

IN THE
SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

NO. 30497

CARL RELF,
Defendant and Appellant.

APPELLANT'S BRIEF

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STATE'S ATTORNEY
PENNINGTON COUNTY
130 KANSAS CITY ST. #300
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Notice of Appeal was filed on October 18, 2023

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PRELIMINARY STATEMENT

Throughout this brief Defendant and Appellant Carl Relf will be referred to as “Relf.” Plaintiff and Appellee, the State of South Dakota, will be referred to as the “State.” References to the settled record will be referred to as “SR,” followed by the page number from the Clerk’s index. References to the transcript of the Initial Appearance, will be designated as “IA” followed by the page number. Arraignment will be designated as “AH” followed by the page number. References to the transcript of the Motions Hearings will be designated as “MH” followed by the number 1 or 2 to designate the order in which the hearings happened. References to the transcript of the Bond Hearing/Pre Trial-Conference will be designated as “PTC” followed by the page number. References to the transcript of the Jury Trial will be designated as “JT” followed by the page number. Reference to videotaped witness hearing will be designated as “RP” followed by the page number. References to the transcript of the Sentencing Hearing will be designated as “SentH” followed by the page number. References to the transcript from the Part 2 Admission will be designated as “Part2H” followed by the page number.

JURISDICTIONAL STATEMENT

Relf appeals from a judgment of conviction for seven counts of Aggravated Assault, signed and filed on September 25, 2023, before the Honorable Jane Wipf Pfeifle of the Seventh Judicial Circuit Court Judge, Pennington County, South Dakota. (SR, 1124). Appeal is by right pursuant to SDCL § 23A-32-2. Notice of appeal was filed on October 18, 2023. (SR 1129).

CASE HISTORY

On June 6, 2022, Robert Pollack reported to law enforcement that a black chevy pickup truck had blocked him and then chased him down the road while he was pulling out of Heart Ranch campground in Rapid City. At some point during their encounter on the road, Pollack had seen that the driver of the chevy pickup had a gun on his person. As the situation escalated with the chevy pickup chasing him at higher speeds, Pollack attempted to conduct a U turn so as to lose the pickup. As he was attempting to turn his car around, Mr. Pollack reported that the driver of the pickup got out of his vehicle and shot towards him. (JT: 9, 40).

Shortly thereafter, construction workers, James Croyle and Anthony (Tony) Morgan, working on a road construction project close by Heart Ranch, on the intersection of Highway 79 and Spring Creek Road, also had an unpleasant interaction with a black pickup. (JT, 10). The driver of the pickup pulled up behind Croyle and Morgan's parked vehicle, got out of the car and approached the two construction workers' with a gun on his side. The driver of the black pick up then held the gun close to Morgan's head. (JT: 10-11, 153-156). Once the armed individual walked away, Croyle immediately started his pickup truck and sped away to warn the other construction workers in the area of the incident. (JT, 11). Morgan was able to identify Relf that day. (JT, 158). Croyle identified Relf in court during his testimony. (JT, 192).

Another construction worker, Timothy (Tim) Birmeier, saw Croyle and Morgan speed into the staging area of the construction zone and heard them yell that someone had a gun. He then saw the black pickup following Morgan and Croyle. (JT, 11). Birmeier then saw the driver of the black pickup pointing a gun from the window of his vehicle

towards him. The workers ducked for cover. (JT: 12, 232). Birmeier heard a gunshot. (JT, 234). This victim identified Relf in the courtroom as the shooter. (JT, 238).

Matthew (Matt) Leon, the owner of the construction company, also saw the handgun pointed at Birmeier as he was standing close to Bermeier. (JT: 12, 135). Leon saw the gun pointed towards Birmeier, then towards Brad Willets and himself, which caused him to also duck for cover behind one of the trucks. (JT, 135). Leon heard the gun being shot. (JT, 12). As the black pickup drove away, Leon got into his own vehicle and followed the black pickup while waiting for law enforcement. (JT1, 13). Leon identified Relf as the shooter that day. (JT, 147).

Another worker, Hannah Covey, was sitting in her own truck at the construction site when she heard Croyle and Morgan yelling about a gunman. She did not have time to get out of the vehicle to find cover, so she just sunk low in her seat instead. (JT: 13, 248-249). During that time, Brad Willits, who had been close to Tim Birmeier, also took cover behind Covey's pickup, essentially placing Hanna's pickup between himself and the black pickup. (JT: 13, 249-250). Covey did not see the gunman, but she also heard the gunshot and saw the black pickup leave the area. (JT: 14, 250).

During the time that the black pickup truck was driving through the Heart Ranch area and having altercations with the various victims in this case, there were calls made to law enforcement from other witnesses. (JT: 10, 14, 260). Deputy Mooney responded to the area of Highway 79 and Spring Creek Road. (JT, 260). Deputy Mooney found the black chevy pickup parked in a driveway nearby Heart Ranch. (JT, 270). Relf was detained and a Glock 9MM pistol was found in the center console of the black pickup. He

was then shown to the complaining witnesses so that they could confirm the identity of the suspected gunman. (JT, 283).

Relf was charged by Complaint with Count 1: Aggravated Assault against Timothy Birmeier, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 2: Aggravated Assault against Brad Willits, a class 3 felony in violation of SDCL 22-18-1.1(5) SR 1; Count 3: Aggravated Assault against James Croyle, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 4: Aggravated Assault against Anthony Morgan, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 5: Aggravated Assault against Robert Pollack, a class 3 felony in violation of SDCL 22-18-1.1(5); (SR, 1).

Relf had his Initial Appearance on June 7, 2022. (IA, 2). An Indictment was filed on June 16, 2022 charging Relf with Count 1: Aggravated Assault against Timothy Birmeier, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 2: Aggravated Assault against Brad Willits, a class 3 felony in violation of SDCL 22-18-1.1(5) SR 1; Count 3: Aggravated Assault against James Croyle, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 4: Aggravated Assault against Anthony Morgan, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 5: Aggravated Assault against Robert Pollack, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 6: Aggravated Assault against Hannah Covey, a class 3 felony in violation of SDCL 22-18-1.1(5); Count 7: Aggravated Assault against Matthew Leon, a class 3 felony in violation of SDCL 22-18-1.1(5). (SR, 31).

