#31134-a-RG
2026 S.D. 59

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

TROY MCFATE, Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT A. ROETZEL
Judge

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CONSIDERED ON BRIEFS
AUGUST 25, 2026
OPINION FILED **11/24/26**

#31134

GUSINSKY, Justice

[¶1.] Troy McFate gave a law enforcement officer a letter stating certain members of law enforcement would be executed unless they stood down within 48 hours. Construing the letter as a threat, officers initiated an investigation and obtained search warrants for McFate's residence, vehicle, and blood. Drug paraphernalia was found in McFate's residence and methamphetamine was subsequently found in his blood. McFate asserts the letter was not a true threat and his speech was protected by the First Amendment. A jury convicted McFate of ingestion of a controlled substance, threatening a law enforcement officer, and possession of drug paraphernalia. McFate appeals. We affirm.

Factual and Procedural History

[¶2.] At approximately 10:00 p.m. on March 29, 2024, Police Officer Lexy Deneke was completing a traffic stop in Hot Springs, South Dakota. As Officer Deneke finalized the stop from inside her patrol car, she noticed an unknown man standing near her vehicle with a piece of paper in his hand. The man, later identified as Troy McFate, was asked by Officer Deneke to leave the area, but he refused to do so. McFate approached her vehicle and handed her the paper through the car window saying, "You'll see it Monday." McFate left the area, and Officer Deneke finalized the traffic stop before reading the note.

[¶3.] The note contained the following printed message:

> DEAR ALL POLICE WORLDWIDE
>
> LET ME MAKE THIS CLEAR WITH EVERYONE WITHIN THE FAKE CORPORATION I YOU HAVE GIVEN YOU 48 HOURS AS FROM TODAY DATE 13TH MARCH 2024 YOU MUST STAND DOWN FROM YOUR CURRENT POSITION

> WITHIN THE ILLUMINATI POLICE FORCES YOU MUST GIVE UP YOUR WARRANT CARD BECAUSE YOU HAVE COMMITTED CRIMES AGAINST HUMANITY AND YOU HAVE BREACHED YOUR OATH TO THE PEOPLE I WILL MAKE THIS CLEAR WITH YOU THAT IF YOU DON'T STAND DOWN FROM YOUR CURRENT POSITION YOU WILL BE ARRESTED BY UNITED STATES MILITARY AND EXECUTED ON MY ORDER WITHOUT ANY TRIAL DO YOU UNDERSTAND.
>
> YOURS SINCERELY
>
> John Kahlooni
> HIS MAJESTY KING JOHN F KAHLOONI JR.

Additionally, in the letter's upper right corner, the original date of "13th March 2024" was crossed out in pen and "4/1/24" was handwritten below it. Accompanying the signature was a printed fingerprint and seal of the "International Common Law Court of Justice."

[¶4.] The letter scared Officer Deneke, and she left the area out of fear that she was being followed by McFate. Although the record is unclear as to how McFate was identified, on April 1, 2024, Police Officer Matthew Maxfield went to McFate's place of employment, Lynn's Dakotamart in Hot Springs. Upon arrival, Officer Maxfield spoke with Duane Fisher, the store manager. Fisher stated that he had previously seen McFate with similar copies of the letter. After locating McFate in the store, Officer Maxfield asked McFate what the letter meant, specifically inquiring about the term "execution." In response, McFate stated, "Something is coming." McFate refused to answer any other questions while being recorded by Officer Maxfield's body camera. Officer Maxfield placed McFate under arrest for threatening a law enforcement officer and for terroristic threats.

[¶5.] Following the arrest, Officer Maxfield requested a search warrant for McFate's residence and vehicle to search for documents pertaining to the letter, firearms, ledgers, and electronic devices. In his supporting affidavit, Officer Maxfield recited the incident with Officer Deneke and McFate's statement prior to the arrest. The circuit court granted the search warrant, and a search of McFate's vehicle revealed five copies of the letter, but these copies did not have a modified date.

[¶6.] While searching McFate's residence, Officer Maxfield discovered "a clear plastic bag containing a white crystalline substance, glass pipe and other drug paraphernalia." Due to this discovery, he immediately left the secured residence, amended his affidavit, and requested a second search warrant to obtain a sample of McFate's blood or urine. The circuit court granted the second search warrant, and jail officials collected a sample of McFate's blood at the Fall River County Jail. Subsequent testing revealed methamphetamine in McFate's blood.

