

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * * *

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

-vs-

Appeal No. 30805

LUIS JOSE MUNOZ,
Defendant and Appellant.

* * * * *

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard Sommers, Presiding

* * * * *

APPELLANT'S BRIEF

* * * * *

Notice of Appeal was filed August 20, 2024

* * * * *

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JURISDICTIONAL STATEMENT

The appellant, Luis Jose Munoz (hereinafter "Munoz"), appeals from the trial court's Judgment of Conviction dated July 23, 2024. Notice of Appeal was filed on August 20, 2024. Jurisdiction is proper pursuant to SDCL § 23A-32-2.

QUESTIONS PRESENTED

- I. Whether there was sufficient evidence to convict Munoz of aggravated assault against Sam Cruz when Munoz did not threaten or put Cruz in fear of imminent serious bodily harm.**

The trial court denied Munoz's motion for judgment of acquittal. There was not sufficient evidence to support Munoz's conviction, because the alleged victim testified that Munoz did not threaten him, but instead said "don't do anything, Filipino", while walking backward and away from the alleged victim. As such, no reasonable jury could have convicted Munoz on this count.

Authority: State v. McReynolds, 2020 S.D. 65, 951 N.W.2d 809; State v. Wolff, 2020 S.D. 15, 941 N.W.2d 216.

- II. Whether there was sufficient evidence to convict Munoz of resisting arrest, when Munoz only walked away from law enforcement without creating a substantial risk of causing physical injury to any law enforcement officer.**

The trial court denied Munoz's motion for judgment of acquittal. There was not sufficient evidence to support Munoz's conviction, because when he was being arrested, Munoz did not prevent or attempt to prevent Officer Cole Kissner from arresting him, nor did he create a substantial risk of causing injury to Officer Cole Kissner. As such, no reasonable jury could have convicted Munoz on this count.

Authority: SDCL § 22-11-4(2); State v. McReynolds, 2020 S.D. 65, 951 N.W.2d 809; State v. Wolff, 2020 S.D. 15, 941 N.W.2d 216.

STATEMENT OF THE CASE

On November 29, 2023, Munoz was indicted by a Brown County grand jury on three counts of aggravated assault (Counts 1, 2 and 3), one count of obstructing law enforcement (Count 4), and one count of resisting arrest (Count 5). Munoz pled not guilty to the charges, and a jury trial commenced on July 15, 2024. Munoz was found guilty of one count of aggravated assault (Count 1), and one count of resisting arrest (Count 5). He was found not guilty of the other charges (Counts 2, 3, and 4).

After a presentence investigation was completed, Munoz was sentenced to twenty (20) years, with twelve (12) years suspended on Count 1, and one (1) year in the Brown County jail on Count 5, with credit for time served. The Judgment of Conviction was filed on July 23, 2024.

This appeal follows.

STATEMENT OF THE FACTS

On November 16, 2023, Munoz entered the Kessler's grocery store in Aberdeen, South Dakota. (TT 17:19-22; TT 33:13-14). At the time, two females, namely, Brooke Olivia Wolf (hereinafter "Wolf"), and Alyssa Lowe (hereinafter "Lowe"), were ringing bells for the Salvation Army in the

entrance to Kessler's grocery store. (TT 17:1; TT 33:13-14). Upon entering, Munoz was observed to have a half drank bottle of vodka in his hand. (TT 17:19-20; TT 33:17-18). Munoz approached Wolf and Lowe, and began talk to them "like any other customer was." (TT 17:21-22).

After a while, the conversation between Munoz and the two females became uncomfortable. (TT 33:18-19). An employee of Kessler's approached the females and asked if assistance was needed for the situation. (TT 18:19-21). Two workers from Kessler's then approached the scene, namely, Vayle Bultema (hereinafter "Bultema") and Phillip "P.J." Jourdain (hereinafter "Jourdain"). (TT 19:4-6). Bultema and Jourdain approached Munoz and asked him to leave. (TT 19:4-6; TT 33:21-25, 34:1).