A Part 2 Information was also filed on June 16, 2022, enhancing counts 1-6 to a Class 1 felony. (SR, 35). The original Part 2 Information only covered counts 1-6 although Relf was advised on the applicable enhancement for each count of his

indictment. (AH, 8). An Amended Part 2 Information was filed on October 10, 2023, which covered count 7 as well. (SR, 1126). There was an admission entered with regards to the original Part 2 Information. (Part2H, 3-4). However, there has not been an admission entered on the record as to the Amended Part 2 Information.

Relf was Arraigned on June 21, 2022. (AH,1). He entered not guilty pleas to all the charges against him and denied the Part 2 Information. (AH, 9-10). Additionally, during the pendency of the case, Relf had a Status Hearing on August 8, 2018. (SH), a standard Motions Hearing on September 8, 2022 (MH1), a Bond Hearing/Pre trial Conference on November 17, 2022 (PTC), a Motion Hearing challenging the 180 days rule (MH2), a hearing on February 21, 2023 to record the testimony of the victim Robert Pallack (RP), a Jury Trial which started on March 6 (JT, 1,2,3), a hearing on the Part 2 Information on March 16, 2023, (Part2H, 3-4), a Status Hearing on July 6 (SH2), and a Sentencing Hearing on September 21, 2023, (SentH).

Relf moved to dismiss his case on the basis of a 180 days' rule violation. A Motion's Hearing was held on February 16, 2023 (MH,2). The Motion was denied as the Court had previously found good cause for having continued the trial from November 21, 2023, due to one of the victims expecting to have a baby on the day the trial was supposed to start. (SR, 86, MH, 2).

The jury trial was then scheduled to start on February 21, 2023. However, on the day that trial was supposed to take place, the weather forecast was such that the parties agreed it would have been dangerous for the jury to drive back home. A decision was made by the judge and agreed upon by State and Defense counsel to move the jury trial to a different date but conduct a videotaped hearing of one of the witnesses, outside of the

presence of the jury, because the State had a fear that the witness was going to move out of the country. (RP, 4). Robert Pollack, one of the victims, was allowed to testify and be cross examined, without the jury present. His testimony and cross examination were videotaped and was then shown to the jury during the course of the jury trial which started on March 6, 2023. (JT, 1). At the end of the jury trial, Relf was found guilty of all counts. (SR, 243).

After the trial was concluded, Relf asked and was appointed new counsel, Paul Winter. (SR, 270). A presentence investigation was ordered and conducted as well. (SR, 1024). A Sentencing hearing was held on September 21, 2023. (SentH, 1). At the conclusion of the sentencing hearing, the Court sentenced Relf to 45 (forty five) years in the South Dakota Penitentiary, with 10 (ten) of those years suspended, 472 days credit, on each count, to run concurrently on all seven counts. (SR, 1124, SentH, 16).

ISSUE

WHETHER THE CIRCUIT COURT'S DECISION TO ALLOW VIDEOTAPED TESTIMONY OF A WITNESS THAT HAD NOT BEEN DECLARED UNAVAILABLE, CONSTITUTES REVERSIBLE ERROR

STANDARD OF REVIEW

“Plain error requires (1) error, (2) that is plain, (3) affecting substantial rights; and only then may we exercise our discretion to notice the error if (4) it “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.”” *State v. Robinson*, 602 N.W.2d 730, 735 (S.D. 1999). ““We invoke our discretion under the plain error rule cautiously and only in exceptional circumstances.”” *State v. Janis*, 880 N.W.2d 76, 82 (S.D. 2016). “Under plain error review, we must initially determine if there was error at trial that is plain” *State v. Janis*, 880 N.W.2d 76, 82 (S.D. 2016).

Alternatively, this Court reviews a trial court's ruling on the admissibility of evidence under an abuse of discretion standard." *State v. Lindner*, 736 N.W.2d 502, 505-06 (S.D. 2007). ""With regard to the rules of evidence, abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *State v. Lindner*, 736 N.W.2d 502, 506 (S.D. 2007)

LEGAL ANALYSIS

ARGUMENT

I. THE CIRCUIT COURT'S DECISION TO ADMIT THE VIDEOTAPED TESTIMONY OF ONE OF THE VICTIMS FOR FUTURE USE AT A TRIAL WITHOUT A SPECIFIC FINDING OF UNAVAILABILITY CONSTITUTED REVERSABLE ERROR.

"In all criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face . . ." SD Const. Art. 6 § 7.

"The testimony given by a witness on the preliminary examination or on a former trial is not admissible as substantive evidence, unless it is satisfactorily shown by the side offering the evidence that such an examination or trial was had in a judicial tribunal; that the witness was sworn and testified; that accused was present and had an opportunity for cross-examination; that the parties and the issues were substantially the same as in the case on trial; and that the witness has since died, or has become insane or has left the state permanently or for an indefinite time, or is unable to attend and testify on account of sickness or physical disability, or after due diligence cannot be found."

State v. Jaques, 256 N.W.2d 559, 562-63 (S.D. 1977) *State v. Carr*, 1940, 67 S.D. 481, 484, 294 N.W. 174 at 175, quoted verbatim in *State v. Nelson*, 1974, 88 S.D. 348, 220 N.W.2d 2 at 7, and *In The Matter of the Neglect and Dependency of D.T.*, 1975, S.D., 237 N.W.2d 166 at 170.").

SDCL19-19-804 states in part:

Exceptions to rule against hearsay--When declarant unavailable as witness.

(a) Criteria for being unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

- (2) Refuses to testify about the subject matter despite a court order to do so;
- (3) Testifies to not remembering the subject matter;
- (4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) The declarant's attendance, in the case of a hearsay exception under subdivision (b)(1); or
 - (B) The declarant's attendance or testimony, in the case of a hearsay exception under subdivision (b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) Former testimony. Testimony that:
 - (A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

The testimony at issue is the videotaped testimony of Robert Pollack. The parties agreed to the video recorded testimony on the evening prior to the day trial was scheduled to begin, February 21, 2023, as described below. Defendant was unaware of this agreement. (SR, 275). On the morning of February 21, 2023, Defendant was dressed in civilian clothes and prepared for trial. The trial court stated that counsel for the parties held a conference call on her way home the evening before regarding two issues. The first issue was the impending severe winter weather and the likelihood of having to continue the jury trial. The second concerned victim witness Robert Pollack's availability in the future, as trial dates had yet to be determined. (RP, 3-4)

The prosecutor stated that "the State has a *fear* that Mr. Pollack will after this date be moving to the Philippines and, thus, be unable to testify so the State ultimately requested the video deposition in front of the Court today." (RP, 4). He went on to say he

had “spoken to” defense counsel and wanted to coordinate with the trial judge to take the video testimony of Pollack.