[¶7.] The State originally charged McFate with the following: count 1: threatening a law enforcement officer or family in violation of SDCL 22-11-15.5, a Class 5 felony; count 2: ingestion of a controlled drug or substance in violation of SDCL 22-42-5.1, a Class 5 felony; count 3: possession of a controlled drug or substance in violation of SDCL 22-42-5, a Class 5 felony; and count 4: possession of drug paraphernalia in violation of SDCL 22-42A-3, a Class 2 misdemeanor. Following a preliminary hearing, however, the circuit court dismissed counts 1 and 3 for lack of probable cause. The State then recharged McFate with a count of

threatening a law enforcement officer or family in violation of SDCL 22-11-15.6, a Class 1 misdemeanor.[1]

[¶8.] McFate moved to suppress the evidence obtained from his residence, vehicle, and blood sample, arguing that Officer Maxfield's affidavits failed to provide probable cause. Specifically, he contended that possession of drug paraphernalia was insufficient to permit a warrant for a blood draw. He additionally contended that the letter was protected speech under the First Amendment such that there was no crime to investigate and, thus, no probable cause to issue a search warrant to look for evidence related to this letter. The circuit court held an evidentiary hearing and denied McFate's motion, rejecting his First Amendment argument and finding that the affidavits provided probable cause for the issuance of the search warrants.[2] Alternatively, the circuit court found that, even in the absence of probable cause, suppression was not called for under the good faith exception.

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1. SDCL 22-11-15.5 (felony) is distinguished from SDCL 22-11-15.6 (misdemeanor) in that the felony charge requires that the threat be transmitted via mail or messenger whereas the misdemeanor charge merely requires that the threat be communicated.

2. The parties agreed that the circuit court could consider the testimony and evidence presented at the preliminary hearing when addressing McFate's First Amendment claim. This included testimony from Officer Deneke regarding McFate's statements when giving her the letter, her fear and concerns after receiving it, and McFate's statements to Officer Maxfield during the subsequent investigation. McFate had raised the First Amendment issue when arguing, at the preliminary hearing, that the threat charge should not be bound over for prosecution. The magistrate court declined to find that the letter was protected speech, noting that the First Amendment does not protect threats of death or violence.

[¶9.] A jury trial was held in May 2025. The State's case relied on the testimony of officers Deneke and Maxfield, Dakotamart manager Duane Fisher, and physical exhibits such as the officers' body camera footage and various forms of the letter. In addition to the factual recitation above, Officer Deneke testified that while the letter was not addressed to her by name, she felt threatened and scared for her life. Duane Fisher, McFate's boss, testified that he found copies of the letter in the break room at Lynn's Dakotamart a few days before McFate gave Officer Deneke the letter. On the same day Fisher found the letters, he saw McFate holding the letters and commented to McFate that Fisher has friends and family in law enforcement. In response, according to Fisher's trial testimony, McFate "might have said, I'm sorry, or something like that."

[¶10.] After the State rested, McFate moved for a directed verdict on the threat charge,[3] which the circuit court denied. McFate testified on his own behalf and, on direct examination, repeatedly stated that he did not write the letter and expressed that he did not intend for the letter to be perceived as a threat. Instead, McFate testified that he found the letter on social media, and his goal in handing it to Officer Deneke was to warn law enforcement. McFate further testified that he was unable to determine the true identity of the author, John Kahlooni.

3. Counsel moved for a directed verdict, but we treat it as a motion for judgment of acquittal pursuant to SDCL 23A-23-1 ("Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place.").

[¶11.] As to the modified date at the top of the letter, McFate said that he crossed off the original date and wrote in a future date as an act of "decoding" which was a type of "math" where he "was figuring out that this could be the date."

[¶12.] On cross-examination, the State pressed McFate on his conversation with Fisher prior to distributing the letter:

> **State:** Because of what [Fisher] said to you, and you apologized about the threatening nature of that note towards law enforcement, but you still went out later, a day or two later, and gave it to Officer Deneke; isn't that correct?
>
> **McFate:** Yes, I did do that.
>
> **State:** So you knew the threatening nature towards law enforcement before you ever gave it to Officer Deneke; isn't that correct?
>
> **McFate:** I guess so.

McFate also admitted on cross-examination that if the original date on the letter had passed, there would no longer be an impending threat and thus no need to warn law enforcement. But during re-direct, McFate reiterated that he did not intend to threaten law enforcement and drew attention to the fact that 48 hours from March 29 is April 1—April Fools' Day. Without calling any other witnesses, McFate rested.

[¶13.] Prior to trial, McFate proposed two supplemental jury instructions related to the mens rea required to prove that the letter was a true threat rather than constitutionally protected speech. The first was a proposed instruction regarding how a person may adopt a third party's threat as their own, citing *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999). The second proposed instruction

stated, "'Threat' defined- to constitute a threat, a person must consciously disregard a substantial and unjustifiable risk that his conduct will cause harm to another person" citing *Counterman v. Colorado*, 600 U.S. 66, 79 (2023).

