *Id. at pg. 172, lines 4-5.* LJ testified that Smith came out of the apartment and was eating something. *Id. at lines 12-16.* LJ testified that the angriest guy went up to Smith and he heard something about a gun. LJ then heard shots fired. *Id. at lines 22-25.* He then dipped over the retaining wall and around the building and then came back to the area. *Id. at pg. 173, lines 1-6.* LJ then helped Christina get Larry Carr, Jr. into Christina's vehicle. *Id. at lines 9-11.* LJ then went up to Martece's apartment and Martece gave him a backpack which held the gun that was used in this incident. *Id. at pg. 174, lines 4-10.* LJ hid the gun until he told his mother about it and ultimately turned it in to police even though Tenessa thought he might go to prison for hiding the same. *Id. at pg. 176, lines1-13.*

A short while later, Smith exited the apartment building and Josh angrily said, "Is this the nigger from Mom's?". *Id. at pgs. 92-93, lines 24-3.* Joseph responded "Yes". *Id. at pg. 93, lines 4-5.* Joshua then started going towards Smith and reached to "hike" up his shorts. *Id. at lines 6-17.* While this was happening some of the mob got up off the retaining wall. *Id. at pg. 94, lines 7-9.* As Joshua was charging Smith, and the others were standing up, Smith pulled out a gun and fired it. *Id. at lines 12-15.* The other young men begin to run in different directions. *Id. at lines 16-17.* Joshua and Jevon were both shot during the incident, as well as Larry Carr, Jr. Jevon was wearing a satchel at the time of the shooting which contained a gun. *Trial Transcript, August 20, 2021, pg. 52, lines 4-6.*

Tenessa yelled out to Devejuan and asked him what he was doing at their apartment complex. *Id. at pg. 60, lines 9-11.* When she did this, one of the other young men outside rand up to her window and said "Who said that? Who said that?" *Id. at lines 11-13.* Tenessa didn't answer him. *Id. at lines 13-14.* The same young man then started yelling and then Tenessa heard gunshots. *Id.*

at lines 16-23. Prior to hearing the gunshots, Tenessa testified that the same young man was talking to someone in an aggressive manner near the door of apartment 120. *Id. at pg. 74, lines 5-8.* At the time he was doing this, the people sitting on the retaining wall stood up. *Id. at lines 9-19.* Tenessa looked at her husband and saw pain on his face and a small red dot on his stomach. *Id. at pg. 61, lines 1-5.* She also saw the other young men running. *Id. at lines 8-10.*

Randy Sarchet, an employee at Dakota Auto Parts on Eighth and Cliff in Sioux Falls, South Dakota testified that a video was captured from one of the surveillance cameras of the business of the parking lot of the apartment complex where the incident occurred. *Transcript of Jury Trial, August 24, 2021, pg. 29, lines 3-5.* The video was turned over to Detective Jon Carda of the Sioux Falls Police Department. *Id. at lines 6-14.*

Detective Carda, after the video was shown to the jury, was asked to explain what was seen in the video. Detective Carda testified that in the video you could see people walking north and work their way into the parking lot. *Id. at pg. 35, lines 14-15.* Then two people go into the building at 120 N. Cliff and another person from the group enters the same building after that. *Id. at lines 17-19.* The three people remain in the building for just under a minute. *Id. at lines 20-21.* Another person walks along the west side of the building, to the northwest corner of the property and stops right under the shadow of the tree where they remain. *Id. at pgs. 35-36, lines 21-5.* The video shows Smith exiting the building and approached by a person in a white shirt (Joshua Allen). *Id. at pg. 36, lines 21-23.* Shots are fired and people then scatter in different directions and Smith fired shots over their heads across Cliff Avenue. *Id. at pg. 37, lines 8-17.*

Tenessa told her son James to call 911 and ran out of the house. *Id. at lines 14-17.* Tenessa told Devejuan to take her husband to the hospital. *Id. at lines 19-20.* She also ran into Smith and told him "You just shot my husband." *Id. at lines 22-24.* Smith stated, "I didn't know." *Id. at*

lines 24-25. Christina took Larry, Jr. to the hospital in her car. *Id. at pg. 62, lines 24-25.* Larry Carr, Jr. passed away on June 10, 2019.

Devejuan was still by Jevon, who had been reaching into a satchel, with his head looking down towards the satchel, when he was shot and putting pressure on Jevon's head. *Transcript of Jury Trial, August 20, 2019, pg. 49-52, lines 4-6.*

LEGAL ANALYSIS

1. The trial court erred in not allowing a hearing and granting Defendant's Motion to Dismissed based upon Statutory Immunity.

Love v. State 286 So. 3d 177 (Fla. 2019
State v. Burtzlaff 493 N.W.2d 1, 7 (S.D. 1992)
Rodgers v. Commonwealth of Kentucky 285 S.W.3d 740 (Ky. 2009)

SDCL 23A-8-2(6) provides, in part, the court must dismiss and indictment or information when it contains a matter which, if true, would constitute a legal justification or excuse of the offense charged, or other bar to the prosecution.

On March 21, 2021, South Dakota Governor Kristi Noem signed House Bill 1212 into law. This bill, as titled, clarified the use of force in South Dakota. Along with clarifying and restating South Dakota's already existing use-of-force laws, House Bill 1212 also created a new statute, SDCL 22-18-4.8, which cloaks a defendant with immunity from criminal prosecution when the defendant uses force, as permitted in SDCL 22-18-4 to 22-18- 4.7, inclusive. SDCL 22-18-4.8 provides, in its entirety:

> A person who uses or threatens to use force, as permitted in SDCL 22-18-4 to 22-18-4.7, inclusive, is justified in such conduct and is immune from criminal prosecution and from civil liability for the use or threatened use of such force brought by the person against whom force was used or threatened, or by any personal representative or heir of the person against whom force was used or threatened, unless:
>
> (1) (a) The person against whom force was used or threatened is a law enforcement officer, who was acting in the performance of
> official duties; and

(b) The officer identified himself or herself; or

(2) The person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer who was acting in the performance of official duties.

The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by a defendant in the defense of any civil action brought by the plaintiff, if the court finds that the defendant is immune from prosecution in accordance with this section.

Nothing in the text or legislative history of SDCL 22-18-4.8 indicates the Legislature intended for the immunity provisions to be available only for prosecutions commencing on or after July 1, 2021. As the South Dakota Supreme Court has repeatedly held:

> The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

Argus Leader v. Hagen, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 (internal citations omitted). The language of SDCL 22-18-4.8 is clear and unambiguous. It creates immunity from criminal prosecution for any person who uses force in a manner consistent with what now-repealed but restated SDCL 22-16-341 and 352 provide.

To be sure, it is well-established that, "[t]he Legislature knows how to include and exclude specific items in its statutes." *Sanford v. Sanford*, 694 N.W.2d 283, 289 (SD 2005)

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1 "Homicide is justifiable if committed by any person while resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is."

2 "Homicide is justifiable if committed by any person in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant if there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished."

(internal citations omitted). If the Legislature intended for SDCL 22-18-4.8 to say, "[a] person who uses or threatens to use force . . . is immune from criminal prosecution *for all prosecutions commencing after July 1, 2021*," or "[a] person who uses or threatens to use force . . . is immune from criminal prosecution *for all prosecutions based on crimes committed before July 1, 2021*," the Legislature could have so said. It did not.

In addition to the clear, unambiguous language of SDCL 22-18-4.8 supports the proposition that its provisions are applicable to the present case, in previously setting forth whether a statute should be given retroactive effect, the South Dakota Supreme Court has held:

> [A] statute will not operate retroactively unless the act clearly expresses an intent to do so" or the change is merely procedural and not substantive. *West v. John Morrell & Co.*, 460 N.W.2d 745, 747 (S.D. 1990). "As related to criminal law and procedure, *substantive law* is that which declares what acts are crimes and prescribes the punishment therefor; whereas *procedural law* is that which provides or regulates the steps by which one who violates a criminal statute is punished." *State v. Sylva*, 248 Kan. 118, 804 P.2d 967, 969 (1991) (quoting *State v. Hutchison*, 228 Kan. 279, 615 P.2d 138, 140 (1980)).

State v. Krause, 2017 S.D. 16, 894 N.W.2d 382, 387 FN 7. (Emphasis in original). Nothing about SDCL 22-18-4.8 declares what acts are crimes. Nothing about SDCL 22-18-4.8 prescribes punishments for crimes. SDCL 22-18-4.8 does not create a new affirmative defense. Established South Dakota law already provides that a Defendant does not need to retreat (SDCL 22-18-4.2(1), previously SDCL 22-18-4) and further justifies homicide when the Defendant is protecting himself (SDCL 22-18-4.2(3), previously SDCL 22-16-34) or a family member (SDCL 22-18-4.1, previously SDCL 22-16-35). Said another way, SDCL 22-18-4.8 leaves unchanged the current murder and affirmative defense statutes. SDCL 22-18-4.8 only affects the *procedure* by which a State is able to seek a conviction.

"Where a new statute deals only with procedure, it applies to all actions, including those which have already accrued or are pending, as well as those which arise after enactment

of the statute."

While South Dakota has not had a chance to interpret the question of whether an immunity statute enacted after the alleged crime was committed may be appropriately applied to a pending case, other states have faced this issue. In *Rodgers v. Commonwealth of Kentucky*[3], the defendant was convicted of first-degree manslaughter. On appeal, one of the claimed errors was that the defendant was not allowed to seek protection under Kentucky's immunity statute. Rodgers's alleged crime was committed in 2004. On July 12, 2006, two months before Rodgers's trial, a new law went into effect in Kentucky that "declared that one who justifiably used defensive force 'is immune from criminal prosecution,' including arrest, detention, charge, or prosecution in the ordinary sense."[4]

While the Kentucky Supreme Court affirmed Rodgers's conviction on other grounds, it concluded that Rodgers was entitled to seek the benefit of Kentucky's immunity statute.

> At least in cases such as this one, that do not involve a peace officer, the immunity provision does not constitute substantive law; it has nothing to do with who is entitled to use self-defense or under what circumstances self-defense is justified. It is, rather, purely procedural, and by prohibiting prosecution of one who has justifiably defended himself, his property or others, it in effect creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial. By declaring that one who is justified in using force "is immune from criminal prosecution," and by defining "criminal prosecution" to include "arresting, detaining in custody, and charging or prosecuting the defendant," the General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges. This aspect of the new law is meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as well. With KRS 503.085, the ***General Assembly has created a new procedural bar to prosecution, and that bar, like other procedural statutes, is to be applied retroactively.***

Id. at 753. (emphasis added). Similar to the immunity statute in *Rodgers*, SDCL 22-18-4.8 does not constitute substantive law. SDCL 22-18-4.8 "has nothing to do with who is entitled to

3 285 S.W.3d 740 (Ky. 2009)
4 *Id.* at 750. (quoting KRS 503.085(1))

use self-defense or under what circumstances self-defense is justified." SDCL 22-18-4.8 is procedural in nature and therefore applies to the instant case.

Next, in *Love v. State*[5], the Defendant was charged with attempted second-degree murder with a firearm. The accused invoked Florida's Stand Your Ground Law as immunity from prosecution. Prior to the defendant's immunity hearing, the state legislature amended statute to shift the burden of proof to the State, as the party seeking to overcome self-defense immunity. In concluding the statute was procedural in nature, and thus, appropriate to apply to the present case, the Florida Supreme Court held:

> Here, although [the immunity statute] may make it more difficult—as a practical matter—for the State to proceed to trial, the statute in no way attaches new legal consequences to events completed before its enactment.
> . . .
> Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity
> . . .
> We conclude that [the immunity statute] was intended to and does apply in this commonsense and ordinary manner. That is, the statute applies to those immunity hearings, including in pending cases, that take place on or after the statute's effective date.

Id. at 187–88. In the instant case, the plain language of SDCL 22-18-4.8, along with a reading of South Dakota and other jurisdiction's case law validates the argument that SDCL 22-18-4.8 applies to pending prosecutions.

As a preliminary matter, "[i]mmunity is a legal question to be decided by the court[.]"[6] Importantly, ". . . [i]mmunity is not just a defense to liability but an entitlement not to stand trial or face the burdens of litigation. Therefore, immunity questions should be resolved as

5 286 So. 3d 177 (Fla. 2019)
6 *Swedlund v. Foster*, 657 N.W.2d 39, 45 (SD 2003)

early as possible."[7]

In 2018, the Wyoming legislature amended its statutes, adding an immunity section, which is similar to SDCL 22-18-4.8. The Wyoming statute provides, in relevant part, that "[a] person who uses reasonable defensive force as defined by subsection (a) of this section shall not be criminally prosecuted for that use of reasonable defensive force."[8]

While, like South Dakota, Wyoming's statue does not contain an explicit provision providing for an immunity hearing, the Wyoming Supreme Court interpreted its immunity statute as a "mandatory, judicially enforceable immunity provision. If an accused asserts protection from prosecution under [the immunity provision of the statute], the district court must determine whether the statutory immunity requirements have been met."[9] Along with Wyoming, at least five other states with immunity statutes also provide for the right to an immunity hearing: Alabama[10], Kansas[11], Oklahoma[12], South Carolina[13], and Florida[14].

Therefore, even though SDCL 22-18-4.8 does not explicitly provide for an immunity hearing, in passing HB 1212, the South Dakota Legislature intended that those individuals who are immune under SDCL 22-18-4.8 should not be prosecuted. If and when such an individual is prosecuted, it becomes the role of the courts, "carrying with it a judicial gatekeeping function[,] to ensure the executive branch does not prosecute individuals who exercised reasonable force in self-defense."[15] Defendants in South Dakota who seek

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7 *Id*. at 45. (internal citations omitted)
8 Wyo. Stat. Ann. § 6-2-602(f)
9 *State v. John*, 460 P.3d 1122, 1131 (Wyo. 2020)
10 *Ex parte Watters*, 220 So.3d 1093 (Ala. 2016)
11 *State v. Ultreras*, 295 P.3d 1020 (Kan. 2013)
12 *McNeely v. State*, 422 P3d 1272 (Okla. Crim. App. 2018)
13 *State. V. Glenn*, 838 SE2d 491 (SC 2019)
14 *Love v. State*, 286 So.3d 177 (Fl. 2019)
15 *John* at 1131

immunity from prosecution under SDCL 22-18-4.8 should, therefore, be afforded an immunity hearing.

As applied to immunity, though, the underlying facts that give rise to immunity are, indeed, elements of the offense. In a first-degree murder case, one of the elements the State must prove is that the defendant acted unlawfully.16 In South Dakota, homicide, under certain circumstances, is justifiable. (SDCL 22-16-32-35). Encompassed within this justification includes self-defense and defense of others. (SDCL 22-16-34,35). Importantly, "[w]hen a homicide defendant raises self-defense or justification, the State must prove beyond a reasonable doubt that the killing was without authority of law."17 *See also State v. Burtzlaff 18* "[w]hen a defendant raises the affirmative defense of self-defense, it is incumbent upon the State to prove beyond a reasonable doubt that the killing was without authority of law." The State's obligation in a self-defense/defense of others case is also codified at SDCL 22-1-2(3), which defines "affirmative defense" as:

> an issue involving an alleged defense to which, unless the state's evidence raises the issue, the defendant, to raise the issue, must present some credible evidence. **If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense**[.]
>
> *Emphasis added.*

The trial court erred in not allowing a hearing and granting Defendant's Motion to Dismissed based upon Statutory Immunity, therefore, the verdict must be vacated, and the case remanded for further proceedings.

