IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

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STATE OF SOUTH DAKOTA, Plaintiff
vs.
RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

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APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The State charged Defendant with one count of Conspiracy to Commit Aggravated Grand Theft by Exploitation (SDCL 22-3-8, 22-4-1, 22-46-3), two counts of Aggravated Grand Theft by Exploitation (SDCL 22-46-3), and five counts of Grand Theft by Exploitation (SDCL 22-46-3). The State dismissed the Conspiracy to Commit Aggravated Grand Theft by Exploitation count prior to jury trial. The Defendant filed Motions for Judgment of Acquittal. The Circuit Court denied such motions. The jury found Defendant guilty of the remaining counts, and Defendant appeals from such Judgment of Conviction dated October 25, 2024 by the Hon. Robert L. Spears, and is taken pursuant to SDCL 23A-32-2. Notice of Entry of such Order was served on Appellant's attorney on November 8, 2024. Notice of appeal in regard to such Order was filed on November 20, 2024.

This appeal is timely pursuant to SDCL 23A-32-15.

STATEMENT OF LEGAL ISSUES

1. Whether Spink County was the proper venue for this case?

   Circuit Court: Never ruled on this issue.

   U.S. Const. amend VI; Article VI §7 S.D. Constitution

2. Whether the State properly identified the Defendant as the person who committed the alleged crimes?

   Circuit Court: Never ruled on this issue.

   State v. Lassiter, 2005 S.D. 8, 692 N.W.2d 171; *State v. Condon*, 2007 S.D. 124, 742 N.W.2d 861

3. Whether the State proved beyond a reasonable doubt that the Defendant had the legal duty to support Betty Clemensen?

Circuit Court: Denied the Defendant's motion for judgment of acquittal on this issue.

SDCL 22-46-3; SDCL 25-7-27
Hermanek-Peck v. Spry (In re a Question of Law from the United States Dist. Court), 2022 S.D. 60, 981 N.W.2d 325

4. Whether the State proved beyond a reasonable doubt that the Defendant was entrusted with the property of Betty Clemensen?

   Circuit Court: Denied Defendant's motion for judgment of acquittal on this issue.

   SDCL 22-46-3
   Matthews v. S.D. Dept. of Soc. Serv. (In re Pooled Advocate Trust), 2012 S.D. 24, 813 N.w.2d 130

5. Did Ron appropriate Betty's property for any purpose?

   Circuit Court: Denied Defendant's motion for judgment of acquittal on this issue.

   SDCL 22-46-3
   Matthews v. S.D. Dept. of Soc. Serv. (In re Pooled Advocate Trust), 2012 S.D. 24, 813 N.w.2d 130

6. Did the State provide evidence of a specific intent of Ron to defraud his mother of any properties or monies?

   Circuit Court: Denied Defendant's motion for judgment of acquittal on this issue.

   SDCL 22-46-3
   State v. Kessler, 772 N.W.2d 132, 2009 S.D. 76; *State v. Morse*, 753 N.W.2d 915, 2008 S.D. 66; *State v. Jackson*, 765 N.W.2d 541, 2009 S.D. 29

7. Whether SDCL 22-46-3 only applies to the exploitation of a person?

   Circuit Court: Denied Defendant's motion for judgment of acquittal on this issue.

   SDCL 22-46-3; SDCL 22-46-1(13); SDCL 22-46-1(1)
   Hermanek-Peck v. Spry (In re a Question of Law from the United States Dist. Court), 2022 S.D. 60, 981 N.W.2d 325;
   In re West River Electric Ass'n Inc., 2004 S.D. 11, 675 N.W.2d 222

8. Was any property taken or stolen from Betty Clemensen by Ron Clemensen in order to meet the essential element of SDCL 22-46-3 that the property taken or stolen must be a certain amount to prove aggravated grand theft by exploitation?

   Circuit Court: Denied Defendant's motion for judgment of acquittal on this issue.

   SDCL 22-46-3; SDCL 22-30A-17.1; SDCL 22-30A-17; SDCL 22-30A-1
   State v. Iron Necklace, 430 N.W.2d 66 (S.D. 1988)

9. What effect does the fact that the mortgages were declared null and void in a collateral civil case have upon the criminal case under SDCL 22-46-3 for exploitation of an elder?

   Circuit Court: Denied the Defendant's motion for judgment of acquittal on this issue.

   Norbeck & Nicholson Co. v. State, 144 N.W. 658 (S.D. 1913); *Hanna v. Landsman*, 2020 S.D. 33, 945 N.W.2d 534

10. Did the State prove beyond a reasonable doubt that Ron Clemensen transferred $88,000 from Edward Jones?

    Circuit Court: Denied Defendant's motion for judgment of acquittal on this issue.

    SDCL 23A-22-3
    State v. Thomason, 2014 S.D. 18, 845 N.W.2d 640; *State v. Winckler*, 260 NW.2d 356 (S.D. 1977)

11. Did the State prove beyond a reasonable doubt that Ron exploited Betty by taking a loan in his own name in the amount of $100,000 from Great Plains Bank?

    Circuit Court: Denied Defendant's motion for judgment of acquittal on this issue.

    SDCL 23A-22-3
    State v. Thomason, 2014 S.D. 18, 845 N.W.2d 640; *State v. Winckler*, 260 NW.2d 356 (S.D. 1977)

12. Did the trial court err by not properly instructing the jury on the good faith affirmative defense?

    Circuit Court: Provided Instruction No. 21 to the jury, but such did not adequately address the Defendant's good faith affirmative defense.

    SDCL 23A-22-3; SDCL 22-1-2(3)
    State v. Holloway, 482 N.W.2d 306 (S.D. 1992)

PRELIMINARY STATEMENT

All references to the trial transcripts will be "TR" followed by the day of trial reference, and page and line numbers, e.g. TR Day 2, p. 24:20-23. First Dakota National Bank (FDNB) and DMAC relate to the same lending institution, and FDNB and DMAC will be used interchangeably in this brief. The indictment refers to DMAC, which is FDNB. Defendant Ronald P. Clemensen will be identified as Ron or Ron Clemensen (without waiving the identity issue) and Betty Clemensen will be referred to as Betty.

FACTS

1. Arlo and Betty and Ron Clemensen operated a family farm. (TR Day 2, p. 24: 24-25; p. 25: 1; TR Day 6 Brock Klapperich testimony; TR Day 5, p. 99: 24-25; p. 100: 1-5; p. 102: 3-17; p. 105: 9-12; pp. 58-59) The farm consisted of real estate owned by the Arlo and Betty Clemensen Trust. The land was mortgaged and the mortgages were periodically refinanced over the years. (See cites below regarding specific loans.)
2. On May 19, 2010, Arlo and Betty Clemensen's trust mortgaged trust land to Dacotah Bank, securing $790,000. The promissory note was signed May 19, 2010 by Arlo and Betty Clemensen's trust. (TR Day 5, p. 7: 4-25; Exhibits B and C)

3. On April 2, 2015, Betty, as the trustee of the Betty Clemensen Trust dated July 29, 2014, signed a mortgage on Betty Clemensen trust land, securing a promissory note signed by Ronald Clemensen promising personally to pay the loan to Dacotah Bank. (TR Day 5, p. 12: 8-25; Ex. 19)
4. While Ron's dad, Arlo Clemensen, was alive, he invested $50,000 into Crossroads Truck and Trailer as start-up seed money. (TR Day 3, p. 69: 18-25; p. 70: 1-6)
5. Arlo passed away in 2011. (TR Day 2, p. 24: 20-23)
6. Betty Clemensen eventually became a 50/50 owner of BRIT, Inc. (TR Day 3, p. 70: 20-24) BRIT, Inc. operated Crossroads. (TR Day 3, p. 70: 25; p. 71: 1-8)
7. In 2014, attorney Carolyn Thompson created and prepared a new trust for Betty Clemensen. (Exhibit 5, TR Day 2 p. 46: 5-8) All of the real estate involved in this case was transferred to the new trust, the Betty Clemensen Living Trust. (Hereinafter referred to as The Trust or Betty's Trust). (Exhibit 6, TR Day 2, p. 47: 16-21; p. 59: 8-23)
8. Betty Clemensen was the sole Trustee of The Trust. (TR Day 2, p. 46: 13-16)
9. On September 29, 2016, Ronald Clemensen[1] signed two notes and two mortgages with First Dakota National Bank (FDNB), also known as DMAC, in the amount of $750,000.00 each. (Exhibits 8 and 9) Real estate owned by The Trust was used for collateral for these two loans. (TR Day 3, p. 36: 19-24, p. 37: 20-22, p. 38: 5-18, 24-25, p. 35: 11-25, p. 39: 1-3, 9-10, p. 36: 1-9, p. 32: 16-24, p. 33: 1-9)
10. Betty Clemensen was sick shortly before the scheduled closing on the loans. (TR Day 5, p. 63: 4-6) Because Betty was unable to attend the closing, Ron signed the

[1] Defendant Ronald P. Clemensen was never identified as the same person who signed the documents. Reference to "Ronald Clemensen" in this Brief is not an admission of identify as an element of the offenses.

mortgage as the agent for Betty using a Power of Attorney prepared by attorney Carolyn A. Thompson. (TR Day 2, p. 44; Exhibit 4, Exhibits 8 and 9; TR Day 5, p. 64: 2-7)

11. The two promissory notes related to the mortgages were signed by Ronald Clemensen personally, and Ronald Clemensen obligated himself to repay the two $750,000 loans from FDNB (Exhibits 8 and 9)
12. The two FDNB mortgages were used to refinance a note from the Arlo and Betty Clemensen Trust to Dacotah Bank (Exhibits B and C) in the amount $665,660.57 (TR Day 5, p. 15: 22-25, p. 16: 1-3; Exhibit E) and to refinance a note owed by Ronald Clemensen to Dacotah Bank in the amount of $824,749.57 (TR Day 5, p. 43: 24-25, p. 44: 1, p. 44: 21-23; Exhibits 8 and 9)
13. On September 16, 2016, Ronald Clemensen signed a mortgage to Great Plains Bank in the amount of $100,000, using real estate owned by The Trust as collateral. (Ex. 10; TR Day 3, p. 42: 18-25; p. 45: 11-13) This mortgage was also signed by Ronald Clemensen as POA for Betty Clemensen, Trustee of The Trust. (Ex. 10)
14. Ronald Clemensen was personal liable for the debt related to the Great Plains Bank mortgage. (TR Day 3, p. 44: 1-21)
15. In discussing the FDNB/DMAC loans with Corey Maaland, the bank officer in charge of the loans, Corey Maaland confirmed that Ron was personally responsible to pay the amounts owed to FDNB. (TR Day 5, p. 66: 5-7)
16. In discussing the Clemensen family farm FDNB/DMAC loans (Exhibits 8 and 9), Corey Maaland testified that it was common for him as a loan officer to deal with

family farms and a transition of the farm to the next generation, i.e. from Arlo and Betty to their son, Ron. (TR Day 5, p. 59) The Clemensen family was getting a lower interest rate on the loan with FDNB than they had with Dacotah Bank. Also, they were getting a longer term so the annual payments were lower. This was a win-win situation for the Clemensen family to help them move forward and transfer the land down to the next generation. (TR Day 5, p. 59)

17. In 2017, Ronald Clemensen began the process of refinancing the mortgages to FDNB/DMAC. The bank prepared an "Acknowledgment" for the beneficiaries of the trust to "sign off on if any further loans were made against trust property." (Exhibit O, TR Day 5, p. 107: 19-25; p. 108: 1-9)

18. The Acknowledgment was sent to Patti Klapperich, Betty Clemensen's daughter, and Brent Klapperich, Brad Klapperich, and Brock Klapperich, Betty Clemensen's grandsons. (TR Day 3, p. 29: 10-17)

19. Pattie Klapperich (through her agent), and Brad Klapperich, and Brock Klapperich all signed the Acknowledgment. (TR Day 3, pp. 3-9; Exhibit O)

20. The Authorization, signed by Betty's daughter (through her agent) and two of her grandsons contained a statement that "In our opinion, Betty L. Clemensen is competent to transact business and is not an incapacitated person. (Ex. O)

21. Dave Lunzman, then an agent of the Division of Criminal Investigation met with Betty Clemensen one time on August 23, 2017. (TR Day 6: p. 84: 14-17) During the interview, Lunzman asked Betty her birthdate, when Arlo passed away, and how long she had lived on the farm. (TR Day 3, p. 15: 25, p. 16: 1-4, p. 15) Lunzman, at trial, did not testify as to asking Betty any questions about the

refinancing of the farm debt or the mortgages. As far as the record shows, no investigator ever questioned Betty about the mortgages or about refinancing the farm debt.

22. On March 5, 2021, Judge Tony Portra issued a Memorandum Decision declaring the mortgages null and void. Therefore, The Trust was not responsible for any mortgages against the land owned by the trust but Ronald Clemensen remained responsible for and obligated to pay back all monies related to such mortgages. (TR Day 4, p. 95: 4-10)

23. On August 11, 2015, William Edwards from Edward Jones, Betty's financial advisor, met with Betty Clemensen and Ronald Clemensen. (TR Day 4, p. 36: 1-4) Mr. Edwards discussed a loan to Ronald Clemensen from Betty Clemensen of $88,000, and Betty Clemensen authorized the transfer of $88,000 from the Edward Jones account to the Plains Commerce Bank checking account owned jointly by Betty Clemensen and Ronald Clemensen. The transfer was made on August 12, 2015. (TR Day 4, p. 39: 10-19; p. 39: 21-25; p. 40: 1)

24. Betty Clemensen authorized similar loans of $50,000, $45,000 and $25,000. Betty discussed each of the loans with William Edwards, her financial advisor, and she authorized the transfers. The final decision to make the loans was Betty's decision. (TR Day 4, p. 41-70)

25. The declaration creating The Trust contained a general assignment of property and an assignment and nominee agreement. (Exhibit 5; TR Day 2, p. 57: 10-18)

26. The general assignment transferred all of Betty's tangible personal property, household goods, furniture, jewelry, etc. to The Trust. (TR Day 2, p. 57: 19-24)

27. The assignment and the assignment and nominee documents, which are the last three pages of the trust (Exhibit 5), are catchall documents to make sure everything gets into the trust and is owned by the trust, including the Edwards Jones investment account and the Plains Commerce Bank checking account. [Assignment and Nominee Agreement attached in the Appendix as Exhibit 2] (Exhibit 5; TR Day 2, p. 58: 23-25; p. 59: 1-3)
28. The loans of $88,000, $50,000, $45,000, and $25,000 were all withdrawn from the Plains Commerce Bank account. The account is held in Aberdeen, South Dakota, and was owned jointly by Betty and Ron. (Exhibit 11)
29. Withdrawals of monies from the joint account of Betty and Ron Clemensen with Plains Commerce Bank could be made by either Betty or Ron. (Exhibit 11; TR Day 3, p. 92: 7-4, 12-18)
30. Betty Clemensen signed a check withdrawing $114,000 on June 1, 2016 from the Plains Commerce Bank checking account. (Exhibit J; TR Day 3, p. 72) The check was made payable to Ronald Clemensen. (Exhibit J)
31. There were no restrictions on Ron's right to withdraw money from the Plains Commerce Bank joint checking account. (TR Day 3, p. 94: 13-18)
32. None of the checks were written using a POA. (TR Day 3, p. 45: 20-22)
33. The $88,000 transfer from the Edward Jones account to the joint checking account of Betty and Ron at Plains Commerce Bank was dated August 12, 2015. (TR Day 3, p. 96: 2-14) The POA did not come into existence until January of 2016. (TR Day 3, p. 96)

34. Ron Clemensen did not transfer any monies out of the Edward Jones account. (TR Day 3, p. 140: 13-19)

35. The $88,000, $50,000, $45,000, and $25,000 were all loans from Betty Clemensen to Ronald Clemensen. (TR Day 4, p. 36: 15-19; TR Day 4, p. 45: 24-25; p. 46: 1-2)

36. It was Ron's intent to pay back the loans in a short period of time. (TR Day 4, p. 46: 21-22; p. 36: 17-19)

37. Ron always intended to repay the loans. (TR Day 4, p. 70: 19-23)

38. All the real estate documents were prepared by financial experts.

39. Exhibit 8, one of the mortgages with FDNB/DMAC was prepared by Shane Pick, DMAC Closing Specialist. (Exhibit 8)

40. Exhibit 9, the other mortgage with FDNB/DMAC was also prepared by Shane Pick, DMAC Closing Specialist. (Exhibit 9)

41. Exhibit 10, the mortgage with Great Plains Bank, was prepared by Great Plains Bank. (Exhibit 10)

42. The trust and power of attorneys were prepared by Attorney Carolyn Thomspon. (Exhibits 3, 4, and 5)

43. Dacotah Bank and DMAC corresponded and confirmed that the proceeds from the FDNB/DMAC mortgage would be used to refinance a debt owed to Dacotah Bank. (Exhibit G) Dacotah Bank prepared and filed a Satisfaction of Mortgage. (Exhibit F)

44. Dacotah Bank and DMAC corresponded and approved Ron's execution of the mortgages using the POA.

45. The Court determined that an instruction on the affirmative defense of good faith was appropriate. (TR Day 6, p. 108: 4-11)

46. The Court gave jury instruction 21, but that instruction did not properly advise the jury of the burden of proof for the affirmative defense.

