

IN THE SUPREME COURT

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

OF THE

FEB 27 2025

STATE OF SOUTH DAKOTA

*Shirley A. Johnson-Leged*  
Clerk

\* \* \* \*

STATE OF SOUTH DAKOTA,  
Plaintiff and Appellee,

vs.

RICHARD SPRY,  
Defendant and Appellant.

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STATE OF SOUTH DAKOTA,  
Plaintiff and Appellee,

vs.

SUSAN SPRY,  
Defendant and Appellant.

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Counsel for Appellants in the above referenced matters served and filed motions for consolidation of appeals Nos. 30787 and 30788. The Court considered the motions and being fully advised in the premises, it is now

ORDERED that the motions be granted and that appeals Nos. 30787 and 30788 be consolidated for the purposes of briefing and submission to the Court.

IT IS FURTHER ORDERED that appellants' brief is due for service and filing on March 18, 2025.

DATED at Pierre, South Dakota, this 27th day of February, 2025.

BY THE COURT:

ATTEST:

*[Signature]*  
Clerk of the Supreme Court  
(SEAL)

*[Signature]*  
Steven R. Jensen, Chief Justice

PARTICIPATING: Chief Justice Steven R. Jensen and Justices Janine M. Kern,  
Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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Appeal No. 30787 / 30788

STATE OF SOUTH DAKOTA

APPELLEE,

VS.

RICHARD SPRY AND SUSAN SPRY,

APPELLANTS

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PETITION FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT  
BON HOMME COUNTY, SOUTH DAKOTA

THE HONORABLE CHERYLE GERING  
CIRCUIT COURT JUDGE

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**APPELLANTS' BRIEF**

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Notice of Appeal filed on August 12, 2024.

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## **PRELIMINARY STATEMENT**

Because there are two underlying circuit court files with different settled records, when those page numbers differ, references to the Settled Record will be cited as “SR” followed by the page number to *State v. Susan Spry* (04CRI22-27) and then the page number to *State v. Richard Spry* (04CRI22-28). When only one case is referenced,

The transcript of the Jury Trial held on April 8, 9 and 10, is cited as JT, followed by a page number or numbers and, when appropriate, line number(s).

Because of the familial relationships of the defendants and various witnesses, the defendants, Susan and Richard Spry, will be referred to by their first names. Richard’s uncle, Richard Hermanek, whose property was at issue, will be referred to by his last name. Other parties with last names similar or identical to Richard Hermanek and the Sprys will be referred to by their first names.

## **JURISDICTIONAL STATEMENT**

Appellants Richard and Susan Spry appeal the Judgments of Conviction; filed on July 16, 2024 (SR 884 / 876); and the Amended Judgments of Conviction, filed on July 26, 2024 (SR 896 / 887); by the Honorable Cheryle Gering, Circuit Court Judge, First Judicial Circuit, adjudicating Susan Spry guilty of one count of Grand Theft, one count of Conspiracy to Commit Grand Theft, and one count of misdemeanor Theft by



Exploitation. Ms. Spry timely filed a Notice of Appeal of her conviction and sentence on August 12, 2024. SR 906 / 897.

This Court has jurisdiction over the appeal pursuant to SDCL § 23A-32-2.

### **STATEMENT OF LEGAL ISSUES**

- I. WHETHER THE CIRCUIT COURT ERRED IN GIVING A JURY INSTRUCTION ON CAPACITY TO CONTRACT AND REFUSING DEFENDANTS' PROPOSED INSTRUCTION ON TESTAMENTARY CAPACITY

*In re Estate of Pringle*, 2008 S.D. 38, 751 N.W.2d 277  
*Johnson v. Markve*, 2022 S.D. 57, 980 N.W.2d 662  
*State v. Webster*, 2001 S.D. 141, 637 N.W.2d 392

- II. WHETHER THE CIRCUIT COURT ERRED IN PROHIBITING TESTIMONY REGARDING RICHARD HERMANEK'S STATEMENTS WHEN SIGNING THE JOINT ACCOUNT AGREEMENT.

SDCL § 19-19-803(3)  
SDCL § 19-19-804(b)(5)  
*State v. Charger*, 2000 S.D. 70, 611 N.W.2d 221

- III. WHETHER THE CIRCUIT COURT ERRONEOUSLY INSTRUCTED THE JURY AS TO THE STATE'S BURDEN OF PROOF REGARDING HERMANEK'S INTENT.

SDCL § 22-30A-1  
SDCL § 23A-22-3  
*State v. Birdsheed*, 2015 S.D. 77, 871 N.W.2d 62

### **STATEMENT OF THE CASE**

On May 24, 2022, in Bon Homme County, the State charged Appellant Susan Spry by indictment with: count 1, Grand Theft; count 2, Conspiracy to Commit Grand Theft; counts 3 through 5, Grand Theft by Exploitation; and

count 7, misdemeanor Theft by Exploitation. SR 1. The State also charged Susan's husband, Richard Spry, in a contemporaneous indictment. SR 1.

A jury trial commenced on April 8, 2024, and concluded on April 10. *See generally JT*. The Honorable Cheryle Gering presided. *Id.*

At the conclusion of the State's case and after the State's rebuttal evidence, Susan made a motion for judgment of acquittal, which the circuit court granted in part, acquitting Susan of counts 3 and 4 of the indictment. JT 287-90 and 454-55; SR 881. The circuit court denied the motion for judgment of acquittal with regard to Richard. JT 287-90, 454-55.

On April 10, 2024, the petit jury found Susan guilty of counts 1, 2, and 7. The jury acquitted Susan on count 5. SR 312; 881, 884, 896. The petit jury found Richard guilty of counts 1, 2, and 6. SR 309.

On July 9, 2024, with respect to Susan, the circuit court imposed a sentence of five years in the penitentiary on count 1, which was suspended, and a thirty-thousand dollar fine; five years on count 2, which was suspended, and a ten thousand dollar fine; and a two-thousand dollar fine on count 7. SR 896. The circuit court ordered that the suspended penitentiary sentences were to run concurrently, and placed Susan on probation. *Id.* The circuit court ordered Susan to pay a total of \$170,500 in restitution as well as court costs and costs of prosecution. *Id.*

With respect to Richard, the circuit court imposed a sentence of five years in the penitentiary on count 1, which was suspended, and a thirty-

thousand dollar fine; five years on count 2, which was suspended, and a ten thousand dollar fine; and a two-thousand dollar fine on count 6. SR 887. The circuit court ordered that the suspended penitentiary sentences were to run concurrently, and placed Richard on probation. *Id.* The circuit court ordered Richard to pay a total of \$170,000 in restitution as well as court costs and costs of prosecution. *Id.*

### STATEMENT OF FACTS

Richard Hermanek was a Korean War veteran and a retired employee of the South Dakota Highway Department, residing in Bon Homme County. JT at 295, 386. In 2012, he suffered a stroke, which caused aphasia and significantly impacted his ability to communicate, though his cognitive abilities remained intact. JT at 72-73, 136, 387, 393-94. This stroke marked a turning point in his life. After his home was burglarized while he was in the hospital, Hermanek decided to move in with his sister, Milada Spry, in a house owned by Milada's son Richard and his wife Susan, who are the appellants herein. JT at 81, 140.

Richard Spry is Hermanek's nephew and namesake, and the two shared a close relationship. For years, the Spry family—Richard, Susan, and their sons—regularly traveled from Omaha and, later, Texas, to Tyndall, South Dakota, to visit Hermanek and Milada. JT at 292-93. These visits were marked by shared holidays, trips, and time spent at Hermanek's home in Running Water, solidifying their familial bond. JT at 292-93; 296-97.

Hermanek developed a similarly close relationship with the Sprys' son, Brenton. *Id.*

In 2018, after Milada broke her hip and entered a nursing home, Hermanek moved into the Good Samaritan North Point Apartments in Tyndall. JT at 76, 303-04, 395.

Before he moved, Hermanek obtained the services of attorney Lisa Rothschadl, who had known Hermanek for years, for purposes of preparing a Power of Attorney naming Richard and Susan as his Attorneys in Fact. JT at 211-12. Rothschadl discussed the Power of Attorney's scope with Hermanek, who willingly executed the document. JT at 219. Hermanek gave Rothschadl no indication that he was acting under duress or that he did not understand the powers that the Power of Attorney conveyed or the consequences of signing it. JT at 217-219. The Power of Attorney was entered into evidence as exhibit 12. JT at 212; SR 316 / 312.

After moving, Hermanek experienced confusion and distress in the new environment. JT at 162-63. Following Milada's death, Hermanek moved into her private room at the nursing home to address difficulties he was experiencing with his roommate. JT at 183; 404. Decisions regarding Hermanek's care were made by Richard and, primarily, Susan, who were designated as his attorneys-in-fact under Power of Attorney prepared by Rothschadl. JT 211-12; *generally* 403 *et seq.*

During Hermanek's time in the nursing home, the Sprys managed his financial affairs, including paying for his care, maintaining his properties, and selling his unoccupied home in Running Water. JT at 395 *et seq.* The house had been vacant for six years, required extensive preparation for sale, and contained personal belongings that the Sprys and others worked to sort and sell. JT at 307-09. Proceeds from the sale were used to fund Hermanek's care. JT at 422, 429, 432.

While acting as Hermanek's Attorney-in-Fact, the Sprys—particularly Susan—were very attentive to Hermanek's needs. JT at 183. The Sprys used Hermanek's funds to pay legitimate expenses related to his care and estate management. JT at 390 *et seq.*<sup>1</sup> These included reimbursement for travel expenses incurred during trips to South Dakota and compensation for their work, including the form of a customary maintenance fee authorized under the POA. JT at 216; 251-52; 390 *et seq.* Hermanek passed away on March 14, 2029. JT at 252.

The State alleged that certain transactions carried out by Richard and Susan constituted theft. SR 1. In particular, counts 1 and 2 of the indictment concerned the creation and funding of a Mutual of Omaha bank account. SR 1. Susan was dissatisfied with the service of the original bank that held

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<sup>1</sup> Count 5 of the indictment against Susan alleged that some of the payments made to the Sprys for expenses associated with preparing the Running Water property for sale were unlawful. The jury acquitted Susan of that count. SR 312, 881.

Hermanek's money, Security State Bank in Tyndall. JT at 414-15. Susan and Richard banked at Mutual of Omaha, where they maintained personal and business accounts. JT at 416. They opened an account there to manage Hermanek's funds pursuant to the POA. JT at 416-17; SR 588 / 584. Susan and Richard did not expect Hermanek to pass away before using the remainder of his funds for his care. JT at 417-18. Susan did explain to Hermanek that she was moving his funds to a joint account at Mutual of Omaha. JT at 418-19. Susan and Richard's son, Brenton, and their employee, Loveada Way, visited Hermanek at the nursing home, where Way explained the terms of the account—including the right of survivorship—to Hermanek, who agreed to sign the paperwork. SR 588 / 584; JT at 340-41, 419. Most of the funds from the Security Bank account and the proceeds from the sale of Hermanek's Running Water home were deposited into the Mutual of Omaha account. JT at 432. The funds in the Mutual of Omaha account were used to pay for Hermanek's care. JT at 422, 429,

After Hermanek's death, Susan notified the banks holding Hermanek's funds. JT at 442. Based upon her conversations with the banks, she closed the accounts, which resulted in the money in the joint Mutual of Omaha account reverting to the possession of Richard and Susan pursuant to the right of survivorship attached to that account. JT at 422. Richard and Susan's conduct concerning this Mutual of Omaha account is the basis for counts 1 and 2 of their respective indictments. SR 1.

## ARGUMENT

Richard and Susan Spry appeal the judgment and sentences with respect to counts 1 and 2 of the indictment. Those counts concerned the joint Mutual of Omaha bank account. According to South Dakota law, the money in that account belonged to Richard and Susan after Hermanek passed, unless another party can rebut the presumption that Hermanek desired that result. SDCL § 29A-6-104. Due to the circuit court's rulings on certain legal issues, Richard and Susan's ability to defend themselves against the allegations in counts 1 and 2 was seriously compromised.

### **I. WHETHER THE CIRCUIT COURT ERRED IN GIVING A JURY INSTRUCTION ON CAPACITY TO CONTRACT AND REFUSING DEFENDANTS' PROPOSED INSTRUCTION ON TESTAMENTARY CAPACITY.**

This Court's reviews a circuit court's refusal to give a proposed jury instruction under an abuse of discretion standard:

We review a trial court's refusal of a proposed instruction under an abuse of discretion standard. The trial court has broad discretion in instructing the jury. Jury instructions are satisfactory when, considered as a whole, they properly state the applicable law and inform the jury. Error in declining to apply a proposed instruction is reversible only if it is prejudicial, and the defendant has the burden of proving any prejudice. Further, to reverse a conviction for failure to give a proposed instruction, the defendant must show that the jury would have returned a different verdict if the proposed instruction was given. Absent such a showing, the trial court will not be reversed.

