

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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NO. 30581

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

vs.

MARIAN BROOKS,

*Defendant and Appellant.*

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

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HONORABLE JON SOGN  
Circuit Court Judge

---

APPELLANT'S BRIEF

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Notice of Appeal Filed on December 29, 2023

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

No. 30581

vs.

MARIAN BROOKS,

*Defendant and Appellant.*

---

**PRELIMINARY STATEMENT**

All references herein to the Settled Record are referred to as "SR." The transcript of the Initial Appearance held April 27, 2022 is referred to as "IA." The transcript of the Arraignment Hearing held May 16, 2022 is referred to as "AH." The transcript of the Bond Hearing held February 14, 2023 is referred to as "BH." The transcript of the Jury Trial held April 3, through April 4, 2023 is referred to as "JT1," and "JT2." The transcript of the Sentencing Hearing held November 22, 2023 is referred to as "SH." Any references to documents will be followed by the appropriate page number. Defendant and Appellant, Marian Brooks, will be referred to as "Brooks."

## **JURISDICTIONAL STATEMENT**

Brooks appeals the Judgment and Sentence entered November 30, 2023, by the Honorable Jon Sogn, Circuit Court Judge of the Second Judicial Circuit. SR 129. Brooks's Notice of Appeal was filed December 29, 2023. SR 134. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

## **STATEMENT OF LEGAL ISSUES**

### **1. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING TESTIMONY THAT THE VICTIM WAS IN FEAR STATEMENT OF CASE**

On April 27, 2022, Brooks made his initial appearance on a complaint alleging two counts of Aggravated Assault (Dangerous Weapon) SDCL § 22-18-1.1(2), two counts of Aggravated Assault (Physical Menace) SDCL § 22-18-1.1(5), two counts of Simple Assault (Attempting to Cause) SDCL § 22-18-1(1), and two counts of Simple Assault (Physical Menace) SDCL § 22-18-1(4). SR 1. On May 11, 2022, The Minnehaha County grand jury returned a true bill on an indictment alleging the same offenses. SR 7. A Part II Information alleging three prior felony convictions was filed May 11, 2022. SR 10. An arraignment was held May 16, 2022. *See generally* AH 6-8. Motions for competency and insanity evaluations were filed on November 18, 2022. SR 23, 25. A Bond Hearing was held on February 14, 2023. *See generally* BH.

Jury trial was held April 3 through April 4, 2023. *See generally* JT1, JT2. On April 4, the jury acquitted Brooks of three counts each of Aggravated Assault and Simple Assault, but found Brooks guilty of one count of Aggravated Assault

(Count 4 Physical Menace) and Simple Assault (Count 8 Physical Menace). JT2 302-303. An Amended Part II Information was filed on May 31, 2023. SR 99. A motion for a competency evaluation was filed again on July 28, 2023. SR 106. On November 22, 2023, Brooks was advised on and admitted to the convictions in the Amended Part II. SH 1-8. After the arguments of counsel and a statement from Brooks, the court noted that Brooks had been deemed competent to proceed and sentenced Brooks to twenty five years with ten suspended on the Aggravated Assault and credit time served on the Simple Assault. SH 25-27. Judgment and Sentence was filed November 30, 2023. SR 129. Notice of Appeal was filed December 229, 2023. SR 134.

### **STATEMENT OF FACTS**

The State's first witness, Brian Monahan (Brian), testified that he worked as a manager for Sunshine Foods in downtown Sioux Falls along with his assistant manager, Bob Conner (Bob). JT1 28. Brian stated that on April 26, 2022, Brooks entered an area of the store that was for employees only. Id 30. Brian and Bob followed Brooks to an area outside near the south drive and walked towards him. Id 32-34. Brian claimed that Brooks "charged at us" and had to be pushed back, at which point Brooks pulled out a knife. Id 34. Brian drew a concealed firearm and Brooks ran away. Id 35. Brian admitted that at the time Brooks was approached outside, Brooks was quiet and relaxing sitting on a rock. Id 55. He

also agreed that Bob was further away from Brooks than he was, that Brooks had the knife by his side, and that Brooks never stepped towards Bob. Id 64.