47. No witness identified Defendant Ronald P. Clemensen as the same person that was involved in any of the actions enumerated in the Indictment. Lunzman identified someone in the courtroom as the person that testified at a previous hearing and as the person he interviewed. The Court was not asked to and the record does not reflect that Defendant Ronald Clemensen had been identified.[1] Thus, the record does not reflect that the person in the courtroom was Defendant Ronald P. Clemensen.

48. No witness testified as to any alleged activity in Spink County, South Dakota.

ARGUMENT

When ruling on a motion for judgment of acquittal, the trial court must consider the evidence in the light most favorable to the nonmoving party who is also given the benefit of all reasonable inferences in their favor. *State v. Wellner*, 318 N.W.2d 324, 332 (S.D. 1982); *State v. Gallegos*, 316 N.W.2d 634, 638 (S.D. 1982); *State v. Vogel*, 315 N.W.2d 321, 322 (S.D. 1982). A motion for judgment of acquittal is properly denied if the State has introduced evidence which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt for the crime charged. *State v. Halverson*, 394

[1]Of course, after a witness points to a person in the courtroom, the prosecutor typically asks that the record reflect that the witness identified the defendant and the trial court typically states that the record will so reflect. That was not done in this case.

N.W.2d 886, 887 (S.D. 1986); *Wellner*, supra; *State v. Moeller*, 298 N.W.2d 93, 94 (S.D. 1980).

"[A] motion for a judgment of acquittal attacks the sufficiency of the evidence[.]" *State v. Timmons*, 2022 S.D. 28 ¶14, 974 N.W.2d 881, 887 (as cited in *State v. Peneaux*, 988 N.W.2d 263, 269, 2023 S.D. 15, ¶24). "In measuring the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Frias*, 2021 S.D. 26, ¶21, 959 N.W.2d 62, 68 (also cited in *State v. Peneaux*, Id.).

Ron Clemensen was convicted of seven counts of theft by exploitation under SDCL 22-46-3 which provides as follows:

> Any person who, having assumed the duty voluntarily, by written contract, by receipt of payment for care, or by order or a court to provide for the support of an elder or an adult with a disability, and having been entrusted with the property of that elder or adult with a disability, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of that person's trust, is guilty of theft by exploitation. Theft by exploitation is punishable as theft pursuant to chapter 22-30A.

The elements of the crime of Theft by Exploitation under SDCL 22-46-3 in the jury instructions 7 and 8 are as follows:

1. The crime was committed at the time and place alleged
2. Identity of Defendant
3. The defendant had the duty and was entrusted with Betty Clemensen's property;
4. The duty was either voluntary, by written contract, by receipt of payment of care, or by an order of a court to provide for the support of Betty Clemenen;

5. The defendant appropriated Betty Clemensen's property to a use or purpose not in the due and law execution of that person's trust;

6. The value of the property which varied by Count number -

a. Count 6 involved a loan on the NW1/4 of Section 6, Township 119, Range 61 with a value exceeding $500,00.00;

b. Count 7 involved a loan on the NE1/4 of Section 6, Township 119, Range 61 with a value exceeding $500,00.00;

c. Count 8 involved a $100,000.00 loan at Great Plains Bank;

d. Count 9 involved an $88,000.00 transfer from Edward Jones;

e. Count 10 involved a $50,000.00 check to Crossroads;

f. Count 11 involved a $45,000.00 check to Crossroads;

g. Count 12 involved a $25,000.00 check to Crossroads.

7. Betty Clemensen was an elder or an adult with a disability.

"The State must prove all the elements of the crime charged." *State v. Thomason*, 2014 S.D. 18, ¶30, 845 N.W.2d 640, 647. "The burden is upon the state to establish every element of the crime beyond a reasonable doubt." *State v. Winckler,* 260 N.W.2d 356, 366 (S.D. 1977). (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)."

Appellant will address each of these elements separately and the failure of the State to prove the elements beyond a reasonable doubt.

Issue 1. Did the State prove Spink County was the venue in which the offense was alleged to have been committed?

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Similarly, Article VI, § 7, of the South Dakota Constitution provides that "[i]n all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." *Gonzales v. Markland*, 2025 S.D. 14 ¶¶ 24 and 27.

The State failed to prove that any of the alleged conduct occurred in Spink County, South Dakota.

As to Count 6 - no witness identified any act by Ron Clemensen in Spink County, South Dakota related to Count 6.

As to Count 7 - no witness identified any act by Clemensen in Spink County, South Dakota related to Count 7.

As to Count 8 - no witness identified any act by Clemensen in Spink County, South Dakota related to Count 8. The loan was obtained in Aberdeen, SD and proceeds deposited in a bank in Aberdeen, SD. Aberdeen, SD is not in Spink County. South Dakota.

As to Count 9 - no witness identified any act by Clemensen in Spink County, South Dakota related to Count 9. The transfer was made from an Edward Jones office in Aberdeen, SD and the money was deposited in a bank in Aberdeen, SD.

As to Counts 10, 11, and 12 - no witness identified any act by Clemensen in Spink County, South Dakota related to those counts. The checks were drawn on a bank in Aberdeen, SD and deposited into an account in Aberdeen, SD.

Venue was not proven in the State's case in chief or in the evidence presented during the remainder of the trial. Defendant's motion should have been granted at the conclusion of the State's case and at the conclusion of all evidence.

Issue 2. Did the State properly identify the Defendant as the person who committed the alleged crimes?

There are three basic elements in a criminal prosecution: (1) proof of the commission of an act; (2) by a person with the necessary mens rea; and (3) accomplished by the defendant. *State v. Lassiter*, 2005 S.D. 8 ¶20, 692 N.W.2d 171

No witness – not the witness from Edward Jones and no witness from any of the involved banks, identified Defendant Ronald P. Clemensen as the person involved in any of the transactions. No witness to the execution of any of the documents was asked to point to Defendant Ronald P. Clemensen and identify him and the prosecutor never asked the judge to confirm for the record that the defendant had been identified.

The prosecution is required to prove the defendant is the person who committed the alleged act and the proof must be beyond a reasonable doubt. *State v. Steele*, 510 N.W.2d 661 (S.D. 1994) (Chief Justice Miller concurring part and dissenting in part).

The trial court's recognition of a witness's in-court identification is necessary to establish the record of a critical aspect of trial for appellate review. *State v. Condon*, 2007 S.D. 124 ¶ 21, 742 N.W.2d 861. The failure of the trial court (in this case because no request was made by the prosecutor) to acknowledge an in-court identification leaves a void in the record and prevents a review by this Court. Id. At ¶ 21.

Identity was not proven.

Issue 3. Whether the State proved beyond a reasonable doubt that the Defendant, Ronald Clemensen, had the legal duty to support Betty Clemensen.

Defendant had no legal duty to support Betty Clemensen.

One of the elements of the crime of Theft by Exploitation is that Ron must have assumed the duty voluntarily or by written contract… to provide for the support of an elder, i.e. his mother Betty.

Hermanek-Peck v. Spry, (*In re a Question of Law from the United States Dist. Court*), 2022 S.D. 60, ¶31, 981 N.W.2d 325, 333, requires the State to prove the theft under SDCL 22-46-3 was committed by a person who assumed the duty to provide for the support of an elder and had been entrusted with the elder's property. *Spry*, p. 333, ¶31.

SDCL 25-7-27 provides in part that an adult child, having the financial ability to do so, shall provide necessary food, clothing, shelter, or medical attendance for a parent who is unable to provide for oneself. The State provided no evidence that Betty Clemensen was unable to provide for herself. Indeed, the significant assets of The Trust were available to support Betty. She was apparently in comfortable financial shape.

The Trust held several million dollars worth of real estate assets and over $1,000,000 in an investment account. Betty was not indigent. Betty had the means to provide for her own support. She was the trustee of her own trust, and as such trustee, she was providing for her own support.

There is no rational basis for a claim that Ron had the duty to provide for the support of Betty, an elder.

Defendant had no fiduciary relationship with either Betty Clemensen or The Trust.

The transfers from the Edwards Jones account were made by Betty, The transfers from the Plains Commerce Bank checking account that were made by the Defendant, as a joint owner of the account were transfers that Defendant had authority to make. When he did make transfers, he did so with Betty's permission, and such were made pursuant to a loan agreement between Ron and Betty whereby Ron borrowed the monies from Betty's Trust. Agent Lunzman acknowledge Rod had that authority. (TR Day 3, p. 95, lines 23-25; p. 96, line 1)

Issue 4. Whether the State proved beyond a reasonable doubt that the Defendant was entrusted with the property of Betty Clemensen?

SDCL 22-46-3 requires the State to prove the theft was committed by a person who " . . . had been entrusted with the elder's property." *Hermanek-Peck v. Spry,* Id. In interpreting the South Dakota statute SDCL 22-46-3, the case of *Wetch v. Crum & Forster Comm. Ins. No. 5: 17-CV-05033-JLV*, 2018 WL 10812341 at 19 (D.S.D. Dec. 6, 2018) found that "[t]he South Dakota statute … limit[s] liability to persons who have been 'entrusted with the property' of an elder."

Hermanek-Peck v. Spry held that the provisions of SDCL 22-46-1(5) exploitation is "the wrongful taking or exercising control over property of an elder … with intent to defraud the elder." Id. p. 333, ¶31.

These two statutes [SDCL 22-46-13 and SDCL 22-46-3] define and describe alternative types of exploitation. Id. p. 333, ¶32. SDCL 22-46-13 defines a civil definition of exploitation. SDCL 22-46-3 defines the criminal offense.

It is an undisputed fact that Ron Clemensen was not entrusted with any of Betty's property. This required element for a criminal conviction of Ron is not present.

State v. Williams, 748 N.W.2d 435, 2008 S.D. 29 considered what is meant by "entrusted with the property of another" in a conviction for embezzlement of property received in trust under SDCL 22-30A-10.

In *State v. Williams*, the court held:

> "Although the State's evidence is not overwhelming, a review of the evidence and the favorable inferences drawn therefrom indicates sufficient evidence to sustain the verdict. Clearly the VFW **entrusted** Williams to handle and account for all the cash taken in and paid out while she served as manager. She was allowed to receive cash advances from Myrmoe Vending when video lottery payouts approached $7,000 in order to have enough cash on hand to cover future video lottery payouts for one week, Thursday to Wednesday. She was **entrusted** to settle accounts with Myrmoe each Thursday, including commission for the use of the machines, video lottery payouts and repayment for any cash advances taken the previous week. Her duties also included accounting for and depositing of proceeds into the VFW bank accounts. She had authority to withdraw funds from the lounge account but not the general account. The State's evidence, if believed by the jury, sufficiently established the requisite entrustment with VFW property pursuant to SDCL 22-30A-10.
>
> Id. p. 444, ¶28.

The facts in *Clemensen* establish beyond a reasonable doubt that Ron Clemensen was not entrusted with any property of his mother. All property described in the charges was entrusted to Betty Clemensen as Trustee of The Trust. She was the only person who had access to the trust monies. Ron Clemensen was entrusted with nothing.

Under the holding of *Hermanek-Peck*, the jury was required to find as an essential element of each of the crimes with which he was charged – theft by exploitation, SDCL 22-46-3 – that he had been entrusted with Betty's property.

The State failed to prove this essential element of the offense. "When a person places funds in a trust, the person gives up ownership of the funds." *Matthews v. S.D. Dep't of Soc. Servs. (In re Pooled Advocate Trust)*, 2012 S.D. 24, ¶44, 813 N.W.2d 130, 144. "[P]roperty placed in trust no longer belongs to the trustor." *Schroeder v. Herbert C. Coe Trust*, 437 N.W.2d 178, 185 (S.D. 1989). The property of Betty Clemensen was placed in the Betty Clemensen trust. (Ex. 6, the deeds to the trust and Ex. 5, the trust, including the Assignment and Nominee Agreement)

Jim Taylor, the defense expert, testified that the trustee is the person who is entrusted with the trust property. (TR Day 4, p. 107: 18-20) And Mr. Taylor testified that in this case, Betty, the trustee of the Betty Clemensen Living Trust, was the person who was entrusted with the assets of the trust. (TR Day 4, p. 107: 18-23)

The State failed to prove the essential element that Betty owned any property. The real estate was placed in The Trust through the deeds and the personal property was placed in the Trust through the Assignment and Nominee Agreement, which states, in relevant part:

> Trustor hereby transfers all property owned by the Trustor to the Trust …
>
> Trustor intends that *any Property presently owned or acquired hereafter by any means shall be owned by Trustee*;
> …
> b. The parties expressly acknowledge that Trustor hereby assigns the Property to Trustee, and Trustor is holding title to the Property as nominee for Trustee to the full extent of the interest therein. *Trustor expressly acknowledges that Trustor has no interest whatsoever in the Property* and agrees that upon demand Trustor will convey possession of the Property to Trustee. (Italics added throughout)

Renee Mettler, a paralegal from Thompson Law, testified that the purpose of the Assignment and Nominee Agreement (ANA) is to make sure everything gets into the

trust, and is held and owned by the trust. (Ex. 5; TR Day 2, p. 58, lines 23-25; p. 59, lines 1-3)

On July 29, 2014, Betty expressly stated in the ANA that all property she then "presently owned or acquired hereafter by any means shall be owned by Trustee", she assigned said property to the Trustee, and acknowledged that she "has no interest whatsoever in the Property." From this, the record evidence shows that all property, including the Edward Jones account and the Plains Commerce Bank checking account was from that date (July 29, 2014) assigned to and owned by The Trust. Betty had "no interest whatsoever in the [assigned] property." Betty had no interest in the Edward Jones Account or the Plains Commerce Bank checking account and, of course, none in the real property.

The State failed to prove that Ron had been entrusted with Betty's property. The State failed to prove an essential element of the crime charged in each count.

Betty entrusted herself with all of her property, real and personal, and did not entrust Ron with anything.

Because no property of Betty's was involved in this case, reasonable doubt exists and Ron is entitled to an acquittal.

Issue 5. Did Ron appropriate Betty's property for any purpose?

Ron Clemensen did not appropriate Betty Clemensen's property for any purpose much less a purpose not in the due and lawful execution of Clemensen's trust.

As shown above in the legal and factual arguments, Ron did not appropriate any property owned by Betty. All of the property listed in the indictment – the real estate and

the accounts – were owned by The Trust. None of the property was owned by Betty Clemensen.

The real estate was used to refinance the obligations of The Trust. Ronald Clemensen took upon himself all debt, including the payment of his parents' debt with Dacotah Bank.

Issue 6. Did the State provide evidence of a specific intent of Ron to defraud his mother of any properties or monies?

An essential element of the crime of theft by exploitation is that Ron must have had the specific intent to defraud his mother.

The court ruled in *State v. Jackson*, 765 N.W.2d 541, 545-546, 2009 S.D. 29, ¶18, that there must be evidence of a purpose to deceive or an intent to defraud at the time the property or money is obtained. In *State v. Morse*, 2008 S.D. 66, ¶12, 753 N.W.2d 915, 919, intent to defraud "means to act willfully and with the specific intent to deceive or cheat, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self." A finding beyond a reasonable doubt of Ron having a specific intent to defraud his mother, Betty, must be established by evidence produced by the State. There was no evidence of a specific intent of Ron to defraud Betty.

In *State v. Kessler*, 772 N.W.2d 132, 137, 2009 S.D. 76, ¶16, *State v. Jackson,* and *State v. Morse*, the Supreme Court reversed each case because the court found insufficient evidence to sustain the theft by deception conviction because there was no evidence in any of these cases that at the time Kessler or Morse or Jackson obtained the money that they intended to deceive. There are no facts, and there was no evidence

presented by the State that Defendant Ron Clemensen, at the time he obtained the money, that he had any intent to deceive his mother. In fact, he obtained the money from the bank (not from Betty), and there was no evidence that he intended to deceive the bank, nor Betty, nor the Betty Clemensen trust. There is no evidence that he had any intent other than to repay the loans.