The trial court then advised the parties of how the testimony would be taken in the courtroom and did so affecting the presence of a jury. She directed the attorneys to look at the camera while they were speaking so “it will show on the screen as if you’re looking right at the jury.” (RP, 5). The trial court offered to switch views to see the attorneys when they spoke and back to the witness for answers but thought “that would make people a bit sick to their stomach maybe.” Id. Ln. 8-12. She explained that “we’ll be able to play [the recording] for the jury at the time of the trial. And so it *would be just as if the witness were present in the courtroom.*” (RP, 5)

After discussing the possible camera angles, defense counsel agreed to keeping the camera focusing on the witness, “And I guess if it becomes appropriate to ask you to zoom out for some reason, we can do that?” The trial judge responded, “Absolutely. Absolutely.” (RP, 6).

Pollack’s testimony began with the State calling him as a witness at the behest of the trial court. The trial court swore him in, and the prosecutor began questioning him. The first exhibit the State presented to Pollack was A map, which was admitted. The prosecutor then requested to publish the map. (RP, 12). As the transcript notes, “State’s Exhibit 1 published to the jury.” The testimony continued to be taken as though the jury was there.

The State next requested that Pollack be allowed off the witness stand to “interact with the map”. (RP, 12-14). Next:

The Court: Any objection?

Mr. Love: No objection.

The Court: You may.

Mr. Thomas: Thank you.

The Witness: (Complied.)

The Court: You may Proceed.

The prosecutor stops Pollack when he gets to the point where he interacts with Defendant and has him identify him the courtroom:

Mr. Thomas: Can you identify him by an article of clothing he's wearing and where he's seated

Pollack: He's wearing a light blue t- -- or light blue dress shirt and he's got black shoes on and he's got dark-colored slacks.

Mr. Thomas: Your Honor, let the record reflect that Mr. Pollack has identified the Defendant Carl Relf.

The Court: The record may so reflect.

(RP, 14)

Later, the prosecutor moved to publish Exhibit 2, the 911 call that Pollack made. (RP, 44). Other exhibits were admitted as well, specifically Exhibits 4 and 5, over the objection of the defense. (RP, 44-48).

The prosecutor sought the admission through Pollack, Exhibit 3, a "sketch he drew for the officer that inspected the car." (JT,47-48). Pollack noted that it was not all his handwriting. The defense objected for lack of foundation and the trial court sustained the objection. The prosecutor tried again and defense counsel's objection was again sustained and the drawing was not admitted.

Finally, during recross the defense objection of asked and answered was sustained, ending the testimony. At the conclusion of the testimony the trial court asked if Pollack was there under subpoena, and when the prosecutor says he was, asked the attorneys if Pollack could be released therefrom. Both attorneys agreed he could be. (JT, 63). Yet, no trial was being held, the time to appear on the trial subpoena had passed rendering the subpoena moot.

The trial court set new trial dates after Pollack's testimony for March 13-15, 2023. Nowhere in the record was Pollack asked if he would be available on the newly scheduled trial dates. After releasing Pollack from the subpoena, the trial court asked him "not to discuss" his testimony with other witnesses "until this matter is concluded." (RP, 40). Defense counsel asked the trial court to expand that admonishment without objection from the State. The judge then asked Pollack not to discuss the case with the media or others to permit the jury to hear the case without influence from elsewhere. (RP, 40)

The judge asked if the parties wanted her to keep the exhibits, to which defense counsel responded, "I think that would probably be appropriate *since they've been admitted into evidence.*" (RP, 44). Although no part of the record of the case, the exhibits were not part of the trial record as no trial had commenced.

The entirety of the transcript from February 21, 2023, was played to the jury. Importantly, the rulings of the trial court including and excluding evidence were heard by the trial jury. At no point prior to trial did the trial court make findings regarding Pollack's availability to testify. The State neither propounded Pollack's unavailability nor produced a stipulation of the parties to it. At no point were the exhibits that were "admitted" during the videotaped testimony offered or accepted into evidence at the jury

trial. The trial court and attorneys treated Pollack's testimony as trial testimony, the exhibits as trial exhibits, and the entirety of the procedure as part of the trial despite the fact that no jury had been selected and sworn in. The State's purpose in recording Pollack's testimony was that it "feared" that Pollack would move out of state to the Philippines prior to the commencement of the jury trial.

What is so confusing is the implication that there was a tacit understanding that Pollack's video recorded testimony was his trial testimony, that there was an unspoken stipulation to that effect. At no point, nonetheless, was any such stipulation filed or read into the record and no motion or proffer made by the State to admit the recording at trial. Affecting the trial, the Court permitted an "in-court" identification. Did that suffice as identifying Relf for purposes of identification at trial? The fiction of the trial is what forms the basis of the appeal issue and defeats the notion that Relf had failed to object.

Pollack was the first witness/victim of June 6, 2022. Admitting his videotaped evidence as his true testimony was prejudicial to the Defendant because Pollock had some of the most aggravating facts such as his testimony that Relf chased him down in his vehicle and shot at him directly. All other witness encounters followed that of Pollock, but none of the other witnesses testified that Relf shot directly at them. Pollock was once of the most significant victims in Relf's case.

The recorded testimony of Robert Pollack was not a deposition authorized under SDCL Ch. 23A-12. Such depositions may be taken upon order of a court or by agreement of the parties. This video recorded testimony was treated as trial testimony during which the participants pretended a jury was present, evidentiary rulings were made, and evidence was admitted and denied. The trial jury heard it all. At no point was Defendant

advised this was a deposition and none of the trappings of a deposition were present. To the contrary, all the accoutrements of a trial were on display. It was the scheduled trial day for which Defendant was prepared in every way. The only fixture differentiating the event from a trial was the absence of a jury. But even that was misleading as the parties and the trial court behaved and spoke as if it were present.

CONCLUSION

Based on the foregoing argument, Defendant requests that his conviction be reversed and his case remanded for a new trial.

Dated this 6th day of August 2024.

