IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Appellee vs. ISAIAH VAUGHN ROUSE, Defendant and Appellant.	)))))))))	Circuit Court: 32CRI23-115 Supreme Court No. 30681

BRIEF OF APPELLANT

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

THE HONORABLE M. BRIDGET MAYER
Circuit Court Judge

Notice of Appeal Filed April 14, 2024

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PRELIMINARY STATEMENT

For the purposes of brevity and clarity, Appellant will use the following abbreviations throughout this brief. All references to the Clerk's Papers pertaining to this action are referred to as CP, followed by the page number. The transcript of the October 24, 2023, motion hearing is referred to as MH, followed by the page number. The transcript of the two-day jury trial beginning on October 25, 2023, is referred to as JT. The abbreviation will be preceded by the volume number and followed by the page number. The Pre-Sentence Investigation report is referred to as PSI. The transcript of the November 15, 2023, change of plea hearing is referred to as PH, followed by the page number. The transcript of the March 15, 2024, sentencing hearing is referred to as ST, followed by the page number.

JURISDICTIONAL STATEMENT

Appellant, Isaiah Rouse, appeals from the Judgment of Conviction signed on March 15, 2024, by the Honorable Judge M. Bridget Mayer, Circuit Court Judge of the Sixth Judicial Circuit, in Pierre, South Dakota. (CP 317-321) On March 15, 2024, Mr. Rouse was notified of his right to appeal, as provided by SDCL 23A-32-15. (CP 321) On April 14, 2024, Mr. Rouse timely filed Notice of Appeal with this Court. (CP 332)

LEGAL ISSUES PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS WHEN THERE WAS A VIOLATION OF THE 180-DAY RULE.

On October 24, 2023, the court orally denied Appellant's motion to dismiss, and found that there was no violation of the 180-day rule, and thus, no speedy trial violations. The court's written order was filed January 1, 2024.

Most Relevant Cases:
State v. Two Hearts, 2019 S.D. 17, 925 N.W.2d 503
State v. Seaboy, 2007 S.D. 24, 729 N.W.2d 370
State v. Cooper, 421 N.W.2d 67, 70 (S.D. 1988)

Relevant Statutory Provisions:
SDCL 23A-44-5.1

II. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL ON ALL FOUR COUNTS WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

On October 26, 2023, the court denied the motion for acquittal on all four counts finding there was, in the court's opinion, sufficient evidence was presented to the jury to render a verdict.

Most Relevant Cases:
State v. Jackson, 2009 S.D. 29, 765 N.W.2d 541
State v. Scott, 2019 S.D. 25, 927 N.W.2d 120

Relevant Statutory Provisions:
SDCL 22-18-1.1(5)

III. WHETHER THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO INTRODUCE OTHER ACTS EVIDENCE WHEN IT WAS UNTIMELY, IMPROPER, IRRELEVANT, AND PREJUDICIAL.

On October 24, 2023, and over the objection of counsel, the trial court orally granted the State's Motion to Introduce Other Acts Evidence.

Most Relevant Cases:
State v. Huber, 2010 S.D. 63.
See State v. Wright, 1999 S.D. 50, N.W.2d 792
State v. Phillips, 2018 S.D. 2, 906 N.W.2d 411

Relevant Statutory Provisions:
SDCL 19-19-404(b)

IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN GRANTED THE STATE'S PROPOSED JURY INSTRUCTION NUMBER 15.

On October 26, 2023, over the objection of defense counsel, the trial court granted the state's proposed version of jury instruction number 15, regarding physical menace, to be presented to the jury.

Most Relevant Cases:
State v. Swan, 925 N.W.2d 476 (S.D. 2019)
State v. Randle, 2018 S.D. 61, 916 N.W.2d 461
State v. Shaw, 2005 S.D. 105, 705 N.W.2d 620

V. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED THE STATE'S PROPOSED JURY INSTRUCTION NUMBER 21.

On October 26, 2023, over the objection of defense counsel, the trial court granted the state's proposed version of jury instruction number 21, regarding statements made by a defendant, to be presented to the jury.

Most Relevant Cases:
State v. Swan, 925 N.W.2d 476 (S.D. 2019)
State v. Randle, 2018 S.D. 61, 916 N.W.2d 461
State v. Shaw, 2005 S.D. 105, 705 N.W.2d 620

STATEMENT OF CASE

The Honorable Judge M. Bridget Mayer, Circuit Court Judge of the Sixth Judicial Circuit, in Pierre, South Dakota, presided over this criminal case. On March 7, 2023, Appellant, Isaiah Rouse, was indicted on four counts, to wit: three counts of Aggravated Assault on Law Enforcement Officer, in violation of SDCL 22-18-1.05 and SDCL 22-18-1.1(5), and one count Threatening a Law Enforcement Officer or Family, in violation of SDCL 22-11-15.6. (CP 1-3) On March 13, 2023, Mr. Rouse made his initial appearance in front of Judge Tara Adamski. (CP 922) On March 24, 2023, a Part II Information for

Habitual Offender was filed by the State, which alleged that on two prior occasions Mr. Rouse had been convicted of a felony. (CP 13) On April 21, 2023, Mr. Rouse pled not guilty to all four counts in the indictment and denied the Part II information. (AR 8) On July 19, 2023, the court entered Pretrial Order for Trial scheduling, among other things, a jury trial beginning, October 25, 2023. (CP 18) The pre-trial order also set a pretrial conference date of October 18, 2023.

On October 24, 2024, a motion hearing was held regarding several pre-trial motions, including the State's Motion to Introduce Other Acts Evidence and Motion to Calculate 180-days, as well as Mr. Rouse's Motion to Dismiss based on a violation of the 180-day rule under SDCL 23A-44-5.1. (*See* MH) The court granted the State's motions and denied Mr. Rouse's Motion to Dismiss. (MH 8, 31; CP 266, 290)

A two-day jury trial began on October 25, 2023. (2 JT) At the close of the State's evidence, Mr. Rouse moved the court for an acquittal on all four counts based on the sufficiency of the evidence presented. (3 JT 248) The trial court denied the motion, and the defense rested. (3 JT 252-54) On October 26, 2023, the jury found Mr. Rouse guilty on all four counts. (3 JT 305)

On November 15, 2023, Mr. Rouse admitted the allegations in the Part II Information for Habitual Offender. (PH 8) On March 15, 2024, the court sentenced Mr. Rouse to thirty-five years each on Counts I, II, and III, which were ordered to run concurrently. The court sentenced Mr. Rouse to 300 days in in the Hughes County jail for Count IV, and he received credit for 300 days previously served. (ST 34-35; CP 319-321). The Judgment of Conviction and Sentence was signed by the court on March 15,

2024. (CP 317-321) Mr. Rouse timely filed his Notice of Appeal to this Court on April 14, 2024.

STATEMENT OF FACTS

A. January 13, 2023

Mr. Rouse, who was in custody at Hughes County Jail, had a good relationship with the correctional officers, was a pleasant person and often joked around with them. (2 JT 111, 177; 3 JT 198, 226) However, on January 13, 2023, Mr. Rouse, while calm, was also frustrated, worried, anxious, and seemed "off" compared to his usual demeanor. (2 JT 152; 3 JT 231, 219, 237) According to Correctional Officer Billings, Mr. Rouse was "shaky" and "something was off with him, something was going on." (3 JT 219) Indeed, Mr. Rouse had been waiting over two hours for his medication. (2 JT 150-51)

According to Correctional Officer Harley Petrak, when she entered the pod, Mr. Rouse looked at her, laughed and said, "I need my medication or the next CO to come in here will get stabbed." (2 JT 150) Mr. Rouse giggled, and Officer Petrak exited the pod to finish her rounds. (2 JT 150-51) Once completed, Officer Petrak inquired about Mr. Rouse's medication and discovered that it had not been administered. (2 JT 150-51)

When Officer Petrak returned to Mr. Rouse, she opened the door, stepped back and the nurse requested that Mr. Rouse come take his medication. (2 JT 151-52, 168-69, 180) Mr. Rouse took his medication and asked to speak with the person in charge. (2 JT 151-52, 168-69, 180) Shortly after Officer Knowlton and Officer Billings arrived, all three officers noticed that Mr. Rouse had a small, two to three inch "golf" pencil clenched in his left hand, which was not uncommon for Mr. Rouse to have with him because he was always writing or drawing. (2 JT 153-54; 3 JT 194, 203-04, 219, 235)

According to Officer Billings, he asked Mr. Rouse to go back in the pod, but he would not listen. (3 JT 218) Instead, according to Officer Petrak and Officer Billings, Mr. Rouse put his medicine cup down and said something akin to, "which motherfucker is going to come at me and going to get stabbed." (2 JT 153-54; 3 JT 291). The officers maintained their distance and Officer Billings asked Mr. Rouse to drop his pencil. (2 JT 155) Notably, during this entire exchange, Mr. Rouse did not make any lunging movement or take any steps forward. (3 JT 202, 206, 236-37) Mr. Rouse did not swing his arms, raise his hands, or make any threats. (3 JT 202, 206, 236-37) To the contrary, Mr. Rouse, having backed up to the podium, just stood there, immobile with his arms by his side. (3 JT 202, 206, 236-37)

Mr. Rouse was calm, but anxious, shaky and "off." (3 JT 237) According to Officer Billings, he tried to de-escalate the situation, and asked Mr. Rouse what was bothering him, and while Mr. Rouse muttered a few things, Officer Billings could not remember what was said. (3 JT 223) At some point, Officer Billings asked Officer Knowlton to bring his taser out. (3 JT 195) However, Officer Knowlton did not have to use the taser. Indeed, Mr. Rouse eventually broke his broke pencil in half and dropped it on the ground. (3 JT 196-97)

Afterwards, Mr. Rouse was handcuffed and taken to a padded cell in the intake. (2 JT 176) According to Officer Petrak, Mr. Rouse apologized to her for his comments and told her he had an anxiety attack. (2 JT 176) According to Officer Petrak's report, the resulting consequences for Mr. Rouse's actions was an undetermined period of lockdown. (CP 379)

Notably, the record reveals that this incident was not considered a serious threat. Indeed, according to Officer Knowlton, "if there's a serious incident in a pod, we'd lock down the pod right away and then we'd handle what was going on." (3 JT 205) However, on January 13, 2023, the pod was not locked down. (3 JT 208). Furthermore, according to Hughes County Sherriff's Deputy, Dan Eilers, this entire incident lasted about a minute or two, and "if it was an incident that they would be [sic] concerning they would call a deputy right away." (2 JT 136, 139) However, this did not happen after the incident on January 13, 2023. (2 JT 136) Indeed, at no point was the Hughes County Sherriff's Office called to investigate or otherwise take any action. (3 JT 208, 2 JT) To the contrary, Deputy Eilers first learned of the incident on March 1, 2023, when he was contacted by Assistant Attorney General Jessica LaMie. (2 JT 123, 133, 135-36)

B. February 25, 2023

On February 25, 2023, Correctional Officer Zane Hesse was performing a mental health sick call in the B Pod. (2 JT 107) According to Officer Hesse, Mr. Rouse stated to him that when he got out of jail, he was going to stab him. (2 JT 107) Considering Mr. Rouse frequently joked with him and made inappropriate comments, Officer Hesse did not know if it was serious or joking. (2 JT 107, 111) Accordingly, Officer Hesse responded, "do it with a spoon; it will be more painful." (2 JT 108) According to Officer Hesse, as Mr. Rouse was putting on his socks he responded to Officer Hess "Do you think I'm joking? I'm being serious." (2 JT 108)

C. Pre-Trial Motions

On September 7, 2023, Mr. Rouse filed Defendant's Motions, which was electronically filed and served on the State. (CP 21-26). That same day, the trial court

granted Defendant's Motions. (CP 27-28). The State did not object, or otherwise acknowledge the filings, until the pre-trial conference, which was held on October 18, 2023. During this conference, the trial court stated that while it "technically" signed the Order granting Mr. Rouse's standard motions, it did so by mistake. (CP 969-970, 282-83) Therefore, the Court ruled that despite signing an order granting Mr. Rouse's motions on September 7, 2023, the Order was invalid. Instead, the court ruled that it should be considered orally granted on October 18, 2023. (CP 970-71, 282-83) During the hearing the court requested the parties look into 180-day rule calculations. (CP 970-74)

After the pre-hearing, both Mr. Rouse and the State filed motions regarding the calculation of the 180-day rule. (CP 193, 175). Specifically, on October 20, 2023, Mr. Rouse filed a Motion to Dismiss on the grounds that he had not been brought to trial within 180-days of his initial appearance, and pursuant to SDCL 23A-44-5.1 his case should be dismissed. (CP 175) In contrast, the State argued that the time between September 7, 2023, through October 18, 2023, should be tolled because the court erred in granting Mr. Rouse's motions. (CP 194-96) Additionally, the State argued that the time between April 14, 2023, when a pretrial order was filed in Mr. Rouse's Hughes County Criminal file 32Cri22-661, through the jury trial, which concluded on June 1, 20234, should also be tolled and attributed to Mr. Rouse. (CP 194-96)

On October 24, 2023, the court held a hearing on all pre-trial motions. During this hearing, the court orally denied Mr. Rouse's motion to dismiss and entered its findings of fact and conclusions of law on the issue on January 1, 2024. (CP 175-178, 193-97, 281-289). In so doing, the court agreed with the State. Specifically, the court found Mr. Rouse was "not in violation of the speedy trial under a raw 180 calculation and otherwise." (MH

2) Yet the court also stated that "if you add the raw 180 days to [March 14, 2023], we get to September 10th [sic] of 2023, and obviously, our trial tomorrow would be beyond that 180-day time." (MH 2, CP 284) Then, the court acknowledged that on the date of September 7, 2023, Mr. Rouse was at 177 days, and his motion would have tolled it at that time, but considering it "mistakenly" signed the order, it is "back to September 11 again as an ending date of the 180." (MH 4, 285)

Nonetheless, the trial court agreed with the State that the time period between April 14, 2023, when a pretrial order was filed in Hughes County Criminal file 32CRI22-661, through the two-day jury trial which concluded on June 1, 2023, should be excluded from the 180-day calculation. (MH 4-8, CP 287-288) Mr. Rouse argued that only the two days he was in trial should be excluded, not the entire forty-seven days requested by the State. (CP 176) Despite this logical interpretation of SDCL 23A-44-5.1, the trial court neglected to entertain Mr. Rouse's argument and elected to use the State's argument "because that makes common sense to the Court." (MH 5-6) In anticipation of an appeal, the court stated further, that "if someone disagrees with me on appeal and says nope, it's only two, I'm going to find that good cause delay starts at that pretrial conference date and find that was good cause for delay." (MH 6) Accordingly, the court calculated that, considering the 47-day tolling, the trial was required to happen on or before October 30, 2023. (MH 6).

During this hearing, the trial court also addressed the State's Motion to Introduce Other Acts Evidence. (CP 182). Specifically, the State sought to introduce testimony from several corrections officers that Mr. Rouse was classified as a potentially violent inmate, and further that he was in custody on an aggravated assault for an alleged

stabbing. (MH 11) According to the State, this testimony was admissible under SDCL 19-19-404(b) for the purpose of showing common plan or scheme, motive, intent, knowledge, absence of mistake, and lack of accident. (MH 11, CP 189)

Mr. Rouse argued that the: 1) State's motion was untimely because it was filed five days before trial; 2) testimony was improper character evidence; 3) evidence was irrelevant and inadmissible; and 4) testimony was unfairly prejudicial to the defendant than it is probative or helpful. (MH 17) The trial court disagreed and granted the State's Motion. According to the court, both parties had been untimely with motions previously; the State's motion "comes very late in this game" but "there's egg on both of you for this." (MH 19) According to the court, the testimony is "just res gestate to what's going on with the charges against the jailers and the allegations that he made. To the extent they want to argue it as other act, as I stated, that same evidence can be used to show intent, pattern, practice, common scheme." (MH 20-21).