Bob agreed that Brooks left the employees only area of the store when asked, that it was not the first time an unauthorized person had ended up in that area, and that he had not asked Brooks to leave the property when he approached him inside. Id 88. On redirect, Bob was asked "In all the experiences of your life, how afraid were you?" Id 91. Brooks objected as to relevance and the objection was overruled. Id. Bob responded by saying it was one of the scariest experiences of his life. Id. He also agreed that he was not as close to Brooks as Brian. Id. Officer Gregory Logan testified that Brooks stated he only "used the knife to defend himself." Id. 177.

Brooks testified that he went into Sunshine to buy some food and drink and decided to use the restroom. Id. 220. Someone said "Hey" but Brooks had his headphones in, so he nodded and walked away. Id. 221. He went outside to smoke a cigarette and did not interact with anyone until being approached by Brian and Bob. Id. 223. Brooks did not see the men approaching and was startled. Id. 225. Brian then used a racial slur towards Brooks and Brooks felt "in fear of my life". Id 226. He had been assaulted by other individuals a few days prior and was suspicious of Brian and Bob. Id. Neither Brian nor Bob had asked him to leave the property prior to approaching Brooks outside. Id 227. He denied swinging the knife at the employees and indicated he was glad to be alive after the encounter. Id 230.

## ARGUMENT

Evidentiary rulings are reviewed under an abuse of discretion standard. *State v. Stone*, 925 N.W.2d 488, 497 (S.D. 2019). The court allowed the State to ask Bob about his level of fear when he saw the knife. In *State v. Stapleton*, 387 N.W.2d 28 (S.D. 1986), the defendant was alleged to have pointed a gun at the victim while the victim was oblivious to the presence of the weapon. He argued that he could not be convicted of Aggravated Assault because the victim was never in fear of the injury that could have occurred from the gun. *Id* 29-30. The *Stapleton* court disagreed and held that fear is not an element of Aggravated Assault (Physical Menace). *Id* 30-31.

Here, the State elicited testimony from Bob that his interaction with Brooks was “one of the scariest times” of his life. JT1 91. Pursuant to *Stapleton*, this question and answer was not relevant, as Bob’s level of fear, or whether he was in any fear at all, is not an essential element of the offense. In overruling the objection, the court did not explain how the testimony was relevant or helpful to the jury. Even if it were relevant, the court should have balanced its admission against the danger of unfair prejudice and confusing the jury under SDCL § 19-19-403.

Likewise, Bob’s statement of how scared he was would be unhelpful to a jury who already has to sort through the testimony of eight witnesses. Bob was asked how he felt *relative to his own life*. What may be the most frightening



experience of Bob's life might be a forgettable moment of unpleasantness to someone else with different life experiences and it is impossible for a jury to meaningfully consider such distinctions in the context of a jury trial. Instead of focusing on Brooks's fear and claim of self-defense, the jury was told that Brooks was the cause of Bob's scariest life experience and this testimony paints Brooks in an extremely negative light. Although the testimony was elicited from Bob and the jury heard testimony that Brian was closer to Brooks than Bob was, the negative connotation that Brooks was scary certainly carried over to the counts related to Brian. Brooks suffered prejudice as a result.

### CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Brooks respectfully requests this Court remand this case to the trial court with an order directing the trial court to reverse the Judgment and Sentence and order a new trial.

Respectfully submitted this 24 of April, 2025.

/s/ Neil Fossum  
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### **CERTIFICATE OF COMPLIANCE**

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL §15-26A-66(b) using Book Antiqua typeface in 12 point type.  
Appellant's Brief contains 1178 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2019.

Dated this 24<sup>th</sup> day of April, 2025

/s/ Neil Fossum

Neil Fossum  
Attorney for Appellant

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the APPELLANT BRIEF were electronically served upon:

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Dated this 24<sup>th</sup> day of April, 2025.

/s/ Neil Fossum

NEIL FOSSUM  
Attorney for Appellant

## APPENDIX

Judgment & Sentence.....	A-1
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A-1

STATE OF SOUTH DAKOTA    )  
  : SS  
COUNTY OF MINNEHAHA    )

IN CIRCUIT COURT  
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  
                                  Plaintiff,

+

PD 22-008558

49CRI22002724

vs.