Munoz pulled out a machete after he was asked to leave Kessler's. (TT 19:12-13; 34:4-5). Law enforcement was then called. (TT 46:4-8). Another employee, Sam Cruz (hereinafter "Cruz"), walked into the area and also encountered Munoz. (TT 46:12-17; TT 72:23-25, 73:1-5). Munoz then left the area.

Munoz was located by law enforcement standing in the middle of State Street. (TT 79:24-25). Officer Cole Kissner (hereinafter "Kissner") gave instructions to Munoz, but Munoz did not comply. (TT 80:10-12). Instead, he

walked away from the officers in the area. (TT 80:16-17). Munoz was eventually taken into custody, after have been shot by a beanbag shotgun with at least three, and possibly four, rounds of beanbag ammunition. (TT 83:7-25). A video was shown to the jury, showing the encounter between Munoz and law enforcement. (TT 91:24; Exhibit 1).

ARGUMENT

- I. Munoz's motion for judgment of acquittal should have been granted on Count 1, because the prosecution failed to prove beyond a reasonable doubt that he was guilty of aggravated assault.**

At the close of the prosecution's case, Munoz moved for judgment of acquittal on each charge in the Indictment. The trial court denied the motion. Munoz argues that the evidence was not sufficient to support the verdict, and the motion for judgment of acquittal should have been granted.

a. *Standard of Review*

This Court reviews a claim of insufficiency of the evidence to support a conviction under the *de novo* standard. State v. McReynolds, 2020 S.D. 65, ¶ 11, 951 N.W.2d 809, 814. This Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. In

this type of challenge to the verdict, the Court does not resolve conflicts in the evidence, nor does it judge the credibility of witnesses. State v. Wolff, 2020 S.D. 15, ¶ 13, 941 N.W.2d 216, 220. The conviction will not be reversed if the evidence, and any reasonable inferences drawn from it, sustain a reasonable theory of guilt. Id.

- b. *The evidence at trial was insufficient to support a conviction on the charge of aggravated assault against Sam Cruz.*

The evidence in this case does not support a conviction for aggravated assault as it concerns Sam Cruz. As Cruz testified, he was going on smoke break while employed at Kessler's. (TT 72:23-24). As he was going outside, he saw Munoz, Jourdain, and Bultema talking. (TT 72:25, 73:1). At the time, Cruz did not know that anything was going on. (TT 73:2-3). In fact, Cruz testified that "(Munoz) probably (thought) I was going to jump on him." (TT 75:1-2).

At that time, Munoz was four to five feet away from Cruz, when he pointed the machete at Cruz and said "don't do anything, Filipino." (TT 73:3-5; 74:1-2; 76:10-16). Munoz was moving backward with the machete. (TT 73:7-8; TT 76:17-19). He then swung it on the floor, and then left the scene. (TT 73:9-10). Per Cruz, the only thing Munoz said to Cruz was "don't try anything Filipino."

(TT 73:11-12; TT 77:11-14).

For the State to meet its burden of proof that Munoz committed aggravated assault against Cruz, it had to prove that Munoz both "attempted" to put Cruz in fear of imminent serious bodily injury, and that Munoz did so by means of a physical menace with a deadly weapon. See South Dakota Criminal Pattern Jury Instruction (hereinafter "SDCPJI") 3-23-3; SR 306. "Physical menace 'requires more than words: there must be some physical act on the part of the defendant.'" State v. Scott, 2019 S.D. 25, ¶ 19, 927 N.W.2d 120. The State does not need to prove "actual fear of imminent serious bodily harm." Id. (citation omitted).

Rather, an attempt to put another in fear exists when the defendant does "any act toward the commission of the crime but fails or is prevented or intercepted in the perpetration thereof."

Id. (citations omitted).

There is no dispute that Munoz' only actions toward Cruz were as follows:

1. He pointed the machete at Cruz, after "probably" thinking that Cruz was going "to jump on him" (TT 75:1-3);
2. Saying "don't do anything Filipino" (TT 73:4-5; 76:10-12);
3. Walking backwards while holding the machete (TT 76:17-18); and
4. Leaving the building and entering the parking lot (TT 76:20-21).

At no point did Munoz attempt, by some physical act, to put Cruz in fear of physical harm.