[¶14.] At trial, McFate objected to the court's proposed jury instructions 19, 20, and 21. He argued that the jury should be instructed as to the correct mens rea under *Counterman*, specifically, that he had a "subjective understanding of the threatening nature of what [he was] communicating." He further argued that it was necessary for the jury to determine whether he took "some action to adopt the threat as his own, because otherwise it should not be illegal to communicate that someone else is being threatened." The circuit court denied McFate's proposed instructions and overruled his objections.

[¶15.] The jury found McFate guilty on all three counts. The circuit court sentenced McFate on June 30, 2025, suspending terms in the state penitentiary and county jail, and imposing fines and costs. McFate filed a notice of appeal on July 3, 2025.

[¶16.] On appeal, McFate raises three issues, which we restate:

1. Whether the circuit court erred by denying McFate's suppression motion.

2. Whether the circuit court erred by refusing to give McFate's proposed jury instructions.

3. Whether the circuit court erred when it denied McFate's motion for judgment of acquittal.

Analysis and Decision

1. Whether the circuit court erred by denying McFate's suppression motion.

[¶17.] McFate first argues that the circuit court erred in denying the motion to suppress his blood test results obtained pursuant to a search warrant. He contends that Officer Maxfield's affidavit failed to provide sufficient probable cause to support a search warrant and subsequent collection of his blood. Although McFate challenged both search warrants below—one for his residence and vehicle and another for his blood—on appeal he only challenges the propriety of the blood draw search warrant. We begin our review with whether there was probable cause to support the blood draw search warrant.

[¶18.] Under both the Fourth Amendment to the United States Constitution and article VI, § 11 of the South Dakota Constitution, "individuals are protected against 'unreasonable searches and seizures[.]'" *State v. Slepikas*, 2021 S.D. 43, ¶ 16, 962 N.W.2d 722, 727 (alteration in original). A neutral judicial officer may "issue a warrant 'based on probable cause prior to the execution of a search.'" *Id.* (citation omitted). "A blood draw constitutes a search of the person such that the State must obtain a warrant or act under an exception to the warrant requirement." *Id.* ¶ 16, 962 N.W.2d at 728 (citation omitted).

[¶19.] "We review the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing." *State v. O'Neal*, 2024 S.D. 40, ¶ 15, 9 N.W.3d 728, 737 (quoting *State v. Ostby*, 2020 S.D. 61, ¶ 13, 951 N.W.2d 294, 298). "However, our review of the probable cause determination of the issuing magistrate judge is deferential. Reviewing courts are

not empowered to conduct an after-the-fact de novo probable cause determination; on the contrary, the issuing judge's legal basis for granting the warrant is examined with great deference." *Id.* (citation modified). "On review, we are limited to an examination of the facts as contained within the four corners of the affidavit." *Id.* (citation omitted).

[¶20.] "In determining whether probable cause exists to support the issuance of a search warrant, there must be a showing of probability of criminal activity." *Id.* ¶ 16, 9 N.W.3d at 737 (citation modified). "[P]robable cause 'is a fluid concept—turning on the assessment of probabilities in particular contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" *Id.* (citation omitted). "The judge must be able to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before the judge, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Ostby*, 2020 S.D. 61, ¶ 14, 951 N.W.2d at 299 (citation modified). On appeal, we evaluate "the totality of the circumstances to decide if there was at least a 'substantial basis' for the issuing judge's finding of probable cause." *O'Neal*, 2024 S.D. 40, ¶ 16, 9 N.W.3d at 737 (citation omitted).

[¶21.] McFate directs our attention to Officer Maxfield's testimony at the suppression hearing. This evidence, however, is beyond the scope of our review, which is limited to whether the affidavit contained probable cause. *Id.* While the majority of Officer Maxfield's amended affidavit pertained to the investigation of

McFate's letter, it covered two legally relevant topics for the blood search warrant: Officer Maxfield's experience and the items located at McFate's residence.

[¶22.] Officer Maxfield's amended affidavit stated that he received McFate's home address from county jail staff. The affidavit also stated that while searching McFate's residence, Officer Maxfield found a clear plastic bag inside of the nightstand containing a "white crystalline substance, [a] glass pipe and other drug paraphernalia."

[¶23.] Based on the information supplied to the circuit court, McFate's residence contained an unknown substance in the same location as a glass pipe and other drug paraphernalia. This information could lead the court to the conclusion that the unknown substance *may* be a controlled drug or substance. *See United States v. Mathes*, 58 F.4th 990, 994 (8th Cir. 2023) (holding that to obtain probable cause, law enforcement need not field test unknown substances "when the totality of the circumstances establish a fair probability or substantial chance that the substance is illicit" (citation omitted)).