Theft by deception is a specific intent crime. *State v. Morse*, Id. ¶18, p. 545. "It is only where [actors do] not believe what they purposely caused [their victims] to believe, and where this can be proved beyond a reasonable doubt, that [these actors] can be convicted of theft. Id. (quoting *State v. Hurst*, 507 N.W.2d 918, 920 (S.D. 1993)). There was no evidence that Ron did not believe in what he was doing, i.e. refinancing farm debt of Arlo and Betty and himself, and borrowing monies to help out the Crossroads business – the business operated by BRIT, Inc. and owed 50% by The Trust. There was no evidence that he did not believe this, nor that he was not going to repay these loans. The State presented no facts to show Ron had the intent to defraud anyone.

These precepts apply to Counts 9, 10, 11 and 12, the loans to Ron. There was no evidence that at the time of receiving these loans, that Ron had anything other than the intent to repay these monies. The $88,000 transfer by Betty to Plains Commerce Bank for Ron to use for Crossroad was a loan. William Edwards even testified that he thought Ron had every intent to repay these loans.

There must be evidence that Defendant acted "willfully and with the specific intent to deceive or cheat[,]" to either cause some financial loss to another or bring about some financial gain to himself. *State v. Morse*, 2008 S.D. 66, ¶12, 753 N.W.2d 919, 991 (citations omitted). There is no evidence that the Defendant obtained the loans set forth

in Counts 6, 7, 8, 9, 10, 11 and 12 with the specific intent to deceive or cheat anyone. In *Kessler*, Id., the court stated: "The prosecution provided no evidence that at the time Defendant obtained the draws or when he entered into the loan contract, he did so with the intent to defraud." In *State v. Clemensen*, the prosecution provided no evidence that at the time Defendant obtained the loans from FDNB, DMAC, Great Plains Bank, or from The Trust that he did so with the intent to defraud.

Here, as in *Kessler*, "There is no pattern of conduct on defendant's part of entering into a loan agreement and absconding with the money." *Kessler*, Id. "Rather, the evidence shows that defendant entered into an agreement similar to the one made earlier with the Hemmers that was successfully completed." Id. All we need to do with the last quote is to substitute "Betty's Trust." "Rather, the evidence shows that defendant entered into an agreement similar to the one made earlier with [Betty's Trust] that was successfully completed."

As set forth in footnote 4 in *Kessler*: "There is no evidence that defendant intended to cause a financial loss to the Hemmers or a gain to himself. Regardless of his use of the loan proceeds for personal expense, defendant remained obligated to repay on the loan and there is no evidence that he did not intend upon fulfilling the obligation."

The evidence presented by the State and confirmed by the defense was that Arlo and Betty and Ron farmed together. In 2010, they borrowed monies from Dacotah Bank. Arlo and Betty mortgaged certain trust land they owned, and signed a promissory note promising to repay the monies to Dacotah Bank. (Ex. 18) At the same time in 2010, Ron Clemensen mortgaged certain properties that he owned to Dacotah Bank and signed a promissory note promising to repay the monies he borrowed from Dacotah Bank. (Ex.

18) Brock Klapperich testified that the Dacotah Bank loans were legitimate debts to finance the farm operation. (TR Day 6, p. 23, lines 21-24) This was merely farm debt of his grandparents, Arlo and Betty, and of his uncle, Ron, whereby they were farming the family farm together.

In 2015, Betty Clemensen signed as trustee of the Betty Clemensen trust, a mortgage to Dacotah Bank, mortgaging certain trust lands in order to secure the additional amount of $419,700, which was borrowed from Dacotah Bank. (Ex. 19) Ron Clemensen signed in his individual capacity, a promissory note promising to repay $419,700 to Dacotah Bank. (Ex. 19)

Then in 2016, Ron, desiring to obtain a lower interest rate than the Dacotah Bank (DMAC) loans, and a longer payment term (30 years), signed mortgages to FDNB as POA for Betty Clemensen, as Trustee of the Betty Clemensen Trust. And he signed the promissory notes as an individual, promising to repay all of these monies.

There is no evidence that Ron intended to cause financial loss to the Betty Clemensen trust or a gain to himself.

Regardless of his use of the loan proceeds to pay off some of his personal debt, Ron Clemensen remained obligated to repay the loan. Also, $665,660.57 of the monies borrowed solely in Ron's name went to pay off The Trust's debt. (Ex. E)

Everything regarding these loans was out in the open. Betty knew what was going on. The attorneys knew what was going on. The title company knew what was going on. William Edwards knew what was going on. The banks knew of and approved of Ron's actions. The bankers even prepared the necessary documents and coordinated release of the prior mortgages.

Everything Ron did was done openly, and done with everyone's approval. This was not deceptive. There was no cheating. This was a family farm, and Ron was refinancing farm debt of the Clemensen family farm: farm debt that almost half of which was The Trust's debt, not Ron's debt.

If there is a travesty that has been done, it is a travesty to Ron. He has been convicted of seven felonies, of exploitation of his mother. Ron refinanced the Clemensen family farm debt with more favorable terms and completely paid off his mother's trust debt of $665,660.57. The State has made it a crime to help your parents, and to refinance family farm debt.

As explained under Issue 12, infra, the jury was not properly instruction on the issue of specific intent.

Issue 7. Whether SDCL 22-46-3 only applies to exploitation of a person?

First, we deal with the issue of the three mortgages. The facts are undisputed. If we view these facts in front of a jury, no rational jury could find Defendant Ronald Clemensen guilty of a crime. These are Counts 6, 7, and 8 and all three charges involve allegations by the State that Ron used the POA (January 4, 2016) (Exhibit 4) and mortgaged The Trust's property. The State alleged that the Defendant appropriated The Trust's land and that such appropriation constitutes theft.

FACTS

A. Betty's Trust owned all of the real estate relevant to the indictment.

B. Betty Clemensen was the trustee of the Betty Clemensen Trust.

C. Judge Portra found as a matter of law that these mortgages are null and void, and were void ab initio.

D. Betty's Trust owns the real estate that was the subject of the indictment, and still owns this property today.

E. Nothing was taken or stolen from Betty's Trust nor from Betty Clemensen.

SDCL 22-46-3 applies to the theft of property by exploitation of a person, specifically an elder or an adult with a disability.

Under SDCL 22-46-1(3), an elder is defined as "a person sixty-five years of age or older." The elder has to be a person. An elder cannot be a trust or other entity. A trust cannot be a person sixty-five years of age or older.

SDCL 22-46-1(1) defines an adult with a disability as "a person eighteen years of age or older who has a condition… to the extent that the person is unable to protect himself or herself or provide for his or her own care." The adult with a disability must be a person. An adult with a disability cannot be a trust. A trust cannot be an adult with a disability. A trust cannot be a person eighteen years of age or older who has a condition rendering the person unable to protect himself or herself or provide for his or her own care.

SDCL 22-46-3 was enacted to protect persons in need of protection. This law does not apply to a trust.

The case of *Hermanek-Peck v. Spry*, makes abundantly clear in dealing with SDCL Chap. 21-65 and with vulnerable adult abuse and exploitation, and with SDCL 22-46-3 and the definitions of an elder or an adult with a disability, and exploitation, that the statutes deal with "persons" and "vulnerable adults" that are unable to protect themselves. The statutory scheme is not established to protect a trust. A trust has its own built in protective mechanisms.

All of the evidence provided in Counts 6, 7, and 8 are related to Ron's use of the power of attorney to mortgage trust property. The allegations and the evidence provided have nothing to do with exploitation of an elder, and the charges must fail as a matter of law.

On April 24, 2024, the court issued a Memorandum Decision on this issue. [Attached as Appendix Ex. 3]

The court opined that, "in the Defendant's view, apparently, it is not a crime to steal from a trust." (Appendix Ex. 3, p. 2) That is not and has never been Defendant's position.

The trial court stated, "Betty Clemensen was an elder adult, put her assets in a trust and named her son, the Defendant in this case, as her Trustee. At all relevant times in the indictment, the Defendant served as Betty Clemensen's Trustee." (Appendix Ex. 3, p. 2) These facts were not true. Betty did not name the Defendant as her trustee. Ron never served as Betty's trustee. The court based its decision on its untrue belief that Ron was the trustee. Ron was never the trustee of the trust.

The court erroneously held that even if the property is held by a trust, SDCL 22-46-3 still applies. (Appendix Ex. 3, p. 2)

Words and phrases in a statute must be given their plain meaning. SDCL 2-14-1.

The plain meaning of SDCL 22-46-3 is that it applies to exploitation of the property of an elder or adult with a disability. An elder or adult with a disability are clearly defined as persons. SDCL 22-46-3 does not apply to exploitation of a trust.

The Defendant has not been charged with stealing from a trust. SDCL 22-30A-10. Defendant has been charged with grand theft by exploitation of an elder or adult with a disability. SDCL 22-46-3.

Defendant would note that in SDCL 22-30A-10, the statute ends with "A distinct act of taking is not necessary to constitute theft pursuant to this section." This statutory provision is not included in SDCL 22-46-3. In the interpretation of this law, and in confining the statute to what is said, under SDCL 22-46-3, a distinct act of taking is necessary to constitute theft. See Issue 8 below.

There are no facts which support the contention that Clemensen manipulated or exploited Betty. Defendant should have been granted a judgment of acquittal on Counts 6, 7, and 8 based upon the clear reading of SDCL 22-46-3.

Regarding Counts 9, 10, 11 and 12, i.e. the $88,000 transfer from the Edward Jones account to the Plains Commerce Bank account, which was a loan to Ron Clemensen, the $50,000 check to Crossroads which was a loan to Ron, the $45,000 check to Crossroads which was a loan to Ron, and the $25,000 check to Crossroads which was a loan to Ron, each one of these transfers were authorized by Betty Clemensen, the trustee of Betty's Trust. (See testimony of Wiliam Edwards.) These were authorized by Betty after discussing these matters with Ron and William Edwards. (William Edwards testimony)

Also, it has been irrefutably proven that the Edward Jones account and the Plains Commerce Bank checking account were owned by The Trust. These assets were not owned by Betty Clemensen. These assets were owned by the Trust. Ron was charged with exploitation of a person, an elder. He did not in any way, shape or form exploit a

person, namely his mother. He did not exploit his mother because she did not own these assets. The trust owned these assets. The elements of SDCL 22-46-3 require that it be proven that Ron exploited Betty. He did not exploit Betty.

Issue 8. Was any property taken or stolen from Betty Clemensen by Ron Clemensen in order to meet the essential element of SDCL 22-46-3 that the property taken or stolen must be a certain amount to prove aggravated grand theft by exploitation or grand theft by exploitation?

Under SDCL 22-46-3 and SDCL Chap. 22-30A, it must be proven that property was "stolen." The undisputed facts are that regarding Counts 6, 7 and 8, no property was taken, and no property was stolen from Betty Clemensen, or from the Betty Clemensen trust.

The trial court revised all instructions to declare that the law was that no property had to be taken and that no property had to be stolen. The court revised all instructions to erroneously provide that property only had to be appropriated. The State had just completed a trial, *State v. Spry*, in Bon Homme County. The instructions used in that case were that the Defendant had to have taken or stolen property.

SDCL Chap. 22-30A, as designated and referred to in SDCL 22-46-3 requires a determination of the value of the property stolen.

SDCL 22-30A-17.1, Aggravated grand theft, provides: "Theft is aggravated grand theft, if the value of the property stolen exceeds five hundred thousand dollars."

SDCL 22-30A-17 provides that "[g]rand theft is a … felony if the property stolen … is more than five thousand but less than or equal to one hundred thousand dollars."

The trial court revised its initial instructions to take took out any reference to property taken or property stolen and inserted in its instructions an amorphous phrase of property appropriated. The State argued that the Defendant misled the jury in closing by arguing that property had to be taken or stolen. (TR Day 7, p. 43: 4-6) The State in its final statement to the jury told the jury that property only had to be appropriated, and that the appropriation of the property was by the Defendant's use of the POA to mortgage property. (TR Day 7, p. 43: 4-6)

This is wrong, and was in fact a misstatement of the law, but the State had the court's ambiguous instruction of property appropriated to support its contention.

The court did instruct the jury that appropriate is "To take something from another for your own use." There was no evidence of taking of property from Betty Clemensen by Ronald Clemensen.

The Defendant was then convicted of having appropriated $1,100,000 based upon the court's erroneous instructions, and the Defendant was convicted without stealing anything. He did not steal any money from the trust, and he did not steal any money from Betty Clemensen.

Under SDCL 22-30A-17, the State is required to prove the value of the stolen property beyond a reasonable doubt. *State v. Iron Necklace*, 430 N.W.2d 66, 81 (S.D. 1988); *State v. Ahmed*, 937 N.W.2d 217, 224, 2022 S.D. 20, ¶25.

The Defendant did not take or steal any of Betty Clemensen's property or real estate, and did not take or steal of property or real estate of Betty's Trust.

The State merely argued that clearly the real estate was over $500,000 in value and decided that the jury would presume the property was taken.

SDCL 22-30A-1 defines theft as "any person who takes, or exercises unauthorized control over, property of another, with intent to deprive that person of the property… ."

There was no taking of property. Such is uncontested. If the State is alleging that the Defendant exercised control of property of another, there must be intent to deprive the owner of that property. The mortgage of Betty Clemensen trust property shows no intent to deprive the owner therefrom. And, as a fact, the owner was never deprived of trust property. The owner, Betty's Trust, had sole ownership of such property during this entire controversy. Not once was the owner deprived of the property.

In *State v. Kessler*, 772 N.W.2d 132, 137, 2009 S.D. 76, ¶16, the court found that "[e]ssentially, the State argues that because defendant failed to proceed with the construction of the house in a timely fashion and spent part of the loan proceeds on items related to the construction of the house, [that] defendant stole money from the Hemmers by deception." The court held that the Defendant had to have stolen property.

In *State v. Clemensen*, there is no evidence Ronald Clemensen "stole" monies or properties. This is a requirement of SDCL 22-46-3 in providing that the punishment and penalties fall under SDCL 22-30A-17 and SDCL 22-30A-17.1.

Judge Portra found that the mortgages were null and void from the beginning. The Defendant never exercised control over the property because the mortgages never existed. As a matter of law, the Defendant never took the property, and never exercised control over the property. Thus taking or exercising control as a matter of law never existed.

Regarding the value of the property appropriated, the State alleged that Count 6, over $500,000 of property was appropriated [or stolen pursuant to the classification of the crime under Chapter SDCL 22-30A]. The State alleged that on Count 7, over $500,000 of property was appropriated [or stolen pursuant to the classification of the crime under SDCL 22-30A].

The State is required to prove the value of the stolen property beyond a reasonable doubt. *State v. Iron Necklace*, Id. p. 81.

Regarding the $1.5 million borrowed from FDNB, the amount of $665,660.57 specifically went to pay off debt owed by Arlo and Betty to Dacotah Bank. (TR Day 5, p. 15, lines 22-25; p. 16, lines 1-3; Ex. E)

Of the $1.5 million borrowed, $834,339.43 went to pay closing costs and Ron's debts with Dacotah Bank. The amount of $824,749.57 went to pay Ron's debt. (TR Day 5, p. 43, lines 24-25; p. 44, lines 1; p. 44, lines 21-23) Ron's $824,749.57 payoff of his debt would come one-half from Count 6's $750,000 mortgage/note, and one-half from Count 7's $750,000 mortgage/note. Therefore, the amount from the Count 6 loan going to pay off Ron's debt would be $412,374.78, and the amount from the Count 7 loan going to pay off Ron's debt would be $412,374.79. Even making the leap (which we are not doing) that the money was stolen, it does not constitute aggravated grand theft of over $500,000.

Issue 9. What effect does the fact that the mortgages were declared null and void in a collateral civil case have upon the criminal case under SDCL 22-46-3 of exploitation of an elder?

"If the contract itself was void at the time of its execution, because of the constitutional inhibition, no circumstances or facts thereafter arising could change its status or render it valid." *Norbeck & Nicholson Co. v. State*, 144 N.W. 658, 659 (S.D. 1913).