D. Jury Trial

A two-day jury trial began on October 25, 2023. (2 JT; CP 1029) During the trial, the State called five witnesses: Zane Hesse, Dan Eilers, Harlie Petrak, Zachery Knowlton, and Brant Billings. (2 JT; 3 JT) In addition to the aforementioned testimony in Sections A and B, *supra*, the only other evidence introduced by the State was a surveillance video of the incident, which failed to corroborate some of the testimony. (*See* State's Exh. 1; 2 JT 127) Specifically, Offers Petrak, Knowlton, and Billings each testified that on January 13, 2023, Mr. Rouse was holding a small two-three inch long "golf" pencil in his clenched hand. (2 JT 130, 154; 3 JT 194, 207, 219) However, the surveillance video did not show a pencil, nor was a pencil recovered or entered into evidence.

Indeed, during the trial, Deputy Eilers revealed that only a clenched fist is seen in the video, not a pencil. (2 JT 128) While Deputy Eilers testified that the video shows Mr. Rouse tossing something to the ground, a pencil was not recovered as part of his investigation. (2 JT 128, 138-39). To the contrary, the pencil was only described to him because "beings [sic] how the incident was on January the 13th and I was made aware on March 1st, the pencil was not collected by jail staff as evidence. They are not trained or certified law enforcement officers." (2 JT 128, 133) Accordingly, Deputy Eilers investigation and testimony was limited to his discussions with the correctional officers as well as a review of the surveillance video. (2 JT 135-37)

Likewise, despite having audio capabilities, there was no audio on the surveillance video. Nonetheless, the video did corroborate, however, the testimony from each of the correctional officers that Mr. Rouse never moved towards them, never flailed his arms, or raised his hands. Indeed, the video reveals that Mr. Rouse just stood there throughout the entire incident, which lasted approximately one to two minutes. (2 JT 139; 3 JT 202, 206, 236-37)

Therefore, at the close of the State's evidence, Mr. Rouse moved the court for an acquittal on all four counts based on the sufficiency of the evidence presented. (3 JT 248) The trial court denied the motion and the defense rested. (3 JT 252-54)

Outside the presence of the jury the parties discussed the jury instructions. Mr. Rouse, by and through his attorney, proposed that instruction number fifteen, physical menace, should only contain the first sentence, because "the second sentence kind of changes the subject and talks about serious bodily harm and proof on that." (3 JT 261) The state disagreed, and the court stated, "so the pattern jury instruction committee has

not made this a pattern in any way, shape or form but it is the law under *State v. Scott* so if you want to give me that, I will reject your proposal and I'll put that in the record." (3 JT 262) Likewise, as to jury instruction number twenty-one, undersigned counsel objected to it on the grounds that it was likely to cause confusion. (3 JT 267) The State argued, and the court agreed, that Mr. Rouse's apology to Officer Petrak warranted the instruction. (3 JT 266-68) On October 26, 2023, the jury found Mr. Rouse guilty on all four counts. (3 JT 304-5)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS WHEN THERE WAS A VIOLATION OF THE 180-DAY RULE.

"A circuit court's findings of fact on the issue of the 180-day rule are reviewed using the clearly erroneous rule." *State v. Seaboy*, 2007 S.D. 24, ¶ 6, 729 N.W.2d 370, 372. However, this Court "review[s] . . . whether the 180-day period has expired as well as what constitutes good cause for delay under a de novo standard." *State v. Two Hearts*, 2019 S.D. 17, ¶ 12, 925 N.W.2d 503, 509 (citing *State v. Andrews*, 2009 S.D. 41, ¶ 6 n.1, 767 N.W.2d at 183 n.1).

Mr. Rouse was not brought to trial within 180 days as mandated by South Dakota Law, and the court erroneously denied Mr. Rouse's motion to dismiss. In so doing, the court miscalculated the 180 days and misplaced the law in the process.

Pursuant to SDCL 23A-44-5.1, every criminal defendant, "shall be brought to trial within one hundred eighty days" and "such one hundred eighty-day period shall commence to run from the date the defendant has first appeared before a judicial officer on an indictment, information or complaint." Certain days are properly excluded from this calculation, including, but not limited to, "the time consumed in the trial of other

charges against the defendant[.]" SDCL 23A-44-5.1(4)(a)-(h). Additionally, the court may find good cause for delay for other exceptional circumstances, not specifically enumerated in the rule. SDCL 23A-44-5.1(4)(h). However, the burden is on the prosecution to establish the existence of good cause for delay. *See* SDCL 23A-44-5.1(5); *see also State v. Cooper*, 421 N.W.2d 67, 71 (S.D. 1988). If a defendant is not brought to trial within 180 days, accounting for any properly excluded days, prejudice to the defendant is presumed and the case shall be dismissed. *See* SDCL 23A-44-5.1(5).

Here, Mr. Rouse made an initial appearance in this matter on March 13, 2023. (CP 922) Pursuant to South Dakota law, the 180-day calculation began running on March 14, 2023. Therefore, Mr. Rouse should have been brought to trial on or before September 11, 2023. Yet, Mr. Rouse's trial did not begin until October 25, 2023. (2 JT; CP 1134) Contrary to the trial court's misplaced reasoning, this demonstrable delay was not a result of any statutory exception for tolling, nor was it for good cause.

Specifically, the State erroneously argued, and the trial court agreed, that the time period between April 14, 2023, when a pretrial order was filed in Hughes County Criminal file 32CRI22-66, through the two-day jury trial which concluded on June 1, 2023, should be excluded from the 180-day calculation. (CP 194-95; MH 4-8) This is incorrect. The plain language of the statute does not state, as the court erroneously reasons, that the legislature meant to include the start of the pretrial conference through the conclusion of trial. (MH 5) To the contrary, the statute plainly states, "time consumed in the trial." While it is undisputed that Mr. Rouse had a trial in file 32CRI22-661, the trial only lasted two days. Therefore, pursuant to SDCL 23A-44-5.1, only those two days

should be excluded from the calculation, not the forty-seven days between the pre-trial conference through the trial. Thus, the court should have granted the motion to dismiss.

Lastly, as an alternative the court also stated, "if someone disagrees with me on appeal and says nope, it's only two, I'm going to find that good cause delay starts at that pretrial conference date and find that was good cause for delay." (MH 6; CP 290) This, too, is erroneous. In determining whether good cause exists to exclude days under SDCL 23A-44-5.1, this Court has consistently distinguished between delays attributable to the State and delays attributable to a defendant. *See State v. Two Hearts*, 2019 S.D. 17 ¶10, 925 N.W.2d 503, 509; *State* v. *Seaboy*, 2007 S.D. 24, ¶ 12, 729 N.W.2d at 373; *Weber*, 2002 S.D. 59, 1 17, 645 N.W.2d at 598; *State v. Sparks*, 1999 S.D. 115, 1 6, 600 N. W.2d 550, 553; Webb, 539 N.W.2d at 95. Additionally, in considering good cause, this Court also focuses on the reason for the delay. *See State v. Cooper*, 421 N.W.2d 67, 70 (S.D. 1988). *State v. Langen*, 2021 SD 36, P28.

Indeed, it logically follows that while Mr. Rouse could not be brought to trial for multiple files on the same day, this case was not stayed pending the conclusion of that other file, nor was the court precluded from setting a trial in this case for any other day of the week during those forty-seven days. Indeed, Mr. Rouse requested a trial date and was in custody throughout the pendency of his case. Mr. Rouse did not delay the matter or request a continuance. Mr. Rouse was present and ready to proceed to trial. This is not tantamount to good cause and is instead wholly prejudicial. Thus, the court erroneously excluded forty-seven days from the 180-day calculation.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL FOUR COUNTS WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

In determining whether a trial court erred in denying a defendant's motion for judgment of acquittal, this Court's "inquiry is whether the State set forward sufficient evidence from which the finder of fact could reasonably find the defendant guilty." *State v. Jackson*, 2009 S.D. 29, ¶ 15, 765 N.W.2d 541, 545. "A guilty verdict will not be set aside if the [S]tate's evidence and all favorable inferences that can be drawn therefrom support a rational theory of guilt." *Id.* (quoting *State v. Phair*, 2004 SD 88, P16, 684 NW2d 660, 665 (quoting *State v. Downing*, 2002 SD 148, P22, 654 NW2d 793, 800).

Here, Mr. Rouse was indicted on three counts of Aggravated Assault on Law Enforcement Officer, in violation of SDCL 22-18-1.05 and SDCL 22-18-1.1(5), and one count Threatening a Law Enforcement Officer or Family, in violation of SDCL 22-11-15.6. (CP 1-3). To find Mr. Rouse guilty of Aggravated Assault on Law Enforcement Officer, the State was required to prove that Mr. Rouse assaulted each of the correctional officers by physical menace with a deadly weapon to put another in fear of imminent bodily harm, which occurred while such officer was engaged in the performance of their duties. (See CP 1-2; CP 224-26)

The State's evidence for the three counts of Aggravated Assault was wholly insufficient, and the court should have granted Mr. Rouse's Motion for a Judgment of Acquittal. Indeed, the evidence revealed that Mr. Rouse had a good relationship with the correctional officers, was a pleasant person and often joked around with them. (2 JT 111, 177; 3 JT 198, 226) However, on January 13, 2023, Mr. Rouse, while calm, was also

frustrated, worried, anxious, and seemed "off" compared to his usual demeanor. (2 JT 152; 3 JT 231, 219, 237)

Moreover, the evidence established that no one at the jail considered this incident a serious threat. Indeed, "if there's a serious incident in a pod" either the jail or the pod would be locked down depending on the circumstances. (3 JT 205) Yet, on January 13, 2023, a lock down was not initiated. (3 JT 208) Furthermore, according to Deputy Eilers, if there is ever a concerning incident at the jail, the Deputy is called right away. (2 JT 136, 139) However, this did not happen on January 13, 2023. (2 JT 136) Indeed, at no point was the Hughes County Sherriff's Office called to investigate or otherwise take any action. (3 JT 208, 2 JT) To the contrary, Deputy Eilers first learned of the incident on March 1, 2023, when he was contacted by Ms. LaMie. (2 JT 123, 133, 135-36)

As for the "deadly weapon," it was alleged that Mr. Rouse had a small, two to three inch "golf" pencil clenched in his left hand. (2 JT 153-54; 3 JT 194, 203-04, 219, 235) However, the pencil was not visible on the surveillance video, and while Deputy Eilers testified that the video shows Mr. Rouse tossing something to the ground, a pencil was not recovered as part of his investigation. (2 JT 128, 133, 138-39).

Lastly, while Mr. Rouse did not follow Officer Billings instructions to leave the pod, or drop the object in his hand, this does not amount to physical menace. It is well established that physical menace "requires more than words: there must be some physical act on the part of the defendant." *State v. Scott*, 2019 S.D. 25, ¶ 19, 927 N.W.2d 120, 127 (*quoting In re R.L.G.*, 2005 S.D. 119, ¶ 10, 707 N.W.2d 258, 261). The State categorially failed to offer any evidence of "physical menace." Indeed, Mr. Rouse did not make any lunging movement or take any steps forward. (3 JT 202, 206, 236-37) Mr. Rouse did not

swing his arms, raise his hands, or make any threats. (3 JT 202, 206, 236-37) To the contrary, Mr. Rouse, having backed up to the podium, stood there, immobile with his arms by his side. (3 JT 202, 206, 236-37)

In other words, no one at the jail felt this incident was serious enough to: 1) lock down the pod or the jail; 2) contact the Sheriff's Office; or 3) save the alleged "dangerous weapon." Instead, the correctional officers did their job, de-escalated the situation, which lasted one to two minutes, and put Mr. Rouse on lockdown and went about their day.

At best, the State's evidence presented a narrative that Mr. Rouse, by words alone, made a threat. Mr. Rouse did not physically act or display any of the established requirements for physical menace. Indeed, the State failed to meet their burden of proof for the three counts of Aggravated Assault on a Law Enforcement Officer as defined in the Indictment. Yet, the court erroneously denied Mr. Rouse's motion for judgment of acquittal.

Undeniably, the evidence presented to the jury was insufficient to find Mr. Rouse guilty beyond a reasonable doubt on the charges of Aggravated Assault on a Law Enforcement Officer and the trial court erred when it denied the motion.

III. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO INTRODUCE OTHER ACTS EVIDENCE WHEN IT WAS UNTIMELY, IMPROPER, IRRELEVANT, AND PREJUDICIAL.

This court reviews a trial court's decision to admit other acts evidence under the abuse of discretion standard. *State v. Wright*, 1999 S.D. 50, ¶ 12, 593 N.W.2d 792, 797; *State v. Werner*, 482 N.W.2d 286, 288 (S.D. 1992); *State v. McDonald*, 500 N.W.2d 243, 245-46 (S.D. 1993).

Here, on October 20, 2023, a mere five days before the trial, the State filed a Motion to Introduce Other Acts Evidence. (CP 182) The court erroneously found that while the State's motion "comes very late in this game" both parties had been untimely with their motions. (MH 19) The trial court was incorrect. Indeed, Mr. Rouse filed Defendant's Motions on September 7, 2023, which was well in advance of trial. (CP 20) Moreover, in his motions, Mr. Rouse moved the Court for an Order requiring the State to specify, *inter alia*, any evidence it intended to introduce pursuant to SDCL 19-19-404. (CP 23) Further, Mr. Rouse moved the court to set a date certain to produce the information. (CP 22-23) The Court granted the motion that same day and ordered the State to produce the information in advance of trial (CP 23, 27) While the trial court and the State postulate that signing of the Order was a mistake, this is irrelevant. (CP 969-970, 282-83)

Indeed, it is not Mr. Rouse's fault that the State failed to act upon being noticed on September 7, 2023, or that the court signed an order by mistake. (CP 969-970, 282-83) To be clear, Mr. Rouse was the only one prejudiced by the State and trial court's blatant and costly errors. The trial court's decision to then grant the motion based on some misguided belief that Mr. Rouse was equally to blame is demonstrably unfair, and tantamount to an abuse of discretion. Mr. Rouse followed proper procedures. The same cannot be said for the State, and arguably, the trial court.

The trial court also erroneously reasoned that the evidence could come in because it "is just res gestate" and arguably, could be used to show intent, pattern, practice, common scheme. (MH 20-21). However, the evidence was not offered in that manner. Indeed, "to determine the admissibility of other acts evidence, the court must determine:

(1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect." *State v. Huber*, 2010 S.D. 63, ¶ 56, 789 N.W.2d 283, 301. Further, SDCL 19-19-404(b) prohibits evidence, like the testimony from Officers Billings and Hess, which is admitted to prove character. *See State v. Wright*, 1999 S.D. 50, ¶ 17, 593 N.W.2d 792, 800; *State v. Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d 411, 415.

