

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
PLAINTIFF/APPELLEE,

v.

APPEAL NO. 30145

TODD W. STEVENS,
DEFENDANT/APPELLANT

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY J. STOLTENBURG
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

For purposes of this brief, references are as follows: (1) “TT” designates the trial transcript and will be followed by the appropriate page and line number; (2) “Appx.” designates Appellant’s Appendix and will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

In this appeal, the Appellant, Todd Stevens, seeks review of the Judgments of Conviction signed on September 20, 2022 and filed on September 21, 2022, which have been consolidated into one Amended Judgment of Conviction on February 6, 2023.

Appx. 1.

Appellant respectfully submits that jurisdiction exists pursuant to SDCL §23A-32-2, as an appeal from a final judgment as a matter of right.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of oral argument.

STATEMENT OF THE LEGAL ISSUES

- I. It was plain error for counsel to fail to request, and the circuit court not to give, required jury instructions on caution and corroboration for accomplice testimony.

Relevant Cases and Statutes:

SDCL § 23A-22-8

State v. Beene, 257 N.W.2d 589 (S.D. 1977).

State v. Dunkelberger, 2018 S.D. 22, 909 N.W.2d 398.

State v. Kihega, 2017 S.D 58, 902 N.W.2d 517.

State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706.

STATEMENT OF THE CASE

Todd Stevens (hereinafter “Stevens”) was indicted October 8, 2021 on six charges: Count 1 – Distribution of a Schedule I or II Substance (Methamphetamine), Count 2 – Drug Free Zone Violation as Felony, Count 3 – Distribution or Possession with Intent to Distribute a Schedule I or II Substance (Methamphetamine), Count 4 – Maintaining a Place Where Drugs are Sold or Kept, Count 5 – Unauthorized Possession of a Controlled Substance (Methamphetamine), and Count 6 – Possession of Marijuana. Appx. 6. The case proceeded to trial on August 17 and 18, 2022 and the jury returned a guilty verdict on all counts.

STATEMENT OF THE FACTS

After receiving a tip from a confidential informant, Detectives for the Brookings Police Department put Todd Stevens’ home under surveillance for suspected drug use and distribution in a school zone. TT 128, ln. 2-6, 17-22. That investigation resulted in an indictment on multiple counts. Appx. 6.

This case was tried in just over a one-day trial, where some of the facts were undisputed. There was no dispute that Stevens lived at 1730 Torrey Pines, which was within 1,000 feet of a school. TT 74, ln. 11-12. There was no dispute that Stevens had a couple grams of methamphetamine on his person when he was pulled over by law enforcement after they searched his home. TT 74, ln. 15-22. There was no dispute over a small amount of methamphetamine and marijuana found in his home either. TT 74, ln. 19-23. Stevens’ attorney admitted that Stevens was a methamphetamine user and smoked

marijuana. TT 74, ln. 23-25. Stevens was properly convicted of Count 4, Maintaining a Place where Drugs are Sold or Kept, Count 5, Unauthorized Possession of a Controlled Substance, and Count 6, Possession of Marijuana. He was not properly convicted of the remaining counts.

Ashley Burgers (hereinafter “Burgers”) was the State’s primary witness and provided all the testimony tending to connect Stevens with the alleged distribution. She was offered immunity from prosecution on her criminal involvement surrounding this case in exchange for testifying against Stevens. TT. 81, ln. 7-11; Appx. 10. Burgers met Stevens while she was absconding from parole in May or June of 2021. TT 82, ln. 22 – 83, ln. 2. Burgers asked Stevens if she could stay with him in Brookings, claiming she was trying to get sober. TT 83, ln. 7-9. Burgers testified that she and Todd both used methamphetamine in the house. TT 84, ln. 21- 85, ln. 1. Other people used meth at the house too, according to Burgers. TT 85, ln. 2-3. When a group of people was around, they would pass a bong around and hang out. TT 89, ln. 25 – 90, ln. 3. That group would be a mixture of her friends and Stevens’ friends. TT 90, ln. 19-21. Burgers acted as a caretaker of the house, and the group that hung out there. TT 106, ln. 17-24. People were in and out of Stevens’ house at all hours that summer for purposes of a remodel as well. TT 120, ln. 15-25.

Burgers also testified that Stevens supplied methamphetamine to the group of friends that hung out at his house. TT 91, ln. 19-23. Burgers testified that Stevens distributed various weights of methamphetamine to “individuals” and to her personally. TT 94, ln. 3-11. But Burgers never paid Stevens for meth. TT 106, ln. 17-18. Burgers testified that Stevens used a digital scale to weigh methamphetamine. TT 97, ln. 4-9, 19-

21. Burgers was the only one allowed in Stevens' bedroom, where some of his methamphetamine was kept. TT 96, ln. 16-17; 143, ln. 9-17.

Burgers named three people – Tesch, Olson, and Love – as individuals Stevens distributed to. TT 99, ln. 1-6. There was no evidence presented that law enforcement had any interaction with those three individuals, or any knowledge at all of Tesch and Olson. Burgers said that there were others, but she did not know names. TT 120, ln. 2-3. She also testified that she helped Stevens keep a list of people who were fronted methamphetamine. TT 122, ln. 1-7. At least once, on August 31, Burgers distributed meth to Love herself. TT 102, ln. 11-13. A letter she wrote to Stevens indicated that she was going to run methamphetamine from Stevens' home to Love in Minnesota. TT 103, ln. 1-8.

Burgers also testified about Stevens' supplier, Ryan Gillis, and that Stevens would get a couple ounces from the dealer typically. TT 107, ln. 4-5, 17-21. She went with Stevens to Sioux Falls on the trips to the dealer. TT 107, ln. 19-21. She also testified to marijuana use in the home. TT 115, ln. 22-24.

Officers did not find anything in the home resembling an "owe sheet", which would document money coming in or out or IOUs for any business. TT 158, ln. 2-9. There was no controlled buy. Police never observed Stevens distributing to anyone. There was no evidence of Stevens actually distributing to anyone outside of Burgers' testimony.

As officers were searching Stevens' home, his cell phone pings showed him driving to Sioux Falls. TT 148, ln. 3-10. Officers waited for Stevens to return to Brookings and conducted a traffic stop on him. TT 149, ln. 1-6. Stevens' person was

searched and a small baggy of methamphetamine, just over two grams, was found on his person. TT 149, ln. 21-24. No drugs were found in the vehicle during a probable cause search of it. TT 150, ln. 14-21. Only a small amount of methamphetamine was found on Stevens' person and in his home. One baggy contained 2.59 grams. TT 160, ln. 22-23. One baggy contained 2.16 grams. TT 161, ln. 1.

At the close of the State's case, Stevens' trial counsel made a motion for judgment of acquittal without any argument in support thereof and the court denied the motion. TT 179, ln. 9-16. The defense did not present any evidence. TT 188, ln. 8-10. The parties and court settled final jury instructions with no objections by trial counsel on the record. TT 187, ln. 9-16. The jury instructions did not include any instruction on accomplice testimony and there is no record of such an instruction being requested.

In closing, trial counsel admitted the State met its burden of proof on Counts 5 and 6, possession of methamphetamine and marijuana, and that he allowed his residence to be used for the keeping or use of drugs, as charged in Count 4. TT 198, ln. 4-7; 206, ln. 3. On the remaining three charges, though, counsel argued the State's evidence was insufficient because of the lack of evidence on when or where things occurred, the fact that only small amounts of methamphetamine consistent with personal use were found, and the lack of corroborating witnesses. TT 198, ln. 23 – 199, ln. 3; 200, ln. 2-4; 201, ln. 5-18. Counsel also argued that the evidence was just as convincing that Burgers was actually the one distributing, not Stevens. TT 202, ln. 3-4. Counsel did emphasize to the jury their instruction that they are the sole judges of witness credibility. TT 202, ln. 15-18. But counsel did not address Burgers as being an accomplice and what that means for her testimony.

The jury returned a guilty verdict on all six counts. TT 213, ln. 2-12. Stevens was later sentenced to a total of 16 years in prison. Appx. 1. Stevens now appeals on the basis that it was plain error to fail to properly instruct the jury on the caution and corroboration that are necessary when dealing with accomplice testimony in criminal cases.

STANDARD OF REVIEW

The issue in this case must be reviewed for plain error. “Where an issue has not been preserved by objection at trial, our review is limited to whether the trial court committed plain error.” *State v. Thomas*, 2011 S.D. 15, ¶ 20, 796 N.W.2d 706, 713 (quoting *State v. Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d 56, 69). This Court may also “consider unpreserved issues in certain cases involving claims of ineffective assistance of counsel.” *Id.*

Ineffective assistance of counsel claims are not normally considered on direct appeal so that the attorneys have the opportunity to defend their choices and strategy for the court’s review. *Id.* ¶ 23, 796 N.W.2d at 714. “This Court will ‘depart from this principle only when trial counsel was so ineffective and counsel’s representation so casual as to represent a manifest usurpation of the defendant’s constitutional rights.’” *Id.* (quoting *State v. Arabie*, 2003 S.D. 57, ¶ 20, 663 N.W.2d 250, 256).

Jury instructions “are sufficient when, viewed as a whole, they correctly state the law and inform the jury.” *State v. Corean*, 2010 S.D. 85, ¶ 38, 791 N.W.2d 44, 58. “A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court’s decision to grant or deny a particular instruction under the abuse of discretion standard.” *Id.* Error is only reversible if the instructions are both erroneous and prejudicial. *Id.*

ARGUMENT

I. It was plain error for counsel to fail to request, and the circuit court not to give, required jury instructions on caution and corroboration for accomplice testimony.

It was plain, prejudicial error here not to instruct the jury properly on Burgers' accomplice testimony. Stevens' conviction on Counts 1, 2, and 3 – Distribution, Distribution in a School Zone, and Distribution or Possession with Intent to Distribute – was obtained substantially on the uncorroborated testimony of Burgers, who is an accomplice. SDCL 23A-22-8 is clear:

A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence which tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

An accomplice's testimony against a defendant has a certain danger of prejudicial impact on the jury, particularly when accompanied by an immunity agreement for the accomplice. It is in the accomplice's "interest not only to implicate others but to minimize his own role and exaggerate the roles of his co-conspirators." Christina J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990).

Many other states require corroboration of an accomplice's testimony before a conviction can be had, just as South Dakota does. *See e.g.*, Ala. Code § 12-21-222; Alaska Stat. § 12.45.020; Ark. Code Ann. § 16-89-111(e)(1); Cal. Penal Code Ann. § 1111; Ga. Code Ann. § 24-4-8; Idaho Code § 19-2117; Minn. Stat. § 634.04; Mont. Code

Ann. § 46-16-213; Nev. Rev. Stat. § 175.291; N.D. Cent. Code Ann. § 29-21-14; Okla. St., Tit. 22, § 742; Ore. Rev. Stat. § 136.440. Even in states that do not have the statutory requirement of corroboration for accomplice testimony, courts have held that a defendant is at least entitled to a jury instruction that accomplice testimony should be received by the jury with caution. *See, e.g., Varum v. State*, 188 So. 346 (Fla. 1939); *McCoy v. State*, 112 A.3d 239 (Del. 2015); *People v. Cobb*, 455 N.E.2d 31 (Ill. 1983); *State v. Quintana*, 621 N.W.2d 121 (Neb. 2001). In South Dakota both a corroboration instruction and a cautionary instruction are required. *State v. Beene*, 257 N.W.2d 589, 591 (S.D. 1977).