Respectfully submitted,

DUFFY LAW FIRM

/s/ Ilisja Duffy

Ilisja Duffy

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CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains approximately 3,903 words and is 13 pages in length.

I certify that the word processing software used to prepare this brief is Microsoft Word Version 16.44.

/s/ Ilisja Duffy
Ilisja Duffy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of August 2024, a true and correct copy of the foregoing Appellant's Reply Brief was served via Odyssey File and Serve, at the e-mail addresses listed below, upon these individuals:

Marty Jackley
atgservice@state.sd.us

Lara Roetzel
larar@pennco.org

/s/ Ilisja Duffy
Ilisja Duffy

APPENDIX

JUDGMENT.....	1.1
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STATE OF SOUTH DAKOTA,)
)SS
COUNTY OF PENNINGTON.)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
Plaintiff,)

File No. CRI 22-2229

vs.)

JUDGMENT

CARL GEORGE RELF,)

DOB: 4-10-69)

Defendant.)

Appearance at sentencing:

Prosecutor: Jason Thomas

Defense attorney: Paul Winter

Date of sentence: September 21, 2023 Date of offenses: June 6, 2022

Charge: Count 1: Aggravated Assault, Class 3 Felony, SDCL 22-18-1.1(5)

Charge: Count 2: Aggravated Assault, Class 3 Felony, SDCL 22-18-1.1(5)

Charge: Count 3: Aggravated Assault, Class 3 Felony, SDCL 22-18-1.1(5)

Charge: Count 4: Aggravated Assault, Class 3 Felony, SDCL 22-18-1.1(5)

Charge: Count 5: Aggravated Assault, Class 3 Felony, SDCL 22-18-1.1(5)

Charge: Count 6: Aggravated Assault, Class 3 Felony, SDCL 22-18-1.1(5)

Charge: Count 7: Aggravated Assault, Class 3 Felony, SDCL 22-18-1.1(5)

Pleas of Not Guilty entered on July 21, 2022

Convicted at Jury Trial: March 8, 2023

Habitual offender admitted on: March 16, 2023

☐ SDCL 22-7-7 ☐ SDCL 22-7-8 ☒ SDCL 22-7-8.1

☒ The Defendant having been convicted at Jury Trial on March 8, 2023; the Defendant having thereafter on March 16, 2023, entered a plea of Guilty to the Part II Information as charged; and the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Court finding the pleas were made knowingly and voluntarily, and with a sufficient factual basis for the entry of the pleas and having asked whether any legal cause existed to show why judgment should not be pronounced, and no cause being offered:

IT IS HEREBY ORDERED:

On Count 1: Aggravated Assault, as enhanced by being an Habitual Offender, the Defendant is sentenced to serve a term of Forty-five (45) years in the South Dakota State Penitentiary with Ten (10) years suspended and Four Hundred Seventy-Two (472) days credit plus each day served in the Pennington County Jail.

On Count 2: Aggravated Assault, as enhanced by being an Habitual Offender, the Defendant is sentenced to serve a term of Forty-five (45) years in the South Dakota State Penitentiary with Ten (10) years suspended and Four Hundred Seventy-Two (472) days credit plus each day served in the Pennington County Jail.

On Count 3: Aggravated Assault, as enhanced by being an Habitual Offender, the Defendant is sentenced to serve a term of Forty-five (45) years in the South Dakota State Penitentiary with Ten (10) years suspended and Four Hundred Seventy-Two (472) days credit plus each day served in the Pennington County Jail.

On Count 4: Aggravated Assault, as enhanced by being an Habitual Offender, the Defendant is sentenced to serve a term of Forty-five (45) years in the South Dakota State Penitentiary with Ten (10) years suspended and Four Hundred Seventy-Two (472) days credit plus each day served in the Pennington County Jail.

On Count 5: Aggravated Assault, as enhanced by being an Habitual Offender, the Defendant is sentenced to serve a term of Forty-five (45) years in the South Dakota State Penitentiary with Ten (10) years suspended and Four Hundred Seventy-Two (472) days credit plus each day served in the Pennington County Jail.

On Count 6: Aggravated Assault, as enhanced by being an Habitual Offender, the Defendant is sentenced to serve a term of Forty-five (45) years in the South Dakota State Penitentiary with Ten (10) years suspended and Four Hundred Seventy-Two (472) days credit plus each day served in the Pennington County Jail.

On Count 7: Aggravated Assault, as enhanced by being an Habitual Offender, the Defendant is sentenced to serve a term of Forty-five (45) years in the South Dakota State Penitentiary with Ten (10) years suspended and Four Hundred Seventy-Two (472) days credit plus each day served in the Pennington County Jail.

- ☒ That Defendant pay court costs of \$116.50.
- ☒ That Defendant's attorney's fees will be a civil lien pursuant to SDCL 23A-40-11.
- ☒ That Defendant pay prosecution costs: UA \$ ___, Drug Test \$50.00, Blood \$ ___, SART Bill \$ ___; Transcript \$29.20.

Check if applicable:

- ☒ That the sentences for Counts 1-7 shall run concurrently with each other.

9/25/2023 10:17:48 AM

Attest:
Ricke, Jolonda
Clerk/Deputy

BY THE COURT:




HON. JANE W. PFEIFLE CIRCUIT JUDGE

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

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30497

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARL GEORGE RELF,

Defendant and Appellant.

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

THE HONORABLE JANE WIPF PFEIFLE
Circuit Court Judge

APPELLEE'S BRIEF

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AND APPELLANT

Notice of Appeal filed October 18, 2023

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30497

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CARL GEORGE RELF,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant/Appellant, Carl George Relf, is referred to as “Relf.” Plaintiff/Appellee, the State of South Dakota, is referred to as “State.” The settled record will be denoted as “SR.” All references to the settled record will be followed by the e-record pagination. Relf’s brief is denoted as “AB.” The transcripts from the case are designated as follows:

February 21, 2023, Pollack Testimony WT

March 6, 2023, Jury Trial, Day 1 JT1

March 7, 2023, Jury Trial, Day 2 JT2

March 8, 2023, Jury Trial, Day 3 JT3

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

JURISDICTIONAL STATEMENT

On September 25, 2023, the Honorable Jane Wipf Pfeifle, Circuit Court Judge, Seventh Judicial Circuit, filed Relf's Judgment and Sentence in Pennington County Criminal File No. 22-2229. SR:1124-25. Relf filed a Notice of Appeal on October 18, 2023. SR:1129-30. This Court has subject matter jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT PLAINLY ERRED IN ALLOWING VIDEOTAPED WITNESS TESTIMONY AT TRIAL DESPITE THE WITNESS NOT BEING DECLARED UNAVAILABLE?