Specifically, during the jury trial Officer Billings and Officer Hess testified that Mr. Rouse was in the maximum security pod because he was in custody for two previous aggravated assault and a previous stabbing. (2 JT 106-07; 3 JT 217) This testimony was improper character evidence, irrelevant and inadmissible. Moreover, considering the insufficiency of evidence, this testimony unfairly prejudiced Mr. Rouse. Indeed, the probative value (there was none) did not outweigh the prejudicial impact. Accordingly, for the reasons argued herein, the court abused its discretion when it granted the state's motion.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED THE STATE'S PROPOSED JURY INSTRUCTION NUMBER 15.

It is well settled that the standard of review of a circuit court's denial of a proposed jury instruction under an abuse of discretion standard. *State v. Swan*, 925 N.W.2d 476, 479 (S.D. 2019) (citing *State v. Randle,* 2018 S.D. 61, ¶ 32, 916 N.W.2d 461, 469). Jury instructions are satisfactory when, "considered as a whole, they properly state the applicable law and inform the jury." *Id.* The trial court has broad discretion in instructing the jury, and error in declining to apply a proposed instruction is reversible only if it is prejudicial. *Id.* "An erroneous instruction is prejudicial if in all probability it

produced some effect upon the verdict and is harmful to the substantial rights of the party assigning it." *Id.* (quoting *State v. Shaw*, 2005 S.D. 105, ¶ 18, 705 N.W.2d 620, 625-26).

Here, Mr. Rouse, by and through his attorney, proposed that instruction number fifteen regarding physical menace should only state, "physical menace requires more than words: there must be some physical act on the part of the defendant." (3 JT 261) However, the court denied the proposal and stated that the following should be provided to the jury:

> Physical menace requires more than words: there must be some physical act on the part of the defendant. However, the State need not prove actual fear of imminent serious bodily harm. Rather, an attempt to put another in fear exists when the defendant does any act toward the commission of the crime but fails or is prevented or intercepted in the perpetration thereof.

(3 JT 262)

As discussed, *supra*, the physical menace for the charges of Aggravated Assault on a Law Enforcement Office was categorially lacking. However, the court, in allowing this jury instruction to shift the focus to "fear" of bodily harm, ultimately ensured that the jury would convict Mr. Rouse on the charges, which they unanimously did. Considering the lack of evidence in this case on that element, but for this instruction, the jury would have likely returned a verdict of not guilty. Therefore, Mr. Rouse was prejudiced, and the trial court abused its discretion.

V. THE TRIAL COURT ABUSED IT DISCRETION WHEN IT GRANTED THE STATE'S PROPOSED JURY INSTRUCTION NUMBER 21.

As discussed, *supra*, it is well settled that the standard of review of a circuit court's denial of a proposed jury instruction under an abuse of discretion standard. *State v. Swan*, 925 N.W.2d 476, 479 (S.D. 2019) (citing *State v. Randle,* 2018 S.D. 61, ¶ 32,

916 N.W.2d 461, 469). Jury instructions are satisfactory when, "considered as a whole, they properly state the applicable law and inform the jury." *Id.* The trial court has broad discretion in instructing the jury, and error in declining to apply a proposed instruction is reversible only if it is prejudicial. *Id.* "An erroneous instruction is prejudicial if in all probability it produced some effect upon the verdict and is harmful to the substantial rights of the party assigning it." *Id.* (quoting *State v. Shaw*, 2005 S.D. 105, ¶ 18, 705 N.W.2d 620, 625-26).

Here, Officer Petrak testified that Mr. Rouse apologized to her for his comments and told her he had an anxiety attack. (2 JT 176) As a result, the state erroneously argued and the court agreed, that an instruction regarding an admission or confession should be provided to the jury. Mr. Rouse rightly argued that this was irrelevant, and likely to confuse the jury, but the court disagreed. The court's decision to include this instruction was an abuse of discretion.

Indeed, this instruction was highly prejudicial to Mr. Rouse considering the insufficiency of the evidence in this case. Simply put, with this irrelevant, and highly prejudicial instruction, the jury was more likely to assume that an apology was a confession, and thus they had enough to convict. Indeed, given the arguments herein, it is highly unlikely the jury reached a guilty verdict based on the State's insufficient evidence. In other words, this jury instruction provided the jury the opportunity to deliberate and infer that Mr. Rouse's apologies for "comments" was a confession. Therefore, Mr. Rouse was prejudiced by the inclusion of this instruction.

CONCLUSION

Appellant respectfully requests that this Court reverse Appellant's convictions on all counts on the grounds that the conviction is barred by the 180-day rule. In the alternative, Appellant respectfully requests that this Court set aside the guilty verdict on the grounds that there was insufficient evidence. In the alternative, Appellant respectfully requests that the Court reverse his conviction and order a new trial based upon the improper use of other acts evidence at trial, and improper jury instructions.

Dated this 30th day of August 2024.

/S/ Katie J Thompson

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Brief of Appellant was e-filed through Odyssey File and Serve for electronic filing and service on August 30, 2024, to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk

Jenny Jorgenson, Assistant Attorney General
E-mail: atgservice@state.sd.us

The original and two copies of the Brief of Appellant were mailed, by U.S. mail, postage prepaid to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated this 31 day of August, 2024.

/S/ Katie Thompson
Katie J. Thompson
Attorney for Appellant

CERTIFICATE PURSUANT TO SDCL 15-26A-66

I, Katie J. Thompson, Attorney at Law, hereby certify that the Brief in the above-entitled matter complies with the type and volume limitations of SDCL 15-26A-66 and that said Brief contains 6400 words, and that said Brief was typed in 12 point, Times New Roman Font.

Dated this 31 day of August 2024.

/S/ Katie Thompson

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APPENDIX

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Appellee vs. ISAIAH VAUGHN ROUSE, Defendant and Appellant.	)))))))))	Circuit Court: 32CRI23-115 Supreme Court No. 30681

APPELLANT'S APPENDIX

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

THE HONORABLE M. BRIDGET MAYER
Circuit Court Judge

Notice of Appeal Filed April 14, 2024

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STATE OF SOUTH DAKOTA) SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. ISAIAH VAUGHN ROUSE DOB: 07/31/1993 Defendant.	)	32CRI23-115 JUDGMENT OF CONVICTION COUNTS 1-4

An Indictment was filed with this Court on the 8th day of March 2023, charging ISAIAH VAUGHN ROUSE with the crimes of COUNT 1: **Aggravated Assault on a Law Enforcement Officer**, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, a Class 2 felony; COUNT 2: **Aggravated Assault on a Law Enforcement Officer**, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, a Class 2 felony; COUNT 3: **Aggravated Assault on a Law Enforcement Officer**, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, a Class 2 felony; and COUNT 4: **Threatening a Law Enforcement Officer or Family**, in violation of SDCL 22-11-15.6. The Hughes County grand jury delivered a True Bill on all 4 counts of the Indictment.

A Part II Information for Habitual Offender (SDCL 22-7-7) was filed with the court alleging that on two prior occasions Defendant had been convicted of a felony, making the Aggravated Assault on a Law Enforcement Officer, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, a Class 1 felony, for each count.

Defendant was arraigned on said Indictment on the 21 day of April 2023. Defendant and Defendant's attorney, Katie Thompson, and prosecuting attorney, Jessica M. LaMie, then Hughes County State's Attorney, appeared at Defendant's arraignment. The Court advised Defendant of his constitutional and statutory rights pertaining to the charges filed against him. Defendant pled not guilty to the charges in the Indictment and denied the Part II Information. Defendant requested a jury trial on the charges contained in the Indictment.

A trial commenced on the 25th day of October, 2023, in Pierre, South Dakota on the charges. On the 26th day of October, 2023, the jury returned a verdict of guilty to all Counts contained within the Indictment.

On the 15th day of November, 2023, the Court advised Defendant of all his statutory and constitutional rights pertaining to the Part II Information. Defendant admitted the allegations contained within the Part II Information for Habitual Offender, making the sentencing level for the crime of Aggravated Assault on a Law Enforcement Officer, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, a Class 1 felony, for each count.

It is, therefore, the JUDGMENT of this Court that Defendant is GUILTY of COUNT 1: **Aggravated Assault on a Law Enforcement Officer**, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, as a Class 1 felony; COUNT 2: **Aggravated Assault on a Law Enforcement Officer**, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, as a Class 1 felony; COUNT 3: **Aggravated Assault on a Law Enforcement Officer**, in violation of SDCL 22-18-1.1(5) and 22-18-1.05, as a

Class 1 felony; and COUNT 4: **Threatening a Law Enforcement Officer or Family**, in violation of SDCL 22-11-15.6.

SENTENCE

On the 15 day of March 2024, Defendant appeared personally and was represented by his attorney, Katie Thompson, and the State appeared by and through Jessica M. LaMie, Assistant Attorney General. The Court asked whether any legal cause existed to show why Judgement should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

COUNT 1: AGGRAVATED ASSAULT AGAINST A LAW ENFORCEMENT OFFICER

IT IS HEREBY ORDERED that the Defendant ISAIAH VAUGN ROUSE shall be committed to the custody of the South Dakota Department of Corrections for placement at an appropriate facility for thirty-five (35) years.

IT IS FURTHER ORDERED that the sentence be served concurrent to the sentence pronounced in COUNTS 2 and 3 and Defendant's current DOC sentence.

IT IS FURTHER ORDERED that Defendant shall pay court costs of $116.50; and court-appointed attorney fees of Katie J. Thompson (payable to Hughes County, 104 E. Capitol Ave., Pierre, SD 57501).

IT IS FURTHER ORDERED that any suspended portion of Defendant's sentence is condition on Defendant paying all fines, costs, and restitution according to a schedule prescribed by the South Dakota Department of Corrections; Defendant complying with all Department of Corrections policies and procedures; and Defendant remaining on good behavior.

COUNT 2: AGGRAVATED ASSAULT AGAINST A LAW ENFORCEMENT OFFICER

IT IS HEREBY ORDERED that the Defendant ISAIAH VAUGN ROUSE shall be committed to the custody of the South Dakota Department of Corrections for placement at an appropriate facility for thirty-five (35) years.

IT IS FURTHER ORDERED that the sentence be served concurrent to the sentence pronounced in COUNTS 1 and 3.

IT IS FURTHER ORDERED that Defendant shall pay court costs of $116.50; and court-appointed attorney fees of Katie J. Thompson (payable to Hughes County, 104 E. Capitol Ave., Pierre, SD 57501).

IT IS FURTHER ORDERED that any suspended portion of Defendant's sentence is condition on Defendant paying all fines, costs, and restitution according to a schedule prescribed by the South Dakota Department of Corrections; Defendant complying with all Department of Corrections policies and procedures; and Defendant remaining on good behavior.

COUNT 3: AGGRAVATED ASSAULT AGAINST A LAW ENFORCEMENT OFFICER

IT IS HEREBY ORDERED that the Defendant ISAIAH VAUGN ROUSE shall be committed to the custody of the South Dakota Department of Corrections for placement at an appropriate facility for thirty-five (35) years.

IT IS FURTHER ORDERED that the sentence be served concurrent to the sentence pronounced in COUNTS 1 and 2 and Defendant's current DOC sentence.

IT IS FURTHER ORDERED that Defendant shall pay court costs of $116.50; and court-appointed attorney fees of Katie J. Thompson (payable to Hughes County, 104 E. Capitol Ave., Pierre, SD 57501).

IT IS FURTHER ORDERED that any suspended portion of Defendant's sentence is condition on Defendant paying all fines, costs, and restitution according to a schedule prescribed by the South Dakota Department of Corrections; Defendant complying with all Department of Corrections policies and procedures; and Defendant remaining on good behavior.

COUNT 4: THREATENING A LAW ENFORCEMENT OFFICER OR FAMILY

IT IS HEREBY ORDERED that the Defendant ISAIAH VAUGHN ROUSE shall serve three hundred (300) days in the Hughes County Jail and received credit for three hundred (300) day previously served.

IT IS FURTHER ORDERED that Defendant shall pay court costs of $96.50.

March 15, 2024

BY THE COURT:

M. Bridget Mayer
Circuit Court Judge

Attest:
Marshall, Stephanie
Clerk/Deputy

NOTICE OF RIGHT TO APPEAL

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

STATE OFSOUTHDAKOTA) : SS COUNTY OF HUGHES)		IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. ISAIAH VAUGH ROUSE, Defendant.	)	32CRI23-115 FINDINGS OF FACT AND CONCLUSIONS OF LAW, RE: SPEEDY TRIAL

Defendant Isaiah Vaugh Rouse (Defendant) raised speedy trial concerns in the above matters. This Court finds no speedy trial violations. Defendant's request to dismiss these matters is DENIED. The court allowed findings and conclusions and objections to be considered after trial. Defendant's objections are denied.

FINDINGS OF FACT

1. An Indictment was filed against Defendant, on March 8, 2023, alleging that on or about January 13, 2023, Defendant committed the offenses of Aggravated Assault Against a Law Enforcement Officer, 3 counts, and on or about February 25, 2023, Defendant committed the offense of Threatening a Law Enforcement Officer or Family, 1 count.
2. Defendant, through counsel Katie J. Thompson (Attorney Thompson) filed a discovery request (or motion) on March 14, 2023.
3. Defendant had other Hughes county pending criminal files

(32Cri.22-661, 32Cri.22-567, and 32Cri.22-564). Hughes County Criminal File 32Cri.22-661 had been scheduled for jury trial and a pre-trial order was filed on April 14, 2023, setting trial dates of May 31, 2023, and June 1, 2023. This file was scheduled for a status hearing on those same dates to keep it on the Court's calendar.

4. A pre-trial conference was held in 32Cri22-661 on May 25, 2023, and trial commenced pursuant to the pre-trial order on May 31 and June 1, 2023.

5. In the above captioned file, the Court entered a Pretrial Order for Trial, on July 19, 2023, setting, among other things, the jury trial dates for October 25 and 26, 2023. The pre-trial order also set pretrial conference date of October 18, 2023.

6. Attorney Thompson filed Defendant's Motions and Defense Motion for Private Investigator, along with accompanying proposed orders on September 7, 2023. It was not noticed for hearing. The State did not agree to the motions.

7. The Court by its own inadvertence or mistake, prematurely signed the Defendant's September 7, 2023 proposed orders in odyssey, ahead of any hearing being held on them. The court normally would not sign orders on the same day they were filed by either counsel, unless it was informed there was no objection to the same. The court was not informed of an agreement to go ahead and

sign those proposed orders. Nor was any hearing held on September 7, 2023. Therefore, those signed orders were not valid as inadvertently and prematurely signed by accident.

8. Defendant's motions were not formally addressed until the pre-trial conference on October 18, 2023 at which time the Court *orally* granted Defendant's Motions and Defense Motion for Private Investigator.

9. Defendant himself sent a letter to the court dated September 8, 2023 (received and filed on September 14, 2023 by the court) claiming that the case was past the 180 day deadline. He also claimed he had not "seen my discovery" in this file, 32Cri.22-115, and acknowledged the trial would begin on October 25, 2023.

10. At the pre-trial hearing on October 18, 2023, pursuant to the Court's order, State was directed to calculate the 180 days and submit a motion to the Court and Defendant.

11. Also, on October 18, 2023, State submitted its Motion to Calculate 180 via e-mail to the Court and Attorney Thompson which was formally filed in Odyssey on October 23, 2023.