In *State v. Thomas*, the trial court in a reckless burning case sua sponte gave the following corroboration instruction: “You cannot find a defendant guilty based upon the testimony by a co-defendant that incriminates the defendant unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense.” 2011 S.D. 15, ¶ 12, 796 N.W.2d 706, 711. The defendant in that case argued the instruction was incomplete in three respects. *Id.* ¶ 13, 796 N.W.2d at 711. First, the defendant argued “that because the instruction referred to ‘co-defendants’ rather than ‘accomplices,’ the jury was not instructed that the accomplice’s testimony had to be corroborated.” *Id.* The defendant also argued “that the court did not adequately instruct on the nature of the evidence necessary to corroborate accomplice testimony,” because it did not mention that accomplice testimony cannot be corroborated only by another accomplice’s testimony, and that such evidence cannot merely show “the commission of the crime or the circumstances thereof.” *Id.* Finally, the defendant argued “the court failed to instruct that accomplice testimony must be viewed with caution.” *Id.* The defendant presented those points as being plain error or ineffective

assistance of counsel since defense counsel did not object to the instruction or propose a different instruction. *Id.* ¶ 14, 796 N.W.2d at 711.

This Court determined that because the jury would reasonably have understood that the accomplices were co-defendants, having been told the accomplices pleaded guilty to crimes arising from the same events the defendant was tried on, there was no error in using the term “co-defendants.” *Id.* ¶ 16, 796 N.W.2d at 712.¹ This Court also stated that the law and facts of that case “warranted instructions on the inadequacy of corroboration that merely showed the circumstances or commission of the offense and the corroboration of one accomplice by another,” so there would have been clearly reviewable error if defense counsel had requested those instructions and been denied them. *Id.* ¶ 18, 796 N.W.2d at 712.

While both a corroboration instruction and a cautionary instruction are required, the cautionary instruction is particularly important. Because Stevens was convicted of three of six counts solely on the inherently unreliable testimony of an accomplice, without a cautionary instruction on accomplice testimony that conviction cannot stand.

A. Cautionary Instruction

“This Court has concluded that when accomplice testimony is presented, there is no conceivable strategic motive that would excuse failure to request a cautionary accomplice instruction.” *Id.* ¶ 25, 796 N.W.2d at 714.

By not requesting that the jury be instructed to consider with caution the testimony of an accomplice, appellant’s counsel

1. Jury instructions are reviewed for “what a reasonable juror could have understood from the instructions.” *Thomas*, 2011 S.D. 15, ¶ 16, 796 N.W.2d at 712.

omitted a defense which might have negated the witness's damning testimony. The instruction, if it had been requested and given, might have mitigated the effect of the witness's testimony, hence reducing the chances of appellant's conviction. No advantage could have been envisioned by appellant's counsel in withholding a request for this instruction.

Id. (quoting *State v. McBride*, 296 N.W.2d 551, 556 (S.D. 1980)).

“[A]n accomplice's testimony ‘ought to be received with suspicion, and with the very greatest care and caution, and ought not be passed upon by the jury under the same rules governing other and apparently credible witnesses.’” *Id.* ¶ 19, 796 N.W.2d at 712 (quoting *Crawford v. United States*, 212 U.S. 183, 204 (1909)). “Further, it is not enough for the circuit court to only instruct that testimony of an accomplice must be corroborated.” *Id.* “The jurors must be warned that, in effect, the accomplice may tailor the truth to his or her own self-serving mold, and that they are to weigh the testimony with that caveat in mind.” *Id.* (quoting *Beene*, 257 N.W.2d at 592).

South Dakota's pattern cautionary jury instruction reads:

You are instructed that the testimony of an accomplice ought to be viewed with caution. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with great care and caution and in the light of all the evidence in the case.

South Dakota Criminal Pattern Jury Instruction 1-14-8. That instruction would have been appropriate to give Stevens' jury.

Thomas stated that it is an error for courts to fail to give a cautionary instruction for accomplice testimony upon request. 2011 S.D. 15, ¶ 19, 796 N.W.2d at 713. But it is

also error for defendant's counsel not to request it. *Id.* ¶ 25, 796 N.W.2d at 714. The jury's verdict in *Thomas* "was based almost entirely upon a credibility dispute" between the accomplices and defendant. *Id.* ¶ 26, 796 N.W.2d at 714.² There were evidentiary reasons to discredit the accomplices' testimony, but "a cautionary instruction from the court would have explicitly warned the jury to examine the [accomplices'] testimony 'with great care and caution.'" *Id.* (quoting *Beene*, 257 N.W.2d at 589). The accomplices in that case were also the only witnesses with direct knowledge of the events. *Id.* ¶ 27, 796 N.W.2d at 715.

Similarly, Burgers was the only witness with any direct knowledge of the alleged distribution. She was the only witness with the opportunity to interact with Stevens day-to-day, and is the only one who had any direct testimony as to Stevens distributing to anyone. *See* TT 99, ln. 1-6. Her testimony should inherently be met with caution due to her immunity agreement with the prosecutor. TT 81, ln. 7-11. But more than that, it should be met with caution because she was obviously an accomplice based on her testimony, and the jury needed to be instructed to treat that testimony with caution.

B. Accomplice Status

"Whether an individual is an accomplice may be a question of law for the court or a question of fact for the jury, depending on the state of the evidence."

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2. *Contrast Smith v. Weber*, 2005 S.D. 85, ¶ 21, 701 N.W.2d 416, 421 (finding no error because the defendant's "convictions were not substantially procured by the accomplice testimony" and there was "overwhelming evidence of [the defendant's] guilt" outside of that testimony where the cautionary instruction was given, but not the corroboration instruction); *State v. Hannemann*, 2012 S.D. 79, ¶ 17, 823 N.W.2d 357, 362 (distinguishing itself from *Thomas* because the case largely implicated trial counsel's decisions that could have involved trial strategy that should be considered in a habeas proceeding).

Corean, 2010 S.D. 85, ¶ 43, 791 N.W.2d at 59 (quoting *State v. Busack*, 532 N.W.2d 413, 415 (S.D. 1995)). “An accomplice must be ‘legally accountable’ for the underlying offense.” *Id.* (quoting *Busack*, 532 N.W.2d at 416).

“An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial.” *State v. Johnson*, 139 N.W.2d 232, 236 (S.D. 1965). An accomplice “must in some manner knowingly and with criminal intent participate, associate or concur with another in the commission of a crime.” *Id.* “If there is a material question of fact about the participation of a witness in the crime, then the question whether that person is an accomplice is decided by the jury. If, on the other hand, there is no dispute regarding the witness’s participation in the crime, then that person’s status as an accomplice is a question of law for the court.” *State v. Olhausen*, 1998 S.D. 120, ¶ 9, 587 N.W.2d 715, 718 (internal citations omitted). Burgers was clearly established as an accomplice here.³

In *State v. Parsons*, the defendant was not entitled to a cautionary instruction because the witnesses did not meet the definition of an accomplice. 342 N.W.2d 21, 22-23 (S.D. 1984). Those witnesses had been granted immunity from prosecution for anything that might come up in their testimony against the defendant. *Id.* at 22. But their only involvement with the defendant’s case was that they were neighbors and told the police that the defendant had stolen property at his garage. *Id.* They were not liable to prosecution for the same offenses as the

3. Burgers could also be considered an informant, as she provided evidence against Stevens “for immunity from punishment.” *State v. Smith*, 325 N.W.2d 304, 307 (S.D. 1982); *State v. Marshall*, 264 N.W.2d 911, 917 (S.D. 1978). Where an informant has testified a cautionary instruction “should be given in a proper case.” *Marshall*, 264 N.W.2d at 917.

defendant. Burgers' involvement in this case was far more impactful and intertwined with Stevens' actions.

Burgers testified that she made trips to Sioux Falls, to a dealer, with Stevens. TT 107, ln. 19-21. She was the only person Stevens trusted to be in his bedroom to get methamphetamine. TT 96, ln. 16-17. Burgers wrote out what appeared to be a ledger that was found in Stevens' trash. TT 145, ln. 24. The letter she wrote to Stevens indicated that she was going to run methamphetamine from Stevens' home to Love in Minnesota. TT 103, ln. 1-8. Burgers was the one in contact with Love. TT 103, ln. 14-17. Her testimony clearly shows that if Stevens was distributing, Burgers was fully involved in the same distribution, making her an accomplice.

Burgers was also offered immunity for her criminal involvement *in the circumstances of this case*, in exchange for her testimony. TT 123, ln. 24 – 124, ln. 1; Appx. 10. Burgers was liable to prosecution for the identical offenses as Stevens. If she testified, she would not “get charged with the same charges.” TT 123, ln. 24 – 124, ln. 1. She participated knowingly and with criminal intent, as evidenced by the letter to Stevens. TT 103, ln. 1-8. Because Burgers was an accomplice, Stevens was entitled to proper cautionary and corroboration jury instructions on Burger's accomplice testimony. *Thomas*, 2011 S.D. 15, ¶ 19, 796 N.W.2d at 712.

C. Corroboration

The jury must be instructed that corroboration is necessary for a defendant to be convicted through accomplice testimony. SDCL 23A-22-8; *Beene*, 257 N.W.2d at 591. “The corroborative evidence must show more than just the commission or circumstances of the offense.” *State v. Dunkelberger*, 2018 S.D.

22, ¶ 13, 909 N.W.2d 398, 400. But the corroborating evidence does not have to be sufficient to sustain a conviction on its own. *Id.* It is sufficient “if it tends to affirm the accomplice’s testimony and establish the accused’s guilt.” *Id.* (quoting *State v. Wheeler*, 2013 S.D. 59, ¶ 9, 835 N.W.2d 871, 873). “Whether the corroboration is sufficient is a question of fact for the jury.” *State v. Kihega*, 2017 S.D. 58, ¶ 11, 902 N.W.2d 517, 522 (quoting *State v. Smithers*, 2003 S.D. 128, ¶ 30, 670 N.W.2d 896, 902). *See also Freeman v. Class*, 95 F.3d 639, 642 n. 5 (8th Cir. 1996) (citing *State v. Sondreal*, 459 N.W.2d 435, 439 (S.D. 1990)) (“While there is circumstantial evidence linking [the defendant] to the crime, whether evidence exists that corroborates an accomplice’s testimony is a question for the jury.”). South Dakota’s pattern jury instruction on accomplices and corroboration, which would have been proper to give in this case, reads as follows:

A person cannot be convicted of a crime upon the testimony of an accomplice unless the accomplice is corroborated by other evidence which tends to connect the defendant with the commission of the offense. The corroborative evidence is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

(To render a person an accomplice, the person must in some manner knowingly and with criminal intent have aided and abetted or have advised and encouraged the commission of the criminal act charged. If the defendant did so, it is not necessary that the defendant be present at the time when and the place where the offense was committed.)

(To aid and abet another in the commission of a crime means to knowingly and with criminal intent aid, promote, encourage or instigate the commission of the offense by act or advice or both.)

(All persons concerned in the commission of a crime such as the one charged, whether they directly commit the act constituting the offense or aid and abet in its commission though not present, are liable to prosecution for the identical offense charged against the defendant on trial.)

(Whether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the evidence in the case.)

((You are hereby instructed that as a matter of law _____ is to be considered an accomplice.))

Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may consist of other evidence of circumstances, the testimony of a witness other than an accomplice, or the testimony or admissions, if any, of the defendant.

In determining whether an accomplice has been corroborated you must first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence his testimony is corroborated. But before you may convict the defendant you must find from all the evidence beyond a reasonable doubt that the defendant is guilty.

South Dakota Criminal Pattern Jury Instruction 1-14-7.