The circuit court allowed previously videotaped witness testimony at trial after the witness indicated he planned to leave the country prior to a rescheduled trial date.

Maroney v. Aman, 1997 S.D. 73, 565 N.W.2d 70

State v. Malcolm, 2023 S.D. 6, 985 N.W.2d 732

State v. McMillen, 2019 S.D. 40, 931 N.W.2d 725

State v. Richmond, 2019 S.D. 62, 935 N.W.2d 792

SDCL 19-19-804

STATEMENT OF THE CASE

On June 15, 2022, a Pennington County Grand Jury indicted Relf on these seven counts:

- Aggravated Assault against Timothy Birmeier, a Class 3 Felony, in violation of SDCL 22-18-1.1(5);

- Aggravated Assault against Brad Willits, a Class 3 Felony, in violation of SDCL 22-18-1.1(5);
- Aggravated Assault against James Croyle, a Class 3 Felony, in violation of SDCL 22-18-1.1(5);
- Aggravated Assault against Anthony Morgan, a Class 3 Felony, in violation of SDCL 22-18-1.1(5);
- Aggravated Assault against Robert Pollack, a Class 3 Felony, in violation of SDCL 22-18-1.1(5);
- Aggravated Assault against Hannah Covey, a Class 3 Felony, in violation of SDCL 22-18-1.1(5);
- Aggravated Assault against Matthew Leon, a Class 3 Felony, in violation of SDCL 22-18-1.1(5);

SR:31-32. The State also filed a Part 2 Information alleging Relf committed three prior felonies: a DUI 3rd in 2008, a Failure to Appear in 2016; and Receiving a Stolen Vehicle in 2016. SR:35-36.

Relf's three-day jury trial was initially set to commence on February 21, 2023. SR:71. That said, the Rapid City area was predicted to experience dangerous weather during the days scheduled for trial. WT:3, 7. Predictions included eight to ten inches of snow in Rapid City, with greater amounts elsewhere in the region. WT:7. Because of the combination of "heavy snow, winds that would lead to dangerous, impossible weather conditions . . ." and low temperatures,

the circuit court found good cause to continue the trial to a different date. WT:7.

But a victim, Robert Pollack, traveled from Aurora, Colorado, to testify at trial. WT:4. Pollack had already delayed travel to the Philippines for trial, and he expected to stay there for a long time. WT:4. The State thus requested Pollack's testimony be taken via a video deposition. WT:4. The State had "a fear that Mr. Pollack will after this date be moving to the Philippines and, thus, be unable to testify so the State ultimately requested the video deposition in front of the Court . . ." WT:4. Defense counsel confirmed that the State's recitation of the situation was accurate. WT:4. Relf was present during the deposition. WT:3. Defense counsel had some questions about the camera angles and zooming the camera out at times. WT:5-7. Neither defense counsel nor Relf voiced any objections to the taking of Pollack's testimony via video deposition. *See* WT:1-53. There was no stipulation or other documentation regarding this arrangement in the record. *See generally* SR:1-1236.

Pollack proceeded to testify as if he were in trial. WT:8-41. Relf had a chance to cross-examine Pollock. WT:30-38. He was also free to object, and his objections were effective. Exhibit 3 was kept out because of Relf's objections. *See* WT:24-27. Following Pollack's testimony, the parties agreed to move the trial to March 6 through March 8. WT:42-44. In the time between Pollack's testimony and trial,

there were no objections in the settled record from either Relf or defense counsel about how Pollack's testimony was taken. *See generally* SR:1-1236.

Relf's three-day jury trial commenced on March 6, 2023. JT1:1. Pollack's videotaped testimony was played as the State's second witness. JT1:31-64. Brad Willets also testified on the first day of trial, in addition to a few other witnesses. JT1:2; 99-135. Willets identified Relf as the defendant. JT1:113-14. On the second day of trial, the remaining victims, Matthew Leon, Anthony Morgan, James Croyle, Timothy Birmeier, and Hannah Covey, also testified. JT2: 129-71, 187-204, 223-41. Morgan testified that he identified Relf at the show-up the day of the incident. JT2:158. DOT worker Kayla Hernandez also testified and identified Relf as the defendant in the courtroom. JT2:177-78. In addition, Deputies Adam Mooney and Christian Raby testified along with two other witnesses. JT2:259-327. Finally, Investigator Jodi Glasgow testified on the third day of trial. JT3:353-73.

The State rested following Investigator Glasgow's testimony. JT3:375. Relf moved for a motion for a judgment of acquittal on all counts, which the circuit court denied. JT3:375. Relf chose not to testify, and the defense rested without presenting any witnesses. JT3:376, 385. The jury returned guilty verdicts on all seven counts of

Aggravated Assault. SR:243-44. Relf entered a guilty plea to the Part II Information roughly a week later. SR:1124.

Relf mailed a letter to the circuit court in May 2023, claiming Pollack committed perjury when he testified in February 2023 without a jury having been sworn in. SR:275-77. Relf further claimed that his trial counsel decided to not object to the proceedings without talking to Relf about the matter. SR:275-77. He argued the Confrontation Clause gave him the right to cross-examine a witness in front of a jury. SR:276. Finally, Relf stated he wanted his disagreement on record, and requested a new trial. SR:275-77

The circuit court sentenced Relf to identical forty-five-year sentences on all seven counts, with ten years on each count suspended. SR:1124-25. The court also applied 472 days of credit to each count for time served. SR:1124-25. The circuit court directed that all seven counts were to run concurrently. SR:1125.

STATEMENT OF FACTS

On June 6, 2022, Robert Pollack was camping in his RV in the Hart Ranch area, located near Rapid City. JT1:32-33. Pollack drove a white 2018 Mitsubishi Outlander SUV. JT1:33. Around 1:00 PM on June 6, Pollack was leaving the Hart Ranch campsite and approached a gate at the entrance. JT1:34. While leaving, Pollack noticed a “gunmetal gray” pickup truck was driving behind him. JT1:34-36. The truck, driven by Relf, eventually pulled up beside Pollack. JT1:36-37.