This is exactly what Judge Portra held. The mortgages at issue in *State v. Clemensen* are null and void, ab initio, null and void and of no force and effect. "[T]he loans were void because Ron did not have the authority to encumber Trust land through a Power of Attorney. When a contract is void, it is 'invalid or unlawful from its inception. It is a 'mere nullity, and incapable of confirmation or ratification.'" *Hanna v. Landsman*, 2020 S.D. 33, ¶34, 945 N.W.2d 534, 545 (quoting *Nature's 10 Jewelers v. Gunderson*, 2002 S.D. 80, ¶12, 648 N.W.2d 804, 807)." (Judge Portra Memorandum Decision dated March 5, 2021)

There is no possible way to bring life back to the two DMAC mortgages, or to the Great Plains Bank mortgage. There is no way to render these valid. There is no way to ratify these mortgages. The mortgages don't exist.

For example, reversed judgments are null and void and are treated as if the lower court never granted the reversed judgment. *Hasse v. Fraternal Order of Eagles No. 2421 of Vermillion*, 658 N.W.2d 410, 411, 2003 S.D. 23, ¶9.

These precepts are equally applicable to the mortgages in *State v. Clemensen*. The mortgages never existed. And yet the State was allowed to question bankers in regard to the possibility of the mortgages being foreclosed on, and the possibility of the loss of the land. This was not appropriate. The mortgages never existed and it was an impossibility to foreclose on these mortgages or to sell the land as collateral for the debt.

The jury was allowed to consider the mortgages as "appropriated" property for purposes of SDCL 22-46-3 and the element of appropriated property of the elder. However, as a matter of law, these mortgages never existed. Defendant Ronald Clemensen could not have appropriated property through a mortgage that never existed.

As a matter of law, this case should not have been submitted to the jury. The jury was allowed to determine as a question of fact whether these mortgages were valid. The jury was allowed to determine as a question of fact whether these mortgages appropriated property of Betty Clemensen. And we know that those facts, those questions, should not have been submitted to the jury because the mortgages did not exist as a matter of law.

Issue 10. Did the State prove beyond a reasonable doubt that Ron Clemensen transferred $88,000 from Edward Jones?

"[I]n case of reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted." SDCL 23A-22-3.

Specifically in regard to Count 9, the $88,000 transfer from Edward Jones, there was not any evidence to support the indictment that Ron Clemensen transferred $88,000 from Edward Jones.

William Edwards testified that all transfers "from" Edward Jones were made by Betty. William Edwards testified that all transfers "from" the Edward Jones account had to be made by Betty. William Edwards testified that Ron did not make transfers from or out of the Edward Jones account.

There was no evidence whatsoever in which the jury could have found "beyond a reasonable doubt" that Ronald Clemensen made a transfer from Edward Jones.

Issue 11: **Did the State prove beyond a reasonable doubt that Ron exploited Betty by taking a loan in his own name in the amount of $100,000 from Great Plains Bank?**

Count 8 alleges that Ronald Clemensen exploited Betty Clemensen by taking a Great Plains Bank (GPB) loan in the amount of $100,000. There was no evidence of a GPB loan taken by Betty Clemensen or by The Trust. Ron signed the GPB promissory note obligating himself to pay back the monies he borrowed in the amount of $100,000. GPB transferred the $100,000 to Ron. In return, Ron signed a promissory note promising to repay the $100,000 loan with interest.

Count 6 specifically deals with the DMAC loan on the NW1/4 §6-119-61. This was the mortgage. Count 7 specifically deals with the DMAC loan on the NE1/4 §24-119-62. These two charges deal with the mortgages signed related to land owned by The Trust. These don't relate to the notes to DMAC because Ron signed the notes, obligating himself to repay the debt. The referral to the specific trust quarters confirm these charges are related to the mortgages. These are loans on trust real estate. Count 8 alleges a $100,000 GPB loan. There is no reference to a loan on a quarter of trust real estate. The allegation is the $100,000 GPB loan was somehow an exploitation of Betty's Trust. However, the loan was not an obligation of Betty Clemensen or Betty's Trust. The $100,000 loan was strictly a loan to Ron Clemensen.

SDCL 23A-22-3 requires an acquittal on this charge. No facts support the indictment charging Clemensen with a nonexistent crime, i.e. borrowing money in his own name.

Issue 12. Did the trial court err by not properly instructing the jury on the good faith affirmative defense?

The trial court gave Jury Instruction 21 but that instruction did not properly address the burden of proof when a good faith affirmative defense is raised.

SDCL 23A-22-3. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

SDCL 22-1-2(3). "Affirmative defense," an issue involving an alleged defense to which, unless the state's evidence raises the issue, the defendant, to raise the issue, must present some credible evidence. If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.

State v. Holloway, 482 N.W.2d 306, (S.D. 1992) The evidence showed that the defendant relied on advice by and documents prepared by multiple financial experts, i.e. William Edwards and bankers from numerous institutions. All those experts allowed the defendant to sign documents on behalf of The Trust. (Maaland TR Day 5, p. 53: 10-19, p. 64: 2-7; Pick p. 26: 11-15, p. 28: 16-25,p. 31: 16-21, p. 33: 10-12 Agri-Access p. 34: 9-24)

The trial court acknowledged the good faith defense as instructions were settled and gave Jury Instruction 21. The jury was instructed that it could consider defendant's good faith in determining whether the defendant acted with intent to defraud. The instruction failed to instruct the jury that the State bears the burden of proof as required

by SDCL 22-1-2(3). The State has the burden to establish the guilt of defendant as to the affirmative defense.

Pattern jury instruction 2-2-1 should have been tailored to the facts of this case and given. The jury should have been given a clear instruction that because the affirmative defense was raised, the State bears the burden of proving the defendant did not act in good faith. The pattern jury instruction would have clearly informed the jury that the State had that burden. As the comments to the pattern jury instruction state, the affirmative defense is an essential element of the case.

Instruction 21, given to the jury, permitted the jury to consider the affirmative defense. The proper instruction would have required the jury to consider the defense and would have placed the burden of proof on the State. The difference between permitting consideration and requiring proof is huge and the mistake is reversible.

Although Defendant did not propose the pattern instruction, the court has an obligation to properly instruct the jury and the trial court's failure should be addressed as plain error. Although the plain error rule should be applied sparingly, it should be applied in this case of an obvious and substantial error. See *State v. Holloway*, 482 N.W.2d 306, (S.D. 1992)

CONCLUSION

This matter should not have been submitted to the jury. Defendant Ronald Clemensen was entitled to a judgment of acquittal.

1. Venue was not proper in this proceeding.
2. Defendant was never identified properly.
3. Defendant did not have the duty to support his mother.

4. Defendant was never the trustee of the Betty Clemensen Trust. As a matter of law, Ronald Clemensen was not entrusted with Betty Clemensen's property.

5. The Defendant did not appropriate Betty's property for any purpose.

6. The prosecution provided no evidence that at the time Defendant Ronald Clemensen borrowed money, or obtained money from DMAC, GPB, or Betty's Trust that he did so with the intent to specific intent to defraud.

7. SDCL 22-46-3, as a matter of law, only applies to exploitation of an elder or adult with a disability. The crime can only be applied to exploitation of a person.

8. SDCL 22-46-3 requires by law that property must be stolen in order for a crime to have been committed. No property was stolen or taken by the Defendant.

9. The mortgages were all declared null and void as a matter of law. The mortgages never existed. The State's entire case was based upon the appropriation of Betty Clemensen trust land through the use of the Power of Attorney to execute the mortgages. Since, by law, and pursuant to Judge Portra's decision, the mortgages did not exist, it is an impossibility for Ronald Clemensen to have appropriated Betty Clemensen trust land.

10. No evidence existed supporting the State's claim that Defendant transferred $88,000 from the Edward Jones account.

11. It is not a crime for Defendant to borrow money when he takes the loan in his own name.

12. The trial court did not properly instruct the jury on Defendant's affirmative defense of good faith.

REQUEST FOR ORAL ARGUMENT

The Appellant requests oral argument in this matter.

Respectfully submitted this 19th day of March, 2025.

____//ss//Casey N. Bridgman//_____
Casey N. Bridgman
Attorney for Appellant Ronald P. Clemensen
P.O. Box 356
Wessington Springs, SD 57382
(605) 539-1066

Dated this 19th day of March, 2025.

____//ss//William Gerdes//_____
William Gerdes
Gerdes & McNeary
Attorney for Appellant Ronald P. Clemensen
104 S. Lincoln St., Suite 111
Aberdeen, SD 57401

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

****

STATE OF SOUTH DAKOTA, Plaintiff
vs.

RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

****

AFFIDAVIT OF MAILING AND PROOF OF SERVICE

****

STATE OF SOUTH DAKOTA)
:
COUNTY OF JERAULD)

Casey N. Bridgman, being first duly sworn on oath, deposes and says: That he is the attorney for the Appellant in the above-entitled action; that on March 19, 2025 he filed Appellant's Brief electronically through Odyssey's File & Serve system, and also served a true and correct copy of the Appellant's Brief on Appellees' counsel electronically at their email addresses of record in Odyssey's File & Serve system, and he further states that on March 19, 2025 he mailed one hard copy of the Appellant's Brief to the Clerk of the Supreme Court of South Dakota, 500 East Capitol Ave., Pierre, SD 57501-5070, by depositing the same in the United States Post Office at Wessington Springs, South Dakota, postage prepaid, addressed as stated above.

Dated this 19th day of March, 2025.

//ss//Casey N. Bridgman//
Casey N. Bridgman

Subscribed and sworn to before me this 19th day of March, 2025.

//ss//Kendra Brandenburg//
Notary Public

(SEAL) My commission expires: __6-27-2025__

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

****

STATE OF SOUTH DAKOTA, Plaintiff
vs.

RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

****

CERTIFICATE OF COMPLIANCE

****

STATE OF SOUTH DAKOTA)
:
COUNTY OF JERAULD)

Casey N. Bridgman, being first duly sworn on oath, deposes and says: That he is the attorney for the Appellant in the above-entitled action, and that he certifies that Appellant's Brief complies with the type volume limitation contained in SDCL 15-26A-66(2), in that Appellant's Brief contains a word count of 9,976.

//ss//Casey N. Bridgman//
Casey N. Bridgman

Subscribed and sworn to before me this 19th day of March, 2025.

//ss//Kendra Brandenburg//
Notary Public
(SEAL) My commission expires: 6-27-2025

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

****

STATE OF SOUTH DAKOTA, Plaintiff
vs.

RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

****

APPENDIX

****

INDEX TO
APPELLANT'S APPENDIX

Ex. 1

FILED
OCT 25 2024
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT
By _____

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF SPINK) FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,) 71CRI 21-74

Plaintiff,)

v.) JUDGMENT OF CONVICTION

RONALD PETER CLEMENSEN,)
DOB: 2-16-1963)

Defendant.)

An Indictment was filed with this Court on the 8th day of July 2021, charging the Defendant with the crimes of **COUNT 1 Conspiracy to Commit Aggravated Grand Theft by Exploitation** (SDCL 22-3-8, 22-4-1, 22-46-3), a Class 2 felony; **COUNTS 6 - 7 Aggravated Grand Theft by Exploitation** (SDCL 22-46-3), a Class 2 felony; and **COUNTS 8-12 Grand Theft by Exploitation** (SDCL 22-46-3), a Class 4 felony. Defendant was arraigned on said Indictment on the 7th day of September 2021. The Defendant, the Defendant's attorney Casey Bridgman, and Kimberly J. Zachrison, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of his constitutional and statutory rights pertaining to the charges that had been filed against him including, but not limited to, the right against self-incrimination, the right of confrontation, and the right to a jury trial. The Defendant pled not guilty.

On January 29, 2024, the State dismissed **COUNT 1 – Conspiracy to Commit Aggravated Grand Theft by Exploitation** (SDCL 22-3-8, 22-4-1, 22-46-3), a Class 2 felony.

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

Filed: 3/19/2025 4:08 PM CST Supreme Court, State of South Dakota #30916

A jury trial began on August 5, 2024. On August 13, 2024 Defendant was found **GUILTY** of **COUNTS 6 - 7 Aggravated Grand Theft by Exploitation** (SDCL 22-46-3), a Class 2 felony; and **COUNTS 8-12 Grand Theft by Exploitation** (SDCL 22-46-3), a Class 4 felony.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense and that the Defendant was represented by competent counsel. It is, therefore, the

JUDGMENT of this Court that the Defendant is guilty of **COUNTS 6 - 7 Aggravated Grand Theft by Exploitation** (SDCL 22-46-3), a Class 2 felony; and **COUNTS 8-12 Grand Theft by Exploitation** (SDCL 22-46-3), a Class 4 felony.

SENTENCE

On the 25th day of October 2024, the Defendant, Ronald Peter Clemensen, the Defendant's attorney Casey Bridgman, and Kimberly J. Zachrison, Assistant Attorney General, appeared for Defendant's sentencing. The Court heard argument of counsel. The Court then 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 sentence:

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As to the offense of **COUNT 6: AGGRAVATED GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of twenty-five (25) years. Those twenty-five (25) years are suspended on the following terms and conditions:

1. Defendant shall serve twenty (20) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay fines in the amount of $500.00 and court costs in the amount of $104.00.
3. Defendant's sentence shall run consecutive to Count 7.
4. Defendant shall be placed on probation for a term of five (5) years. Defendant shall abide by the standard probation agreement with Court Services.
5. Defendant shall complete moral recognition therapy within six months.
6. Defendant shall maintain contact with his attorney.
7. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

As to the offense of **COUNT 7: AGGRAVATED GRAND THEFT BY EXPLOITATION**:

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of twenty five (25) years. Those twenty five (25) years are suspended on the following terms and conditions:

1. Defendant shall serve twenty (20) days in the Spink County Jail or any other Spink County facility. Defendant shall self report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of $500.00 and court costs in the amount of $104.00.
3. Defendant's sentence shall run consecutive to Count 6.
4. Defendant shall be placed on probation for a term of five (5) years. Defendant shall abide by the standard probation agreement with Court Services.
5. Defendant shall complete moral recognition therapy within six months.
6. Defendant shall maintain contact with his attorney.
7. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

As to the offense of **COUNT 8: GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run consecutive to Counts 6 and 7 and concurrent to Counts 9-12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

As to the offense of **COUNT 9: GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8, 10-12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

As to the offense of **COUNT 10: GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8-9, 11-12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 11: GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

Filed: 11/20/2024 1:07 PM CST · Spink County, South Dakota 71CRI21-000074

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8-10, 12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 12: GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8-11.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

IT IS FURTHER ORDERED that the Defendant shall make restitution in the amount of $8,717.94 to the Spink County Clerk of Courts for prosecution costs.

IT IS FURTHER ORDERED that the Defendant shall make restitution in the amount $294.80 to the Attorney General's Office for prosecution costs.

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

IT IS FURTHER ORDERED that the Court expressly reserves control and jurisdiction over the Defendant for the period of 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 terms of this Order at any time.

Dated this 26th day of October 2024.

BY THE COURT:

Robert L. Spears
Robert Spears
Circuit Court Judge

ATTEST:
Tisha Kuntzel
Clerk of Courts
By: _____
Deputy

NOTICE OF RIGHT TO APPEAL

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

Filed: 11/20/2024 1:07 PM CST Spink County, South Dakota 71CRI21-000074

Ex. 2

Assignment and Nominee Agreement

This Agreement, made by and between BETTY CLEMENSEN ("Trustor") and BETTY CLEMENSEN, Trustee, of the BETTY CLEMENSEN LIVING TRUST, dated July 29, 2014 ("Trustee") is effective July 29, 2014.

WHEREAS, Trustor established a revocable trust ("Trust") for estate planning purposes on July 29, 2014;

WHEREAS, Trustor hereby transfers all property owned by Trustor to the Trust, including, but not limited to, the property identified on Schedule A, whether real or personal, tangible or intangible, but exclusive of annuities, IRA's, retirement plans under the Internal Revenue Code, or any property the transfer of which would violate any agreement restricting transfer of such property or cause any tax to become due ("Property");

WHEREAS, Trustor intends that any Property presently owned or acquired hereafter by any means shall be owned by Trustee;

WHEREAS, Trustor and Trustee agree that certain Property is more conveniently managed and administered in the name of the Trustor rather than Trustee;

WHEREAS, Trustee desires to establish a legal relationship with Trustor with respect to the Property;

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties agree as follows:

a. The above recital clauses are hereby incorporated into this Agreement by reference.

b. The parties expressly acknowledge that Trustor hereby assigns the Property to Trustee, and Trustor is holding title to the Property as nominee for Trustee to the full extent of the interest therein. Trustor expressly acknowledges that Trustor has no interest whatsoever in the Property and agrees that upon demand Trustor will convey possession of the Property to Trustee.

c. Trustee shall bear all costs and expenses incurred in connection with the Property.

d. In any suit, arbitration or other action brought to enforce the provisions of this Agreement or for the breach or to restrain the breach of any of the terms of this Agreement (any such activity being referred to herein as a "Proceeding"), the prevailing party shall be entitled to receive from the other party hereto named in such Proceeding a reasonable attorney's fee, whether incurred before, during or after any hearing, appeal, or collection

proceeding, as determined by the Court or Arbitrator, as the case may be, in such Proceeding.

e. This Agreement shall survive the death of Trustor and Trustee.