+

JUDGMENT & SENTENCE

MARIAN ALEXANDER BROOKS,  
                                  Defendant.

+

An Indictment was returned by the Minnehaha County Grand Jury on May 11, 2022, charging the defendant with the crimes of Count 1 Aggravated Assault-Dangerous Weapon on or about April 26, 2022; Count 2 Aggravated Assault-Dangerous Weapon on or about April 26, 2022; Count 3 Aggravated Assault-Physical Menace on or about April 26, 2022; Count 4 Aggravated Assault-Physical Menace on or about April 26, 2022; Count 5 Simple Assault-Attempts, Has Ability on or about April 26, 2022; Count 6 Simple Assault-Attempts, Has Ability on or about April 26, 2022; Count 7 Simple Assault-Physical Menace on or about April 26, 2022; Count 8 Simple Assault-Physical Menace on or about April 26, 2022 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on May 16, 2022, Amber Whittington appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Jennifer Hynek, Deputy State's Attorney appeared for the prosecution and, Jonathan Leddige, appeared as counsel for the defendant. A Jury was impaneled and sworn on April 3, 2023 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on April 4, 2023 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, MARIAN ALEXANDER BROOKS, not guilty as charged as to Count 1 Aggravated Assault-Dangerous Weapon; not guilty as to Count 2 Aggravated Assault-Dangerous Weapon; not guilty as to Count 3 Aggravated Assault-Physical Menace; *guilty* as to Count 4 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)); not guilty as to Count 5 Simple Assault-Attempts, Has Ability; not guilty as to Count 6 Simple Assault-Attempts, Has Ability; not guilty as to Count 7 Simple Assault-Physical Menace and *guilty* as to Count 8 Simple Assault-Physical Menace (SDCL 22-18-1(4))."

Chris Miles

On November 22, 2023, the defendant returned to Court with counsel, ~~Jonathan Leddige~~, and the State was represented by Deputy State's Attorney, Jennifer Hynek; at which time the defendant admitted to the Part II Habitual Criminal Offender Information (SDCL 22-7-8). The defendant was then asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

S E N T E N C E

AS TO COUNT 4 AGGRAVATED ASSAULT-PHYSICAL MENACE / HABITUAL OFFENDER : MARIAN ALEXANDER BROOKS shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty five (25) years with credit for one hundred seven (107) days served and with ten (10) years of the sentence suspended on the conditions that the defendant enter into and comply with all terms of Parole Agreement as established by Board of Pardons and Parole and that the defendant pay \$116.50 in court costs to the Minnehaha County Clerk of Courts (to be collected by Parole Services).

AS TO COUNT 8 SIMPLE ASSAULT-PHYSICAL MENACE : MARIAN ALEXANDER BROOKS shall be incarcerated in the Minnehaha County Jail, located in Sioux Falls, South Dakota, for one hundred seven (107) days with credit for one hundred seven (107) days served; concurrent to Count 4. The defendant is ordered to pay \$96.50 in court costs to the Minnehaha County Clerk of Courts (to be collected by Parole Services).

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

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

11/30/2023 2:23:03 PM

BY THE COURT:

  
\_\_\_\_\_  
JUDGE JON C. SOGN  
Circuit Court Judge

Attest:  
Hagert, Eve  
Clerk/Deputy





IN THE SUPREME COURT  
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APPEAL FROM THE CIRCUIT COURT  
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MINNEHAHA COUNTY, SOUTH DAKOTA

---

THE HONORABLE JON SOGN  
Circuit Court Judge

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**APPELLEE'S BRIEF**

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Notice of Appeal filed December 29, 2023

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IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30581

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

MARIAN BROOKS,

*Defendant and Appellant.*

---

**PRELIMINARY STATEMENT**

Appellant, Marian Brooks, will be called “Defendant” or “Brooks.” Appellee, State of South Dakota, will be known as “State.” Defendant was convicted of Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) and Simple Assault-Physical Menace (SDCL 22-18-1(4)) in Minnehaha County Criminal File No. 49CRI22-002724. He has filed an appeal. Citations to Appellant’s brief will be referred to as “DB.” Citations to the settled record will be referred to as “SR.” All document designations will be followed by the appropriate page number(s).