12. On October 20, 2023, Attorney Thompson filed a Motion to Dismiss alleging a violation of 180-day rule.

13. On October 24, 2023, the parties appeared, and the speedy trial issue was addressed by the Court.

Based on these Findings of Fact, the Court hereby enters its,

CONCLUSIONS OF LAW

1. A Defendant must be brought to trial within 180 days of the Defendant's initial appearance on the "indictment, information, or complaint." SDCL 23A-44-5.1. This is commonly known as the 180-day rule.
2. The 180-day rule is a rule of procedure designed to expeditiously get cases through the court system. *State v. Langen*, 2021 S.D. 36, ¶18, 961 N.W.2d 585, 589. Certain periods of delay are to be excluded from the 180 calculation that are set out in SDCL 23A-44-5.1(4) (a)-(f). A catch-all provision is provided for in subsection (g) but only if the court finds that there are good cause reasons for other periods of delay not found in (a)-(f). *Id.* at ¶19. The court is to focus on the reason or root of the delay.
3. In calculating any period of time, the first day *is not* included in the calculation, but the last day *is* included in the calculation unless it falls on a Saturday, Sunday, or legal holiday and runs until the next day not one of those days. SDCL 23A-41-1.
4. Defendant's initial appearance was held on March 13, 2023. If no tolling occurred, the 180-day period would have ended September 10, 2023, which fell on a Sunday and therefore the 180-day period would have ended September 11, 2023.
5. However, "the period of delay resulting from other proceedings

concerning the Defendant, including but not limited to...the time from filing until disposition of pretrial motions of the Defendant" is also to be excluded in computing the 180-day time. SDCL 23A-44-5.1(4)(a).

6. Caselaw provides that the calculation for tolling the 180-day period commences on the filing of any defense motions and until final disposition of those motions. *State v. Seaboy*, 2007 S.D. 24, 729 N.W.2d 370. Defendant, through Attorney Thompson, filed discovery and investigator motions on September 7, 2023. (A "request" for discovery was also filed earlier on March 14, 2023, and the court has no written order on that request).

7. At the time Defendant's September Motions and Defense Motion for Private Investigator were filed one hundred seventy-seven (177) days of the 180- days had run from his initial appearance (if the March request or motion is not considered).

8. The Court *orally* granted Defendant's motions on October 18, 2023. However, no new written order regarding these motions was filed and should have been as the court found that the previously wrongly signed orders were invalid. "It is settled law that for final disposition, "[o]rders are required to be in writing because the trial court may change its ruling before the order is signed and entered." *Seaboy* at 373 citing *State v. Sparks*, 1999

S.D. 115, ¶ 7, 600 N.W.2d 550, 554.

9. Because there was no valid written order to stop the tolling period, the tolling period from September 7, 2023, through today is still in progress of tolling. Arguably the same can be stated of the earlier filed "request" for discover, filed even earlier, in March of 2023.

10. Even if the court were to utilize its oral rulings from October 18, 2023, to stop tolling and start the running of time to be the date of its oral rulings, the statutory time would have run October 21, 2023, which fell on a Saturday and therefore the 180-day period would have ended October 23, 2023. Defendant's trial was scheduled for October 25 and 26, 2023. (again, should the court consider the March request, even more days are excluded from the calculation).

11. Nonetheless, Attorney Thompson filed a Motion to Dismiss on October 20, 2023, again tolling of the 180 running until the filing of the Court's Order which, given the extremely close proximity of this Court's oral ruling on the 180-day issue and Defendant's scheduled jury trial, would likely be filed after the conclusion of trial.

12. Again, even if the Court were to utilize its oral rulings from October 24, 2023, to stop the toll and start the running of time to be the date of its oral rulings, the statutory time would have

run October 26, 2023, and trial would have already commenced.

13. Additionally, "the period of delay resulting from other proceedings concerning the Defendant, including but not limited to . . . the time consumed in the trial of other charges against the defendant" is also to be excluded in computing the 180-day time. SDCL 23A-44-5.1(4)(a).

14. Defendant claims this statute should be narrowly read. Defendant argues that only the actual days "in" the physical trial is excludable from a 180 calculation. Defendant concludes that only 2 days were expended in the other jury trial of 32Cri.22-661 and therefore only those 2 days would be excluded in the 180 calculation of this trial in 32Cri. 23-115.

15. A commonsense interpretation of "...the time consumed *in* trial" necessarily means the time from the pre-trial conference.[1] The time after a pretrial conference necessarily includes all the last-minute preparations before trial commences and,

> at a pretrial conference assuming pretrial conferences are held, meaning we are ready to go, we're good to go, it's last minute and everything else stops that you work on and you're getting ready for trial. That's my history in being a prosecutor. Defense knows the time is of the essence to get all the witnesses interviewed, all the

[1] Upon review of the transcript of the Hearing on October 24, 2023, this Court used the term "pretrial conference", when referencing when the pretrial order was filed on the April 14, 2023.

exhibits ready, all that and that's why they call it a pretrial conference.

Motion Hearing, 5, 12-20.

16. The pending trial in 32Cri23-661 further tolled the time in this file from when the pretrial conference was held on May 25, 2023 through the end of the jury trial on June 1, 2023, with an additional seven (7) days being attributed to Defendant. Assuming the October 26, 2023 date as stated above, therefore the 180-day period would have ended November 1, 2023.[2]

17. In addition to the matter pending 32Cri23-661 Defendant also has another matter in 32Cri22-564, which is still pending final disposition. The aforementioned tolled time periods are also excluded from calculation of the 180 days for good cause under SDCL 23A-44-5.1(4)(g). There is no evidence of any attempt by the State to circumvent the 180 day rule.

18. The court further concludes the reasons for the periods of delay discussed herein, if deemed not sufficient as excludable time under section (4)(a), and given his numerous pending case files, there is good cause under 23A-44-5.1(g). Defendant's cases were also prioritized to the most serious ones being put to the front of the several cases needing to be scheduled for jury trial. His cases were also scheduled ahead of other Defendant's awaiting trials.

[2] In the event, no pretrial conference would be held, there could be good cause delay from the date of the pretrial order which would have been an additional forty (40) days attributable to Defendant.

19. The Court further concludes there is no state or federal constitutional speedy trial violation in these matters.

20. For the reasons set forth in the above FINDINGS OF FACT and CONCLUSIONS OF LAW, the Defendant's Motion to Dismiss is Denied.

21. Any Conclusion of Law deemed to be a Finding of Fact or vice versa is hereby redesignated as such and incorporated into the Findings of Fact or Conclusions of Law as the case may be.

Dated this 1st day of January, 2024.

BY THE COURT:

M. Bridget Mayer

M. Bridget Mayer
Circuit Court Judge

Attest:
Sitzman, Kelli
Clerk/Deputy

INSTRUCTION NO. 15

Physical menace requires more than words: there must be some physical act on the part of the defendant. However, the State need not prove actual fear of imminent serious bodily harm. Rather, an attempt to put another in fear exists when the defendant does any act toward the commission of the crime but fails or is prevented or intercepted in the perpetration thereof.

INSTRUCTION NO. 21

A statement made by a defendant other than at his trial may be either an admission or confession.

An admission is a statement by a defendant admitting one or more of the facts at issue. It is not sufficient by itself to prove guilt of the crime charged, but it may prove one or more of the elements of the crime charged.

A confession is a statement by a defendant which admits every element of the crime charged, thus admitting guilt of the crime charged.

You are the exclusive judges as to whether a confession was made by the defendant and if the statement is true in whole or in part. If you find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true. It is for you to determine what weight, if any, to give to a purported admission or confession. However, evidence of a claimed oral admission or confession of the defendant ought to be viewed with caution and weighed with care.

The guilt of a defendant may not be established only by any admission or confession made outside of this trial. Before any person may be convicted of a criminal offense, there must be proof, independent of the statement, that the crime in question was committed, but it is not necessary the independent proof include proof as to the identity of the person by whom the offense was committed.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30681

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ISAIAH VAUGHN ROUSE,

Defendant and Appellant.

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

THE HONORABLE M. BRIDGET MAYER
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed April 14, 2024

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ISAIAH VAUGHN ROUSE,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Isaiah Vaughn Rouse, is referred to as "Defendant." The settled record is denoted as "SR." Trial exhibits are referenced as "Ex" followed by the exhibit number and time stamp if applicable. Defendant's Brief is denoted as "DB." All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On March 15, 2024, the Honorable M. Bridget Mayer, Circuit Court Judge, Sixth Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Isaiah Vaughn Rouse*, Hughes County Criminal File Number 32CRI23-000115. SR:317-21. Defendant filed his Notice of Appeal on April 14, 2024. SR:333. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT VIOLATED DEFENDANT'S RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS?

The circuit court tolled periods of time, which resulted in Defendant being tried within 180 days.

State v. Cooper, 421 N.W.2d 67 (S.D. 1988)

State v. Seaboy, 2007 S.D. 24, 729 N.W.2d 370

State v. Two Hearts, 2019 S.D. 17, 925 N.W.2d 503

SDCL 23A-44-5.1

II.

WHETHER SUFFICIENT EVIDENCE EXISTS TO SUSTAIN DEFENDANT'S CONVICTIONS?

The circuit court denied Defendant's motion for judgment of acquittal, finding the State presented sufficient evidence for the jury to convict Defendant.

State v. Peltier, 2023 S.D. 62, 998 N.W.2d 333

State v. Peneaux, 2023 S.D. 15, 988 N.W.2d 263

State v. Robertson, 2023 S.D. 19, 990 N.W.2d 96

SDCL 22-11-15.6

SDCL 22-18-1.1(5)

III.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY ALLOWING EVIDENCE ON WHAT OFFICERS KNEW ABOUT WHY DEFENDANT WAS IN JAIL?

The circuit court allowed the correctional officers to testify, per their knowledge, that Defendant was in custody on an

alleged aggravated assault for an alleged stabbing as *res gestae* evidence, or alternatively as evidence of pattern, practice, common scheme, intent, and lack of mistake or accident.

State v. Boe, 2014 S.D. 29, 847 N.W.2d 315

State v. Medicine Eagle, 2013 S.D. 60, 835 N.W.2d 886

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

State v. Walton, 1999 S.D. 80, 600 N.W.2d 524

SDCL 19-19-404(b)

IV.

WHETHER THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY REGARDING PHYSICAL MENACE?

The circuit court denied Defendant's proposed physical menace instruction, reasoning that additional law would be added to the instruction.

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

State v. Nelson, 2022 S.D. 12, 970 N.W.2d 814

State v. Robertson, 2023 S.D. 19, 990 N.W.2d 96

State v. Scott, 2019 S.D. 25, 927 N.W.2d 120

V.

WHETHER THE CIRCUIT COURT PROPERLY HELD THAT EVIDENCE OF DEFENDANT'S APOLOGY WARRANTED AN ADMISSION OR CONFESSION INSTRUCTION?

The circuit court held that evidence of Defendant's apology warranted an admission or confession instruction.

State v. Corean, 2010 S.D. 85, 791 N.W.2d 44

State v. Dokken, 385 N.W.2d 493 (S.D. 1986)

State v. Nelson, 2022 S.D. 12, 970 N.W.2d 814

State v. Spaniol, 2017 S.D. 208, 95 N.W.2d 329

STATEMENT OF THE CASE

On March 7, 2023, in *State of South Dakota v. Isaiah Vaughn Rouse*, Hughes County Criminal File Number 32CRI23-000115, a grand jury issued an Indictment charging Defendant with four counts. SR:1-2. Counts 1 through 3 charged Aggravated Assault on a Law Enforcement Officer in violation of SDCL 22-18-1.1(5) and SDCL 22-18-1.05, a Class 2 felony. SR:1-2. The law enforcement officers were Correctional Officer Harlie Petrak, Correctional Officer Brant Billings, and Correctional Officer Zach Knowlton, respectively. SR:1-2. Count 4 charged Threatening a Law Enforcement Officer or Family in violation of SDCL 22-11-15.6, a Class 1 misdemeanor. SR:2. The law enforcement officer was Correctional Officer Zane Hesse. SR:2. The State filed a Part II Information pursuant to SDCL 22-7-7 alleging Defendant had been convicted of two prior felonies:

1. Ingesting a Controlled Substance disposed of on August 12, 2014, arising out of Hughes County, South Dakota; and
2. Reckless Burning or Exploding disposed of on February 5, 2019, arising out of Hughes County, South Dakota.

SR:13.

Defendant made his initial appearance on March 13, 2023. SR:284. On March 14, 2023, Defendant filed a request for discovery. SR:10-12, 285.

On September 7, 2023, Defendant filed a document titled "Defendant's Motions," which included a Motion for Discovery, Motion for Disclosure of Rule 404 and Rule 406 Information, Motion to Sequester State's Witnesses, and a Motion for Access to Juror List and Questionnaires. SR:20-25. Defendant also filed a Motion for Appointment of Investigator. SR:29. While the settled record contains orders granting the motions signed hours after the motions were filed, SR:27-28, the circuit court later explained why the orders were invalid and should not have been signed by the circuit court. SR:282-85, 969-71.

Defendant himself wrote a letter to the circuit court that was received September 8, 2023, and filed September 12, 2023. SR:31. Defendant titled the letter with citations to what appears to be four criminal file numbers. SR:31. Defendant wrote that he believed the 180-day deadline for him to be brought to trial had passed. SR:31. Defendant also suggested that he was not prepared to proceed with a trial by stating, "I've never seen my discovery on case 23-115." SR:31.

On October 18, 2023, a pretrial conference was held. SR:949. The circuit court held that Defendant's September 7, 2023, motions were mistakenly granted the same day. SR:969-71. The circuit court

reasoned that 1) it mistakenly thought a hearing was held on the motions, 2) no hearing had been set for the motions, and 3) the State had no chance to respond before the orders were signed. SR:969-71. In reference to Defendant's letter, the circuit court stated, "I think the 180 is close but technically, I signed those orders. That would have tolled it, the filing for [Defendant's] investigator, back on September 7th, and I'm now granting it technically today to give [the State] the opportunity to object. But I am going to ask [the parties] to calculate [the 180 days] with that in mind." SR:969-70.

On October 20, 2023, Defendant filed a Motion to Dismiss, alleging a violation of the 180-day rule pursuant to SDCL 23A-44-5.1. SR:175-77. Defendant conceded that two days should be excluded for a trial that occurred in one of his other cases, 32CRI22-000661. SR:176-77. Defendant claimed no other time should be excluded, and so the charges should be dismissed. SR:177. The State filed a Motion to Calculate 180 Days, arguing that time from Defendant's pretrial motions and time from Defendant's other case needed to be excluded as delays attributable to him under SDCL 23A-44-5.1(4)(a). SR:193-97.

On October 24, 2023, the circuit court held a hearing to address the 180-day issue and other motions. SR:986-96. The circuit court entered oral findings of fact, concluded that the 180-day rule had not been violated, and denied the motion to dismiss. SR:986-96. The circuit court subsequently entered written Findings of Fact and Conclusions of

Law and an Order Denying Speedy Trial Violations and Denying Motion to Dismiss. SR:281-90.

The case proceeded to a jury trial beginning on October 25, 2023, before the Honorable M. Bridget Mayer, Circuit Court Judge, Sixth Judicial Circuit. SR:1029. At the end of the State's case, Defendant unsuccessfully moved for judgment of acquittal. SR:1297-301. Before closing arguments, the parties settled jury instructions. SR:1306-21; *see* SR:215-48 (Final Jury Instructions). After closing arguments, the case was given to the jury. SR:1323-52. Later that day, the jury found Defendant guilty of all counts. SR:249, 1352-56.