IN WITNESS WHEREOF, the parties have executed this Assignment and Nominee Agreement as of the day and year first above written.

Trustor and Trustee:

Betty Clemensen

BETTY CLEMENSEN

STATE OF SOUTH DAKOTA)
SS
COUNTY OF LINCOLN)

On this July 29, 2014, before me, the undersigned officer, personally appeared BETTY CLEMENSEN known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

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

Sandy Hensch

Notary Public-South Dakota
My Commission Expires: 04/21/2020

SANDY HENSCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

Ex.3

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
CODINGTON COUNTY COURTHOUSE
14 1st Avenue S.E., Watertown, SD 57201
Fax Number (605) 882-5106

HON. ROBERT L. SPEARS
Circuit Judge
(605) 882-5107
Robert.Spears@ujs.state.sd.us

MICHELLE GAIKOWSKI
Court Reporter
(605) 882-5020
Michelle.Gaikowski@ujs.state.sd.us

April 24, 2024

Kimberly Zachrison
1302 E. Hwy 14 STE 1
Pierre, SD 57101

Casey Bridgman
P.O. Box 356
Wessington Springs, SD 57382

Ref: State v. Clemensen, 71CRI21-0074, Defendants Pretrial Motion to Dismiss Counts 6, 7, 8 on the Indictment on File.

Counselors,

The opinion of the Court pertaining to the defendant's motion to dismiss the above numbered counts in the indictment is set forth below. For the reasons stated, the defendant's pretrial motion to dismiss is denied.

Facts/Procedural History

This Court conducted a second pretrial hearing in the above file on April 3, 2024. The Court took several pretrial motions submitted by the parties under advisement. The defendant seeks an order from this Court dismissing counts 6,7,

and 8, as charged in the indictment. The defendant claims that the above counts do not describe a public offense. Or, in the alternative, the defendant appears to argue to this Court there is/was a defect in the indictment that requires dismissal.

Analysis/Discussion

The standards a trial court must apply when considering a motion to dismiss an indictment or information in a criminal case are limited and set forth very clearly in SDCL 23A-8-2. None of the nine specific reasons stated in the above statute as grounds for a dismissal are present in this case. This Court notes the defendant claims the above counts should be dismissed for failure to describe a public offense. In this case, the State has pled the offense of grant theft by exploitation. Yet, in the defendant's view, there is no crime described in counts 6,7, and 8 of the indictment because if a theft occurred at all, the theft was from a trust not a person. Consequently, in the defendant's view, apparently, it is not a crime to steal from a trust.

On the facts asserted by the State, Betty Clemensen was an elder adult, put her assets in a trust and named her son, the defendant in this case, as her Trustee. At all relevant times in the indictment, the defendant served as Betty Clemensen's Trustee. On the facts asserted by the State thus far, Betty Clemensen depended on the defendant's care, support, and management of her finances and assets. The defendant stands accused of intent to defraud, appropriate property to a use outside the lawful execution of that person's trust. (SDCL 22-46-3). Nowhere in this statute is there a stated exception that simply because an elderly person put his or her assets in a trust, there is no grand theft by exploitation. It appears to this Court that the defendant is reading something into the above Statute that is simply not there. Consequently, this Court rejects the argument advocated by the

defendant and his motion to dismiss counts 6,7, and 8 in the indictment is denied on this record.

Additionally, this Court has read and reviewed the case of State v. Bale, 512 N.W.2d, 164, (S.D. 1994), cited by the defendant as authority to dismiss counts 6, 7, and 8 in this indictment. The Bale case is easily distinguished from the case at bar on the facts and its legislative history. Therefore, Bale is not a controlling precedent and is inapplicable to the facts and issues pending before this Cout.

CONCLUSION

Based on the foregoing, the defendant's motion to dismiss counts 6,7,and 8 in the indictment is denied. Ms. Zachrison shall prepare findings and conclusions consistent with this writing unless waived along with the appropriate order for my signature. Failure to do so within 10 days of the above date, will result in this Memorandum becoming the Order, Findings and Conclusions of this Court.

Robert L. Spears
Circuit Court Judge

Filed on: 4/24/2024 Spink County, South Dakota 71CRI21-000074

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30916

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RONALD PETER CLEMENSEN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT L. SPEARS
Circuit Court Judge

APPELLEE'S BRIEF

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AND APPELLANT

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E-mail: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notice of Appeal filed November 20, 2024

Filed: 5/22/2025 9:57 AM CST Supreme Court, State of South Dakota #30916

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CASES CITED: **PAGE**

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30916

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RONALD PETER CLEMENSEN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Ronald Peter Clemensen, is referred to as "Clemensen." Appellee, the State of South Dakota, is referred to as "State." References to documents are designated as follows:

Settled Record (Spink Criminal File No. 21-74) ..... SR

Jury Trial Transcript (August 6, 2024).....JT2

Jury Trial Transcript (August 7, 2024).....JT3

Jury Trial Transcript (August 8, 2024).....JT4

Jury Trial Transcript (August 9, 2024).....JT5

Jury Trial Transcript (August 12, 2024).....JT6

Jury Trial Transcript (August 13, 2024).....JT7

Exhibits ..... EX

Clemensen's Brief..... AB

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

JURISDICTIONAL STATEMENT

On October 25, 2024, the Honorable Robert L. Spears, Circuit Court Judge, Fifth Judicial Circuit[1], entered a written Judgment of Conviction. SR: 2152-61. Clemensen timely filed his Notice of Appeal on November 20, 2024. SR: 2175. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT CLEMENSEN'S CONVICTIONS ON ALL COUNTS?

The circuit court denied Clemensen's motions for judgment of acquittal finding the State presented sufficient evidence for the jury to convict Clemensen on all counts of the indictment.

SDCL 22-46-3

Est. of Thacker v. Timm, 2023 S.D. 2, 984 N.W.2d 679

State v. Ahmed, 2022 S.D. 20, 973 N.W.2d 217

State v. Davis, 131 N.W.2d 730 (N.D. 1964)

II. WHETHER THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY ON CLEMENSEN'S GOOD FAITH AFFIRMATIVE DEFENSE?

The circuit court provided the jury with three instructions on Clemensen's good faith defense. Two of which Clemensen purposed.

State v. Pfeiffer, 2024 S.D. 71, 14 N.W.3d 636

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

---

[1] Because of conflicts in the fifth circuit, Judge Spears presided over this case. SR: 276-77.

STATEMENT OF THE CASE

The Spink County grand jury indicted[2] Clemensen on the following counts:

- Count 1: Conspiracy to Commit Aggravated Grand Theft by Exploitation, contrary to SDCL 22-3-8, 22-4-1, and 22-46-3, a Class 2 felony;
- Count 6: Aggravated Grand Theft by Exploitation, contrary to SDCL 22-46-3, a Class 2 felony;
- Count 7: Aggravated Grand Theft by Exploitation, contrary to SDCL 22-46-3, a Class 2 felony;
- Count 8: Grand Theft by Exploitation, contrary to SDCL 22-46-3, a Class 4 felony;
- Count 9: Grand Theft by Exploitation, contrary to SDCL 22-46-3, a Class 4 felony;
- Count 10: Grand Theft by Exploitation, contrary to SDCL 22-46-3, a Class 4 felony;
- Count 11: Grand Theft by Exploitation, contrary to SDCL 22-46-3, a Class 4 felony; and
- Count 12: Grand Theft by Exploitation, contrary to SDCL 22-46-3, a Class 4 felony.

SR: 1-9. Before trial, the State dismissed Count 1: Conspiracy to Commit Aggravated Grand Theft by Exploitation and also dismissed the counts against the two co-defendants. SR: 555. Both parties filed several motions prior to trial, including several discovery motions, multiple motions to dismiss, and various motions to allow certain evidence into trial. SR: 31-32, 345-527, 608-29, 635-49, 929-1032, 1036-43, 1316-28.

---

[2] Clemensen was charged with two co-defendants on the same indictment. He was not charged with all counts in the indictment. SR: 1- 9.

At the close of the State's case in chief, Clemensen filed written motions for judgment of acquittal on Counts 6-8 and made oral motions on all the counts. SR: 1466-92; JT4: 3-8. The circuit court denied the motions. After a seven-day trial, the jury convicted Clemensen on all counts. He renewed his motions for judgment of acquittal, after the verdict, which the court also denied. SR: 2109-30, 2143-50.

The circuit court sentenced Clemensen to the following:

- Counts 6 and 7: Aggravated Grand Theft by Exploitation- The circuit court ordered Clemensen to serve twenty-five years in prison and suspend twenty-five years. SR: 2154-55. He was placed on probation for five years and ordered to serve twenty days in county jail. *Id.* The court ordered the sentences to run consecutive to one another. *Id.*
- Counts 8-12: Grand Theft by Exploitation- The circuit court ordered Clemensen to serve ten years in prison and suspended ten years. SR 2156-60. He was ordered to serve twenty days in county jail. *Id.* The court ordered the sentences to run consecutive to Counts 6 and 7 but Counts 8-12 are to run concurrent with one another. *Id.*

STATEMENT OF FACTS

Betty and Arlo Clemensen had a farm in Spink County. JT3: 13. The couple had two children, Ronald Clemensen and Patty Ellwanger. EX: 2. Patty had three boys with her first husband, Thomas Kalpperich: Brent, Brad, and Brock. EX: 2. Betty and Arlo split the household responsibilities where Betty handled the cooking, cleaning, and upkeep of the home and Arlo farmed and took care of the finances. JT2: 22-23.

When Arlo passed away in 2011, Clemensen stepped in and started helping Betty out by handling the finances. JT2: 23-24. In 2014,

Betty executed a durable power of attorney (POA), naming Clemensen as her agent. EX: 3. This POA would go into effect if Betty were to become incapacitated. EX: 3, JT2: 43. She executed another POA in 2016, also naming Clemensen as the agent, which went into effect immediately upon execution. EX: 4, JT2: 43.

In 2014, Betty created the Betty Clemensen Revocable Trust. EX: 5, JT2: 45. She transferred her real property into the trust. EX: 6, JT2: 48. Betty was the trustor (or settler) of the trust. EX: 5, JT2: 71. She was also the initial trustee of the trust and the initial beneficiary of the trust. EX: 5, JT2: 71. Clemensen was named the successor co-trustee of the trust. EX: 5, JT2: 79.

Clemensen began having some financial problems of his own. In 2016, Clemensen took out three separate loans, two for $750,000 from Frist Dakota National Bank (DMAC), and one for $100,000 from Great Plains Bank. EX: 8, 9, 10, 16, JT3: 34-35, 38, 42-45. To obtain these loans he used Betty's land as collateral, signing off on the mortgages as Betty's POA. *Id.* Betty herself did not sign off on these mortgages. *Id.* Years later, these mortgages were deemed null and void because Clemensen did not have the authority to mortgage Betty's property. JT5: 93.

Clemensen's financial struggles continued, and he needed money for his failing trucking business, Crossroads. In 2015, Betty and

Clemensen met with William Edwards[3], a financial advisor at Edward Jones. JT4: 36. The meeting with Edwards resulted in a margin loan issued to Clemensen for $88,000, where he would pay off the balance in six months. JT4: 42. While Edwards did not know the discussions Clemensen and Betty had prior to coming in for the loan, it was clear Clemensen had expressed his financial struggles to Betty prior to the meeting. JT4: 58. And it was apparent that Clemensen expected to get the loan. JT4: 69.

Rather than paying the money back, Clemensen continued to borrow more money from the Edward Jones account. By the end of 2017, Clemensen's balance had reached $312,000. JT4: 56. Edwards expressed his concerns about Clemensen borrowing so much money to Betty. JT4: 56. He also had concerns about Betty's declining cognitive abilities. JT4: 74. He eventually contacted the Edward Jones "home office" in St. Louis and was told that they could not authorize any more loans from Betty's account. JT4: 57.

The $88,000 loan from Edward Jones was transferred to Betty's bank account. JT3: 89. While Clemensen's name was also on Betty's

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[3] Betty and Arlo first met with Edwards in the 1980's. JT4: 28. They were one of Edwards's first clients. JT4: 28. Arlo had some concerns about his retirement account that Edwards helped them with and the relationship with Edwards continued until both Arlo and Betty passed. JT4: 28. The two had several accounts with Edward Jones, including an investment account, and had built a nest egg for themselves. JT4: 29, 32, 74. Arlo and Betty never withdrew funds from their investment account. JT4: 65-66.

account, it was Betty's money that funded the account through her social security and income from Edward Jones. JT3: 161. Clemensen proceeded to write three checks from that account in the amounts of $50,000, $45,000, and $25,000. EX: 13, 14, 15. The checks were made out to Crossroads and the memo line read, "loan." EX: 13, 14, 15. These funds were never paid back.

In August 2017, Brent Klapperich, Betty's grandson, received a request to use Betty's land to "bank roll" a business Clemensen had. JT2: 27. He reached out to Clemensen and the conversation left him feeling uneasy. JT2: 27. Brent reported Clemensen for elder abuse. JT2: 27.

Dave Lunzman, a former agent with the Division of Criminal Investigation, working for elder abuse crimes[4], learned about Betty and Clemensen in July 2017. JT3: 4,7. He met Betty at an assisted living facility in Aberdeen. JT4: 14. Betty had trouble remembering things. JT4: 15-20. She could not recall her birthday, when her husband passed away, the date, or how long she had been living at the assisted living facility. JT4: 15-20. As Lunzman continued to investigate, he discovered the mortgages Clemensen took out on Betty's land, the transfer from Edward Jones, and the three checks Clemensen wrote from Betty's account. *See* JT3: 4-142.

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[4] At the time of trial, Lunzman was working at the Brown County Sheriff's office. JT4: 4.

ARGUMENTS

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT CLEMENSEN'S CONVICTION'S ON ALL COUNTS.

Clemensen makes several arguments regarding the State not meeting its burden in proving different elements of the various counts. He argues the circuit court should have granted his motion for judgment of acquittal. For the sake of judicial efficiency, the State combined issues 1-11 and will address how the State met its burden at trial by proving every element of each count.

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Peneaux*, 2023 S.D. 15, ¶ 24, 988 N.W.2d 263, 269 (citing *State v. Timmons*, 2022 S.D. 28, ¶ 14, 974 N.W.2d 881, 887). "'A motion for a judgment of acquittal attacks the sufficiency of the evidence.'" *Id.* "When reviewing the sufficiency of the evidence, [this] Court considers '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. Ahmed*, 2022 S.D. 20, ¶ 14, 973 N.W.2d 217, 221 (quoting *State v. Wolf*, 2020 S.D. 15, ¶ 13, 941 N.W.2d 216, 220). This Court "accepts the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict." *Id.* "This Court does not 'resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence on appeal.'" *Id.* Further, a "conviction may be supported by circumstantial evidence even

when all the elements of the crime are established circumstantially." *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 45, 705 N.W.2d 620, 633).

Clemensen was charged with seven counts, all under the same statute, SDCL 22-46-3, which states:

> Any person who, having assumed the duty voluntarily, by written contract, by receipt of payment for care, or by order of a court to provide for the support of an elder or an adult with a disability, and having been entrusted with the property of that elder or adult with a disability, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of that person's trust, is guilty of theft by exploitation.

The circuit court broke the statute down into six elements that the State must prove. SR: 1515-16. The State was also required to prove where the crimes occurred and the identity of the perpetrator. SR: 1512-13. Based on the evidence presented at trial, the State presented sufficient evidence to meet its burden of proving every element of each of the counts charged.

A. Clemensen had a duty and was entrusted with Betty's property.

The State presented sufficient evidence to prove Clemensen had a duty and was entrusted with Betty's property. Testimony revealed how Arlo handled the finances and the farm while Betty took care of the house. JT2: 23-24. After Arlo passed in 2011, Betty began relying on Clemensen to handle the finances for her. JT2: 23-24. In fact, Clemensen was all Betty had. JT4: 74.

Clemensen was on Betty's bank account, and he was added as an authorized person on Betty's Edward Jones account so Clemensen could discuss her finances. JT4: 33, EX: 11. There is no dispute that Clemensen helped Betty with her finances.