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16 SDCL 22-16-4

17 *State v. Pellegrino*, 1998 S.D. 39, ¶ 19, 577 N.W.2d 590, 598 (citing *Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344, 353 (1985); *State v. Wilcox*, 48 S.D. 289, 297, 204 N.W. 369, 372 (1925))

18 493 N.W.2d 1, 7 (S.D. 1992)

2. The trial court erred in allowing the State to introduce evidence that Smith was precluded under the law from possessing a firearm.
SDCL 22-16-30
Conaty v. Solem, 422 N.W.2d 102, 104 (S.D.1988)
State v. Birdshead, 871 N.W.2d 62 (S.D. 2015)

The trial court allowed the State to introduce testimony from Sergeant Harris that Smith was precluded from possessing a firearm on June 8, 2019. *Trial Transcript, August 24, 2021, pg. 179.*

SDCL 22-16-34 states, "Homicide is justifiable if committed by any person while resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is" and SDCL 22-16-35 states, "Homicide is justifiable if committed by any person in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant if there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished."

The presence of the word "lawful" before the word defense in SDCL 22-16-35 simply explains when homicide is justifiable. The language goes on to explain that lawful defense occurs when there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished. The South Dakota Supreme Court has provided significant instruction as to the factors that can be decided by a jury in determining whether self-defense is justified. Justified defense is another way of stating lawful defense.

In *Andrews*, the defendant was charged with manslaughter, and the circuit court gave an excusable homicide instruction under SDCL 22-16-30 as requested by the defendant. No issue was raised on appeal concerning the excusable homicide instruction given by the court. Instead, the Court considered whether the circuit court erred by permitting the State to present other act evidence showing the defendant was a minor in possession of alcohol, driving under the influence of alcohol, in possession of a stolen weapon, and in possession of a weapon while under the influence at the time of the shooting. The Court held that this evidence was properly admitted to show defendant was not acting lawfully at the time of the shooting, stating, "[Defendant's] underage

and driving under the influence through the streets of Rapid City with the barrel of a loaded shotgun pointing out the driver's side window, was not 'doing any lawful act' when the gun discharged killing Davis." 2001 S.D. 31, ¶ 11, 623 N.W.2d at 81. The language in *Andrews* is not an affirmation that the lawfulness of the defendant's actions should be determined by the court as a matter of law, but that evidence of unlawful conduct may be admissible on the defendant's claim of excusable homicide.

State v. Randle, 2018 SD 61, P31. (See Commonwealth v. Legg, 551 Pa. 437, 711 A.2d 430, 432 n.2 (Pa. 1998) (quoting Commonwealth v. Hobson, 484 Pa. 250, 398 A.2d 1364, 1368 (Pa. 1979)) (stating that one of the elements of the defense of excusable homicide is that "[t]he act resulting in death must be a lawful one"); Ealey v. State, 158 So. 3d 283, 289 (Miss. 2015) (quoting Burge v. State, 472 So. 2d 392, 395 (Miss.1985)) (noting that excusable homicide occurs when a jury finds that a killing occurred while a defendant was doing "a lawful act by lawful means with usual and ordinary caution and without any unlawful intent"); State v. Yarborough, 198 N.C. App. 22, 679 S.E.2d 397, 407 (N.C. Ct. App. 2009) (quoting State v. York, 347 N.C. 79, 489 S.E.2d 380, 390 (N.C. 1997)) ("Any defense based on the suggestion that the death was the result of an accident or misadventure must be predicated upon the absence of an unlawful purpose on the part of the defendant."); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104, 107 (S.C. 1999) ("the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide"); see also 40 Am. Jur. 2d Homicide § 75 (1968) ("The fact that one carries a concealed weapon in violation of the law does not render him criminally responsible . . . where death is caused by the accidental discharge of the weapon, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of law.").

State v. Birdshead, 871 N.W.2d 62 (S.D. 2015) is no different. Birdshead had an illegal firearm, a sawed-off shotgun. He said he had it to protect himself because he generally needs to be able to do so. Two men began to beat Birdshead while he was conducting a drug deal. Birdshead pulled the sawed off and wrestled with it with one of the men. Birdshead pulled the trigger and shot one of the men. The man died from his gunshot wound.

Birdshead's charges at trial were three counts of manslaughter in the first degree, commission of a felony with a firearm, and possession of a controlled weapon. Id. at ¶7. Birdshead asks for an instruction stating that he could possess the firearm if he came into control of it for purposes of self-defense. The instruction was denied. The SDSC affirmed that decision because the Court found that he did not come into control of the firearm for the purposes of self-defense against these two specific men. Every indication in the Birdshead opinion supports that the instruction was intended to defend against the gun charges. The proposed instruction was based upon Conaty v. Solem 422 N.W.2d 102, 104 (S.D.1988) which holds that a defendant potentially could have a defense to possession of an illegal firearm based on justification. Nothing in Birdshead indicates that the Court was considering self-defense justification generally. Again, the opinion is specific to the nature of the gun laws. There certainly was no discussion of whether a person must submit themselves to be murdered rather than be able to take up arms in defense of themselves simply because of a statutory prohibition.

This evaluation of the cases provided in consideration of the question of whether the State could submit evidence of Ramon Smith's status as a felon make it clear that they could not and the trial court erred in allowing said testimony.

3. The trial court erred in not setting aside the verdict and entering a judgment of acquittal.

State v. Hage, 532 NW2d 406, 410 (SD 1995)

State v. Quist, 910 NW2d 900 (SD 2018)
State v. McCahren, 878 NW2d 586 (SD 2016)

If the jury has returned a guilty verdict, the Court may set aside the verdict and enter an acquittal if the evidence is insufficient to sustain a conviction of the offense or offenses. *See*, SDCL 23A-23-3

The South Dakota Supreme Court has consistently stated "[i]n measuring evidentiary sufficiency, [the courts] ask whether, after viewing 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." *State v. Disanto, 688 NW2d 201, 206 (SD 2004).* The courts will set aside a jury verdict only "where the evidence and all reasonable inferences to be drawn therefrom fail to sustain a rational theory of guilt." *State v. Hage, 532 NW2d 406, 410 (SD 1995).*

It is well settled the State must prove every element of the charged offense beyond a reasonable doubt. *Thibodeau v. State, 298 NW2d 818, 819 (SD 1980); Sandstrom v. Montana, 442 US 510 (1979)* (noting the Fourteenth Amendment to the United States Constitution requires the State to prove each and every element of a criminal offense beyond a reasonable doubt).

The evidence, when viewed most favorably to the prosecution was insufficient for a rational trier of fact to find that Ramon Smith is guilty of Murder in the 2nd Degree (Depraved Mind) beyond a reasonable doubt.

The State was required to present evidence that, taken in a light most favorable to the State, shows beyond a reasonable doubt that Ramon Smith was acting in an "imminently dangerous" manner evincing a "depraved mind" and "without regard for human life".

The case law in South Dakota that has discussed what "depraved mind" means for purposes of Murder in the 2nd Degree would not support a finding that Ramon Smith's actions in this case were the result of a depraved mind. In cases where Murder in the 2nd Degree (Depraved Mind)

was properly submitted to the jury, in part, the actions involved (1) the defendant being drunk and stabbing 4-5 people multiple times at a party following a verbal argument (*State v. Primeaux, 328 NW2d 256 (SD 1982)*); (2) a defendant severely beating his elderly mother, denying her contact with help, and then shooting her in the face as she lay on the floor (*State v. Liable, 594 NW2d 328 (SD 1999)*); (3) a defendant shooting a gun several times into another car as both vehicles were traveling down the highway (*State v. Lyerla, 424 NW2d 908 (SD 1988)*); (4) a defendant in an unprovoked attack, beating and kicking the decedent to death (*State v. Quist, 910 NW2d 900 (SD 2018)*); (5) evidence that a baby died from skull fractures caused by either severe shaking or blows to the head caused by the defendant (*State v. Miller, 851 NW2d 703 (SD 2014)*)*;* and evidence that the defendant was essentially playing Russian Roulette with a shotgun against two unwilling friends (*State v. McCahren, 878 NW2d 586 (SD 2016)*).

Ramon Smith's actions do not rise up to the standard of depraved mind in light of an undisputed and immediate threat of death or severe bodily harm facing him. Ramon Smith's use of deadly force occurred only after attacked by the angry mob outside of the apartment.

The evidence, when viewed most favorably to the prosecution, is insufficient for a rational trier of fact to find Ramon Smith guilty of Manslaughter in the 1st Degree (Dangerous Weapon).

The burden is on the prosecution to prove beyond a reasonable doubt that Ramon Smith did not have a reasonable belief that the angry mob was a danger to himself and that he could not have reasonably believed that the angry mob would cause himself great personal injury or death.

The evidence at trial showed that Ramon Smith had come from Minneapolis on June 7, 2019, for the purpose of getting a car from his sister, Martece Saddler, and hanging out for a few days in Sioux Falls, South Dakota. Ramon Smith had no idea that there was any type of "Facebook feud" going on between Christina Haney and Jasmine Allen.

Ramon Smith, Martece Saddler, and Christina Haney (Saddler's girlfriend) arrived back in Sioux Falls around midnight, stopped at the Haney/Saddler apartment, and then headed downtown to Pave.

Once at Pave, Haney and Saddler got out of Haney's new Mercedes SUV and proceeded to talk with Deidra and Darneisha Williams. Smith, Haney, Saddler and Deidra proceeded to an after party where they stayed for a short period of time and then went back to the Haney/Saddler apartment by the intersection of 8th and Cliff.

The next day it was reported to Haney, by Haney's mother Tenessa Carr, that Jasmine Allen had showed up banging on the outside security door to the apartment complex and wanting Haney to come out. This is due to the fact that Haney told Darneisha Williams the night before something to the effect of that she had something for that fat bitch Jasmine and that Darneisha had then told Jasmine about it.

After Saddler, Haney, Smith and Diedre awoke Saddler and Haney went to Paris McAbee's apartment, who was the mother of Jasmine Allen. Jasmine and Paris were not there, but Joseph Allen was there. The testimony set forth showed the Haney, Saddler, and Joseph got in a yelling match that culminated in Saddler kicking a fan in the window. Smith, who had driven his new car, was only outside and only ever went near the apartment when he heard the commotion. It is evident that Joseph Allen saw Smith and then gathered his brothers and friends to go to the Haney/Saddler apartment to confront Smith and the rest.

Joseph Allen, Jevon Allen, Joshua Allen, Devejuan Brown-Norris, Zykey McAbee, Daquan Holmes, and Rashaun Williams (the "angry mob") all meet up at various places to go to the apartment and confront the occupants. The evidence was clear that the angry mob, parked around the block and walked around the corner to the parking lot of the apartment. Jevon Allen

had a satchel that contained a gun and the video showed that Jevon initially went to the back side of the apartment complex to prevent anyone leaving from the back door. None of the angry mob had their cell phones with them and Devejuan Brown-Norris had taken off work to assist the mob.

Once in the parking lot, Joseph Allen, Joshua Allen and Daquan Holmes went inside the security door (which was left accidently propped open by one of the apartment tenants) and up to the Saddler/Haney apartment and started banging and kicking on the door while yelling at the occupants inside. This alarmed Smith, Haney, Saddler, and LJ Carr, who had come over to visit with his sister Christina Haney.

Smith, Haney, and LJ looked out the window and saw the angry mob sitting on the concrete barrier and Joseph Allen yelling and waving his arms around. Smith told Haney to get down from looking out the window as he feared the crowd would shoot at the apartment windows.

LJ Carr looked out the window again and saw that his father, Larry Carr, had gone outside to talk to Brown-Norris, who he knew from work. LJ then went outside as well.

Smith, remembering the Snapchat video with the gun sent by Josh Allen a short while earlier in the day, was fearful for his life and that of Haney and Saddler. Smith also thought, since he wasn't from Sioux Falls and didn't know anything about this feud and any members of the angry mob, that he could go outside and reason with them and see why so many guys showed up to deal with a girls' feud. Smith did take a gun from the cabinet that he saw Saddler have the night before and tucked it in his waistband for his protection.

Smith did go outside and had his hands up, trying to ask them why they were there. Josh Allen yelled "is this the nigga" and Joseph Allen replied "yes" and then Josh charged at Smith, in doing so he reached behind his back to pull up his shorts, however Smith did not know that and

thought he was reaching for a gun. Smith also thought another member of the mob was reaching for a gun. Fearing for his life, Smith did shoot Saddler's gun multiple times and struck Jevon Allen, Josh Allen and Larry Carr. Larry Carr died a couple days later; a result of being struck.

The angry mob all ran in different directions and Smith did run around the corner and shoot over two of them as one had turned and told him they were coming back. Smith gave the gun to Saddler and told her to give it to the police and left Sioux Falls. He was arrested later in Minnesota and gave an interview to police without the assistance or presence of counsel.

The evidence, when viewed in a light most favorable to the prosecution, can only reasonably be interpreted to show that Smith was in fear for his own life, and that of Haney and Saddler, from the moment that the Snapchat video with the gun was sent and then the angry mob showed up and started trying to kick in the door of the Haney/Saddler apartment. Smith's fear of imminent death or severe bodily injury only ceased when the angry mob had disbursed from the parking lot. Smith's duty to cease defending himself, Haney, and Saddler with deadly force ceased only when the angry mob was no longer a threat.

4. The trial court erred by not granting a mistrial.

State v. Johnson, 2001 S.D. 80, ¶ 9, 630 N.W.2d 79, 82
State v. Alidani, 2000 S.D. 52, ¶ 9, 609 N.W.2d 152, 155
State v. Mollman, 2003 S.D. 150, ¶ 23, 674 N.W.2d 22, 29

A motion in limine had been filed by the defense, and granted by the trial court, precluding the State from eliciting testimony regarding the fact that Smith had just been released from prison. The State, when questioning Christina asked, "did something happen up in Minneapolis for him (Smith) to come back with you?" *Transcript of Jury Trial, August 24, 2021, pg. 82, lines 7-8.* Christina responded, "When he (Smith) had gotten out of prison." *Id. at line 9.*

"The denial of a motion for mistrial will not be overturned unless there

is an abuse of discretion. Motions for mistrial are within the discretion of the trial judge and will not be granted unless there is a showing of actual prejudice to the defendant." *State v. Johnson, 2001 S.D. 80, ¶ 9, 630 N.W.2d 79, 82 (quoting State v. Alidani, 2000 S.D. 52, ¶ 9, 609 N.W.2d 152, 155).* "For purposes of determining whether there are grounds for a mistrial, there must be error 'which, in all probability, produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'" *State v. Mollman, 2003 S.D. 150, ¶ 23, 674 N.W.2d 22, 29 (quoting State v. Anderson, 2000 S.D. 45, ¶ 36, 608 N.W.2d 644, 655).*

In the present case, Smith was being tried for Second Degree Murder, First Degree Manslaughter and various other charges. The trial court had signed an Order precluding the State from introducing evidence that Smith had just been released from prison recently. The Order was violated. In a case where Smith was claiming self-defense the testimony of a witness that he was just released from prison no doubt had an effect on the jury even though the trial court had admonished the jury. The "bell couldn't be unrung". In looking at the verdict and the evidence set forth at trial, it is very likely that the jury considered this statement and it resulted in prejudice to Smith as the jury found him guilty of all charges.

CONCLUSION

In the case at hand, the trial court erroneously refused to grant a Motion to Dismiss based upon Statutory Immunity, erroneously allowed evidence that Smith couldn't possess a firearm, and erroneously denied a Motion for a Mistrial. Therefore, the jury verdict must be set aside, and the case remanded for a new trial.

Dated this 3rd day of October, 2022.

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Appellant, through counsel, hereby respectfully requests oral argument in the above-entitled matter.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served one (1) copy of Appellant's Brief upon the persons herein next designated all on the date below by email to said addresses, to wit:

Mr. Matthew Templar
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which email address is the last email address of the addressee known to the subscriber.

Dated this 3rd day of October, 2022.

/s/Manuel J. de Castro, Jr.
Manuel J. de Castro, Jr.