A post-jury verdict proceeding was held where Defendant used foul language multiple times directed at the circuit court and State. SR:250, 1364-66. Defendant also continually interrupted and disrespected the circuit court. SR:250, 1364-66. Based on Defendant's actions, the circuit court ordered Defendant be held in Contempt of Court. SR:250, 1366.

On November 15, 2023, Defendant admitted to the Part II Information. SR:1391. On March 15, 2024, the circuit court sentenced Defendant to thirty-five years in the South Dakota Penitentiary for Counts 1 through 3 with the sentences to run concurrently. SR:319-20, 1435-36. For Count 4, the circuit court sentenced Defendant to three hundred days in county jail with credit for three hundred days served. SR:321, 1433. Defendant appealed. SR:290.

STATEMENT OF FACTS

On January 13, 2023, and February 25, 2023, Defendant threatened to stab correctional officers who were caring for him at the Hughes County Jail. During the January 13, 2023, incident, Defendant entered a prohibited area, clenched a sharpened pencil in his fist, and threatened officers. SR:1162-63, 1170, 1243. Defendant threatened, "Which one of you motherfuckers are going to come at me and are going to be stabbed first." SR:1170. During the February 25, 2023, incident, after threatening to stab an officer, Defendant clarified, "Do you think I'm joking? I'm being serious." SR:1143-47.

A. January 13, 2023.

In January 2023, Defendant had been in the custody of the Hughes County Jail for a few months related to an aggravated assault charge. SR:1187, 1144, 1266. Defendant was housed in the Pod B cellblock—the maximum-security housing unit. SR:1144, 1187.

The jury heard that at around 7:30 p.m. on January 13, 2023, Officer Harlie Petrak, a correctional officer at the Hughes County Jail, was making her regular rounds through the maximum-security housing unit. SR:1162, 1185-86. When Officer Petrak encountered Defendant, Defendant threatened, "If I don't get my meds, the next CO to come in here is going to get stabbed." SR:1162, 1217. Officer Petrak exited the cellblock and spoke with the nurse. SR:1163. The nurse confirmed Defendant had not received his medications. SR:1163. The nurse

retrieved Defendant's medication and walked to Defendant's cellblock door with Officer Petrak. SR:1163.

Officer Petrak opened Defendant's cellblock door and directed Defendant to take his medication.[1] SR:1163; Ex:1 at 00:00. Defendant approached the door, but did not stop. SR:1163; Ex:1 at 00:00. Instead, he walked out of the door and into the housing officer's area. SR:1163; Ex:1 at 00:00. Inmates were prohibited from entering the housing officer's area unless taken there by an officer. SR:1163. Officer Petrak commanded and motioned for Defendant to return to his cellblock. SR:1163, 1181, 1216; *see* Ex:1 at 00:05. Defendant refused, stating, "What the fuck are you going to do about it? Nothing. Exactly." SR:1163-64, 1267. Officer Petrak ordered Defendant to step back into the cellblock. SR:1164. Defendant responded, "You better get the person in charge." SR:1164.

Officer Brant Billings, a correctional officer who was in the housing officer's area, started to approach Defendant. SR:1166, 1263-65; Ex:1 at 00:40. Officer Billings asked Defendant, "[W]hat's going on?" SR:1267. Defendant replied, "[W]hat are you going to do about it?" SR:1267. Officer Billings commanded Defendant to cuff up, which meant to turn

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[1] When inmates are typically administrated medication, an officer opens the cellblock door, and the inmate waits inside the cellblock to receive the medication. SR:1177.

around and put his hands behind his back. SR:1267. Defendant refused. SR:1267.

At the same time Officer Billings reached the maximum-security housing unit entrance where Defendant was located, Officer Zack Knowlton, another correctional officer, also reached the area where Defendant was standing. Ex:1 at 01:00; SR:1240-42. About twenty seconds later, Officer Petrak started taking steps backwards away from Defendant. Ex:1 at 01:00.

The officers noticed that Defendant had both of his fists clenched by his sides. SR:1166, 1268-69. Defendant tightly clenched a three-inch pencil[2] in his left fist with the sharpened end of the pencil pointed towards the officers. SR:1166, 1243, 1257. The pencil was sharpened to a point. SR:1192, 1243, 1268-69. Defendant appeared agitated, shaky, and odd compared to his typical demeanor. SR:1193, 1257, 1268-70.

Defendant then threatened, "Which one of you motherfuckers are going to come at me and are going to be stabbed first." SR:1170, 1197; *see* SR:1268, 1271. Officer Billings testified that once he heard the threat and saw the pencil, he knew the situation was serious. SR:1268. He believed the pencil was a weapon that could be used to injure the officers and was concerned for their safety. SR:1268, 1271, 1275.

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[2] Inmates were prohibited from bringing pencils outside the housing units. SR:1192.

Officer Knowlton also testified that he considered Defendant a threat at that point because he could stab someone. SR:1244. Officer Knowlton was scared one of the officers could be injured. SR:1246. He testified the pencil was a sharpened weapon that could cause bodily injury to anybody. SR:1244. Officer Knowlton believed that the officers should have locked down the jail during the incident. SR:1257.

Officer Petrak testified that she was very nervous after Defendant's threat. SR:1193. She testified that she started to take backwards steps away from Defendant once she considered him a threat to her personally. SR:1194; *see* Ex:1. Officer Petrak wanted to maintain the "reactionary gap" of six feet—the minimum space she needed between her and Defendant to react. SR:1194. She testified that a person could die if stabbed with a pencil. SR:1195.

At this point, five officers can be seen in the security camera footage with their attention focused on Defendant. Ex:1 at 02:03. Officer Billings kept speaking with Defendant to deescalate the situation. SR:1189. Officer Billings commanded Defendant to drop or give up the pencil multiple times. SR:1196, 1246, 1270. While Officer Billings continued to speak with Defendant, he retrieved a taser secured in the housing officer's area. SR:1169; Ex:1 at 02:12. An officer is only allowed to retrieved the taser when the officer believes there is a threat to themselves or others. SR:1197.

Officer Billings handed the taser to Officer Knowlton. SR:1169; Ex:1 at 3:20. Billings told Defendant, "[H]ere's your last chance, give up the object." SR:1273. Defendant replied, "Or what? You going to tase me?" SR:1290. Officer Knowlton turned on the taser as he approached Defendant from behind. SR:1273; Ex:1 at 4:40. Defendant looked over his shoulder at Officer Knowlton. Ex:1 at 4:45. At this point, a sixth correctional officer entered the housing officer's area to assist. Ex:1 at 05:20.

Defendant eventually raised his left fist up to about chest height, looked down at his left hand, snapped the pencil, and tossed it at Officer Billings. SR:1170, 1273; Ex:1 at 06:40. Defendant complied with Officer Billings' command to turn around. SR:1170, 1273. Officer Billings handcuffed Defendant and took him to a padded cell. SR:1214.

About an hour later, Officer Petrak brought water to Defendant. SR:1214. Defendant apologized to Officer Petrak and said that he was sorry for the comments he made. SR:1214.

B. February 25, 2023.

Merely six weeks later, Defendant threatened to stab another correctional officer. Officer Zane Hesse, who was a correctional officer at the Hughes County Jail during the incident, testified at trial. SR:1143. Officer Hesse testified that on February 25, 2023, he was working at the jail and had contact with Defendant who was an inmate there.

SR:1143- 44. Officer Hesse testified that Defendant was housed in the maximum-security housing unit. SR:1144.

While in the maximum-security housing unit, Defendant threatened Officer Hesse. SR:1145. Defendant stated that he would get out of jail in two weeks and then would stab Officer Hesse. SR:1145. Officer Hesse was unsure if Defendant was serious or joking, so Officer Hesse responded in a joking manner. SR:1146. Officer Hesse replied, "Do it with a spoon; it will be more painful." SR:1146. Officer Hesse then laughed. SR:1146. Defendant did not laugh; Defendant replied, "Do you think I'm joking? I'm being serious." SR:1146-47.

Officer Hesse reported the threat to his supervisor. SR:1147. Officer Hesse and his supervisor discussed the threat. SR:1148. The supervisor asked Officer Hesse if he believed Defendant was serious and, if so, Defendant would be locked down. SR:1148. Defendant was locked down. SR:1148.

The above evidence, along with other evidence presented over the course of a two-day trial, resulted in Defendant's conviction on all four counts.

ARGUMENTS

I.

THE CIRCUIT COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS.

A. *Background.*

On appeal, Defendant argues that the circuit court erroneously denied Defendant's motion to dismiss because he was not brought to trial within 180 days pursuant to SDCL 23A-44-5.1. DB:12-13. Defendant challenges the time the circuit court excluded for a delay caused by Defendant's separate criminal matter, Hughes County Criminal File Number 32CRI22-000661. DB:13-14. Seven days—the time between the pretrial conference through the end of trial—were properly excluded. DB:13-14. But even if the circuit court attributed zero days for the delay caused by Defendant's separate criminal matter, the 180-day rule still was not violated. Thus, the circuit court properly denied Defendant's motion to dismiss.

B. *Standard of Review.*

This Court reviews a circuit court's findings of fact on the 180-day rule under the clearly erroneous standard. *State v. Two Hearts*, 2019 S.D. 17, ¶ 12, 925 N.W.2d 503, 509. But this Court reviews "whether the 180-day period has expired and the existence of good cause for delay under the de novo standard." *State v. Little Long*, 2021 S.D. 38, ¶ 57, 962 N.W.2d 237, 256 (citing *State v. Andrews*, 2009 S.D. 41, ¶ 6 n.1, 767 N.W.2d 181, 183 n.1).

C. *Defendant's Motions and Other Criminal Matter Tolled the 180 Days and Good Cause Existed to Exclude the Time.*

A defendant shall be brought to trial within 180 days from the date the defendant makes a first appearance before a judicial officer.

Two Hearts, 2019 S.D. 17, ¶ 10, 925 N.W.2d at 509; SDCL 23A-44-5.1. But some periods of time are excluded from the 180-day calculation, which includes, in part:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant, including motions brought under § 23A-8-3; . . . and the time consumed in the trial of other charges against the defendant;
> . . .
> (d) The period of delay resulting from the absence or unavailability of the defendant; [and]
> . . .
> (h) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. . . .

SDCL 23A-44-5.1(4); *see Two Hearts*, 2019 S.D. 17, ¶ 17, 925 N.W.2d at 511 ("The State is not responsible for delays resulting from [the defendant]'s continuances or periods in which his motions were pending").

A circuit court's oral rulings are not "final dispositions" that end a defendant's pretrial motion tolling pursuant to SDCL 23A-44-5.1(4)(a). *See State v. Sparks*, 1999 S.D. 115, ¶ 7, 600 N.W.2d 550, 554 (recognizing oral rulings do not finally dispose of motions under the 180-day rule). For example, in *State v. Seaboy*, the defendant filed a motion to sever on February 6, 2006—three days before trial. 2007 S.D. 24, ¶ 10, 729 N.W.2d 370, 373. The circuit court heard the motion the same day. *Id.* The circuit court entered a written order disposing of the motion on February 9, 2006. *Id.* This Court held that three days were

excluded from the 180 days. *Id.* This Court noted, "It is settled law that for final disposition, '[o]rders are required to be in writing because the trial court may change its ruling before the order is signed and entered.'" *Id.* ¶ 9 n.4, 729 N.W.2d at 373 n.4 (quotation omitted).

This Court's "primary consideration in assessing good cause [under SDCL 23A-44-5.1(4)(h)] is whether the delay is attributable to the State or the defendant." *State v. Langen*, 2021 S.D. 36, ¶ 31, 961 N.W.2d 585, 592. Exceptional circumstances that may constitute good cause for delay include: (1) unique, nonrecurring events; (2) nonchronic court congestion; and (3) unforeseen circumstances, such as unexpected illness or unavailability of counsel or a witness. *State v. Cooper*, 421 N.W.2d 67, 70 (S.D. 1988).

Here, the 180-day clock began to run on March 13, 2023, when Defendant first appeared before the circuit court. SR:284. If no periods of delay were excluded, the 180 days would have ended September 11, 2023. SR:284; *see* SDCL 23A-41-1; SDCL 23A-44-5.1. But even though more than 180 days had passed between Defendant's initial appearance and the October 25, 2023, trial, certain periods of delay were properly excluded.

The circuit court directed the parties to calculate the 180-day rule. SR:283. The circuit court received the State's Motion to Calculate 180 Days and Defendant's Motion to Dismiss, heard arguments from counsel, received the State's Proposed Findings of Fact and Conclusions of Law,

and received Defendant's objections. SR:175-77, 193-97, 259-65, 268-75, 986-96. The circuit court orally denied Defendant's motion to dismiss at the hearing and subsequently entered written Findings of Fact and Conclusions of Law and an Order Denying Speedy Trial Violations and Denying Motion to Dismiss. SR:281-90.

The circuit court's findings of fact are not clearly erroneous. And the findings of fact support the conclusion that the 180-day period had not expired and good cause for delay existed. The circuit court found that Defendant's September 7, 2023, motions tolled the 180 days until trial. SR:286. Defendant's pretrial motions tolled the "time from filing until final disposition." SDCL 23A-44-5.1(4)(a). While the circuit court mistakenly signed orders hours after Defendant filed the motions, those orders were not valid nor *final* dispositions of the motions. On October 18, 2023, a hearing was held where the motions were addressed. SR:286. The circuit court found that the September 7, 2023, orders were invalid at the time the orders were signed, no hearing was held on the motions, and the State did not have an opportunity to respond. SR:282-85, 969-71. The circuit court subsequently orally ruled on the motions. SR:285. The settled record does not contain an order entered after the oral ruling that stopped the tolling before trial. SR:285-86; *see Sparks*, 1999 S.D. 115, ¶ 7 n.5, 600 N.W.2d at 554 n.5 (noting that it is a party's duty to ensure written orders are entered on their motions). Therefore,

Defendant's September 7, 2023, motions, standing alone, tolled the time until trial. SR:286.

Defendant challenges the circuit court's exclusion of time resulting from one of his other criminal files, but overlooks the fact that even if the circuit court attributed zero days to this delay, the 180 days was still tolled because of his motions. To the extent Defendant's arguments are material to the outcome of this issue, the circuit court properly excluded seven days attributable to Defendant's other criminal matter. The circuit court found that three other Hughes County criminal files were pending while Defendant awaited trial on this matter. SR:281-82. The circuit court found that a pretrial conference was held in 32CRI22-000661 on May 25, 2023, and the trial was held on May 31, 2023, and June 1, 2023. SR:281-82. The circuit court excluded seven days as a "period of delay resulting from other proceedings concerning the Defendant, including but not limited to . . . the time consumed in the trial of other charges against [D]efendant." SR:287.

Defendant concedes that two days were properly excluded for the trial held on May 31, 2023, and June 1, 2023. DB:13-14. Defendant then argues that forty-seven days from the pretrial conference on April 14, 2023, to the *end* of trial on June 1, 2023, should not have been excluded. DB:13-14. Defendant's arguments are contradictory regarding the trial dates and misstate the time the circuit court ultimately tolled from the other case. *Compare* DB:14, *with* SR:287-88.