**JURISDICTIONAL STATEMENT**

Defendant’s two-day trial began on April 3, 2023. SR:129. The jury returned a verdict of guilty for Count 4 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5)) and Count 8 Simple Assault-Physical Menace (SDCL 22-18-1(4)). SR:129-30. On November 22, 2023, Defendant admitted to the Part II Habitual Criminal Offender

Information. *Id.* The trial court entered its Judgment and Sentence on November 30, 2023. *Id.* Defendant filed a Notice of Appeal on December 29, 2023. SR:134-35. This Court has jurisdiction for this appeal under SDCL 23A-32-2.

## **STATEMENT OF LEGAL ISSUE AND AUTHORITIES**

### **I.**

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING A VICTIM TO TESTIFY THAT HE WAS IN FEAR?

The circuit court denied Defendant's objection to exclude testimony of the witness regarding fear.

*State v. Belt*, 2024 S.D. 82, 15 N.W.3d 732

*State v. Rudloff*, 2024 S.D. 73, 15 N.W.3d 468

*State v. Carter*, 2023 S.D. 67, 1 N.W.3d 674

SDCL 19-19-401

## **STATEMENT OF THE CASE AND FACTS**

On May 11, 2022, the Minnehaha County Grand Jury filed an Indictment charging Brooks with: Count 1: Aggravated Assault with a dangerous weapon, against victim Robert [Bob] Conner, in violation of SDCL 22-18-1.1(2); Count 2: Aggravated Assault with a dangerous weapon, against victim Brian Monahan, in violation of SDCL 22-18-1.1(2); Count 3: Aggravated Assault by physical menace with a deadly weapon, against victim Robert [Bob] Conner, in violation of SDCL 22-18-1.1(5); Count 4: Aggravated Assault by physical menace with a deadly weapon, against victim Brian Monahan, in violation of SDCL 22-18-

1.1(5); Count 5: Simple Assault against victim Robert [Bob] Conner, in violation of SDCL 22-18-1(1); Count 6: Simple Assault against victim Brian Monahan, in violation of SDCL 22-18-1(1); Count 7: Simple Assault against victim Robert [Bob] Conner, in violation of SDCL 22-18-1(4); and Count 8: Simple Assault, against victim Brian Monahan in violation of SDCL 22-18-1(4). SR:7-9. His initial appearance took place on April 27, 2022. SR:626.

A Part II Information was also filed on May 11, 2022, alleging that Brooks had prior convictions for:

- First Degree Theft in Webster County, Iowa, in 2008;
- Assault while Participating in a Felony in Webster County, Iowa, in 2008; and
- Assault Causing Injury to Police Officers/Others in Webster County, Iowa, in 2008.

SR:10.

Brooks' arraignment took place on May 16, 2022, where he was informed of his statutory and constitutional rights in addition to a plea of not guilty was entered for all counts. SR:641, 645-51. Prior to trial, Defense counsel filed various motions involving mental health evaluation, competency, in limine, and prior bad acts. SR:23-24, 30-38.

The trial began on April 3, 2023. SR:293. The State's first witness was Brian Monahan. SR:319. Brian had worked for Sunshine Foods for thirty-eight years. SR:320. At the time of the crime, he was the manager of a store located at 530 South Second Avenue in Sioux Falls, South

Dakota. SR:320-21. Brian testified that his assistant manager at the store was Bob Conner. SR:320.

Brian stated that on April 26, 2022, Defendant entered the store and was later found in a “back room” area where only employees are allowed. SR:322. Bob also saw him and asked him to leave. Defendant did leave the building, but sat just outside the store, next to a flower box. SR:323. Both Brian and Bob confronted Defendant to get him to leave the property. *Id.* Brian took out his phone and took a photo of Defendant. SR:327, 347. At no time did Brian threaten or swear at Defendant. SR:361. When they got about ten feet away from confronting him, Defendant began swearing at them and charged them. SR:323, 329. They got out of his way, but Defendant charged them again, and Brian pushed him back. SR:326, 330. Defendant responded by reaching “in his back area,” pulled out a “butcher block knife,” and charged at them again. *Id.* He dropped his knife, picked it up, and made another charge. SR:330-31. He “swung [the knife] upwards.” SR:354. At one point Brian was about three feet away from Defendant and Bob was seven to eight feet away. SR:341. Brian thought that Defendant was going to “stab us or slash us.” *Id.* Brian testified that “if he sliced me, who says he wouldn’t take two steps farther . . . and try and hurt Bob . . . .” SR:364. Brian pulled out his concealed pistol and pointed it at Defendant. *Id.* Defendant stopped, raised his hands and took off running. SR:327. While this happened, Bob called the police. SR:331.