In *Dunkelberger*, a defendant argued that a video should have been suppressed that had been admitted into evidence, and that without that video there was not sufficient corroboration of an accomplice's testimony connecting the defendant to the crime. 2018 S.D. 22, ¶ 11, 909 N.W.2d at 400. This Court found that any error on the video's admission was harmless and the other evidence presented was sufficient corroboration anyway. *Id.* *Dunkelberger* is distinguishable because the corroborating evidence for the accomplice testimony included a video relevant to the offense, admissions by the Defendant that were consistent with the accomplice's testimony, and physical evidence of the defendant's physical description for the jury to review. *Id.* ¶¶ 14-16, 909 N.W.2d at 400-01.

Here, there is no video of Stevens committing any distribution nor any testimony from Stevens consistent with Burgers' testimony. There is no controlled buy. There is no firsthand testimony of distribution outside of Burgers'. And only a small amount of methamphetamine was found, which is inconsistent with distribution.

“[T]here is no requirement that every material fact testified to by the accomplice be confirmed by corroborative evidence.” *Smithers*, 2003 S.D. 128, ¶ 33, 670 N.W.2d at 903 (quoting *State v. Reutter*, 374 N.W.2d 617, 626). But none of Burgers' testimony regarding distribution was corroborated. The corroboration rule is “intended to protect defendants from convictions based *solely* on the testimony of accomplices who may have a motive to make up an unverifiable story.” *Kihega*, 2017 S.D. 128, ¶ 18, 902 N.W.2d at 524. The question of corroboration is meant for the jury, which was not given the opportunity to properly address it in this case.

This case is distinguishable from *State v. Kihega*, where this Court found the corroborating evidence was sufficient, but the jury was “correctly instructed on corroboration.” 2017 S.D. 128, ¶ 18, 902 N.W.2d at 524. Whether the corroboration was sufficient is a question for the jury. *Id.* ¶ 11, 902 N.W.2d at 522. The jury was not given a proper instruction that would put that determination on the jury. That corroboration instruction is essential, and it was plain error that it was not given in this case.

D. Ineffective Assistance of Counsel

The right of an accused to guaranteed assistance of counsel is found in Article VI, Section 7 of the South Dakota Constitution and the Sixth Amendment to the U.S. Constitution. To prevail on a claim of ineffective assistance of counsel, “a defendant must show that his counsel provided ineffective assistance and that he was prejudiced as

a result.” *Thomas*, 2011 S.D. 15, ¶ 21, 796 N.W.2d at 713. Counsel’s assistance is ineffective if their “representation fell below an objective standard of reasonableness.” *Id.* “The question is whether counsel’s representation ‘amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.’” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

Thomas was one of the “rare cases where an ineffective-assistance-of-counsel claim is ripe for review on direct appeal.” 2011 S.D. 15, ¶ 20, 796 N.W.2d at 713. The defendant claimed counsel was deficient primarily for failing to request appropriate accomplice instructions. *Id.* ¶ 22, 796 N.W.2d at 713. This Court stated “[t]here is no question that, at the very least, trial counsel should have requested a cautionary accomplice instruction.” *Id.* ¶ 24, 796 N.W.2d at 714.⁴ Failure to do so, “together with other errors, violates due process and the defendant’s right to counsel.” *Id.* See also *Cash v. Culver*, 358 U.S. 633, 637-38 (1959).

The Court determined in *Thomas*, the facts “established on direct appeal that trial counsel provided ineffective assistance.” 2011 S.D. 15, ¶ 27, 796 N.W.2d at 715. Similarly, this case presents a claim for ineffective assistance of counsel that is ripe for review on direct appeal. Trial counsel did not request a cautionary instruction. Counsel could not have had any legitimate strategic reason not to request the instruction, and the error is prejudicial. *Id.* ¶ 25, 796 N.W.2d at 714. See also *Beene*, 257 N.W.2d at 592 (finding the defendant’s conviction was substantially procured by the accomplice’s testimony and failure to give a cautionary instruction was prejudicial error); *State v.*

4. This Court went on to say that trial counsel “could not claim that asking for the instruction would have been futile” because *State v. Beene* mandated trial courts to make the instruction upon request. *Thomas*, 2011 S.D. 15, ¶ 24, 796 N.W.2d at 714.

McBride, 296 N.W.2d 551, 554 (S.D. 1980) (“By not requesting that the jury be instructed to consider with caution the testimony of an accomplice, appellant’s counsel omitted a defense which might have negated [the witness’s] damning testimony.”); *Grooms v. State*, 320 N.W.2d 149, 152 (S.D. 1982) (determining there was no advantage to be gained by not requesting the cautionary instruction, just like *McBride*). While trial counsel hinted at the need for corroboration in closing argument, and called the jury’s attention to its role as the judge of witness credibility, that was not sufficient to deal with the accomplice issue. See TT 201, ln. 5-6; 202, ln. 15-18.

A general jury instruction regarding credibility of witnesses does not cure any error from not giving the accomplice instructions.⁵ It actually has “the erroneous effect of telling the jury that the credibility of an accomplice was to be determined by the same test as would be applied in determining the credibility of any other witness.” *Beene*, 257 N.W.2d at 591. That directly contradicts SDCL 23A-22-8. “The jury is to be admonished so that it will not accept the words of an accomplice at face value, with any presumption of truthfulness and candor, or upon the same standard as that applied to other witnesses.” *Beene*, 257 N.W.2d at 591 (quoting *People v. Gordon*, 516 P.2d 298, 304 (1973)).

5. Stevens’ jury was given the following instruction:

You are the sole and exclusive judges of all questions of fact and the credibility of the witnesses and the weight to be given the testimony of each of them.

In determining the credit to be given any witness you may consider ability and opportunity to observe, memory, manner while testifying, any interest, bias, or prejudice, and the reasonableness of the testimony considered in the light of all the evidence in the case.

It was ineffective assistance of counsel for trial counsel to fail to request proper instructions on accomplice testimony, and Stevens' right to competent counsel was clearly compromised.

E. Prejudice

Relief on a theory of plain error also requires a showing of prejudice. *Thomas*, 2011 S.D. 15, ¶ 14, 796 N.W.2d at 711. "Prejudice 'exists only when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 28, 796 N.W.2d at 715 (quoting *Dillon v. Weber*, 2007 S.D. 81, ¶ 8, 737 N.W.2d 420, 424) (additional internal citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

"[W]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)). The question in this case, then, is if you assume the accomplice testimony of Burgers is discredited by the jury after proper instruction, and take that testimony away, is there a reasonable probability that the jury would have reasonable doubt as to Stevens' guilt on Counts 1 through 3. Just as in *Thomas*, here Stevens has established "a reasonable probability that proper jury instructions, motions, and objections at trial may have changed the outcome." *Id.* ¶ 30, 796 N.W.2d at 716. Confidence in the outcome of the trial is absolutely undermined.

This Court has found prejudice where a cautionary instruction was not given in multiple cases. See *Grooms*, 320 N.W.2d 149; *McBride*, 296 N.W.2d 551; *Beene*, 257

N.W.2d 589. “In each of those cases, no witnesses other than the accomplices gave testimony directly tending to show the defendants’ complicity.” *Thomas*, 2011 S.D. 15, ¶ 29, 796 N.W.2d at 715. This Court also reversed and remanded for a new trial in *Thomas* because prejudice was established. *Id.* ¶ 30, 796 N.W.2d at 716. The State’s other evidence in *Thomas* was circumstantial, tending only to directly establish the defendant’s presence at the scene, and the conviction depended on the accomplices’ credibility. *Id.*

The Eighth Circuit has also followed this Court’s lead to determine that the error in not requesting an appropriate cautionary and corroboration instruction was not harmless error. *Freeman v. Class*, 95 F.3d 639, 642 (8th Cir. 1996). The Eighth Circuit stated in *Freeman* that “[f]ailure to make the requests was highly prejudicial to Freeman to the extent that the fundamental fairness of the proceeding and the conviction was undermined.” *Id.* “Had the jury been properly instructed, it may well have discredited [the accomplice’s] testimony, which was the only direct evidence that linked [the defendant] to the theft of the car.” *Id.* “Moreover, counsel’s failure to make such requests deprived [the defendant] of a jury that would give appropriate analysis to the evidence presented.” *Id.* That court determined that it was proper to conclude there was “not only a reasonable probability that, absent counsel’s error, the jury would have had a reasonable doubt respecting [the defendant’s] guilt, but that [the defendant] was denied a fair trial.” *Id.*

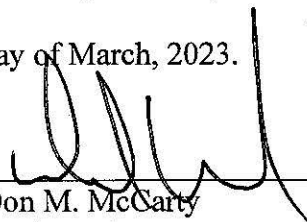
Similarly, there is a real probability that if counsel had properly requested accomplice instructions and the trial court had granted the request that the jury would have had reasonable doubt about Stevens’ guilt. He was denied a fair trial without those instructions.

CONCLUSION

Stevens' conviction of Counts 1, 2, and 3 of the Indictment rests on the uncorroborated testimony of an accomplice without the required jury instructions. Because the jury was not properly instructed on the caution it should use in considering Burgers' testimony or the corroboration necessary to support it, the convictions cannot stand.

Stevens respectfully requests that this Court reverse the convictions on Count 1 – Distribution of a Schedule I or II Substance (Methamphetamine), Count 2 – Drug Free Zone Violation as a Felony, and Count 3 – Distribution or Possession with Intent to Distribute a Schedule I or II Substance (Methamphetamine).

Respectfully submitted this 29th day of March, 2023.



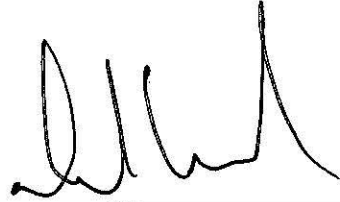
Don M. McCarty
Stacia Jackson
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1441 6th Street, Suite 200
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Brief and all appendices were filed online and served upon:

Office of the Attorney General
1302 E. Hwy 1 Ste. 1
Pierre, SD 57501
605-773-3215
ATGSERVICE@STATE.SD.US

on this 29th day of March, 2023.

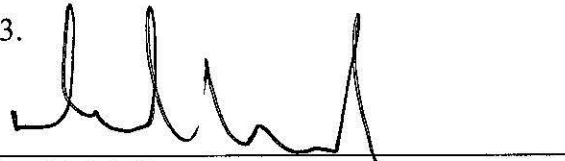


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staciajackson@lawinsd.com

CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 5,863 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 29th day of March, 2023.

A handwritten signature in black ink, appearing to read 'Don M. McCarty', is written over a horizontal line.

Don M. McCarty
Helsper, McCarty & Rasmussen, P.C.

APPENDIX

Amended Judgment of Conviction	Appx. 1
Indictment	Appx. 6
Burgers' Immunity Offer Letter	Appx. 10
Pattern Jury Instructions	Appx. 11

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF BROOKINGS)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
Plaintiff,)
)
v.)
)
TODD W. STEVENS,)
)
Defendant.)

CRI21-584

**AMENDED
JUDGMENT OF CONVICTION**

An Indictment was filed with this Court on the 8th day of October, 2021, charging the Defendant with the crimes of Count 1: Distribution of a Schedule I or II Substance (SDCL 22-42-2); Count 2: Drug Free Zone, Violation as Felony (SDCL 22-42-19(1)); Count 3: Distribution or Possession with Intent to Distribute a Schedule I or II Substance (SDCL 22-42-2); Count 4: Maintaining a Place Where Drugs are Sold or Kept (SDCL 22-42-10); Count 5: Unauthorized Possession of a Controlled Substance (SDCL 22-42-5); and Count 6: Possession of Marijuana (SDCL 22-42-6). The Defendant was arraigned on said Indictment on the 12th day of October, 2021. The Defendant, the Defendant's attorney, Rick Ribstein, and Dan C. Nelson, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges against the Defendant. The Defendant pled not guilty to the charges in the Indictment. The Defendant requested a jury trial on the charges contained in the Indictment.