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STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
		PD 19-10689
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI19004281
vs.	+	JUDGMENT & SENTENCE
RAMON DERON SMITH, [aka RAMON A SMITH aka RAMON SADDLER] Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on June 19, 2019, charging the defendant with the crimes of Count 1 Murder-2nd Degree (Depraved Mind) on or about June 10, 2019; Count 2 Manslaughter-1st Degree-Dangerous Weapon on or about June 10, 2019; Count 3 Attempted Murder-1st Degree (Premeditated) on or about June 8, 2019; Count 4 Attempted Murder-1st Degree (Premeditated) on or about June 8, 2019; Count 5 Aggravated Assault-Extreme Indifference on or about June 8, 2019; Count 6 Aggravated Assault-Extreme Indifference on or about June 8, 2019; Count 7 Aggravated Assault-Extreme Indifference on or about June 8, 2019; Count 8 Aggravated Assault-Dangerous Weapon on or about June 8, 2019; Count 9 Aggravated Assault-Dangerous Weapon on or about June 8, 2019; Count 10 Aggravated Assault-Dangerous Weapon on or about June 8, 2019; Count 11 Aggravated Assault-Serious Bodily Injury on or about June 8, 2019; Count 12 Aggravated Assault-Serious Bodily Injury on or about June 8, 2019; Count 13 Aggravated Assault-Physical Menace or about June 8, 2019; Count 14 Aggravated Assault-Physical Menace or about June 8, 2019; Count 15 Aggravated Assault-Physical Menace or about June 8, 2019; Count 16 Reckless Discharge of Firearm or Bow and Arrow on or about June 8, 2019; Count 17 Possession of Firearm by Convicted Felon on or about June 8, 2019; Count 18 Commit or Att to Commit Felony With Firearm on or about June 8, 2019; Count 19 Commit or Att to Commit Felony With Firearm on or about June 8, 2019 and a Part II Habitual Criminal Offender Information was filed. The defendant was arraigned upon the Indictment and Information on September 12, 2019, Michael Miller appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Ashley Trankle and Melinda Folkens, Deputy State's Attorneys appeared for the prosecution and, Manuel J. de Castro, Jr, and Angel Runnels, appeared as co-counsel for/with the defendant. Prior to the commencement of the Jury Trial, Indictment Counts 3 through 7, 11, 12 and 16 through 19 were dismissed by the State.

On August 16, 2021, a Jury was impaneled and sworn to try the case. On August 26, 2021, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant returned into open court in the presence of the defendant, the Jury returned its verdict, to-wit:

"We the Jury, find the defendant, RAMON DERON SMITH, guilty as charged as to Count 1 Murder-2nd Degree (Depraved Mind) (SDCL 22-16-7) (Verdict Form Count 1); guilty as charged as to Count 2 Manslaughter-1st Degree-Dangerous Weapon (SDCL 22-16-15(3)) (Verdict Form Count 2); guilty as charged as to Count 8 Aggravated Assault-Dangerous Weapon (SDCL 22-18-1.1(2)) (Verdict Form Count 3); guilty as charged as to Count 9 Aggravated Assault-Dangerous Weapon (SDCL 22-18-1.1(2)) (Verdict Form Count 4); guilty as charged as to Count 10 Aggravated Assault-Dangerous Weapon (SDCL 22-18-1.1(2)) (Verdict Form Count 5); guilty as charged as to Count 13 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) (Verdict Form Count 6); guilty as charged as to Count 14 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) (Verdict Form Count 7); guilty as charged as to Count 15 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) (Verdict Form Count 8)."

On January 13, 2022, the defendant returned to Court with co-counsel, Manuel J. de Castro, Jr, and Angel Runnels, and the State was represented by Deputy State's Attorney's, Ashley Trankle and Melinda Folkens. The defendant admitted to the Amended Part II Habitual Criminal Offender Information and a Motion hearing was held as to the applicable Habitual Statute.

The defendant was then asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 1 MURDER-2ND DEGREE (DEPRAVED MIND) / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for Life without the possibility of parole (per SDCL 22-16-7). It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 2 MANSLAUGHTER-1ST DEGREE (DANGEROUS WEAPON) / HABITUAL OFFENDER : no sentence is imposed.

AS TO COUNT 3 (INDICTMENT COUNT 8) - AGGRAVATED ASSAULT -DANGEROUS WEAPON / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty five (25) years; consecutive to Count 1, with credit for nine hundred thirty eight (938) days served. It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 4 (INDICTMENT COUNT 9) - AGGRAVATED ASSAULT -DANGEROUS WEAPON / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty five (25) years; with credit for nine hundred thirty eight (938) days served; consecutive to Counts 1 and 3 (Indictment Counts 1 and 8). It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 5 (INDICTMENT COUNT 10) - AGGRAVATED ASSAULT -DANGEROUS WEAPON / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty five (25) years; with credit for nine hundred thirty eight (938) days served; consecutive to Counts 1, 3, and 4 (Indictment Counts 1, 8, and 9). It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 6 (INDICTMENT COUNT 13) - AGGRAVATED ASSAULT – PHYSICAL MENACE / HABITUAL OFFENDER : RAMON DERON SMITH : the Court finds this Count to be in the alternative to Count 3 (Indictment Count 8). No sentenced is imposed.

AS TO COUNT 7 (INDICTMENT COUNT 14) - AGGRAVATED ASSAULT – PHYSICAL MENACE / HABITUAL OFFENDER : RAMON DERON SMITH : the Court finds this Count to be in the alternative to Count 4 (Indictment Count 9). No sentenced is imposed.

AS TO COUNT 8 (INDICTMENT COUNT 15) - AGGRAVATED ASSAULT – PHYSICAL MENACE / HABITUAL OFFENDER : RAMON DERON SMITH: the Court finds this Count to be in the alternative to Count 5 (Indictment Count 10). No sentenced is imposed.

The Court finds that Counts for which the defendant was convicted and for which sentence is imposed consisted of separate transactions; therefor are viewed as separate and distinct acts.

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

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

Dated at Sioux Falls, Minnehaha County, South Dakota, this 20th day of January, 2022.

BY THE COURT:

JUDGE BRADLEY G. ZELL
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____
Deputy

FILED
JAN 20 2022
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 29902

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RAMON SMITH,

Defendant and Appellant.

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

THE HONORABLE BRADLEY G. ZELL
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEYS FOR PLAINTIFF AND APPELLEE

Notice of Appeal filed February 7, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29902

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RAMON SMITH,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant/Appellant, Ramon Smith, is referred to as "Defendant." Plaintiff/Appellee, the State of South Dakota, is referred to as "State." The settled record in the underlying case is denoted as "SR," followed by the e-record pagination. The Defendant's brief is denoted as "DB." The transcripts from the case are designated as follows:

August 12, 2021, Motions Hearing ..... MH

Trial Transcript Vol. 4 .....TT4

Trial Transcript, August 20, 2021.....TT5

Trial Transcript Vol. 6 .....TT6

Trial Transcript Vol. 7 .....TT7

Trial Transcript Vol. 8 .....TT8

January 13, 2022, Sentencing.....ST

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On January 20, 2022, the Honorable Bradley G. Zell, Minnehaha County Circuit Court Judge, Second Judicial Circuit, filed Defendant's Judgment and Sentence in Minnehaha County Criminal File 19-004281. SR:2012-14. Defendant filed a Notice of Appeal on February 7, 2022. SR:2032-33. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES[1]

I.

WHETHER THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND IN DENYING HIS REQUEST FOR AN IMMUNITY HEARING?

The circuit court determined that changes to South Dakota's self-defense statutes were not retroactive and denied Defendant's Motion to Dismiss and his request for an immunity hearing.

Dennis v. Florida, 51 So. 3d 456 (Fla. 2010)

Love v. Florida, 286 So. 3d 177 (Fla. 2019)

State v. Krause, 2017 S.D. 16, 894 N.W.2d 382

State v. Rodriguez, 2020 S.D. 68, 952 N.W.2d 244

SDCL 22-18-4.8

[1] This is the order in which Defendant presents the issues in Defendant's brief. The State's brief will argue the issues in the following order: I, III, II, and IV, for brevity, clarity, and conciseness.

II.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING TESTIMONY THAT DEFENDANT WAS A FELON PROHIBITED FROM POSSESSION A FIREARM?

The circuit court allowed the State to elicit testimony from one of its witnesses during trial that Defendant was statutorily prohibited from possessing a firearm under South Dakota law.

North Carolina v. Mercer, 818 S.E.2d 375 (N.C. 2018)

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

State v. Stone, 2019 S.D. 18, 925 N.W.2d 488

III.

WHETHER THE CIRCUIT COURT ERRED IN DENYING THE MOTION TO SET ASIDE THE VERDICT?

The circuit court denied Defendant's motion to set aside the verdict following the jury finding Defendant guilty.

State v. Burtzlaff, 493 N.W.2d 1 (S.D. 1992)

State v. Falkenberg, 2021 S.D. 59, 965 N.W.2d 580

State v. Podzimek, 2019 S.D. 43, 932 N.W.2d 141

State v. Stone, 2019 S.D. 18, 925 N.W.2d 488

IV.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR MISTRIAL?

The circuit court denied Defendant's motion for mistrial based on inadvertent testimony referencing Defendant's recent release from prison.

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

State v. Dillon, 2010 S.D. 72, 788 N.W.2d 360

State v. Kvasnicka, 2013 S.D. 25, 829 N.W.2d 123

STATEMENT OF THE CASE

On June 19, 2019, a Minnehaha grand jury indicted Defendant on the following nineteen counts:

- Count 1: Murder (Second Degree), a Class B felony, in violation of SDCL 22-16-7
- Count 2: Manslaughter (First Degree), a Class C felony, in violation of SDCL 22-16-15(3)
- Count 3: Attempted Murder (First Degree) – Premeditated, a Class 2 felony, in violation of SDCL 22-16-4(1) and SDCL 22-4-1
- Count 4: Attempted Murder (First Degree) – Premeditated, a Class 2 felony, in violation of SDCL 22-16-4(1) and SDCL 22-4-1
- Count 5: Aggravated Assault – Extreme Indifference, a Class 3 felony, in violation of SDCL 22-18-1.1(1)
- Count 6: Aggravated Assault – Extreme Indifference, a Class 3 felony, in violation of SDCL 22-18-1.1(1)
- Count 7: Aggravated Assault – Extreme Indifference, a Class 3 felony, in violation of SDCL 22-18-1.1(1)
- Count 8: Aggravated Assault – Dangerous Weapon, a Class 3 felony, in violation of SDCL 22-18-1.1(2)
- Count 9: Aggravated Assault – Dangerous Weapon, a Class 3 felony, in violation of SDCL 22-18-1.1(2)
- Count 10: Aggravated Assault – Dangerous Weapon, a Class 3 felony, in violation of SDCL 22-18-1.1(2)
- Count 11: Aggravated Assault – Serious Bodily Injury, a Class 3 felony, in violation of SDCL 22-18-1.1(4)
- Count 12: Aggravated Assault – Serious Bodily Injury, a Class 3 felony, in violation of SDCL 22-18-1.1(4)
- Count 13: Aggravated Assault – Physical Menace, a Class 3 felony, in violation of SDCL 22-18-1.1(5)
- Count 14: Aggravated Assault – Physical Menace, a Class 3 felony, in violation of SDCL 22-18-1.1(5)
- Count 15: Aggravated Assault – Physical Menace, a Class 3 felony, in violation of SDCL 22-18-1.1(5)
- Count 16: Reckless Discharge of a Firearm, a Class 1 misdemeanor, in violation of SDCL 22-14-7(1)
- Count 17: Possession of Firearm by Convicted Felon, a Class 6 felony, in violation of SDCL 22-14-15
- Count 18: Commit or Attempt to Commit a Felony with a Firearm, a Class 2 felony, in violation of SDCL 22-14-12

- Count 19: Commit or Attempt to Commit a Felony with a Firearm, a Class 2 felony, in violation of SDCL 22-14-12.

SR:8-12. The State filed an Amended Part II Information, alleging Defendant committed three prior felonies: Criminal Sexual Contact (First Degree), Fleeing a Peace Officer in a Motor Vehicle, and Attempted Murder (Second Degree). SR:153-54.

Throughout the pendency of the case, there were at least forty-eight motions that were filed and considered by the circuit court. *See* SR:I-VII (Chronological Index). Only the motions relevant to this appeal will be discussed in depth. On July 14, 2021, Defendant filed a Motion to Dismiss Based on Statutory Immunity, asserting the charges against him must be dismissed because of recent passage of new "stand your ground" laws by the South Dakota Legislature. SR:231-32; *see also* SDCL 22-18-4 through 4.8. The circuit court denied the motion, ruling that the "Stand Your Ground" legislation was a substantive change in the law and did not apply retroactively to Defendant's case. SR:349-51. Defendant filed a Motion to Reconsider, which was denied by the circuit court as well. SR:396, 408. This Court denied Defendant's Petition for Allowance of Appeal from Intermediate Order. SR:395.

The State filed a Notice to Offer Felony Status Relative to Self-Defense approximately one week before trial. SR:411-12. It argued that Defendant's felony status was relevant to rebut his self-defense claim. *Id.* Over Defendant's objection, the circuit court allowed the State to

elicit this information from Detective Jacob Harris in an oral ruling during trial. TT5:6-36; TT6:11-20, 178-79; SR:435-41. It also denied a Motion in Limine by the State which sought to prevent Defendant from claiming self-defense due to his felony status. TT6:6-7.

Defendant filed a pretrial Motion in Limine to preclude the State from mentioning Defendant's incarceration or release from prison. SR:431-32. The State did not object to the motion and the circuit court granted it. MH:76-78; SR:433. On the morning of trial, the State dismissed the following counts of the indictment: 3, 4, 5, 6, 7, 11, 12, 16, 18, and 19. TT4:15. The State had already previously dismissed Count 17, Possession of a Firearm by a Convicted Felon. SR:344.

At trial, Detective Harris testified Defendant was statutorily prohibited from possessing a firearm under South Dakota law. TT6:179. Prior to that testimony, the circuit court instructed the jury to consider the evidence only as to the reasonableness of Defendant's self-defense claim. TT6:178-79.

During the State's case-in-chief, in response to a question from the State about what caused Defendant to return from Minneapolis with her, Christina Haney testified that Defendant "had gotten out of prison." TT6:82. The circuit court instructed the jury to disregard the statement. *Id*. Defendant subsequently moved for a mistrial during the next break. *Id*. at 115. He argued Haney's answer was prejudicial and violated the Motion in Limine the circuit court previously granted. TT6:115-16. The

State argued it did not try to elicit information about Defendant's prior penitentiary time and noted the court had instructed the jury to disregard the statement right after it happened. TT6:116-17.

The circuit court denied the Motion for Mistrial, concluding that the State did not intentionally or recklessly elicit the testimony from Haney and that it instructed the jury to disregard the statement. TT6:120-21. Further, it presumed the jury would follow its instruction. TT6:121.

At the close of the State's case, Defendant moved for a judgment of acquittal, which was denied by the circuit court. TT7:4-8. Defendant renewed his motion for judgment of acquittal before closing; the circuit court again denied it as to all counts. TT7:70-71. The jury found Defendant guilty on:

- Count 1, Murder in the Second Degree;
- Count 2, Manslaughter in the First Degree;
- Count 3, Aggravated Assault (Dangerous Weapon) (Joshua Allen);
- Count 4, Aggravated Assault (Dangerous Weapon) (Jevon Allen);
- Count 5, Aggravated Assault (Dangerous Weapon) (Joseph Allen);
- Count 6, Aggravated Assault (Physical Menace) (Joshua Allen);
- Count 7, Aggravated Assault (Physical Menace) (Jevon Allen); and
- Count 8, Aggravated Assault (Physical Menace) (Joseph Allen).

SR:633-35.

In the weeks following trial, Defendant filed a Motion to Set Aside the Verdict. SR:819-20. Defendant asked the circuit court to set aside the Second-Degree Murder verdict, claiming there was no evidence of a depraved mind, and that Defendant acted in self-defense. ST:5-9. The

circuit court denied the motion. ST:9-13. After that, Defendant admitted to the allegations in the State's Amended Part II Information. ST:21-22.