*State v. Webster*, 2001 S.D. 141, ¶ 7; 637 N.W.2d 392, 394 (internal citations omitted).

At trial, the State presented evidence, including testimony from nursing home staff and medical records, arguing that Hermanek lacked the

capacity to understand the Mutual of Omaha joint account agreement he shared with Richard and Susan. See JT at 52 et seq., 155 et seq., 185 et seq., 229 et seq., 433 et seq.; SR 390-450 / 386-446. In response, Richard and Susan presented testimony from friends of Hermanek, including Loveada Way, who was present when Hermanek signed the agreement, attesting to his capacity and intent. See JT at 333 et seq.

Richard and Susan submitted Proposed Jury Instruction No. 5, which outlined the standard for testamentary capacity— the ability to make decisions about property distribution after one’s death. See SR 238 / 235; JT at 468. Instead, the circuit court provided Instruction No. 24, which applied the legal standard for capacity to enter into a contract. SR 332 / 328.

The distinction between these instructions is crucial. The legal capacity to make decisions about property distribution after death differs from the capacity required to enter into a contract. *See Johnson v. Markve*, 2022 S.D. 57, ¶ 34, 980 N.W.2d 662, 673 (“[T]he capacity to contract and testamentary capacity are different.”). The proposed instruction correctly stated:

[I]t is not necessary that a person desiring to make a will have the capacity to make contracts and do business. One may lack competency, such that in the view of medical science he is not of sound mind and memory, yet still retains the requisite competency to make decisions about the distribution of his property after his death.



SR 238. This standard is well established. *In re Estate of Pringle*, 2008 S.D. 38, 20, 751 N.W.2d 277, 284. A document need not be formally classified as a "will" to be testamentary in nature:

To meet the requirement of testamentary intent, the decedent must have intended the document to be a revocable disposition of property effective upon his death and that intent must be apparent from the writing and from the surrounding circumstances. The testamentary character is satisfied if the document makes a disposition of property after death or appoints an executor. It is not necessary that technical words be used to make a disposition of property.

*Matter of Nelson's Estate*, 274 N.W.2d 584, 587 (S.D. 1978). This Court has previously held that lifetime real estate gifts "are testamentary in nature when the record indicates that they were executed with a mind toward disposition of the real property following [the testator's] death." *Johnson*, 2022 S.D. 57, ¶ 32. While this case concerns a financial account rather than real estate, the principle remains relevant given the substantial sum involved, which included proceeds from the sale of Hermanek's home.

The circuit court erroneously characterized the joint account agreement as solely a contract, thereby excluding the possibility of it also being a testamentary instrument. See JT 469-70; SR 332 / 328 at No. 24 ("In this case, the Mutual of Omaha bank account form signed by Richard Hermanek was a contract."). However, the surrounding circumstances suggest otherwise. Both Susan and Loveada Way explained to Hermanek that the money in the account would pass to Richard and Susan upon his death. See JT at 340-41, 418. According to Way, Hermanek verbally and

physically affirmed his intent that "Susie" should receive the funds upon his passing. See JT at 382-83. Unlike the "personal instructions" at issue in *Nelson's Estate*, here, the agreement and the circumstances surrounding it demonstrate its testamentary character since it disposed of the Mutual of Omaha account's funds upon Hermanek's death. See *Nelson's Estate*, 274 N.W.2d at 487.

The circuit court's refusal to give the proposed instruction was prejudicial to Richard and Susan. By labeling the account agreement a "contract" and refusing to provide an instruction on testamentary capacity, the court prevented the jury from considering whether Hermanek intended the funds to pass to Richard and Susan upon his death and whether he had the testamentary capacity to make that decision. This error compromised the defense's ability to present a critical aspect of their case, warranting reversal on counts 1 and 2.

## **II. WHETHER THE CIRCUIT COURT ERRED IN PROHIBITING TESTIMONY REGARDING RICHARD HERMANEK'S STATEMENTS WHEN SIGNING THE JOINT ACCOUNT AGREEMENT.**

"The circuit court has broad discretion in making evidentiary rulings." *State v. Charger*, 2000 S.D. 70, ¶ 17, 611 N.W.2d 221, 225. This Court presumes that evidentiary rulings are correct and reviews the rulings under an abuse of discretion standard, applying the test of whether the Court believes that "a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion." *Id.*

Before trial, the defense served notice of its intent to introduce testimony regarding statements made by Hermanek when he signed the joint account agreement (Exhibit 14), as evidence of his intent. See SR 588 / 584 et seq.; SR 146 / 144. Alternatively, the defense argued the statements were admissible under SDCL § 19-19-804(b)(5) (decedent's statements) and § 807 (residual exception). In a subsequent filing and at trial, defense counsel also cited SDCL § 19-19-803(3) (then-existing mental, emotional, or physical condition) as grounds for admissibility. See SR 234 / 231; JT at 341.

The defense called Loveada Way, an employee of Richard and Susan, who met with Brenton and Hermanek at the nursing home and provided him with the Mutual of Omaha joint account agreement. See JT at 338. Way testified that she explained to Hermanek that this was the same document Susan had discussed with him and that any remaining funds in the account would pass to Richard and Susan upon his death. See JT at 340-41. When the defense asked about Hermanek's reaction, the circuit court prohibited Way from testifying regarding his statements, ruling they were "offered for the truth of the matter asserted." See JT at 102, 343-44, 377. However, the court permitted her to testify that Hermanek nodded in agreement and gestured for the pen to sign. See JT at 343-44, 377.

Outside the jury's presence, the defense called Way to testify in order to provide an offer of proof. See JT at 381-84. She testified that after

explaining the agreement, Hermanek verbally responded “mmm-hmm” while nodding and referred to Susan, saying “Susie.” See JT at 382-83.

**1. Verbal Conduct is not hearsay.**

This Court has recognized that verbal conduct is not necessarily hearsay:

Not all out-of-court statements are hearsay. The hearsay rule only prohibits admission of evidence of out-of-court statements offered to prove the truth of the out-of-court declaration. Defendant overlooks the well-established ‘verbal acts’ rule. Utterances made contemporaneously with or immediately preparatory to an act which is material to the litigation that tends to explain, illustrate or show the object or motive of an equivocal act and which are offered irrespective of the truth of any assertion they contain, are not hearsay and are admissible.

*Charger*, 2000 S.D. 70 at ¶ 26 (quoting *State v. Kelley*, 953 S.W.2d 73, 85 (Mo.App.1997)).

Here, Hermanek’s verbal conduct—saying “mmm-hmm” and “Susie”—was made contemporaneously with Way’s explanation of the agreement and immediately preparatory to signing it. This verbal conduct, in context, illustrated his intent and voluntary assent to the agreement’s terms.

The circuit court’s ruling also rested on a factual error. The court incorrectly asserted that Way “did not discuss the document with [Hermanek], other than this is what Susan Spry talked with him about.” JT at 379-80. In fact, Way testified that she explicitly told Hermanek that, if he signed the account paperwork, then “if anything should happen to him, that . . . the money would be Susan and Richard’s.” JT at 341.

If the circuit court considered the document equivocal regarding survivorship rights, then under the verbal acts rule, Hermanek's statements were admissible to explain or illustrate his intent. The jury should have been allowed to hear his statements to properly assess his intent when signing the document.

**2. SDCL § 19-19-803(3).**

Even if considered assertions of truth, Hermanek's statements were admissible under Rule 803(3), which allows for admission of "a statement of the declarant's then-existing state of mind (such as motive, intent or plan) . . ." Way's testimony demonstrated that Hermanek's statements reflected his then-existing intent—his motive for signing the agreement. The statements were not offered to prove Hermanek's memory or belief at the time, but rather his intent in signing the document, which is explicitly permitted under Rule 803(3).

Unlike Rules 804(5) and 807, which require additional findings regarding whether the decedent made the statement, or that sufficient guarantees of trustworthiness support the Statement, respectively, Rule 803(3) has no such requirement. The circuit court did not find that Hermanek's statements were not reflective of his present state of mind, were not made naturally, or were made under suspicious circumstances. *Johnson v. Skelly Oil Co.*, 288 N.W.2d 493, 494 (SD 1980). Without such disqualifying

findings, the court abused its discretion by excluding Way's testimony regarding Hermanek's statements.

### **3. Prejudicial effect.**

The circuit court instructed the jury, in instruction number 25, that:

A bank account opened in joint names raises a rebuttable presumption that the creator of such an account intended rights of survivorship to attach to it upon the creator's death, meaning all of the money in the account would go to the surviving parties named in the account. In this case, the presumption can be rebutted only by the State proving by clear and convincing evidence that Richard Hermanek did not intend for the rights of survivorship to attach to the Mutual of Omaha Bank account at the time the account was created, but merely intended the arrangement for his own benefit or convenience, and not for the benefit of the defendants.

SR 332 / 328 at Jury Instruction No. 25.

Hermanek's reaction to Way's explanation of the account agreement constituted the defense's strongest evidence that Hermanek intended the right of survivorship to attach to the Mutual of Omaha bank account.

Instead, Richard and Susan were required to rely upon Way's description of Hermanek's non-verbal conduct. Furthermore, hearing that Hermanek was able to respond to Way verbally would have presented the jury with a contrast to witness Nikki Chladek's testimony that Hermanek was confused when Way and Brenton visited him. JT at 59.

### **III. WHETHER THE CIRCUIT COURT ERRONEOUSLY INSTRUCTED THE JURY AS TO THE STATE'S BURDEN OF PROOF REGARDING HERMANEK'S INTENT.**

"Whether a jury instruction correctly states the law is a question of law reviewed de novo." *State v. Birdshead*, 2015 S.D. 77, ¶ 23, 871 N.W.2d 62, 72; SDCL § 23A-22-3.

The circuit court’s Instruction No. 25 effectively lowered the State’s burden of proof, requiring only clear and convincing evidence—rather than proof beyond a reasonable doubt—that Richard and Susan exercised unauthorized control over the Mutual of Omaha account.

Richard and Susan had proposed a jury instruction requiring the State to rebut the presumption beyond a reasonable doubt, citing SDCL § 23A-22-3. SR 169 / 166 at p. 4. They also argued this standard to the circuit court when settling instructions. JT at 466-67.

An essential element of both Counts 1 and 2 was that Richard and Susan exercised “unauthorized control” over the account. SR 1; SDCL § 22-30A-1. The circuit court properly charged the jury in Instruction No. 11 that the offense of grand theft required proof that the defendant “[t]ook or exercised unauthorized control over money.” JT at 486-87 (emphasis added).

Although the court instructed the jury that the State must prove each element beyond a reasonable doubt, Instruction No. 25 conflicted with this directive by allowing the State to rebut the presumption of intent by clear and convincing evidence.<sup>2</sup> The court relied on SDCL § 29A-6-104, which applies in civil cases where due process standards are different. However, the

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<sup>2</sup> In this way, the present case is distinguishable from *State v. Pfeiffer*, 2024 S.D. 71, 14 N.W.2d 636. In *Pfeiffer*, this Court held that the trial court was not required to specifically charge the jury about the reasonable doubt standard when discussing each element, since the instructions as a whole adequately apprised the jury of this requirement. 2024 S.D. 71 at ¶¶ 39-44. In this case, however, a specific instruction—number 25—substitutes a different standard for an element of the offense.

issue of whether Hermanek intended the right of survivorship to apply is fundamentally a question of whether Richard and Susan were authorized to control the funds after his death—an essential element of the offense.

Due process requires the State to prove lack of authorization beyond a reasonable doubt, not by clear and convincing evidence. *In re Winship*, 397 U.S. 358, 364 (1970). The circuit court’s instruction improperly diminished the State’s burden of proof, warranting reversal.

### CONCLUSION

For the foregoing reasons, the circuit court erred in refusing to give the proposed jury instruction on testamentary capacity, prohibiting key testimony regarding Richard Hermanek’s statements, and improperly instructing the jury on the State’s burden of proof regarding Hermanek’s intent. These errors significantly prejudiced the defense, undermining Richard and Susan’s ability to present their case effectively. Accordingly, this Court should reverse the convictions on Counts 1 and 2 and remand for a new trial.



## REQUEST FOR ORAL ARGUMENT

Undersigned counsel for Appellants Richard and Susan Spry respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 3rd day of March 2025.