The trial commenced on the 17th day of August, 2022, in Brookings, South Dakota on the charges. On the 18th day of August, 2022, the jury returned a verdict of guilty of Count 1: Distribution of a Schedule I or II Substance; guilty of Count 2: Drug Free Zone, Violation as Felony; guilty of Count 3: Distribution or Possession with Intent to Distribute a Schedule I or II Substance; guilty of Count 4: Maintaining a Place Where Drugs are Sold or Kept; guilty of Count 5: Unauthorized Possession of a Controlled Substance; and guilty of Count 6: Possession of Marijuana.

It is, therefore,

ORDERED that a Judgment of guilty is entered as to the following- Count 1: Distribution of a Schedule I or II Substance in violation of SDCL 22-42-2; Count 2: Drug Free Zone, Violation as Felony in violation of SDCL 22-42-19(1); Count 3: Distribution or Possession with Intent to Distribute a Schedule I or II Substance in violation of SDCL 22-42-2; Count 4: Maintaining a Place Where Drugs are Sold or Kept in violation of SDCL 22-42-10; Count 5: Unauthorized Possession of a Controlled Substance in violation of SDCL 22-42-5; and Count 6: Possession of Marijuana in violation of SDCL 22-42-6.

SENTENCE

On the 20th day of September, 2022, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

As to Count 1: Distribution of a Schedule I or II Substance, A Class 4 Felony- It is by the Court, ORDERED that the Defendant be imprisoned in the State Penitentiary of the State of South Dakota, Sioux Falls, South Dakota, at hard labor for the full term and period of one (1) year, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary; and in addition thereto, said Defendant shall pay a fine and court costs in the amount of \$500.00; said Defendant shall abide by the following terms and conditions:

1. That the Defendant shall abide by all the rules and regulations of the South Dakota Board of Pardon and Paroles.
2. That the Defendant remain a law abiding citizen and commit no federal state or local crime.
3. That the Defendant shall pay the fine and costs imposed.
4. That said Defendant shall pay \$276.00 to the Brookings County Clerk of Courts (for reimbursement to the South Dakota Drug Control Fund, in c/o Division of Criminal Investigation, E. Highway 34, Pierre, SD 57501) for the costs of the drug testing in this case.
5. That the fine and costs heretofore ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

ORDERED that said Defendant receive credit of forty-five (45) days for time previously served as a result of said offense.

As to Count 2: Drug Free Zone, Violation as Felony, A Class 4 Felony- It is by the Court, ORDERED that the Defendant be imprisoned in the State Penitentiary of the State of South Dakota, Sioux Falls, South Dakota, at hard labor for the full term and period of five (5) years, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary; and in addition thereto, said Defendant shall pay a fine and court costs in the amount of \$500.00; said Defendant shall abide by the following terms and conditions:

1. That the Defendant shall abide by all the rules and regulations of the South Dakota Board of Pardon and Paroles.

2. That the Defendant remain a law abiding citizen and commit no federal state or local crime.

3. That the Defendant shall pay the fine and costs imposed.

4. That the fine and costs heretofore ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

As to Count 3: Distribution or Possession with Intent to Distribute a Schedule I or II Substance, A Class 4 Felony- It is by the Court, ORDERED that the Defendant be imprisoned in the State Penitentiary of the State of South Dakota, Sioux Falls, South Dakota, at hard labor for the full term and period of ten (10) years, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary; and in addition thereto, said Defendant shall pay a fine and court costs in the amount of \$500.00; said Defendant shall abide by the following terms and conditions:

1. That the Defendant shall abide by all the rules and regulations of the South Dakota Board of Pardon and Paroles.

2. That the Defendant remain a law-abiding citizen and commit no federal state or local crime.

3. That the Defendant shall pay the fine and costs imposed.

4. That the fine and costs heretofore ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

As to Count 4: Maintaining a Place Where Drugs are Sold or Kept, A Class 5 Felony- It is by the Court, ORDERED that the Defendant shall pay court costs in the amount of \$116.50.

IT IS FURTHER ORDERED that said Defendant shall serve forty-five (45) days in the Brookings County Detention Center, Brookings, South Dakota. Said Defendant shall abide by the following terms and conditions:

1. That the Defendant shall pay the fine and costs imposed.

2. That the costs heretofore ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

ORDERED that said Defendant receive credit of forty-five (45) days for time previously served as a result of said offense of Count 4: Maintaining a Place Where Drugs are Sold or Kept.

As to Count 5: Unauthorized Possession of a Controlled Substance, A Class 5 Felony- It is by the Court, ORDERED that the Defendant shall pay court costs in the amount of \$116.50.

IT IS FURTHER ORDERED that said Defendant shall serve forty-five (45) days in the Brookings County Detention Center, Brookings, South Dakota. Said Defendant shall abide by the following terms and conditions:

1. That the Defendant shall pay the fine and costs imposed.
2. That the costs heretofore ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

ORDERED that said Defendant receive credit of forty-five (45) days for time previously served as a result of said offense of Count 5: Unauthorized Possession of Controlled Substance.

As to Count 6: Possession of Marijuana, A Class 6 Felony- It is by the Court, ORDERED that the Defendant shall pay court costs in the amount of \$116.50.

IT IS FURTHER ORDERED that said Defendant shall serve thirty (30) days in the Brookings County Detention Center, Brookings, South Dakota. Said Defendant shall abide by the following terms and conditions:

1. That the Defendant shall pay the fine and costs imposed.
2. That the costs heretofore ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Parole, should said Defendant make parole.

ORDERED that said Defendant receive credit of thirty (30) days for time previously served as a result of said offense of Count 6: Possession of Marijuana.

As to Count 1: Distribution of a Schedule I or II Substance; Count 2: Drug Free Zones Created, Violation as Felony; and Count 3: Distribution or Possession with Intent to Distribute a Schedule I or II Substance; ORDERED that the penitentiary sentences herein imposed shall run consecutively to each other.

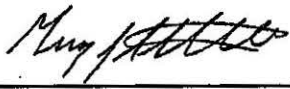
ORDERED that said Defendant stand committed to the Sheriff in and for Brookings County for transportation to the South Dakota State Penitentiary, Sioux Falls, South Dakota, to commence serving said penitentiary sentence.

2/6/2023 8:42:18 AM

BY THE COURT:

Attest:
Beasley, Anette
Clerk/Deputy





Gregory J. Stoltenburg
Circuit Court Judge

STATE OF SOUTH DAKOTA)
COUNTY OF BROOKINGS) SS

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

TODD W. STEVENS,
DOB: 9/17/1964
1730 TORREY PINES DR
BROOKINGS, SD 57006

Defendant.

CRI21-584
INDICTMENT FOR:

COUNT 1: DISTRIBUTION OF A
SCHEDULE I OR II SUBSTANCE
A CLASS 4 FELONY
VIOLATION OF SDCL 22-42-2

COUNT 2: DRUG FREE ZONE
VIOLATION AS FELONY
A CLASS 4 FELONY
VIOLATION OF SDCL 22-42-19(1)

COUNT 3: DISTRIBUTION OR
POSSESSION WITH INTENT
TO DISTRIBUTE A SCHEDULE
I OR II SUBSTANCE
A CLASS 4 FELONY
VIOLATION OF SDCL 22-42-2

COUNT 4: MAINTAINING A
PLACE WHERE DRUGS
ARE SOLD OR KEPT
A CLASS 5 FELONY
VIOLATION OF SDCL 22-42-10

COUNT 5: UNAUTHORIZED
POSSESSION OF A
CONTROLLED SUBSTANCE
A CLASS 5 FELONY
VIOLATION OF SDCL 22-42-5

COUNT 6: POSSESSION OF
MARIJUANA
A CLASS 6 FELONY
VIOLATION OF SDCL 22-42-6

THE BROOKINGS COUNTY GRAND JURY CHARGES:

That on or about the 27th day of September, 2021, in the County of Brookings,

FILED

OCT 08 2021

Appx. 6

SOUTH DAKOTA
CLERK OF COURT
By *Amos*

State of South Dakota, Todd W. Stevens did commit the public offenses of Count 1: Distribution of a Schedule I or II Controlled Substance, a Class 4 Felony (SDCL 22-42-2); Count 2: Drug Free Zone – Violation as Felony, a Class 4 Felony (SDCL 22-42-19(1)); Count 3: Distribution or Possession with Intent to Distribute a Schedule I or II Substance, a Class 4 Felony (SDCL 22-42-2); Count 4: Maintaining a Place where Drugs are Sold or Kept, a Class 5 Felony (SDCL 22-42-10); Count 5: Unauthorized Possession of a Controlled Substance, a Class 5 Felony (SDCL 22-42-5), and Count 6: Possession of Marijuana, a Class 6 Felony (SDCL 22-42-6), in that he did:

COUNT 1:

distribute a substance listed in Schedule II of SDCL Chapter 34-20B, namely:
Methamphetamine;

COUNT 2:

commit the offense set forth in Count 1 above at 1730 Torrey Pines Dr., in the City of Brookings, Brookings County, South Dakota, said location being within 1000 feet of Mickelson Middle School, located at 1801 12th St. S., in the City of Brookings, Brookings County, South Dakota;

COUNT 3:

possess with the intent to distribute a substance listed in Schedule II of Chapter 34-20B, namely: Methamphetamine;

COUNT 4:

keep or maintain a place which was resorted to by persons using controlled drugs and substances, namely: 1730 Torrey Pines Dr., located in Brookings County, South Dakota, for the purpose of using such substances, or which is used for keeping and selling of such substances;

COUNT 5:

knowingly possess a controlled drug or substance, Methamphetamine, A Schedule II Substance; such not having been obtained directly or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice; and

COUNT 6:

knowingly possess Marijuana in a quantity of more than two ounces but less than one-half pound; contrary to statute in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 8th day of October, 2021, at Brookings, South Dakota.

A True Bill
"A TRUE BILL"

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

Molly Moran
Grand Jury Foreperson

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

Ashely Burgers

208 S 5th Ave

Brandon, SD 57005

RE: State of South Dakota v. Todd Stevens

Dear Ms. Burgers:

With respect to your cooperation and testimony regarding Todd Stevens' criminal case CRI 21-584, the following terms and conditions apply:

You, Ashley Burgers, agree to cooperate with law enforcement, and said cooperation provide complete immunity from any prosecution in Brookings County regarding your involvement in criminal activity occurring in months of June, July, and August of 2021, and a parole revocation based on methamphetamine usage or absconding in the month of August of 2022.

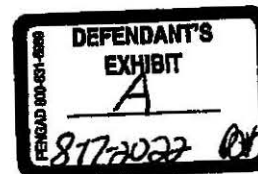
The State may use any statement made or information provided by you in a prosecution for false statements, perjury, or obstructions of justice, premised on statements or actions during your testimony at trial, scheduled for August 17, 2022.

If you refuse to cooperate or testify at the jury trial on the aforementioned date, any and all agreements referenced herein in this letter are void and rescinded.

Sincerely,

 8/15/2022
Dan C. Nelson
State's Attorney
Brookings County State's Attorney Office
520 Third Street, Ste 330
Brookings, SD 57006
P: 605-692-8606 F: 605-692-6960
E: dnelson@brookingscountysd.gov

 8/15/22



ACCOMPLICE — JURY TO DETERMINE WHETHER WITNESS WAS AN ACCOMPLICE

Instruction No. _____

A person cannot be convicted of a crime upon the testimony of an accomplice unless the accomplice is corroborated by other evidence which tends to connect the defendant with the commission of the offense. The corroborative evidence is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

(To render a person an accomplice, the person must in some manner knowingly and with criminal intent have aided and abetted or have advised and encouraged the commission of the criminal act charged. If the defendant did so, it is not necessary that the defendant be present at the time when and the place where the offense was committed.)