Even under the deferential standard for reviewing evidence outlined above, no reasonable jury could have concluded that Munoz committed an assault on Cruz. He made no steps toward attempting to cause any problem with Cruz; instead, he warned Cruz "don't do anything" and backed his way out of the building. As such, the conviction on Count 1, alleging aggravated assault against Cruz, should be reversed.

II. Munoz's motion for judgment of acquittal should have been granted on Count 2, because the prosecution failed to prove beyond a reasonable doubt that he was guilty of resisting arrest.

As stated above, at the close of the prosecution's case, Munoz moved for judgment of acquittal on each charge in the Indictment, including the charge of resisting arrest (Count 5). The trial court denied the motion. Munoz argues that the evidence was not sufficient to support the verdict, and the motion for judgment of acquittal should have been granted.

a. *Standard of Review*

The same standard of review applies as is set forth in section 1, *supra*. This Court reviews a claim of insufficiency of the evidence to support a conviction under the *de novo* standard. McReynolds, 2020 S.D. 65, at 11.

This Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. In this type of challenge to the verdict, the Court does not resolve conflicts in the evidence, nor does it judge the credibility of witnesses. Wolff, 2020 S.D. 15, at 13. The conviction will not be reversed if the evidence, and any reasonable inferences drawn from it, sustain a reasonable theory of guilt. Id.

- b. *The evidence at trial was insufficient to support a conviction on the charge of resisting arrest.*

The evidence in this case does not support a conviction for resisting arrest. Munoz was charged with subsection (2) of the resisting arrest statute, which provides:

Any person who intentionally prevents or attempts to prevent a law enforcement officer, acting under color of authority, from effecting an arrest of the actor or another, by: ... (2) using any means which creates a substantial risk of causing physical injury to the law enforcement officer or any other person; is guilty of resisting arrest.

SDCL 22-11-4(2). See also SR 12.

The evidence on this count is contained in Exhibit 1, the video from Officer Kissner that was played for the

jury. (TT 91:24). Upon review of that video, it is apparent that once Munoz was shot with the beanbag shotgun, he laid prone on the ground and did not resist officers efforts to place him under arrest. Further, when officers approached Munoz, he was not brandishing the machete:

Q: Sir, just briefly, the machete wasn't actually located on his person, was it?

A: When he was searched it was found in his right boot.

Q: So when he had gone onto the ground and was laying on the ground, he didn't throw the machete off to the side?

A: No, that was taken by another officer.

Q: And that was in his boot at that time, is that what you said?

A: Yes.

Q: Which boot?

A: His right boot.

(TT 84:13-22) (emphasis added). In other words, Munoz did not create "a substantial risk of causing physical injury" to Officer Kisner, as he did not brandish or threaten to use the machete while he was laying on the ground.

As such, the conviction on Count 5, alleging resisting arrest against Cruz, should be reversed.

CONCLUSION

Cruz's convictions on Counts 1 (aggravated assault) and 5 (resisting arrest) of the Indictment should be reversed, because there was insufficient evidence to convict him. The trial court erred in not granting his motion for judgment of acquittal. As a result, this Court must either reverse the convictions in their entirety, or remand the case for a new trial on Counts 1 and 5.

REQUEST FOR ORAL ARGUMENT

Munoz requests oral argument concerning these matters.

Dated this 7th day of February, 2025.

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CERTIFICATE OF COMPLIANCE

Christopher D. Dohrer, attorney for Appellant,
hereby certifies that the foregoing brief meets the
requirements for monospaced typeface in accordance with SDCL
§ 15-26A-66(a) as follows:

- a. Appellant's brief does not exceed 40 pages;
- b. The body of Appellant's brief was typed in Courier
New 12 point typeface; and
- c. Appellant's brief contains 2,508 words and 12,964
characters with no spaces and 16,253 characters
with spaces, according to the word and character
counting system in WordPerfect used by the
undersigned.

Dated this 7th day of February, 2025.

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CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, hereby certifies that on the 7th day of February, 2025, two true and correct copies of Appellant's Brief with attached appendix were mailed by first class mail, postage prepaid to:

Ms. Sarah Thorne
South Dakota Attorney General's Office
1302 E Hwy 14, Ste. 1
Pierre, SD 57501

and the original and two copies were mailed by first class mail, postage prepaid, to the South Dakota Supreme Court, 500 East Capitol, Pierre, SD 57501.