The circuit court instructed the jury that the definition of fiduciary duty as, "a duty to act for someone else's benefit, while subordinating one's personal interests of that of the other person." SR: 1535. Clemensen assumed a duty to act for Betty's benefit as she could not handle her finances on her own.

Further, Betty had a POA, making Clemensen her attorney of fact. The POA went into effect immediately when signed in 2016. JT2: 43. This POA authorized Clemensen to make decisions regarding Betty's financial matters. EX: 4. "As a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Est. of Thacker v. Timm*, 2023 S.D. 2, ¶ 20, 984 N.W.2d 679, 686, (quoting *Est. of Stoebner v. Huether,* 2019 S.D. 58, ¶ 17, 935 N.W. 2d 262, 267).

Clemensen was Betty's attorney of fact. He was on her bank account and an authorized person on her Edward Jones account. He assumed the duty to help her with her finances. There was sufficient evidence presented that not only did Clemensen have a duty to Betty, but also that he was entrusted with her property.

B. *Clemensen voluntarily assumed the duty to provide support to Betty.*

The State presented ample evidence that Clemensen voluntarily assumed the duty to support Betty. Arlo was the one who handled the finances for him and Betty. JT2: 22-23. Upon his death, Clemensen took over that role. JT2: 23-24. He voluntarily took on that duty. There was no dispute that Clemensen helped his mother out with her finances. Therefore, the State presented sufficient evidence to show Clemensen voluntarily took on the duty to support Betty.

C. Clemensen appropriated Betty's property in a use or purpose not in the due and law of execution of Betty's trust.

1. Counts 6-8

Clemensen was convicted of aggravated grand theft by exploitation and grand theft by exploitation (Counts 6-8). He used Betty's land to secure three different loans he used to pay off his debts. EX: 8, 9, 10; JT3: 34-35, 38, 42-45.

In 2014 Betty created and executed the trust. JT2: 45; EX: 5. By doing so, she transferred all her land and tangible personal property into the trust. JT2: 48, 57; EX: 5. The trust designated Betty as the trustee and Clemensen and Ellwanger as successor co-trustees. JT2: 46.

Pamela Reiter[5] explained to the jury how a trust is an arrangement whereby property is legally owned and managed by the trustee. JT2: 70. And the trustee owns the legal title to the property that is in the trust. JT2: 71, 77.

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[5] Reiter is a South Dakota attorney that served as an expert witness on behalf of the State regarding POAs. JT2: 61-65.

Clemensen used the land, that was in the trust, to secure three separate loans. EX: 8, 9, 10, 16; JT3: 34-35, 38, 42-45. Two loans were for $750,000 each, and the other loan was for $100,000. Clemensen used the money to pay off debts on his property and put the rest towards Crossroads. JT3: 40.

Because Betty was the trustee, she was the legal owner of the trust property. Clemensen used Betty's property to take out loans to pay his debts; the loans did not benefit Betty. The circuit court instructed the jury that the definition of appropriate was "to take something from another for your own use." SR: 1518. Based on the facts presented, a reasonable jury could have found (and did find) Clemensen appropriated Betty's property in a use or purpose not in the due and law of the execution of the trust.

Clemensen argues the State needed to prove Clemensen stole Betty's property instead of appropriated it. AB: 33-36. But the statute under which Clemensen was charged uses the word "appropriate," not "stole." SDCL 22-46-3. For his argument, he relies on the fact SDCL 22-46-3 references ch. 22-30A, which uses the term "stolen." AB: 33-34. But the reference to ch. 22-30A pertains to punishment only. *See* SDCL 22-46-3 (... Theft by exploitation is punishable as theft pursuant to chapter 23-30A). Therefore, "stolen" is not an element that needs to be proven at trial.

Clemensen also believes that if Betty's property is in a trust, he cannot be convicted of theft by exploitation because the property belongs to the trust, not Betty. AB: 21-25. But "[o]nce a trust is created and property transferred into the trust, the trustee holds legal title of the trust property while the beneficiary holds the equitable title." *Shakman v. Dep't of Revenue*, 2019 IL App (1st) 182197, ¶ 26, 146 N.E.3d 640, 645 (citing *Culicchia v. Hupfauer*, 379 Ill. App. 3d 562, 565, 318 Ill. Dec. 762, 884 N.E.2d 730 (2008)). So, Clemensen can be convicted of theft by exploitation, even when the property is held in trust.

Clemensen similarly contends that he cannot be found guilty of the crimes because the mortgages he took out using Betty's land as collateral were deemed null and void. AB: 36-38. Clemensen signed the mortgages in September 2016. EX: 8, 9, 10, 16, JT3: 38, 40, 45. Then in 2021, the circuit court declared the mortgages null and void. SR: 1048-60. Clemensen enjoyed the benefit of those contracts over four years. Further, "[a] violator of law cannot justify his offense and escape punishment on the ground that the contract, a product of the crime, is void. The contract is merely evidence submitted in proof of some of the facts, of a chain of facts, to prove the crime charged." *State v. Davis*, 131 N.W.2d 730, 733 (N.D. 1964). Accordingly, the State presented sufficient evidence to prove Clemensen appropriated Betty's property to secure three loans.

2. Counts 9-12

For Count 9, the indictment alleged that Clemensen transferred money from Edward Jones. SR: 6. The evidence presented showed that Betty had an investment account with Edward Jones. JT4: 32; EX: A. She added Clemensen as an authorized person, which allowed Clemensen to buy and sell stocks, request payment of money, and write checks. JT4: 32. This was not an account she withdrew money from. JT4: 65-66. But Clemensen went with Betty to meet with Edwards to discuss a loan to Clemensen against Betty's account.

A paper trail shows the funds going from the Edward Jones account into Betty's bank account. JT3: 89; EX: A, EX: 11. Then Clemensen withdrew those funds to give to someone tied to his business Crossroads. EX: 12.

For Counts 10-12, Clemensen was convicted of writing checks from Betty's bank account to Crossroads. SR: 7-8. The evidence presented showed that Clemensen wrote three checks from Betty's account to Crossroads. EX: 13, 14, 15. While both Betty and Clemensen's names were on the account, it was Betty's income from social security and Edward Jones funding the bank account. JT3: 161. Pamela Reiter, the State's expert witness, testified that the owner of the joint account depends on who is depositing money. JT2: 86. Even if the bank allows either owner to withdraw the money, the joint bank account does not alter the ownership rights between the two owners. JT2: 93.

While Clemensen's name was on the bank account, Betty was the one who contributed the funds for the account. JT3: 161. Plus, Clemensen wrote the checks to his trucking business. This was a direct benefit to Clemensen. Betty relied on Clemensen to help with her finances. But Clemensen took it upon himself to take "loans" from his mother's account. Based on the evidence presented a reasonable jury found Clemensen appropriated Betty's property in a use or purpose not in the due and law of execution of Betty's trust.

D. Clemensen had the intent to defraud.

Clemensen used Betty's property to secure loans to help pay off his debts. He also took money from Betty's bank account to make payments to his trucking business, Crossroads. On each of the three checks he wrote to Crossroads, he wrote "loan" in the memo line. EX: 13, 14, 15. The money he transferred to Edward Jones bank was a loan against Betty's account. So, for all six counts, Clemensen "borrowed" money. But there was no evidence that he repaid any of those loans. Indeed, the evidence shows the contrary. Edwards testified that Clemensen's balance at Edward Jones was up to $312,000 by June 2017. JT4: 56. In fact, his debt got so out of hand, Edwards contacted the "home office" for Edward Jones in St. Louis. JT4: 57. The home office determined Edward Jones could not loan Clemensen any more money. JT4: 57.

Nor was there any evidence Clemensen repaid the "loans" from Betty's bank account. He marked the checks as loans, but it was never

repaid. Further, Clemensen never paid back the loans in which he used Betty's property for collateral. JT5: 96-97.

The circuit court instructed the jury on the definition for intent to defraud as being, "to act willfully and with the specific intent to deceive or cheat, ordinarily for the purpose of either causing some financial loss to another or brining about some financial gains to oneself." SR: 1521. By taking out several loans, that he never paid back, which only benefitted himself and his trucking business, there was sufficient evidence to support the fact Clemensen had the intent to defraud Betty.

E. Value of the property.

Two counts, counts 6 and 7, alleged Clemensen committed aggravated grand theft by exploitation. This requires the State to prove the value of the property Clemensen appropriated to be more than $500,000. SR: 6. The remaining counts, counts 8-12, alleged Clemensen committed grand theft by exploitation, which requires the State to prove the property appropriated was more than $5,000 but less than $100,000. SR: 7-9. The valuation of the property and checks do not seem to be in dispute.

1. Count 6

The evidence showed that Clemensen used a piece of Betty's property, NE 1/4 Section 6, Township 119, Range 61, to obtain a loan from First Dakota National Bank (DMAC) for $750,000. EX: 9, 16; JT3: 38.

2. Count 7

The evidence showed that Clemensen used a piece of Betty's property, NE 1/4 Section 24, Township 119, Range 62, to obtain a loan from First Dakota National Bank (DMAC) for $750,000. EX: 8, 16; JT3: 40.

Count 8

The evidence showed that Clemensen used a piece of Betty's property, SE 1/4 Section 12, Township 119 North, Range 62 West of the 5th PM and /or NE 1/4 of Section 24, Township 119 North, Range 62 West of the 5th PM, to obtain a loan from Great Plains Bank for $100,00. EX: 10; JT3: 42.

3. Count 9

The State presented evidence that Clemensen transferred $88,000 from Betty's Edward Jones account and then withdrew that money. EX: 12; JT3: 89, 96.

4. Count 10

The State presented evidence that Clemensen wrote a check for $50,000 to Crossroads from Betty's bank account. EX: 13; JT3: 92.

5. Count 11

The State presented evidence that Clemensen wrote a check for $45,000 to Crossroads from Betty's bank account. EX: 14; JT3: 53.

6. Count 12

The State presented evidence that Clemensen wrote a check for $25,000 to Crossroads from Betty's bank account. EX: 115; JT3: 53.

F. *Betty was an elder.*

There is no dispute to Betty's age. She was born on August 26, 1926. EX: 11. The crimes took place between 2015-2017, making her eighty-nine to ninety-one years old when the crimes occurred. A person is considered an elder if they are over the age of sixty-five. SR: 1517.

G. *Clemensen waived the issue of venue.*

The indictment alleged the crimes were committed in Spink County. Clemensen argues, for the first time on appeal, that the State did not prove venue at trial. AB: 17-19. But this issue is waived since it was not argued to the circuit court.

The Venue addresses the county where the prosecution is to be brought. *State v. Greene,* 86 S.D. 177, 192 N.W.2d 712, 715 (S.D. 1971). This is typically where the alleged crime occurred. S.D. Const. art. VI § 7; SDCL 23A-16-3. "Venue is not an integral part of the criminal offense[]" as it "does not affect the question of guilt or innocence of the accused." *Greene*, 86 S.D. 177, 183, 192 N.W.2d at 716 (citing *State v. Rasch,* 70 S.D. 517, 19 N.W.2d 339 (1945)). Therefore, the State must prove by the preponderance of the evidence where the crime took place. *State v. Whistler,* 2014 S.D. 58, ¶ 12, 851 N.W. 2d 905, 910 (citing *State v. Iwan,* 2010 S.D. 92, ¶¶ 8–9, 791 N.W.2d 788, 789). "Venue is

sufficiently established if the circumstances and evidence tend to the conclusion in a manner satisfactory to the jury that the place of the crime corresponds with that set forth in the information." *State v. Thomason*, 2015 S.D. 90, ¶ 28, 872 N.W.2d 70, 77–78 (internal quote omitted).

When it is apparent on the face of the indictment that the venue is not proper, the objection must be raised before trial, or it is deemed waived. *State v. Hernandez*, 2016 S.D. 5, ¶ 19, 874 N.W.2d 493, 498 (citing *State v. Haase*, 446 N.W.2d 62, 65 (S.D.1989)). But "when an indictment contains a proper allegation of venue so that a defendant has no notice of a defect of venue until the government rests its case, the objection is timely if made at the close of the evidence." *Id.* This Court found a defendant waived the issue of venue when the defendant failed to raise the issue at the close of the State's case. *Hernandez*, 2016 S.D. 5, ¶ 19, 874 N.W.2d at 498-99. Because Clemensen failed to raise venue at the close of the State's case, the issue is waived.

If this Court determines Clemensen did not waive the issue of venue for appeal, Clemensen failed to show prejudice under a plain error review. This Court reviews unpreserved issues for plain error. *State v. Guziak*, 2021 S.D. 68, ¶ 10, 968 N.W.2d 196, 200. To establish plain error, Clemensen must show there was error, it was plain, affecting substantial rights, and only then can this Court exercise its discretion "to notice error if [] it seriously affects the fairness, integrity, or public

reputation of the judicial proceedings." *Guziak*, 2021 S.D. 68, ¶ 10, 968 N.W.2d at 200 (citing *State v. Jones*, 2012 S.D. 7, ¶ 8, 810 N.W.2d 202, 205. But Clemensen does not argue plain error. He does not address any of the four factors requiring this Court to find plain error. In particular, he does not show how he was prejudiced, especially since the State presented evidence to support the crimes that occurred in Spink County.

For Counts 6-8, Clemensen used Betty's property to secure loans. Betty's property was located in Spink County. JT3: 38, 40, 42; EX: 8, 9, 10. Because the property Clemensen appropriated was in Spink County, the State met its burden of proving Counts 6-8 occurred in Spink County.

For Count 9, Clemensen appropriated funds from Betty's Edward Jones account. While Edward Jones is located in Aberdeen, the money was deposited into Betty's bank account at Plains Commerce Bank. While Plains Commerce Bank may be in Aberdeen, Betty's bank statement is from the Plains Commerce Bank, Conde branch.[6] EX: 11; SR: 1828. Clemensen withdrew that money from the Plains Commerce Bank account. Similarly, for Counts 10-12, Clemensen wrote checks from Betty's Plains Commerce Bank account. EX: 13, 14, 15. Because

[6] The account number on the bank statement matches the account number on the withdraw slip for $88,000, as well as on the checks. EX: 12, 13, 14, 15.

Conde is in Spink County, the evidence supports that Counts 9-12 occurred in Spink County.

Not only did Clemensen waive his venue argument, but the State also presented evidence that all seven counts of the indictment occurred in Spink County. Therefore, Clemensen's argument for lack of venue falls short.

H. *Clemensen was properly identified at trial.*

"To secure a conviction, the State must identify the defendant as the party completing all requisite elements of the crime." *State v. Condon*, 2007 S.D. 124, ¶ 19, 742 N.W.2d 861, 867. This Court has "recognized that a courtroom identification is not necessary when the evidence is sufficient to establish the inference that the defendant is the person who committed the crime." *Condon*, 2007 S.D. 124, ¶ 20, 742 N.W.2d at 867 (citing *State v. Sonen*, 492 N.W.2d 303, 307 (S.D.1992)). But when in-court identification occurs during trial, the State has the responsibility of preserving the identification for the record. *Id.*

When it comes to Counts 6-8, Clemensen signed the documents for the loan agreements as POA on behalf of Betty. EX: 8, 9, 10; JT3: 36-39, 46. In fact, Clemensen admitted the two loans from First Dakota National Bank (DMAC) were taken out to help "clean up some of his property or his farmland" and to help with Crossroads. JT3: 40. Testimony also showed that Clemensen was the one to take out the loans, not Betty. JT3: 20, 23-24, 39; JT6: 20, 37-39, 50.

As for Count 9-12, Clemensen signed each of the four checks. Evidence showed that Clemensen was responsible for the transfer from Edward Jones. Edwards testified that Clemensen needed money for his business. JT4: 27. The money was loaned against Betty's account. JT4: 38. The money was supposed to be paid back in six months, but instead of paying it back, Clemensen borrowed more money. JT4: 42. And Clemensen took the money from the Edward Jones transfer and gave the funds to someone connected to Crossroads. EX: 12.

Clemensen was part of the conversations with Edwards Jones. JT4: 36, 43. Clemensen also made his need for the money known to Betty before the meeting and probably pleaded for her help. JT4: 58-59. Edwards was concerned about Betty's cognitive abilities. JT4: 74. And it was clear Betty did not understand anything when it came to her finances. JT2: 23-24.

As for Counts 10-12, Clemensen signed the checks to Crossroads. His name was on the signature line of the checks. EX: 13, 14, 15.

