IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 28722

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

JOSHUA JOHN ARMSTRONG,

Defendant and Appellant.

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

HONORABLE ROBIN HOUWMAN
Circuit Court Judge

APPELLANT'S BRIEF

BEAU J. BLOUIN
Minnehaha County Public Defender
413 North Main Avenue
Sioux Falls, SD 57104

Attorney for Defendant/Appellant

JASON RAVNSBORG
Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501

AARON MCGOWAN
Minnehaha County State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104

Attorneys for State/Appellee

Notice of Appeal Filed on September 5, 2018

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PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR". The transcript of the Arraignment Hearing held September 28, 2017 is referred to as "AH." The transcript of the Motion Hearing held April 18, 2018 is referred to as "MH." The transcript of the Jury Trial held April 30, 2018 through May 1, 2018 is referred to as "JT1," "JT2"[1] and "JT3." The transcript of the Sentencing Hearing held July 16, 2018 is referred to as "ST." All references to documents will be followed by the appropriate page number. Exhibits are referred to as "Ex."

[1] Volumes 1 and 2 of the Jury Trial transcript cover the proceedings on April 30, 2018, with Volume 2 covering the voir dire portion of the trial. JT1, JT2. Volume 3 covers the second day of the two-day trial, on May 1, 2018. JT3.

followed by the exhibit number. Defendant and Appellant, Joshua John Armstrong, will be referred to as "Armstrong."

JURISDICTIONAL STATEMENT

Armstrong appeals the Judgment and Sentence entered August 6, 2018, by the Honorable Robin Houwman, Circuit Court Judge of the Second Judicial Circuit. SR 383. Armstrong's Notice of Appeal was filed September 5, 2018. SR 397. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT ERRED IN DENYING ARMSTRONG'S MOTION FOR JUDGMENT OF ACQUITTAL.

The trial court denied Armstrong's motion, finding the evidence sufficient to convict Armstrong under the statute.

People ex rel. C.C.H., 2002 S.D. 113, 651 N.W.2d 702

State v. Paulson, 2015 S.D. 12, 861 N.W.2d 504

Aman v. Edmunds Cent. Sch. Dist. No. 22-5, 494 N.W.2d 198 (S.D. 1992)

SDCL 22-22-45

II. WHETHER THE COURT ERRED IN REFUSING ARMSTRONG'S JURY INSTRUCTION ON THE EFFECT OF THE LANGUAGE "DIRECTLY" IN SDCL 22-22-45.

The trial court refused Armstrong's proposed jury instruction.

State v. St. Cloud, 465 N.W.2d 177 (S.D. 1991)

State v. Knoche, 515 N.W.2d 834 (S.D. 1994)

SDCL 22-22-45

III. WHETHER THE COURT ERRED IN REFUSING ARMSTRONG'S PROPOSED JURY INSTRUCTION ON SPECIFIC INTENT.

The trial court refused Armstrong proposed jury instruction.

State v. St. Cloud, 465 N.W.2d 177 (S.D. 1991)

State v. Knoche, 515 N.W.2d 834 (S.D. 1994)

SDCL 22-22-45

STATEMENT OF CASE

On August 24, 2017, a Minnehaha County grand jury returned an Indictment charging Armstrong with the following: Count 1—Threatening to Commit a Sexual Offense, in violation of SDCL 22-22-45. SR 1. The State filed a Part II Habitual Offender Information on September 27, 2017, alleging Armstrong had three prior felony convictions, including two prior felony sex offenses. SR 9. Arraignment on the Indictment and the Part II Information was held September 28, 2017. *See generally* AH. On March 29, 2018, the State filed notice that it was electing to proceed on the doubling statute, pursuant to SDCL 22-6-5.1, subjecting Armstrong to double the maximum penalty allowed under SDCL 22-22-45 because he was a prisoner when the offense was allegedly committed. SR 30. The State dismissed the Part II Habitual Offender Information on April 26, 2018. SR 62.

Jury trial in the matter began on April 30, 2018. *See generally* JT1. At the conclusion of the State's case-in-chief, Armstrong moved the trial court for a judgment of acquittal. JT1 80-85. Armstrong argued the evidence was insufficient

to meet the elements of the statute as a matter of law. *Id*. The trial court denied Armstrong's motion. *Id*. at 89-91.

During trial, Armstrong proposed two jury instructions. JT3 30-36. One of the proposed instructions was on specific intent.[2] SR 71. The trial court refused Armstrong's proposed instruction and instead approved Instruction No. 19, which mirrors South Dakota Pattern Jury Instruction 1-12-1, an instruction applying to cases involving a general intent offense. JT3 33; SR 142; *see* SDPJI 1-12-1. Armstrong proposed another jury instruction informing the jury that the term "directly" in SDCL 22-22-45 modifies both of the terms "threatens" and "communicates" in the statute. SR 70; JT3 33-36. The instruction provided that in order to convict Armstrong, the jury was required to find he either "directly threatened or directly communicated specific intent to commit a further felony sex offense." SR 70; JT3 33-34. The trial court refused Armstrong's proposed instruction, finding the term "directly" does not modify the language "communicates specific intent to commit further felony sex offenses . . . ." JT3 35-36.

At the conclusion of the trial, on May 1, 2018, the jury found Armstrong guilty. JT3 65-66. He was sentenced by Judge Houwman on July 16, 2018. *See generally* ST. The court imposed twenty years in the state penitentiary, with ten of

[2] Defendant's Proposed Instruction on specific intent states: "Specific intent crimes require that the offender have a specific design to cause a certain result. In this case, in order to find Mr. Armstrong guilty, the State must prove that the defendant acted with the specific design or purpose to threaten Ms. Hall." SR 71.

those years suspended. ST 22. The sentence was ordered to run consecutive to Armstrong's other penitentiary sentence. *Id*. The Judgment and Sentence was entered on August 6, 2018. SR 383.

STATEMENT OF FACTS

In August 2016, Armstrong, who was incarcerated at the South Dakota State Penitentiary, sent a packet of letters and other documents to a Sioux Falls organization that provides counseling and advocacy services for victims of sexual and domestic assault. JT1 21-22; Ex. 1. Armstrong addressed the envelope to "P.R.E.A." Ex. 1. PREA is the acronym for the Prison Rape Elimination Act, a federal act mandating prisons to offer services to incarcerated individuals who report sexual assault. JT1 21-22. By writing "PREA" on the outside of the envelope, prison staff are not allowed to open a prisoner's letter to review its contents. *Id*. at 22-23.

The packet of documents sent by Armstrong included two letters, one addressed to PREA and the other to Governor Dennis Daugaard. The packet also included a commissary order form filled out by Armstrong, and documents containing statements about treatment being used as a weapon against him and quotes from a South Dakota Supreme Court opinion concerning Armstrong's prior conviction for felony sexual contact in 2009. *See State v. Armstrong*, 2010 S.D. 94, 793 N.W.2d 6. Ex. 1A, 1B, 1C, 1D. In the documents, Armstrong makes reference to his prior sexual contact case. *Id*. He expresses anger and frustration over the fact that his counselors for his mandatory prison sex offender treatment

program later testified to statements he made during counseling in his trial for felony sexual contact. *Id*. He also discusses his refusal to ever take part in any future sex offender treatment because of his distrust for the Department of Corrections, and because any statements he would make in treatment would likely be used against him in the future. *Id*.

In his letter to PREA, Armstrong also wrote:

> I want you to know that I am absolutely serious about what I said about Kasandra Hall. I have got nothing to lose and everything to gain by raping and killing her or a guard. At least I will be serving time for a crime that I actually committed and to be honest I would rather die of lethal injection than sit in this cell suffering from untreated psoriasis and thoughts that I can't seem to stop.