Ultimately, the circuit court sentenced Defendant to life in prison for his Second-Degree Murder conviction and matching twenty-five-year sentences for the three aggravated assault, dangerous weapon, convictions (Counts 3, 4, and 5). SR:2013-14. It ordered all sentences to run consecutive to each other. *Id.* The court did not impose any sentences on Counts 2, 6, 7, and 8. *Id.*

STATEMENT OF THE FACTS

On June 8, 2019, in Sioux Falls, Defendant exited the apartment complex at 120 North Cliff Avenue. Within seconds, he pulled out a pistol and shot at a group of unarmed people gathered in the complex's parking lot. Exhibit 119 at 02:50 to 03:20[2]; TT6:174. Three people were shot as the group scattered: Joshua Allen was shot in the shoulder; Jevon Allen was shot in the head; and Larry Carr Jr. was shot in the abdomen. TT4:60-61, 82-83, 146-47. Defendant chased Zykey Richardson and Joshua and fired shots at them as they ran across Cliff Avenue. TT4:82, 148; TT6:90, 174; Ex.118 at 53:25-53:45; *see also* TT4:168-70. All three victims that were shot were hospitalized; Larry

[2] Ex. 119 is a cropped version of the original surveillance video from Dakota Auto Parts, which is Ex. 118. TT6:170-71. Ex. 119 zooms in on the parking lot of 116 and 120 North Cliff Avenue, which is where the incident took place. *Id.*

Carr Jr. ultimately died from the gunshot wound to his abdomen. TT4:83; TT5:56, 142; TT6:74, 91.

Approximately one minute after he fired into the group, Defendant discarded the gun in the parking lot and fled the scene. Ex.119 at 03:35-04:05; Ex.120 at 25:30-25:45.[3] Defendant drove back to Minneapolis, where he lived. Ex.120 at 27:45-28:00. After arriving in Minneapolis, Defendant cut off his dreadlocks. Ex.120 at 56:30-57:15; *see also* Ex.129 (showing Defendant prior to the incident). Over the next couple of weeks, the black Buick that Defendant drove and the white Mercedes that Christina Haney (Carr Jr's daughter) and Martece Saddler (Haney's fiancé and Defendant's sister) drove were found in the Minneapolis area. TT6:158. Defendant was arrested twelve days after the shooting. Ex.120 at 52:00-52:15.

Defendant did not live in Sioux Falls. TT6:81-82. In fact, he arrived in Sioux Falls less than twelve hours before the shooting; Saddler and Haney had driven to Minneapolis to pick him up because Defendant planned to purchase a vehicle from Saddler. TT6:81-82; Ex.120 at 26:40-27:10. When they returned to Sioux Falls, the group went to the Pave Bar. TT6:83. While at Pave, Saddler and Haney exchanged words with Darneisha Williams about Jasmine Allen and a Facebook post. TT6:83.

[3] Exhibit 120 is Defendant's interview with law enforcement. The accompanying transcript can be found at SR:690-774.

On the morning of June 8, 2019, Jasmine Allen went to Haney's apartment complex at 120 North Cliff, shouting Haney's name from the parking lot. TT4:49-50; TT6:98. Tanessa Carr, Haney's mother, called and told Haney about Jasmine's presence; Haney did not seem concerned. TT4:49-50, 52. A while later, Haney, Saddler, and Defendant then drove to Jasmine's apartment, looking for her. TT6:84-86. Jasmine was not there, but an argument ensued with Jasmine's brother, Joseph Allen. TT6:84-86. The argument continued until Joseph shut the door on Haney and Saddler. TT6:85-86. Saddler kicked in a window fan to the Allens' apartment to continue talking to Joseph as she and Haney left. TT6:85-86. Saddler, Haney, and Defendant then returned to Haney's apartment. TT6:86.

When they got back, Larry Carr III ("LJ"), Haney's younger brother, came over to Haney's apartment, joining Defendant, Haney, and Saddler. TT5:145-46, 149. LJ noticed a gun tucked in the futon and that Defendant would sit down next to it. TT5:147-48. While in the apartment, Haney apparently received SnapChat videos of Joseph holding a gun and threatening her. TT6:87. Nobody in the apartment called 911 after viewing the SnapChat videos. TT6:87. LJ testified that he did not remember seeing the videos. TT5:166.

At approximately 1:00 P.M., a group of people arrived at 120 North Cliff. TT5:148. The group was made up of six or seven men: Joseph Allen, Joshua Allen, Jevon Allen, Devejuan Brown-Norris, Zykey

Richardson, and a couple of others. TT4:79, 142, 158. They were there in response to Haney's and Saddler's actions at Jasmine's apartment. *See* TT5:149-51; TT6:101-08. Three members of the group pounded on Haney's apartment door for approximately twenty seconds before retreating to the parking lot. TT5:150; *see also* Ex.119 at 00:20-00:45.

Nobody in the apartment called the police; instead, Defendant grabbed the gun that was tucked in the futon cushions. TT5:149-50. LJ testified nobody hid in the bedrooms, nor did anybody seem scared. TT5:150. Haney also noted that no one hid in the bedrooms. TT6:88. The four were livid that the group had come over to the apartment for Haney and Saddler. TT5:151. Around this time, Defendant said if he went outside, he was going to start shooting. TT5:151.

Larry Carr Jr., who had been monitoring the situation from his apartment window, recognized Brown-Norris and walked outside to talk with him. TT4:54-56; TT6:173-74. Upon seeing his father outside, LJ ran out of Haney's apartment and tried to get Carr Jr. back into his apartment. TT5:151. While outside, LJ observed that no one in the group had a weapon and no one threatened him. TT5:152-53. When Defendant walked outside, Joshua Allen moved towards him and the two yelled at each other before Defendant pulled out his weapon and started shooting. TT4:81; TT5:153.

After the shooting, Saddler took the firearm that Defendant abandoned, placed it into a backpack, which she gave to LJ. TT5:156,

174. LJ fled the apartment and hid the gun to try to keep his sister from getting into trouble. TT4:69-71; TT5:156-59. Haney drove Carr Jr. to the hospital and then returned to her apartment. TT6:91. Haney refused to talk to law enforcement. *Id.* Saddler and Haney then drove towards Minneapolis, meeting Defendant on the highway and caravanning together. TT6:92. Haney did not call the police throughout the trip to Minneapolis. *Id.* Then Haney and Sadler went on the run, fleeing to Las Vegas before they were arrested in Idaho, four days after the shooting. TT6:93, 157.

At the scene of the shooting, law enforcement marked off the area, collected evidence, and interviewed witnesses. TT5:41-77; TT6:39-72, 152-58. Forensic Specialist Jacqueline Wynia documented and photographed the scene; she created a sketch of the parking lot showing where different pieces of evidence were located. *See generally*, TT6:41-71; Ex.112. Officer Devan Wilson discovered a weapon in a satchel around Jevon Allen; the weapon was not cocked, and the satchel flap was closed. TT5:49-54. Detective Harris and the State returned to the parking lot about a year later and took measurements of Defendant's path through the parking lot during the shooting. TT6:175-76; *see also* Ex.130-37.

Weeks after the shooting, Haney contacted law enforcement and told them about the murder weapon. TT6:94. LJ did not know the gun he hid was the murder weapon until this date. TT5:158. LJ and

Tanessa Carr then drove to the police station and handed over the murder weapon. TT5:158-59; TT6:160-61.

Law enforcement interviewed Defendant after he was arrested. *See generally* Ex.120. Defendant told Detective Harris and Sergeant Kooistra that he didn't call police after the group had come over to Haney's apartment because he was scared. Ex.120 at 59:20-1:00:00. Defendant said he intended to go outside and try and diffuse the situation, but that Haney told him not to do it because she didn't know what the group would do. Ex.120 at 06:05-7:20. Defendant armed himself and proceeded outside to confront the group, even though the number of people in the group terrified him. Ex.120 at 06:00-09:30. Defendant also claimed that one of the individuals saw him walk out the door and rushed towards him and apparently reached for a weapon, which caused Defendant to open fire. Ex.120 at 07:40-9:30.

ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS AS WELL AS HIS REQUEST FOR AN IMMUNITY HEARING.

A. Standard of Review.

A question of law is reviewed de novo. *West v. John Morrell & Co.*, 460 N.W.2d 745, 746 (S.D. 1990). Questions of statutory interpretation are also reviewed de novo. *Mercer v. S. Dakota Att'y Gen. Off.*, 2015 S.D. 31, ¶12, 864 N.W.2d 299, 302.

When dealing with our statutes, no section of the South Dakota Codified Laws shall be "construed as retroactive unless such intention plainly appears." SDCL 2-14-21. Also, a "'statute will not operate retroactively unless the act clearly expresses an intent to do so' or the change is merely procedural and not substantive." *State v. Krause*, 2017 S.D. 16, ¶16, n.7, 894 N.W.2d 382, 387, n.7 (quoting *West*, 460 N.W.2d at 747).

B. *The Circuit Court did not err in Denying Defendant's Motion to Dismiss because the Stand Your Ground Laws are Not Retroactive.*

House Bill 1212 (HB1212) was passed by the South Dakota Legislature and became law on July 1, 2021. One of the sections passed, SDCL 22-18-4.8, grants a defendant immunity from criminal prosecution and civil liability if his or her actions are in self-defense. To overcome this immunity, the State must prove by clear and convincing evidence the defendant did not act in self-defense. SDCL 22-18-4.8. The burden of proof language was added in 2022, when the Legislature passed Senate Bill 195 (SB195). An Act to establish the burden of proof after a claim of immunity, SB195, 2022 Session https://mylrc.sdlegislature.gov/api/Documents/233842.pdf (last accessed November 14, 2022).

During committee testimony, Representative Kevin Jensen, HB1212's prime sponsor, confirmed that it was taken from Florida law. An act to clarify the use of force: Hearing on HB1212 Before the H. St. Aff. Comm., 2021 Leg., (S.D. 2021) (testimony of Rep. Kevin Jensen at

1:57:10 to 1:57:35) https://sdlegislature.gov/Session/Bill/21846. Rep. Jensen reiterated HB1212 was taken from Florida law again on the House Floor. Floor Debate on HB1212, 2021 Leg., (S.D. 2021) Rep. Kevin Jensen at 06:39:55-06:40:10. Indeed, SDCL 22-18.4.8 and Fla. Stat. 776.032 are very similar. *Compare* SDCL 22-18-4.8 and Fla. Stat. Ann. § 776.032 (West).

The circuit court concluded SDCL 22-18-4.8 did not apply retroactively to Defendant's case. SR:349-51. In a subsequent order, it denied Defendant's Motion to Dismiss and ruled Defendant was not entitled to an immunity hearing. SR:391. In its analysis, the circuit court defined what "procedural" and "substantive" laws mean in the criminal procedure context. SR:349-50. The circuit court discussed the Florida case of *Love v. Florida*, noting that case's primary holding applied to an amendment of the Florida's immunity statute. *Id.*; 286 So.3d 177, 180, 186 (Fla. 2019).

The circuit court then consulted persuasive authority from Nebraska and Iowa to help in reaching its conclusion. SR:349-51. The court concluded that SDCL 22-18-4.8 is a new statute to South Dakota law and "seemingly created new substantive rights and legal burdens." *Id.* at 351. Specifically, a person who "lawfully uses self-defense is now immune from criminal prosecution and civil liability." *Id.*

Defendant now asserts that if the Legislature did not intend that SDCL 22-18-4.8 apply retroactively, it would have said so. DB:16-17.

While it is true that the Legislature "knows how to include and exclude specific items in its statutes," *Sanford v. Sanford*, 2005 S.D. 34, ¶19, 694 N.W.2d 283, 289, it is also true that "the general rule is that newly enacted statutes will not be given a retroactive effect unless such an intention is plainly expressed by the Legislature." *Schultz v. Jibben*, 513 N.W.2d 923, 925 (S.D. 1994) (further citation omitted). The plain language of SDCL 22-18-4.8 shows the Legislature did not include a clause intending for it to apply retroactively. This legislative intent is further cemented by SDCL 2-14-21, which states that no statute will be construed as retroactive unless such an intention plainly appears.

Defendant next argues that SDCL 22-18-4.8 is a procedural change and is therefore retroactive. DB:18-19. As support, he cites to *Rodgers v. Commonwealth of Kentucky*. DB:17-19; 285 S.W.3d 740 (K.Y. 2009). In *Rodgers*, the Kentucky Supreme Court held that KRS 503.085, which grants immunity to one who justifiably uses self-defense, was retroactive. *Rodgers*, 285 S.W.3d at 752-53. It reasoned the immunity statute did not constitute substantive law as "it has nothing to do with who is entitled to use self-defense or under what circumstances self-defense is justified." *Id.* at 753. The Kentucky court further explained the statute is a "procedural bar" to prosecution, meaning it can be applied retroactively. *Id.*

In defining what constituted procedural and substantive law, the Kentucky Supreme Court used its own caselaw. *See id.* at 751. It

defines substantive changes as those that "change and redefine out-of-court rights, obligations and duties of persons in their transactions with others." *Id.* On the other hand, procedural amendments are: "[t]hose amendments which apply to the in-court procedures and remedies which are used in handling pending litigation . . . ." *Id.* But these definitions do not track with South Dakota law.

In defining procedural and substantive changes to criminal law, this Court and the Florida Supreme Court have used identical definitions. *Compare Krause*, 2017 S.D. 16, ¶16 n.7, 894 N.W.2d at 387 n.7, *with Love*, 286 So. 3d at 185. Florida and South Dakota's definition of a substantive law is "that which declares what acts are crimes and prescribes the punishments therefore." *Krause*, 2017 S.D. 16, ¶16 n.7, 894 N.W.2d at 387 n.7; *Love*, 286 So. 3d at 186. Procedural law is "that which provides or regulates the steps by which one who violates a criminal law is punished." *Id.* Under these definitions, the *Love* court concluded that the right to assert immunity was a "substantive right." *Love*, 286 So.3d at 186.

The Florida Supreme Court reached the opposite conclusion of Kentucky: the "plain language" of Fla. Stat. 776.032 granted defendants a "*substantive right* to assert immunity from prosecution and to avoid being subjected to a trial." *Dennis v. Florida*, 51 So.3d 456, 460, 462 (Fla. 2010) (emphasis added). It explained that not being "arrested, detained, charged, or prosecuted as the result of the use of legally

justified force" is a substantive right. *Id.* By way of comparison in *Love v. Florida*, the Florida Supreme Court ruled that an amendment to the immunity statute (creating Fla. Stat. 776.032(4), which modified the burden of proof for a claim of immunity) was a procedural change that applied retroactively. 286 So.3d at 180, 186. Additionally, the *Love* court reaffirmed that the creation of the right to assert immunity was a "substantive right." *Id.* at 186.

Kansas also determined that its self-defense immunity provision was not retroactive. *Washington v. Kansas*, 311 P.3d 1168 (table), 2013 WL 5925896 *2 (Kan. Ct. App. 2013); *see also* Kan. Stat. Ann. §21-5231 (West)(Kansas's immunity statute). The Court of Appeals of Kansas concluded that the Kansas Legislature could have made the immunity provision retroactive when it chose to make other recent changes in self-defense law retroactive, but it chose not to. *Id.*

Here, the South Dakota Legislature created a new substantive right to assert immunity from criminal prosecution. SDCL 22-18-4.8 did not merely regulate the "steps by which one who violates a criminal statute is punished." *Krause*, 2017 S.D. 16, ¶16 n.7, 894 N.W.2d at 387 n.7. It altered what acts can be considered a crime and the punishment for certain acts. *Id.*; *see also Love*, 286 So. 3d at 185.