(To aid and abet another in the commission of a crime means to knowingly and with criminal intent aid, promote, encourage or instigate the commission of the offense by act or advice or both.)

(All persons concerned in the commission of a crime such as the one charged, whether they directly commit the act constituting the offense or aid and abet in its commission though not present, are liable to prosecution for the identical offense charged against the defendant on trial.)

(Whether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the evidence in the case.)

((You are hereby instructed that as a matter of law _____ is to be considered an accomplice.))

Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may consist of other evidence of circumstances, the testimony of a witness other than an accomplice, or the testimony or admissions, if any, of the defendant.

In determining whether an accomplice has been corroborated you must first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence his testimony is corroborated. But before you may convict the defendant you must find from all the evidence beyond a reasonable doubt that the defendant is guilty.

Reference:

SDCL 23A-22-8

State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706

State v. Smithers, 2003 S.D. 128, 670 N.W.2d 896

State v. Olhausen, 1998 S.D. 120, 587 N.W.2d 715

State v. Busack, 532 N.W.2d 413 (S.D. 1995)

Jenner v. Leapley, 521 N.W.2d 422 (S.D. 1994)
State v. Sondreal, 459 N.W.2d 435, 438 (S.D. 1990)
State v. Phyle, 444 N.W.2d 380 (S.D. 1989)
State v. Lingwall, 398 N.W.2d 745 (S.D. 1986)

Comment:

The many cases on accomplice testimony are annotated after SDCL 23A-22-8.

That portion of the instruction dealing with witnesses who are accomplices as a matter of law is governed by *State v. Hoadley*, 319 N.W.2d 505 (S.D. 1982).

Depending on the facts of the case, the jury should either be instructed that they are to determine the accomplice issue or that there is an accomplice as a matter of law. Give portions in single () where jury determines whether witness is accomplice. Give portions in (()) where witness is accomplice as a matter of law and eliminate single (). A portion of the committee, drafting this instruction feel that based on *State v. Reutter*, 374 N.W.2d 617 (S.D. 1985) the following wording should be added to the first paragraph of this instruction.

"Evidence is sufficient for corroboration where the corroborative evidence in some substantial degree tends to affirm the truth of the testimony of the accomplice and establish the guilt of the accused." *State v. Sondreal*, 459 N.W.2d 435, 438 (S.D. 1990). The question as to whether the evidence corroborated the alleged conspirator's testimony is for the jury.

The evidence of corroboration need not be evidence sufficient to convict. It need only be adequate to affirm the truth of the accomplice and establish the guilt of the defendant.

Jenner v. Leapley, 521 N.W.2d 422 (S.D. 1994). Mere grant of immunity does not make witness an accomplice.

State v. Busack, 532 N.W.2d 413 (S.D. 1995). Whether someone is an accomplice can be a question of law or fact. If the facts of the alleged accomplice's participation are disputed or susceptible to different interpretations, the question is one of fact for the jury.

(Revised 2012)

ACCOMPLICE — TESTIMONY HOW VIEWED

Instruction No. _____

You are instructed that the testimony of an accomplice ought to be viewed with caution. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with great care and caution and in the light of all the evidence in the case.

Reference:

State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706
State v. Bradley, 431 N.W.2d 317 (S.D. 1988)
State v. Hoadley, 319 N.W.2d 505 (S.D. 1982)
State v. Spoonmore, 287 N.W.2d 104 (S.D. 1980)
State v. Beene, 257 N.W.2d 589 (S.D. 1977)
State v. Douglas, 70 S.D. 203, 16 N.W.2d 489 (1944)

Comment:

If requested, this instruction must be given in addition to Instruction 1-14-7.

In *State v. Laib*, 397 N.W.2d 658 (S.D. 1986), the Supreme Court held that use of the word "caution" for "distrust" at the end of the first sentence was not error.

(Revised 2012)

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30145

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TODD W. STEVENS,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY J. STOLTENBURG
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed October 20, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30145

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TODD W. STEVENS,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant/Appellant, Todd W. Stevens, is referred to as “Defendant.” Plaintiff/Appellee, the State of South Dakota, is referred to as “State.” The settled record in the underlying case is denoted as “SR,” followed by the e-record pagination. Defendant’s brief is denoted as “DB.” Trial exhibits will be designated by “Ex,” followed by the exhibit number. The transcripts from the case are designated as follows:

Jury Trial Vol. 2JT2

Jury Trial Vol. 3JT3

September 20, 2022, Sentencing HearingST

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

JURISDICTIONAL STATEMENT

On September 21, 2022, the Honorable Gregory J. Stoltenburg, Brookings County Circuit Court Judge, Third Judicial Circuit, filed Defendant's Judgments and Sentence in Brookings County Criminal File 19-3154. SR:197-209. Defendant filed a Notice of Appeal on October 20, 2022. SR:262-64. The Judgments were consolidated into an Amended Judgment of Conviction on February 6, 2023. SR:578-82. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

I. WHETHER IT WAS PLAIN ERROR FOR DEFENSE COUNSEL TO FAIL TO REQUEST AND THE CIRCUIT COURT TO NOT GIVE JURY INSTRUCTIONS PERTAINING TO ACCOMPLICE WITNESSES?

Defendant did not object to the jury instructions during trial, confining this Court to plain error review on appeal.

State v. Busack, 532 N.W.2d 413 (S.D. 1995)

State v. Corean, 2010 S.D. 85, 791 N.W.2d 44

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

State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706

STATEMENT OF THE CASE AND FACTS¹

Ashley Burgers moved in with Defendant in early June 2021 and lived with him through August 31, 2021. JT2:83, 105. Defendant lived in Brookings, at 1730 Torrey Pines Drive. JT2:141-42. Burgers was not

¹ The Statement of the Case and the Statement of the Facts have been combined for brevity, clarity, and conciseness.

romantically involved with Defendant. JT2:84. While she stayed with him, both Defendant and Burgers used methamphetamine. JT2:84-85. Defendant also smoked meth in his house with groups of people. JT2:85, 90. Defendant, Burgers, and their friends smoked meth constantly during the time Burgers lived with Defendant. JT2:90-91. Defendant would supply the meth for Burgers and the other people who came to his house to smoke. JT2:91. Defendant kept meth in various spots throughout his residence, including in the basement walls, in his bedroom dresser drawer, and other places. JT2:92.

Defendant allowed Burgers to go into his bedroom to grab different things that he needed. JT2:96-97. Defendant would use a scale to weigh out different amounts of meth. JT2:97-98. Defendant received payment from his friends for the meth he would give out to them. JT2:100-01. Burgers fronted one of Defendant's friends, Roger Love, meth because Defendant was passed out at the time. JT2:102-05. Burgers later testified it was a common occurrence for Love to be fronted meth. JT2:106. Defendant and Burgers were supplied meth by Ryan Gillis, who lived in Sioux Falls. JT2:107. Defendant and Burgers drove down to Sioux Falls several times and Defendant would purchase meth from Gillis. JT2:107. Burgers' testimony was ambiguous as to whether she bought meth from Gillis during the time she was with Defendant. See SR:107-11. She later testified that the most meth she saw Defendant possess was a quarter pound. JT2:110.

In June 2021, Brookings Police Department Detective Dana Rogers started investigating Defendant. JT2:127-28. Detective Rogers began van surveillance of Defendant's residence to determine who lived there. JT2:128. Detective Rogers confirmed Defendant lived there through his visual surveillance. JT2:129-30. He determined Defendant contacted Ryan Gillis. JT2:130-31. As part of his investigation, Detective Rogers conducted two trash pulls of Defendant's residence, obtaining two broken methamphetamine pipes and a handwritten note from Burgers to Defendant, saying she was taking a "full" from under Defendant's mattress. JT2:133; SR: 160-61. He also determined Burgers lived at the residence at the time. JT2:134-35.

Detective Rogers observed that Burgers lived at the residence through the last day of August; she was arrested in Sioux Falls on September 1, 2021. JT2:135-36. Detective Rogers obtained a tracking warrant for Defendant's vehicles. JT2:136-37. He determined that Defendant was near Ryan Gillis's address in Sioux Falls a couple of times. JT2:137. In September 2021, two separate individuals leaving Defendant's residence were arrested; one of them had a baggy of methamphetamine, inside his vehicle and the other had a methamphetamine pipe. JT2:139-40.

Law enforcement then obtained a search warrant for Defendant's residence. JT2:141. In searching the home, law enforcement found some of Defendant's mail, confirming he lived at the address. JT2:141-

42. Detective Rogers found a small bag of methamphetamine under Defendant's mattress, drug paraphernalia, and a bag of marijuana. JT2:143-44. Detective Rogers also found in Defendant's bedroom a scale, spork, and measuring spoon, all of which had white residue on them. JT2:142-49, 155.

Law enforcement arrested Defendant when he returned to Brookings from Sioux Falls. JT2:148-49. A search of Defendant's vehicle turned up a small bag of methamphetamine. JT2:149-50. Detective Rogers did not obtain a blood draw from Defendant because he would not cooperate. JT2:152.

On October 8, 2021, a Brookings County Grand Jury Indicted Defendant on six counts: 1) Distribution of a Schedule I or II Substance, a Class 4 Felony, in violation of SDCL 22-42-2; 2) Drug Free Zone Violation, a Class 4 Felony, in violation of SDCL 22-42-19(1); 3) Distribution or Possession With Intent to Distribute a Schedule I or II Substance, a Class 4 Felony, in violation of SDCL 22-42-2; 4) Maintaining a Place Where Drugs are Sold or Kept, a Class 5 Felony, in violation of SDCL 22-42-10; 5) Unauthorized Possession of a Controlled Substance, a Class 5 Felony, in violation of SDCL 22-42-5; and 6) Possession of Marijuana, a Class 6 Felony, in violation of SDCL 22-42-6. SR:13-16.

Defendant's initial counsel filed several motions, including a Motion to Suppress Evidence. SR:41-42. Following withdrawal of

Defendant's first counsel, trial counsel was appointed to represent Defendant on March 26, 2022. SR:68-69. Trial counsel made the decision to move to withdraw Defendant's motion to suppress. SR:79.

Defendant's jury trial started on August 17, 2022. JT2:1. Burgers signed an immunity agreement a few days before trial and testified for the State. SR:148; JT2:77-125. She testified that she witnessed Defendant giving his friends meth in exchange for money. JT2:90-91, 100. She also testified that she would write down who Defendant fronted meth to, that she was allowed to get things from Defendant's bedroom, such as the scale, for him, and that she took a full ounce of meth to front to Love. JT2:100-05, 121-22. Trial counsel for Defendant brought in Defendant's immunity agreement during cross-examination. JT2:123-24.

Aaron Karl, a GIS² specialist with the City of Brookings, testified that Defendant's residence at 1730 Torrey Pines Drive was located within 1,000 feet of Mickelson Middle School. JT2:175-77. Further, Brookings County Deputy Sherriff David Biteler testified to some text messages Defendant sent to his son from a jail phone. JT2:169-73. In the messages, Defendant talked about his meth use, including that he

² A GIS specialist refers to a Geographic Information System. What is a geographic information system? *USGS*. <https://www.usgs.gov/faqs/what-geographic-information-system-gis> (last accessed May 10, 2023). This is confirmed by Karl's testimony, when he states his "responsibilities are map making, keeping up with parcel data, just zoning information, rentals, kind of everything" and that he uses a geospatial software. JT2:175-76.

“helped” his friends and that they “paid each other back the cost”.

JT2:170-73.

When the circuit court asked for any objections or additions to the final jury instructions, trial counsel affirmed that he did not have either objections or additions. JT3:187. The final jury instructions included Instruction No. 26, which told the jury they were the judges of witness credibility. SR:122. In addition, Instruction 27 told the jury they could disregard the testimony of a witness if they believed that witness to have lied about a material fact in the case. SR:123.