Ex. 1A. Towards the end of his letter, Armstrong writes:

> I don't get visits. I don't get mail. I don't have property or commissary. I shed skin worse than a snake and my body feels like its on fire every day and I can't remember a day in seven years where I didn't itch and bleed. I know that I can not live like this much longer and fight my own conscience every day to keep me from raping Kasi Hall or a guard, but if the warden and Governor are willing to sacrifice her I might as well. Like I said I've got NOTHING to lose so I might as well get my cock wet in the process right?
>
> What would you do? Please let me know if or when you forward the letter to Daugaard. I want to know where I stand and what I need to do in my near future. If you don't respond by August 26th, 2016 I will assume that I am on my own and might as well die embarrassing South Dakota's government.

Id.

In Armstrong's second letter, addressed to Governor Daugaard, he again refers to his prior case and his refusal to take part in treatment because his

counselors used his statements against him. Ex. 1B. Armstrong indicates other inmates, individuals he refers to as "Da Vinci" and "J-Love," may also refuse sex offender treatment as a result of what happened to him and, as a consequence, put the community in danger. *Id*. Armstrong blames the Governor and South Dakota government officials and asks the Governor what he is "willing to 'SACRIFICE'?" *Id*. Armstrong writes, "Since I know I will NEVER receive proper treatment because of what Sheila Kieso and David Mitchell did at my trial, I'll never be assessed ever again and Government officials like you are willing to SACRIFICE the rape and exploitation of innocent women and children . . ." *Id*.

In reference to the mental health counselor at the prison, Cassandra Hall, he writes:

> I would gladly stand in front of a Judge and Jury for a sexual assault and most likely a murder and tell them that someone like Kasi Hall had to be raped and murdered because a court of law thought that Dragons could have sex with humans? Seriously Governor Daugaard? You would let people like Da Vinci and J-Love get out untreated to abuse more Bernie's, Sarah's, Dawn's, and Peyton's because a thirteen year old girl said that 'bad things' equate to sexual acts with a minor?
>
> See sir, I will be honest with you. I have to fight myself every day. Each day I think about putting in a kite to Mental Health to talk about my issues. When Kasi and I are alone I slip my cuffs render her unconscious and slide those tight pants to her knees bend her over her desk, spit lube that round ass of hers and slide it into her hard fast and deep. Then when she wakes up and I'm about ready to cum I use the grooves on the hand cuffs to tear out her throat. I think I could honestly get away with rape and murder because you could have prevented it. Warden Young could have given me my property, books, magazines, commissary and stuff but chose to SACRIFICE Ms. Hall instead.

Id.

Armstrong provides the Governor with the option of either meeting his list of demands, or "sacrificing" innocent women and children, including Cassandra Hall. *Id*. The first option, according to Armstrong, was to ignore his letter. In regard to option one, Armstrong writes:

> Since I know that I will never receive the proper help that I know I need and want, have no commissary property or money on my books I might as well fulfill my fantasies and desires and fuck Kasi in her round sexy ass and kill her as I shoot my load into her. If you people don't care whether I do this or not why the Hell should I? You know that if you are willing to "SACRIFICE" her sexual assault and possible murder hell I'm willing to get my cock wet and listen to her squeal too!

Id. The other options posed to the Governor by Armstrong involved providing him with a long list of items, including several hundreds of thousands of dollars to be place in various accounts, hygiene supplies, commissary, books, magazines, movies, accessories, vehicles, clothes and weapons. *Id*.; *see* JT1 68-70. Armstrong also offered the option of giving him a full pardon for all of his offenses, reinstating his Second Amendment rights, providing him with hunting and fishing licenses and giving him a driver's license. One of Armstrong's demands included the following meal:

> 2: 20 piece chicken McNuggets, 4: ¼ pounders with cheese and bacon, 4 super size fries 2 Mcfish no tarter sauce or mayo, 2 spicy chicken no mayo or tomato, 4 sausage, Egg Cheese McMuffin, 4 Ham Egg and Cheese McBiscuit, 8 hashbrowns and a large Iced McCoffee.

Id.

On the final page of the letter, Armstrong writes:

> Maybe your people could call and ask Kasi Hall with mental Health a few questions for me. "Is your shit chute nice and tight?" "Does your cunt get nice and hot and juicy?" Which would you prefer, a torn throat, broken neck or strangulation? See sir if you honestly don't care if I get help and re-offend I am sure that Kasi would be the first of many little sacrifices until the State of South Dakota decides to put a needle in my vein plus I get to hand people like Da Vinci and J-Love who get out in a few month and years the liberty of refusing treatment and raping and exploiting innocent women and children.
>
> If you choose to ignore this letter I hope that when you force me to rape someone like Kasi or a guard that my attorney will subpoena this letter from P.R.E.A. as evidence against South Dakota and maybe local news would like to read the fact that you would rather put children through that kind of trauma than cough up some cash and time. I wonder if they will find this letter reasonable too?
>
> Sincerely
> Joshua John Armstrong
> 16096
> P.O. Box 5911 SDSP
> Sioux Falls S.D. 57117

Id.

On August 11, 2016, Michelle Markgraf, executive director at the Compass Center, received Armstrong's packet of documents. JT1 23. The Compass Center assists the South Dakota State Penitentiary with PREA services, which includes educating staff and serving as a point of contact for prisoners who wish to report sexual harassment or a sexual assault within the prison. *Id*. at 22. Upon receiving the documents, Markgraf read them and became concerned for Cassandra Hall. *Id*. at 24-25. Markgraf contacted the South Dakota Division of Criminal Investigation (DCI), and

an agent later met with Markgraf and collected Armstong's papers.[3] *Id*. at 25.

At trial, Cassandra Hall, mental health therapist at the South Dakota State Penitentiary, testified that she conducted therapy within the walls of the penitentiary and Armstrong was housed on her unit. *Id*. at 28-29. Hall reported having minimal weekly contact with Armstrong at the prison, which often consisted of asking Armstrong how he was doing and seeing if he had any mental-health-related needs. *Id*. at 30. According to Hall, she probably passed by Armstrong in the hallways of the prison at times as well. *Id*. In August 2016, Hall was made aware of the contents of the letters by another prison staff member. *Id*. at 31. She also read copies of the letters. *Id*. After some time had passed, Armstrong told Hall that he would never do any of "that" to her, but said he had to use her for leverage. *Id*. Armstrong was subsequently assigned to a different mental health therapist at the prison *Id*. at 31-32.

On cross-examination, Hall acknowledged she did not work for either PREA or the Compass Center. *Id*. at 33. Hall further explained that during the roughly two years she worked as a therapist on Armstrong's unit, she was never alone with him, and he was always placed in handcuffs, a belly chain and leg restraints. *Id*. at 33. Hall said she was made aware of the letter by someone with the special investigations unit, but she did not remember specifically who

[3] At trial, on cross-examination, Markgraf confirmed that none of the letters she received were addressed to Cassandra Hall, and that Hall did not work for either PREA or the Compass Center. JT1 26. Markgraf did not know Hall. JT1 27.

provided her the information. *Id*. at 34. She conceded Armstrong's letters were not written, addressed or sent directly to her. *Id*.

Michael Hockett, special agent with the South Dakota Division of Criminal Investigation, testified that he received a call from Markgraf in August 2016 in regards to Armstrong's letters. *Id*. at 38. Hockett later collected the letters from Markgraf and kept them in his custody. *Id*. at 38. According to Hockett, after receiving the letters he contacted Steve Baker, a major at the penitentiary, to discuss their contents. *Id*. at 62-63. Baker told Hockett he would notify Hall and take measures to keep her safe. *Id*. at 63. Hockett subsequently conducted an interview with Armstrong about the letters. *Id*.; Ex. 2. During the interview, Armstrong admitted to writing the letters but denied having any issue with Hall. *Id*. at 64, 72; Ex. 2, 1A, 1B, 1C, 1D. Armstrong referred to his letters as "bullshit" and a "smoke screen," and indicated Hall was in no danger. *Id*. at 73; Ex. 2. Armstrong explained to Hockett that the purpose of the letters was to pick up a charge so he could get his day in court to address what happened to him in his prior case. *Id*. at 73-74; Ex. 2.