On the other hand, an example of a procedural change is the amendment to SDCL 22-18-4.8: Senate Bill 195 (SB195). An Act to establish the burden of proof after a claim of immunity, SB195, 2022

Session https://mylrc.sdlegislature.gov/api/Documents/233842.pdf (last accessed November 14, 2022). Passed by the South Dakota Legislature in 2022, SB195 established the State's burden of proof to refute a claim of immunity. *Id.* Establishing a burden of proof "provides and regulates the steps" that one who violates criminal law is punished, it provides the burden of proof to the State. SB195 is similar to the amendment which created Fla. Stat. 776.032(4), the section at issue in *Love*, which was considered a procedural change. *Compare* SDCL 22-18-4.8 to Fla. Stat. Ann. 776.032(4) (West); *see also Love*, 286 So.3d at 180 (discussing the 2017 amendment to Fla. Stat. 776.032).

The right to immunity in SDCL 22-18-4.8 is a substantive change: it affects the situations in which a person can be "arrested, detained, charged, or prosecuted as the result of the use of legally justified force." *Dennis*, 51 So.3d at 462. Thus, the circuit court properly denied Defendant's motion to dismiss and not providing an immunity hearing.

C. *The Circuit Court Denying Defendant's Motion to Dismiss was Harmless Error.*

Even if the circuit court erred in denying Defendant's Motion to Dismiss and in not granting Defendant an immunity hearing under SDCL 22-18-4.8, it was harmless error.[4] The burden of proof on the

[4] Harmless error is "any error, defect, irregularity or variance which does not affect substantial rights." *State v. Larson*, 512 N.W.2d 732, 737 (S.D. 1994) (citing SDCL 23A-44-14). Error is harmless if it can be "confidently [said], on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *State v. Rodriguez*, 2020 S.D. 68, ¶36, 952 N.W.2d 244, 254 (further citation omitted).

State in a potential immunity hearing would be clear and convincing evidence. SDCL 22-18-4.8; *see also In re Setliff*, 2002 S.D. 58, ¶13, 645 N.W.2d 601, 605 (explaining the burden of the "clear and convincing" standard is less than "beyond a reasonable doubt" standard). The State more than met that burden by proving Defendant's guilt beyond a reasonable doubt at trial.

The jury saw the evidence and heard testimony over five days of trial. They rejected Defendant's self-defense theory by finding Defendant guilty beyond a reasonable doubt on all charges. SR:633-35; *see also* SR:587 ("beyond a reasonable doubt" jury instruction, Instruction No. 14). With its verdicts, the jury showed that the State rebutted any presumptions of self-defense.

Simply put, Defendant wants to overturn the jury's verdict that used a beyond a reasonable doubt standard to go back through the motions of having an immunity hearing, which has a lower burden of proof. When Defendant's request for immunity is denied because a jury already found him guilty under a higher burden of proof, Defendant will then get yet another jury trial or get a plea deal. This process results in a waste of time and resources for the State, the County, and Defendant himself.

II.

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SET ASIDE THE GUILTY VERDICT.

A. Standard of Review.

A circuit court's denial of a motion to set aside the guilty verdict is reviewed under the same standard as a denial for motion of acquittal: de novo. *See State v. Podzimek*, 2019 S.D. 43, ¶30, 932 N.W.2d 141, 149 (stating the standard of review for a motion for acquittal when addressing whether a circuit court erred in denying post-trial motion to set aside the guilty verdicts) (citing *State v. Stone*, 2019 S.D. 18, ¶38, 925 N.W.2d 488, 500, reh'g denied (Apr. 16, 2019)). In conducting its review, this Court determines "whether the evidence was sufficient to sustain the conviction." *Podzimek*, 2019 S.D. 43, ¶30, 932 N.W.2d at 149 (further citation omitted). To do so, this Court asks "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Stone*, 2019 S.D. 18, ¶38, 925 N.W.2d at 500 (further citation omitted). "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." *Podzimek*, 2019 S.D. 43, ¶30, 932 N.W.2d at 149 (further citation omitted).

It is the role of the jury to resolve conflicts in the evidence and weigh the credibility of the State's and Defendant's cases. *Stone*, 2019

S.D. 18, ¶45, 925 N.W.2d at 502 (citing *State v. Quist*, 2018 S.D. 30 ¶15, 910 N.W.2d 900, 904-05). The jury is also the exclusive judge of witness credibility. *State v. McKinney*, 2005 S.D. 73, ¶26, 699 N.W.2d 471, 480 (further citation omitted). Because it is the jury's function, this Court does not "resolve conflicts in the evidence, or pass on the credibility of witnesses, or weigh the evidence." *Id.*

B. There was Sufficient Evidence Presented to Sustain each of the Jury's Guilty Verdicts Against Defendant.

1. The Evidence Establishes that Defendant Committed Second-Degree Murder and did not Act in Self-Defense.

To convict Defendant of Second-Degree Murder, the State had to prove the following elements beyond a reasonable doubt: (1) Defendant caused Larry Carr Jr.'s death; (2) he did so "by an act imminently dangerous to others evincing a depraved mind, without regard for human life"; (3) Defendant did not intend to cause a particular person's death; and (4) "at the time and place, the killing was not justifiable." SR:593 (Instruction No. 20); *see also* SDCL 22-16-7. The State was also required to prove beyond a reasonable doubt that Defendant did not act in self-defense. SR:598 (Instruction No. 25).

Defendant asserts that the evidence viewed in a light most favorable to the prosecution was insufficient to sustain his Second-Degree Murder conviction.[5] DB:25. He claims that his use of deadly

[5] Defendant does not specifically argue the evidence was insufficient for any of his aggravated assault convictions. *See* DB:24-29. "It is well-

force was in self-defense because he was "attacked by the angry mob outside of the apartment." DB:26, 29. A review of the evidence shows this is not the case and that any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Stone*, 2019 S.D. 18, ¶ 38, 925 N.W.2d at 500 (further citation omitted).

a. *The Defendant Caused Larry Carr Jr.'s Death and Did Not Intend to Kill Larry Carr Jr.*

Defendant does not specifically argue the State failed to prove that he caused Larry Carr Jr.'s death and that he did not intend to kill him. *See* DB:24-29. Yet the evidence presented shows the State met its burden in proving both elements beyond a reasonable doubt.

Multiple witnesses, including Devejuan Brown-Norris, Tanessa Carr, and LJ, testified that Carr Jr. had been shot by Defendant. TT4:60-61, 146; TT6:154. Tanessa Carr, who'd been watching from her apartment window, rushed out to tend to her husband, and told the Defendant, "You shot my husband!" to which Defendant replied: "I didn't know." TT4:61-62. Dr. Kenneth Snell testified that Carr Jr. was killed by the gunshot wound to the abdomen. TT5:141-42. Forensic scientist Frans Maritz determined the bullet which killed Carr Jr. was fired from the gun turned into police on July 1, 2019. TT5:122-25; *see also* Ex.125

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settled that the failure to brief an issue and support an argument with authority waives the right to have this Court review it." *Duerre v. Hepler*, 2017 S.D. 8, ¶28, 892 N.W.2d 209, 220 (further citation omitted). Despite Defendant's waiver, the State submits that the evidence discussed in relation to the Second-Degree Murder and Manslaughter convictions also prove the aggravated assault convictions.

(SR:688-89). This is the gun that Defendant abandoned after the shooting, and LJ hid after the fact. TT5:156-58.

No evidence was presented showing Defendant specifically intended to kill Carr Jr. Likewise, as shown below, the evidence discussed in Section II(B)(1)(b) establishes Defendant had no specific intent to kill Carr Jr.

b. Defendant's Actions Evinced a Depraved Mind.

Sufficient evidence was presented to the jury for it to find that Defendant killed Carr Jr. through an "act imminently dangerous to others evincing a depraved mind, without regard for human life" beyond a reasonable doubt. SR:593 (Instruction No. 20). An instance of a depraved mind could be when a person intentionally shoots into a crowd of people. *See State v. Satter*, 1996 S.D. 9, ¶21, 543 N.W.2d 249, 253 (quoting *Washington v. Mitchell*, 188 P.2d 88, 93-94 (Wash. 1947)); *Readus v. Mississippi*, 997 So. 2d 941, 945 (Miss. Ct. App. 2008) (finding that a person firing a gun inside of an apartment containing several people which resulted in the death of one person to be no different than the "classic example of depraved heart murder of shooting into a crowd."); *Kansas v. Jones*, 8 P.3d 1282, 1286 (Kan. Ct. App. 2000) (concluding that a person firing a gun randomly toward a group of people and attempting to scare them off is sufficient to support a finding of reckless behavior that manifests an extreme indifference to human life).

A security camera from Dakota Auto Parts, across the street from Haney's apartment, captured the shooting on video. *See generally* Ex.119. The video showed three men walking into Haney's apartment building, where they remained for twenty seconds before exiting. Ex.119 at 00:22-00:42; *see also* TT6:173. The group then milled about the parking lot for over two minutes. Ex.119 at 00:43-02:56. During this time, Carr Jr. exited his apartment complex and walked over to the group. *Id.* at 1:47-2:02; TT6:173-174. About thirty seconds later, LJ exited Haney's apartment complex and walked over to the group, wanting to get his dad back inside. Ex.119 at 02:10-02:22; TT5:151-52. No one in the parking lot had a weapon drawn. TT4:147-48. Instead of staying in the safety of the locked apartment or calling 911, Defendant went outside. TT5:152-53.

Less than a minute after LJ walked outside, Defendant exited the apartment building and confronted the group. Ex.119 at 02:56-03:05; TT4:81-82, 147. Joshua Allen moved towards Defendant while other members of the group turned towards Defendant. Ex.119 at 02:57-03:00; TT4:81. Joshua then stopped, still a distance away from Defendant, before recoiling back as Defendant began shooting. Ex.119 at 03:00-03:02; TT4:81. Carr Jr., Joshua, and Jevon were hit. TT4:81-82, 146. When the rest of the group scattered, Defendant chased Richardson and Joshua, firing shots towards them across Cliff Avenue. Ex.118 at 53:25-53:40; TT4:82, 148, 168-70. Defendant abandoned his

weapon and fled the scene less than a minute after he started shooting. Ex.119 at 03:21-04:05; Ex.120 at 25:30-25:45; TT5:156.

The State also presented testimony from several witnesses who were present before and during the shooting that corroborated the video. LJ testified that Defendant picked up the gun while still in the apartment and said he was going to start shooting if he went outside. TT5:149-51. LJ also confirmed that no one in the apartment seemed scared. TT5:150. Richardson and Brown-Norris both testified they saw Defendant come outside and start shooting. TT4:81-82, 146-47. Defendant's case is similar to *State v. Stone*. In that case, Stone and the victim got into a fist fight. *Stone*, 2019 S.D. 18, ¶3, 925 N.W.2d at 493. Stone moved away from the victim, drew his pistol, and shot the unarmed victim, as the victim moved towards him. *Id.* Stone's conviction for Second-Degree Murder was upheld. *Id.* at ¶¶45-47. Here, Defendant shot into the unarmed group, striking and killing one, even though, like in *Stone*, the use of deadly force was not justified.

Defendant's actions after the shooting also circumstantially establish his depraved mind at the time. *State v. Owens*, 2002 S.D. 42, ¶82, 643 N.W.2d 735, 756 ("[A]n attempt by the accused to flee following commission of the alleged crime is circumstantially relevant to prove not only commission of the act, *but also the intent and purpose* with which it was committed." (emphasis in original) (further citation omitted)). Defendant drove back to Minneapolis and cut off his dreadlocks, shaving

his head. TT6:92; Ex.120 at 56:30-57:15. As this Court recognizes, "evidence of flight or concealment immediately after the events charged in the indictment[ ] may be relevant to show consciousness of guilt." *State v. Falkenberg*, 2021 S.D. 59, ¶43, 965 N.W.2d 580, 592 (quoting *Stone*, 2019 S.D. 18, ¶26, 925 N.W.2d at 498). Law enforcement arrested Defendant a full week and a half after the shooting. Ex.120 at 52:00-52:15. LJ and Carr turned over the weapon Defendant used to kill Carr Jr. to police on July 1, 2019. TT5:158-59.

Defendant and Haney also offered a different version of what happened, creating a factual dispute for the jury to resolve. *McKinney*, 2005 S.D. 73, ¶ 26, 699 N.W.2d at 480 (further citation omitted). In his interview with law enforcement, Defendant claimed that once the pounding on the door started, the people in the apartment hid in the bedrooms. Ex.120 at 04:30-07:30. Haney testified that LJ and Defendant were on the floor, fearful of potential gun fire from the windows because of the alleged Snapchat videos Haney received.[6] TT6:88.

Defendant also told officers that Haney did not want him to go outside because she was afraid the group would kill him.[7] Ex.120 at

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[6] Detective Harris testified that law enforcement was not able to recover these apparent SnapChat videos. TT6:170. LJ also stated he did not remember seeing the alleged videos, despite being in the apartment at the time they were supposedly sent. TT5:166.

[7] Haney also testified to this at trial. In response to Haney's testimony, the State recalled Tenessa Carr for rebuttal. Carr testified Haney told her that Defendant stated he was was going to start shooting if he went

04:30-07:30. Defendant claimed that after he armed himself and left the apartment, he told the group to lock the door. *Id.* He claimed that he was scared, yet he still walked out to confront the group. *Id.* at 59:20-1:00:00. Even if the jury believed Defendant's version of events, the fact remains that Defendant left the safety of the apartment and shot three unarmed men, who stayed at least nineteen feet away from Defendant. TT6:178; Ex. 119 at 02:56-03:05; *see also Stone*, 2019 S.D. 18, ¶45, 925 N.W.2d at 502 (affirming the jury's verdict of Second-Degree Murder against Stone, who shot an unarmed victim).

In considering the evidence in a light most favorable to the verdict, a reasonable jury could find that the Defendant acted with a depraved mind. *State v. Frias*, 2021 S.D. 26, ¶21, 959 N.W.2d 62, 68. Thus, there was sufficient evidence for the jury to find Defendant evinced a depraved mind beyond a reasonable doubt. *Stone*, 2019 S.D. 18, ¶38, 925 N.W.2d at 500.

c. Defendant was not Justified in Killing Larry Carr Jr.

Finally, the State proved beyond a reasonable doubt that Defendant's killing of Larry Carr Jr. was not justified. "A homicide is justifiable by any person when resisting any attempt to murder such person or commit any felony upon him." SR:598 (Instruction No. 25).

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outside and that she tried to keep Defendant from going outside. TT6:126. Further, she revealed that Haney and Saddler were still in a relationship at the time of trial. *Id.* at 126-27.

"Whether, under the particular facts of each case, homicide was justified is for the jury to decide." *Frias*, 2021 S.D. 26, ¶29, 959 N.W.2d at 70 (further citation omitted). And the State had the burden of proving beyond a reasonable doubt the killing was "without authority of law." *State v. Pellegrino*, 1998 S.D. 39, ¶19, 577 N.W.2d 590, 598 (citing *Franklin v. Franklin*, 471 U.S. 307, 314 (1985)). "When a defendant claims justifiable homicide because he was threatened with serious bodily injury, the responding 'force becomes limited to that which is reasonable in the circumstances, and, as the threat of harm dissipates, so does the reasonableness of the force used.'" *State v. Cottier*, 2008 S.D. 79, ¶13, 755 N.W.2d 120, 127 (quoting *State v. Jacques*, 428 N.W.2d 260, 265-66 (S.D. 1988)).

The State presented evidence from before, during, and after the shooting to prove that Defendant's killing of Carr Jr. was not justified. The evidence discussed above, in Subsection B, also goes to whether Defendant was justified in using deadly force. Before the shooting, three people entered Haney's apartment complex, pounded on the door for less than twenty seconds, then retreated outside to the parking lot. Ex.119 at 00:20-00:45.