The jury found Defendant guilty of all six counts on the indictment. SR:132-33. The circuit court sentenced Defendant to one year in the Penitentiary on Count 1, five years in the Penitentiary on Count 2, and ten years in the Penitentiary on Count 3, plus forty-five days in the Brookings County Detention Center for Counts 4 and 5, and thirty days in the Brookings County Detention Center on Count 6. ST:8-9. Counts 1, 2, and 3 were to run consecutive to each other. SR:198.

ARGUMENT

I. IT WAS NOT PLAIN ERROR FOR THE CIRCUIT COURT TO FAIL TO GIVE JURY INSTRUCTIONS ON ACCOMPLICE WITNESSES.

A. Standard of Review

The State agrees with Defendant that review of any alleged error regarding jury instructions is limited to plain error review. DB:6;

State v. Malcolm, 2023 S.D. 6, ¶ 35, 985 N.W.2d 732, 741. Failure to propose jury instructions or object to the jury instructions at trial limits this Court to plain error review. *Malcolm*, 2023 S.D. 6, ¶ 35, 985 N.W.2d at 741.

“In order to establish plain error, an appellant must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.”

Malcolm, 2023 S.D. 6, ¶ 36, 985 N.W.2d at 741 (cleaned up) (further citation omitted). Further, the defendant must show that the error was prejudicial. *Id.* “Not every error that occurs during trial constitutes plain error;” it “must be applied ”cautiously and only in exceptional circumstances.” *State v. McMillen*, 2019 S.D. 40, ¶ 25, 931 N.W.2d 725, 733 (cleaned up).

B. *Accomplice Status*

“An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. To render one an accomplice he must in some manner knowingly and with criminal intent participate, associate, or concur with another in the commission of a crime.” *State v. Busack*, 532 N.W.2d 413, 415–16 (S.D. 1995) (cleaned up). Whether a witness is an accomplice can be either a question of fact for the jury or a question of law for the trial court. *Id.* at 415. “If the facts as to a witness' alleged participation in the crime are disputed or

susceptible to different inferences, the question is one of fact for the jury; otherwise, it is a question of law.” *Id.*

Here, Burgers testified that she was the only person allowed to go into Defendant’s room to grab the scale or other things that he needed. JT2:96-98, 100. She also kept a potential ledger of people that Defendant fronted meth to, and who still owed him money. JT2:121-22, 145. On one occasion, she took an ounce meth from under Defendant’s mattress and fronted it to Roger Love, because Defendant was passed out. JT2:103-05; SR:160-61 (Ex. 22, 24). She also accompanied Defendant on trips to meet Gillis in Sioux Falls where Defendant would buy meth. JT2:107-11. Finally, Burgers’ immunity agreement said that in exchange for cooperation with law enforcement, she would not be charged for criminal activity occurring in the months June through August 2021, the time period that she lived with Defendant; she admitted as much during cross-examination. JT2:123-24; SR:148 (Ex. A).

But Burgers also stated that Defendant was the person who weighed the methamphetamine and distributed it. JT2:100. She testified that Defendant was the one who received money from distribution. JT2:100-01. Burgers did not testify she received the money when Defendant sold meth. *See* JT2:100-01. Further, Burgers never explicitly testified she bought meth from Gillis when she was with Defendant her testimony to that fact is ambiguous. *See* JT2:107-11.

Defendant claims it is undisputed that Burgers is somebody “who is liable to prosecution for the identical offense[s]” Defendant committed. *Busack*, 532 N.W.2d at 415–16 (S.D. 1995) (cleaned up). But in a more recent case analyzing the accomplice status of witnesses who entered plea agreements and were given immunity, this Court found “their level of participation in the events surrounding the [crimes] was susceptible to different factual inferences.” *State v. Corean*, 2010 S.D. 85, ¶ 44, 791 N.W.2d 44, 59. The trial court in *Corean* rejected the defendant’s request for an accomplice jury instruction for three persons who were party to the kidnapping and murder Troy Klug. *Corean*, 2010 S.D. 85, ¶ 10, 791 N.W.2d at 50. The three knew that Klug was bound and held in the trunk of a car and in a toolbox over a period of days without food or water. *Id.* at ¶¶ 10-14. When Corean asked for accomplice jury instructions for the three additional witnesses, the circuit court rejected that request, stating it was a fact question for the jury whether they were accomplices. *Id.* at ¶ 42. This Court affirmed that decision saying, “the circuit court correctly concluded that it was a jury question whether those individuals were accomplices.” *Id.* at ¶ 44. If the circuit court in *Corean* correctly concluded that the jury must decide who an accomplice is, and this Court held there was no error in not instructing the jury that the witnesses were accomplices as a matter of law, the same could be said here.

C. Jury Instructions.

Defendant argues that it was plain error for defense counsel to fail to request, and the circuit court to fail to give, instructions on taking an accomplice's testimony with caution and an instruction requiring an accomplice's testimony to be corroborated. DB:9-16. Defendant specifically cites pattern instructions 1-14-7 and 1-14-8 as those that should have been given. DB:10, 14-15.

A circuit court errs in "failing upon request" to give a cautionary instruction pertaining to accomplice testimony when the evidence is "sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice. . . ." *State v. Thomas*, 2011 S.D. 15, ¶ 19, 796 N.W.2d 706, 713; (cleaned up) *see also State v. Beene*, 257 N.W.2d 589, 592-93 (S.D. 1977) (concluding it "will be deemed error" for a trial court to fail upon request to "give a cautionary instruction concerning accomplice testimony" whenever the evidence is sufficient to warrant it).

"Instructions are sufficient when, viewed as a whole, they correctly state the law and inform the jury." *Thomas*, 2011 S.D. 15, ¶ 18, 796 N.W.2d at 712 (further citation omitted). This Court has said that providing the jury with a regular witness credibility instruction when accomplice testimony is present in the case confuses the jury, as it tells the jury to judge accomplice witnesses by the same standard as they do other witnesses. *Beene*, 257 N.W.2d at 591; *see also* SR:122 (Instruction

No. 26, discussing witness credibility.) But it has also affirmed the non-inclusion of accomplice jury instructions when the facts of an alleged accomplice's involvement are unclear. *Corean*, 2010 S.D. 85, ¶¶ 10, 44 791 N.W.2d at 50.

When appropriate, SDCL 23A-22-8 provides that there must also be corroboration of an accomplice's testimony by other evidence connecting a defendant with the commission of the crime. It also states that the evidence must show more than the commission of the offense, "or the circumstances thereof." SDCL 23A-22-8.

Here, there is no question Defendant did not request the accomplice jury instructions. Accordingly, this Court is confined to whether the trial court committed plain error. *Thomas*, 2011 S.D. 15, ¶ 20, 796 N.W.2d at 713; DB:6-7. To establish plain error, Defendant must first show the trial court's failure to sua sponte give the jury instructions, without a request, was (1) error (2) that was plain. *Malcolm*, 2023 S.D. 6, ¶ 36, 985 N.W.2d at 741.

Defendant relies on *Thomas*, 2011 S.D. 15, for the notion that reversible plain error occurred here. See DB:9-11. But upon closer review, *Thomas* failed to reach the question of whether the trial court committed plain error by not giving a cautionary instruction without a request. See *Thomas*, 2011 S.D. 15, ¶ 20, 796 N.W.2d at 713. Rather, this Court skipped right to the second issue in saying "we conclude that this is one of those rare cases where an ineffective-assistance-of-counsel

claim is ripe for review on direct appeal, [so] we confine the remainder of our analysis to that claim for relief.” *Id.* Defendant has not cited authority stating a trial court commits plain error by failing to sua sponte give a cautionary instruction pertaining to accomplice testimony or corroboration of accomplice testimony. *See* DB:9-11, 13-16.

Rather, this Court has held that a trial court’s failure to give an accomplice corroboration instruction was error, but not plain error. *Smith v. Weber*, 2005 S.D. 85, ¶ 10 701 N.W.2d 416, 419. In *Smith*, “the court did not give, and trial counsel did not request pattern instruction 1-14-7, which requires corroboration of an accomplice’s testimony by evidence which tends to connect the defendant with the commission of the offense.” *Id.* ¶ 10. But this Court held the defendant “failed to establish reversible error” because there was sufficient evidence in the record, even without the accomplice testimony. *Id.* at ¶ 23.

As discussed above, Burgers’ level of participation in the events surrounding Defendant’s crimes was “susceptible to different factual inferences.” *Corean*, 2010 S.D. 85, ¶ 44, 791 N.W.2d at 59. And as discussed below, parts of Burgers’ testimony were corroborated by Detective Rogers and Deputy Biteler. Therefore, the trial court did not commit plain error by failing to sua sponte give jury instructions on accomplice testimony. *See McMillen*, 2019 S.D. 40, ¶ 25, 931 N.W.2d at 733 (stating that plain error is to be “applied cautiously and only in exceptional circumstance.”)

D. *Ineffective Assistance of Counsel*

This Court will not address ineffective assistance of counsel claims on direct appeal without exceptional circumstances. *Malcolm*, 2023 S.D. 6, ¶ 41, 985 N.W.2d at 742 (citing *State v. Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d 113, 120-21 (further citation omitted)). This is because the record on direct appeal typically “does not afford a basis to review the performance of trial counsel.” *State v. Alvarez*, 2022 S.D. 66, ¶ 34, 982 N.W.2d 12, 20. Ineffective assistance claims are heard on direct appeal “only when trial counsel was so ineffective and counsel’s representation so casual as to represent a manifest usurpation of the defendant’s constitutional rights.” *Id.* at ¶ 35 (cleaned up); *Malcolm*, 2023 S.D. 6, ¶ 42, 985 N.W.2d at 742. “There is a strong presumption that counsel’s performance falls within the wide range of professional assistance and the reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” *Thomas*, 2011 S.D. 15, ¶ 21, 796 N.W.2d at 713 (quoting *Steichen v. Weber*, 2009 S.D. 4 ¶ 25, 760 N.W.2d 381, 392-93).

This Court has held that an ineffective assistance of counsel claim is reviewable on direct appeal when defense counsel fails to request a cautionary instruction for accomplice testimony. *Thomas*, 2011 S.D. 15, ¶¶ 24-27, 796 N.W.2d at 714. In addition, this Court has held that “when accomplice testimony is presented, there is no conceivable strategic motive that would excuse failure to request a cautionary

accomplice instruction.” *Id.* at ¶ 25; *see also State v. McBride*, 296 N.W.2d 551, 554 (S.D. 1980).

This Court’s decision to address an ineffective assistance claim on direct appeal in *Thomas* was an unusual and exceptional one. Reliance on this outlier may not be proper, as this Court’s decision in *Corean* suggests it is possible Burgers’ level of participation could be interpreted as an accomplice but could also be interpreted as that of a friend, roommate, and fellow user. When a witness’ level of participation is susceptible to different conclusions, the jury need not be instructed about accomplice testimony. *Corean*, 2010 S.D. 85, ¶ 44, 791 N.W.2d at 59. But if this Court determines Stevens’ counsel plainly erred in not proposing accomplice testimony jury instructions, *Thomas* instructs that the same is reversible error. 2011 S.D. 15, ¶ 25, 796 N.W.2d at 714.

E. Prejudice

The standard for prejudice under plain error and ineffective assistance of counsel under *Strickland* are the same. *Neels v. Dooley*, 2022 S.D. 4, ¶ 15, 969 N.W.2d 729, 735. Under plain error, a defendant must show “that the error affected the defendant’s substantial rights...” *Id.*; *see also Malcolm*, 2023 S.D. 6, ¶ 36, 985 N.W.2d at 741.