Armstrong testified at trial in his defense. JT3 9. He admitted writing, or at least rewriting, and sending the letters addressed to PREA and Governer Daugaard. *Id*. at 11-14, 17, 24. Armstrong contended he wrote the letters to go on the record and request protective custody from the Department of Corrections. *Id*. at 9-10. He referenced his prior case, and the testimony of his sex offender treatment counselors, and stated he no longer trusted or felt safe with the South

Dakota Department of Corrections. *Id*. at 12. Armstrong testified he had no intent to hurt anyone. *Id*. at 21.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING ARMSTRONG'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE ESTABLISHED THE LETTERS CONTAINING THE ALLEGED THREATS WERE NOT SENT OR COMMUNICATED DIRECTLY TO THE ALLEGED VICTIM.

"'The denial of a motion for judgment of acquittal presents a question of law that [the Court] review[s] de novo." *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 14, 772 N.W.2d 117, 122). "The ultimate question in such an appeal is 'whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *State v. Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d 600, 606 (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). The Court "accept[s] the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict." *Id.* The Court will "not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal." *Id.* "[T]he evidence is insufficient only when no rational trier of fact could find guilt beyond a reasonable doubt. *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606 (quoting *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140) (internal quotation omitted).

"Statutory interpretation and application are questions of law." *State v.*

Schouten, 2005 S.D. 122, ¶ 9, 707 N.W.2d 820, 822 (quoting *Block v. Drake*, 2004 S.D. 72, ¶ 8, 681 N.W.2d 460, 463). "Conclusions of law are reviewed by this Court under the de novo standard, with no deference to the circuit court." *Id*. "Statutory construction is employed to discover the true intent of the legislature in enacting laws, which is ascertained primarily from the language used in the statute." *Schouten*, 2005 S.D. 122, ¶ 9, 707 N.W.2d at 823 (citing *State v. Myrl & Roy's Paving, Inc.*, 2004 S.D. 98, ¶ 6, 686 N.W.2d 651, 653). "The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect." *Rowley v. S.D. Bd. Of Pardons and Paroles*, 2013 S.D. 6, ¶ 5, 826 N.W.2d 360, 363 (quoting *Brant*, 2012 S.D. 12, ¶ 7, 809 N.W.2d at 849).

SDCL 22-22-45 provides:

> Any person who has been convicted of a felony sex offense as defined in § 22-24B-1 who directly threatens or communicates specific intent to commit further felony sex offenses is guilty of threatening to commit a sexual offense. Threatening to commit a sexual offense is a Class 4 felony.

The evidence presented at trial established Armstrong's letters containing the alleged threats against Cassandra Hall were sent to a third party. Armstrong addressed the letters to PREA and sent them directly to the executive director of the Compass Center, Michelle Markgraf. Markgraf then called DCI, and special agent Michael Hockett met with Markgraf and collected the letters. Hockett did not inform Hall of the letters, but sometime later Hall was made aware of their

contents and provided copies to read. JT1 67. In the letters, while Armstrong brings up Hall's name multiple times and indicates he may rape and kill her or a guard if his demands are not met, he addresses his words to a PREA staff member and Governor Daugaard. Ex. 1A, 1B. At trial, Hall admitted Armstrong had never directly communicated any threats to her in person at the prison. JT1 32-35. Further, Hall, Markgraf and Hockett all agreed the letters in question were never sent directly to Hall. *Id*. at 25-28, 32-35, 66-75.

Accordingly, the question before this Court is two-fold: (1) What is the meaning of "directly" as it pertains to SDCL 22-22-45; and (2) Whether the term "directly" modifies both of the verbs "threatens" and "communicates." In opposing Armstrong's motion for judgment of acquittal at trial, the State argued the following:

> The State would argue that he did directly threaten to commit a further felony sex offense. I don't see anywhere in there, and as well the dictionary definition and saw that direct is deemed specifically or as a purpose. I would argue that an indirect threat, under his letters, would have been, quote, the sacrifice of innocent woman [sic] and children. That would be indirect. Here when we're talking specifically about Cassandra Hall, he is naming a specific person, it's a direct threat to her, to rape her. He is around her, she is close to him, he has access to her, and it's direct about that.

JT1 87.

Here, the State's argument conflates the meaning of a direct, versus an indirect, threat with a specific, versus a general, threat. The term "directly," as stated in SDCL 22-22-45 refers to the manner of the delivery of the alleged threat

in question. In order to directly threaten a person under the statute, the threat must be communicated or delivered, whether orally, through a letter, email or other social medium, directly to the object of the threat. By contrast, a letter sent to a third party, or parties, that communicates an intent to hurt the object of the threat, is an example of an indirect threat. Here, adopting the State's argument—that specifically naming Cassandra Hall in the letter constitutes a direct threat—would effectively swallow the meaning of an indirect threat.

This Court's prior holdings in cases involving a question of whether a threat was communicated directly are instructive. In *People ex rel. C.C.H.*, an eighth grade student, C.C.H., told a school teacher on two consecutive days that he wanted "to kill" another classmate. 2002 S.D. 113, ¶ 4, 651 N.W.2d 702, 704. The day after C.C.H.'s second statement to the teacher, he was arrested, charged and ultimately adjudicated of disorderly conduct. *Id*. at 704-05. On appeal, this Court stated, "Clearly, the evidence proves that the threats were not communicated directly to the intended victims, but rather to a teacher who had inquired in C.C.H.'s demeanor." *Id*. at 707.

In *State v. Paulson*, the defendant sent threatening letters to a court presiding over his various civil lawsuits. 2015 S.D. 12, ¶ 2, 861 N.W.2d 504, 505. The defendant was subsequently charged with one count of threatening a judicial officer under SDCL 22-11-15, which provides in relevant part: "Any person who, directly or indirectly, utters or addresses any threat or intimidation to any judicial or ministerial officer . . . is guilty of a Class 5 felony." *Id*. On

appeal, the defendant claimed he had not authored one of the memorandums containing threatening language. *Id*. at 508. In disposing of the defendant's claim, this Court noted that the defendant "may also 'indirectly' threaten a judicial officer by offering another's work and still violate SDCL 22-11-15." *Id*.

Similar to this Court's interpretation of the term "directly" as it pertained to communicating a threat in *C.C.H.* and *Paulson*, the term as used in SDCL 22-22-45 refers to the manner of delivery of the communication. Like C.C.H., where the student informed his teacher that he wanted to kill a fellow student, and this Court found the alleged threat to be indirect, rather than direct, Armstrong's letters were addressed, sent and directed to third-parties. None of the alleged threats at issue were communicated directly to the alleged victim.

Moreover, in criminally punishing anyone "who directly threatens or communicates specific intent to commit further felony sex offenses," the Legislature intended for the term "directly" to modify both of the verbs "threatens" and "communicates" under SDCL 22-22-45. That is, the statute makes it a crime for someone with prior felony sexual offenses to either: (1) directly threaten to commit further sexual offenses, or (2) directly communicate a specific intent to commit further sexual offenses. SDCL 22-22-45.

The language in SDCL 22-42-5 is analogous. The statute makes it a crime to "knowingly possess a controlled drug or substance . . . ." There, the term "controlled" modifies both of the terms "drug" and "substance." The fact that the term "controlled" is not repeated immediately before the word "substance" does

not mean the Legislature intended to criminalize the knowing possession of any substance. The statute criminalizes knowing possession of controlled drugs, and knowing possession of controlled substances. SDCL 22-42-5.