BY   
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## CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). The undersigned certifies that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief is 22 pages long, including the cover sheet, Table of Contents, and Table of Authorities, and contains 4,768 words and 24,871 characters, no spaces, exclusive of the Appendix. Counsel relied on the word and character count of Microsoft Word word processing software used to prepare this brief at font size 12, Century Schoolbook, and left justified.

Dated this 3rd day of March 2025.

John R. Hinrichs  
John R. Hinrichs

## CERTIFICATE OF SERVICE AND MAILING

The undersigned hereby certifies that a true and correct copy of this document and the attached appendix was served via the Unified Judicial System's Odyssey e-filing system and first-class mail upon:

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The undersigned further certifies that this document and the attached appendix was filed with the South Dakota Supreme Court via the Unified Judicial System's Odyssey e-filing system, emailed to SCCLerkBriefs@ujs.state.sd.us, and by mailing the original via first class mail to:

Ms. Shirley Jameson-Fergel  
Clerk, South Dakota Supreme Court  
500 East Capitol Ave.  
Pierre, SD 57501-5070

Dated this 4th day of March 2025.

John R. Hinrichs  
John R. Hinrichs

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

---

Appeal No. 30787 / 30788

STATE OF SOUTH DAKOTA

APPELLEE,

VS.

RICHARD SPRY AND SUSAN SPRY,

APPELLANT

---

PETITION FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT  
BON HOMME COUNTY, SOUTH DAKOTA

THE HONORABLE CHERYLE GERING  
CIRCUIT COURT JUDGE

---

**APPENDIX TO APPELLANTS' BRIEF**

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John R. Hinrichs  
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SIEGEL, HINRICHS &  
TYSDAL, LLP  
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*Attorney for Appellant*

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*Attorneys for Appellee*

Notice of Appeal filed on August 12, 2024.

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STATE OF SOUTH DAKOTA

COUNTY OF BON HOMME

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

RICHARD SPRY,  
DOB: 10/17/1941  
2210 Pebble Beach Drive  
League City, TX 77573

**SUSAN SPRY,**  
**DOB: 09/22/1948**  
**2210 Pebble Beach Drive**  
**League City, TX 77573**

Defendants.

**FILED**

MAY 24 2022

Bon Homme County Clerk of Courts  
First Judicial Circuit Court of SD

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

04  
71CRI22-27  
04 71CRI22-28

INDICTMENT FOR:

**COUNT 1**  
**GRAND THEFT**  
**(SDCL 22-30A-17)**  
**(Class 3 felony)**

**COUNT 2**  
**CONSPIRACY TO COMMIT GRAND**  
**THEFT**  
**(SDCL 22-30A-17, 22-3-8)**  
**(Class 3 felony)**

**COUNT 3**  
**GRAND THEFT BY EXPLOITATION**  
**(SDCL 22-46-3)**  
**(Class 4 felony)**

**COUNT 4**  
**GRAND THEFT BY EXPLOITATION**  
**(SDCL 22-46-3)**  
**(Class 4 felony)**

**COUNT 5**  
**GRAND THEFT BY EXPLOITATION**  
**(SDCL 22-46-3)**  
**(Class 6 felony)**

**COUNT 6**  
**GRAND THEFT**  
**(SDCL 22-30A-17)**  
**(Class 6 felony)**

**COUNT 7**  
**THEFT BY EXPLOITATION**  
**(SDCL 22-46-3)**  
**(Class 1 Misdemeanor)**

THE BON HOMME COUNTY GRAND JURY CHARGES:

COUNT 1

Between the 17th day of October 2018 and the 19th day of March 2019, in the County of Bon Homme, State of South Dakota, RICHARD SPRY and **SUSAN SPRY** did commit the public offense of **GRAND THEFT** (SDLC 22-30A-17) in that she did take, or exercise unauthorized control over Richard Hermanek's property with intent to deprive Richard Hermanek of that property in an amount more than one hundred thousand dollars but less than or equal to five hundred thousand dollars; to wit: Mutual of Omaha bank account; and as to

COUNT 2

Between the 17th day of October 2018 and the 19th day of March 2019, in the County of Bon Homme, State of South Dakota, RICHARD SPRY and **SUSAN SPRY** did commit the public offense of **CONSPIRACY** (SDCL 22-3-8, 22-30A-17) in that she did enter into an agreement with another person to commit an unlawful act, namely **GRAND THEFT**, and she and /or her co-conspirator did an overt act to effect the object of the conspiracy and with the intent to advance the object of the conspiracy, including (but not limited to) opening a Mutual of Omaha bank account; removing money from Richard Hermanek's South Dakota bank account; and removing money from the Mutual of Omaha bank account to place the money in a Beacon State Bank Account; and as to

### COUNT 3

Between the 25th day of July 2018 and the 6th day of April 2020, in the County of Bon Homme, State of South Dakota, **SUSAN SPRY** did commit the public offense of **GRAND THEFT BY EXPLOITATION** (SDCL 22-46-3) in that she did had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of Richard Hermanek and having been entrusted with Richard Hermanek's property, did, with intent to defraud, appropriate Richard Hermanek's property for a use or purpose not in the due and lawful execution of Richard Hermanek's trust in an amount more than five thousand dollars but less than or equal to one hundred thousand, to-wit 2005 Honda Pilot. Richard Hermanek was an elder or an adult with a disability; and as to

### COUNT 4

Between the 25th day of July 2018 and the 20th day of April 2020, in the County of Bon Homme, State of South Dakota, **SUSAN SPRY** did commit the public offense of **GRAND THEFT BY EXPLOITATION** (SDCL 22-46-3) in that she had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of Richard Hermanek and having been entrusted with Richard Hermanek's property, did, with intent to defraud, appropriate Richard Hermanek's property for a use or purpose not in the due and lawful execution of Richard Hermanek's trust in an amount more than five thousand dollars but less than or equal to one hundred



thousand, to-wit: 2001 Ford Ranger. Richard Hermanek was an elder or an adult with a disability; and as to

#### COUNT 5

Between the 1st day of August 2018 and the 31st day of January 2019, in the County of Bon Homme, State of South Dakota, **SUSAN SPRY** did commit the public offense of **GRAND THEFT BY EXPLOITATION** (SDCL 22-46-3) in that she had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of Richard Hermanek and having been entrusted with Richard Hermanek's property, did, with intent to defraud, appropriate Richard Hermanek's property for a use or purpose not in the due and lawful execution of Richard Hermanek's trust in an amount more than one thousand dollars but less than or equal to two thousand five hundred dollars; to wit: checks to the Sprys. Richard Hermanek was an elder or an adult with a disability; and as to

#### COUNT 6

Between the 30th day of March 2019 and the 22nd day of April 2019, in the County of Bon Homme, State of South Dakota, **RICHARD SPRY** did commit the public offense of **GRAND THEFT** (SDCL 22-30A-17) in that he did take, or exercise unauthorized control over Richard Hermanek's property with intent to deprive Richard Hermanek of that property in an amount more than one

thousand dollars in value but is less than or equal to two thousand five hundred dollars; to wit: 2018 Tax Return; and as to

COUNT 7

On or about the 1st day of March 2019, in the County of Bon Homme, State of South Dakota, **SUSAN SPRY** did commit the public offense of **THEFT BY EXPLOITATION** (SDCL 22-46-3) in that she had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of Richard Hermanek and having been entrusted with Richard Hermanek's property, did, with intent to defraud, appropriate Richard Hermanek's property for a use or purpose not in the due and lawful execution of Richard Hermanek's trust in an amount that exceeds four hundred dollars but does not exceed one thousand dollars, to-wit: April Maintenance fee. Richard Hermanek was an elder or an adult with a disability; contrary to statute in such case made and provide against the peace and dignity of the State of South Dakota.

Dated this 24 day of May 2022.

"A True Bill"  
"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX  
GRAND JURORS.

  
\_\_\_\_\_  
GRAND JURY FOREPERSON

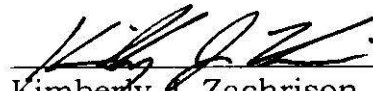
WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARD TO THIS  
INDICTMENT:

Betty Merritt  
Barbara Hermanek-Peck  
Brett Spencer

STATE OF SOUTH DAKOTA     )  
                                      : SS           REQUEST FOR  
COUNTY OF BON HOMME     )           ARREST WARRANT

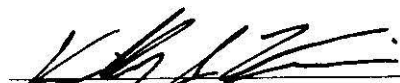
I, Kimberly J. Zachrison, Assistant Attorney General and prosecuting attorney in the above matter, do hereby request arrest warrants to be issued against the above Defendants.

Dated this 24<sup>th</sup> day of May 2022.

  
\_\_\_\_\_  
Kimberly J. Zachrison  
Assistant Attorney General  
Prosecuting Attorney  
1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501  
Telephone: (605) 773-3215  
Email: [atgservice@state.sd.us](mailto:atgservice@state.sd.us)

STATE OF SOUTH DAKOTA     )  
                                      : SS           NOTICE OF DEMAND  
COUNTY OF BON HOMME     )           FOR ALIBI DEFENSE

I, Kimberly J. Zachrison, prosecuting attorney in the above matter, hereby states that the alleged offenses were committed between July 25, 2018 and April 20, 2020, in Bon Homme County, South Dakota. I hereby request that Defendants and their respective attorney serve upon me a written notice of their intention to offer a defense of alibi within ten (10) days as provided in SDCL 23A-9-1. Failure to provide such notice may result in an exclusion of any testimony pertaining to an alibi defense.

  
\_\_\_\_\_  
Kimberly J. Zachrison  
Prosecuting Attorney

**FILED**

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BON HOMME

SS MAY 24 2022

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

Bon Homme County Clerk of Courts  
First Judicial Circuit Court of SD

04  
71CRI22-27  
04 71CRI22-28

Plaintiff,

v.

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**League City, TX 77573**

SUSAN SPRY,  
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Dated this 24 day of May 2022.

"A True Bill"  
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THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX  
GRAND JURORS.

  
GRAND JURY FOREPERSON


WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARD TO THIS  
INDICTMENT:

Betty Merritt  
Barbara Hermanek-Peck  
Brett Spencer

STATE OF SOUTH DAKOTA     )  
                                      : SS         REQUEST FOR  
COUNTY OF BON HOMME     )         ARREST WARRANT

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Dated this 24<sup>th</sup> day of May 2022.

  
\_\_\_\_\_  
Kimberly J. Zachrison  
Assistant Attorney General  
Prosecuting Attorney  
1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501  
Telephone: (605) 773-3215  
Email: [atgservice@state.sd.us](mailto:atgservice@state.sd.us)

STATE OF SOUTH DAKOTA     )  
                                      : SS         NOTICE OF DEMAND  
COUNTY OF BON HOMME     )         FOR ALIBI DEFENSE

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\_\_\_\_\_  
Kimberly J. Zachrison  
Prosecuting Attorney

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

COUNTY OF BON HOMME

: SS

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

**FILED**

04CRI22-28

Plaintiff,

JUL 26 2024

vs.

RICHARD SPRY,  
DOB: 10/17/1941

  
Bon Homme County Clerk of Courts  
First Judicial Circuit Court of SD

**AMENDED**  
JUDGMENTS OF CONVICTION  
COUNTS 1, 2, AND 6

Defendant.

An Indictment was filed with this Court on the 24th day of May, 2022, charging Defendant Richard Spry with the crimes of COUNT 1: GRAND THEFT, in violation of SDCL 22-30A-17, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota; COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT, in violation of SDCL 22-30A-17 and 22-3-8, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota; and COUNT 6: GRAND THEFT, in violation of SDCL 22-30A-17, a Class 6 felony, occurring between March 30, 2019 and April 22, 2019 in Bon Homme County, South Dakota.

The Defendant was arraigned on said Indictment on the 9th day of May, 2023.

Defendant Richard Spry, the Defendant's attorney, John Hinrichs, and Kimberly Zachrison, Assistant Attorney General, appeared personally. The Court advised the Defendant of his constitutional and statutory rights, the nature of the charges, and the maximum penalties. Defendant stated that he understood and pled not guilty to the charges stated against him in the Indictment. The Defendant requested a jury trial on the charges contained in the Indictment.