Relf asked Pollack if he had a body in the back of his SUV. JT1:36. Pollack denied this, replying that it was a sleeping bag. JT1:36. Relf then drove his vehicle ahead of Pollack's to the intersection, partially blocking the centerline on the road. JT1:37.

As Pollack sought to go around Relf's vehicle, he noticed Relf exposing a weapon at him. JT1:38. Pollack took off at a high rate of speed down the road, with Relf following him. JT1:39-40. While Pollack tried to turn his vehicle around, Relf exited his own truck, shouted "mother fucker" and fired a shot at Pollack's vehicle.¹ JT1:39-41. Pollack saw the weapon and quickly floored his vehicle, driving as fast as he could. JT1:41. As he fled, Pollack called 911 and drove toward the Public Safety Building at the School of Mines. JT1:42. Pollack informed law enforcement what happened. JT1:42. The interaction between Relf and Pollack was observed by Eric Kriz, who was in the parking lot at the Hart Ranch Golf Course. JT1:67-71.

Brad Willets of Tru-Form construction was part of a crew working on Highway 79 and City Springs Road. JT1:101. This job site was near the incident between Pollack and Relf. *See* JT1:101-02. Willets noticed Relf's truck had an Oklahoma University License plate. JT1:102. As Willets headed toward the job site, Relf passed him on a blind turn in an oncoming traffic lane. JT1:103-04.

¹ Pollack discovered the bullet hole roughly nine to ten days later. JT1:50.

After shooting towards Pollack's vehicle, Relf drove into the construction zone. See JT1:109-11. Anthony Morgan and James Croyle were sitting in their truck at the construction site on Highway 79 heading towards Hart Ranch, waiting for the crews ahead of them to finish so they could do their jobs. JT2:151. While Morgan and Croyle were sitting in their vehicle, they noticed Relf driving into the construction zone at a high rate of speed before it stopped quickly behind theirs. JT2:152. Morgan noticed the truck had an Oklahoma license plate. JT2:152.

Right after hitting the brakes, Relf stepped out of his truck with a pistol. JT2:153. Morgan told Croyle about the weapon, and Croyle tried to drive away, but Relf had gotten up to their vehicle. JT2:153-54. Relf came to the passenger side of the truck, where Morgan was seated. JT2:155. He grabbed Morgan's shirt and stuck his firearm into Morgan's face, pointing it directly at him, with his finger on the trigger. JT2:155-56. Relf yelled at Morgan "Did you do it? Did you do it?" JT2:155. Morgan and Croyle denied even knowing Relf. JT2:155.

After roughly a minute, Relf let go of Morgan and walked back towards his vehicle. JT2:159. Morgan and Croyle immediately drove off into the staging area. JT2:159. Willets arrived at the job site for a meeting with Tim Birmeier, Matthew Leon, Brenda Flottmeyer, and Kayla Hernandez. JT1:106. As the others were standing around in the construction zone, Morgan, and Coyle drove by and told Willets and the

others that someone pulled a gun on them, and then drove off.

JT1:106; JT2:160.

After Morgan and Coyle drove through, Relf's black pickup truck followed them into the construction area. JT1:109, JT2:135. As he drove, Relf hit multiple construction cones that were lined up on the road. JT2:176-77. Relf then pulled a gun and pointed it at Tim Birmeier, Willets, and Leon. JT2:135. Relf said that he was "pissed." JT2:135. Leon tried to get away, moving around the tailgate of his pickup. JT2:137. Relf pulled his pickup forward and again pointed his weapon at Leon. JT2:137. DOT Supervisor Hannah Covey was also in the area, and tried to hunker down as best she could in her truck as Relf was in the area. JT2:248-49. Willits had taken cover behind Covey's truck, putting Covey in between Relf and Willits. JT2:249-50. A gunshot then rang out. JT2:137. After firing the gun, Relf drove off south on Highway 79. JT2:138.

Pennington County Sheriff's Deputy Adam Mooney was on duty that day. JT2:259-60. He received two calls for service in the Hart Ranch Area. JT2:260. Deputy Mooney spoke to some of the construction workers when he arrived on scene and learned about Relf's vehicle: a dark-colored Chevy with an Oklahoma University license plate on the front. JT2:261. Deputy Mooney received another call from individuals who had been shot at; they described the same vehicle as

the first call and described Relf as a Native American or Hispanic male with a white t-shirt. JT2:263.

Deputy Mooney followed the road south out of the construction site and eventually ran into Relf. JT2:268-70. Relf and his vehicle matched the descriptions given to Deputy Mooney. JT2:270-71.

Deputy Mooney approached Relf with a rifle drawn and got Relf onto the ground. JT2:272. While he was on the ground, Relf began talking, first denying he had a weapon, then saying he only got a gun because the construction workers had a gun. JT2:273. After more law enforcement officers arrived, Relf was arrested and taken into custody. JT2:273-74.

Once Relf was secured, Deputy Mooney searched Relf's truck and found a Glock 9mm pistol in the center console of the truck. JT2:274. Deputy Mooney found that there were thirteen total rounds in the pistol. JT2:274. He also determined that the pistol could hold 16 rounds total: one in the chamber and fifteen in the magazine. JT2:274. Deputy Mooney further saw a coffee mug filled with beer in the center console of the truck as well as shooters of liquor. JT2:274-75. Deputy Mooney collected Relf's pistol and put it into evidence. JT2:279.

After law enforcement arrested Relf, they went back to the construction site and conducted a show-up identification. JT2:283. Deputy Mooney confirmed that he arrested the right person during the show-up. JT2:294-95. Relf was taken into custody and later interviewed by Investigator Glasgow and Officer Jayson Herra. JT2:295.

Law enforcement investigated the crime, including interviewing potential victims and looking over the crime scene at the construction zone. JT2:311-13. While walking the scene, one of the construction employees informed Pennington County Sherri's Deputy Christian Raby that he found a shell casing, which Deputy Raby collected and placed into evidence. JT2:315-18. As part of the Investigation, Sgt. David Olson confirmed that a bullet struck Pollack's vehicle and determined the bullet would've been between 4-9 mm in caliber. JT1:85-91.

The bullet casing and the 9mm pistol were sent to Pierre to the Division of Criminal Investigation (DCI) by Investigator Glasgow. JT3:362-64. The report generated by the DCI determined the shell casing from the construction zone was fired by Relf's 9mm pistol. JT3:364. The DCI also found Relf's DNA on the pistol. JT3:365.