Likewise, the term "directly" in the current case modifies both "threatens" and "communicates" under the statue. SDCL 22-22-45. And the omission of the term "indirectly" in the language is notable. For example, SDCL 22-11-15 criminalizes a threat made "directly or indirectly" to a judicial officer. There, the inclusion of "indirectly" in the statute is indicative of the Legislature's practice of including the term "indirectly" when it intends to criminalize both a direct and an indirect threat. Here, the legal principal expressio unius est exclusion alterius is applicable. It means "the expression of one thing is the exclusion of another." *Aman v. Edmunds Cent. School Dist. No. 22-5*, 494 N.W.2d 198, 200 (S.D. 1992) (citation omitted). By including the term "directly" but omitting the term "indirectly," the Legislature demonstrated its intent to criminalize only those threats communicated directly to the victim. If the Legislature intended for an indirect threat or communication to constitute a crime under SDCL 22-22-45, the term would have been included.

Thus, the evidence was insufficient to establish Armstrong directly threatened or communicated a specific intent to commit further felony sex offenses, and the trial court erred in denying his motion for judgment of acquittal.

II. THE TRIAL COURT ERRED IN REFUSING ARMSTRONG'S

PROPOSED JURY INSTRUCTION ON THE EFFECT OF THE TERM "DIRECTLY" IN SDCL 22-22-45.

This Court reviews a trial court's refusal to give the jury a proposed instruction under an abuse of discretion standard. *State v. St. John*, 2004 S.D. 15, ¶ 8, 675 N.W.2d 426, 427. "A trial court must instruct a jury as warranted by the evidence presented." *State v. St. Cloud*, 465 N.W.2d 177, 181 (S.D. 1991) (citing *State v. Grey Owl*, 295 N.W.2d 748, 750 (S.D. 1980) (citations omitted). "[J]ury instructions are adequate when, considered as a whole, they give a full and correct statement of the law applicable to the case. *Id*. at 181-82 (citing *Grey Owl*, 295 N.W.2d at 751). "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." *State v. Webster*, 2001 S.D. 141, ¶ 7, 637 N.W.2d 392, 394. In order to prove prejudice, Armstrong must show that the jury probably would have returned a different verdict if the proposed instruction had been provided. *See State v. Knoche*, 515 N.W.2d 834, 838 (S.D. 1994).

At trial, Armstrong proposed a jury instruction informing the jury the term "directly" in SDCL 22-22-45 modifies the language "threatens" and "communicates" in the statute. SR 70. The instruction provided that in order to convict Armstrong, the jury was required to find that he either "directly threatened or directly communicated specific intent to commit a further felony sex offense." SR 70; JT3 33-34. The trial court refused Armstrong's proposed instruction, finding the term "directly" did not modify the language

"communicates specific intent to commit further felony sex offenses . . . ." JT3 35-36. The court stated, "I think 'directly' clearly references 'threatens' and it's an either or situation in this statute, and so I don't believe that the Defense's proposed instruction accurately conveys what the language of the statute is." *Id*. at 36.

For the same reasons stated above, the court erred in finding the term "directly" does not modify the term "communicates" in SDCL 22-22-45. Further, the refusal to give the jury the proposed instruction was prejudicial to Armstrong. The court's instructions, as provided, invited jurors to convict Armstrong if they found his letters constituted an indirect communication of an intent to commit further sexual assaults. Indeed, consistent with the trial court's ruling, the State argued to the jury in closing argument that the alleged threats did not need to be sent or communicated directly to Hall. JT3 44-45. According to the State, specifically referring to Hall in the letters was enough. *Id*. Thus, if the trial court had accepted Armstrong's jury instruction, the jury would have been properly instructed and the verdict probably would have been different.

III. THE TRIAL COURT ERRED IN REFUSING ARMSTRONG'S PROPOSED JURY INSTRUCTION ON SPECIFIC INTENT.

This Court reviews a trial court's refusal to give the jury a proposed instruction under an abuse of discretion standard. *State v. St. John*, 2004 S.D. 15, ¶ 8, 675 N.W.2d 426, 427. "A trial court must instruct a jury as warranted by the evidence presented." *State v. St. Cloud*, 465 N.W.2d 177, 181 (S.D. 1991) (citing

State v. Grey Owl, 295 N.W.2d 748, 750 (S.D. 1980) (citations omitted). "[J]ury instructions are adequate when, considered as a whole, they give a full and correct statement of the law applicable to the case. *Id*. at 181-82 (citing *Grey Owl*, 295 N.W.2d at 751). "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." *State v. Webster*, 2001 S.D. 141, ¶ 7, 637 N.W.2d 392, 394. In order to prove prejudice, Armstrong must show that the jury probably would have returned a different verdict if the proposed instruction had been provided. *See State v. Knoche*, 515 N.W.2d 834, 838 (S.D. 1994).

At trial, Armstrong proposed a jury instruction on specific intent, instructing the jury the "State must prove that the defendant acted with the specific design or purpose to threaten Ms. Hall." SR 71; JT3 30-31. The State opposed the instruction, arguing the "utterance itself" was enough, and requested a general intent instruction. JT3 32. The trial court refused Armstrong's proposed instruction, and instead provided Instruction No. 19, which mirrors South Dakota Pattern Jury Instruction 1-12-1, an instruction applying to cases involving a general intent offense. JT3 33; SR 142; *see* SDPJI 1-12-1. Instruction No. 19 provides:

> In the crime of Threatening to Commit a Sexual Offense, the defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful.

The trial court also provided Instruction No. 20, which provided:

> The State must prove that the defendant intended to issue a threat or knew that his communication would be viewed as a threat. The intent with which an act is done is shown by the circumstances surrounding the act, the manner in which it is done, and the means used.

JT3 139-147.

Here, the court erred in providing the jury an instruction on general intent. The intent required under SDCL 22-22-45 is explicitly provided in the language of the statute: "specific intent." Indeed, at the pretrial motions hearing, on the issue of Armstrong's motions in limine to redact portions of his letters to PREA and Governor Daugaard, the State agreed SDCL 22-22-45 required specific intent. MH 11-13. In its written objections to the motions in limine, the State asserted, "This offense is a specific intent crime." SR 54. In fact, in objecting to Armstrong's motions in limine, the State argued to the trial court that portions of the letters were necessary for the jury to see because the evidence went "to the Defendant's specific intent[.]" *Id*. at 11; *see* SR 54. The court agreed with the State and found those portions of the letters relevant to Armstrong's intent. *Id*. at 13; SR 65.

Because SDCL 22-22-45 explicitly requires specific intent, the trial court erred in refusing Armstrong's proposed jury instruction on specific intent, and by providing the jury an instruction on general intent. The statute requires more than general intent. In order to find Armstrong guilty, the jury was required to

find that he acted with the specific intent to threaten Hall.

Armstrong was prejudiced by the court's err because it lowered the State's burden of proof under the statute. If the jury had been properly instructed, they may have found the letters were merely a ploy to have his day in court and shed light on his grievances related to his prior case; that his letters and outrageous demands were merely fantasies; and they may have found the evidence insufficient to prove Armstrong acted with a specific intent to threaten Hall.

CONCLUSION

The trial court erred in denying Armstrong's motion for judgment of acquittal because the evidence established Armstrong never directly communicated a threat to Hall. Moreover, the court's failure to properly instruct the jury in this case prejudiced Armstrong because it lowered the State's burden of prove and likely influenced the jury's verdict.

For the aforementioned reasons, authorities cited, and upon the settled record, Armstrong respectfully asks this Court to reverse and remand the case with an order directing the trial court to vacate his Judgment and Sentence.

Respectfully submitted this 21st day of March, 2019.

/s/ Beau J. Blouin
Beau J. Blouin
Minnehaha County Public Defender
ATTORNEY for APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 5,933 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 21st day of March, 2019.