A jury trial commenced on the 8th day of April, 2024, in Tyndall, South Dakota, on the charges contained in the Indictment. On the 10th day of April 2024, the jury returned a verdict

against Defendant Richard Spry of guilty on COUNT 1: GRAND THEFT; COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT; and COUNT 6: GRAND THEFT. Based upon the jury's verdict, the Court found Defendant Richard Spry guilty of these offenses.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Richard Spry is guilty of the crime of COUNT 1: GRAND THEFT, in violation of SDCL 22-30A-17, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Richard Spry is guilty of the crime of COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT, in violation of SDCL 22-30A-17 and 22-3-8, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Richard Spry is guilty of the crime of COUNT 6: GRAND THEFT, in violation of SDCL 22-30A-17, a Class 6 felony, occurring between March 30, 2019 and April 22, 2019.

#### SENTENCES

On the 9th day of July, 2024, the Defendant Richard Spry appeared for sentencing. Defendant was represented by his attorney, John Hinrichs, who appeared personally; and the State appeared by and through Kimberly Zachrison, Assistant Attorney General. The report of the pre-sentence investigation was previously provided to the Court, the defendant, his attorney, and the prosecuting attorney. After hearing from counsel, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentences.

**With the advice of counsel, Richard Spry knowingly, voluntarily, and intelligently waived his right to a hearing to modify the judgments to reflect the lower amount of court costs due to the date of offense.**

As to the offense of COUNT 1: GRAND THEFT

IT IS ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Richard Spry shall pay a fine of \$30,000.00 and court costs of **\$106.50**. This amount is owed by Defendant individually.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Richard Spry shall pay restitution in the amount of \$170,000.00, this amount to be paid joint and several with Defendant Susan Spry, 04CRI22-27. Restitution will be paid first, before any other fines and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Richard Spry shall pay prosecution costs in the amount of \$1,494.52, this amount to be paid joint and several with Defendant Susan Spry, 04CRI22-27.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Richard Spry shall be imprisoned in the South Dakota State Penitentiary for a term of five (5) years, there to be kept, fed and clothed according to the rules and regulations governing that institution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, the five (5) year sentence shall be suspended pursuant to SDCL § 23A-27-18, upon the terms and conditions of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1 Defendant Richard Spry is placed on probation for a term of four (4) years, commencing on July 9, 2024. The terms of probation are stated below jointly for Counts 1, 2, and 6.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the penitentiary sentences, if the suspended sentences are revoked, and the probationary terms, as to Counts 1, 2, and 6 shall run concurrently to each other.

As to the offense of COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT

IT IS ORDERED, ADJUDGED AND DECREED that as to Count 2, Defendant Richard Spry shall pay a fine of \$10,000.00 and court costs of **\$106.50**. This amount is owed by Defendant individually.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 2, Defendant Richard Spry shall be imprisoned in the South Dakota State Penitentiary for a term of five (5) years, there to be kept, fed and clothed according to the rules and regulations governing that institution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 2, the five (5) year sentence shall be suspended pursuant to SDCL § 23A-27-18, upon the terms and conditions of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 2, Defendant Richard Spry is placed on probation for a term of four (4) years, commencing on July 9, 2024. The terms of probation are stated below jointly for Counts 1, 2, and 6.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the penitentiary sentences, if the suspended sentences are revoked, and the probationary terms, as to Counts 1, 2, and 6 shall run concurrently to each other.

## As to the offense of COUNT 6: GRAND THEFT

IT IS ORDERED, ADJUDGED AND DECREED that as to Count 6, Defendant Richard Spry shall pay a fine of \$4,000.00 and court costs of \$106.50. This amount is owed by Defendant individually.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 6, Defendant Richard Spry shall pay restitution of \$1,714.00, which amount is owed individually. Restitution will be paid first, before any other fines and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 6, Defendant Richard Spry shall be imprisoned in the South Dakota State Penitentiary for a term of two (2) years, there to be kept, fed and clothed according to the rules and regulations governing that institution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 6, the two (2) year sentence shall be suspended pursuant to SDCL § 23A-27-18, upon the terms and conditions of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 6, Defendant Richard Spry is placed on probation for a term of four (4) years, commencing on July 9, 2024. The terms of probation are stated below jointly for Counts 1, 2, and 6.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the penitentiary sentences, if the suspended sentences are revoked, and the probationary terms, as to Counts 1, 2, and 6 shall run concurrently to each other.



## PROBATION TERMS FOR COUNTS 1, 2, AND 6

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms and conditions of Defendant's probation includes the following:

1. Defendant shall sign the standard probation agreement with court services and shall obey all conditions imposed by court services even though those conditions may not have been specifically set out by the court.
2. Defendant shall obey all federal, state, tribal and local laws and be a good law-abiding citizen in all respects.
3. Defendant shall pay all financial obligations as ordered by the court. Defendant shall work out a payment schedule with court services, and if requested, Defendant shall execute a wage assignment form.
4. Defendant shall not consume, purchase, nor possess any alcoholic beverages of any kind. Defendant shall not enter bars, liquor stores, or other locations where the sale of alcoholic beverages is the primary business.
5. Defendant shall not consume, purchase, possess, or distribute any mind or mood altering drugs or substances of any kind. Defendant shall not possess drug paraphernalia.  
  
Defendant shall not be present where others are using mind or mood altering drugs or substances of any kind. Verification of any prescribed medication must be provided by Defendant to court services. Medical marijuana is not authorized without a court order from this court.
6. Defendant shall submit to urinalysis, breath or blood testing at any time requested to do so by court services or law enforcement, and Defendant shall be responsible for the costs of that testing.

7. Defendant, and Defendant's person, residence, vehicles and personal property, shall be subject to random search and seizure by court services or law enforcement upon reasonable suspicion that Defendant is violating any provision of this court's order or of any probation agreement.
8. Defendant shall obtain all evaluations required by court services and comply with all requirements of the evaluators and court services.
9. Defendant shall enroll in and successfully complete all other programs required by court services.

Defendant Richard Spry was advised of his right to appeal on July 9, 2024, which is also set forth below.

THE DEFENDANT WAS ADVISED THAT THE DEFENDANT HAS A RIGHT TO APPEAL FROM THIS ORDER/JUDGMENT WITHIN 30 DAYS AFTER IT IS SIGNED, ATTESTED AND FILED, THAT IF THEY WAIT MORE THAN 30 DAYS IT WILL BE TOO LATE TO APPEAL, AND THAT IF THEY ARE INDIGENT, UPON THEIR APPLICATION, THIS COURT WOULD APPOINT AN ATTORNEY TO HANDLE THAT APPEAL FOR THEM.

Dated this 26th day of July, 2024.

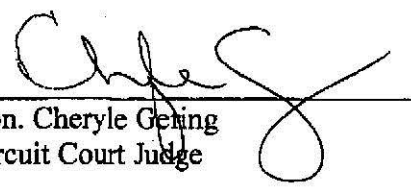
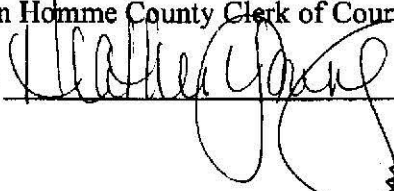
BY THE COURT:

ATTEST:

Heather Young

Bon Homme County Clerk of Court

By



Hon. Cheryle Getting  
Circuit Court Judge



# FILED

STATE OF SOUTH DAKOTA

JUL 26 2024

IN CIRCUIT COURT

COUNTY OF BON HOMME

: SS

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

Bon Homme County Clerk of Courts

First Judicial Circuit Court of SD 04CRI22-27

Plaintiff,

vs.

**AMENDED**  
JUDGMENTS OF CONVICTION  
COUNTS 1, 2, AND 7

SUSAN SPRY,  
DOB: 09/22/1948

Defendant.

An Indictment was filed with this Court on the 24th day of May, 2022, charging Defendant Susan Spry with the crimes of COUNT 1: GRAND THEFT, in violation of SDCL 22-30A-17, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota; COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT, in violation of SDCL 22-30A-17 and 22-3-8, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota; COUNT 3: GRAND THEFT BY EXPLOITATION, in violation of SDCL 22-46-3, a Class 4 felony, occurring between July 25, 2018 and April 6, 2020 in Bon Homme County, South Dakota; COUNT 4: GRAND THEFT BY EXPLOITATION, in violation of SDCL 22-46-3, a Class 4 felony, occurring between July 25, 2018 and April 20, 2020 in Bon Homme County, South Dakota; COUNT 5: GRAND THEFT BY EXPLOITATION, in violation of SDCL 22-46-3, a Class 6 felony, occurring between August 1, 2018 and January 31, 2019 in Bon Homme County, South Dakota; and COUNT 7: THEFT BY EXPLOITATION, in violation of SDCL 22-46-3, a Class 1 misdemeanor, occurring on or about March 1, 2019 in Bon Homme County, South Dakota.

The Defendant was arraigned on said Indictment on the 9th day of May, 2023. The Defendant Susan Spry, the Defendant's attorney, John Hinrichs, and Kimberly Zachrison,

Assistant Attorney General, appeared personally. The Court advised the Defendant of her constitutional and statutory rights, the nature of the charges, and the maximum penalties. Defendant stated that she understood and pled not guilty to the charges stated against her in the Indictment. The Defendant requested a jury trial on the charges contained in the Indictment.

A jury trial commenced on the 8th day of April, 2024, in Tyndall, South Dakota, on the charges contained in the Indictment. The court acquitted the Defendant Susan Spry of Counts 3 and 4. On the 10th day of April 2024, the jury returned a verdict against Defendant Susan Spry of guilty on COUNT 1: GRAND THEFT; COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT; and COUNT 7: THEFT BY EXPLOITATION. The jury acquitted Defendant Susan Spry on Count 5. The court has entered a separate judgment of acquittal for Counts 3, 4, and 5. Based upon the jury's verdict, the Court found Defendant Susan Spry guilty of Counts 1, 2, and 7.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Susan Spry is guilty of the crime of COUNT 1: GRAND THEFT, in violation of SDCL 22-30A-17, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Susan Spry is guilty of the crime of COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT, in violation of SDCL 22-30A-17 and 22-3-8, a Class 3 felony, occurring between October 17, 2018 and March 19, 2019 in Bon Homme County, South Dakota.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Susan Spry is guilty of the crime of COUNT 7: THEFT BY EXPLOITATION, in violation of SDCL 22-46-3, a Class 1 misdemeanor, occurring on or about March 1, 2019 in Bon Homme County, South Dakota.

## SENTENCES

On the 9th day of July, 2024, the Defendant appeared for sentencing. Defendant Susan Spry was represented by her attorney, John Hinrichs, who appeared personally; and the State appeared by and through Kimberly Zachrison, Assistant Attorney General. The report of the pre-sentence investigation was previously provided to the Court, Defendant Susan Spry, her attorney, and the prosecuting attorney. After hearing from counsel, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentences.

**With the advice of counsel, Susan Spry knowingly, voluntarily, and intelligently waived her right to a hearing to modify the judgments to reflect the lower amount of court costs due to the date of offense.**

As to the offense of COUNT 1: GRAND THEFT

IT IS ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Susan Spry shall pay a fine of \$30,000.00 and court costs of \$106.50. This amount is owed by Defendant individually.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Susan Spry shall pay restitution in the amount of \$170,000.00, this amount to be paid joint and several with Defendant Richard Spry, 04CRI22-28. Restitution will be paid first, before any other fines and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Susan Spry shall pay prosecution costs in the amount of \$1,494.52, this amount to be paid joint and several with Defendant Richard Spry, 04CRI22-28.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, Defendant Susan Spry shall be imprisoned in the South Dakota Women's Prison for a term of five (5) years, there to be kept, fed and clothed according to the rules and regulations governing that institution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1, the five (5) year sentence shall be suspended pursuant to SDCL § 23A-27-18, upon the terms and conditions of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 1 Defendant Susan Spry is placed on probation for a term of four (4) years, commencing on July 9, 2024. The terms of probation are stated below jointly for Counts 1 and 2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the penitentiary sentences, if the suspended sentences are revoked, and the probationary terms, as to Counts 1 and 2 shall run concurrently to each other.

As to the offense of COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT

IT IS ORDERED, ADJUDGED AND DECREED that as to Count 2, Defendant Susan Spry shall pay a fine of \$10,000.00 and court costs of **\$106.50**. This amount is owed by Defendant individually.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 2, Defendant Susan Spry shall be imprisoned in the South Dakota Women's Prison for a term of five (5) years, there to be kept, fed and clothed according to the rules and regulations governing that institution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 2, the five (5) year sentence shall be suspended pursuant to SDCL § 23A-27-18, upon the terms and conditions of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 2, Defendant Susan Spry is placed on probation for a term of four (4) years, commencing on July 9, 2024. The terms of probation are stated below jointly for Counts 1 and 2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the penitentiary sentences, if the suspended sentences are revoked, and the probationary terms, as to Counts 1 and 2 shall run concurrently to each other.