Dated this 7th day of February, 2025.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

-vs-

Appeal No. 30805

LUIS JOSE MUNOZ,
Defendant and Appellant.

* * * * *

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard Sommers, Presiding

* * * * *

APPENDIX TO APPELLANT'S BRIEF

* * * * *

Notice of Appeal was filed August 20, 2024

* * * * *

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FILED

JUL 23 2024

STATE OF SOUTH DAKOTA

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

JUDGMENT OF CONVICTION

-VS-

CRI23-1155

LUIS JOSE MUNOZ,

Defendant.

An Indictment was filed with this Court on December 1, 2023, charging the Defendant with the crime of Aggravated Assault in violation of SDCL 22-18-1.1(5) and Resisting Arrest in violation of SDCL 22-11-4(2). A Part II Information for Habitual Offender in violation of SDCL 22-7 was filed on January 25, 2024. The Defendant was arraigned on said Indictment on January 26, 2024. The Defendant, the Defendant's attorney, Chris Dohrer, and Jennifer Stoddard, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant pled not guilty to the charges of Aggravated Assault in violation of SDCL 22-18-1.1(5), Resisting Arrest in violation of SDCL 22-11-4(2), and to the Part II Information for Habitual Offender in violation of SDCL 22-7.

A Jury Trial was held before this Court on July 15 and July 16, 2024. The Defendant, the Defendant's attorney, Chris Dohrer, and Jennifer Stoddard, prosecuting attorney, appeared at the Defendant's trial. At the conclusion of the trial, the Defendant was found guilty.

A pre-sentence investigation was ordered, and a sentencing hearing was held before the Court on July 23, 2024. The Defendant, the Defendant's attorney, Chris Dohrer, and Jennifer Stoddard, prosecuting attorney, appeared at the Defendant's sentencing hearing.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; that the Defendant was represented by competent counsel; that the Defendant exercised his right to a jury trial and was found guilty.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Aggravated Assault in violation of SDCL 22-18-1.1(5), Resisting Arrest in violation of SDCL 22-11-4(2), and the Part II Information for Habitual Offense in violation of SDCL: 22-7.

SENTENCE

On July 23, 2024, 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:

ORDERED that the Defendant be incarcerated in the South Dakota State Penitentiary for a period of twenty (20) years, with twelve (12) years suspended, and one (1) year in the Brown County Jail on the Resting Arrest charge and with credit of 249 days for time already served through July 23, 2024, and it is

FURTHER ORDERED, that Defendant promptly pay \$116.50 in court costs for the Aggravated Assault Charge and \$98.50 in court costs for the Resisting Arrest charge, and it is

FURTHER ORDERED the Defendant reimburse Brown County for all Court-appointed attorney fees and private investigator costs, and it is

FURTHER ORDERED the Defendant pay restitution to the Crime Victim's Fund for the victim's medical costs and/or and counseling costs, if any, and it is

FURTHER ORDERED, the Defendant has no contact with the victim, Sam Cruz while in custody and on parole and it is

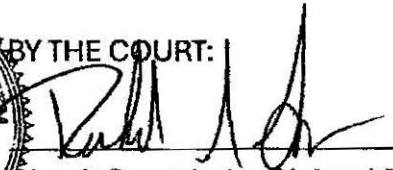
FURTHER ORDERED, that any suspended portion of this sentence be under the Department of Corrections, Board of Pardons & Paroles.

IT IS HEREBY NOTED that pursuant to SDCL 23A-27-48, the defendant was informed in open court of the estimated minimum period he must serve before being eligible for parole.

Dated this 23rd day of July



BY THE COURT:


Circuit Court Judge Richard Sommers

ATTEST:

Marla R. Zastrow, Clerk of Court

By: , Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30805

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LUIS JOSE MUNOZ,

Defendant and Appellant.