/s/ Beau J. Blouin
Beau J. Blouin
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

SHIRLEY A. JAMESON-FERGEL
Clerk of the Supreme Court
SCClerkBriefs@ujs.state.sd.us

JASON RAVNSBORG
Attorney General
atgservice@state.sd.us
Attorney for Appellee, State of South Dakota

AARON MCGOWAN
Minnehaha County State's Attorney
ujsservice@minnehahacounty.org
Attorney for Appellee, State of South Dakota

Dated this 21st day of March, 2019.

/s/ Beau J. Blouin
Beau J. Blouin
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, South Dakota 57104
(605) 367- 4242
bblouin@minnehahacounty.org

APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
		CRIM. NO. 17-6749
STATE OF SOUTH DAKOTA, Plaintiff, v. JOSHUA JOHN ARMSTRONG, DOB 02/10/75 SD State Penitentiary Sioux Falls, SD 57117 Defendant.	)	JUDGMENT OF CONVICTION AND SENTENCE

An Indictment was filed in this Court on the 24th day of August, 2017, charging the Defendant with the crime of Count 1 - Threatening to Commit a Sexual Offense (SDCL 22-22-45), a Class 4 Felony, and also alleging inmate status for purposes of the doubling statute, SDCL 22-6-5.1 and 22-11A-1. An Information for Habitual Offender was filed September 27th, 2018.

The Defendant, the Defendant's attorney, Neil Fossum, and Lindsey S. Quasney, prosecuting attorney, appeared at the Defendant's arraignment on September 28th, 2017. The Court advised the Defendant of his constitutional and statutory rights pertaining to the charge that had been filed against him. The Defendant pled not guilty to the charge filed in the Indictment. The Defendant also plead not guilty to the Information for Habitual Offender.

A jury trial commenced April 30, 2018, in Sioux Falls, South Dakota. The State elected to proceed on the doubling statute prior to trial and the Information for Habitual Offender was dismissed. On the 1st day of May, 2018, the jury returned a verdict of guilty to Count 1 of the Indictment, and also found that the defendant was an inmate at the time the offense was committed. The state dismissed the Information for Habitual Offender.

ORDERED that a JUDGMENT of guilty is entered as to **Count 1 - Threatening to Commit a Sexual Offense (SDCL 22-22-45), a Class 4 Felony**, and that the defendant was an inmate at the time the offense was committed for purposes of the doubling statute (SDCL 22-6-5.1 and 22-11A-1).

SENTENCE

On the 16th day of July, 2018, the Defendant, the Defendant's attorney, Wade Warntjes, and Lindsey S. Quasney, prosecuting attorney, appeared at the Defendant's sentencing. The Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS HEREBY ORDERED that the Defendant Joshua John Armstrong be sentenced to serve twenty (20) years in the South Dakota State Penitentiary, with ten (10) years suspended.

IT IS FURTHER ORDERED that the Defendant Joshua John Armstrong pay court costs of one hundred and four ($104.00) dollars to the Minnehaha County Clerk of Courts.

IT IS FURTHER ORDERED that the Defendant Joshua John Armstrong pay grand jury transcript costs of one hundred and twelve ($112.00) dollars to the Minnehaha County Clerk of Courts to be forwarded to the Attorney General's Office at Finance Division(Restitution) 1302 E. Highway 14, #1 Pierre, SD 57501.

IT IS FURTHER ORDERED that the Parole Forfeiture Statute does apply, meaning the Defendant's parole has been forfeited. SDCL 24-15A-20.

IT IS FURTHER ORDERED that it is suspended on the condition that the Defendant comply with conditions of Parole.

IT IS FURTHER ORDERED this sentence shall run consecutive to the Defendant's file in Moody County Criminal File #09-29.

IT IS FURTHER ORDERED that the Court expressly reserves control and jurisdiction over the Defendant for the period of the sentence imposed and that this Court may revoke the suspension at any time and reinstate the sentence without diminishment or credit for any of the time that the Defendant was on probation.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 3rd day of August, 2018.

BY THE COURT:

The Honorable Robin Houwman
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK

By: Dara Melius, Deputy

SEAL

FILED
AUG 06 2018
Minnehaha County, S.D.
Clerk Circuit Court

NOTICE OF APPEAL

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

SHIRLEY A. JAMESON-FERGEL
Clerk of the Supreme Court
SCClerkBriefs@ujs.state.sd.us

JASON RAVNSBORG
Attorney General
atgservice@state.sd.us
Attorney for Appellee, State of South Dakota

AARON MCGOWAN
Minnehaha County State's Attorney
ujsservice@minnehahacounty.org
Attorney for Appellee, State of South Dakota

Dated this 21st day of March, 2019.

/s/ Beau J. Blouin
Beau J. Blouin
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, South Dakota 57104
(605) 367- 4242
bblouin@minnehahacounty.org

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28722

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSHUA JOHN ARMSTRONG,

Defendant and Appellant.

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

THE HONORABLE ROBIN J. HOUWMAN
Circuit Court Judge

APPELLEE'S BRIEF

JASON R. RAVNSBORG
ATTORNEY GENERAL

Erin E. Handke
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Beau J. Blouin
Christopher Miles
Attorney at Law
413 North Main Avenue
Sioux Falls, SD 57104
Telephone: (605) 367-4242
E-mail: cmiles@minnehahacounty.org

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed September 5, 2018.

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CASES CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28722

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSHUA JOHN ARMSTRONG,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Joshua Armstrong, is referred to as "Defendant." Appellee, the State of South Dakota, is referred to as "State." References to documents are designated as follows:

Settled Record (Minnehaha Criminal File No. 17-6749).... SR

Jury Trial Transcript (April 30- May 1, 2018)
(Three Volumes) JT1, JT2, JT3

Defendant's Brief.....DB

Exhibits ..... EX

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

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Conviction and Sentence entered by the Honorable Robin J. Houwman, Circuit Court Judge, Minnehaha County, Second Judicial Circuit. SR 383-86. The Judgment

of Conviction and Sentence was filed on August 6, 2018. *Id.* Defendant filed a Notice of Appeal on September 5, 2018. SR 397-98. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION OF JUDGMENT OF ACQUITTAL?

The circuit court denied Defendant's motion for judgment of acquittal.

State v. Bosworth, 2017 S.D. 43, 899 N.W.2d 691

Loughrin v. United States, 573 U.S. 351, 134 S.Ct. 2384, 189 L.Ed.2d 411

SDCL 22-22-45

II. WHETHER THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S PROPOSED JURY INSTRUCTION ON THE EFFECT OF THE WORD "DIRECTLY" IN SDCL 22-22-45?

The circuit court did not provide the jury with Defendant's proposed instruction.

State v. Shaw, 2005 S.D. 105, 705 N.W.2d 620

Stern Oil Co. Inc. v. Brown, 2018 S.D. 13, 907 N.W.2d 800

SDCL 22-22-45

III. WHETHER THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S PROPOSED JURY INSTRUCTION ON SPECIFIC INTENT?

The circuit court did not provide the jury with an instruction on specific intent.

State v. Schouten, 2005 S.D. 122, 707 N.W.2d 820

SDCL 22-22-45

STATEMENT OF THE CASE

The Minnehaha County Grand Jury indicted Defendant on August 24, 2017, for one count of Threatening to Commit a Sexual Offense contrary to SDCL 22-22-45, a Class 4 felony. SR 1-2. After a two-day trial the jury found Defendant guilty. SR 148. On July 16, 2018, the circuit court sentenced Defendant to twenty years in the South Dakota State Penitentiary with ten years suspended. SR 381-86. The court filed its Judgment of Conviction and Sentence on August 6, 2018. SR 381-86. Defendant filed a Notice of Appeal on September 5, 2018. SR 397-98.

STATEMENT OF THE FACTS

On August 8, 2016, Defendant was an inmate at the South Dakota State Penitentiary (SDSP), in Sioux Falls, South Dakota. EX 3. On that date he wrote two letters and mailed them, in a single envelope, along with a commissary form; case slips; two drawings; and two stories, to the Compass Center[1] in Sioux Falls, South Dakota. JT1 22-24; EX 1A, 1B, 1C, 1D. Defendant labeled the envelope "PREA"[2]. EX 1.