[¶24.] But even if there was reason to believe that the substance at McFate's residence was illicit, it does not follow that there was probable cause to believe that McFate recently ingested the substance. Officer Maxfield's amended affidavit does not offer any facts linking the substance with recent use. In the absence of such facts, the inference of recent ingestion is too remote to constitute probable cause that McFate committed the offense of ingestion of a controlled drug or substance. Thus, the circuit court erred in finding probable cause.

Alternative good-faith exception

[¶25.] Although Officer Maxfield's amended affidavit was deficient, the circuit court did not err in denying McFate's motion to suppress the blood draw because the good-faith exception applies. "Under the good-faith exception, evidence may be admissible, even when a warrant is subsequently invalidated, if law enforcement's reliance on the warrant was objectively reasonable." *State v. Running Shield*, 2015 S.D. 78, ¶ 6, 871 N.W.2d 503, 505 (citation omitted). This exception is reviewed de novo. *Id.* (citation omitted).

[¶26.] "We have previously explained that '[s]uppression of evidence is not a personal constitutional right, but a judicially created remedy to deter constitutional violations by government officials.'" *Id.* ¶ 7, 871 N.W.2d at 506 (alteration in original) (citing *United States v. Leon*, 468 U.S. 897, 906 (1984)). "The United States Supreme Court has described the exclusionary rule as a 'last resort' appropriate when 'the deterrence benefits of suppression . . . outweigh its heavy costs.'" *Id.* (alteration in original) (citing *Davis v. United States*, 564 U.S. 229, 237 (2011)). "Because the goal of deterrence will not always be advanced by excluding relevant, though illegally seized, evidence, the Supreme Court has identified several exceptions to the exclusionary rule." *State v. Fierro*, 2014 S.D. 62, ¶ 26, 853 N.W.2d 235, 244 (citation omitted).

[¶27.] Along with the United States Supreme Court, we have recognized that "suppression remains an appropriate remedy" in four circumstances: (1) "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his

reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his judicial role; (3) the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) the warrant is so facially deficient—i.e., in failing to particularize the place to be searched or the things seized—that the executing officers cannot reasonably presume it to be valid." *Running Shield*, 2015 S.D. 78, ¶ 7, 871 N.W.2d at 506 (citation modified). McFate argues the third circumstance applies: that "the affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (citation omitted).

[¶28.] An officer executing a search warrant cannot rely on a "bare bones" affidavit. *State v. Belmontes*, 2000 S.D. 115, ¶ 18, 615 N.W.2d 634, 639–40 (citation omitted). "This good faith inquiry is limited to the 'objectively ascertainable question of whether a reasonable well trained officer would have known that the search was illegal despite the magistrate's authorization.'" *Id.* ¶ 14, 615 N.W.2d at 638 (citation omitted); *see Leon*, 468 U.S. at 922 n.23. "Reasonable inferences may be drawn from the information in the affidavit." *Running Shield*, 2015 S.D. 78, ¶ 9, 871 N.W.2d at 507 (citation omitted).

[¶29.] Here, Officer Maxfield was both the affiant and the officer that conducted the seizure of McFate's blood. Viewed under an objective standard, acting as the executing officer, Officer Maxfield could have reasonably believed the affidavit provided probable cause. The affidavit provided that the affiant was experienced in drug investigations and located a "clear plastic bag containing a

white crystalline substance, [a] glass pipe, and other drug paraphernalia" inside of McFate's residence.

[¶30.] Thus, the facts contained in the affidavit were "not so deficient that an executing officer could not reasonably believe that it was valid." *Id.* ¶ 9, 871 N.W.2d at 506. Instead, Officer Maxfield, viewed as an objectively reasonable officer, could have reasoned that because of the presence of an unknown white crystalline substance located alongside drug paraphernalia in McFate's home, there was probable cause to believe he had recently ingested a controlled drug or substance.

[¶31.] Since nothing about Officer Maxfield's conduct calls for deterrence and the good-faith exception applies, the circuit court properly denied McFate's motion to suppress.

2. Whether the circuit court erred by refusing to give McFate's proposed jury instructions.

[¶32.] "This Court generally reviews a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard." *State v. Spry*, 2026 S.D. 21, ¶ 23, 34 N.W.3d 192, 199 (citation modified). "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *State v. Cadotte*, 2026 S.D. 28, ¶ 41, 35 N.W.3d 824, 832 (citation omitted). "The party asserting error has the burden of showing prejudice in failure to give a requested instruction." *Spry*, 2026 S.D. 21, ¶ 23, 34 N.W.3d at 199 (citation omitted).