ARGUMENT

THE TRIAL COURT DID NOT PLAINLY ERR.

A. Introduction.

Relf's sole issue on appeal is whether "the circuit court's decision to allow videotaped testimony of a witness [Pollack] that had not been declared unavailable, constitutes reversible error." AB:6. Relf does not allege any error with the testimony of the other witnesses, nor does he place the sufficiency of the State's evidence at issue. See AB:6-13. The jury found Relf guilty of seven counts of Aggravated Assault. SR:243-

44. Only one of those counts, Count 5, is affected by Pollack's testimony. The rest of the victims testified, as did several of the responding law enforcement officers and other witnesses. Thus, at the outset, the State requests that this Court affirm the jury's guilty verdicts on Relf's other six counts of Aggravated Assault.

Relf did not object to Pollack's video deposition at the time it occurred. See WT:1-53. Relf also did not object to the videotaped testimony being played for the jury. JT1:29-31. "[F]ailure to object at trial constitute[s] waiver of this issue." *State v. Boston*, 2003 S.D. 71, ¶ 27, 665 N.W.2d 100, 109 (citing *State v. Andrews*, 2001 S.D. 31, ¶ 19, 623 N.W.2d 78, 83). "A criminal trial is not a game where defendant's counsel may lie in the weeds and hold back motions or objections that go to the very heart of the prosecution." *State v. Lachowitzer*, 314 N.W.2d 307, 309 (S.D. 1982) (cleaned up). "The introduction of evidence to support any criminal charge can and must be objected to in order to preserve the record." *State v. Williams*, 297 N.W.2d 491, 493 (S.D. 1980) (further citations omitted).

Accordingly, Relf asks this Court to review this case for plain error only. AB:6.

B. Standard of Review.

The State agrees with Relf that any review of his issue of witness testimony is reviewed under the plain error standard. AB:6-7;

State v. Malcolm, 2023 S.D. 6, ¶ 35, 985 N.W.2d 732, 741. “Where an issue has not been preserved by objection at trial, our review is limited to whether the trial court committed plain error.” *State v. Stevens*, 2024 S.D. 3, ¶ 14, 2 N.W.3d 372, 377 (further citation omitted).

“In order to establish plain error, an appellant must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Malcolm*, 2023 S.D. 6, ¶ 36, 985 N.W.2d at 741 (cleaned up) (further citation omitted). Further, the defendant must show that the error was prejudicial. *Id.* “Not every error that occurs during trial constitutes plain error;” it must be applied “cautiously and only in exceptional circumstances.” *State v. McMillen*, 2019 S.D. 40, ¶ 25, 931 N.W.2d 725, 733 (cleaned up).

C. *It was not Plain Error for the Circuit Court to Allow Pollack’s Videotaped Testimony to be Played for the Jury.*

1. *Pollack’s Testimony was Deposition Testimony Agreed to by the Parties and the Circuit Court.*

Relf asks this Court to consider his argument in the context of his right to confront a witness against him. *See* AB:7-8. It is true SDCL 19-19-804 provides exceptions to the hearsay rule when the declarant is unavailable as a witness. The relevant part of the statute reads:

(b) Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former testimony. Testimony that:

(A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one....

SDCL 19-19-804. A witness's "unavailability can be premised on mental limitations, as well as physical absence." *State v. Toohey*, 2012 S.D. 51, ¶ 14, 816 N.W.2d 120, 128.

A defendant is also "constitutionally guaranteed the right to confront the witnesses against him" through the Confrontation Clause of the Sixth Amendment. *Toohey*, 2012 S.D. 51, ¶¶ 12-13, 816 N.W.2d at 127. "A violation [of the Confrontation Clause] occurs when the witness making the testimonial statements is both unavailable and has not previously been subject to cross-examination." *State v. Richmond*, 2019 S.D. 62, ¶ 30, 935 N.W.2d 792, 801 (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004)); *State v. Rodriguez*, 2020 S.D. 68, ¶ 46, 952 N.W.2d 244, 257. The rights afforded to a defendant by the Confrontation Clause is "generally satisfied when the defense is given a full and fair opportunity to probe and expose a witness'[s] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness'[s] testimony." *State v. Podzimek*, 2019 S.D. 43, ¶ 13, 932 N.W.2d 141, 146.

Relf's ask is off-base, though, because he was not denied his statutory or Constitutional rights. Relf's trial was originally scheduled to begin on February 21, 2023. But the trial was continued because of

the dangerous weather predicted for the Rapid City area at the time. WT:3, 7. The State informed Relf and the circuit court that one of their witnesses, Robert Pollack, a victim in the case, traveled from Aurora, Colorado, to testify. WT:4. In addition, the State believed Pollack would move to the Philippines for a long time after the February trial date. WT:4. Thus the State requested a video deposition of Pollack's testimony. WT:4. The prosecutor said he spoke to defense counsel and the circuit court about the situation. WT:4. Defense counsel confirmed with the circuit court the State's rendition of the situation was correct. WT:4-5. Defense counsel did not object to taking Pollack's testimony via a video deposition. *See generally* WT:1-53.

At trial, the circuit court introduced Pollack's testimony by telling the jury they would hear testimony from a witness who "by agreement of the parties, provided his testimony in a recorded proceeding prior to today." JT1:29. The circuit court instructed the jury that they could decide how much weight to give Pollack's testimony and that the jury "may consider the testimony of this witness as you would any witness as if he were in the courtroom today testifying." JT1:29. The videotaped testimony was then played for the jury. JT1:30-31. At no point during the trial did defense counsel object to Pollack's videotaped testimony being played. JT1:29-64.

Relf argues that it was "confusing" the parties had an understanding (not all of which was documented in the settled record)

that Pollack's testimony would be considered his trial testimony.

AB:12. The settled record appears to show that defense counsel and the State came to an agreement to allow Pollack to testify before the trial because a weather event would delay the trial to a date where Pollack would likely be unavailable. WT:1-8; SR:153-54. The circuit court found good cause to continue the trial because of inclement weather. WT:1-8; SR:153-54. Any further stipulation or other information about Pollock's videotaped testimony that the State and defense counsel agreed to is absent from the record. "Where the trial court record is incomplete and not adequate to the task, [this Court's] presumption is that the circuit court acted properly." *Graff v. Children's Care Hosp. & Sch.*, 2020 S.D. 26, ¶ 16, 943 N.W.2d 484, 489.