One letter was addressed "To Whom it May Concern." EX 1A. In it Defendant introduced himself as an inmate and asked for help in sending the remaining contents of the envelope to Governor Dennis

[1] The Compass Center provided counseling and advocacy services to survivors of sexual assault and domestic violence. JT1 21.
[2] PREA stands for Prison Rape Elimination Act. JT1 22. The Compass Center receives PREA complaints from inmates regarding sexual harassment or sexual assault occurring in the prison. JT1 22. Prison staff is prohibited from reading mail marked PREA. JT1 22.

Daugaard. EX 1A. Defendant accused the South Dakota Department of Corrections (DOC) of breaking the law and withholding his mail. EX 1A. He explained that he does not seek treatment while in DOC custody because he does not trust the counselors. EX 1A. Defendant's distrust stems from two counselors testifying against him at his prior trial. EX 1A; *see State v. Armstrong*, 2010 S.D. 94, 793 N.W.2d 6. In the letter, he discussed raping and killing C.H., a DOC mental health counselor. EX 1A. Defendant admits he was "absolutely serious about what [he] said about [C.H.]. [He has] got nothing to lose and everything to gain by raping and killing her or a guard." EX 1A. The letter stated in part:

> I am absolutely serious about what I said about [C.H.]. I have got nothing to lose and everything to gain by raping and killing her or a guard. . . I can't live like this much longer and fight my own conscience every day to keep me from raping [C.H.] or a guard, but if the Warden and Governor are willing to sacrifice her, I might as well. Like I said, I have nothing to lose, so I might as well get my cock wet in the process.

EX 1A.

The second letter included in the envelope was eighteen-pages long and addressed to then-Governor Daugaard. EX 1B. Defendant first asks Governor Daugaard what he is willing to sacrifice. EX 1B. Defendant claims he has case law, that if shared among inmates, would set them free. EX 1B. He also claims two inmates, J-Love and Da Vinnci, planned to rape children once they are out of prison and provided detailed descriptions of their plans. EX 1B. Defendant also shared his own fantasies involving young children. EX 1B.

Several times throughout the second letter, Defendant discussed C.H. EX 1B. Defendant proclaims he would "gladly stand in front of a jury for sexual assault and most likely murder and tell them someone like [C.H.] . . . had to be raped and murdered . . ." EX1B.

The letter depicted how Defendant planned to attack C.H. EX 1B. First, he would seek mental health treatment to get C.H. alone. EX 1B. Then,

> [w]hen [C.H.] and I are alone, I slip my cuffs and render her unconscious and slide those tight pants to her knees, bend her over her desk, spit lube that round ass of hers, and slide it into her hard, fast, and deep. Then when she wakes up and I am about ready to cum, I use the groves [sic] of the handcuffs to tear out her throat. I think I could honestly get away with rape and murder because you could have prevented it. Warden Young could have given me my property, books, magazines, commissary and stuff, but chose to sacrifice [C.H.] instead.

EX 1B. Governor Daugaard is then told he can save C.H. by giving into Defendant's demands. EX 1B. Failure to meet Defendant's demands would result in inmates receiving the previously mentioned case law and C.H. being attacked. EX 1B.

Defendant provided Governor Daugaard with several options to save C.H. EX 1B. Option one was to ignore the letter and Defendant would advise J-Love and Da Vincci to commit as many crimes as possible. EX 1B. He would also act on his fantasy of raping C.H. EX 1B. Option two demanded that Defendant be given several pornographic books, $800,000 deposited in various accounts, all his debts paid, various religious magazines and books, items from

commissary, items from the azuregreen.net website[3], non-religious books and magazines[4], and $54 million for mental and emotion duress and neglect, with all interest for the next twenty-five years paid for by the state of South Dakota. EX 1B.

Option three required the State to give Defendant $52 million, tax free, in mental and emotional damages, a full pardon, including a pardon for Defendant's conviction in Flandreau Santee Tribal Court, his Second Amendment rights reinstated with a big and small game and fishing license, his driver's license or driving permit reinstated, $300,000 cash in a black and silver Nike backpack, medical care provided for Defendant at the State's expense for the next twenty years, and food from McDonald's[5]. EX 1B.

After providing these three options, Defendant changed his mind and decided to let Governor Daugaard pick from only two options. EX 1B. The first option remained the same: ignore the letter and mass chaos would erupt. EX 1B. The second option was a much more detailed list of items demanded by Defendant, including $45 million; a

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[3] Azuregreen.net is a whole-sale website featuring metaphysical, spiritual, and gift items intended for wiccan, pagan, and magical communities. https://www.azuregreen.net/Aboutus.asp (June 4, 2019).
[4] Defendant admits that some of the non-religious books and magazines are available to him in the DOC library but would like to have something to read at home. EX 1B.
[5] The McDonald's order included forty chicken McNuggets; four quarter pounders with cheese and bacon; four supersized fries; two McFish sandwiches- no tartar sauce or mayo; two spicy chicken sandwiches- no mayo or tomato; four sausage, egg, cheese McMuffins; four ham, egg, and cheese McBiscuits; eight hash browns; and a large McCoffee.

silver Dodge Ram Rebel 1500 quad cab pickup; clothes, hygiene products; electronics; movies; thirty-two types of guns or $1.8 million and a $500,000 gift card to Gary's Gun; certification in each weapon; grenades; weapons used in various movies[6]; camping and fishing supplies[7]; survival food; gold; $2 million cash in a Nike backpack; $10 million in cashier's checks; food from Pizza Ranch[8]; mental health treatment at DOC's expense; treatment for his psoriasis at DOC's expense; books; and weapons outfitted with silencers as featured on a Keloland news segment. EX 1B.

Michelle Markgraf was working at the Compass Center when she opened the envelope sent by Defendant. JT1 23-24. The letters' content raised a lot of concerns for Michelle. JT1 24-25. Michelle, armed with such alarming material, notified South Dakota Division of Criminal Investigation (DCI). JT1 25. DCI collected the envelope's contents and began an investigation. JT1 25. Agent Michael Hockett notified Major Steven Baker with the SDSP's Special Investigations Unit, of Defendant's threats. JT1 62. Major Baker indicated he would notify C.H. and ensure her safety. JT1 62-63.

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[6] Defendant referenced several weapons from fictious movies such as *Hunger Games* and *Divergent*.
[7] Defendant asked Governor Daugaard to personally set up and put together a tackle box of items he uses himself while fishing.
[8] Defendant's order from Pizza Ranch included one large bronco pizza, one large roundup pizza, one large bacon cheeseburger pizza, one large BBQ chicken pizza, four chicken strips, four potato wedges, four breadsticks, four garlic cheese bread, forty pieces of chicken, and a large Coke or Cherry Pepsi.

Agent Hockett interviewed Defendant. JT1 63. Defendant admitted to Agent Hockett that he wrote the letter and made the threat because he liked C.H. EX 2, 2A. When asked if anything in the letter was an actual threat, Defendant said "if I have to do something stupid like that I will." EX 2A. Defendant admitted multiple times to wanting to get charged for making threats. EX 2A.

Prior to trial, Defendant and the State stipulated that Defendant was incarcerated in the SDSP and has been previously convicted of two felony sex offenses, meeting an element of the crime charged. EX 3. This stipulation was presented to the jury. JT1 36.

A Minnehaha jury found Defendant guilty of threatening to commit a sexual offense in violation of SDCL 22-22-45. SR 148.