[¶33.] In instances where the alleged error is not the denial of a proposed instruction but "whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo." *State v. Clemensen*, 2025 S.D. 68, ¶ 44, 28

N.W.3d 902, 917 (citation omitted), *reh'g denied* (Jan. 15. 2026). "Jury instructions are to be considered as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient." *Id.* (citation modified).

[¶34.] McFate proposed two supplemental jury instructions relating to whether his communication was protected speech and objected to the circuit court's proposed instructions concerning what needed to be proven to convict him on the threat charge. McFate first asserts that the jury instructions failed to inform the jury of the mens rea required to convict a defendant for communicating an alleged threat. He claims the circuit court's proposed instructions did not adequately define the requisite mens rea and that the specific facts of this case warranted a supplemental instruction stating that a defendant must adopt a third-party threat as his own to be convicted for the communication of such a threat. McFate's second argument is that the circuit court erred by giving a jury instruction that inaccurately defined a threat, as charged in this case. We address these issues in turn.

Mens rea

[¶35.] First, we examine whether the circuit court properly instructed the jury on the mental state that must be proven to convict a defendant for communicating a threat in a case in which the defendant has claimed the communication was protected speech under the First Amendment. The circuit court provided the following jury instructions:

> **Instruction No. 19:** Any person who, knowingly and intentionally, communicates any threat to take a life or inflict serious bodily harm upon a law enforcement officer of the state

> or a member of the officer's immediate family, is guilty of a crime.
>
> **Instruction No. 20:** The elements of Count 2: Threatening Law Enforcement Officer or Family, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:
>
> ***1.*** The defendant knowingly and intentionally communicates any threat to a law enforcement officer.
>
> ***2.*** The defendant threatened to take the life of or to inflict serious bodily harm upon the law enforcement officer.

[¶36.] Instruction 19 substantially mirrors SDCL 22-11-15.6, with minor edits such as the removal of a reference to the felony threat statute and class of the violation, and Instruction 20 sets forth the elements the State had to prove to convict McFate on this charge. While Instructions 19 and 20 require the jury to find that McFate "knowingly and intentionally" communicated the threat, McFate argues they are insufficient to satisfy the United States Supreme Court's holding in *Counterman* because they lack "language referencing the Defendant's subjective understanding of the threat."

[¶37.] In *Counterman*, the United States Supreme Court considered whether, in cases involving criminal charges for threats of violence, the First Amendment requires the State to prove that "the defendant had some subjective understanding of the threatening nature of his statements." 600 U.S. at 69. Before addressing this question, the Court first noted that "[t]rue threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection" and that "a statement can count as such a threat based solely on its objective content." *Id.* at 72. But the Court determined that "the First Amendment nonetheless demands that the State

in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications." *Id.* The Court then noted the different types of cases in which First Amendment concerns are raised and the various mens rea standards that have applied to such cases. These include acts committed purposefully—the speaker "wants his words to be received as threats;" knowingly—the speaker "knows to a practical certainty that others will take his words as threats;" or recklessly—the speaker "is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id.* at 79 (citations omitted). The Court ultimately determined that a recklessness standard must be met to distinguish a true threat from protected speech. *Id.* at 79–80.[4]

[¶38.] McFate's reliance on *Counterman* is, therefore, misplaced because the charged crime at issue here, SDCL 22-11-15.6, sets an even higher mens rea standard than the recklessness standard set out in *Counterman*. Because

4. Although we have not yet had the occasion to apply the *Counterman* holding as to what mens rea is required to convict a defendant who has raised a First Amendment claim in a true threat case, we have addressed the initial question of what type of speech constitutes a true threat. In *State v. Draskovich*, when presented with a First Amendment claim by a defendant charged with threatening a judicial officer, we applied the objective standard of whether "the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'" 2017 S.D. 76, ¶ 9, 904 N.W.2d 759, 762 (citation omitted). And while we have addressed, in *State v. Armstrong*, what mens rea must be proven to convict a defendant for violating SDCL 22-22-45, a statute criminalizing a different type of threat that is silent as to the required mens rea, the case did not involve a First Amendment claim. 2020 S.D. 6, ¶ 41, 939 N.W.2d 9, 19 (requiring a defendant to "have an intention to do the physical act (directly threaten or communicate a specific intent to commit a further felony sex offense), along with the knowledge that the nature of the communication and the context in which it is communicated is such that a reasonable recipient would perceive it as a threat").