Lunzman also identified Clemensen in the courtroom as the person in the blue and white striped shirt, next to defense counsel. JT3: 25. The evidence pointed to Clemensen as being the perpetrator. Therefore, the State presented sufficient evidence that Clemensen was the one who committed the crimes charged.

In viewing the evidence in light most favorable to the State, there was sufficient evidence to convict Clemensen of two counts of aggravated

grand theft by exploitation and five counts grand theft by exploitation. Therefore, his convictions should be affirmed.

II. THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY ON CLEMENSEN'S GOOD FAITH AFFIRMATIVE DEFENSE.

Clemensen argues the circuit court erred by not properly instructing the jury on his good faith affirmative defense. But the circuit court provided the jury instructions on the defense of good faith reliance that Clemensen requested. And when the instructions are read as a whole, they properly state the law.

A. Standard of Review.

The circuit court's decision to grant or deny a particular jury instruction is reviewed under the abuse of discretion standard. *State v. Pfeiffer*, 2024 S.D. 71, ¶ 38, 14 N.W.3d 636, 647. This is because the circuit court has discretion on how the instructions are worded and arranged. *Id.* "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Pfeiffer*, 2024 S.D. 71, ¶ 54, 14 N.W.3d at 652 (quoting *State v. Caffee*, 2023 S.D. 51, ¶ 26, 996 N.W.2d 351, 360). But "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." *Pfeiffer*, 2024 S.D. 71, ¶ 38, 14 N.W.3d at 647. "The jury instructions are to be considered as a whole, and if the

instructions when so read correctly state the law and inform the jury, they are sufficient." *State v. Tuopeh*, 2025 S.D. 16, ¶ 14, -- N.W.2d-- (quoting *State v. Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d 145, 150–51). But if an objection is not made to the circuit court on an instruction, the issue is reviewed under plain error. *See State v. Robertson*, 2023 S.D. 19 ¶ 18, 990 N.W. 2d 96, 101.

B. The circuit court properly instructed the jury on good faith reliance.

Prior to settling jury instructions both the State and Clemensen provided the circuit court with proposed jury instructions. SR 1152-90, 1195-305. Clemensen provided three instructions as it related to his defense of good faith reliance on Carolyn Thompson's[7] advice. SR: 1221- 23. The circuit court used two of Clemensen's proposed instructions and added another one[8].

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[7] Carolyn Thompson was the attorney who drafted Betty's trust and POA. JT2: 39-45. Clemensen's defense was he relied on Thompson's advice when signing as POA for Betty. JT7: 42.

[8] Instruction No. 20(a)- Good faith reliance on a lawyer's advice may be considered when determining whether the defendant had the necessary intent to defraud in order to commit the crime of theft by exploitation. SR: 1531.

Instruction No. 20(b)- In this case the defendant Ronald Clemensen has raised the defense of advice of counsel and that he relied on the advice of his lawyer to explain his actions in the use of the Power of Attorney, the use of certain funds in a joint bank account he had with his mother, Betty Clemensen, and to justify his conduct in Counts 6-12 in the indictment.

To be valid and constitute a defense to the criminal charges, the essential elements of advice of counsel are:

1. The defendant sought out the advice of a lawyer, and;

(continued...)

SR: 1531-33. While settling the jury instructions, Clemensen did not object or take issue with the court's instructions. See JT6: 104-09.

Clemensen is now arguing the proper jury instruction given to the jury regarding his good faith reliance defense was criminal pattern instruction 2-2-1, which reads:

> Evidence has been introduced that the defendant [was unaware that the property taken was that of another] [acted under an honest and reasonable claim of right to the property involved] [had a right to acquire or dispose of the

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(...continued)

2. The defendant made a full, fair, and complete disclosure to the lawyer of all pertinent, relevant facts the defendant had knowledge of tending to prove, or disprove the allegations, and;
3. Thereafter, the defendant acted on the advice of the lawyer. SR: 1532.

Instruction No. 21- One of the issues in this case is whether the defendant acted in good faith. Good faith is a complete defense to the crimes of aggravated grand theft by exploitation and grand theft by exploitation if you find that the defendant did not act with the intent to defraud or with the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises, which is an element of the charges. The essence of the good faith defense is that one
(...continued)
who acts with honest intentions cannot be convicted of a crime of requiring intent to defraud.
Good faith requires, among other things, an opinion or belief that is honestly held, even if the opinion is in error or the belief is mistaken. However, even though the defendant honestly held a certain opinion or belief, the defendant did not act in good faith if he knowingly made false or fraudulent representations or promises or otherwise acted with the intent to defraud or deceive another. Proof of fraudulent intent requires more than the defendant made a mistake in judgment or management or was careless.
The State has the burden of proving beyond a reasonable doubt that the defendant acted with the intent to defraud. Evidence that the defendant acted in good faith may be considered by you, together with the other evidence, in determining whether or not the defendant acted with the intent to defraud. SR: 1533.

> property as was done]. The state must prove beyond a reasonable doubt that the defendant acted with the specific intent to _____.
>
> If you find that the defendant [was unaware that the property taken was that of another] [acted under an honest and reasonable claim of right to the property involved] [had a right to acquire or dispose of the property as was done], the specific intent essential to the crime of _____ is lacking and if you find that the state has failed to prove beyond a reasonable doubt that the defendant acted with such specific intent you must find the defendant not guilty.

He claims the jury was not instructed that the State had the "burden to establish guilt of defendant as to the affirmative defense." AB: 41.

Clemensen admits this issue was not raised at the circuit court level and asked this Court to review the issue under plain error. AB: 41. For a plain error review, Clemensen bears the burden of showing prejudicial error. *State v. Malcolm*, 2023 S.D. 6, ¶ 36, 985 N.W.2d 732, 741. And prejudicial error "requires a showing of a 'reasonable probability' that, but for the error, the result of the proceeding would have been different." *State v. Robertson*, 2023 S.D. 19, ¶ 18, 990 N.W.2d at 101 (quoting *State v. Babcock*, 2020 S.D. 71, ¶ 45, 952 N.W.2d 750, 763).

Clemensen makes no claims of how he was prejudiced by the court not providing the jury with the pattern instruction. Further, when viewing the instructions as a whole, the circuit court properly instructed the jury. *See State v. Armstrong*, 2020 S.D. 6, ¶ 12, 939 N.W.2d 9, 12 (Stating if jury instructions, as a whole, correctly "state the law and inform the jury" the instructions are sufficient.).

The court told the jury the State had the burden of proof, and that burden never switches to Clemensen. SR: 1512. This combined with the three good faith jury instructions the circuit court provided properly state the law and are therefore sufficient.

Clemensen cannot show how he was prejudiced by the jury not hearing the newly proposed instruction. Thus, his argument fails.

CONCLUSION

Based on the arguments above and authorities, the State requests that Clemensen's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 6,279 words.

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

Dated this 22nd day of May 2025.

/s/ Erin E. Handke
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Ronald Peter Clemensen* was served electronically through Odyssey File and Serve upon Casey Bridgman at bandalaw@venturecomm.net and William Gerdes at gerdes@dakotalaw.com.

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

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

****

STATE OF SOUTH DAKOTA, Plaintiff
vs.
RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

****

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STATEMENT OF FACTS

The Statement of Facts set forth by the State in its brief on pages 4-7 provides a completely innocent recitation of a family farm operation, and the refinancing of Clemensen farm debt incurred by both Betty and Ron Clemensen. Nothing therein provides a basis for a criminal complaint under SDCL 22-46-3 for theft by exploitation. Taking all of the facts set forth by the State as true and proven, such facts do not support a conviction of Ron Clemensen of SDCL 22-46-3.

The State failed to prove that Defendant Ronald Clemensen is the same person who did any of the alleged acts. Any reference to "Ron or "Ronald" in this brief is for convenience and not a waiver of the identification issue.

Ron farmed with his parents, Arlo and Betty Clemensen. Arlo also made an investment in Crossroads. After Arlo died in 2011, Ron helped Betty implement her financial decisions. Ron had very limited authority to make financial decisions for Betty. For example, Ron lacked authority to mortgage property held in Betty's trust. Arlo and Betty created a trust in 2005. In 2014, several years after Arlo's death, Betty created a trust for herself. Betty appointed Ron as her agent through a 2016 Power of Attorney. Ron borrowed monies to refinance Clemensen farm debt, including paying $665,660.57 of Arlo and Betty's farm debt. (TR Day 5, p. 15:22-25, p. 16:1-3; Exhibit E)

Prior to completion, all transactions involved in this case were reviewed by financial experts such as Betty's investment advisor, various bankers and title insurance companies. None of the transactions were hidden in any way and all of the transactions were at Betty's request.

The mortgages on Betty's trust land were declared void. Ron was held responsible and liable for the money borrowed. Betty's trust land was not liable for any of the monies Ron borrowed.

Betty approved all loans to Ron, and monies were transferred from the Edward Jones account by Betty to the Plains Commerce Bank joint account to facilitate the loans to Ron. (TR Day 4, p. 39:10-19; p. 39:21-25; p. 40:1; pp. 41-70) The loans were to be used to pay Crossroads' debts. Crossroads was a business owned jointly by Betty and Ron. (TR Day 3, p. 20) Everyone acknowledged that Ron intended to repay these loans at the time they were borrowed. (TR Day 4,p. 46:21-22; p. 36:17-19; p. 70:19-23)

The State refers to Appellants as "Clemensen" throughout Appellee's brief. That reference is convenient but the State did not prove identity and identity is not conceded. Many exhibits contain the words "Ron Clemensen" or "Ronald Clemensen" but no witness testified that Appellant is the person who placed those words on the Exhibits. That point is necessary as Appellant addresses the question of venue. The State makes many assertions by assuming Appellant signed the documents and that the documents were signed in Spink County but neither was proven.

A parade of witnesses testified about the financial transactions used to convict the defendant. None of those witnesses (1) provided an in court identification of the defendant as the person who signed or was otherwise involved in any of the exhibits or (2) identified any conduct in Spink County.

• Renee Mettler testified about Betty Clemensen's estate planning. JT2:39

• Trevor Samson testified about the Clemensen family's banking history with Dacotah Bank. JT 5:4

• Shane Pick testified about banking activity with Dakota MAC. JT 5:23

• Corey Maaland testified about banking activity with Dakota MAC. JT 5:48

• Jeff Wolfgram testified about banking activity with First Dakota Bank. JT 5:81

• Terry Zetterlund testified about banking activity with Great Plains Bank. JT 5:99

• Wiliam Edwards testified about Betty's financial matters. JT 4:27.

Each of those witnesses could have been asked:

(a) Do you see the person who executed those documents in the courtroom?

(b) Can you point him out and tell us what he is wearing?

(c) May the record reflect that the witness has identified the defendant?

(d) Did any of this activity occur in Spink County, South Dakota?

The State did not ask those questions. Therefore, venue and identify were not proven.

The listed witness did not provide proof of identity or proof of venue. Each listed witness did provide guidance on the financial transactions for which Clemensen is convicted and upon which Clemensen reasonably relied in good faith

ARGUMENT

For purposes of Clemensen's Reply Brief, Clemensen will respond to the State's elements.

Element A. Clemensen had a duty and was entrusted with Betty's property.

An element of SDCL 22-46-3 is the assumption of "the duty… to provide for the support of an elder." The State argues and the indictment alleges that Clemensen had "a" duty. The allegation and argument center around some vague, undefined duty. By contrast, the statute deals with a specific, named duty to provide support. Words and

phrases in a statute must be given their plain meaning and effect. *In re West River Electric Ass'n, Inc.*, 2004 SD 11, ¶21, 675 N.W.2d 222, 228 (citations and quotations omitted). Each word in the statute is there for a specific purpose and cannot be ignored.

Clemensen's defense was based upon the statute, that is, the duty to provide for the support. He was not prepared to provide a defense that he had a duty, e.g. a fiduciary duty to Betty, or a duty to be a financial planner or advisor to Betty.

The words used in SDCL 22-46-3 require proof beyond a reasonable doubt that Clemensen had "the duty to provide for the support": of Betty Clemensen. "A" is an indefinite article that denotes a single but unspecified person or thing. The American Heritage Dictionary, Fourth Edition ©2006. Here, the State starts with an unspecified duty and then equates that vague language to a fiduciary duty. Building on that argument, the State then takes the position that, as a matter of law a fiduciary relationship exists whenever a power of attorney is created. (State's brief, p. 10) The State rewrites the statute to conform to its belief that the duty imposed by SDCL 22-46-3 is a fiduciary duty. The agency created through the power of attorney does not equate to provide for Betty's support.[1]

SDCL 22-46-3 has an element (here unproven), the duty for Betty's support. "The," as used in the statute, denotes a particular, specified duty. The American Heritage Dictionary, Fourth Ed. ©2006.

The State and the court mistakenly told the jury that an element of the offense which the State must prove is that Ron had a duty to his mother. That was an easy bar to pass, but it was not the legal bar to pass as required by SDCL 22-46-3.

---

[1] Compare SDCL 25-7-27. In some instances, an adult child has a duty to support an indigent parent. Nothing in this case suggests that Clemensen had such a duty.

The court was required to inform the jury that the State must prove beyond a reasonable doubt that Ron had the specific duty to his mother, i.e. the duty to provide for the support of Betty.

The judge did not so instruct the jury. Instruction No. 1 given to the jury by the court was that Clemensen is accused by the State as having had "a" duty to provide for the support of Betty Clemensen in every count of the indictment (Counts 6-12). The court later instructed the jury (Instructions 6, 7 and 8) that the duty to provide for the support of Betty Clemensen is "the duty." Then, in Instruction 21(b), the court instructs the jury on a fiduciary duty. No specification was made that the duty is the duty to provide for the support of Betty Clemensen, not a fiduciary duty to Betty Clemensen.

The Defendant made several motions in regard to the court's failure to properly instruct the jury on the element of "the duty to provide for the support of Betty Clemensen." At the very beginning of the trial, before a jury was selected, the Defendant made a motion that the indictment was defective. The indictment wrongly states the statute upon which Clemensen was charged. The indictment alleged that Clemensen had "a" duty.

The court has an obligation to properly instruct the jury and the trial court's failure to do so is plain error, encompassing an obvious and substantial error. *State v. Holloway*. 482 N.W.2d 306, 309 (S.D. 1992).

Betty provided for her own support. She had the trust income, social security, and rent income. Betty was not indigent. The fact that Ron wrote checks at Betty's direction to pay for her living expenses does not equate with the legal duty to provide for the support of Betty.

In a review of the laws of the surrounding states (North Dakota, Nebraska, Iowa, and Minnesota), each state has laws, criminal and civil, which protect vulnerable adults or elders from exploitation. [*State v. Stubbs*, 555 N.W.2d 55 (Neb. 1996); *State v. Henderson*, 4 N.W.3rd 223 (N.D. 2024); *State v. Campbell*, 756 N.W.2d 263, 274 (Minn. Ct. of Appeals 2008); *State v. Columbus*, Court of Appeals of Minnesota, 2004 WL 850097; *In re Chapman*, 884 N.W.2d 222 (Iowa 2016)] These states, along with South Dakota, all include the requirement of support for the elder or vulnerable adult, making sure that no one exploits such a person, leaving them without monies to pay for normal living expenses. All of these states require that a person charged with the duty to provide for the support of an elder or vulnerable adult are actually entrusted with the monies to provide the support. The State does not even mention the element that must be proven beyond a reasonable doubt, i.e., that Ron was entrusted with Betty's property.

B. Clemensen voluntarily assumed the duty to provide [for the] support of an elder.

To support this contention, the State provides conclusions: "The State presented ample evidence that Clemensen voluntarily assumed the duty to support Betty." (State's brief, p. 11) "Therefore, the State presented sufficient evidence to show Clemensen voluntarily took on the duty to support Betty." These are conclusions, not evidence.

The only fact that the State provided to the jury and in its brief was: "There was no dispute that Clemensen helped his mother out with her finances."

The question then becomes, is the fact that Ron helped his mother out with her finances the same thing, i.e. does it equate with the duty to provide for the support of his mother?

The State provides no authority, no citation, no case which supports its theory that "helping your mother out with her finances" is the same thing as voluntarily assuming the duty to provide for the support of your mother. "The failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived." *State v. Pelligrino*, 1998 S.D. 39, ¶22, 577 N.W.2d 590, 599.

The statutory language of SDCL 22-46-3 and the duty to provide for the support of an elder encompasses more than helping someone out with finances. If I help my neighbor balance her checkbook, have I suddenly voluntarily assumed the duty to provide for my neighbor's support?