ARGUMENTS

I

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Defendant argues the circuit court erred when it denied his motion for judgment of acquittal. DB 12. Defendant asserts that to be convicted under SDCL 22-22-45 there must be evidence that Defendant either directly threatened or directly communicated specific intent to commit further felony sex offenses. DB 13-14. Defendant alleges there was no evidence showing he directly threatened or directly communicated his intent to commit further felony sex offenses to C.H. because he sent the letters to the Compass Center, not C.H. Defendant misconstrues the

statute. SDCL 22-22-45 does not require Defendant to directly communicate his intent to commit a further sex offense to the victim. Thus, the circuit court properly denied Defendant's motion of judgment of acquittal.

A. *Standard of Review.*

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d 327, 330 (citing *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83). The question is "whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt." *State v. Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d 600, 606 (citing *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). "An appellate court is not required to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Martin*, 2015 S.D. 2, ¶ 13 (quoting *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140). Rather, the evidence is reviewed in a light most favorable to the verdict. *State v. Fasthorse*, 2009 S.D. 106, ¶ 6, 776 N.W.2d 233, 236 (citing *Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d at 342). Likewise, "this Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or reweigh the evidence." *Id.* "If the evidence, including circumstantial evidence, and reasonable inferences drawn therefrom, sustains a reasonable theory of guilt, a guilty verdict will not

be set aside." *Fasthorse*, 2009 S.D. 106, ¶ 6, 776 N.W.2d at 236 (citing *Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d at 342).

Issues of statutory interpretation are questions of law reviewed de novo. *State v. Johnsen,* 2018 S.D. 68, ¶ 9, 918 N.W.2d 876, 878. The purpose of statutory interpretation is to fulfill the legislative dictate as determined by its intent. *Id.* Legislative intent is typically determined by examining the express language of the statute. *Id.* Because statutes must be construed according to their intent, the intent must be determined from the statute as a whole. *Id.*

B. There is sufficient evidence to convict Defendant of threatening to commit a sexual offense under SDCL 22-22-45.

In determining the sufficiency of the evidence, this Court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Riley,* 2013 S.D. 95, ¶ 14, 841 N.W.2d 431, 436. To convict Defendant of threatening to commit a sexual offense, the State must prove Defendant has been convicted of a felony sex offense, as defined in SDCL 22-24B-1, and he directly threatened or communicated specific intent to commit a further felony sex offense. Defendant asks this Court to engage in statutory construction, arguing "directly" modifies both "threatens" and "communicates." DB 13-14. However, the language of SDCL 22-22-45 does not support Defendant's contention.

Statutory construction "begins with an analysis of [the statute's] plain language and structure." *State v. Bariteau*, 2016 S.D. 57, ¶ 15, 884 N.W.2d 169, 175 (citing *Puetz Corp. v. S.D. Dep't of Revenue*, 2015 S.D. 82, ¶ 16, 871 N.W.2d 632, 637). That is because "'[t]he language expressed in the statute is the paramount consideration' and 'if the words and phrases in the statute have plain meaning and effect, [this Court] should simply declare their meaning and not resort to statutory construction.'" *Bariteau*, 2016 S.D. 57, ¶ 15, 884 N.W.2d at 175 (quoting *Dale v. Young*, 2015 S.D. 96, ¶ 6, 873 N.W.2d 72, 74). In other words, "'[w]hen the language in a statute is clear, certain and unambiguous, there is no reason for construction and the Court's only function is to declare the meaning of the statute as clearly expressed.'" *State v. Bingham*, 2017 S.D. 14, ¶ 3, 894 N.W.2d 389, 390 (quoting *Hayes v. Rosenbaum Signs & Outdoor Advert.*, 2014 S.D. 64, ¶ 28, 853 N.W.2d 878, 885). This Court will not "declare the intent of [a] statute based on what [it] thought the Legislature meant to say." *In re Marvin M. Schwan Charitable Foundation*, 2016 S.D. 45, ¶ 23, 880 N.W.2d 88, 94. Instead, it is "'bound by the actual language of applicable statutes' and 'assume[s] that statutes mean what they say and that the legislators have said what they meant.'" *Id.* (quoting *State v. Bordeaux*, 2006 S.D. 12, ¶ 8, 710 N.W.2d 169, 172).

The ultimate question presented by Defendant is whether the term "directly" modifies both "threatens" and "communicates"[9] in SDCL 22-22-45. *See* DB 14. In examining the plain meaning of the statute, the terms "directly threatens" and "communicates" are separated by the word "or." "The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately." *State v. Bosworth,* 2017 S.D.43, ¶ 23, 899 N.W.2d 691, 697. *See Loughrin v. United States*, 573 U.S. 351, 357, 134 S.Ct. 2384, 2390 (2014) (determining that in ordinary use, the term "or" is almost always disjunctive and the words it connects are given separate meanings) (citing *United States v. Woods*, 571 U.S. 31, 45, 134 S.Ct. 557, 567 (2013)). Also, when particular language is included in one section of the statute but omitted from another, it is presumed the provisions are intended to have different meanings. *Loughrin*, 573 U.S. 351 at 358. Here, the legislature included "directly" before the term "threatens" but omitted it before the term "communicates." Consequently, these are two separate clauses intended to have different meanings and provides for two separate ways to violate the statute.

---

[9] Defendant also asks the Court to define "directly." He cites two cases that turn on First Amendment issues, arguing he did not "directly" threaten C.H. DB 14-15. However, this is a statutory interpretation issue. Defendant is not raising a First Amendment violation claim. Even if he were, not all threats are protected speech. *See State v. Draskovich*, 2017 S.D. 76, 904 N.W.2d 759 (holding that defendant saying, "I can see why people shoot up courthouses," to courthouse personnel, was not protected speech under the First Amendment).

Finally, "it is always safer not to add or subtract from the language of the statute unless imperatively required to make it a rational statute." *Estate of Ducheneaux*, 2018 S.D. 26, ¶ 67, 909 N.W.2d 730, 748 (quoting *Fin-Ag, Inc. v. Pipestone Livestock Auction Mkt., Inc.,* 2008 S.D. 48, ¶ 16, 753 N.W.2d 29, 38). If the statute were to be construed as Defendant suggests, it would contradict the plain meaning of the statute. In fact, it would make the alternative elements redundant. If the legislative intent was to prohibit previously convicted sex offenders from directly threatening or directly communicating their intent to commit further sex offenses, the two clauses would essentially mean the same thing; Defendant would need to directly relay his intent to commit a sex offense to the intended victim.

To support his argument, Defendant analogizes SDCL 22-22-45 to SDCL 22-42-5, which prohibits the possession of a controlled drug or substance. DB 16. Defendant argues that the term "controlled" applies to both drug and substance even though they are separated by the term "or."[10] DB 16-17. Therefore, he claims the same rational applies here for SDCL 22-22-45. However, this Court need not compare SDCL 22-22-45 to other statutes because the plain language of the statute is clear and unambiguous. The two clauses are separated by the disjunctive word

[10] The legislature defined the term "controlled drug or substance" in SDCL 22-42-1. In creating the definition for "controlled drug or substance," the legislature purposefully veered from the ordinary use of "or" in the disjunctive by applying the term "controlled" to both "drug" and "substance" even though the terms are separated by the word "or."

"or," making them two distinct acts. The lack of the word "directly" before the term "communicates" indicates Defendant did not need to directly communicate his threat to C.H to violate SDCL 22-22-45. Therefore, there is no need to engage in additional statutory construction.

There is also sufficient evidence to support Defendant's conviction of threatening to commit a sexual offense. Defendant stipulated to having prior felony sex offense convictions. SR 138; EX 3. He admitted not only to Agent Hockett, but also to the jury that he wrote the letters at issue. JT3 14; EX 2A. In the letter addressed to Governor Daugaard, Defendant references raping C.H. on at least seven occasions. EX 1B. Also, in the letter addressed "To Whom it May Concern" Defendant confirmed he is "absolutely serious about what [he] said about [C.H.]. [He has] got nothing to lose and everything to gain by raping and killing her or a guard." EX 1A. Similarly, Defendant told Agent Hockett, "I mean if I have to do something stupid like that I will." EX 2A.