There was a store surveillance video of the event that was admitted into evidence. SR:333-37.

Bob Conner was called next to testify. Bob had worked at the Sunshine store for twenty-four years. SR:366. Bob stated that when he first saw the knife, he “was even more scared” because Defendant was going towards Brian. SR:374. Bob was also scared for his own safety because Defendant “was swinging a knife” that looked like “a long kitchen knife.” SR:374-75. On redirect, the State asked Bob to compare with “all the experiences in your life, how afraid were you?” SR:383. Defense counsel objected due to a lack of relevance, but the trial court overruled and let Bob answer. *Id.* Bob explained that Defendant’s assault was “one of my scariest times I believe.” *Id.*

Several Sioux Falls Police Department officers also testified. One of the officers testified that he was wearing a body camera while explaining to Defendant his charges and warning to him not to violate the no-contact order. SR:507-08. On that video, Defendant claimed that he was the victim of an attempted murder, and he wanted Bob and Brian put in jail. SR:508.

After the officers testified, the State rested. SR:514. Defendant’s counsel made a motion for judgment of acquittal on all the counts. SR:515. The trial court denied the motion. SR:517.

When the defense brought its case, Defendant chose to testify. SR:521. He acknowledged that on April 26, 2022, he went to the

Sunshine grocery store for breakfast. SR:521-22. At the store, he went to the back room where the restrooms are located and “just walked around” until someone told him to leave that area. SR:522-23. He then went outside the store to smoke a cigarette. SR:524. Once outside, Defendant claims a person from the store called him a derogatory name, while telling him to leave the premises. SR:527. He also said that one of them used their phone to record him, which triggered Defendant to charge at the two store employees, Brian and Bob. SR:528-29. He later testified that “it didn’t matter” to him if anyone took his photo. SR:542. Defendant admitted to “pointing to the knife [and telling the store employees] ‘I have a knife on me.’” SR:530. Defendant claimed that based on his life experience, he was “in fear for his life” from Brian and Bob. SR:532. Defendant estimated that he was probably twenty feet away from Bob when he claimed to have been in fear for his life. SR:541.

On cross-examination, Defendant conceded that while he was in the back of the store to use the bathroom, he never stood in line and waited for the bathroom to be unoccupied. SR:537. He also confirmed that he never bought any food that morning at the store. *Id.* Defendant admitted that the store employee did not come to him “flailing his hands” and he did not have a “gun in his hands” when Defendant claimed that he was in fear for his life. SR:540. He also admitted that he charged Brian three times. SR:550. Upon completion of Defendant’s testimony, the defense rested. SR:555.



After deliberation, the jury reached the following verdicts for the indicted crimes:

Count 1: Not guilty of Aggravated Assault (dangerous weapon) on Robert [Bob] Conner;

Count 2: Not guilty of Aggravated Assault (dangerous weapon) on Brian Monahan;

Count 3: Not guilty of Aggravated Assault (physical menace) on Robert [Bob] Conner;

Count 4: Guilty of Aggravated Assault (physical menace) on Brian Monahan;

Count 5: Not guilty of Simple Assault (attempts, has ability) on Robert [Bob] Conner;

Count 6: Not guilty for Simple Assault (attempts, has ability) on Brian Monahan;

Count 7: Not guilty of Simple Assault (physical menace) on Robert [Bob] Conner; and

Count 8: Guilty of Simple Assault (physical menace) on Brian Monahan.

SR:93-94, 604-05.