Instructions 19 and 20 required the jury to find that the defendant knowingly and intentionally communicated a threat, they served a dual purpose. They provided a correct statement of the mens rea required to meet the elements of SDCL 22-11-15.6, and they also satisfied the mens rea required in *Counterman* to overcome a claim that the communication was protected by the First Amendment.

[¶39.] McFate further asserts that the circuit court erred when it denied his instruction concerning third-party threats and in doing so, "invaded the province of the jury when it made a factual finding that the Defendant had adopted the threat as his own."

[¶40.] Before trial, McFate proposed the following jury instruction:

> If a defendant's repetition of a third party's threat is reasonably interpreted as a simple disclosure of the existence of the threat for informational purposes, no illegality has occurred. If, on the other hand, a defendant's repetition of a third party's threat is reasonably interpreted as communicating the defendant's *own* intent, purpose, or goal to "kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive," the defendant has violated [the law and committed a crime]. In the latter scenario, the defendant has effectively adopted the third party's threat as his own.
>
> (Source: *Viefhaus*, 168 F.3d at 396).

In denying this instruction, the circuit court alluded to evidence admitted at trial that would not support McFate's claim that he was simply providing a third party's letter to warn law enforcement. But this was an additional basis for denying the instruction. The circuit court's principal reason for denying it was that the other instructions it was giving to the jury clearly defined what would constitute a threat under the governing statute.

[¶41.] "Criminal defendants are entitled to instructions on their theory of the case when evidence exists to support that theory." *State v. Warfield*, 2026 S.D. 20, ¶ 31, 33 N.W.3d 473, 482 (citation omitted). It is well settled that a circuit "court need not instruct on matters that find no support in the evidence." *Id.* (citation omitted). "[A] court does not abuse its discretion by denying requested instructions that amplify legal principles already embodied in the court's overall instructions." *State v. Pfeiffer*, 2024 S.D. 71, ¶ 42, 14 N.W.3d 636, 649 (citation omitted).

[¶42.] Regardless of whether the circuit court improperly determined that there was insufficient evidence to instruct the jury on the concept of a third-party threat, the circuit court's denial of the instruction on the basis that other instructions sufficiently addressed this issue was sound. Whether or not McFate threatened law enforcement, as defined in SDCL 22-11-15.6, was covered by Instructions 19 and 20, which required that the jury find that McFate "knowingly and intentionally, communicat[ed] any threat to a law enforcement officer." Moreover, the circuit court also instructed the jury that the term "intentionally" means "a specific design to cause a certain result" and "knowingly" means "a knowledge that the facts exist which bring the act or omission within the provisions of any statute." Together, these instructions clearly conveyed to the jurors that to convict McFate, they had to find that he intended to communicate a threat, not simply a helpful warning, and that he knew his actions would be perceived as a threat. In fact, McFate's counsel used these instructions to argue to the jury that if McFate provided the letter to send a warning to law enforcement, he did not knowingly and intentionally threaten the officer.

[¶43.] When viewing the jury instructions in their totality, we conclude that the circuit court properly instructed the jury as to the mens rea requirements and did not abuse its discretion when it denied McFate's proposed third-party threat instruction.

Definition of threat

[¶44.] Lastly, McFate argues the circuit court erred by giving Instruction 21, which defined a threat as follows:

> A threat is a declaration or show of disposition or determination to unsettle the mind of the person to whom it was directed so as to prevent voluntary action. The threat may be communicated in any manner. No specific words are necessary to constitute a threat. A threat may be made by innuendo or suggestion. You may consider such things as the relationship between the defendant and the police officer, as well as the circumstances under which the statement was made, to determine whether or not a threat was made.

McFate asserts that Instruction 21 lowered the State's burden of proof. Specifically, he contends that the instruction's phrase, "unsettle the mind" is vague and could lead to criminalizing protected speech that a person may find merely unsettling.

[¶45.] Instruction 21 is derived from a pattern instruction defining the term "threat" in the context of crimes charged under SDCL 22-30A-4, theft by threat. Because this case does not involve theft by threat, that is, a crime which involves various types of threats used to obtain another's property, this instruction was not a perfect fit. And although it contains language that could generally apply to how different types of threats are made—it could be communicated in any manner, no specific words are necessary, and it could be made by innuendo or suggestions—it also includes language that does not align with the requirements in SDCL 22-11-

15.6. For example, it refers to a threat being made for the purpose of preventing voluntary action by the person to whom it was directed, which is not a requirement to convict someone under SDCL 22-11-15.6. However, McFate used this particular language to his advantage and argued to the jury that the letter was not a threat, as defined in Instruction 21.