There are many situations where an agent pays the bills of their principal with a power of attorney (POA) or helps the principal out with their finances. No one would ever consent to become an agent pursuant to a POA if such fact meant that this person, by taking on the duties as POA, voluntarily assumed, or by written contract assumed, the duty to provide for the support of their principal.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

There are no facts or law which support a conviction of Clemensen for having the duty to provide for the support of Betty.

Element C. Clemensen appropriated Betty's property in a use or purpose not in the due and lawful execution of Betty's trust.

This element deals with the necessity that Ron must be "entrusted" with Betty's property. Once that element is met, then the search for the truth continues and the jury must find that Ron appropriated Betty's property to a use or to a purpose not in the due and lawful execution of that person's (Betty's) trust. Neither of these elements has been proven. In fact, the evidence proves that Ron was not entrusted with anything. (See initial brief)

The State admits that Betty was the trustee and owned all of the assets of the trust. (Appellee brief, p. 11 and pp. 23-24). And yet, the State does not in any sense confront the element of the offense that Ron must be entrusted with property in order to commit the offense. The State ignores this element.

In element A above, the State establishes that an element to be proved is that: "Clemensen had a duty and was entrusted with Betty's property." Yet the State does not even mention how any fact presented by the State to the jury proved that Ron was entrusted with any of Betty's property. Instruction No. 8 – Elements, each of which the State must prove beyond a reasonable doubt: 1. The Defendant had the duty and was entrusted with Betty Clemensen's property.

"The State must prove all the elements of the crime charged." *State v. Thomason*, 2014 S.D. 18, ¶30, 845 N.W.2d 640, 647. "The burden is upon the State to establish every element of the crime beyond a reasonable doubt." *State v. Winckler*, 260 N.W.2d 356, 366 (S.D. 1977) (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)."

Shankman v. Dep't of Revenue, 2019 ILLApp. (1st), held that "… while the trustee and beneficiary may hold legal and equitable title of the property respectively, "[n]either a trustee nor a beneficiary owns property as a natural person does."

Betty, the trustee, does not own the property as a natural person. Betty did not own the property separate or distinct from the trust. Betty entrusted herself with the trust property, not Ron.

The State's only response to the fact that the mortgages are null and void is to cite a North Dakota case, *State v. Davis*, 131 N.W.2d 730, 733 (N.D. 1964). The State claims that the mortgages are a product of the crime, and that the mortgages are merely evidence submitted in proof of some of the facts to prove the crime charged.

Davis dealt with a crime making it unlawful to sell or offer for sale any securities without first registering those securities. Id. p. 733. The securities offered for sale were null and void for lack of consideration and because they were not registered. Id.

The crime was the offer to sell unregistered securities. The securities were null and void, but this was no defense to the crime because the securities, and the offer to sell these securities, was the very proof of the crime charged.

The mortgages are not the product of the crime of exploitation. The mortgages were approved by Betty, by the bankers, by the attorneys, by the title company, and by Carolyn A. Thompson, the attorney for Betty and the attorney for Ron. The mortgages prove that Ron was never entrusted with trust property.

Regarding Counts 9-12, Ron never transferred any monies out of the Edward Jones account to himself. All the evidence is in support of the fact that Betty made all transfers (Counts 9-12) out of the Edward Jones account to the Plains Commerce Bank

account to allow Ron to withdraw these monies as loans to assist in his and his mother's business ventures in Crossroads. SDCL 22-30A-1 defines theft as any person who takes or exercises control over property of another with intent to deprive him of it. The element regarding "intent to deprive" the owner of those monies is missing. Otherwise, everyone of us who have borrowed monies would be guilty of theft. Ron planned to repay the loans. There is no intent to deprive Betty of those monies.

Ron withdrew those monies on a valid claim of right. Betty agreed to loan the monies, and Betty transferred the monies to the checking account with Plains Commerce Bank (PCB). Ron then, based upon his prior approval of the loans by his mother, wrote checks transferring the loan proceeds out of the PCB account to Crossroads.

Betty's approval of these loans is a valid defense to any claim that Ron exploited his mother. These monies were taken under a valid claim of right based upon Betty loaning him these monies. *State v. Weckert*, 95 N.W. 924-925 (S.D. 1903).

Ron also had a valid claim of right to these monies as the joint account owner.

If a vulnerable adult or other person gives competent consent for expenditures, the state will not be able to prove beyond a reasonable doubt that a fiduciary obligation has been breached, cited in *State v. Campbell*, 756 N.W.2d 263, 274 (Minn. 2008). See *Christensen v. Redman*, 243 Minn. 130, 136, 66 N.W.2d 790, 794 (1954) ("[O]ne acting in a fiduciary capacity must exercise the ultimate fidelity in discharging his trust to his principal. However, where the agent discloses to the principal what he intends to do and the principal acquiesces therein, there can be no claim of a breach of fiduciary relationship.") The *Campbell* court held that such consent or approval is a complete defense to the criminal charges. Id.

Betty's consent to the loans is a complete defense to the criminal charges.

There is no support for the State's contention that "Clemensen took it upon himself to take 'loans' from his mother's account." (Appellee brief, p. 15, lines 5-6)

It is a fact that all loans (Counts 9-12) were approved by Betty Clemensen. Ron did not take loans from his mother's account. He discussed all loans with his mother and with Bill Edwards. Betty Clemensen approved of these loans, and she transferred specific amounts regarding the loans ($88,000, $50,000, $45,000, and $25,000) from the Edward Jones account to the joint checking account, authorizing Ron to use those monies, withdraw those monies as loans for the Crossroads business. Betty's actions, her authorizing the loans and transferring these to Ron, are a complete defense to the charges. *State v. Campbell*, Id. p. 274.

D. Intent to Defraud

In reviewing the Appellee's brief on "intent to defraud," there is not a single case or statute or citation to support its argument. The failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is deemed waived. *State v. Pelligrino*, supra.

The conclusion reached by the State is "By taking out several loans, that he never paid back, which only benefitted himself and his trucking business, there was sufficient evidence to support the fact Clemensen had the intent to defraud Betty." Appellee brief, p. 16.

It is an uncontroverted fact that Ron Clemensen paid off Arlo and Betty's farm debt in the amount of $665,660.57 in taking out the loans from FDNB. Also, Crossroads

was actually BRIT, Inc. and Betty Clemensen and Ron Clemensen were 50/50 owners of BRIT, Inc. d/b/a Crossroads.

So the State is left with the fact that Ron took out several loans that he never paid back. There is no evidence, nothing, from which a jury could find beyond a reasonable doubt a specific intent of Ron Clemensen to deceive or cheat Betty when he borrowed these monies.

The State totally ignores the *Kessler* line of cases as set forth in Appellant's initial brief.

The *Kessler* cases stand for the proposition that it must be proven that at the time Ron took out these loans that he had no intent to repay these loans. It must be proven that he took out the loans with the intent to take the monies, never repay the monies, and abscond. *Kessler*, Id., p. 137, ¶16.

We ask this court to do the analysis of the record, as was done in *Kessler*, *Morse*, and *Jackson*. There is no evidence of a specific intent of Ron to cheat or deceive his mother when these loans were taken. The fact that Ron borrowed money and did not repay the monies is not proof of intent to cheat or deceive or intent of not to repay the money when the money was borrowed. The Defendant, in fact, provided evidence that Ron had every intention to repay the monies when he borrowed the monies. See initial brief, p. 27-29. [TR Day 4, p. 46:21-22; p. 36:17-19; p. 70:19-23]

E. Value of the Property.

The Defendant relies upon his arguments in his initial brief regarding the valuation of property. The statute indicates that the theft in exploitation by theft refers to SDCL Chap. 22-30A. This requires the valuation to be determined by the value of the

property stolen. This is what the Defendant was informed of when he was charged with this crime. This is what the Defendant based his defense upon.

The court in its instruction defined appropriation as the taking of property. Instruction No. 8(b). SDCL 22-30A-1 defines theft as taking property with the intent to deprive the owner of that property. And yet the State's only contention in Counts 6, 7 and 8 is that: "Clemensen used a piece of Betty's property … to obtain a loan … ." And this was not Betty's property, this was the Trust's property.

The term "use" is defined as, "To put into service or apply for a purpose; employ." The American Heritage Dictionary, Fourth Edition ©2006. Nowhere in SDCL 22-46-3 does it constitute a crime to use something. Every reasonable interpretation deals with taking or stealing. And appropriation means to take.

The use of these mortgages to obtain a loan does not constitute the taking of this property, and at most, constitute the use of the properties to obtain a loan for Clemensen.

The use does not constitute a taking with the intent to deprive the owner of that property.

The jury convicted Ron of transferring $88,000 from the Edward Jones account, and there was not a single piece of evidence that Ron transferred anything from the Edward Jones account. Betty transferred the $88,000 from the Edward Jones account to the joint checking account.

F. Betty was an elder.

It is undisputed that Betty was an elder. However, Betty Clemensen was not exploited. She did not own the subject property, and Betty Clemensen never entrusted Ron with any of her property.

G. Venue.

The State bears the burden of proving venue by a preponderance of the evidence. The level of required proof is lower than proof of other elements, but the burden of proof remains on the State. The venue issue was not waived.

First, the issue was presented to the Court and the jury through the jury instructions. Instruction 4 advised the jury that the State has the burden of proving the charges. Instructions 7 and 8 advised the jury that the State must prove the crime was committed at the time and place alleged. The place alleged was Spink County.

Second, as conceded by the State on page 18 of its Brief, venue is Constitutional. *Gonzales v. Markland*, 2025 S. D. 14, ¶22. Because venue is Constitutional, it can be raised on appeal. SDCL 23A-32-13.

Third, even if waiver is considered, the failure of the State to prove venue can be raised on appeal as plain error even if venue had not been properly brought to the attention of the trial court. SDCL 23A-44-15.

At most trials, witnesses are routinely asked, "In what County and State did those events take place?" Here, no witness was asked that question. The State now wants the Court to rescue it from its error by assuming facts (including identification) and without any basis in law. No evidence of exploitation in Spink County was admitted. "Why prosecutors fail to put in evidence on this necessary and almost always easily proved feature, is difficult to understand." *State v. Van Beek*, 87 S.D. 598, 212 N.W.2d 659 (S.D. 1973), 663 (conviction affirmed because evidence showed the town where the crime was committed).

Venue is not established by the land being in Spink County. Much like theft, "Exploitation" is the taking or exercising control over property. SDCL 22-46-1(5). Exploitation is complete and venue established at the location of the taking or exercise of control. No evidence shows any taking or exercise of control occurring in Spink County. The location of real estate or bank accounts in Spink County does not establish venue.

The State's argument that mailing a bank statement from somewhere in Spink County establishes venue lacks legal or factual basis. Does the State take the position that some bank in Spink County has a stack of dollar bills segregated as Betty's money and that money is taken from that stack to pay each check written out of the account? There is no evidence of the completion of any banking transaction in Spink County.

H. Identification.

Routinely, but not here, witnesses are asked to identify the defendant and the Court is then asked to let the record reflect that the witness has identified the defendant. Why the prosecutor failed to identify defendant in court is difficult to understand. See, *Van Beek, supra.*

Witnesses listed earlier in this brief - bankers and others - could have been asked to identify the defendant. They were not asked. Identity was not proven. While some cases use forensic tools such as fingerprints or DNA to show identity, this case did not.

The State's argument on identification lists multiple documents that might have been signed by Ron or Ronald Clemensen and then baldly states that the defendant is the signatory. The evidence, however, fails because the witnesses failed to identify the defendant as the same person who signed the documents. Apparently, someone placed the name "Ron Clemensen" or "Ronald Clemensen" on those documents but we do not know

who did that. Again, evidence that might have been easily provided through the named witnesses but was not.

For what it's worth, Dave Lunzman pointed to someone in the courtroom. The trial court was not asked to acknowledge the identification of that person (because the State did not make the request) leaving a void in the record and preventing a review by this Court. *State v. Condon*, 2007 S.D. 124 ¶ 21, 742 N. W.2d 861.

I. Good Faith Affirmative Defense.

The court's duty is to instruct the jury as to the law which applies to this case. Instruction No. 30. SDCL 22-30A-16 provides an affirmative defense to a prosecution of theft that the defendant "[a]cted under an honest and reasonable claim of right to the property involved or that the defendant had a right to acquire and dispose of the property as he or she did."

SDCL 22-1-2 provides that because the defendant raised the affirmative defense, "the guilt of the Defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense[.]"

The jury was instructed it may be considered by good faith in determining the defendant's intent. The jury was given a permissive instruction.

The correct instruction, and settled law, requires the State to prove the defendant's intent and requires an acquittal unless the State to can disprove the good faith affirmative defense. Good faith and claim or right are the same legal concept.

The claim or right / good faith affirmative defense was supported by the testimony of all of the financial experts. Not a single financial expert questioned the

defendant's authority to completed the transactions and the defendant reasonably relied on the experts involvement in the transactions.

The bankers raised no issue with any of the transactions, including the checks written or the mortgages signed.

The attorneys, both Betty's and the banks', approved the transactions.

Ron used approximately half of the monies borrowed to pay Arlo and Betty's debt.

Betty Clemensen, after consulting with William Edwards, approved of all of the loans.

The evidence is overwhelming that Ron had an honest and reasonable claim of right to the properties involved or that Ron had an honest and reasonable right to acquire and dispose of the property as he did.

The jury was given permission to consider the affirmative defense much like it could consider motive. The jury was told that it could consider motive (Instruction 17) and that it could consider good faith (Instruction 21).

The Court was required, as its duty, to properly instruct that jury that it must consider the affirmative defense, that the State has the burden of proving the affirmative defense, and that the affirmative defense must be proven beyond a reasonable doubt.

The instructions taken as a whole do not overcome the failure to give the appropriate instruction. Instruction 4 told the jury that only the elements of the offense need be proven beyond a reasonable doubt. The affirmative defense was not listed as an element, therefore, the instructions taken as a whole only compound the problem.

The comments to the pattern jury instruction for a claim of right are informative. The comment guides trial courts by stating the affirmative defense becomes an essential element of the State's case and even suggests that the claim of right defense can be included as an essential element in the jury instruction defining the defense.

This is plain error.

CONCLUSION

The judgment of conviction of Ronald Clemensen should be vacated.

REQUEST FOR ORAL ARGUMENT

The Appellant requests oral argument in this matter.

Respectfully submitted this 20th day of June, 2025.

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Dated this 20th day of June, 2025.

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IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

****

STATE OF SOUTH DAKOTA, Plaintiff
vs.

RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

****

AFFIDAVIT OF MAILING AND PROOF OF SERVICE

****

STATE OF SOUTH DAKOTA)
:
COUNTY OF JERAULD)

Casey N. Bridgman, being first duly sworn on oath, deposes and says: That he is the attorney for the Appellant in the above-entitled action; that on June 20, 2025 he filed Appellant's Reply Brief electronically through Odyssey's File & Serve system, and also served a true and correct copy of the Appellant's Reply Brief on Appellees' counsel electronically at their email addresses of record in Odyssey's File & Serve system, and he further states that on June 20, 2025 he mailed one hard copy of the Appellant's Brief to the Clerk of the Supreme Court of South Dakota, 500 East Capitol Ave., Pierre, SD 57501-5070, by depositing the same in the United States Post Office at Wessington Springs, South Dakota, postage prepaid, addressed as stated above.

Dated this 20th day of June, 2025.

//ss//Casey N. Bridgman//
Casey N. Bridgman

Subscribed and sworn to before me this _____ day of February, 2025.

//ss//Kendra Brandenburg//
Notary Public
(SEAL) My commission expires: 6-27-2025

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

****

STATE OF SOUTH DAKOTA, Plaintiff
vs.

RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

****

CERTIFICATE OF COMPLIANCE

****

STATE OF SOUTH DAKOTA)
:
COUNTY OF JERAULD)

Casey N. Bridgman, being first duly sworn on oath, deposes and says: That he is the attorney for the Appellant in the above-entitled action, and that he certifies that Appellant's Reply Brief complies with the type volume limitation contained in SDCL 15-26A-66(2), in that Appellant's Reply Brief contains a word count of 4,993.

//ss//Casey N. Bridgman//
Casey N. Bridgman

Subscribed and sworn to before me this 20th day of June, 2025.

//ss//Kendra Brandenburg//
Notary Public
(SEAL) My commission expires: 6-27-2025

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
APPEAL #30916

****

STATE OF SOUTH DAKOTA, Plaintiff
vs.

RONALD P. CLEMENSEN, Defendant

****

APPEAL FROM CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA, THE HONORABLE
ROBERT L. SPEARS, CIRCUIT COURT JUDGE, PRESIDING

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APPENDIX

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