In the circuit court's written findings, it modified its oral findings, clarified that the pretrial conference date was May 25, 2023, not April 14, 2023, and attributed seven days to one of Defendant's other cases, 32CRI22-000661. SR:288-89. Accordingly, the circuit court excluded seven days, not forty-seven.

The excluded seven days[3] were from one of Defendant's separate criminal cases—a different "proceeding concerning the [D]efendant" and included a trial. *See* SDCL 23A-44-5.1(4)(a). Defendant was unavailable to be tried because once the pretrial conference occurred in the other case, "everything else stops that you work on and you're getting ready for trial. . . . [Defense must] get all the witnesses interviewed [and] all the exhibits ready." SR:287; *see also* SDCL 23A-44-5.1(4)(d) (excluding "[t]he period of delay *resulting from the . . . unavailability of the defendant*"). Defendant had another proceeding, that included two days of trial, that he and his counsel needed to spend time ahead of trial preparing for, which caused him to be unavailable in this case. Therefore, seven days should be excluded under SDCL 23A-44-5.1(4)(a) and (d).

Should this Court disagree, good cause existed for excluding the time. *See* SR:287. In determining good cause existed, the circuit court incorporated its previously discussed rationale, and added that the State

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[3] Again, Defendant conceded that the two days of trial were properly excluded, DB:13-14. Defendant's concession, along with the correct pretrial conference date, leaves five disputed days.

did not attempt to circumvent the 180-day rule and noted that Defendant had several pending files. SR:288; *see Cooper*, 421 N.W.2d at 70 (noting that unique events and unavailability of counsel[4] may constitute good cause). Further, the events that led to the circuit court mistakenly signing the September 7, 2023, orders were unique, nonrecurring events constituting good cause. *See Cooper*, 421 N.W.2d at 70.

Defendant's pretrial motions on September 7, 2023, standing alone, tolled the 180-day rule until trial. SR:286. The time was properly excluded under SDCL 23A-44-5.1(4)(a). Further, seven days, the time from Defendant's pretrial conference date to the end of trial in 32CRI22-000661, were properly excluded under SDCL 23A-44-5.1(4)(a), (d) and (h). Because, the circuit court did not err in excluding time from the 180-day rule, Defendant is not entitled to dismissal.

II.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTIONS.

A. *Background.*

On appeal, Defendant challenges the sufficiency of the evidence regarding his convictions. DB:2. Defendant supports his arguments by presenting the evidence in a light most unfavorable to the verdict.

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[4] Defense counsel also represented Defendant in his other criminal matters. *See* SR:1004.

SR:15-16. Defendant also raises issues related to credibility and weight of the evidence. SR:15-16. However, when viewing the evidence in the light most favorable to the verdict, sufficient evidence exists to support the jury's verdicts.

B. *Standard of Review.*

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

> To do so, [this Court] ask[s] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside.

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

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

In determining the sufficiency of the evidence, this Court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Peltier*, 2023 S.D. 62, ¶ 25, 998

N.W.2d at 341. The jury found Defendant guilty on all four counts. Counts 1 through 3 charged Aggravated Assault on a Law Enforcement Officer in violation of SDCL 22-18-1.1(5) and SDCL 22-18-1.05 and Count 4 charged Threatening a Law Enforcement Officer in violation of SDCL 22-11-15.6.[5]

SDCL 22-18-1.1(5) provides, "Any person who . . . [a]ttempts by physical menace with a deadly weapon to put another in fear of imminent serious bodily harm . . . is guilty of aggravated assault." SDCL 22-18-1.1(5). SDCL 22-18-1.05 enhances the penalty for aggravated assault if the assault occurs against a law enforcement officer while the officer was engaged in the performance of the officer's duties. SDCL 22-18-1.05.

The circuit court instructed the jury that, to find Defendant guilty of Counts 1 through 3, the State must prove, beyond a reasonable doubt, that, at the time and place alleged,

> 1. Defendant attempted to put [Harlie Petrak, Brant Billings, and Zach Knowlton] in fear of imminent serious bodily injury;

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[5] To the extent Defendant is raising a sufficiency argument regarding Count 4, there was sufficient evidence to sustain the conviction. The jury heard Officer Hesse was a law enforcement officer working at the Hughes County Jail at the time of the threat. SR:1143-44. Defendant stated to Officer Hesse that he would get out of jail in two weeks and then planned to stab Officer Hesse. SR:1145. When Officer Hesse responded with a joke, Defendant replied, "Do you think I'm joking? I'm being serious." SR:1146-47. The jury also heard that a person could die from being stabbed. SR:1195. Therefore, sufficient evidence established the elements of Threatening a Law Enforcement Officer in violation of SDCL 22-11-15.6 to support the jury's verdict.

2. [Harlie Petrak, Brant Billings, and Zach Knowlton were] law enforcement officer[s];

3. [Harlie Petrak, Brant Billings, and Zach Knowlton were] engaged in the performance of [his or her] duties at the time of the offense; and

4. Defendant did so by means of physical menace with a deadly weapon.

SR:224-26. The circuit court also instructed the jury on the definition of dangerous or deadly weapon, serious bodily injury, and physical menace. SR:227, 231.

Defendant does not present arguments related to elements two or three—that Harlie Petrak, Brant Billings, and Zach Knowlton were law enforcement officers engaged in the performance of their duties at the time of the offense. *See* DB:15-17. Indeed, each officer testified accordingly. SR:1185-86, 1240-42, 1263-65.

Instead, Defendant alleges there was insufficient evidence by pointing to Defendant's behavior on different days, questioning how the officers perceived and handled the encounter, suggesting the deadly weapon did not exist, and arguing Defendant's conduct did not meet the definition of physical menace. DB:15-17.

This Court recently clarified what the State is required to prove under SDCL 22-18-1.1(5). In *State v. Peneaux*, this Court explained, "The gravamen of the offense is the attempt to put a person in fear of imminent serious bodily harm." 2023 S.D. 15, ¶ 37, 988 N.W.2d 263, 272 (quotation omitted). This Court added that the relevant question is

not whether the alleged victim was in fear and "[i]nstead, the focus is on what the defendant was attempting to do." *Id.* ¶ 39, 988 N.W.2d at 272.

For example, in *State v. Robertson*, the defendant argued that there was insufficient evidence that he used the victim's truck as a "deadly weapon" in a physically menacing manner. 2023 S.D. 19, ¶ 26, 990 N.W.2d 96, 103. The defendant ran to the victim's truck, entered the driver's side door, and put the truck in gear. *Id.* ¶ 4, 990 N.W.2d at 98. The victim jumped on to the moving truck, was drug a few feet before positioning his feet on a step, reached into the cab, and placed the defendant in a headlock. *Id.* ¶ 29, 990 N.W.2d at 103. At this point, the defendant said, "Let's go for a fucking ride." *Id.* The defendant continued to drive the truck until pulled out by the victim. *Id.* This Court held there was sufficient evidence to sustain a reasonable theory of guilt for the aggravated assault conviction. *Id.* ¶ 33, 990 N.W.2d at 104. This Court reasoned, in part, that the defendant's actions and statement were sufficient to show that he attempted to put the victim in fear of imminent serious bodily harm by physical menace with a deadly weapon. *Id.* ¶ 32, 990 N.W.2d at 104.

Applying the de novo standard of review, applying the applicable law and jury instructions, and considering the evidence in the light most favorable to the State, Defendant's motion for judgment of acquittal was properly denied. Sufficient evidence established elements one—that Defendant attempted to put Harlie Petrak, Brant Billings, and Zach

Knowlton in fear of imminent serious bodily injury on January 13, 2023. Sufficient evidence also established element four—that Defendant did so by means of physical menace with a deadly weapon.

During trial, the jury sat through two days of evidence, heard from five witnesses and considered three video exhibits. The jury heard that Officer Petrak was making her regular rounds through the maximum security housing unit when Defendant threatened, "If I don't get my meds, the next CO to come in here is going to get stabbed." SR:1162. When Officer Petrak retrieved Defendant to administer his medicine, Defendant took the action of entering the housing officer's area, an area he was not supposed to enter unless brought there by an officer. SR:1163. Defendant refused to go back into the cellblock. SR:1163-64, 1181, 1216, 1267; *see* Ex:1 at 00:05. Not only did he enter a prohibited area, unbeknownst to Officer Petrak at the time, Defendant took the action of bringing a prohibited item with him—a pencil sharpened to a point. SR:1166, 1243, 1257. The jury heard inmates were prohibited from bringing pencils outside the cellblocks. SR:1192.

Evidence showed that the three officers were in the area when Defendant threatened, "Which of you motherfuckers are going to step up and get stabbed first?" SR:1197, 1268-71. Even if the jury believed Defendant's argument on appeal that Defendant generally had a good relationship with the officers, *see* DB:15-16, the jury also heard evidence that on January 13, 2023, Defendant refused to follow multiple

commands to drop the object, and seemed agitated, shaky, and odd compared to his typical demeanor. SR:1196, 1268-70, 1246.

To the extent Defendant is arguing there was insufficient evidence to show the officers were in fear because of how they handled the encounter, DB:16-17, this Court has held actual fear is not an element of aggravated assault. *See, e.g.*, *Peneaux*, 2023 S.D. 15, ¶ 37, 988 N.W.2d at 272. The jury was instructed accordingly—"the State need not prove actual fear of imminent serious bodily harm." SR:231 (Instruction 15).

Defendant implies that the deadly weapon did not exist because it was not visible in the security camera exhibit and the pencil was not part of the evidence. DB:16. While Exhibit 1 does not clearly depict the pencil based on how far away Defendant was from the camera,[6] the jury heard the three officers' testimony about the pencil's existence. SR:1192, 1257, 1268-69. Further, the security camera shows Officer Billings engaging in a grabbing motion when Defendant tossed the pencil at him. *See* Ex:1 at 07:00. It is illogical to believe that Officer Billings was attempting to grab an object that did not exist.

And the jury heard testimony about how the pencil was a deadly weapon. A dangerous or deadly weapon is "any firearm, stun gun, knife or device, instrument, material or substance, whether animate or

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[6] The security video shows Defendant's left hand clenching tightly and moving. Ex:1 at 01:40. A jury could reasonably infer based on testimony and the exhibit that Defendant was repositioning the pencil in his fist during the encounter.

inanimate, which is calculated or designed to inflict death or serious bodily harm, or by the manner in which it is used is likely to inflict death or serious bodily harm." SR:227 (Instruction 11); *see* SDCL 22-1-2(10) (defining dangerous or deadly weapon); *see, e.g.*, *Robertson*, 2023 S.D. 19, ¶ 28, 990 N.W.2d at 103 ("Although an automobile is not calculated or designed to inflict death or serious bodily harm, it can be used in a manner that is likely to inflict death or serious bodily harm and, when so used, it constitutes a dangerous weapon." (quotation omitted)). Defendant threatened to use the pencil, a "material," to stab officers—a use of the pencil in a way that would likely inflict serious bodily injury. Defendant brought the sharpened pencil out of the cellblock and into a prohibited area—the housing officer's area. Defendant held the pencil in a way one would to stab someone. He was not holding the pencil like a person typically would to draw or draft letters. *See, e.g.*, SR:1257. Based on this evidence, a rational trier of fact could have found that the pencil was a deadly weapon.

The jury also heard additional testimony that the pencil could cause serious bodily injury—an injury which is grave and not trivial, and which gives rise to apprehension of danger to life, health, or limb. *See* SR:227. Officer Petrak testified that if Defendant "hit the proper artery [with the pencil], it could be deadly towards an individual." SR:1195; *see also* SR:1245 (additional evidence about how a stab wound from a sharpened pencil could cause bleeding or infection). The jury also heard

about an incident where an inmate stabbed himself in the arm with a sharpened pencil, causing blood to spray all over the room. SR:1168. That inmate was taken to the hospital "with some pretty serious injuries." SR:1168. Based on this evidence, a rational trier of fact could have found that being stabbed with the pencil could cause serious bodily injury.

Defendant alleges there was insufficient evidence of physical menace because Defendant did not physically act. DB:16. The jury was instructed that "[p]hysical menace requires more than words, there must be some physical act on the part of the defendant." SR:231 (Instruction 15). Defendant overlooks all of his physical acts—entering a prohibited area, bringing a prohibited item into the prohibited area, positioning the pencil in his clenched fist in a way one would to stab someone, positioning the pencil in his fist so the sharpened end was pointed towards the officers, and refusing to follow commands. Based on all the evidence, Defendant's actions and threats are sufficient to show that he attempted to put each of the three officers in fear of imminent serious bodily injury by physical menace with a deadly weapon. *See Robertson*, 2023 S.D. 19, ¶ 32, 990 N.W.2d at 104.

In viewing the evidence in a light most favorable to the verdict, there is sufficient evidence to support Defendant's convictions. A rational trier of fact could have found all elements necessary for the convictions. Contrary to Defendant's assertion that the "physical

menace" element was not proven, Defendant's words and actions with the deadly weapon support the element. Therefore, Defendant's motion for judgment of acquittal was properly denied, and the jury's verdicts should be affirmed.

III.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING EVIDENCE ON WHAT OFFICERS KNEW ABOUT WHY DEFENDANT WAS IN JAIL.

A. *Background.*

Defendant argues that the circuit court abused its discretion by allowing the State to present evidence of the correctional officers' knowledge about why he was in jail. DB:18-19. The State proposed that the officers be allowed to testify, "per their knowledge, that he was in custody on an aggravated assault for an alleged stabbing." SR:997. The circuit court did not abuse its discretion by allowing the evidence as *res gestae*. The circuit court also did not abuse its discretion by alternatively allowing the testimony under SDCL 19-19-404(b) ("Rule 404(b)") as evidence of pattern, practice, common scheme, intent, and lack of mistake or accident. SR:1004-08.

B. *Standard of Review.*

A "trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion." *State v. Carter*, 2023 S.D. 67, ¶ 24, 1 N.W.3d 674, 685 (quotation 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." *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109. To prevail on a challenge to a circuit court's evidentiary ruling, Defendant must show that the circuit court abused its discretion, and the error was prejudicial. *State v. Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d 266, 280 (quoting *Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d at 255).

C. *The circuit court properly allowed the evidence.*

"'*Res gestae*' is a theory of relevance which recognizes that certain evidence is relevant because of its unique relationship to the charged crime . . . ." *State v. Otobhiale*, 2022 S.D. 35, ¶ 16, 976 N.W.2d 759, 767 (quotation omitted). "'*Res gestae*' also known as intrinsic evidence, is evidence of wrongful conduct other than the charged criminal conduct offered for the purpose of providing the context in which the charged crime occurred." *State v. O'Neal*, 2024 S.D. 40, ¶ 45, 9 N.W.3d 728, 747 (quoting *Otobhiale*, 2022 S.D. 35, ¶ 16, 976 N.W.2d at 767). This Court has "approved the admission of other crimes where such evidence is 'so blended or connected' with the one[s] on trial . . . that proof of one incident involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged." *Otobhiale*, 2022 S.D. 35, ¶ 17, 976 N.W.2d at 767 (quoting *State v. Hoadley*, 2002 S.D. 109, ¶ 37, 651 N.W.2d 249, 258).

Because "Rule 404(b) governs the admissibility of extrinsic evidence only[,] . . . evidence intrinsic to the charged offense is not excluded by Rule 404(b)." *Id.* ¶ 16, 976 N.W.2d at 767; *see State v. Floody*, 481 N.W.2d 242, 252 (S.D. 1992) (concluding that because evidence constituted part of the circumstances of the charged crime, 404(b) is not implicated because other acts evidence is not being introduced).