At that point, Defendant was not "in the midst of an attack" where he needed to protect himself; the "threat of harm" had dissipated. *State v. Burtzlaff*, 493 N.W.2d 1, 8 (S.D. 1992)(rejecting Burtzlaff's self-defense claim because evidence showed the victim retreated to watch television

while Burtzlaff grabbed a shotgun, returned to the victim, and shot him); *Cottier*, 2008 S.D. 79, ¶13, 755 N.W.2d at 127. Again, instead of remaining in the safety of Haney's apartment and calling 911, Defendant walked outside and confronted the group he was allegedly scared of while armed with a loaded weapon. Yet no one in the group was armed.[8]

Also, Defendant's self-defense claim was undercut by his flight after the shooting, his attempt to hide his identity by cutting off his dreadlocks, and by abandoning his gun; these actions displayed a "consciousness of guilt." *Falkenberg*, 2021 S.D. 59, ¶43, 965 N.W.2d at 592 (quoting *Stone*, 2019 S.D. 18, ¶26, 925 N.W.2d at 498); *see also People v. Harmon*, 49 N.E.3d 470, 487 (Ill. Ct. App. 2015)("[e]vidence of flight, as well as discarding of the weapon, is competent circumstantial evidence that refutes theory that defendant acted in self-defense" (further citation omitted)). Defendant's actions do not show an individual who believed he engaged in justified, lawful self-defense. *See Owens*, 2002 S.D. 42, ¶82, 643 N.W.2d at 756. Rather, his actions are consistent with someone that committed a murder and fled the area. *See generally Stone*, 2019 S.D. 18, 925 N.W.2d 488. Again, Defendant's situation is similar to *State v. Stone*, where Stone fled the state and tried to change his appearance after killing the victim. *Id.* at ¶¶2-7, 47. After Stone was

[8] As mentioned above, Jevon Allen carried a satchel with a weapon in it, but testimony confirmed the satchel was zipped shut when it was found at the scene around Allen, and the gun inside of it was not cocked. TT5:49, 51-54.

arrested, he claimed self-defense, but the jury -–like Defendant's jury–- rejected that claim and found him guilty of Second-Degree Murder. *Id.* at ¶¶ 44-45.

Defendant also claims the group of people in the parking lot constituted an "angry mob" that attacked him. DB:26. The evidence presented showed that the "angry mob" described by Defendant was anything but. Richardson testified that the group was mostly standing around or sitting, waiting for someone to come outside. *See* TT4:80. Brown-Norris mentioned that everybody in the parking lot was just "standing around, talking" before the shooting. TT4:143-44. LJ testified he didn't feel threatened by the group after he exited Haney's apartment to get his father out of the group. TT5:152. Multiple people who were near the apartment complex testified similarly. *See* TT4:108, 117, 128, 134.

The security footage further disproves Defendant's claim that he was attacked by an "angry mob." The video shows that no one in the group physically attacked or charged towards Defendant. Ex.119 at 02:54-03:10. Detective Harris measured a stall in the parking lot at approximately nineteen feet. TT6:178. Using this measurement, Joshua Allen, the closest member of the group, was at least nineteen feet away from Defendant when he was shot. *See* Ex.119 at 02:55-03:05. Joshua Allen was the only person in the group who was animated. TT4:60, 81. Also, no one in the group had a weapon drawn; Jevon Allen's gun was in

a closed satchel and had not been cocked. *See Stone*, 2019 S.D. 18, ¶¶45-47, 925 N.W.2d at 502 (affirming jury's decision to find Stone guilty of Second-Degree Murder for shooting an unarmed victim); *see also Connecticut v. Revels*, 99 A.3d 1130, 1141-43 (Conn. 2014) (concluding there was sufficient evidence for the jury to reject Revels' self-defense claim, including evidence that the victim couldn't have fired his weapon at the scene); *Louisiana v. Williams*, 265 So. 3d 902, 914, (La. App. 4 Cir. 2019) writ granted, 2019-00490 (La. 10/15/19), 280 So. 3d 595, and aff'd, 2019-00490 (La. 4/3/20), 340 So. 3d 761, on reh'g, 2019-00490 (La. 7/9/20), 298 So. 3d 151 (Upholding the jury's guilty verdict on murder charge and noting that evidence presented showed the victim was unarmed and made no physical contact toward Williams, who escalated the incident by leaving the scene, retrieving a firearm, and returning). The only gun drawn was Defendant's.

The question of whether Defendant was justified in using deadly force was for the jury to decide. *See Stone*, 2019 S.D. 18, ¶45, 925 N.W.2d at 502. Here, the jury considered that question and concluded there was evidence, beyond a reasonable doubt, that Defendant did not act in self-defense. And because there is "sufficient evidence to sustain [that] reasonable theory of guilt", this Court should affirm Defendant's murder conviction. *Id.* at ¶38.

2. First Degree Manslaughter.

To convict Defendant of First-Degree Manslaughter, the State had to prove, beyond a reasonable doubt: (1) Defendant caused Larry Carr Jr.'s death; (2) Defendant killed Carr Jr. by "means of a dangerous weapon, a firearm"; (3) Defendant acted without any intent to kill Carr Jr.; and (4) Defendant was not justified in the killing. SR:597 (Instruction No. 24); *see also* SDCL 22-16-15(3). Defendant argues there is insufficient evidence to sustain his conviction claiming that the evidence showed Defendant could be interpreted to show that Defendant "was in fear of his life." DB:26, 29.

As discussed above, the evidence proved the necessary elements and is sufficient to sustain Defendant's manslaughter conviction. Specifically, the evidence established that Defendant was not justified in killing Carr Jr. Section II(B)(1)(c). The other three elements of manslaughter were not in serious dispute and were easily proven by the evidence the State presented. *See* Section II(B)(1). The State respectfully asks this Court to affirm Defendant's conviction for manslaughter.

III.

THE CIRCUIT COURT PROPERLY ALLOWED TESTIMONY ABOUT DEFENDANT'S FELONY CONVICTION.

A. Standard of Review.[9]

[9] Defendant fails to include a standard of review for this section of his brief. *See* DB:21-24.

"The evidentiary rulings of a circuit court are presumed to be correct." *State v. Falkenberg*, 2021 S.D. 59, ¶41, 965 N.W.2d at 592 (further citations omitted). Evidentiary rulings are reviewed for an abuse of discretion. *Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d at 497. This Court uses a two-step process in its review of evidentiary rulings: "first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was a prejudicial error that in all probability affected the jury's conclusion." *State v. Hankins*, 2022 S.D. 67, ¶20, __ N.W.2d __ (further citation omitted).

In the evidentiary context, an "abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d at 497 (further citation omitted). To establish prejudice, a defendant must show that "but for the circuit court's error the jury would have delivered a different verdict." *Id.* at ¶33.

B. The Circuit Court did not Abuse its Discretion When It Allowed Testimony That Defendant was Statutorily Prohibited from Possessing a Firearm.

In two separate rulings during trial, the circuit court granted the State's Notice to Offer Felony Status Relative to Self-Defense Evidence. *See generally*, TT5:6-36; TT6:11-20. The circuit court then focused on the use of the word "lawful," and what constituted lawful activity. TT5:7. It allowed Defendant to go forward with his self-defense claim, but also ruled the State would be allowed to present evidence on whether

Defendant's conduct was lawful. TT5:10. Citing *North Carolina v. Mercer* and *State v. Birdshead*, the circuit court discussed the reasonableness of Defendant possessing a firearm as a felon. TT5:10-14; 818 S.E.2d 375, 380-81 (N.C. 2018) (cleaned up); 2015 S.D. 77, ¶24, 871 N.W.2d at 72. The court ruled that the State would be allowed to elicit testimony that Defendant was a felon in unlawful possession of a firearm for the limited purpose of allowing the jury to consider it as a factor for Defendant's self-defense claim. TT5:13-14. It noted the State previously dismissed the Possession of a Firearm by a Convicted Felon charge, so its admission would not lead to prejudice against Defendant. TT5:14.

The next day of trial, the circuit court further explained its reasoning when it denied Defendant's objection to the court's ruling and denied a motion in limine by the State seeking to prohibit Defendant from using self-defense due to his felon status. *See generally* TT6:2-20. It confirmed that Defendant's felony status could be used for the limited purpose of allowing the jury to consider whether Defendant's conduct was justified, stating "the more the jury can consider, the better they can do their job." TT6:16, 20. The circuit court conducted an analysis under Rule 401 and 403 and it appropriately determined that Defendant's felony status was relevant and that the evidence was prejudicial, but not unduly prejudicial. *See* TT6:16-18. The circuit court noted the evidence was relevant as to justification: it went to Defendant's state of mind because he knew he was prohibited from possessing a firearm at the time

of the incident. TT6:16-17; *see also* SDCL 19-19-404(b). The court also appropriately noted that Defendant's felony status was just one of many factors that the jury could consider. TT6:19-20.

The evidence about Defendant's felon status was introduced during Detective Harris's testimony:

> [Prosecutor]: Detective, on June 8th of 2019, was the defendant prohibited by South Dakota statute from possession or having in his control a firearm?
>
> [Detective Harris]: Yes.

TT6:179. Immediately before this testimony, the circuit court instructed the jury as to what this evidence could be used for: determining whether the Defendant acted reasonably. TT6:178. The jury was again given this limiting instruction in the circuit court's final jury instructions. SR:599 (Instruction No. 26). That instruction noted that an individual "prohibited from possessing a firearm can possess a firearm to defend himself if it is justified under the circumstances." SR:599.

Defendant argues that the circuit court erred by allowing testimony that he could not lawfully possess a weapon to be heard by the jury, but does not give specifics as to how the circuit court misapplied a specific rule of evidence. *See* DB:24. Instead, Defendant relies on *State v. Andrews*, *State v. Birdshead*, *State v. Randle*, and other cases to support his contention that the State could not submit evidence of Defendant's felon status. DB:24. In *State v. Andrews*, an excusable

homicide instruction was at issue, not one on justifiable homicide, like in this case. *State v. Andrews*, 2001 S.D. 31, ¶11, 623 N.W.2d 78, 81; SR:598. In addition, the *Andrews* Court held the trial court did not abuse its discretion in admitting several of Andrews' unlawful actions on the night he shot Davis. *Id.* at ¶¶8-12.

State v. Randle dealt with the trial court denying Randle's proposed excusable homicide instruction. *State v. Randle*, 2018 S.D. 61, ¶29, 916 N.W.2d 461, 468. This Court determined the evidence presented a theory for the jury that Randle's killing was "accidental and excusable." *Id.* at ¶37. Here, Defendant does not claim an accident or excuse; he admits the killing but claims self-defense.

State v. Birdshead involved Birdshead possessing an illegal firearm. During a drug deal, two men attacked Birdshead, who eventually gained control of a shotgun and killed one of the men. *State v. Birdshead*, 2015 S.D. 77, ¶¶5-6, 871 N.W.2d at 68. The circuit court denied Birdshead's proposed jury instruction, which stated that a person who, normally, cannot possess a firearm can do so if he came into control of the firearm for self-defense. *Id.* at ¶¶23-24.[10] This Court held the trial court did not abuse its discretion in denying the instruction, as

[10] To the extent Defendant relies on *Conaty v. Solem*, 422 N.W.2d 102 (S.D. 1988), as referenced in *Birdshead*, that argument also fails, because Defendant here was not on trial for illegal possession of a firearm. *See* DB:24; 422 N.W.2d at 104. Further, the jury was able to consider the reasonableness of Defendant's illegal possession of a firearm in his self-defense claim, as discussed in this section.

Birdshead did not come into possession of the shotgun for self-defense. *Id.* Also, unlike in *Birdshead*, the denial of a jury instruction is not at issue here. *See* DB:21-24. The alleged problem is that the circuit court allowed the jury to consider whether Defendant's possession of a weapon, when he was statutorily prohibited from doing so, was reasonable under the circumstances.

The out of state authority Defendant cites is also not applicable. In *North Carolina v. Yarborough*, Yarborough broke into a house intending to rob the victim when a struggle broke out for Yarborough's shotgun, which resulted in the victim's death. 679 S.E.2d 397, 407 (N.C. 2009). Yarborough claimed the trial court failed to instruct on the defense of accident, which the court denied. *Id.* He did not claim self-defense. *Id.* Likewise, *South Carolina v. Burriss* deals with the trial court failing to instruct the jury on the law of accident; the issue in that case was an accidental discharge of a firearm that was raised in self-defense. 513 S.E.2d 104, 107-09 (S.C. 1999). In *Ealey v. Mississippi*, a trial court refused Ealey's accident-or-misfortune jury instruction in a situation where Ealey gave birth in a hotel room, wrapped the baby in a comforter, placed it in a suitcase, and left it behind her church. 158 So.3d 283, 289-91 (Miss. 2015). Mississippi's Supreme Court upheld the trial court's ruling. *Id.* Because Defendant did not raise an accident defense, these cases do not apply.

In South Dakota the law is clear, "[w]hether, under the particular facts of each case, homicide was justified is for the jury to decide." *Frias*, 2021 S.D. 26, ¶ 29, 959 N.W.2d at 70. And "[t]he determination of whether defendant acted reasonably, in light of possible legal alternatives, is question for the jury, after appropriate instruction." *Mercer*, 818 S.E.2d at 381. The State met its burden of proving beyond a reasonable doubt that the killing was "without the authority of law." *Pellegrino*, 1998 S.D. 39, ¶19, 577 N.W.2d at 598; *see also* SR:598 (instructing the jury that the State needed to prove Defendant did not act in self-defense beyond a reasonable doubt; Instruction No. 25). And the jury was properly allowed to consider evidence of Defendant's felony status to determine whether his knowingly breaking the law to defend himself was reasonable. *See Mercer*, 818 S.E.2d at 380-81.

Further, Defendant does not explain how this prejudiced him, thus he cannot show that but for this testimony being presented, the "jury would have delivered a different verdict." *Stone*, 2019 S.D. 18, ¶33, 925 N.W.2d at 499 (further citation omitted). The fact that Defendant claims this evidence was prejudicial does not mean it should have been kept out. As the circuit court noted – all evidence is prejudicial to an individual's case to a certain degree. TT6:18. The prejudice that must be shown is unfair prejudice. SDCL 19-19-403; *State v. Wright*, 1999 S.D. 50, ¶16, 593 N.W.2d 792, 799.

But "evidence does not cause danger of unfair prejudice merely because its legitimate probative force damages the defendant's case." *Stone*, 2019 S.D. 18, ¶24, 925 N.W.2d at 497 (quoting *State v. Fischer*, 2013 S.D. 23, ¶15, 828 N.W.2d 795, 800). "Prejudice refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *Birdshead*, 2015 S.D. 77, ¶63, 871 N.W.2d at 83 (further citations omitted) (inner quotation omitted). Here, there was no danger of "unfair prejudice." *Id.* As discussed above, the jury could consider a multitude of evidence in deciding whether Defendant acted in self-defense, not just the testimony that he was not lawfully allowed to possess a firearm.

In short, the circuit court properly allowed Detective Harris to testify about Defendant being statutorily prohibited from possessing a firearm. Even if the court erred, Defendant has not shown he was unfairly prejudiced by its admission or that the jury's verdict would have been different had it not been admitted. *Stone*, 2019 S.D. 18, ¶¶22, 33, 925 N.W.2d at 497 (further citation omitted).

IV.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL.

A. Standard of Review.

"[This Court] will not overturn a circuit court's decision to deny a motion for mistrial unless there is an abuse of discretion." *State v. Delehoy*, 2019 S.D. 30, ¶20, 929 N.W.2d 103, 108 (further citation

omitted). An abuse of discretion is a "fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Id.* at ¶22 (further citation omitted).

Not only must Defendant show the circuit court abused its discretion, he must also show he was prejudiced by the circuit court's decision. *State v. Kvasnicka*, 2013 S.D. 25, ¶17, 829 N.W.2d 123, 127. "Error is prejudicial when, in all probability . . . it produced some effect upon the final results and affected rights of the party assigning it." *Id.* (quoting *State v. Fool Bull*, 2009 S.D. 36 ¶34, 766 N.W.2d 159, 167).