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

THE HONORABLE RICHARD SOMMERS
Circuit Court Judge

APPELLEE'S BRIEF

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AND APPELLANT

Notice of Appeal filed August 20, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30805

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LUIS JOSE MUNOZ,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant/Appellant, Luis Jose Munoz, is referred to as “Munoz.” Plaintiff/Appellee, the State of South Dakota, is referred to as “State.” The settled record is denoted as “SR.” All references to the settled record are followed by the e-record pagination. Trial exhibits are designated as “Ex”; Munoz’s brief is denoted as “AB.” In addition, two witnesses and three victims are identified by their initials in pre-trial documents. *See* SR:14-15, 31. Therefore, the State identifies these individuals by their initials in its brief. The jury trial transcript dated July 15-16, 2024, is denoted as TT.

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

JURISDICTIONAL STATEMENT

On July 23, 2024, the Honorable Richard Sommers, Circuit Court Judge, Fifth Judicial Circuit, filed Munoz's Judgment of Conviction in Brown County Criminal File No. 23-1155. SR:403-04. Munoz filed a Notice of Appeal on August 20, 2024. SR:408-09. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED IN DENYING MUNOZ'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS 1 AND 5?¹

The circuit court denied Munoz's motion for judgment of acquittal on all counts. The jury found Munoz guilty on Counts 1 and 5, and not guilty on Counts 2, 3, and 4.

State v. Gallegos, 316 N.W.2d 634 (S.D. 1982)

State v. Peneaux, 2023 S.D. 15, 988 N.W.2d 263

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

State v. Solis, 2019 S.D. 36, 931 N.W.2d 253

SDCL 22-11-4(2)

SDCL 22-18-1.1(5)

STATEMENT OF THE CASE

On November 29, 2023, a Brown County grand jury indicted Munoz on the following five counts:

¹ Munoz presents the circuit court's denial of his judgment of acquittal on Counts 1 and 5 as two issues. AB:ii. The State combines these two issues into one for brevity and conciseness.

- Count 1: Aggravated Assault against S.C., a Class 3 felony, in violation of SDCL 22-18-1.1(5);
- Count 2: Aggravated Assault against P.J., a Class 3 felony, in violation of SDCL 22-18-1.1(5);
- Count 3: Aggravated Assault against V.B., a Class 3 felony, in violation of SDCL 22-18-1.1(5);
- Count 4: Obstructing Law Enforcement, a Class 1 misdemeanor, in violation of SDCL 22-11-6; and
- Count 5: Resisting Arrest, a Class 1 misdemeanor, in violation of 22-11-4(2).

SR:11-16. Munoz was arrested two days later. SR:18. The State filed a Part II Habitual Offender alleging Munoz committed burglary in Texas in 2007. SR:27. Defense counsel filed several motions before trial, including a Motion to Exclude References to Young Girls and a Motion to Exclude References to November 2nd Incident. SR:31-34. The State also filed several standard pretrial motions. SR:35-36. The State and defense counsel further filed discovery motions. SR:37-41.

Munoz's two-day jury trial began on July 15, 2024. TT:1. Multiple witnesses testified for the State, including the three alleged victims, V.B., P.J., and S.C. TT:43-78. In addition, B.W. and A.L., who were bell ringers at Kessler's the day of the assault, testified. TT:16-43. Aberdeen Police Department Officers Cole Kissner, Kaden Johnson, Jordan Majeske, and Zackery Krage also testified. TT:79-95. Officer Johnson's bodycam recorded Munoz's interactions with law enforcement after he responded to the scene; it was played for the jury. TT:86-92; Ex. 1.

After the State rested, Munoz moved for a motion of judgment of acquittal on all counts. TT:97. He argued that even though a machete is

a deadly weapon, nobody was put in fear because Munoz was retreating from the scene. TT:96-98. On Counts 4 and 5, obstructing law enforcement and resisting arrest, Munoz claimed that after viewing the video of the arrest, the evidence was not there. TT:98. The State resisted the motion, reiterating that none of the three victims acted aggressively towards Munoz. TT:98-99. It also argued Munoz was on video saying he obstructed law enforcement and wasn't going to stop for any officer except officer Kretchman. TT:99. The circuit court denied Munoz's motion on all counts. TT:99-100.