#### PROBATION TERMS FOR COUNTS 1 AND 2

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the terms and conditions of Defendant's probation includes the following:

1. Defendant shall sign the standard probation agreement with court services and shall obey all conditions imposed by court services even though those conditions may not have been specifically set out by the court.
2. Defendant shall obey all federal, state, tribal and local laws and be a good law-abiding citizen in all respects.
3. Defendant shall pay all financial obligations as ordered by the court. Defendant shall work out a payment schedule with court services, and if requested, Defendant shall execute a wage assignment form.

4. Defendant shall not consume, purchase, nor possess any alcoholic beverages of any kind. Defendant shall not enter bars, liquor stores, or other locations where the sale of alcoholic beverages is the primary business.
5. Defendant shall not consume, purchase, possess, or distribute any mind or mood altering drugs or substances of any kind. Defendant shall not possess drug paraphernalia. Defendant shall not be present where others are using mind or mood altering drugs or substances of any kind. Verification of any prescribed medication must be provided by Defendant to court services. Medical marijuana is not authorized without a court order from this court.
6. Defendant shall submit to urinalysis, breath or blood testing at any time requested to do so by court services or law enforcement, and Defendant shall be responsible for the costs of that testing.
7. Defendant, and Defendant's person, residence, vehicles and personal property, shall be subject to random search and seizure by court services or law enforcement upon reasonable suspicion that Defendant is violating any provision of this court's order or of any probation agreement.
8. Defendant shall obtain all evaluations required by court services and comply with all requirements of the evaluators and court services.
9. Defendant shall enroll in and successfully complete all other programs required by court services.



As to the offense of COUNT 7: THEFT BY EXPLOITATION

IT IS ORDERED, ADJUDGED AND DECREED that as to Count 7, Defendant Susan Spry shall pay a fine of \$2,000.00 and court costs of \$86.50. This amount is owed by Defendant individually.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to Count 7, Defendant shall pay restitution of \$500.00. This amount shall be paid individually. Restitution will be paid first, before any other fines and costs.

Defendant Susan Spry was advised of her right to appeal on July 9, 2024, which is also set forth below.

THE DEFENDANT WAS ADVISED THAT THE DEFENDANT HAS A RIGHT TO APPEAL FROM THIS ORDER/JUDGMENT WITHIN 30 DAYS AFTER IT IS SIGNED, ATTESTED AND FILED, THAT IF THEY WAIT MORE THAN 30 DAYS IT WILL BE TOO LATE TO APPEAL, AND THAT IF THEY ARE INDIGENT, UPON THEIR APPLICATION, THIS COURT WOULD APPOINT AN ATTORNEY TO HANDLE THAT APPEAL FOR THEM.

Dated this 26<sup>th</sup> day of July, 2024.

BY THE COURT:

ATTEST:

Heather Young

Bon Homme County Clerk of Court

By

  
Hon. Cheryle Cering  
Circuit Court Judge



STATE OF SOUTH DAKOTA     )  
  :ss  
COUNTY OF BON HOMME     )

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

04 CRI 22-0027

04 CRI 22-0028

Plaintiff,

vs.

DEFENDANTS' PROPOSED  
JURY INSTRUCTION NO. 5

SUSAN SPRY

and

RICHARD SPRY,

Defendants.

Susan Spry and Richard Spry, by and through his undersigned attorney, and respectfully proposes the following jury instruction. To wit:

South Dakota law requires that a person making decisions about the distribution of his property after his death be of sound mind. Such soundness of mind is demonstrated when a person is able to comprehend the nature and extent of his property, the persons who are the natural objects of his bounty, and the disposition that he desires to make of said property.

Soundness of mind does not require that one have the intellectual vigor of youth or perfect health. Mere physical weakness is not determinative of soundness of mind. Moreover, it is not necessary that a person desiring to make a will have the capacity to make contracts and do business. One may lack competency, such that in the view of medical science he is not of sound mind and memory, yet still retains the requisite competency to make decisions about the distribution of his property after his death.

Source:

- SDCL 29A-2-501
- *Matter of Estate of Linnell*, 388 N.W.2d 881, 883 (S.D.1986)
- *In re Estate of Pringle*, 2008 S.D. 38, ¶ 20, 751 N.W.2d 277, 284
- *Matter of Certification of Question of Law from United States District Court, District of South Dakota, Southern Division, Titled as: Briggs v. Briggs*, 2019 S.D. 37; 931 N.W.2d 510 (discussing a trust as a “testamentary document”)

Dated this 8th day of April, 2024.

BY /s/ John R. Hinrichs  
John R. Hinrichs (john@hpslawfirm.com)  
HEIDEPRIEM, PURTELL,  
SIEGEL, HINRICH & TYSDAL, LLP  
101 W. 69th St., Ste 105  
Sioux Falls, SD 57108  
(605) 679-4470

*Attorney for Susan Spry and Richard Spry*

Instruction No. \_\_\_\_

South Dakota law requires that a person making decisions about the distribution of his property after his death be of sound mind. Such soundness of mind is demonstrated when a person is able to comprehend the nature and extent of his property, the persons who are the natural objects of his bounty, and the disposition that he desires to make of said property.

Soundness of mind does not require that one have the intellectual vigor of youth or perfect health. Mere physical weakness is not determinative of soundness of mind. Moreover, it is not necessary that a person making decisions about the distribution of his property following his death have the capacity to make contracts and do business. One may lack competency, such that in the view of medical science he is not of sound mind and memory, yet still retains the requisite competency to make decisions about the distribution of his property after his death.

Prepared By:  
Zieser & Rothschild Law Office  
P.O. Box 476  
Tyndall, SD 57066  
(605) 589-3333

COPY

REC  
7-25-18 B

04CRI22-000027

### DURABLE POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS THAT I, Richard Hermanek, of the City of Tyndall, County of Bon Homme, State of South Dakota, do make, constitute and appoint Richard Spry of 1417 Leeward Circle, Kemah, Texas 77565 and Susan Spry of 1417 Leeward Circle, Kemah, Texas 77565 to be my true and lawful attorneys in fact for me and in my name to exercise all powers in regard to my affairs and over my property, which I, myself, can do, reserving no power whatsoever save only disposing of the same by will and give my said attorney full power and authority to do everything whatsoever necessary to be done in the premises as fully as I could if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute or successor attorney shall lawfully do or cause to be done by virtue thereof and further to make health and personal care decisions for me as authorized in this document. It is the intention of Richard Hermanek to appoint both Richard Spry and Susan Spry as attorneys-in-fact and the action of one shall constitute the action of both as this appointment is made in the alternative.

Not by way of limiting the foregoing powers in any sense by speaking specifically of powers, but merely to emphasis that these powers are included in the above general statement, said attorney is authorized:

1. to buy, sell, convey, mortgage, lease, exchange or pledge all of my real and personal property, and to execute deeds, leases, mortgages, security agreements, notes, assignments, purchase and sale agreements, and all other documents related to my real and personal property;
2. to conduct any and all of my business with financial institutions;
3. to expend and pay for my support, care or benefit;
4. to manage, handle and liquidate my investments;
5. to exercise all of my rights as a shareholder of any bonds, shares of stock or any other form of investment;
6. to contract and pay for all types of services, materials and repairs in connection with my property and affairs;

20202959NR-001

Filed on: 04/10/2024 Bon Homme County, South Dakota 04CRI22-000027



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7. to pay, settle, compromise and satisfy any debt or obligation owed by or to me;
8. to borrow money for me and to use my assets as security for loans;
9. to enter, add to and withdraw from my safety deposit box;
10. to conduct any activity involving any checking or savings accounts with any financial institution which shall include the ability to write checks, withdraw money, and deposit funds;
11. to execute all documents, to obtain, maintain and cancel all types of insurance for me and my property;
12. to execute all documents required to process insurance claims, Medicare, Medicaid, Social Security and all other benefits to which I may be entitled;
13. to hire professional advisors, physicians, dentists, accountants, attorneys, appraisers and investment counselors for my benefit;
14. to prepare, sign and file federal, state and local tax returns of all kinds, claims for refunds, requests for extensions of time, petitions to court and all other tax-related documents and to act in my behalf in tax matters of all kinds and for all periods of time;
15. to consent to, refuse or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication and the use of mechanical or other procedures that affect any bodily function, including but not limited to artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;
16. to have access to medical records and information to the same extent that I am entitled to, including the right to disclose the contents to others;
17. to authorize my admission to or discharge even against medical advice from any hospital, nursing home, residential care, assisted living or similar facility or service;
18. to contract on my behalf for any health care related service or facility on my behalf, without my agent incurring personal financial liability for such contract;
19. to hire and fire medical, social service and other support personnel responsible for my care;
20. to authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment but not intentionally cause my death;

COPY

21. take any other action necessary to do what I authorize here, including but not limited to granting any waiver or release from liability required by any hospital, physician, or other health care provider;

22. signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my attorney in fact, or to seek actual or punitive damages for the failure to comply;

23. To give any property belonging to me to any person my attorney in fact shall deem proper without consideration.

I hereby authorize my attorney-in-fact to obtain any information protected by the Health Insurance Portability and Accountability Act of 1996 (HIPPA). I hereby authorize my attorney-in-fact to obtain any health information that is protected under this Act.

This Power of Attorney shall not be affected by my disability, it being my intent that the authority conferred shall be exercisable notwithstanding my later disability or incapacity or later uncertainty as to whether I am dead or alive.

This Power of Attorney shall continue until terminated in writing.

I hereby revoke all prior power of attorneys executed by me.

IN WITNESS WHEREOF, I hereby execute and subscribe my name herewith this 25  
day of July, 2018.

Richard A. Hermanek  
Richard Hermanek

State of South Dakota)

)ss.

County of Bon Homme)

On this the 25 day of July, 2018, before me L. Rothschild, the undersigned officer, personally appeared Richard Hermanek, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.



L. Rothschild  
Notary Public  
My Commission expires: 1/1/22

Instruction No. 24

A person's capacity is essential to his ability to contract or devise his property. Agreements, wills, and transfers of property undertaken without capacity are void. In this case, the Mutual of Omaha bank account form signed by Richard Hermanek was a contract.

The State has the burden of proving Richard Hermanek's lack of capacity by proof beyond a reasonable doubt.

A person entirely without understanding has no power to make a contract of any kind. "Entirely without understanding" means that the person contracting did not possess the mental dexterity required to comprehend the nature and ultimate effect of the transaction in which he was involved. The critical inquiry must always focus on the person's mental acuity and understanding of the transaction at the time contracting occurred.



### Instruction No. 25

A bank account opened in joint names raises a rebuttable presumption that the creator of such an account intended rights of survivorship to attach to it upon the creator's death, meaning all of the money in the account would go to the surviving parties named on the account. In this case, this presumption can be rebutted only by the State proving by clear and convincing evidence that Richard Hermanek did not intend for the rights of survivorship to attach to the Mutual of Omaha Bank account at the time the account was created, but merely intended the arrangement for his own benefit or convenience, and not for the benefit of the defendants.

Clear and convincing evidence is more than a mere preponderance of the evidence but need not be beyond a reasonable doubt. It is that measure or degree of proof which will produce in your mind a firm belief or conviction as to the allegation sought to be established. It is evidence that is so clear, direct, weighty, and convincing that it allows you to reach a clear conviction of the precise facts at issue, without hesitancy as to their truth. Evidence need not be voluminous or undisputed to accomplish this.

Even if you find that there is clear and convincing evidence that Richard Hermanek did not intend rights of survivorship to attach to the Mutual of Omaha Bank account, you may not find either defendant guilty of the crime of Grand Theft as charged in count 1 of the indictment or Conspiracy to Commit Grand Theft as charged in count 2 of the indictment unless you find that the State has proven all of the elements of those offenses beyond a reasonable doubt.

CU22-27  
CU22-28

STATE OF SOUTH DAKOTA )  
 ) SS.  
COUNTY OF BON HOOME )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

IN THE MATTER OF THE  
ELDER FINANCIAL EXPLOITATION  
INVESTIGATION OF  
**RICHARD HERMANEK**

AFFIDAVIT  
AND  
CERTIFICATION OF BUSINESS  
RECORDS PURSUANT TO  
SDCL 19-19-803(6) AND  
SDCL 19-19-902(11)

**FILED**

APR 10 2024

STATE OF Arizona )  
 ) SS.  
COUNTY OF Maricopa )

*Ben Hemme*  
Ben Hemme County Clerk of Courts  
First Judicial Circuit Court of SD

I, Sylvia Cross, being first duly sworn upon her oath,  
deposes and states:

1. I am over eighteen years of age, of sound mind, and capable of making this affidavit based on personal knowledge of the facts stated herein which are all true and correct.
2. That CIT Bank received a subpoena for the production of documents from Kimberly Zachrison, Assistant Attorney General, of the State of South Dakota (see attached).
3. That in my capacity with CIT Bank I am familiar with and responsible for account information maintained on a regular basis in the ordinary course of administering such accounts.