After Brooks was convicted, an Amended Part II Information was filed on May 31, 2023. SR:99. A motion for a competency evaluation was filed on July 28, 2023. SR:106. Defendant admitted to the Part II Information on November 22, 2023. SR:665, 672. On that same day, Defendant waived his right to a 48-hour delay and sentencing occurred. SR:673-74. Defendant gave a long rambling statement before the court handed down his sentence. SR:680-89. The court commented after

Defendant's statement that his last mental health evaluation found him competent to proceed. SR:689.<sup>1</sup>

Although Defendant could have received enhancement up to a life sentence for the Aggravated Assault conviction, the court sentenced him to twenty-five years in the State Penitentiary with ten years suspended and 107 days credit for time served. SR:690-91. On the Simple Assault conviction, Defendant received 180 days, with credit for 107 days already served. The two sentences were ordered to run concurrently. SR:691.

The trial court entered its Judgment and Sentence on November 30, 2023. SR:129-30. Defendant filed his Notice of Appeal on December 29, 2023. SR:134-35.

## **ARGUMENT**

### **I.**

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION  
IN ALLOWING A VICTIM TO TESTIFY THAT HE WAS IN  
FEAR.

#### **A. *Introduction.***

Defendant argues that the court erred by allowing the State to ask Bob "about his level of fear when he saw [Defendant's] knife." DB:5. Defendant further claims that Bob's response caused him to suffer "prejudice." DB:6.

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<sup>1</sup> The competency evaluation the court was referencing took place on September 18, 2023. SR:12. The report stated that within a reasonable degree of medical certainty, that Defendant was competent to proceed. SR:127.

The State maintains that allowing Bob to answer the question was not an abuse of discretion by the trial court. The State also claims that Bob's response to the question did not produce prejudice. This position is supported by the fact that all four charges where Bob was listed as the victim resulted in "not guilty" verdicts.

B. *Standard of Review.*

The circuit court's "evidentiary rulings are presumed to be correct." *State v. Goodshot*, 2017 S.D. 33, ¶ 14, 897 N.W.2d 346, 350 (quoting *State v. Hannemann*, 2012 S.D. 79, ¶ 19, 823 N.W.2d 357, 362). Evidentiary rulings are reviewed for abuse of discretion. *State v. Rudloff*, 2024 S.D. 73, ¶ 32, 15 N.W.3d 468, 481. 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." *In re D.S.*, 2022 S.D. 11, ¶ 21, 970 N.W.2d 547, 554 (quoting *State v. Stone*, 2019 S.D. 18, ¶ 34, 925 N.W.2d 488, 499-500).

"[N]ot only must error be demonstrated, but it must also be shown to be prejudicial error." *State v. Hayes*, 2014 S.D. 72, ¶ 22, 855 N.W.2d 668, 675 (quoting *State v. Moran*, 2003 S.D. 14, ¶ 13, 657 N.W.2d 319, 324). Prejudicial error occurs when "a reasonable probability that, but for [the error], the result of the proceeding would have been different." *State v. Carter*, 2023 S.D. 67, ¶ 25, 1 N.W.3d 674, 685.

C. *Analysis.*

For evidence to be admissible at trial it must be relevant. *State v. Thomas*, 2021 S.D. 10, ¶ 44, 955 N.W.2d 759, 772. SDCL 19-19-401 states that “. . . [e]vidence is relevant if: (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact is of consequence in determining the action . . . .” *Id.* This Court has held that “[t]he law favors admitting relevant evidence no matter how slight its probative value.” *State v. Bunger*, 2001 S.D. 116, ¶ 11, 633 N.W.2d 606, 609.

On redirect, the State asked Bob in “all the experiences in your life, how afraid were you?” SR:383. Defense counsel objected to the question, arguing that it lacked relevance. The trial court overruled the objection. *Id.* Bob answered that Defendant’s assault was “one of my scariest times I believe.” *Id.*

Defendant claims that the question on being “afraid” lacked relevance, citing SDCL 19-19-403. DB:5. Defendant points out that “any fear at all, is not an essential element of the offense Aggravated Assault (physical menace).” DB:5. The State agrees that actual fear of imminent serious bodily harm is not an essential element of the offense. This Court has stated that the crime is completed when the attempt to put one in fear of imminent serious bodily harm is completed. *State v. LaCroix*, 423 N.W.2d 169, 170 (S.D. 1988) (*see also State v. Ahmed*, 2022 S.D. 20, ¶ 15, 973 N.W.2d 217, 221).