[¶46.] Nevertheless, the reference to a threat being a declaration to "unsettle the mind of the person to whom it was directed" could be conceived, if this instruction was read in isolation, as requiring something less than the type of threat required to establish a violation of SDCL 22-11-15.6. But when read in the context of the instructions in their totality, this instruction did not alleviate the State's burden to prove that McFate intentionally communicated a specific type of threat—a "threat to take a life or inflict serious bodily harm." Given the serious nature of the threat required by SDCL 22-11-15.6, there was no need to define the word "threat." *See State v. Schmiedt*, 525 N.W.2d 253, 255 (S.D. 1994) ("Specific words used in instructions which are self-explanatory and readily understood need not be specifically defined." (citation omitted)). But while Instruction 21 was not necessary to instruct the jury on the statutory elements that needed to be proven, it did not lower the State's burden of proof as suggested by McFate. If anything, it added an additional requirement, as noted above, that was not necessary for a conviction under SDCL 22-11-15.6. Moreover, the State did not use the phrase "unsettle the mind" when arguing to the jury that it had proven a threat. McFate has not shown that he was prejudiced by this instruction. *See State v. Moschell*, 2004 S.D. 35, ¶ 54, 677 N.W.2d 551, 567 ("It is . . . well-established that a party

charging that an instruction was erroneous maintains not only the burden of showing that the instruction was error, but also the burden of showing that it was prejudicial." (citation omitted)).

[¶47.] We note, however, that when there is a dispute of fact as to whether a communication is a "true threat" such that it is not protected by the First Amendment, courts should provide a jury instruction defining a "true threat" that is consistent with existing precedent on that issue. In *State v. Draskovich*, a case involving a First Amendment claim by a defendant who was charged with the crime of threatening a judicial officer, we cited the United States Supreme Court's description of true threats as:

> those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protects individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."

2017 S.D. 76, ¶ 8, 904 N.W.2d 759, 762 (citing *Virginia v. Black*, 538 U.S. 343, 359–60 (2003)). We stated that "[t]o determine whether a statement constitutes a true threat, we analyze the alleged threat in the light of its entire factual context and decide whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *Id.* ¶ 9 (citation modified). Viewing the communication from the perspective of what a recipient could reasonably conclude aligns with the statement in *Counterman* that whether a statement is a true threat of violence that is not protected by the First Amendment can be "based solely on its objective content." 600 U.S. at 72.

[¶48.] *Draskovich* involved a court trial, but in a case where a jury is asked to determine whether a statement is a true threat, as opposed to protected speech, *Draskovich* can supply language for jury instructions. *See United States v. Dierks*, 978 F.3d 585, 592 (8th Cir. 2020) (concluding that the trial court should have instructed the jury on "both a subjective finding of knowledge or intent and also an objective finding that the communication was threatening"). We note that when McFate earlier argued, in his motion to suppress, that the letter was not a true threat and was thus protected by the First Amendment, he relied on *Draskovich* and its analysis of whether the recipient of the statements at issue could reasonably conclude they expressed a threat to injure. But when settling jury instructions, McFate did not propose an instruction in line with *Draskovich* that properly defined what constitutes a "true threat" that is not protected by the First Amendment. Instead, he focused solely on the mens rea component that must be proven in accordance with *Counterman*.[5]

[¶49.] From our review of the trial record, both McFate and his counsel essentially conceded that the letter was a true threat, as defined in *Draskovich*. McFate acknowledged the threatening nature of the letter when testifying at trial. And when defense counsel moved for judgment of acquittal on the threat charge, he

5. Although McFate labeled his proposed instruction regarding the adoption of a third-party threat as a definition of a true threat, it was geared to what he did or did not intend, i.e., the required mens rea. In fact, the language McFate proposed from *Viefhaus* was not contained in that court's analysis of the First Amendment issue. Rather, it was part of the court's discussion of what actions of a defendant must be proven to meet the requirements of statutes criminalizing the "making of the threat." *United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999).

did not ask the circuit court to reconsider its earlier determination, which was based on an analysis of the *Draskovich* factors, that the letter constituted a true threat. And although defense counsel referred to protected speech when presenting closing argument to the jury, counsel focused on McFate's claim that he only intended to provide the letter for informational purposes rather than to threaten law enforcement. As to whether the letter itself was a true threat, counsel stated to the jury, "I don't think anybody is taking any issue that this letter contains information that is scary and threatening." Under the circumstances here, the circuit court did not abuse its discretion by not giving an instruction defining a "true threat."

3. Whether the circuit court erred when it denied McFate's motion for judgment of acquittal.

[¶50.] At trial, McFate limited his motion for judgment of acquittal to the threat charge. On appeal, McFate's arguments focus on whether McFate's conduct constituted a true threat as opposed to speech protected under the First Amendment and whether SDCL 22-11-15.6 requires the threat be made to a specific law enforcement officer or agency.