4. That it is the regular practice of our business to record and maintain such information and the records are kept in the ordinary course of that business.

5. That the records are created contemporaneously to the transactions that they reflect.

6. That in my capacity with CIT Bank I have caused a thorough and diligent search to be made of the account information requested in the subpoena for the production of documents.

7. That in response to the Subpoena issued by Assistant Attorney General Zachrison, the requested records were compiled.

8. That as requested in the subpoena, the records were provided to Special Agent Spencer, Division of Criminal Investigation, for the South Dakota Attorney General's Office.

9. That the documents attached, consisting of 65 pages, and provided to Special Agent Spencer, are a true accurate reproduction of those records.

Dated this 7th day of January, ~~2020~~<sup>2021</sup>, at Phoenix,  
Arizona.

Sybil

Custodian of Records For CIT Bank

Subscribed and sworn to before me this 7th day of JAN, ~~2020~~<sup>2021</sup>.

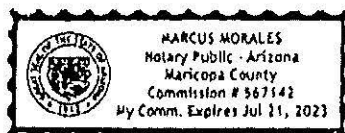
Marcus Morales

Notary Public

My Commission Expires:

Jul 21, 2023

(Seal)



2

# Account Agreement

Date: 8/20/2019

<b>Institution Name &amp; Address</b>	
MUTUAL OF OMAHA BANK MAIN BANK 3333 FARNAM ST OMAHA, NE 68131	
Supersedes card dated 10/17/18 Superseded by SR 92674	

**IMPORTANT ACCOUNT OPENING INFORMATION:** Federal law requires us to obtain sufficient information to verify your identity. You may be asked several questions and to provide one or more forms of identification to fulfill this requirement. In some instances we may use outside sources to confirm the information. The information you provide is protected by our privacy policy and federal law.

Enter Non-Individual Owner Information on page 2. There is additional Owner/Signer information space on page 2.

<b>Owner/Signer Information 1</b>	
Name	SUSAN C SPRY
Relationship	Joint or first (Primary)
Address	2210 PEBBLE BEACH DR LEAGUE CITY, TX UNITED STATES 77573-4454
Mailing Address (if different)	
Home Phone	(402) 498-0872
Work Phone	(402) 498-0872
Mobile Phone	(402) 498-0872
E-Mail	
Birth Date	■■■■■
SSN/TIN	■■■■■ 2114
Gov't Issued Photo ID (Type, Number, State, Issue Date, Exp. Date)	■■■■■
Other ID (Description, Details)	■■■■■
Employer	RICHARD E SPRY, INC.
Previous Financial Inst.	
<b>Owner/Signer Information 2</b>	
Name	RICHARD E SPRY
Relationship	Joint or other (Secondary)
Address	2210 PEBBLE BEACH DR LEAGUE CITY, TX UNITED STATES 77573-4454
Mailing Address (if different)	
Home Phone	(402) 498-0872
Work Phone	(402) 498-0872
Mobile Phone	(402) 498-0872
E-Mail	
Birth Date	■■■■■
SSN/TIN	■■■■■
Gov't Issued Photo ID (Type, Number, State, Issue Date, Exp. Date)	■■■■■
Other ID (Description, Details)	SS 2767
Employer	RICHARD E SPRY, INC.
Previous Financial Inst.	

<b>Internal Use</b>	3284
<b>Account Title &amp; Address</b>	
SUSAN C SPRY OR RICHARD E SPRY 2210 PEBBLE BEACH DR LEAGUE CITY, TX UNITED STATES 77573-4454	
<b>Ownership of Account</b>	
The specified ownership will remain the same for all accounts. (For consumer accounts, select and initial.)	
<input type="checkbox"/> Single-Party Account	<input checked="" type="checkbox"/> Multiple-Party Account
<input type="checkbox"/> Corporation - For Profit	<input type="checkbox"/> Corporation - Nonprofit
<input type="checkbox"/> Partnership	<input type="checkbox"/> Sole Proprietorship
<input type="checkbox"/> Limited Liability Company	
<input type="checkbox"/> Trust-Separate Agreement Dated:	
<b>Beneficiary Designation</b>	
(Check appropriate ownership above - select and initial below.)	
<input type="checkbox"/> Single-Party Account	
<input type="checkbox"/> Single-Party Account with Pay-On-Death (POD)	
<input checked="" type="checkbox"/> Multiple-Party Account with Right of Survivorship	
<input type="checkbox"/> Multiple-Party Account with Right of Survivorship and POD	
<input type="checkbox"/> Multiple-Party Account without Right of Survivorship	
<b>Beneficiary Name(s), Address(es), and SSN(s)</b>	
(Check appropriate beneficiary designation above.)	

☐ If checked, this is a temporary account agreement.

Number of signatures required for withdrawal: 1

## Signatures

The undersigned authorize the financial institution to investigate credit and employment history and obtain reports from consumer reporting agency(ies) on them as individuals. Except as otherwise provided by law or other documents, each of the undersigned is authorized to make withdrawals from the account(s), provided the required number of signatures indicated above is satisfied. The undersigned personally and as, or on behalf of, the account owner(s) agree to the terms of, and acknowledge receipt of copy(ies) of, this document and the following:

- |   |  |
|---|--|
| <input checked="" type="checkbox"/> Terms and Conditions      | <input checked="" type="checkbox"/> Privacy            |
| <input checked="" type="checkbox"/> Electronic Fund Transfers | <input checked="" type="checkbox"/> Truth in Savings   |
| <input checked="" type="checkbox"/> Substitute Checks         | <input checked="" type="checkbox"/> Funds Availability |
| <input type="checkbox"/> Common Features                      | <input checked="" type="checkbox"/> Schedule of Fees   |

☐ Agency Designation (See Owner/Signer Information for Agency designation(s).)

Agency designation (select and initial): ☐ Survives OR

☐ Terminates on disability or incapacity of parties.

- |                             |       |
|-----------------------------|-------|
| 1 [x] <i>Susan C Spry</i>   |       |
| SUSAN C SPRY                |       |
| 2 [x] <i>Richard E Spry</i> |       |
| RICHARD E SPRY              |       |
| 3 [x]                       | 4 [x] |

Signature Card A-2  
Bankers Systems Inc  
Workers Kiosk Financial Services ©2003, 2008

MPNPLA2-AZ 5/2/2007

Inkjet: Page 1 of 2



Non-Individual Owner Information		
Name		
EIN		
Phone		
Mobile Phone		
E-Mail		
Type of Entry		
State/Country & City of Organization		
Nature of Business		
Address		
Mailing Address (if different)		
Authorization/Resolution Date		
Previous Financial Inst.		
Account Description	Account #	Initial Deposit Source
Basic Checking	3284	\$ \$100.00 <input type="checkbox"/> Cash <input type="checkbox"/> Check <input type="checkbox"/> _____
		\$ _____ <input type="checkbox"/> Cash <input type="checkbox"/> Check <input type="checkbox"/> _____
		\$ _____ <input type="checkbox"/> Cash <input type="checkbox"/> Check <input type="checkbox"/> _____
Services Requested		
<input type="checkbox"/> ATM <input type="checkbox"/> Debit/Check Cards (No. Requested: _____)		
<input type="checkbox"/> _____		<input type="checkbox"/> _____
<input type="checkbox"/> _____		<input type="checkbox"/> _____
Other Terms Information		



Owner/Signer Information 3	
Name	RICHARD E SPRY
Relationship	Joint or other (Secondary)
Address	2210 PEBBLE BEACH DR LEAGUE CITY, TX USA 77573-4454
Mailing Address (if different)	
Home Phone	
Work Phone	
Mobile Phone	
E-Mail	UNKNOWN
Birth Date	
SSN/TIN	
Gov't Issued Photo ID (Type, Number, State, Issue Date, Exp. Date)	
Other ID (Description, Date)	
Employer	
Previous Financial Inst.	

Owner/Signer Information 4	
Name	
Relationship	
Address	
Mailing Address (if different)	
Home Phone	
Work Phone	
Mobile Phone	
E-Mail	
Birth Date	
SSN/TIN	
Gov't Issued Photo ID (Type, Number, State, Issue Date, Exp. Date)	
Other ID (Description, Date)	
Employer	
Previous Financial Inst.	

Backup Withholding Certifications	
(If not a "U.S. Person," certify foreign status separately.)	
TIN: 9919	
<input checked="" type="checkbox"/> Taxpayer I.D. Number (TIN) - The number shown above is my correct taxpayer identification number.	
<input checked="" type="checkbox"/> Backup Withholding - I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding.	
<input type="checkbox"/> Exempt Recipient - I am an exempt recipient under the Internal Revenue Service Regulations.	
I certify under penalties of perjury the statements checked in this section and that I am a U.S. person (including a U.S. resident alien).	
X <u>Richard A. Hermanek</u> 10/24/18 (Date)	
RICHARD A HERMANEK	

Non-Individual Owner Information	
Name	
EN	
Phone	
Mobile Phone	
E-Mail	
Type of Entity	
State/Country & Date of Organization	
Number of Business	
Address	
Mailing Address (if different)	
Authorization/Resolution Date	
Previous Financial Inst.	

Account Description	Account #	Initial Deposit Source
Basic Checking	1284	\$1,603.30 <input type="checkbox"/> Cash <input type="checkbox"/> Check
		<input type="checkbox"/> Cash <input type="checkbox"/> Check
		<input type="checkbox"/> Cash <input type="checkbox"/> Check

Services Requested	
<input type="checkbox"/> ATM	<input type="checkbox"/> Debit/Credit Cards (No. Requested: _____)
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Other Terms/Intention	
<input checked="" type="checkbox"/>	No Discrepancies Found
<input type="checkbox"/>	Discrepancy Resolution:

Signature Card A-2  
Banking Service to  
Wells Fargo Financial Services ©2003, 2006

MPNPLAZ-AZ 5/2/2007

Initial: \_\_\_\_\_ Page 2 of 2

STATE OF SOUTH DAKOTA

)  
:SS  
)

IN CIRCUIT COURT

COUNTY OF BON HOMME

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

RICHARD SPRY,

Defendant.

04CRI22-28

VERDICT FORM

We the jury, duly empaneled in the above-entitled case find as follows:

**AS TO DEFENDANT RICHARD SPRY**

COUNT 1: GRAND THEFT (Mutual of Omaha Account)

**NOT GUILTY**

**PLEASE CIRCLE ONE**

**GUILTY**

COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT

**NOT GUILTY**

**PLEASE CIRCLE ONE**

**GUILTY**

COUNT 6: GRAND THEFT (Tax Return)

**NOT GUILTY**

**PLEASE CIRCLE ONE**

**GUILTY**

Signed this 10 day of April, 2024.

  
FOREPERSON



STATE OF SOUTH DAKOTA

)  
:SS  
)

IN CIRCUIT COURT

COUNTY OF BON HOMME

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

SUSAN SPRY,

Defendant.

04CRI22-27

VERDICT FORM

We the jury, duly empaneled in the above-entitled case find as follows:

**AS TO DEFENDANT SUSAN SPRY**

COUNT 1: GRAND THEFT (Mutual of Omaha Account)

**NOT GUILTY**

**PLEASE CIRCLE ONE**

**GUILTY**

COUNT 2: CONSPIRACY TO COMMIT GRAND THEFT

**NOT GUILTY**

**PLEASE CIRCLE ONE**

**GUILTY**

COUNT 5: GRAND THEFT BY EXPLOITATION (Checks)

**NOT GUILTY**

**PLEASE CIRCLE ONE**

**GUILTY**

COUNT 7: THEFT BY EXPLOITATION (April Maintenance Fee)

**NOT GUILTY**

**PLEASE CIRCLE ONE**

**GUILTY**

Signed this 10 day of April, 2024.