A defendant who alleges ineffective assistance of counsel also has the “burden of proving prejudice.” *Thomas*, 2011 S.D. 15, ¶ 28, 796 N.W.2d at 715. For ineffective assistance claims, prejudice “exists only when there is a reasonable probability that, but for counsels’

unprofessional errors, the result of the proceeding would have been different.” *Id.* Under plain error, the error must have affected Defendant’s substantial rights, which usually means “that there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Neels*, 2022 S.D. 4, ¶ 16, 969 N.W.2d at 735 (citing *Greer v. United States*, 141 S.Ct. 2090, 2096 (2021)); *see also Malcolm*, 2023 S.D. 6, ¶ 36, 985 N.W.2d at 741.

i. Corroboration

A defendant “fail[s] to establish reversible error” when there was sufficient evidence in the record absent the accomplice testimony. *Smith*, at ¶ 23, 701 N.W.2d at 421. In this case, Defendant’s guilty verdict was not based solely on Burgers’ credibility; the State presented more evidence to sustain Defendant’s convictions on Counts 1-3, even without Burgers’ testimony.

Most of Burgers’ testimony was corroborated by other evidence in the record even though “[a]ccomplice testimony need not be corroborated by evidence sufficient to sustain a conviction.” *State v. Reutter*, 374 N.W.2d 617, 626 (S.D. 1985). SDCL 23A-22-8 is satisfied when the “corroborative evidence in some substantial degree tends to affirm the truth of the testimony of the accomplice and establish the guilt of the accused.” *Id.* *see also State v. Kihega*, 2017 S.D. 58, ¶ 15, 902 N.W.2d 517, 523 (holding that corroboration of accomplice testimony may be established by circumstantial evidence alone).

One could conclude Burgers' testimony affirmed the other corroborative evidence but was not in itself the basis for the jury's verdict. Burgers testified that she saw Defendant distributing drugs to his friends. JT2:85-964. This testimony was corroborated by Exhibits 61, 57, and the testimony of Sheriff's Deputy Biteler. JT2:165-75; SR:193. At trial, Sheriff's Deputy Biteler read from Defendant's text messages in Ex. 61:

This [explicative] drug called meth and I bought it from many different people. I also helped other friends and we just paid each other back the cost. If that is considered being a distributor than I guess I and all the past friends are dealers than but I will say its [explicative] to tag me or any other as a dealer when the real ones have pounds or more available for the people that are not necessarily friends, they are actually costumers in my mind. I didn't operate that way nor did my friends.

JT2:172. Detective Rogers also surveilled the residence and testified he arrested two people right after they left Defendant's residence. JT2:140-42. The first man had a small quantity of meth with him, and the second, Paul Schlimmer, had a meth pipe on him. JT2:138-39.

Detective Rogers also conducted a field test on the dresser in Defendant's bedroom where a scale, measuring spoon, and spork, all with white residue on them, were found; it tested positive for meth. JT2:155. Finally, Detective Rogers also found several broken meth pipes during one of his trash pulls. JT2:133.

Burgers also testified that Defendant had a scale he would use to weigh and measure meth on, and that she would sometimes grab it for

him. JT2:96-98, 100. During the search of the home, Detective Rogers found a digital scale in Defendant's bedroom. JT2:155; SR:163-64 (Ex. 27 and 28). He also found a measuring spork and spoon next to it. SR:176 (Ex. 40). There was white residue on the measuring spork and spoon, as well as the scale. JT2:147, 155; SR:164-65 (picture of the scale showing a white residue on it). During his search of the home, Detective Rogers field tested the dresser where the scale, measuring cup, and spork were placed; it came back positive for meth. JT2:155.

Other parts of Burgers' testimony were also corroborated. For instance, she said she lived with Defendant at 1730 Torrey Pines Drive. JT2:82-84. This was corroborated by her handwritten notes, as well as a job application, that were found during Detective Rogers' trash pulls. JT2:133; SR:162 (Ex. 25). During the search, pieces of mail establishing Defendant's residence at 1730 Torrey Pines Drive were also found. JT2:141.

Burgers testified that she would go with Defendant to see Ryan Gillis where Defendant would purchase drugs and that they would take his vehicles. JT2:107. Detective Rogers obtained a warrant to track Defendant's vehicles; he noted that Defendant's location was within a few blocks of Gillis' address on two different occasions, despite the tracker only being in place around mid-August 2021. JT2:136-37.

Other evidence presented at trial establishing Defendant's guilt included Aaron Karl's testimony that Defendant's residence was located

within 1,000 feet from Mickelson Middle School in Brookings. JT2:175-76. When Defendant was arrested, he also had a small bag of meth in his possession. JT2:149-50.

This Court has found no error when the evidence, absent accomplice jury instructions, is more than sufficient to uphold the verdict. *Weber*, 2005 S.D. 85, ¶ 12, 701 N.W.2d at 419. In short, Detective Rogers testimony, as well as Defendant’s text messages to his son, “tend[ed] to affirm the truth of the testimony of [Burgers] and establish the guilt of the accused.” *Reutter*, 374 N.W.2d at 626. When the rest of the evidence is “considered as a whole,” it is more than “suspicious circumstances.” *State v. Smithers*, 2003 S.D. 128, ¶ 33, 670 N.W.2d 896, 903. Because most of Burgers’ testimony was corroborated, the outcome of Defendants trial would not have been different if the jury had been instructed on corroboration of accomplice testimony. *Neels*, 2022 S.D. 4, ¶¶ 15-16, 969 N.W.2d at 735.

ii. Cautionary Instruction

Defendant cannot show that it was prejudicial for trial counsel to not request, and the circuit court not to give, his requested cautionary instruction. The cases Defendant cites, such as *Thomas* and *Beene*, involve guilty verdicts based solely on the credibility of the accomplice. *Thomas*, 2011 S.D. 15, ¶ 30, 796 N.W.2d at 716. (“[A] conviction in this case depended upon the Broomfields’ credibility.”); *Beene*, 257 N.W.2d at 592 (“Here, the State’s case turned upon Friesen’s credibility.”). Other

cases in which this Court has found prejudice in failure to give cautionary accomplice instructions have similar facts. *See Grooms v. State*, 320 N.W.2d 149, 152 (S.D. 1982) (stating that the accomplice's testimony was "of crucial importance to the outcome of this case"); *see also McBride*, 296 N.W.2d at 554 (noting that a possible accomplice was the only person to give testimony linking McBride to the burglary).

Here, as discussed above, Burgers' testimony was not the only evidence linking Defendant to Counts 1-3. Detective Rogers testified that he had been watching Defendant's residence for months. He had conducted trash pulls of Defendant's residence showing drug use was occurring. He stopped two people that had just left Defendant's house and found either meth or drug paraphernalia on them. And Deputy Biteler testified as to text messages Defendant sent his son while he was in jail; text messages where Defendant admits to having given drugs to his friends. Thus, Defendant cannot show that "but for" the lack of an instruction telling the jury to view Burgers' testimony with caution, "the outcome of the proceeding would have been different." *Neels*, 2022 S.D. 4, ¶¶ 15-16, 969 N.W.2d at 735 (further citation omitted).

Lastly, this Court reviews jury instructions as a whole. *Thomas*, 2011 S.D. 15, ¶ 18, 796 N.W.2d at 712. The final jury instructions included Instruction No. 26, which told the jury they were the judges of witness credibility. SR:122. In addition, Instruction 27 told the jury they could disregard the testimony of a witness if they believed that

witness to have lied about a material fact in the case. SR:123. These are sufficient to guide the jury on its consideration of Burgers' testimony when she had not been determined to be an accomplice as a matter of law, and the facts suggested she may not be liable for the same crimes as Defendant.

CONCLUSION

The State agrees with Defendant that Counts 4, 5, and 6 are not at issue, and requests that this Court affirm those convictions. The State requests that this Court affirm Defendant's Judgment of Conviction as to Counts 1, 2, and 3.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 4,592 words.

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

Dated this 15th day of May 2023.

/s/ Stephen G. Gemar
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of May, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Todd W. Stevens* was served through Odyssey File and Serve upon Don C. McCarty, donmccarty@lawinsd.com.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
PLAINTIFF/APPELLEE,

v.

APPEAL NO. 30145

TODD W. STEVENS,
DEFENDANT/APPELLANT

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY J. STOLTENBURG
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

For purposes of this brief, references are as follows: (1) “TT” designates the trial transcript and will be followed by the appropriate page and line number; (2) “AB” designates the Appellee’s Brief and will be followed by the appropriate page number.

STATEMENT OF THE LEGAL ISSUE

I. It was plain error for counsel to fail to request, and the circuit court not to give, required jury instructions on caution and corroboration for accomplice testimony.

Relevant Cases and Statutes:

State v. Corean, 2010 S.D. 85, 791 N.W.2d 44

State v. Johnson, 139 N.W.2d 232 (S.D. 1965)

State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706

SDCL 23A-22-8

STATEMENT OF THE CASE AND FACTS

The Appellant would rely on the facts as developed throughout the Appellant’s Brief and Appellee’s Brief, and incorporated into the argument below.

ARGUMENT

I. It was plain error for counsel to fail to request, and the circuit court not to give, required jury instructions on caution and corroboration for accomplice testimony.

A. Accomplice Status

Ashley Burgers was clearly an accomplice based on her testimony at trial, which entitled Todd Stevens to proper cautionary and corroboration instructions to the jury. In its brief, the State acknowledges numerous points of Burgers' testimony that illustrate she was an accomplice to Stevens. That includes Burgers' testimony that she was the only person allowed to go into Stevens' room to grab things for him, that she kept a ledger regarding who was fronted meth and owed money, that she distributed Stevens' meth to Roger Love herself, that she accompanied Stevens to buy meth, and that her immunity agreement provided she would not be charged for that criminal activity while living with Stevens. *See* AB 9.

The State's attempts at pointing out other testimony that does not support Burgers being an accomplice are unconvincing. The State believes it relevant to the analysis that Burgers' testimony was "ambiguous" as to whether she bought meth from Ryan Gillis, and that she did not say she weighed the meth or received any money. AB 9. But her testimony showed her at least going with Stevens to Sioux Falls, and she was fully involved in the alleged distribution in the home. *See* TT 96, 107. The claim that she did not weigh or distribute the meth is contradicted by her distributing an ounce to Love herself. TT 103, 1-12. Burgers "in some manner knowingly and with criminal intent participate[d], associate[d] or concur[ed] with [Stevens] in the commission of a crime." *State v. Johnson*, 139 N.W.2d 232, 236 (S.D. 1965).

The State cites *State v. Corean*, 2010 S.D. 85, 791 N.W.2d 44 for its position that a jury must decide whether someone is an accomplice, and because this Court held in *Corean* that there was no error in not instructing that some witnesses were accomplices as a matter of law, that there is no error in Stevens' case either. AB 10. But that interpretation of *Corean* is incorrect. The Defendant in that case believed five witnesses to be accomplices and argued that each of those witnesses was an accomplice as a matter of law. *Corean*, 2010 S.D. 85, ¶ 42, 791 N.W.2d 44, 59. The trial court gave a full jury instruction on accomplices, identifying only two out of five as accomplices as a matter of law. *Id.* The trial court decided that the remaining witnesses' accomplice status was a question of fact for the jury. *Id.* The relevant question on appeal was whether the trial court prejudicially erred in not instructing that those remaining three witnesses were accomplices as a matter of law, and this Court determined the trial court did not err in instructing the jury the way it did. *Id.* ¶¶ 44-45, 791 N.W.2d at 59.

The key point to *Corean* the State misses is that the jury was still given an instruction on accomplice testimony. That instruction may have only identified some witnesses as accomplices as a matter of law, but it also told the jury specifically that “[w]hether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the evidence in this case.” *Id.* ¶ 42, 791 N.W.2d at 59. Stevens was not given the benefit of any accomplice instruction, let alone one that instructed the jury to decide if Burgers was an accomplice. The jury could not properly perform its function without that instruction.