The defense rested without calling any witnesses. TT:100. After closing statements, the jury went into deliberation. TT:144-45. The jury found Munoz guilty of Count I, Aggravated Assault against S.C., and Count 5, Resisting Arrest. SR:331-32. It returned not guilty verdicts on Counts 2, 3, and 4. SR:331-32. Munoz was also found guilty of the 2007 burglary alleged in the Part II Habitual Offender. SR:403-04.

The circuit court sentenced Munoz to twenty years in the state penitentiary with twelve years suspended for Aggravated Assault. SR:404. It also ordered Munoz to serve one year in the Brown County Jail for Resisting Arrest, with 249 days credit. SR:404.

STATEMENT OF THE FACTS

On November 16, 2023, B.W. and A.L. were ringing bells for the Salvation Army at Kessler's grocery store in Aberdeen. TT:16-17, 33. Munoz walked up to the two women with a bottle of vodka in his hands

and began talking to them. TT:17, 33. After a time, A.L. and B.W. got uncomfortable with the conversation. TT:33-34. The two women talked with Munoz for fifteen to twenty minutes. TT:35. They tried to avoid aggravating Munoz after seeing the bottle of alcohol in his hand. TT:35.

A customer who passed the trio informed Kessler's staff of the situation. TT:36. V.B., one of Kessler's front-end managers, walked out to the scene with P.J. TT:44-45. When the two arrived, V.B. immediately noticed the bottle of Vodka in Munoz's hand. TT:45. V.B. asked Munoz to leave due to his intoxication and threatened to call the police if he refused to leave. TT:45. P.J. then stepped forward and gestured towards the door. TT:45.

Munoz next took a couple of steps back before he pulled out a machete and waved it at V.B. and P.J. TT:45-46. During this time, V.B. called 911 and motioned for A.L. and B.W. to leave the area. TT:46. Another Kessler's employee, S.C., walked outside to smoke a cigarette when he saw the altercation. TT:72-73. Munoz noticed S.C., who was about four to five feet away from him, and pointed the machete at him and said, "[D]on't do anything, Filipino." TT:73. S.C. was shocked to see Munoz pointing the machete at him and tried to calm himself down. TT:73. For three to four seconds, Munoz stood still and pointed the machete at S.C. TT:76. Munoz then stepped backward while waving the machete until he heard police sirens, then fled from the scene. TT:72-74.

Aberdeen Police Department Officer Cole Kissner received V.B.'s 911 call and was dispatched to Kessler's along with other officers. *See* TT:78-79. Officer Kissner found Munoz standing in the middle of a nearby street, staring at the police vehicle. TT:79-80. Officer Kissner commanded Munoz to put his hands up and get on the ground. TT:80. Munoz refused these commands, walking away from the officers and taking his sweatshirt off before throwing it on the ground. TT:80. Aberdeen Police Officer Jordan Majeske also responded to the call. TT:83. Because Munoz was not listening to law enforcement instructions and officers on the scene did not know if he still had the machete on him, Officer Majeske used a beanbag shot gun to get Munoz to comply. TT:83-84. After at least three shots from the beanbag gun, Munoz finally complied. TT:83-84. Law enforcement located a large machete on Munoz's person. TT:84.

Law enforcement arrested Munoz and took him to the hospital to get his injuries from the beanbag gun checked out. *See* TT:91-92; *see also* Ex. 1, 18:30-29:35. Officers then transported Munoz to the Brown County Jail. TT:92.

ARGUMENT

THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE
CIRCUIT COURT TO DENY MUNOZ'S MOTION FOR
JUDGMENT OF ACQUITTAL.

a. Standard of Review.

A denial of a motion for judgment of acquittal is reviewed de novo. *State v. Solis*, 2019 S.D. 36, ¶ 17, 931 N.W.2d 253, 258 (further citation omitted). This Court determines “whether the evidence was sufficient to sustain the conviction.” *Id.* at 258. To do this, this Court asks “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (cleaned up). “If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside.” *Id.* (cleaned up).

b. There was Sufficient Evidence to Support the Circuit Court’s Denial of Munoz’s Motion for Judgment of Acquittal on Count 1.