  
\_\_\_\_\_  
FOREPERSON

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

---

No. 30787/30788

---

STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

RICHARD SPRY AND SUSAN SPRY,

*Defendants and Appellants.*

---

APPEAL FROM THE CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT  
BON HOMME COUNTY, SOUTH DAKOTA

---

THE HONORABLE CHERYLE GERING  
Circuit Court Judge

---

**APPELLEE'S BRIEF**

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AND APPELLEE

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Notice of Appeal filed August 12, 2024

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IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30787/30788

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

RICHARD SPRY AND SUSAN SPRY,

*Defendants and Appellants.*

---

**PRELIMINARY STATEMENT**

The Defendants, Richard and Susan Spry, are referred to individually by their first names and collectively as “the Sprys.” Richard Hermanek, whose property is at issue, is referred to by his last name. References to Richard’s Settled Record, 04CRI22-28, is denoted “SR1.” References to Susan’s Settled Record, 04CRI22-27, is denoted “SR2.” References to the Appellant’s Brief is denoted “AB.” The proper page number(s) follows the references.

**JURISDICTIONAL STATEMENT**

The circuit court entered Amended Judgments against the Sprys on July 26, 2024, and the Sprys timely filed Notices of Appeal on August 12, 2024. SR1:876-82, 897; SR2:884-90, 906. Therefore, this Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

## STATEMENT OF LEGAL ISSUES AND AUTHORITIES

### I.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN GIVING A JURY INSTRUCTION ON CAPACITY TO CONTRACT?

The Sprys argued testamentary capacity, not contractual capacity, was the proper instruction for regarding a bank account agreement. Over their objection, the court instructed the jury on capacity to contract.

- *Johnson v. Markve*, 2022 S.D. 57, 980 N.W.2d 662
- *Estate of Wenzel-Mosset v. Nickels*, 575 N.W.2d 425 (N.D. 1998)
- SDCL 29A-6-106

### II.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN PROHIBITING TESTIMONY CONCERNING HERMANEK'S STATEMENTS?

The circuit court prohibited the testimony as the Sprys did not show it fit under any exception to the hearsay rule.

- *State v. Harris*, 2010 S.D. 75, 789 N.W.2d 303
- SDCL 19-19-803(3)

### III.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY AS TO THE STATE'S BURDEN OF PROOF REGARDING HERMANEK'S INTENT?

The circuit court ruled the jury instruction was sufficient, as it named the appropriate burden of proof.

- *In re Estate of Kuhn*, 470 N.W.2d 248 (S.D. 1991)
- *Wagner v. Wagner*, 163 N.W.2d 339 (S.D. 1968)
- *State v. Pfeiffer*, 2024 S.D. 71, 14 N.W.3d 636



## **STATEMENT OF THE CASE**

The State charged Richard with two counts of Grand Theft; one count of Conspiracy to Commit Grand Theft; and one count of Theft by Exploitation. SR1:1-7. The State charged Susan with one count of Grand Theft; one count of Conspiracy to Commit Grand Theft; three counts of Grand Theft by Exploitation; and one count of Theft by Exploitation. SR2:1-7.

A joint jury trial began on April 8, 2024, and concluded on April 10. *See* SR1:940-1756. At the conclusion of the State's case and after the State's rebuttal evidence, the Sprys made a motion for judgment of acquittal. SR1:1245-53, 1415-20. The circuit court acquitted Susan of two counts of Grand Theft by Exploitation and denied the motion as to Richard. SR1:1258, 1424; SR2:881-83. The jury acquitted Susan of the final count of Grand Theft by Exploitation. SR2:312.

The jury found the Sprys guilty of Grand Theft, for taking or exercising unauthorized control over Hermanek's Mutual of Omaha bank account, and Conspiracy to Commit Grand Theft. SR1:309; SR2:312-13. The jury also found Richard guilty of one count of Grand Theft, for taking or exercising unauthorized control over Hermanek's 2018 Tax Return. SR1:309.

## **STATEMENT OF THE FACTS**

In 2012, Hermanek had a stroke, which disrupted his ability to communicate and his mental cognition. SR1:1011-12, 1020-21, 1075-77, 1363-64. Thereafter, Hermanek moved in with his sister, Milada, who is Richard's mother and Susan's mother-in-law. SR1:1007-08, 1020, 1079. Subsequently, Hermanek created a Power of Attorney that named the Sprys as his attorneys-in-fact. SR1:312-14, 1149-51.

In 2018, Hermanek moved into an independent living facility. SR1:1015. After moving, Hermanek experienced confusion. SR1:1101. Soon thereafter, Hermanek moved to a nursing home where he developed a UTI which increased his confusion. SR1:997.

While Hermanek was in the nursing home, the Sprys, as Hermanek's attorneys-in-fact, managed his financial affairs, including paying for his care. SR1:1373-74. The Sprys opened an account at Mutual of Omaha in Hermanek's name, which, unlike his prior bank account, included a right of survivorship for the Sprys. SR1:586-89, 1386-88. The Sprys deposited the funds from his previous bank account and the proceeds from the sale of Hermanek's home into the Mutual of Omaha account. SR1:1402.

In 2019, Hermanek passed away. SR1:1412. After Hermanek's death, the Sprys closed Hermanek's Mutual of Omaha account and transferred the money to their own bank account. SR1:1227, 1412.

## ARGUMENTS

### I.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN GIVING A JURY INSTRUCTION ON CAPACITY TO CONTRACT.

#### A. *Background.*

On appeal, the Sprys argue the circuit court abused its discretion by refusing to give their proposed jury instruction regarding the capacity needed to sign the Mutual of Omaha Bank account form. AB:9-12. The Sprys argue testamentary capacity, not contractual capacity, was needed for Hermanek's assent to the account form. AB:10.

At trial, the Sprys' proposed Instruction No. 5, which states:

[I]t is not necessary that a person desiring to make a will have the capacity to make contracts and do business. One may lack competency, such that in the view of medical science he is not of sound mind and memory, yet still retains the requisite competency to make decisions about the distribution of his property after his death.

SR1:235. The circuit court refused to give the Sprys' proposed Instruction No. 5 and instead, finding contractual capacity was required, properly gave Instruction No. 24, which states:

[T]he Mutual of Omaha bank account form signed by Richard Hermanek was a contract. The State has the burden of proving Richard Hermanek's lack of capacity by proof beyond a reasonable doubt.

SR1:353, 1498-99.

*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. Contractual Capacity was Required for Hermanek’s Assent to the Mutual of Omaha Bank Account Form.*

In holding that the Mutual of Omaha Bank account form required contractual capacity, the circuit court considered the form’s language, SDCL 29A-6-106, Will Contests § 10:3 (2d ed.),<sup>1</sup> *Johnson v. Markve*, and *Wenzel-Mosset v. Nickels*. SR1:261-64, 1439-40, 1549.

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<sup>1</sup> Will Contests §10:3 (2d ed.) states, “[a] bank account agreement is a contract, and in the very few cases in which the donor’s capacity to contract has been challenged, the courts have required the donor to have the ability to understand the nature and effect of the bank deposit contract in order to make a depositary contract with a bank.” Hon. Eunice Ross and Thomas J Reed, Will Contests § 10:3 (2d ed. 2023)

In *Johnson*, this Court stated, “[t]he standards by which capacity is assessed are different for contracting parties as compared to those wishing to dispose of their property in anticipation of death.” *Johnson v. Markve*, 2022 S.D. 57, ¶ 30, 980 N.W.2d 662, 672. The *Johnson* case does not specifically discuss a bank account but dictates that a Power of Attorney document is governed by contractual capacity, and lifetime real estate gifts “are testamentary in nature when the record indicates that they were executed ‘with a mind toward disposition of the real property following [the testator’s] death.’” *Id.* ¶¶ 31-32, 980 N.W.2d at 672 (quoting *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 26, 790 N.W.2d 52, 62). Here, the circuit court, held that the account agreement was similar to Johnson’s Power of Attorney and distinguished the agreement from Johnson’s real estate transaction. SR1:1439-40.

In *Wenzel-Mosset*, the North Dakota Supreme Court considered whether Wenzel-Mosset was mentally competent when she made changes to her bank account. *Estate of Wenzel-Mosset*, 575 N.W.2d at 428. That court held contractual capacity was required for Wenzel-Mosset to make changes to her bank account. *Id.* at 429. In this case, the circuit court found Wenzel-Mosset’s situation to be like Hermanek’s. SR1:1440.

Contractual capacity was required for Hermanek’s assent to the Mutual of Omaha Bank account form. Like *Wenzel-Mosset*, while the

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(citing *Estate of Wenzel-Mosset v. Nickels*, 575 N.W.2d 425 (N.D. 1998)); see SR1:262-64.

bank account ultimately had the effect of being a testamentary instrument, contractual capacity was required to enter into the agreement. Because the joint account agreement required contractual capacity, the circuit court properly refused to give the Sprys' proposed jury instruction about testamentary capacity. The Sprys' proposed jury instruction did not accurately describe the law; therefore, the circuit court did not abuse its decision in refusing to give their proposed instruction.

Further, the Sprys did not show a prejudicial error. "To warrant reversal, defendants must show that refusal to grant an instruction was prejudicial, meaning 'the jury . . . probably would have returned a different verdict if [the] requested instruction had been given.'" *State v. Birdsheed*, 2015 S.D. 77, ¶ 27, 871 N.W.2d 62 at 73 (quoting *State v. Pellegrino*, 1998 S.D. 39, ¶ 9, 577 N.W.2d 590, 594). The Sprys argue they were prejudiced because "labeling the account agreement a 'contract' and refusing to provide an instruction on testamentary capacity, the court prevented the jury from considering whether Hermanek intended the funds to pass to Richard and Susan upon his death and whether he had the testamentary capacity to make that decision." AB:12. As previously discussed, contractual capacity, not testamentary capacity, was required to enter into the bank account agreement. Because Instruction No. 24 provided a correct statement of

the applicable law, the circuit court did not abuse its discretion or commit a prejudicial error.

## II.

### THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING TESTIMONY CONCERNING HERMANEK'S STATEMENTS.

#### A. *Background.*

In October of 2018, the Sprys' employee, Loveada Way, and the Sprys' son, Brenton, visited Hermanek at the nursing home and Hermanek signed the Mutual of Omaha account agreement. SR1:1285-90, 1308-11, 1389-90.

At trial, the Sprys attempted to introduce Hermanek's responses of "Susie. Yes" and "mmm-hmm" when Hermanek was asked whether he understood the terms of the Mutual of Omaha account agreement.<sup>2</sup> SR1:1311, 1351-53. The circuit court prohibited Way from testifying to these statements holding the statements were not admissible under the verbal acts exception to hearsay, SDCL 19-19-803(3), or the catch all exception to hearsay. SR1:1347-50, 1354. On appeal, the Sprys argue the statements were admissible under the verbal acts exception and SDCL 19-19-803(3). AB:14-15.

#### B. *Standard of Review.*

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<sup>2</sup> At trial, the Mutual of Omaha account agreement was Exhibit 14. See SR1:584-650.

A trial court's evidentiary rulings are presumed to be correct and are reviewed under the abuse of discretion standard. *State v. Harris*, 2010 S.D. 75, ¶ 8, 789 N.W.2d 303, 307 (citing *State v. Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d 100, 105). Abuse of discretion is defined as "discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *State v. Carter*, 2023 S.D. 67, ¶ 24, 1 N.W.3d 674, 685 (quoting *State v. Snodgrass*, 2020 S.D. 66, ¶ 25, 951 N.W.2d 792, 802). "If error is found, it must be prejudicial before this Court will overturn the trial court's evidentiary ruling." *Harris*, 2010 S.D. 75, ¶ 8, 789 N.W.2d at 307 (citing *Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d at 105). In describing what constitutes prejudice, this Court has stated an error is prejudicial when there was "a reasonable probability that, but for the [claimed] error, the result of the proceeding would have been different." *Carter*, 2023 S.D. 67, ¶ 25, 1 N.W.3d at 685 (citation omitted).

*C. Hermanek's Statements were Inadmissible Hearsay.*

**i. Hermanek's Statements Were Not Admissible Under the Verbal Acts Exception to Hearsay.**

The verbal acts exception to hearsay states:

Utterances made contemporaneously with or immediately preparatory to an act which is material to the litigation that tends to explain, illustrate, or show the object or motive of an equivocal act and which are offered irrespective of the truth of any assertion they contain, are not hearsay and are admissible.



*Harris*, 2010 S.D. 75, ¶ 13, 789 N.W.2d at 308-09 (quoting *State v. Charger*, 2000 S.D. 70, ¶ 26, 611 N.W.2d 221, 226-27).

In *Harris*, this Court found that the statements made during the controlled buys between the Defendant and the informant were admissible hearsay because the statements “were not offered to prove the truth of their substance, but rather to prove that the purchases of crack cocaine from Harris actually took place. . . . [T]hey were offered ‘to establish what was done or created.’” *Id.* ¶ 15, 789 N.W.2d at 309 (*Charger*, 2000 S.D. 70, ¶¶ 25-27, 611 N.W.2d at 226-27).