[¶51.] "A motion for judgment of acquittal attacks the sufficiency of the evidence, which is a question of law whether the motion is considered before or after the jury's verdict." *State v. Long*, 2025 S.D. 69, ¶ 28, 29 N.W.3d 289, 297 (citation modified). "This Court reviews the denial of a motion for judgment of acquittal de novo." *Id.* (citation omitted).

[¶52.] "The ultimate question is whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond

a reasonable doubt." *Id.* ¶ 29 (citation modified). "This Court accepts the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict." *Id.* (citation modified). "We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal. 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.* (citation modified).

[¶53.] McFate now asks us, as part of our analysis of whether there was sufficient evidence to support the jury's verdict, to consider whether McFate's communication constitutes a true threat as defined in *Draskovich* and the United States Supreme Court's precedent on which it rests. However, as noted above, McFate never asked the circuit court to revisit this question, nor did he ask that this question be presented to the jury.[6] We therefore address whether the evidence was sufficient to sustain the jury's verdict on the First Amendment issue that was presented to the jury—whether McFate knowingly and intentionally communicated a threat to take the life of or to inflict serious bodily harm upon a law enforcement officer.

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6. If the jury had been presented with this issue, we would then undertake a de novo review, applying the definition of a true threat and the factors *Draskovich* identifies that may be considered to determine whether "the recipient could reasonably conclude that the statement was a true threat." 2017 S.D. 76, ¶ 9, 904 N.W.2d at 762. *See Fams. Achieving Indep. & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1411 (8th Cir. 1997) (noting that when an appellate court reviews a First Amendment claim, it "must 'make an independent examination of the whole record' to ensure that its 'judgement does not constitute a forbidden intrusion on the field of free expression'") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

[¶54.] In this case, the evidence presented at trial was sufficient to sustain a conviction for a violation of SDCL 22-11-15.6. While McFate's defense centered on his testimony that he was attempting to warn Officer Deneke of the impending danger described in the letter, his testimony was inconsistent on this point. During cross-examination, McFate testified that he recognized the threatening nature of the letter and that, but for his "decoding" and modifying of the letter's date, the threat would have passed and there would have been no need to warn anyone. The jury could conclude that McFate had the specific intent to threaten law enforcement given his statement to Officer Deneke when handing her the letter, "You'll see it Monday," a date that would correspond with the 48 hours referenced in the letter in which she would be executed if she did not "stand down from [her] current position." Ultimately, it was the jury's responsibility to determine the credibility of the witnesses and it is apparent, by the verdict, that the jury did not believe McFate's claim that he was merely delivering a warning. Under the circumstances here, we conclude that there was sufficient evidence to uphold the jury's determination that McFate knowingly and intentionally communicated a threat to take the life of or to inflict serious bodily harm upon a law enforcement officer.

[¶55.] McFate's second argument on this issue pertains to the language of SDCL 22-11-15.6. On appeal, McFate argues that the statute requires the threat to be directed to a specific law enforcement officer. To this point, McFate notes the letter was not addressed to any officer by name, but instead to "the institution of law enforcement."

[¶56.] "When conducting . . . statutory interpretation, 'we give words their plain meaning and effect, and read statutes as a whole.'" *State v. Bryant*, 2020 S.D. 49, ¶ 20, 948 N.W.2d 333, 338 (citation omitted). "[T]he starting point when interpreting a statute must always be the language itself." *Id.* (alteration in original) (citation omitted).

[¶57.] SDCL 22-11-15.6 prohibits threats communicated "upon a law enforcement officer." McFate has not presented a textual ambiguity but instead attempts to modify and add an additional requirement into the statute—a request we cannot consider. *See City of Sioux Falls v. Ewoldt*, 1997 S.D. 106, ¶ 13, 568 N.W.2d 764, 767 ("Ordinarily, we may not, under the guise of judicial construction, add modifying words to the statute or change its terms." (citation omitted)). In this case, McFate handed the letter to Officer Deneke and spoke to her when doing so. While the letter was addressed to "ALL POLICE WORLDWIDE" and not directly to Officer Deneke, the statute's plain language does not contain a requirement that the communication be addressed or directed to a specific law enforcement officer.[7]

[¶58.] Affirmed.

[¶59.] JENSEN, Chief Justice, and SALTER, DEVANEY, and MYREN, Justices, concur.

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7. While not necessary for our analysis, McFate's actions were in conformance with his erroneous interpretation of SDCL 22-11-15.6 in that he did present the threatening communication to a "specific" police officer and told her "You'll see it Monday."