B. The Circuit Court did not Abuse its Discretion in Denying Defendant's Motion for a Mistrial.

Before trial, the circuit court entered an order prohibiting the State from discussing Defendant's past incarceration or referencing Defendant's release from prison. SR:431-32. During the direct examination of Christina Haney, the following exchange occurred:

> [Prosecutor]: Had [Defendant] ever been to Sioux Falls to visit you?
>
> [Haney]: No.
>
> [Prosecutor]: And did something happen up in Minneapolis for him to come back with you?
>
> [Haney]: When he had gotten out of prison --
>
> [Prosecutor]: I'm going to go ahead and stop you.
>
> [Haney]: Ok.
>
> [Defense counsel]: Your Honor, can we approach?
>
> [Court]: Sure.
>
> (Bench conference.)

> [The Court]: Ladies and gentleman, you shall disregard the last comment of the witness in this matter. Remove it from your mind. It's not to be considered in any manner as it relates to testimony of this witness for consideration in this matter. You may proceed.

TT6:82. At the next break, a hearing was held outside the presence of the jury. TT6:114-21. Defense counsel moved for a mistrial and argued the testimony violated the court's order on Defendant's motion in limine, that it was unfairly prejudicial, and because the bell couldn't be unrung with the jury. TT6:115-16. The State responded by noting it hadn't specifically elicited the answer from Haney, and that neither the State nor Haney purposefully violated the motion. TT6:116. Further, the State mentioned that Haney stopped her testimony as soon as the violation occurred and noted the circuit court had admonished the jury to disregard the answer. TT6:116-17.

The circuit court denied Defendant's motion for mistrial. TT6:121. It considered whether the inadvertent mention of Defendant's being released from prison was solicited by the State, and whether the court had the opportunity on record to correct the mistake. TT6:118-20. The circuit court concluded that the State did not try to solicit the answer from Haney. TT6:120. The circuit court also reminded the parties it corrected the mistake on the record, providing a curative instruction to the jury directly following the testimony. TT6:120. It also noted that it presumed the jury would follow the circuit court's instructions on the matter. TT6:121.

Defendant now argues that he was prejudiced by Haney's testimony. DB:30. He further claims the jury likely still considered Haney's testimony because the "bell couldn't be unrung." DB:30.

Yet Defendant fails to show that Haney's testimony was actually prejudicial. First, the circuit court immediately admonished the jury and instructed them to disregard the comment, remove it from their minds, and not consider it in any manner. TT6:82. It is presumed that "juries understand and abide by curative instructions." *State v. Dillon*, 2010 S.D. 72, ¶28, 788 N.W.2d 360, 369 (citing *State v. Maves*, 358 N.W.2d 805, 809 (S.D. 1984) (further citations omitted). Second, Defendant does not put forth any evidence showing the jury did not abide by the circuit court's curative instruction. *See* DB:29-30. Third, the State instantly recognized Haney's error and stopped her testimony to comply with the court's order on Defendant's motion in limine and to preserve his right to a fair trial. *See* TT6:82.

As mentioned *supra*, the jury considered a wealth of evidence and used it to convict Defendant. Among the evidence was the security camera video showing Defendant shooting into the group of unarmed people in the parking lot, Defendant's subsequent flight to Minneapolis immediately following the incident, and eyewitness testimony leading up to and during the shooting. Because of the overwhelming evidence of Defendant's guilt, Haney's single, and unsolicited, statement referencing Defendant's release from prison did not "produce[] some effect upon the

final results and affected rights of the party assigning it." *Kvasnicka*, 2013 S.D. 25, ¶17, 829 N.W.2d at 127; *see also West Virginia v. Sherrod*, No. 11-1121, 2012 WL 5857302, at *1-3 (W. Va. Nov. 19, 2012) (affirming circuit court's decision to deny Sherrod's motion for mistrial, which was based on a single reference to Sherrod's incarceration); *People v. Harbach*, No. 284988, 2009 WL 1506792, at *1-3 (Mich. Ct. App. May 28, 2009) (upholding the trial court's denial of three separate motions for mistrial based on repeated references to Harbach's incarceration). Thus, the circuit court did not make a "fundamental error of judgment" or a "choice outside the range of permissible choices" in denying Defendant's motion for mistrial. *Delehoy*, 2019 S.D. 30, ¶22, 929 N.W.2d at 109.

CONCLUSION

The State respectfully requests this Court affirm Defendant's Judgment of Conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,954 words.

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

Dated this 16th day of November, 2022.

/s/ Stephen G. Gemar
Stephen G. Gemar
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of November, 2022, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Ramon Smith* was served via electronic mail upon Manuel J. de Castro, Jr., mdecastro1@yahoo.com.

/s/ Stephen G. Gemar
Stephen G. Gemar
Assistant Attorney General

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 29902

Plaintiff/Appellee,

v.

RAMON SMITH,

Defendant/Appellant,

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

HONORABLE BRADLEY ZELL
Circuit Court Judge

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Notice of Appeal Filed February 7, 2022

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TABLE OF AUTHORITIES

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 29902

STATE OF SOUTH DAKOTA,
Plaintiff/Appellee,

vs.

RAMON SMITH,
Defendant/Appellant.

PRELIMINARY STATEMENT

Defendant and Appellant, Ramon Smith, will be referred to throughout this brief as "Smith" or "Appellant". The Appellee, State of South Dakota, will be referred to as "State" or "Appellee". The transcript of the Jury Trial will be referred to as "J.T.". The transcript of the Sentencing will be referred to as "S.T.". All transcripts of Motions Hearings will be referred to as "M.H." followed by date of the hearing.

JURISDICTIONAL STATEMENT

An Indictment was filed with the Minnehaha County Clerk of Courts on June 19, 2019 charging Smith with the following, Count I: Murder – 2nd Degree (Depraved Mind), in violation of SDCL 22-16-7, Class B Felony; Count 2: Manslaughter – 1st Degree – Dangerous Weapon, in violation of SDCL 22-16-15(3), Class C Felony; Count 3: Attempted Murder – 1st Degree – in violation of SDCL 22-16-4(1) and SDCL 22-4-1, Class 2 Felony; Count 4: Attempted Murder – 1st Degree – in violation of SDCL 22-16-4(1) and SDCL 22-4-1, Class 2 Felony; Count 5: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 6: Aggravated

Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 7: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 8: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 9: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 10: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 11: Aggravated Assault – Serious Bodily Injury – in violation of SDCL 22-18-1.1(4), Class 3 Felony; Count 12: Aggravated Assault – Serious Bodily Injury – in violation of SDCL 22-18-1.1(4), Class 3 Felony; Count 13: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 14: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 15: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 16: Reckless Discharge of a Firearm – in violation of SDCL 22-14-7(1), Class 1 Misdemeanor; Count 17: Possession of a Firearm by Convicted Felon, in violation of SDCL 22-14-15, Class 6 Felony; Count 18: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony; and Count 19: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony. A Part II Information was filed on June 19, 2019.

On September 19, 2019, Smith was arraigned on the Indictment and entered a Not Guilty plea.

A jury trial was held from August 16, 2021, through August 26, 2021. Prior to the commencement of trial, the State dismissed Counts 3-7, 11, 12, and 16-19 of the Indictment. On August 26, 2021, the Jury found Smith Guilty of Count 1: Murder – 2nd Degree (Depraved Mind); Count 2: Manslaughter – 1st Degree – Dangerous Weapon;

Count 8: Aggravated Assault – Dangerous Weapon; Count 9: Aggravated Assault – Dangerous Weapon; Count 10: Aggravated Assault – Dangerous Weapon; Count 13: Aggravated Assault – Physical Menace; Count 14: Aggravated Assault – Physical Menace; Count 15: Aggravated Assault – Physical Menace.

On January 13, 2022, Smith appeared before the trial court and Admitted to an Amended Part 11 Information. After said Admission, Smith was sentenced as to Count 1: Murder – 2nd Degree (Depraved Mind) to life in prison in the South Dakota State Penitentiary without the possibility of parole and costs of $106.50; Count 2: Manslaughter – 1st Degree (Dangerous Weapon) no sentence with imposed; Count 8: Aggravated Assault – Dangerous Weapon – twenty-five (25) years in the South Dakota State Penitentiary, consecutive to Count 1, credit for nine hundred thirty-eight (938) days served, and costs of $106.50; Count 9: Aggravated Assault – Dangerous Weapon - twenty-five (25) years in the South Dakota State Penitentiary, consecutive to Count 1 and 3, credit for nine hundred thirty-eight (938) days served, and costs of $106.50; Count 10: Aggravated Assault – Dangerous Weapon - twenty-five (25) years in the South Dakota State Penitentiary, consecutive to Count 1, 3 and 4, credit for nine hundred thirty-eight (938) days served, and costs of $106.50; Count 13: Aggravated Assault – Physical Menace – no sentence was imposed; Count 14: Aggravated Assault – Physical Menace – no sentence was imposed; Count 15: Aggravated Assault – Physical Menace – no sentence was imposed. The trial court also found that each Count Smith was convicted of was a separate transaction for purposes of any possible parole. Notice of Appeal was filed on February 7, 2022. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

1. The trial court erred in not allowing a hearing and granting Defendant's Motion to Dismissed based upon Statutory Immunity.

2. The trial court erred in allowing the State to introduce evidence that Smith was precluded under the law from possessing a firearm.

3. The trial court erred in not setting aside the verdict and entering a judgment of acquittal.

4. The trial court erred by not granting a mistrial.

PROCEDURAL STATEMENT

An Indictment was filed with the Minnehaha County Clerk of Courts on June 19, 2019 charging Smith with the following, Count I: Murder – 2nd Degree (Depraved Mind), in violation of SDCL 22-16-7), Class B Felony; Count 2: Manslaughter – 1st Degree – Dangerous Weapon, in violation of SDCL 22-16-15(3), Class C Felony; Count 3: Attempted Murder – 1st Degree – in violation of SDCL 22-16-4(1) and SDCL 22-4-1, Class 2 Felony; Count 4: Attempted Murder – 1st Degree – in violation of SDCL 22-16-4(1) and SDCL 22-4-1, Class 2 Felony; Count 5: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 6: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 7: Aggravated Assault – Extreme Indifference – in violation of SDCL 22-18-1.1(1), Class 3 Felony; Count 8: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 9: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 10: Aggravated Assault – Dangerous Weapon – in violation of SDCL 22-18-1.1(2), Class 3 Felony; Count 11: Aggravated Assault – Serious Bodily Injury – in violation of SDCL 22-18-1.1(4), Class 3 Felony; Count 12: Aggravated Assault – Serious Bodily Injury – in violation of SDCL 22-18-1.1(4), Class 3 Felony; Count 13: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 14: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3

Felony; Count 15: Aggravated Assault – Physical Menace – in violation of SDCL 22-18-1.1(5), Class 3 Felony; Count 16: Reckless Discharge of a Firearm – in violation of SDCL 22-14-7(1), Class 1 Misdemeanor; Count 17: Possession of a Firearm by Convicted Felon, in violation of SDCL 22-14-15, Class 6 Felony; Count 18: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony; and Count 19: Commit or Attempt to Commit Felony with Firearm, in violation of SDCL 22-14-12, Class 2 Felony. A Part II Information was filed on June 19, 2019.

On September 19, 2019, Smith was arraigned on the Indictment and entered a Not Guilty plea.

A jury trial was held from August 16, 2021, through August 26, 2021. Prior to the commencement of trial, the State dismissed Counts 3-7, 11, 12, and 16-19 of the Indictment. On August 26, 2021, the Jury found Smith Guilty of Count 1: Murder – 2nd Degree (Depraved Mind); Count 2: Manslaughter – 1st Degree – Dangerous Weapon; Count 8: Aggravated Assault – Dangerous Weapon; Count 9: Aggravated Assault – Dangerous Weapon; Count 10: Aggravated Assault – Dangerous Weapon; Count 13: Aggravated Assault – Physical Menace; Count 14: Aggravated Assault – Physical Menace; Count 15: Aggravated Assault – Physical Menace.

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STATEMENT OF FACTS

Appellant hereby incorporates his previous Statement of Facts as if set forth in full.

LEGAL ANALYSIS

1. The trial court erred in not allowing a hearing and granting Defendant's Motion to Dismissed based upon Statutory Immunity.

Appellant hereby incorporates his previously set forth Legal Analysis as if set forth in full.

Appellant agrees that the standard of review is de novo as set forth in Appellee's Brief. *See West v. John Morell & Co, 460 NW2d 745, 746 (SD 1990); Mercer v. S. Dakota Atty Gen. Off., 864 NW2d 299, 302 (SD 2015).*

The State argues in their brief that the immunity statute is substantive and not procedural and therefore not retroactive. As cited in Appellant's Brief, *Rogers v. Commonwealth, 285 SW3d 740 (2009)* held that the following statute, similar to SDCL 22-18-4.8, was procedural only as it did not provide merely a defense against liability, but protection against the burdens of prosecution and trial as well.

> (1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
>
> (3) The court shall award reasonable attorney's fees, court costs, compensation for law of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

SDCL 22-18-4.8 provides, in its entirety:

> A person who uses or threatens to use force, as permitted in SDCL 22-18-4 to 22-18-4.7, inclusive, is justified in such conduct and is immune from criminal prosecution and from civil liability for the use or threatened use of such force brought by the person against whom force was used or threatened, or by any personal representative or heir of the person against whom force was used or threatened, unless:
>
> (1) (a) The person against whom force was used or threatened is a law enforcement officer, who was acting in the performance of official duties; and
>
> (b) The officer identified himself or herself; or

(2) The person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer who was acting in the performance of official duties.

The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by a defendant in the defense of any civil action brought by the plaintiff, if the court finds that the defendant is immune from prosecution in accordance with this section.

South Dakota, Like Kentucky, does not apply substantive statutes retroactively, but does apply procedural statutes retroactively. The 2006 immunity statute in Kentucky, as stated by *Rogers,* is purely procedural. According to the court, "the General Assembly has created a new procedural bar to prosecution and that bar, like other procedural statutes, is to be applied retroactively." *Id.* The South Dakota Legislature, likewise, created a procedural bar to prosecution and likewise, it should be applied retroactively.

The State argues that *State v. Fordyce, 940 NW2d 419, 427 (Iowa 2020)* is persuasive authority on the issue whether the immunity statute is procedural or substantive. However, the Iowa Supreme Court only ruled on the issue of whether Iowa Code § 704.1 Stand-Your-Ground provision was a change in substantive law or not; the Court ruled it was and did not require retroactive application. *Id.* However, § 704.1 defines "Reasonable Force" and is not an immunity statute. The Iowa Supreme Court did not discuss whether Iowa Code § 704.13, which creates an immunity from "criminal or civil liability," was procedural or substantive and whether it applied retroactively, so the case can be distinguished from the one at hand.

Nothing in the text or legislative history of SDCL 22-18-4.8 indicates the Legislature intended for the immunity provisions to be available only for prosecutions commencing on or after July 1, 2021. As the South Dakota Supreme Court has repeatedly held:

> The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

Argus Leader v. Hagen, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 (internal citations omitted). The language of SDCL 22-18-4.8 is clear and unambiguous. It creates immunity from criminal prosecution for any person who uses force in a manner consistent with what now repealed but restated SDCL 22-16-34 and 35 provide.

SDCL 22-18-4.8 does not create a new affirmative defense. Established South Dakota law already provides that a Defendant does not need to retreat (SDCL 22-18-4.2(1), previously SDCL 22-18-4) and further justifies homicide when the Defendant is protecting himself (SDCL 22-18-4.2(3), previously SDCL 22-16-34) or a family member (SDCL 22-18-4.1, previously SDCL 22-16-35). Said another way, SDCL 22-18-4.8 leaves unchanged the current murder and affirmative defense statutes. SDCL 22- 18-4.8 only affects the *procedure* by which a State is able to seek a conviction.

"Where a new statute deals only with procedure, it applies to all actions, including those which have already accrued or are pending, as well as those which arise after enactment of the statute."

In the instant case, the plain language of SDCL 22-18-4.8, along with a reading of South Dakota and other jurisdiction's case law validates the argument that SDCL 22-18-4.8 applies to pending prosecutions.