In viewing the evidence in a light most favorable to the verdict, there is sufficient evidence to support Defendant's conviction of threats to commit a sexual offense. Therefore, the circuit court properly denied Defendant's motion for judgment of acquittal.

II.

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S PROPOSED JURY INSTRUCTION REGARDING THE LANGUAGE OF SDCL 22-22-45.

Defendant argues the circuit court abused its discretion when it denied his proposed instruction informing the jury that the term "directly" modifies both "threatens" and "communicates" in SDCL 22-22-45. Because the jury instruction Defendant proposed is not an accurate recitation of the law the court properly rejected it.

A. *Standard of Review.*

> [This Court] review[s] 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.

State v. Shaw, 2005 S.D. 105, ¶ 18, 705 N.W.2d 620, 625 (quoting *State v. Martin*, 2004 S.D. 82, ¶ 21, 683 N.W.2d 399, 406). However, the circuit court does not have the discretion to give incorrect, misleading, conflicting or confusing instructions. *Stern Oil Co. Inc. v. Brown*, 2018 S.D. 13, ¶ 41, 907 N.W.2d 800, 814. A circuit court does not err simply by refusing to amplify instructions which substantially cover the principle embodied in the requested instruction. *Tammen v. K & K Mgmt. Services, Inc.,* 2019 S.D. 29, ¶ 13, __ N.W.2d. __. Jury instructions are to be considered as a whole. *State v. Klaudt*, 2009 S.D. 71, ¶ 20, 772

N.W.2d 117, 123. If the instructions properly state the law and inform the jury, they are sufficient, and no error occurs. *Id.*

B. The circuit court properly denied Defendant's proposed jury instruction regarding "directly" modifying both "threatens" and "communicates."

The circuit court rejected Defendant's proposed instruction that stated, "[t]hroughout the instructions, the adverb, directly modifies both the words 'threatened' and 'communicated.' In order to convict Mr. Armstrong as to Count 1, you must find beyond a reasonable doubt that he directly threatened or directly communicated specific intent to commit a further felony sex offense." SR 70. The court rejected this instruction because it believed, "based on the language of the statute and the statutory construction . . . 'directly' clearly references 'threatens' and it's an either[-]or situation." JT3 35-36. The circuit court therefore concluded the proposed instruction did not accurately convey the language of the statute. JT3 35-36. The jury was instead provided with Instruction No. 11, which states:

> [i]n this action the defendant, Joshua John Armstrong, is accused by the State of South Dakota in an indictment charging that on or between the days of August 8th and 9th, 2016, in Minnehaha County, South Dakota, while a prisoner in the South Dakota State Penitentiary, the defendant, having been convicted of a felony sex offense, did directly threaten or communicate a specific intent to commit a further felony sex offense, and by such conduct committed the offense of Threatening to Commit a Sexual Offense.

SR 139. The court also instructed the jury on the statutory language of the offense charged as well as the elements of the crime. SR 141.

Again, as previously argued in Issue I, the adverb "directly" in SDCL 22-22-45 does not modify both "threatened" and "communicated." Therefore, Defendant's proposed jury instruction was incorrect and a misleading statement of the law.

The circuit court properly instructed the jury on the statute under which Defendant was charged. The instructions provided were correct, proper, and adequate statements of the law. Additionally, the circuit court heard arguments from both parties regarding Defendant's proposed instruction and articulated its well-grounded reason for rejecting Defendant's proposal. Therefore, the circuit court did not abuse its discretion when it refused Defendant's proposed jury instruction.

III.

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S PROPOSED JURY INSTRUCTION ON SPECIFIC INTENT.

Defendant argues the circuit court erred when it denied his proposed jury instruction on specific intent. DB 19-20. However, the circuit court correctly determined such instruction was not necessary because SDCL 22-22-45 is a general intent crime. JT3 33.

A. Standard of Review.

Determining whether a crime requires specific intent is an issue of statutory interpretation which is reviewed de novo. *State v. Liaw*, 2016 S.D. 31, ¶ 8, 878 N.W.2d 97, 100.

B. The circuit court properly denied Defendant's proposed jury instruction on specific intent.

In determining whether a crime requires specific intent or general intent, the legislative enactment that proscribes the conduct must be examined. *State v. Schouten,* 2005 S.D. 122, ¶ 11, 707 N.W.2d 820, 823 (citing *State v. Shilvock-Havird*, 472 N.W.2d 773, 776 (S.D. 1991)). Specific intent requires a defendant to have a specific design to cause a certain result, whereas general intent only requires a defendant to engage in conduct prohibited by statute. *Id.* ¶ 13. The mere use of the term intentionally does not designate an additional mental state beyond that accompanying the act. *Id.* ¶ 13 (citing *Shilvock-Havird*, 472 N.W.2d at 776.

Here, SDCL 22-22-45 makes it a crime to "directly threaten or communicate specific intent to commit a felony sex offense." The crime is the act of threatening or communicating. The "specific intent" language in the statute does not go to Defendant's mens rea in *making* the threat or communication, but to the *type* of communication being made.

When comparing SDCL 22-22-45 to other statutes, it is evident the circuit court properly concluded that SDCL 22-22-45 is a general intent crime. In *Schouten,* this Court reasoned that SDCL 22-18-26.1, Intentionally Causing Contact with Bodily Fluids or Human Waste, is a specific intent crime because the Legislature included the language "*with the intent to assault*" (emphasis added). 2005 S.D. 122, ¶ 17, 707

N.W.2d at 825. Likewise, in *Liaw*, this Court concluded that SDCL 22-19-1.1 was a specific intent crime because it required "the State to prove beyond a reasonable doubt that Liaw engaged in the prohibited conduct *with the purpose of* inflicting bodily injury or terrorizing the victim." *Liaw,* 2016 S.D. 31, ¶ 17, 878 N.W.2d at 102. On the other hand, general intent crimes do not require an additional mental intent beyond the accompanying act. *See Schouten,* 2005 S.D. 122*,* ¶ 17, 707 N.W.2d at 825. *See also State v. Boe*, 2014 S.D. 29, ¶ 28, 847 N.W.2d 315, 322-23 (holding aggravated assault was a general intent crime, requiring the State to prove the defendant had intent to do the physical act that the crime requires). Similarly, SDCL 22-22-45 does not require an additional mental state beyond the accompanying act, the direct threat or communication.

In sum, the phrase "specific intent" in SDCL 22-22-45 does not require Defendant have specific intent to directly threaten or communicate with the victim. "Specific intent" does not require an additional mens rea element, instead it refers to the type of communication. Because SDCL 22-22-45 is a general intent crime, the circuit court properly denied Defendant's proposed jury instruction on specific intent.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence be affirmed.

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 4,343 words.

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

Dated this 5th day of June 2019.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 5, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Joshua Armstrong* was served via electronic mail upon Christopher Miles at cmiles@minnehahacounty.org.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

Minnehaha County Annex Bldg, 413 N Main Ave, Sioux Falls, SD 57104
Phone: (605) 367-4242 Fax: (605) 367-6102

June 20, 2019

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

Re: State of South Dakota v. Joshua John Armstrong # 28722

Dear Ms. Jameson-Fergel:

Please be advised that upon reviewing the brief submitted by Appellee in the above entitled matter, Appellant has decided not to reply to Appellee's Brief. Defendant requests this Court to rely on arguments and issues addressed in Appellant's brief submitted to the Court on March 21st, 2019.

Respectfully submitted this 20th day of June, 2019.

/s/ Chris Miles

Chris Miles
Deputy Public Defender
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, SD 57104
Telephone: (605)367-4242
Attorney for Appellant

CC:
Jason Ravsnborg, Attorney General
Aaron McGowan, Minnehaha County State's Attorney