Burgers was legally accountable at least for the first three offenses Stevens was charged with. TT 123, ln. 24 – 124, ln. 1; *Corean*, 2010 S.D. 85, ¶ 43, 791 N.W.2d

at 59; *Johnson*, 139 N.W.2d at 236. An accomplice “must in some manner knowingly and with criminal intent participate, associate or concur with another in the commission of a crime.” *Johnson*, 139 N.W.2d at 236. Based on that standard, Burgers would clearly be an accomplice. But even if there is a question as to Burgers’ accomplice status, the jury was never instructed to make the decision that is theirs to make. See *State v. Olhausen*, 1998 S.D. 120, ¶ 9, 587 N.W.2d 715, 718. “The jurors must be warned that, in effect, the accomplice may tailor the truth to his or her own self-serving mold, and that they are to weigh the testimony with that caveat in mind.” *State v. Thomas*, 2011 S.D. 15, ¶19, 796 N.W.2d 706, 712. Because Burgers was an accomplice, Stevens was entitled to proper cautionary and corroboration jury instructions on Burger’s accomplice testimony. *Id.*

B. Corroboration

The State contends that there is sufficient evidence in the record outside of Burgers’ testimony to support the convictions on Counts 1, 2, and 3 of the Indictment. AB 16. Particularly, the State points to Detective Rogers’ and Lieutenant Biteler’s testimony. AB 13.

The State notes that Detective Rogers conducted van surveillance at the residence, and saw Stevens come and go from the residence during the surveillance. TT 128, ln. 18-24; 130, ln. 17-23. He also conducted trash pulls in August 2021 and found “evidence of what appeared to be drug use occurring inside the home.” TT 133, ln. 2-9. That evidence included a handwritten note about smoking marijuana and some meth pipes, along with the handwritten note from Burgers. TT 133, ln. 9-21. Empty baggies with marijuana residue were also found during a trash pull. TT 144, ln. 13-15. A white

envelope with “a possible ledger written on it” was also found and presented to the jury. TT 145, ln. 24. The creation of that ledger is attributed to Burgers, further supporting her accomplice status. AB 9. Officers did in the course of their search of the home find meth, a scale, paraphernalia, and marijuana in his home. TT 143, ln. 2 – 144, ln. 5, 155. A spork and measuring spoon were found in Stevens’ bedroom with white residue on them. TT 144, ln. 16-22.

Detective Rogers saw individuals coming and going from Stevens’ home that Detective Rogers considered known drug users. TT 139, ln. 10 – 140 ln. 8. Brian Jones “made a short-term stop” at Stevens’ home and then left, so Detective Rogers had him followed and he was stopped for an equipment violation, at which time methamphetamine was found in his vehicle. TT 139, ln. 15-21. Paul Schlimmer was also observed leaving Stevens’ home one day, was stopped by South Dakota Highway Patrol after Detective Rogers contacted them, and a methamphetamine pipe was found on Schlimmer’s person. TT 139, ln. 23 – 140, ln. 3. There was no evidence presented that the items found on those individuals came from Stevens, and neither individual testified at trial. Officers also had access to Schlimmer’s cell phone at one point and found nothing incriminating to Stevens on it. TT 154, ln. 2-12. The presence of methamphetamine or paraphernalia with known drug users is not sufficiently corroborative of Burgers’ testimony.

Detective Rogers’ surveillance also saw Burgers coming and going in Stevens’ vehicles on her own. TT 135, ln. 17-19. He obtained a warrant to track Stevens’ vehicles. TT 136, ln. 8-10. Rogers picked up Stevens’ vehicle a few blocks away from Gillis’ home in Sioux Falls a couple times. TT 137, ln. 11-18. And when Stevens was

stopped coming back from Sioux Falls, no drugs were found in his vehicle. TT 150, ln. 14-21. Only a small amount was found on Stevens' person. TT 149, ln. 21-24. There is no doubt that drugs were being used by Stevens and Burgers in the home, but that is all that evidence supports. There is no evidence of any intent to distribute the drugs as charged in Count 3 of the Indictment. The only corroboration of Burgers' testimony on travelling to purchase drugs from Gillis was Rogers seeing Defendant's vehicle location four or five blocks away from Gillis' address a couple times. TT 137, ln. 14-18. Gillis lives in the area of Russell and 12th Avenue in Sioux Falls. TT 108, ln. 4-9. That area of Sioux Falls has many restaurants, businesses, and the Denny Sanford Premiere Center, and there was no testimony that Defendant's vehicle was ever found to be located at Gillis' address.

The State also points to Exhibits 61 and 57 and Lieutenant Biteler's testimony regarding those exhibits as corroboration for Burgers' distribution testimony. AB 17. Those exhibits specifically state that Stevens purchased meth but are vague as to any distribution or what drug was allegedly distributed. Further, the text messages Lieutenant Biteler read from are full of misspellings and errors, hard to read, and he had to guess at words. TT 171, ln. 16-20; 174, ln. 3-5. The messages certainly do not provide any corroboration as to the location of any alleged distribution.

The State's final witness at trial, a GIS Specialist, confirmed Stevens' home was within 1,000 feet of Mickelson Middle School in Brookings. TT 176, ln. 15-24. This only corroborates the fact that Stevens' home was located in a drug free zone, and provides no support to the allegations of drug use or distribution. The only evidence presented of Stevens distributing in a drug free zone was Burgers' testimony.

SDCL 23A-22-8's corroboration requirements are met only where the "corroborative evidence in some substantial degree tends to affirm the truth of the testimony of the accomplice and establish the guilt of the accused." *State v. Reutter*, 374 N.W.2d 617, 626 (S.D. 1985). The State cites *Smith v. Weber* and *State v. Smithers* as cases supporting a decision not to reverse a conviction where there is sufficient evidence outside of the accomplice testimony. In *Weber*, there was "great evidence of guilt" outside of the accomplice testimony. 2005 S.D. 85, ¶ 14, 701 N.W.2d 416, 419-20. In *Smithers*, the sufficient corroborating evidence was the defendants' own statements and admissions, and paraphernalia and other evidence found during a search. 2003 S.D. 128, ¶ 31, 670 N.W.2d 896, 903. Here, there was no corroborating testimony from Stevens. The only statement by Stevens provided as evidence was a few text messages between Stevens and his son, which do not provide any more than circumstantial corroboration on distribution, and provide no corroboration of distribution in a drug free zone. There was no controlled buy, and no evidence that anyone received methamphetamine from Stevens' house outside of Burgers' testimony. Taking the evidence outside of Burgers' testimony as a whole, it is not, as the State argues, more than "suspicious circumstances" of distribution. *See* AB 19; *Smithers*, 2003 S.D. 128, ¶ 33, 670 N.W.2d at 903.

This case is more akin to *Grooms v. State*, where the accomplice was the sole witness to testify with direct knowledge about the crime. 320 N.W.2d 149, 152 (S.D. 1982). Here, Burgers was the only witness with any direct knowledge of the alleged distribution. The remaining evidence only shows: Stevens had drugs and paraphernalia in his home and a small amount of methamphetamine on his person, both in amounts inconsistent with distribution; his home was located in a drug free zone; Stevens' vehicle

was within a few blocks of a dealer's home in Sioux Falls; some known drug users had a small amount of drugs or paraphernalia on their person after leaving Stevens' home; Burgers left a note for Stevens telling him *she* was distributing some of his meth; and Stevens sent vague, hard to read messages to his son without any evidence as to where any alleged distribution would have occurred. The evidence outside of Burger's testimony is entirely circumstantial and does not tend to connect Stevens with the crime of distribution, let alone in a drug free zone, or possession with intent to distribute.

As trial counsel pointed out in his closing argument, the facts in this case are consistent with possession, but they are not consistent with distribution. *See* TT 200-201. There is no substantial degree of corroboration of Burgers' testimony from the other evidence. The corroboration rule is "intended to protect defendants from convictions based *solely* on the testimony of accomplices who may have a motive to make up an unverifiable story." *State v. Kihega*, 2017 S.D. 128, ¶ 18, 902 N.W.2d 517, 524. Moreover, sufficient corroboration is a question for the jury. *Id.* ¶ 11, 902 N.W.2d at 522. But the jury was not properly instructed to consider it in this case.

C. Prejudice

The State argues that there was no prejudice in not giving the proper accomplice instructions and attempts to distinguish this Courts cases such as *Thomas* and *Beene* as involving guilty verdicts based solely on the credibility of the accomplice. AB 19. *See Thomas*, 2011 S.D. 15, ¶ 30, 796 N.W.2d at 716; *State v. Beene*, 357 N.W.2d 589, 592 (S.D. 1977). But this case is completely analogous to those cases. Burgers' testimony provided the only direct evidence of distribution, distribution in a drug free zone, or possession with intent to distribute. Counsel was ineffective in not requesting proper

instructions, and the prejudice from that error is extensive. The State does concede that if this is plain error by counsel that *Thomas* instructs that the error is reversible. AB 15 (citing *Thomas*, 2011 S.D. 15, ¶ 25, 796 N.W.2d at 714).

The Eighth Circuit case *Freeman v. Class* is equally instructive. 95 F.3d 639 (8th Cir. 1996). Where the accomplice instructions were not requested, the failure to do so “was highly prejudicial . . . to the extent that the fundamental fairness of the proceedings and the conviction was undermined.” *Id.* at 642. Failing to make the request deprives a defendant “of a jury that would give appropriate analysis to the evidence presented.” *Id.* Proper accomplice instructions should have been given in this case, and the failure to do so was plain, reversible error.

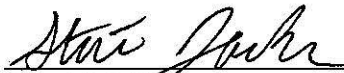
The State’s reliance on the credibility instruction given to the jury in this case is insufficient. Rather than curing the error from failing to instruct on accomplice testimony, the credibility instruction creates “the erroneous effect of telling the jury that the credibility of an accomplice was to be determined by the same test as would be applied in determining the credibility of any other witness.” *Beene*, 257 N.W.2d at 591. Taken as a whole, the jury instructions did not sufficiently prepare the jury to make the decisions it needed to make. Just as with *Thomas*, the failure to request appropriate accomplice instructions so deprived Stevens of effective counsel that his due process rights were violated and the error is reversible on direct appeal. *See Thomas*, 2011 S.D. 15, ¶¶ 20, 24, 796 N.W.2d at 713-14. There is “a reasonable probability that proper jury instructions, motions, and objections at trial may have changed the outcome.” *Id.* ¶ 30, 796 N.W.2d at 716. Confidence in the outcome of the trial as to Counts 1 through 3 – Distribution of a Controlled Substance, Drug Free Zone Violation, and Distribution or

Possession with Intent to Distribute – is undermined. Counsel’s error was plain, Stevens was entitled to proper jury instructions on accomplice testimony, and the error is reversible.

CONCLUSION

Despite the State’s arguments to the contrary, Stevens’ conviction on Counts 1 through 3 of the Indictment does rest on uncorroborated accomplice testimony to a jury that was not properly instructed regarding that testimony. Stevens respectfully requests that this Court reverse the convictions on Count 1 – Distribution of a Schedule I or II Substance (Methamphetamine), Count 2 – Drug Free Zone Violation as a Felony, and Count 3 – Distribution or Possession with Intent to Distribute a Schedule I or II Substance (Methamphetamine).

Respectfully submitted this 13th day of June, 2023.



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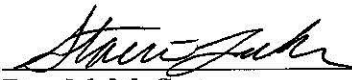


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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 2,623 words from the Statement of the Case and Facts through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 13th day of June, 2023.



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