The trial court erred in not allowing a hearing and granting Defendant's Motion to Dismissed based upon Statutory Immunity, therefore, the verdict must be vacated, and the case remanded for further proceedings.

2. The trial court erred in allowing the State to introduce evidence that Smith was precluded under the law from possessing a firearm.

The trial court allowed the State to introduce testimony from Sergeant Harris that Smith was precluded from possessing a firearm on June 8, 2019. *Trial Transcript, August 24, 2021, pg. 179.*

> SDCL 22-16-34 states, "Homicide is justifiable if committed by any person while resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is" and SDCL 22-16-35 states, "Homicide is justifiable if committed by any person in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant if there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished."

The presence of the word "lawful" before the word defense in SDCL 22-16-35 simply explains when homicide is justifiable. The language goes on to explain that lawful defense occurs when there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished. The South Dakota Supreme Court has provided significant instruction as to the factors that can be decided by a jury in determining whether self-defense is justified. Justified defense is another way of stating lawful defense.

In *Andrews*, the defendant was charged with manslaughter, and the circuit court gave an excusable homicide instruction under SDCL 22-16-30 as requested by the defendant. No issue was raised on appeal concerning the excusable homicide instruction given by the court. Instead, the Court considered whether the circuit court erred by permitting the State to present other act evidence showing the defendant was a minor in possession of alcohol, driving under the influence of alcohol, in possession of a stolen weapon, and in possession of a weapon while under the influence at the time of the shooting. The Court held that this evidence was properly admitted to show defendant was not acting lawfully at the time of the

shooting, stating, "[Defendant's] underage and driving under the influence through the streets of Rapid City with the barrel of a loaded shotgun pointing out the driver's side window, was not 'doing any lawful act' when the gun discharged killing Davis." *2001 SD 31, ¶ 11, 623 NW2d at 81.* The language in *Andrews* is not an affirmation that the lawfulness of the defendant's actions should be determined by the court as a matter of law, but that evidence of unlawful conduct may be admissible on the defendant's claim of excusable homicide.

State v. Randle, 2018 SD 61, P31. (See Commonwealth v. Legg, 711 A2d 430, 432 n.2 (Pa 1998) (quoting Commonwealth v. Hobson, 398 A2d 1364, 1368 (Pa 1979)) (stating that one of the elements of the defense of excusable homicide is that "[t]he act resulting in death must be a lawful one"); *Ealey v. State, 158 So3d 283, 289 (Miss 2015) (quoting Burge v. State, 472 So2d 392, 395 (Miss1985))* (noting that excusable homicide occurs when a jury finds that a killing occurred while a defendant was doing "a lawful act by lawful means with usual and ordinary caution and without any unlawful intent"); *State v. Yarborough, 679 SE2d 397, 407 (NC Ct App 2009) (quoting State v. York, 489 SE2d 380, 390 (NC 1997))* ("Any defense based on the suggestion that the death was the result of an accident or misadventure must be predicated upon the absence of an unlawful purpose on the part of the defendant."); *State v. Burriss, 513 SE2d 104, 107 (S.C. 1999)* ("the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide"); see also 40 Am. Jur. 2d Homicide § 75 (1968) ("The fact that one carries a concealed weapon in violation of the law does not render him criminally responsible . . . where death is caused by the accidental discharge of the weapon, for in such case death cannot be said to be the natural or necessary result of carrying the weapon in violation of law.").

State v. Birdshead, 871 NW2d 62 (SD. 2015) is no different. Birdshead had an illegal firearm, a sawed-off shotgun. He said he had it to protect himself because he generally needs to be able to do so. Two men began to beat Birdshead while he was conducting a drug deal. Birdshead pulled the sawed off and wrestled with it with one of the men. Birdshead pulled the trigger and shot one of the men. The man died from his gunshot wound.

Birdshead's charges at trial were three counts of manslaughter in the first degree, commission of a felony with a firearm, and possession of a controlled weapon. Id. at ¶7. Birdshead asks for an instruction stating that he could possess the firearm if he came into control of it for purposes of self-defense. The instruction was denied. The SDSC affirmed that decision because the Court found that he did not come into control of the firearm for the purposes of self-defense against these two specific men. Every indication in the Birdshead opinion supports that the instruction was intended to defend against the gun charges. The proposed instruction was based upon Conaty v. Solem 422 N.W.2d 102, 104 (S.D.1988) which holds that a defendant potentially could have a defense to possession of an illegal firearm based on justification. Nothing in Birdshead indicates that the Court was considering self-defense justification generally. Again, the opinion is specific to the nature of the gun laws. There certainly was no discussion of whether a person must submit themselves to be murdered rather than be able to take up arms in defense of themselves simply because of a statutory prohibition.

The State argues that there was no prejudice as a result of the trial court allowing this testimony. This is erroneous if you look at the voir dire that was conducted and the jurors' questions concerning whether Ramon was "lawfully" possessing a gun when the incident occurred. A plethora of jurors wanted to know the answer to that as it was very

important to them and then days into the trial, after jury selection and testimony began, the trial court allowed the State to bring in said testimony. This was extremely prejudicial, and the matter should be reversed for a new trial.

3. The trial court erred in not setting aside the verdict and entering a judgment of acquittal.

If the jury has returned a guilty verdict, the Court may set aside the verdict and enter an acquittal if the evidence is insufficient to sustain a conviction of the offense or offenses. *See,* SDCL 23A-23-3

The South Dakota Supreme Court has consistently stated "[i]n measuring evidentiary sufficiency, [the courts] ask whether, after viewing 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." *State v. Disanto, 688 NW2d 201, 206 (SD 2004).* The courts will set aside a jury verdict only "where the evidence and all reasonable inferences to be drawn therefrom fail to sustain a rational theory of guilt." *State v. Hage, 532 NW2d 406, 410 (SD 1995).*

It is well settled the State must prove every element of the charged offense beyond a reasonable doubt. *Thibodeau v. State, 298 NW2d 818, 819 (SD 1980); Sandstrom v. Montana, 442 US 510 (1979)* (noting the Fourteenth Amendment to the United States Constitution requires the State to prove each and every element of a criminal offense beyond a reasonable doubt).

The State argues that Defendant exited the apartment building and confronted the group. That simply isn't true. Smith exited the apartment building with his hands up and asked what the problem was. He was trying to alleviate the situation. The State argues that Joshua Allen moved towards Defendant while other members of the group turned towards the Defendant. Again, the video clearly shows what happened and Joshua Allen

was charging at Smith, not "moving" towards Smith. This case is distinguishable from *State v. Stone, 925 NW2d 493 (SD 2019).* In *Stone* there were two individuals, Stone, and the victim; in this case there were approximately 8 grown men trying to fight one person – Smith.

The evidence, when viewed in a light most favorable to the prosecution, can only reasonably be interpreted to show that Smith was in fear for his own life, and that of Haney and Saddler, from the moment that the Snapchat video with the gun was sent and then the angry mob showed up and started trying to kick in the door of the Haney/Saddler apartment. Smith's fear of imminent death or severe bodily injury only ceased when the angry mob had disbursed from the parking lot. Smith's duty to cease defending himself, Haney, and Saddler with deadly force ceased only when the angry mob was no longer a threat.

4. The trial court erred by not granting a mistrial.

A motion in limine had been filed by the defense, and granted by the trial court, precluding the State from eliciting testimony regarding the fact that Smith had just been released from prison. "The denial of a motion for mistrial will not be overturned unless there is an abuse of discretion. Motions for mistrial are within the discretion of the trial judge and will not be granted unless there is a showing of actual prejudice to the defendant." *State v. Johnson, 2001 S.D. 80, ¶ 9, 630 N.W.2d 79, 82 (quoting State v. Alidani, 2000 S.D. 52, ¶ 9, 609 N.W.2d 152, 155).* "For purposes of determining whether there are grounds for a mistrial, there must be error 'which, in all probability, produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'" *State v. Mollman, 2003 S.D. 150, ¶ 23, 674 N.W.2d 22, 29 (quoting State v. Anderson, 2000 S.D. 45, ¶ 36, 608 N.W.2d 644, 655).*

In the present case, Smith was being tried for Second Degree Murder, First Degree Manslaughter, and various other charges. The trial court had signed an Order precluding the State from introducing evidence that Smith had just been released from prison recently. The Order was violated. In a case where Smith was claiming self-defense the testimony of a witness that he was just released from prison no doubt had an effect on the jury even though the trial court had admonished the jury. Coupled with the fact that the jury was instructed that Smith couldn't lawfully possess a gun and further that he was just released from prison, prejudice is presumed, and the result should be the granting of a new trial.

CONCLUSION

In the case at hand, the trial court erroneously refused to grant a Motion to Dismiss based upon Statutory Immunity, erroneously allowed evidence that Smith couldn't possess a firearm, and erroneously denied a Motion for a Mistrial. Therefore, the jury verdict must be set aside, and the case remanded for a new trial.

Dated this 24th day of January, 2023.

/s/ Manuel J. de Castro, Jr.
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Appellant, through counsel, hereby respectfully requests oral argument in the above-entitled matter.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served one (1) copy of Appellant's Brief upon the persons herein next designated all on the date below by email to said addresses, to wit:

Mr. Stephen Gemar
atgservice@state.sd.us

Mr. Daniel Haggar
dhaggar@minnehahacounty.org

which email address is the last email address of the addressee known to the subscriber.

Dated this 24th day of January, 2023.

/s/Manuel J. de Castro, Jr.
Manuel J. de Castro, Jr.

APPENDIX TABLE OF CONTENTS

ICC-3C-SPO
ICC-Jail
Soan TOPen

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
		PD 19-10689
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI19004281
vs.	+	JUDGMENT & SENTENCE
RAMON DERON SMITH, [aka RAMON A SMITH aka RAMON SADDLER] Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on June 19, 2019, charging the defendant with the crimes of Count 1 Murder-2nd Degree (Depraved Mind) on or about June 10, 2019; Count 2 Manslaughter-1st Degree-Dangerous Weapon on or about June 10, 2019; Count 3 Attempted Murder-1st Degree (Premeditated) on or about June 8, 2019; Count 4 Attempted Murder-1st Degree (Premeditated) on or about June 8, 2019; Count 5 Aggravated Assault-Extreme Indifference on or about June 8, 2019; Count 6 Aggravated Assault-Extreme Indifference on or about June 8, 2019; Count 7 Aggravated Assault-Extreme Indifference on or about June 8, 2019; Count 8 Aggravated Assault-Dangerous Weapon on or about June 8, 2019; Count 9 Aggravated Assault-Dangerous Weapon on or about June 8, 2019; Count 10 Aggravated Assault-Dangerous Weapon on or about June 8, 2019; Count 11 Aggravated Assault-Serious Bodily Injury on or about June 8, 2019; Count 12 Aggravated Assault-Serious Bodily Injury on or about June 8, 2019; Count 13 Aggravated Assault-Physical Menace or about June 8, 2019; Count 14 Aggravated Assault-Physical Menace or about June 8, 2019; Count 15 Aggravated Assault-Physical Menace or about June 8, 2019; Count 16 Reckless Discharge of Firearm or Bow and Arrow on or about June 8, 2019; Count 17 Possession of Firearm by Convicted Felon on or about June 8, 2019; Count 18 Commit or Att to Commit Felony With Firearm on or about June 8, 2019; Count 19 Commit or Att to Commit Felony With Firearm on or about June 8, 2019 and a Part II Habitual Criminal Offender Information was filed. The defendant was arraigned upon the Indictment and Information on September 12, 2019, Michael Miller appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Ashley Trankle and Melinda Folkens, Deputy State's Attorneys appeared for the prosecution and, Manuel J. de Castro, Jr, and Angel Runnels, appeared as co-counsel for/with the defendant. Prior to the commencement of the Jury Trial, Indictment Counts 3 through 7, 11, 12 and 16 through 19 were dismissed by the State.

On August 16, 2021, a Jury was impaneled and sworn to try the case. On August 26, 2021, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant returned into open court in the presence of the defendant, the Jury returned its verdict, to-wit:

AS TO COUNT 5 (INDICTMENT COUNT 10) - AGGRAVATED ASSAULT -DANGEROUS WEAPON / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty five (25) years; with credit for nine hundred thirty eight (938) days served; consecutive to Counts 1, 3, and 4 (Indictment Counts 1, 8, and 9). It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 6 (INDICTMENT COUNT 13) - AGGRAVATED ASSAULT – PHYSICAL MENACE / HABITUAL OFFENDER : RAMON DERON SMITH : the Court finds this Count to be in the alternative to Count 3 (Indictment Count 8). No sentenced is imposed.

AS TO COUNT 7 (INDICTMENT COUNT 14) - AGGRAVATED ASSAULT – PHYSICAL MENACE / HABITUAL OFFENDER : RAMON DERON SMITH : the Court finds this Count to be in the alternative to Count 4 (Indictment Count 9). No sentenced is imposed.

AS TO COUNT 8 (INDICTMENT COUNT 15) - AGGRAVATED ASSAULT – PHYSICAL MENACE / HABITUAL OFFENDER : RAMON DERON SMITH: the Court finds this Count to be in the alternative to Count 5 (Indictment Count 10). No sentenced is imposed.

The Court finds that Counts for which the defendant was convicted and for which sentence is imposed consisted of separate transactions; therefor are viewed as separate and distinct acts.

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

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

Dated at Sioux Falls, Minnehaha County, South Dakota, this 20th day of January, 2022.

BY THE COURT:

JUDGE BRADLEY G. ZELL
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____
Deputy

FILED
JAN 20 2022
Minnehaha County, S.D.
Clerk Circuit Court

"We the Jury, find the defendant, RAMON DERON SMITH, guilty as charged as to Count 1 Murder-2nd Degree (Depraved Mind) (SDCL 22-16-7) (Verdict Form Count 1); guilty as charged as to Count 2 Manslaughter-1st Degree-Dangerous Weapon (SDCL 22-16-15(3)) (Verdict Form Count 2); guilty as charged as to Count 8 Aggravated Assault-Dangerous Weapon (SDCL 22-18-1.1(2)) (Verdict Form Count 3); guilty as charged as to Count 9 Aggravated Assault-Dangerous Weapon (SDCL 22-18-1.1(2)) (Verdict Form Count 4); guilty as charged as to Count 10 Aggravated Assault-Dangerous Weapon (SDCL 22-18-1.1(2)) (Verdict Form Count 5); guilty as charged as to Count 13 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) (Verdict Form Count 6); guilty as charged as to Count 14 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) (Verdict Form Count 7); guilty as charged as to Count 15 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) (Verdict Form Count 8)."

On January 13, 2022, the defendant returned to Court with co-counsel, Manuel J. de Castro, Jr, and Angel Runnels, and the State was represented by Deputy State's Attorney's, Ashley Trankle and Melinda Folkens. The defendant admitted to the Amended Part II Habitual Criminal Offender Information and a Motion hearing was held as to the applicable Habitual Statute.

The defendant was then asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 1 MURDER-2ND DEGREE (DEPRAVED MIND) / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for Life without the possibility of parole (per SDCL 22-16-7). It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 2 MANSLAUGHTER-1ST DEGREE (DANGEROUS WEAPON) / HABITUAL OFFENDER : no sentence is imposed.

AS TO COUNT 3 (INDICTMENT COUNT 8) - AGGRAVATED ASSAULT -DANGEROUS WEAPON / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty five (25) years; consecutive to Count 1, with credit for nine hundred thirty eight (938) days served. It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 4 (INDICTMENT COUNT 9) - AGGRAVATED ASSAULT -DANGEROUS WEAPON / HABITUAL OFFENDER : RAMON DERON SMITH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty five (25) years; with credit for nine hundred thirty eight (938) days served; consecutive to Counts 1 and 3 (Indictment Counts 1 and 8). It is ordered that the defendant shall pay $106.50 court costs through the Minnehaha County Clerk; which shall be collected by the Board of Pardons and Parole.