On Count 1, Aggravated Assault, the State needed to show beyond a reasonable doubt that Munoz (1) attempted to put S.C. “in fear of imminent serious bodily injury”; and (2) did so “by means of physical menace with a deadly weapon.” SR:306 (Jury Instruction No. 10); *see also* SDCL 22-18-1.1(5). A deadly weapon is any “firearm, stun gun, knife, or device . . . which is calculated or designed to inflict death or serious bodily harm.” SR:303 (Jury Instruction No. 7); *see also* SDCL 22-1-2(10); *State v. Robertson*, 2023 S.D. 19, ¶ 27, 990 N.W.2d 96, 103 (referencing the same definition).

The relevant question of an aggravated assault charged under SDCL 22-18-1.1(5) is “not whether the alleged victim was in fear and instead, the focus is on what the defendant was *attempting* to do.”

Robertson, 2023 S.D. 19, ¶ 31, 990 N.W.2d at 104 (emphasis in original) (cleaned up). “The gravamen of the offense is the attempt to put a person in fear of imminent serious bodily harm.” *Id.* (cleaned up). “Physical menace ‘requires more than words: there must be some physical act on the part of the defendant.’” *Robertson*, 2023 S.D. 19, ¶ 27, 990 N.W.2d at 103 (citing *State v. Scott*, 2019 S.D. 25, ¶ 19, 927 N.W.2d 120, 127) (further citation omitted); *see also* SR:303 (providing the same definition to the jury). “Actual fear of imminent serious bodily harm is not an essential element of the offense.” *State v. Peneaux*, 2023 S.D. 15, ¶ 37, 988 N.W.2d 263, 272 (further citation omitted).

The State presented sufficient evidence for the jury to find Munoz committed Aggravated Assault against S.C. beyond a reasonable doubt. S.C. testified Munoz waved a machete at him when they were about four or five feet apart. TT:72-74. Munoz pointed the machete directly at S.C. and told him, “[D]on’t do anything, Filipino.” TT:73. S.C. testified that Munoz pointed the machete directly at him for three or four seconds. TT:76. S.C. stated that he was shocked and that he tried to calm down. TT:72-73. Munoz continued to swing the machete, moving backward. TT:73. Only when he heard police sirens did Munoz flee the scene. TT:73.

Munoz pointing the machete at S.C. for three to four seconds is the “physical act” required under SDCL 22-18-1.1(5) that is an attempt to “put another in fear of imminent serious bodily harm.” *See Robertson*,

2023 S.D. 19, ¶ 27, 990 N.W.2d at 103; *see also State v. Gallegos*, 316 N.W.2d 634, 636-39 (S.D. 1982) (holding that a defendant who pulled a knife and waved it at a victim, causing the victim to jump back to avoid being stabbed is sufficient evidence to support a rational theory of guilt); *see also State v. Ahmed*, 2022 S.D. 20, ¶ 17, 973 N.W.2d 217, 222 (noting that it makes no difference whether a gun pointed at someone was loaded or unloaded in discussing the factual basis for an aggravated assault charge under SDCL 22-18-1.1(5)). Along with this act, Munoz also threatened S.C. by saying, “[D]on’t do anything, Filipino.” TT:73. Munoz’s machete meets the criteria of a deadly weapon. *See Robertson*, 2023 S.D. 19, ¶ 27, 990 N.W.2d at 103; SDCL 22-1-2(10).

It is the jury’s job to resolve any conflicts in the evidence and to determine witness credibility. *State v. Ganrude*, 499 N.W.2d 608, 611 (S.D. 1993). Munoz stood still and pointed the machete at S.C., who was four to five feet away from him, for three to four seconds. From that distance, Munoz could have easily lunged forward and hit S.C. with the blade of his machete. Munoz also told S.C. to not try anything. S.C. testified he was shocked at seeing Munoz with the machete. The jury could have reasonably inferred that Munoz’s actions of pointing the machete at S.C., combined with the threatening language, constituted an attempt by Munoz to put S.C. in fear of serious bodily injury. *See Solis*, 2019 S.D. 36, ¶ 17, 931 N.W.2d at 258. In short, the State presented

sufficient evidence for the jury to find Munoz guilty of Aggravated Assault against S.C.

c. There was Sufficient Evidence to Support the Circuit Court's Denial of Munoz's Motion for Judgment of Acquittal on Count 5.