Here, unlike *Harris*, the verbal acts exception did not apply because the statements were offered for the truth of the matter asserted. SR1:1041, 1347. The Sprys offered Hermanek’s responses not “to establish what was done or created” but rather to prove that Hermanek voluntarily assented to the agreement’s terms. SR1:1349. Because the statements were offered for the truth of the matter asserted, the statements are hearsay and, therefore, not admissible. Because the circuit court properly excluded Hermanek’s statements, it did not abuse its discretion in doing so.

**ii. Hermanek’s Statements were Not Admissible Under SDCL 19-19-803(3).**

SDCL 19-19-803(3) provides “[a] statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition . . . , but not including a statement of memory or belief to prove the fact remembered or believed unless it

relates to the validity or terms of the declarant's will[]” are not excluded by the rule against hearsay. The circuit court held that Hermanek's statements were inadmissible hearsay because the statements were being offered to prove the fact remembered or believed and did not relate to the validity or terms of Hermanek's will. SR1:1348-49. The circuit court stated because “the statements would have been made to prove a belief of Mr. Hermanek as to what [] he was signing and why he wanted to sign it,” SDCL 19-19-803(3) “would not apply to . . . that specific part of Ms. Way's testimony.” SR1:1349. The Sprys argued “the statements were not being offered to show Mr. Hermanek's belief, so much as they were being offered to show his intent when he was signing[.]” SR1:1349. The circuit court held because the account agreement form was left blank regarding right-of-survivorship, Hermanek's intent was not expressed in the document. SR1:1349-50. At that point, the Sprys made an offer of proof via Way's testimony; the circuit court held it was maintaining the ruling it previously made. SR1:1350-54.

The Sprys argue Hermanek's statements were admissible under SDCL 19-19-803(3) because his “statements reflected his then-existing intent--his motive for signing the agreement.” AB:15. The Sprys argue the circuit court abused its discretion by excluding Hermanek's statements because it “did not find Hermanek's statements were not reflective of his present state of mind, were not made naturally, or were

made under suspicious circumstances.” AB:15 (citing *Johnson v. Skelly Oil Co.*, 288 N.W.2d 493, 494 (S.D. 1980)).<sup>3</sup>

Contrary to the Sprys’ claim, Hermanek’s statements failed to show his existing state of mind and failed to illustrate his intent or motive in signing the agreement. As the circuit court stated, the statements were being offered to prove a fact remembered or believed and did not relate to a will. Therefore, these statements are not admissible under SDCL 19-19-803(3)’s exception to hearsay. Because the statements were inadmissible, the circuit court did not abuse its discretion in excluding the statements.

**iii. The Exclusion of Hermanek’s Statements did not Result in Prejudice.**

“To establish reversible error with regards to an evidentiary ruling, ‘a defendant must prove not only that the trial court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice.’” *State v. Osman*, 2024 S.D. 15, ¶ 35, 4 N.W.3d 558, 569 (quoting *State v. Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d 237, 255). To demonstrate prejudice, the Sprys must show there was “a reasonable probability that, but for the [claimed] error, the result of the proceeding

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<sup>3</sup> The *Johnson* case states, “[r]equirements for the use of a declarant’s statement of plan or intention are that the statement must be of a present existing state of mind and must appear to have been made in a natural manner and not under circumstances of suspicion.” 288 N.W.2d at 494 (citation omitted). In this case, because the statements did not reflect Hermanek’s existing state of mind, the circuit court did not need to consider whether the statements were made naturally or not made under suspicious circumstances.

would have been different.” *Carter*, 2023 S.D. 67, ¶ 25, 1 N.W.3d at 685 (citation omitted).

The Sprys argue they were prejudiced for two reasons:

“Hermanek’s reaction to [the] explanation of the account agreement constituted the defense’s strongest evidence that Hermanek intended the right of survivorship to attach to the Mutual of Omaha bank account[]” and “hearing that Hermanek was able to respond [] verbally would have presented the jury with a contrast [of Nurse Chladek’s] testimony that Hermanek was confused when Way and Brenton visited him.” AB:16.

First, as discussed in the previous section, Hermanek’s reaction did not illustrate his intent. Further, Way testified, without objection, that when discussing the account agreement Hermanek nodded in agreement and gestured for the pen to sign. SR1:1313, 1347. Because there was no objection, the circuit court allowed Way to convey the same message that the excluded statements did. Therefore, the Sprys were not prejudiced by the statement’s exclusion.

Second, Hermanek’s ability to respond verbally does not contradict Nurse Chladek’s testimony that Hermanek was confused when Way and Brenton visited. To contradict Nurse Chladek’s testimony, Way and Brenton testified about Hermanek’s mental state when they visited him. SR1:1288-90, 1309. Way testified that Hermanek recognized Way and Brenton when they arrived, and he was happy and was in good spirits. SR1:1309. Brenton also testified to Hermanek’s mental state when he

and Way visited. SR1:1288-90. Brenton testified that Hermanek recognized himself and Way and was not too confused or cognitively impaired to sign any paperwork. SR1:1289-90. The Sprys' claim that the results of the proceedings would have been different if Hermanek's statements were admitted is without merit.

For these reasons, the Sprys were not prejudiced by the exclusion of Hermanek's statements.

### III.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY AS TO THE STATE'S BURDEN OF PROOF REGARDING HERMANEK'S INTENT.

#### A. *Background.*

The Sprys argue "[t]he circuit court's Instruction No. 25 effectively lowered the State's burden of proof, requiring only clear and convincing evidence-rather than proof beyond a reasonable doubt-that Richard and Susan exercised unauthorized control over the Mutual of Omaha account." AB:17. Contrary to the Sprys' claim, the jury instruction adequately states the State's burden was proving Hermanek's lack of capacity by proof beyond a reasonable doubt.

#### B. *Standard of Review.*

This Court recently explained,

A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. However, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo.

Under this de novo standard, we construe jury instructions as a whole to learn if they provided a full and correct statement of the law.

*State v. Pfeiffer*, 2024 S.D. 71, ¶ 50, 14 N.W.3d 636, 647 (quoting *State v. Black Cloud*, 2023 S.D. 53, ¶ 50, 996 N.W.2d 670, 683).

*B. The Jury Instruction Correctly Conveys the State's Burden.*

In creating Instruction No. 25, the circuit court considered SDCL 29A-6-104<sup>4</sup> and SDCL 29A-6-103, subsection 1<sup>5</sup> and 3.<sup>6</sup> SR1:1441-42. These statutes make clear that at the time of death, unless there is clear and convincing evidence of a different intention, a joint account belongs to the surviving party. Instruction No. 25 properly states:

A bank account opened in joint names raises a rebuttable presumption that the creator of such an account intended rights of survivorship to attach to it upon the creator's death, meaning all of the money in the account would go to the surviving parties named on the account.

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<sup>4</sup> SDCL 29A-6-104 states “[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. . . . However, on the death of the sole trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear evidence of a contrary intent.”

<sup>5</sup> SDCL 29A-6-103 subsection 1 states, “[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.”

<sup>6</sup> SDCL 29A-6-103 subsection 3 states “[u]nless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime[.]”

In this case, this presumption can be rebutted only by the State proving by clear and convincing evidence that Richard Hermanek did not intend for the rights of survivorship to attach to the Mutual of Omaha Bank account at the time the account was created, but merely intended the arrangement for his own benefit or convenience, and not for the benefit of the defendants.

. . .

Even if you find that there is clear and convincing evidence that Richard Hermanek did not intend rights of survivorship to attach to the Mutual of Omaha Bank account, you may not find either defendant guilty of the crime of Grand Theft . . . or Conspiracy to Commit Grand Theft . . . unless you find that the State has proven all of the elements of those offenses beyond a reasonable doubt.

SR1:353, 1499-1500.

Caselaw provides that “an account opened in joint names raises a rebuttable presumption that the creator of such an account intended . . . rights of survivorship[ ] to attach to it.” *In re Estate of Kuhn*, 470 N.W.2d 248, 250 (S.D. 1991) (quoting *Wagner v. Wagner*, 163 N.W.2d 339, 342 (S.D. 1968)). “The presumption that an asset held in joint tenancy passes to the second party upon the death of the first can be rebutted only by a showing with clear and convincing evidence that the original depositor [ ] did not intend rights of survivorship to attach to the joint asset, but merely intended the arrangement for her own convenience.” *Id.* at 250-51 (citing *Roth v. Pier*, 309 N.W.2d 815, 816 (S.D. 1981)). These statutes, while not lowering the State’s burden of proof, dictate how to overcome the presumption that a creator of an account opened in joint names did not intend the rights of survivorship to attach to it.

Although the Sprys argue that Instruction No. 25 “lowered the State’s burden of proof, requiring only clear and convincing evidence . . . that Richard and Susan exercised unauthorized control over the Mutual of Omaha account[,]” that claim is incorrect. AB:17. Instruction No. 25 properly instructed the jury that the presumption that Hermanek intended rights of survivorship to attach to the account can be rebutted by clear and convincing evidence. The instruction then states, “even if [the jury] find[s] there is clear and convincing evidence that [] Hermanek did not intend rights of survivorship to attach to the Mutual of Omaha Bank account, [the jury] may not find either defendant guilty . . . unless [the jury] find[s] that the State has proven all of the elements of those offenses *beyond a reasonable doubt*.” (emphasis added).

In *Pfeiffer*, this Court held that the trial court was not required to specifically instruct the jury with the reasonable doubt standard for each element, because the instructions, as a whole, adequately apprised the jury of this requirement. *Pfeiffer*, 2024 S.D. 71, ¶¶ 39-44, 14 N.W.3d at 647-48. Here, similar to *Pfeiffer*, the jury was repeatedly instructed that “[t]he State has the burden of proving every element of an offense charged beyond a reasonable doubt. The burden of proof never shifts to the defendant, but rests upon the State throughout the trial.” SR1:241; *see also* SR1:340, 342, 353, 372.

The Sprys’ claim that the jury instructions lowered the State’s burden of proof is incorrect. The jury was required to find that the State



proved all the elements beyond a reasonable doubt. Because the circuit court correctly instructed the jury on the State's burden of proof, the Sprys' claim must be denied.

### **CONCLUSION**

Based on the foregoing arguments and authorities, the State respectfully requests that the Sprys' Judgments of Conviction 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 3,994 words.

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

Dated this 15th day of April 2025.

/s/ Renee Stellagher  
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 15, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Richard Spry and Susan Spry* was served by electronic mail on John R. Hinrichs at [john@hpslawfirm.com](mailto:john@hpslawfirm.com).

/s/ Renee Stellagher  
Renee Stellagher  
Assistant Attorney General

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 30787 / 30788

STATE OF SOUTH DAKOTA

APPELLEE,

VS.

RICHARD SPRY AND SUSAN SPRY,

APPELLANTS

---

PETITION FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT  
BON HOMME COUNTY, SOUTH DAKOTA

THE HONORABLE CHERYLE GERING  
CIRCUIT COURT JUDGE

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APPELLANTS' REPLY TO APPELLEE'S BRIEF

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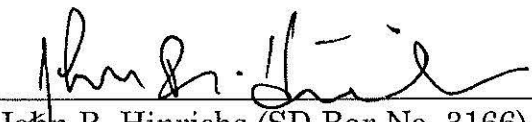
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Notice of Appeal filed on August 12, 2024.

Undersigned counsel for Appellants Richard Spry and Susan Spry having reviewed Appellee's Brief and concluded that the issues raised in Appellants' Brief filed March 4, 2025, have been adequately briefed, Appellants hereby rely upon the facts and arguments set forth in their Appellants' Brief and Appendix thereto, the settled record, and all other materials submitted to this Court and respectfully urge the Court to reverse the Judgment of Conviction with respect to counts 1 and 2 against each Appellant.

Respectfully submitted this 15<sup>th</sup> day of May, 2025.

  
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## CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). The undersigned certifies that the brief complies with the type volume limitation. The brief is four pages long, including the cover sheet, and contains 415 words and 2,543 characters, no spaces. Counsel relied on the word and character count of Microsoft Word word processing software used to prepare this brief at font size 12, Century Schoolbook, and left justified.

Dated this 15th day of May, 2025.

John R. Hinrichs  
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document was served via email and the Unified Judicial System's Odyssey e-filing system upon:

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The undersigned further certifies that this document was filed with the South Dakota Supreme Court via the Unified Judicial System's Odyssey e-filing system and emailed to SCCLerkBriefs@uj.s.state.sd.us and by mailing the original via first class mail to:

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Dated this 15th day of May, 2025.

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