The State disagrees with the view that testimony is relevant only if it specifically proves an element of the crime. Bob was a named victim in four of the eight assault charges being tried. Bob’s description of how he felt while subject to a knife attack is relevant to the crime of assault. It not only serves to make a fact “more or less probable” but it is also “of consequence” in proving the crime of assault. SDCL 19-19-401. This Court has stated “[t]he moment evidence is found relevant, the scale ‘tips emphatically in favor of admission . . . .’” *State v. Belt*, 2024 S.D. 82, ¶ 24, 15 N.W.3d 732, 738.

Defendant also argues that if the State’s question to Bob was relevant, the court “should have balanced its admission against the danger of unfair prejudice.” DB:5. Defendant did not ask the court to conduct balancing. SR:383. Defendant then summarily claimed that he “. . . suffered prejudice . . .” DB:6.

D. *Prejudice.*

The State maintains that no abuse of discretion or error occurred when the court allowed Bob to answer the State’s question. *Rudloff*, 2024 S.D. 73, ¶ 32, 15 N.W.3d at 481. Moreover, even if “error is found, it must be prejudicial in nature before this Court will overturn the trial court’s evidentiary ruling.” *State v. Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d 538, 544 (see also: *State v. Carter*, 2023 S.D. 67, ¶ 25, 1 N.W.3d at 685).

“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” SDCL 23A-44-14. Thus, even if this Court finds that there was an abuse of discretion by allowing Bob’s answer, it “will affirm unless the defendant’s substantial rights were violated.” *State v. Osgood*, 2003 S.D. 87, ¶ 20, 667 N.W.2d 694. As noted in *State v. Smithers*, 2003 S.D. 128, 670 N.W.2d 900, “‘It is not error alone that reverses judgments of convictions,’ there must be ‘error plus injury.’” *State v. Owens*, 2002 S.D. 42, ¶ 39, 643 N.W.2d 748. Error is said to be prejudicial when “in all probability . . . it produced some effect upon the final result and affected rights of the party assigning it.” *Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d at 544; *State v. Vatne*, 2003 S.D. 31, ¶ 10, 659 N.W.2d 383. Evidence is prejudicial only if it “persuades the jury in an unfair or illegitimate manner . . . not merely because it harms the other party’s case.” *Mattson*, 2005 S.D. 71, ¶ 20, 698 N.W.2d at 546; *see also State v. Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d 62, 83 (“[T]he harm must come not from prejudice, but from ‘unfair’ prejudice.”).

Defendant demonstrates inconsistency when he testified that he had to draw his knife because of “ . . . fear for his life,” but argues now that Bob’s fear is prejudicial when Bob was threatened with the same knife and testified it was “one of my scariest times . . . .” SR:383, 532. Defendant also makes no showing of prejudice apart from the accusation in his brief. SR:6. That accusation collapses on the fact that the jury

found Defendant “not guilty” of all four counts where Bob was the named victim of the assault. SR:93-94, 604-05. The jury had the surveillance video to evaluate the situation, thus any statement made by Bob about his own perception of fear had no effect on the verdicts pertaining to Brian.

### **CONCLUSION**

Based on the above argument and authorities, the State respectfully asks this Court to affirm Defendant’s convictions and sentences.

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 2,663 words.

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

Dated this 5th day of June, 2025.

/s/ John M. Strohman

John M. Strohman

Assistant Attorney General

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 5th day of June, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v Marian Brooks*, was served electronically through Odyssey File and Serve on Neil Fossum at [nfossum@minnehahacounty.gov](mailto:nfossum@minnehahacounty.gov)

/s/ John M. Strohman

John M. Strohman

Assistant Attorney General





**Minnehaha County Public Defender**

June 12, 2025

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

RE: State of South Dakota v. Marian Brooks 30581

Dear Ms. Jameson-Fergel,  
Please be advised that upon reviewing the brief submitted by Appellee in the above-entitled matter, Appellant has decided not to reply to Appellee's Brief. Defendant requests this Court to rely on arguments and issues addressed in Defendant's brief submitted to the Court on April 24<sup>th</sup>, 2025

Sincerely,

A handwritten signature in black ink, appearing to read "Neil Fossum".

Neil Fossum  
Deputy Public Defender

NDF/sms



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