The circuit court allow the State to present evidence of officers' knowledge about why Defendant was in jail. *See* SR:997. At trial, Officer Petrak testified that he knew Defendant was in jail for an aggravated assault charge. SR:1187. Officer Billings testified that he knew Defendant was in custody for an assault charge and may have known that the charge arose from a stabbing. SR:1266. Officer Hesse believed that Defendant was in custody for two aggravated assault warrants. SR:1144.

The evidence that Defendant was in jail for a stabbing provided context tending to explain the events and circumstances in which the crimes here occurred. The fact that Defendant was in custody at the Hughes County Jail for an alleged stabbing is closely intertwined with the threats to stab officers here. *See State v. Walton*, 1999 S.D. 80, ¶ 20, 600 N.W.2d 524, 529 (holding that evidence of the defendant's history of carrying a knife was not improper character evidence or prior acts evidence, but was evidence that was intricately related to the facts of the

case in which the defendant stabbed the victim). The evidence contextualized the threats made against the officers, as it illustrates Defendant's state of mind and the continuity of the threatening behavior over a short period. The evidence also offers context to show why officers responded the way they did. SR:1001.

The circuit court also concluded that the evidence was admissible under several permitted uses identified in Rule 404(b). The admission of other acts evidence is controlled by Rule 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted with conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

SDCL 19-19-404(b).

A circuit court must apply a two-prong analysis to determine the admissibility of the evidence. *State v. Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d 411, 415 (citing *State v. Huber*, 2010 S.D. 63, ¶ 56, 789 N.W.2d 283, 301). This analysis requires the circuit court to determine "(1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect." *Id.* The State has the burden to persuade the circuit court that the evidence has a permissible purpose. *State v. Armstrong*, 2010 S.D. 94, ¶ 11, 793 N.W.2d 6, 11 (citing *State v. Lassiter*, 2005 S.D. 8, ¶ 15, 692 N.W.2d 171, 176). Rule 404(b) is a rule

of inclusion, not a rule of exclusion. *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 17, 835 N.W.2d 886, 892 (citing *State v. Wright*, 1999 S.D. 50, ¶ 13, 593 N.W.2d 792, 798).

"The determination of whether evidence is relevant 'is committed to the sound discretion of the trial court, for which this Court will not substitute its own judgment.'" *State v. Birdshead*, 2015 S.D. 77, ¶ 38, 871 N.W.2d 62, 76 (quotation omitted). When considering whether other acts evidence should be admitted to prove intent or lack of accident, the circuit court must compare the similarities between the other acts and the crime Defendant is charged with violating. *State v. Boe*, 2014 S.D. 29, ¶ 23, 847 N.W.2d 315, 321. Other acts evidence can also be admitted "where the uncharged misconduct is sufficiently similar to support the inference that they are manifestations of a common plan, design, or scheme . . . ." *State v. Big Crow*, 2009 S.D. 87, ¶ 8, 773 N.W.2d 810, 812 (citing *State v. Champagne*, 422 N.W.2d 840, 842 (S.D. 1988)). "[W]here the defendant denies doing the charged act, evidence of a common plan or scheme to achieve the act is directly relevant to refute this general denial." *Medicine Eagle*, 2013 S.D. 60, ¶ 18, 835 N.W.2d at 893 (quoting *State v. Ondricek*, 535 N.W.2d 872, 875 (S.D. 1995)).

The evidence was relevant to show pattern, practice, common scheme, intent, and lack of mistake or accident. The circuit court found the conduct was similar enough to be admitted as other acts. SR:1001-02. An officer believed that Defendant was in custody for an alleged

stabbing and Defendant was threatening to stab officers here. The evidence showed how Defendant reacts to situations. SR:1001. The evidence was relevant to show intent. *See* SR:1006; *Boe*, 2014 S.D. 29, ¶ 23, 847 N.W.2d at 321 ("[T]he record shows a similarity between the victims and the crimes sufficient to support the court's decision to admit the evidence to prove intent and to negate [the defendant's] claims of accident and mistake[.]"). The evidence was relevant to refute Defendant's denial of the crimes, along with his contention that he was merely joking around. The "jury [was also] entitled to know why [the officers were] in fear of imminent bodily harm with a pencil and why it's physical menace with a deadly weapon." SR:1007.

Once the circuit court found the other acts evidence relevant, "the balance tips emphatically in favor of admission." *Medicine Eagle*, 2013 S.D. 60, ¶ 17, 835 N.W.2d at 893 (quoting *Huber*, 2010 S.D. 63, ¶ 59, 789 N.W.2d at 302). For the evidence to be excluded, damage to Defendant's position must come from an unfair prejudice. *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799. "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 (quoting *State v. Moeller,* 1996 S.D. 60, ¶ 38, 548 N.W.2d 465, 478). Defendant has the burden of establishing the prejudice of the evidence substantially outweighs the probative value. *Id.* ¶ 61, 871 N.W.2d at 82 (citing *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799).

The circuit court properly considered whether the probative value substantially outweighed the prejudicial effect. The circuit court found that the evidence did not go to improper character or propensity, Defendant was not unfairly prejudiced, and the probative value of the evidence was outweighed by any prejudicial effect. SR:1004.

Even if the circuit court abused its discretion, Defendant has not shown he was prejudiced. Error is prejudicial when, "a reasonable probability [exists] that, but for [the error], the result of the proceeding would have been different." *Carter*, 2023 S.D. 67, ¶ 26, 1 N.W.3d at 686 (quotation omitted). In other words, "a probability sufficient [exists] to undermine confidence in the outcome." *Id.* (quotation omitted). Prejudice cannot be showed if the evidence was unimportant relative to, and the alleged prejudice outweighed by, "the overall strength of the prosecution's case." *State v. Richmond*, 2019 S.D. 62, ¶ 36, 935 N.W.2d 792, 802.

To the extent Defendant argues he was prejudiced by the evidence because he was not given sufficient notice, that argument fails. First, the circuit court held that the order Defendant referenced in support of the argument was invalid. *See* SR:994. Without citing any authority on appeal, Defendant argues that the circuit court's reasoning that the signing was a mistake is irrelevant. DB:18. But even if the notice was untimely, Defendant was not prejudiced because Defendant had "been aware of what these allegations are." SR:1005. The circuit court

reasoned, "I believe that you're the same counsel in all of these files so he's known about it." SR:1004; *see generally O'Neal*, 2024 S.D. 40, ¶ 46, 9 N.W.3d at 747 (holding there was no prejudice when the evidence was provided to the expert long before trial and the expert was able to review the evidence in forty-five minutes).

The disputed evidence is either *res gestae* or was admissible under a permitted use in Rule 404(b). Defendant also cannot show prejudice. Even if the jury had not heard the testimony, the jury would not have changed its conclusion that Defendant was guilty because of the strength of the evidence. *See* Issue II. Therefore, the circuit court did not abuse its discretion when it allowed the officers' testimony.

IV.

THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY ON PHYSICAL MENACE.

A. *Background.*

On appeal, Defendant argues that the circuit court abused its discretion by including two subjects in Jury Instruction 15. *See* DB:20; SR:255, 1310-11. He argues that the way the circuit court instructed the jury allowed the jury to ignore the physical menace part of the instruction and "allowed this jury to shift focus to 'fear' of bodily harm." DB:20. The instruction correctly states the law and informs the jury. No relief is justified because this Court presumes the jury followed the instructions.

B. *Standard of Review.*

This Court generally reviews a circuit court's decision to grant or deny a proposed jury instruction for an abuse of discretion. *State v. Ortiz-Martinez*, 2023 S.D. 46, ¶ 36, 995 N.W.2d 239, 246 (quoting *State v. Schumacher*, 2021 S.D. 16, ¶ 25, 956 N.W.2d 427, 433). However, "a court has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error." *State v. Nelson*, 2022 S.D. 12, ¶ 42, 970 N.W.2d 814, 828. A defendant has the burden to "show not only that a particular instruction was erroneous, but also that it was prejudicial." *State v. Frazier*, 2001 S.D. 19, ¶ 35, 622 N.W.2d 246, 259 (quotation omitted). This Court "considers jury instructions as a whole, and if they correctly state the law and inform the jury, they are sufficient." *Ortiz-Martinez*, 2023 S.D. 46, ¶ 36, 995 N.W.2d at 246 (quoting *Nelson*, 2022 S.D. 12, ¶ 42, 970 N.W.2d at 828 (cleaned up)).

C. *The Jury is Presumed to have Followed the Instructions.*

A jury found Defendant guilty, in part, of three counts of Aggravated Assault on a Law Enforcement Officer in violation of SDCL 22-18-1.1(5) and SDCL 22-18-1.05. SDCL 22-18-1.1(5) provides, "Any person who . . . [a]ttempts by physical menace with a deadly weapon to put another in fear of imminent serious bodily harm . . . is guilty of aggravated assault." SDCL 22-18-1.1(5).

This Court often explains what the State is required to prove under SDCL 22-18-1.1(5). *See, e.g.*, *Robertson*, 2023 S.D. 19, ¶ 31, 990 N.W.2d at 104. For example, in *State v. Scott*, this Court noted that,

> Physical menace "requires more than words: there must be some physical act on the part of the defendant." *In re R.L.G.*, 2005 S.D. 119, ¶ 10, 707 N.W.2d 258, 261. However, the State need not prove "actual fear of imminent serious bodily harm." *State v. LaCroix*, 423 N.W.2d 169, 170 (S.D. 1988). Rather, an attempt to put another in fear exists when the defendant does "any act toward the commission of the crime but fails or is prevented or intercepted in the perpetration thereof." *R.L.G.*, 2005 S.D. 119, ¶ 9, 707 N.W.2d at 261 (quoting *State v. Schmiedt*, 525 N.W.2d 253, 255 (S.D. 1994)).

2019 S.D. 25, ¶ 19, 927 N.W.2d 120, 127.

Accordingly, the circuit court relied on *State v. Scott* and instructed the jury in Instruction 15 as follows:

> Physical menace requires more than words: there must be some physical act on the part of the defendant. However, the State need not prove actual fear of imminent serious bodily harm. Rather, an attempt to put another in fear exists when the defendant does any act toward the commission of the crime but fails or is prevented or intercepted in the perpetration thereof.

SR:231. The circuit court reasoned, "This is one paragraph and it sets forth the whole law and this is the law." SR:1311.

Defendant does not argue that the instruction is an incorrect statement of the law. *See* DB:19-20; SR:1310-11. Indeed, Instruction 15 is verbatim (without case citations) from *State v. Scott*. Instead, Defendant argues that the circuit court abused its discretion because only the first sentence of Instruction 15 should have been given. DB:20.

Defendant alleges that because other law was included, the jury may have focused on certain parts of the instruction. DB:20.

The circuit court had discretion in the wording and arrangement of its jury instructions. *Birdshead*, 2015 S.D. 77, ¶ 14, 871 N.W.2d at 70. The circuit court exercised its discretion by including "the whole law" from *State v. Scott* in the instruction rather than separating the three sentences into different instructions.

The jury is presumed to have considered the physical menace element and definition. The circuit court instructed the jury that it "must accept and apply the law as stated in these instructions which [it] may consider as a whole. [It] should not disregard any instruction, or give special attention to any one instruction . . . ." SR:243 (Instruction 27). This Court generally presumes that juries follow the circuit court's instructions and have no reason to believe they failed to do so here. *Nelson*, 2022 S.D. 12, ¶ 41, 970 N.W.2d at 828.

Defendant alleges the instruction was prejudicial. However, Defendant's conclusory argument that based on "the lack of evidence in this case on that element, but for this instruction, the jury would have likely returned a verdict of not guilty," DB:20, is not enough to show prejudice. *See generally State v. O'Brien*, 2024 S.D. 52, ¶ 32, ___ N.W.3d ___ (holding that the defendant's "conclusory argument[s] [are] insufficient to meet [his] burden . . . ." (quotation omitted)). For the

reasons set forth under Issue II., the State presented sufficient evidence to prove the physical menace element.

The circuit court instructed the jury on the law consistent with *State v. Scott*, which Defendant does not allege is an incorrect statement of the law. Thus, the circuit court correctly instructed the jury on the law, exercised its discretion in the arrangement of the instructions, and did not abuse its discretion in denying Defendant's proposed instruction.

V.

THE CIRCUIT COURT PROPERLY HELD THAT EVIDENCE OF DEFENDANT'S APOLOGY WARRANTED AN ADMISSION OR CONFESSION INSTRUCTION.

A. *Background.*

On appeal, Defendant argues that the circuit court abused its discretion by instructing the jury on admissions and confessions. SR:20-21. Defendant argues that his apology to Officer Petrak did not constitute either an admission or confession, so the instruction was irrelevant and confusing. DB:21. Defendant also argues that, because the jury instruction was given, "the jury was more likely to assume that an apology was a confession, and thus they had enough to convict." DB:21.

Competent evidence was presented at trial to warrant the instruction. Whether Defendant's apology was an admission or confession was a factual issue for the jury to decide. The jury was then properly instructed how to consider an admission or confession and the

State's burden of proof. No relief is justified because this Court presumes the jury followed the instructions.

B. *Standard of Review.*

The standard of review under Issue IV.B. is incorporated here by reference.

C. *The Jury Heard Competent Evidence to Support an Admission and Confession Instruction.*

Circuit courts "possess broad discretion in instructing the jury." *State v. White Face*, 2014 S.D. 85, ¶ 18, 857 N.W.2d 387, 393 (quotation omitted). "After all evidence has been presented, it is the [circuit] court's duty to instruct the jury as evidence warrants." *State v. Brings Plenty*, 490 N.W.2d 261, 268 (S.D. 1992). Generally, if a circuit court finds a party's proposed instruction accurately instructs on the law and is relevant to an issue competently supported by evidence, the court is justified in giving a jury instruction on the issue. *State v. Spaniol*, 2017 S.D. 208, ¶ 49, 95 N.W.2d 329, 346 (citing *State v. Aesoph*, 2002 S.D. 71, ¶ 47, 647 N.W.2d 743, 759); *see also State v. Shaw*, 2005 S.D. 105, ¶ 23, 705 N.W.2d 620, 627 (explaining that a circuit court must instruct on the law when there is competent evidence on the record on which such instruction can be based).

A defendant's criminal admission is an "avowal of a fact or of circumstances from which guilt may be inferred." *State v. Corean*, 2010 S.D. 85, ¶ 40, 791 N.W.2d 44, 58 (quotation omitted). Evidence of an admission includes not only a defendant's direct statements but also

includes demeanor, conduct, and other acts from which guilt may be inferred. *Id.* "A confession is an admission of guilt . . . . It is a special kind of admission. Every confession is an admission but not every admission is a confession." *State v. Dokken*, 385 N.W.2d 493, 504 (S.D. 1986) (quotation omitted).

Here, the jury heard evidence about the nature of Defendant's apology to Officer Petrak along with the context and circumstances under which it was made. *See* SR:1214. The jury heard testimony about the aggravated assault from the officers involved and watched video evidence depicting the assault. The jury heard and saw that Defendant was ultimately handcuffed and taken into a different area. SR:1214; Ex:1 at 07:00. The jury heard that Defendant was placed in a padded cell. SR:1214. Merely an hour after the encounter, Officer Petrak had her next encounter with Defendant. SR:1214. The jury heard Officer Petrak testify that at that time, "[Defendant] had apologized to me and said that he was sorry for the comments he made." SR:1214.