On Count 5, Resisting Arrest, the State needed to present evidence beyond a reasonable doubt that Munoz “intentionally prevented or attempted to prevent Officer Cole Kissner from effecting the arrest of the defendant by any means other than physical force or violence, which created a substantial risk of causing physical injury to Officer Cole Kissner.” SR:310 (Jury Instruction No. 14); *see also* SDCL 22-11-4(2). Further, Officer Kissner must have been acting under “color of authority” and trying to arrest Munoz. SR:310 (Jury Instruction No. 14); *see also* SDCL 22-11-4(2). An officer acts under the color of authority if “in the regular course of assigned duties, he or she is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances.” SDCL 22-11-5.

Officer Kissner testified at trial. TT:79-81. He stated that law enforcement received a report of a male brandishing a machete and threatening employees at Kessler's grocery store. TT:79. Officer Kissner responded to the call and located Munoz standing in the middle of a nearby street, staring at his police cruiser. TT:79-80. Once he located Munoz, Officer Kissner commanded Munoz to put his hands up and get on the ground. TT:80. Munoz refused and continued walking, despite

Officer Kissner telling him to get on the ground and stop walking multiple times. TT:80.

Officer Majeske testified that when Munoz refused to listen to officers' instructions, they used a beanbag gun to detain him. TT:83. Officers deployed the gun because of the report given to them; law enforcement was unsure if Munoz still had the machete in his possession and that Munoz refused to listen to them. TT:83. Officer Johnson described Munoz as "uncooperative" and that he "seemed very volatile." TT:86. After detaining him, officers found a large machete on Munoz's person. TT:83-84.

Munoz attempted to prevent Officer Kissner and others from arresting him by not following their instructions multiple times and walking away from them. As discussed above, a machete constitutes a dangerous weapon. Testimony from the Kessler's employees and A.L. and B.W. also established that Munoz was intoxicated. Officer Kissner responded to the call; he ordered Munoz to get his hands up and get on the ground. Simply put, Officer Kissner was acting under the color of authority to arrest Munoz when he arrived on scene after receiving the emergency dispatch of a man with a machete. Officer Kissner worked for the Aberdeen Police Department, and was "in the regular course of assigned duties" when called to scene. See SDCL 22-11-5. Further, Officer Kissner made a "judgment in good faith based upon surrounding facts and circumstances" when he ordered Munoz to get on the ground.

See SDCL 22-11-5.

When viewed in a light most favorable to the State, “any rational trier of fact” could have found Munoz guilty beyond a reasonable doubt. *Solis*, 2019 S.D. 36, ¶ 17, 931 N.W.2d at 258. Munoz did not want to be arrested; he refused to listen to officers’ instructions on the scene and attempted to walk away from them. He also did not surrender the machete; law enforcement only secured it after they took Munoz to the ground. Law enforcement also did not know whether Munoz ditched the machete.

Jury Instruction No. 14 stated that Munoz needed to prevent Officer Kissner from arresting him through any means “*other* than physical force or violence, which created a substantial risk of causing physical injury” to Officer Kissner. SR:310 (emphasis added). Munoz did that through possessing a deadly weapon and not listening to officers’ repeated instructions to get down on the ground.

The jury considered all these facts and testimony in finding Munoz guilty of Resisting Arrest. The jury concluded that Munoz “created a substantial risk of causing physical injury” to Officer Kissner with his conduct. See SR:310 (Jury Instruction No. 14). After listening to the testimony of the officers, the jury also concluded Officer Kissner was acting under the “color of authority” to arrest Munoz. The State presented sufficient evidence to sustain the jury’s verdict finding Munoz guilty of resisting arrest.

CONCLUSION

The State respectfully requests that this Court affirm Munoz's Judgment of Conviction.

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 2,597 words.

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

Dated this 24th day of March 2025.

/s/ Stephen G. Gemar

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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of March 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Luis Jose Munoz* was served via electronic mail upon Christopher D. Dohrer at cdohrerlaw@nvc.net.

/s/ Stephen G. Gemar

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