Because this testimony was taken by deposition with the consent of the parties and the approval of the trial court, there was no Confrontation Clause violation here. See WT:3-5. Relf was able to cross-examine Pollack face-to-face. WT:30-38. He was given a "full and fair opportunity" to ask Pollack questions and place his credibility in doubt in front of the jury. *Podzimek*, 2019 S.D. 43, ¶ 13, 932 N.W.2d at 146; see also *State v. Little Long*, 2021 S.D. 38, ¶ 47, 962 N.W.2d 237, 254 (stating that the Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might

wish.”) (further citations omitted). For purposes of the Confrontation Clause, Pollack was available through the parties’ agreement.

Relf claims in his brief that he was unaware of the agreement between the parties to record Pollack’s testimony. AB:8; SR:275. But Relf was present when Pollack’s testimony was recorded; Pollack identified him. WT:1, 13-14. Relf was also present at trial when the videotaped testimony was played and said nothing or otherwise objected. JT1:28-32. Relf only made an issue of this arrangement after the fact, two months after he was found guilty. SR:275. Throughout the pendency of his case, Relf also contacted the circuit court directly when he felt there was a problem. SR:72-81, 152-59, 258-59.

Simply put, the State, defense counsel, and the circuit court agreed to present Pollack’s testimony in this way. *See* WT:3-8. The State raised its concern Pollack would not be available after the scheduled February 2023 trial dates. The circuit court found good cause to continue the trial because of dangerous weather and explained its reasoning. Even if the circuit court did not make a specific finding of Pollack’s unavailability, the State showed that Pollack would likely be unavailable for any future trial date. Under these circumstances, the circuit court used its discretion and allowed Pollack to testify via video deposition. *See Maroney v. Aman*, 1997 S.D. 73, ¶ 27, 565 N.W.2d 70, 76 (stating the circuit court has discretion to admit or deny deposition testimony).

This alleged error by the circuit court in failing to specifically declare that Pollack was an unavailable witness under SDCL 19-19-804 does not rise to the “exceptional” circumstances required for this Court to invoke plain error review. *McMillen*, 2019 S.D. 40, ¶ 25, 931 N.W.2d at 733 (cleaned up).

2. Relf Cannot Show Prejudice.

Even if the circuit court erred in failing to make a specific finding that Pollack would be unavailable for the scheduled trial date, the admission of Pollack’s testimony does not constitute plain error. Relf still must show a “reasonable probability that, but for the error, the result of the proceeding would have been different.” *Stevens*, 2024 S.D. 3, ¶ 14, 2 N.W.3d at 377 (cleaned up).

Other witnesses testified to the interaction between Pollack and Relf. Willets saw the interaction between Relf and Pollack from a distance. JT1:102-03. He testified that as Pollack’s vehicle pulled its U-Turn and drove back towards Relf, he heard what he thought was a gunshot. JT1:103-04. Eric Kriz, a witness who was at the Hart Ranch Golf Course the day of the incident, testified that he saw Relf’s vehicle chasing Pollock’s, and that Relf was screaming profanities. JT1:64-69. Kriz also heard the gunshot. JT1:70-71. Further, Sgt. Olson also testified that he examined Pollack’s vehicle from that day; he concluded that Pollack’s vehicle had likely been shot with a bullet ranging from 4 to 9 mm in caliber. JT1:86-92.

And Pollack was one of the seven victims who testified at Relf's trial. The jury found Relf guilty of all seven counts of aggravated assault. Other witnesses, including Willets and Croyle, identified Relf, both at the scene on the day of the incident and in the courtroom during trial. JT1:114; JT2:192-93, 197. Leon testified that Relf pointed his pistol at him, Tim Birmeier, and Willets. JT2:136-37. In Leon's case, Relf was only ten to fifteen feet away from him. JT2:137. Morgan testified that he and Croyle were in his truck when Relf stopped behind them. JT2:152-55. Relf grabbed Morgan's shirt and pointed the gun directly at him, less than a foot from his face. JT2:155-56. Testimony from Covey and Willets showed that Covey was in between Relf and Willets, as Relf pointed the gun towards Willets. JT1:109-11, JT2:249-50.

Along with the victims, Deputy Mooney, who responded to the 911 calls that day, testified. He testified that he found and arrested Relf; his vehicle and appearance tracked with witness descriptions. JT2:270-71, 277. Deputy Mooney found the black Glock 9mm pistol in the center console of Relf's truck, which had thirteen rounds out of a possible sixteen that could have been in the gun. JT2:271-72, 274. While being arrested, Relf told Deputy Mooney that a "construction worker had a gun so then he got his gun." JT2:273. Deputy Mooney also brought Relf back to the construction site and performed a show-up examination with the construction workers; he confirmed he had the

right person. JT2:293-95. Investigator Glasgow confirmed at trial that Relf's DNA was on his Glock 9mm pistol and that the bullet fired in the construction zone was fired from Relf's pistol. JT3:362-65.

Relf had the ability to cross-examine Pollack. The jury got to view Pollack's expressions and testimony because of its video form. Defense counsel objected at various points in Pollack's testimony, including to keep State's Exhibit 3 from being admitted. WT:24-27. And at the very least, Relf would have still been convicted of six out of the seven counts of Aggravated Assault that did not involve Pollack. Because Relf's sentences for each count was the same, a concurrent sentence of forty-five years with ten years suspended, Relf's sentence also would not have changed. Given the videotaped deposition testimony was through an agreement of the circuit court and the parties as discussed above, Relf also cannot show the circuit court's decision to show the video to the jury "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Stevens*, 2024 S.D. 3, ¶ 14, 2 N.W.3d at 377 (cleaned up).

Simply put, the circuit court did not err when it did not specifically declare Pollack unavailable. His video deposition was properly taken and admitted and is not the type of "exceptional circumstance" that constitutes reversible error. *McMillen*, 2019 S.D. 40, ¶ 25, 931 N.W.2d at 733 (cleaned up).

CONCLUSION

The State respectfully requests this Court affirm Relf's entire Judgment of Conviction and all 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 4,385 words.

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

Dated this 20th day of September 2024.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of September 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Carl George Relf* was served through Odyssey File and Serve upon Ilisja Duffy at ilisja@duffylaw.us.

/s/ Stephen G. Gemar
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