Over Defendant's objection, the circuit court instructed the jury in Instruction 21 on an admission or confession. SR:237; *see* South Dakota Criminal Pattern Jury Instruction 1-14-3. Defendant argues that Instruction 20 was irrelevant because his apology was not an admission or confession. DB:21.

This Court has rejected similar arguments. In *State v. Corean*, the defendant objected to an instruction on admissions, arguing that none of

her out-of-court statements rose "to the level of an admission." 2010 S.D. 85, ¶ 39, 791 N.W.2d at 58. In *Corean*, the jury was empaneled for an accessory to murder and aiding and abetting aggravated kidnapping case. *Id.* ¶ 1, 791 N.W.2d at 48. The jury heard evidence that 1) the kidnapped victim was detained in the defendant's garage, 2) the defendant was present at scene, 3) the defendant told someone that they were not going to call the cops, and 4) the defendant stated, "[W]e need an alibi." *Id.* ¶¶ 8, 12, 41, 791 N.W.2d at 49-50, 58. The circuit court ruled that the jury would be instructed to decide "whether or not any of these statements were admissions, [and] whether the statement [was] true in whole or in part." *Id.* ¶ 39, 791 N.W.2d at 58. This Court held, "The circuit court did not err in giving an instruction on admissions." *Id.* ¶ 41, 791 N.W.2d at 59. This Court reasoned that the instruction was proper because a jury could have inferred guilt from the defendant's acts and statements. *Id.* ¶ 41, 791 N.W.2d 44 at 58.

The circuit court acted accordingly here. Evidence was presented to the jury that Defendant apologized to Officer Petrak. Like the circuit court's reasoning in *Corean*, the circuit court's instruction stated that it was for the jury to decide whether any statement was an admission or confession, and whether the statement was true in whole or in part. In *Corean*, a defendant's statement indicating that the parties should establish an alibi could be considered by a jury. Similarly, here, Defendant's apology made in this context and under the circumstances—

given while he was being detained in a padded room an hour after threatening officers—could be considered by the jury as a confession or an admission. Based on this evidence, the circuit court was justified in giving a jury instruction on the issue.

Even if Defendant is correct that the instruction was irrelevant, he still is not entitled to relief. Defendant claims that prejudice exists because there was insufficient evidence. DB:21. For the reasons set forth under Issue II., there was sufficient evidence.

Defendant also argues that because the circuit court gave an instruction on admissions and confessions, the jury returned a verdict based on assumptions. DB:21. But the circuit court instructed the jury on the State's burden of proof, how it must return a verdict, and its duty as factfinder. *See, e.g.*, SR:220 (Instruction 4); SR:221 (Instruction 5); SR:241 (Instruction 25); SR:256 (Instruction 30); SR:247 (Instruction 31). Further, in the admission or confession instruction, the circuit court instructed, "Before any person may be convicted of a criminal offense, there must be proof, independent of the statement, that the crime in question was committed." SR:237 (Instruction 21). This Court generally presumes that juries follow the circuit court's instructions and have no reason to believe they failed to do so here. *Nelson*, 2022 S.D. 12, ¶ 41, 970 N.W.2d at 828.

Based on the nature of the apology acknowledging wrongdoing and the context in which it was made, the circuit court was justified in giving

a relevant jury instruction on the issue. The jury was then instructed that if any statement was determined by the jury to be an admission or confession, "[i]t [was] for [the jury] to determine what weight, if any, to give to a purported admission or confession." SR:237. The circuit court did not abuse its discretion by correctly instructing the jury.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,928 words.

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

Dated this 15th day of October 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 15, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Isaiah Vaughn Rouse*, was served via Odyssey File and Serve upon Katie J. Thompson at kjt@thompsonlaw.co.

/s/ Jennifer M. Jorgenson
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Appellee vs. ISAIAH VAUGHN ROUSE, Defendant and Appellant.	)))))))))	Circuit Court: 32CRI23-115 Supreme Court No. 30681

REPLY BRIEF OF APPELLANT

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

THE HONORABLE M. BRIDGET MAYER
Circuit Court Judge

Notice of Appeal Filed April 14, 2024

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I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS WHEN THERE WAS A VIOLATION OF THE 180-DAY RULE.

In its response, the State erroneously argues that seven days, not forty-seven, were properly excluded by the court, but "even if the court attributed zero days, the 180-day rule was still not violated." SB 14. The State's argument falls flat.

First, the State takes issue with the fact that Mr. Rouse relied on the circuit court's oral findings on the day of the hearing. *See* SB 18, DB 14, MH 4-8. The court specifically stated,

> So using that calculation, the pretrial conference in 23-661 was April 14, 2023, and that trial ended June 1st of 2023. That calculation ends up being 47 days. The 47th day, when you add that to that raw September 11th, gets you to Saturday, October 28th, which again on that statute that I just read to you about you don't count Saturdays or Sundays or legal holidays, means we got to have this trial on or before Monday, October 30th.

MH 6. Mr. Rouse was "in the trial" for two of those days, not forty-seven. *See generally* SDCL 23A-44-5.1(4)(a)-(h). While the circuit court – months later – did make findings of fact and conclusions of law on the issue, the circuit court was anything but clear on the exclusion of time. CP 287-288; App. 12-13. Indeed, in a footnote, the circuit court stated that during the hearing it "used the term 'pretrial conference' when referencing when the pretrial order was filed on the [sic] April 14, 2023." CP 287-288, n.1; App. 12-13. Likewise, in another footnote, the court stated that "in the event no pretrial conference would be held, there could be good cause delay from the date of the pretrial order which would have been an additional forty (40) days attributable to Defendant." CP 288, n.2; App. 13, n.2.

Even assuming *arguendo* that this Court believes the circuit court's findings are clear, and it contradicted its oral findings of fact, this is just another example of the cumulative errors and injustices attributed to Mr. Rouse that should not have been. Indeed, the circuit court worked exceptionally hard to find a way to not dismiss this case and it did so contrary to Mr. Rouse's rights. Mr. Rouse was not brought to trial within 180 days as mandated by South Dakota Law, and the court erroneously denied Mr. Rouse's motion to dismiss.

Second, the State's bold averment that "even if the court attributed zero days, the 180-day rule was still not violated" is also flawed. SB 14. The court agreed a raw calculation would result in a violation. MH 3. Mr. Rouse made an initial appearance in this matter on March 13, 2023. CP 922. Pursuant to South Dakota law, the 180-day calculation began running on March 14, 2023. Therefore, Mr. Rouse should have been brought to trial on or before September 11, 2023. Yet, Mr. Rouse's trial did not begin until October 25, 2023. 2 JT; CP 1134.

Moreover, contrary to the State's misplaced reasoning, this demonstrable delay was not for good cause. If a defendant is not brought to trial within 180 days, accounting for any properly excluded days, prejudice to the defendant is presumed and the case shall be dismissed. *See* SDCL 23A-44-5.1(5). While the court may find good cause for delay for other exceptional circumstances, not specifically enumerated in the rule, the burden is on the prosecution to establish the existence of good cause for delay. *See* SDCL 23A-44-5.1(5); *see also State v. Cooper*, 421 N.W.2d 67, 71 (S.D. 1988). The State failed to meet it burden because its entire argument was based on its misplaced 180-day calculation, and a belief that the circuit court's mistakes are somehow attributed to Mr. Rouse.

Mr. Rouse requested a trial date and was in custody throughout the pendency of his case. Mr. Rouse did not delay the matter or request a continuance. Mr. Rouse was present and ready to proceed to trial. This is not tantamount to good cause and is instead wholly prejudicial. Thus, the court erroneously denied Mr. Rouse's motion to dismiss.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL FOUR COUNTS WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

To support its tenuous argument on this issue, the State takes improper liberties with how Mr. Rouse was holding the pencil. SB 27-8. According to the State, Mr. Rouse "held the pencil in a way one would stab someone. He was not holding the pencil like a person typically would to draw or draft letters." SB 27. However, this was not the testimony before the jury. Instead, the testimony was that Mr. Rouse usually had a pencil in his hand; it was not uncommon, and he did it most of the time. 3 JT 203-4. Furthermore, while the video did not show a pencil, nor was one found, the testimony was that Mr. Rouse was firmly holding or gripping a two-to-three-inch pencil in his left hand. Period. 3 JT 194; 2 JT 128, 133, 138-39. Any inferences to the contrary were from the State, not the evidence.

Indeed, Mr. Rouse did not make any lunging movement or take any steps forward. 3 JT 202, 206, 236-37. Mr. Rouse did not swing his arms, raise his hands, or make any threats. 3 JT 202, 206, 236-37. To the contrary, Mr. Rouse, having backed up to the podium, stood there, immobile with his arms by his side. 3 JT 202, 206, 236-37. Likewise, the State's argument that Mr. Rouse was not holding the pencil "like a person typically would to draw or draft letters" is devoid of logic. Indeed, it begs the question: how exactly does one walk around with a writing object in their hand, especially a two

inch one? To be sure, it is far more likely that someone would be holding or gripping it in their hand, and not, as the State absurdly argues, ready to draw or draft letters. SB 27.

Lastly, the State's response overlooks the fact that no one at the jail considered this incident a serious threat. Indeed, "if there's a serious incident in a pod" either the jail or the pod would be locked down depending on the circumstances. 3 JT 205. Yet, on January 13, 2023, a lock down was not initiated. 3 JT 208. Furthermore, according to Deputy Eilers, if there is ever a concerning incident at the jail, the Deputy is called right away. 2 JT 136, 139. However, this did not happen on January 13, 2023. 2 JT 136. Indeed, at no point was the Hughes County Sherriff's Office called to investigate or otherwise take any action. 3 JT 208, 2 JT. To the contrary, Deputy Eilers first learned of the incident on March 1, 2023, when he was contacted by Ms. LaMie. 2 JT 123, 133, 135-36. In other words, no one at the jail felt this incident was serious enough to: 1) lock down the pod or the jail; 2) contact the Sheriff's Office; or 3) save the alleged "dangerous weapon." Instead, the correctional officers did their job, de-escalated the situation, which lasted one to two minutes, and put Mr. Rouse on lockdown and went about their day.

At best, the State's evidence presented a narrative that Mr. Rouse, by words alone, made a threat. Mr. Rouse did not physically act or display any of the established requirements for physical menace. Indeed, the State failed to meet their burden of proof for the three counts of Aggravated Assault on a Law Enforcement Officer as defined in the Indictment. Yet, the court erroneously denied Mr. Rouse's motion for judgment of acquittal. Undeniably, the evidence presented to the jury was insufficient to find Mr. Rouse guilty beyond a reasonable doubt on the charges of Aggravated Assault on a Law Enforcement Officer and the trial court erred when it denied the motion.

III. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO INTRODUCE OTHER ACTS EVIDENCE WHEN IT WAS UNTIMELY, IMPROPER, IRRELEVANT, AND PREJUDICIAL.

In response, the State argues that this improper evidence "contextualized the threats made against the officers, as it illustrates Defendant's state of mind and the continuity of the threatening behavior over a short period. The evidence also offers context to show why officers responded the way they did." SB: 32. Likewise, the State boldly, and improperly claims that "Defendant cannot show prejudice Even if the jury had not heard the testimony, the jury would not have changed its conclusion that Defendant was guilty because of the strength of the evidence." SB 36. The State is wrong.

First, as argued above, this evidence is contrary to how the officers acted or otherwise perceived this incident. Indeed, no one at the jail considered this incident a serious threat. 3 JT 205, 208; 2 JT123, 133, 135-36, 139. This testimony was improper character evidence, irrelevant and inadmissible. Second, Mr. Rouse was prejudiced. Indeed, he was convicted and as argued here and, in his Brief, the State's evidence was tenuous at best. *See* Issue II. This testimony unfairly prejudiced Mr. Rouse. Indeed, the probative value (there was none) did not outweigh the prejudicial impact. Accordingly, the court abused its discretion when it granted the state's motion.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED THE STATE'S PROPOSED JURY INSTRUCTION NUMBER 15.

In its response, the State misses the salient point: "[a]n erroneous instruction is prejudicial if in all probability it produced some effect upon the verdict and is harmful to the substantial rights of the party assigning it." *State v. Swan*, 925 N.W.2d 476, 479 (S.D. 2019) (quoting *State v. Shaw*, 2005 S.D. 105, ¶ 18, 705 N.W.2d 620, 625-26). Here, Mr.

Rouse proposed that instruction number fifteen regarding physical menace should only state, "physical menace requires more than words: there must be some physical act on the part of the defendant." 3 JT 261. However, the court denied the proposal. 3 JT 262.

In a case where physical menace was categorially lacking, the court allowed the instruction to shift the focus to "fear" of bodily harm, which ultimately ensured that the jury would convict Mr. Rouse on the charges, which they unanimously did. Considering the lack of evidence in this case on that element, but for this instruction, the jury would have likely returned a verdict of not guilty. Therefore, Mr. Rouse was prejudiced, and the trial court abused its discretion.

V. THE TRIAL COURT ABUSED IT DISCRETION WHEN IT GRANTED THE STATE'S PROPOSED JURY INSTRUCTION NUMBER 21.

The State's reliance on *State v. Corean*, 2010 S.D. 85, 791 N.W.2d 44 is misplaced. Here, unlike in *Corean*, Mr. Rouse did not make a statement rising to the same level of those made by the defendant in *Corean*. Instead, Mr. Rouse apologized to Officer Petrak for his comments and told her he had an anxiety attack. Nothing more. 2 JT 176. It is a far leap in logic to infer that an apology for comments, which were unknown and unsubstantiated, is the same as those offered in *Corean*. Here, an apology for unknown comments, without more, is not an admission to the crimes charged, and the instruction was highly prejudicial.

Indeed, considering the insufficiency of the evidence in this case, the jury was more likely to assume that an apology – for unknown and unsubstantiated comments – was a confession, and thus they had enough convict. Indeed, this jury instruction provided the jury the opportunity to deliberate and infer that Mr. Rouse's apologies for

"comments" was a confession. Therefore, Mr. Rouse was prejudiced by the inclusion of this instruction.

CONCLUSION

For all the reasons argued herein and in Appellant's Brief, Appellant respectfully requests that this Court reverse Appellant's convictions on all counts on the grounds that the conviction is barred by the 180-day rule. In the alternative, Appellant respectfully request that this Court set aside the guilty verdict on the grounds that there was insufficient evidence. In the alternative, Appellant respectfully requests that the Court reverse his conviction and order a new trial based upon the improper use of other acts evidence at trial, and improper jury instructions.

Dated this 14th day of November 2024.

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The undersigned attorney hereby certifies that the foregoing Reply Brief of Appellant was filed by electronic filing and service on November 14, 2024, to:

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The original and two copies of the Brief of Appellant will be mailed, by U.S. mail, postage prepaid upon acceptance of the brief by the clerks to:

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Dated this 14 day of November, 2024.

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CERTIFICATE PURSUANT TO SDCL 15-26A-66

I, Katie J. Thompson, Attorney at Law, hereby certify that the Brief in the above-entitled matter complies with the type and volume limitations of SDCL 15-26A-66 and that said Brief contains 2043 words, and that said Brief was typed in 12 point, Times New Roman Font.

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