

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30751

MICHAEL DAVID GEIST
Defendant/Appellant

vs.

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

HONORABLE ROBERT GUSINSKY, CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal was filed on July 8, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1
PRELIMINARY STATEMENT 1
JURISDICTIONAL STATEMENT..... 1
STATEMENT OF LEGAL ISSUES 2
WHETHER THE CIRCUIT COURT ERRED IN ADMITTING EVIDENCE OVER DEFENSE COUNSEL’S OBJECTION..... 2
STATEMENT OF FACTS..... 3
STANDARD OF REVIEW 4
APPENDIX
 1. **JUDGMENT**.....Appendix Page 1
 2. **STATE’S NOTICE OF INTENT TO INTRODUCE SPECIFIED EVIDENCE**Appendix Page 3
 3. **DEFENDANT’S OBJECTION TO STATE’S NOTICE OF INTENT TO INTRODUCE SPECIFIED EVIDENCE**Appendix Page 8

TABLE OF AUTHORITIES

CASES CITED:

Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972)..... 5
Davis v. Kressly, 107 N.W.2d 5 (S.D. 1961).....5
F.M. Stagle & Co. v. Bushnell, 16 N.W.2d 914, 916 (S.D. 1944)5
Myron v. Coil, 143 N.W.2d 738 (S.D. 1966).....5
State v. Lohnes, 432 N.W.2d 77 (S.D. 1988).....6
State v. Reeves, 967 N.W.2d 144(S.D. 2021).....5,6
State v. Luke, 464 P.3d 914 (H.I. 2020).....7
State v. Newman, 484 P.2d 473 (Wash.App. 1971)..... 5

<i>State v. Rife</i> , 337 N.W.2d 724 (Neb. 1983).....	5
<i>State v. Strangle</i> , 97 A.3d 634 (N.H. 2014).....	7

STATUTES CITED:

SDCL § 22-18-1.05	2
SDCL § 22-18-1(1).....	2
SDCL § 22-18-1(5).....	2
SDCL § 22-35-6(1).....	2
SDCL § 23A-32-2	1

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

NO. 30751

MICHAEL DAVID GEIST,

Defendant and Appellant.

APPELLANT’S BRIEF

PRELIMINARY STATEMENT

Throughout this Brief, Michael David Geist, will be referred to as “Mr. Geist” or “Appellant.” The State of South Dakota will be referred to as “State.” References to documents in the record herein will be designated as follows:

- Arraignment Transcript (November 17, 2022).....ARR
- Pre-Trial Conference.....PTC
- State’s Notice of Intent to Introduce Specified EvidenceSTA
- Defendant’s Objection to State’s Notice of Intent to Introduce Specified EvidenceDEF
- Jury Trial Transcript.....JT

JURISDICTIONAL STATEMENT

Mr. Geist appeals from the Judgment entered by the Honorable Robert Gusinsky in the Seventh Judicial Circuit, on July 1, 2024. Notice of Appeal was timely filed on July 8, 2024. This Court has jurisdiction over this matter pursuant to SDCL § 23A-32-2.

STATEMENT OF LEGAL ISSUES

Whether the circuit court erred in admitting evidence over defense counsel's objection.

STATEMENT OF THE CASE

On April 14, 2023, the State of South Dakota charged Mr. Geist by Complaint with Simple Assault on a Law Enforcement/Public Officer, in that he did attempt to cause bodily injury to Officer Dalton Santana, and did have the actual ability to cause such injury, while Officer Dalton Santana was a law enforcement or other public officer engaged in the performance of his duties, in violation of SDCL § 22-18-1(1) and SDCL 22-18-1.05; or in the alternative, Simple Assault on a Law Enforcement/Public Officer, in that he did intentionally cause bodily injury to Officer Dalton Santana, which did not result in serious bodily injury, while Officer Dalton Santana was a law enforcement or other public officer engaged in the performance of his duties, in violation of SDCL § 22-18-1(5) and SDCL 22-18-1.05. The State of South Dakota also charged Mr. Geist by Complaint with Criminal Trespass, in that he did then and there, knowing he was not privileged to do so, enter or remain in the premises of another where notice against trespass was given by actual communication, in violation of SDCL § 22-35-6 (1). On April 25, 2023, Mr. Geist waived his right to a preliminary hearing. On May 30, 2023, Mr. Geist was arraigned and entered a not-guilty plea. (ARR, 8, 2).

On January 12, 2024, the State filed a Notice to Intent to Introduce Specified Evidence. Mr. Geist filed an Objection to the State's Notice of Intent to Introduce Specified Evidence on January 19, 2024. The Court heard arguments on the State's Notice and the Defense's Objection at the Pre-Trial Conference held on January 23, 2024. The Court stated

it would “make a decision based upon the evidence provided at trial whether or not to a proper foundation is laid.” *PTC*, 10, 17-19.

A jury trial was held on January 31 and February 1, 2024. During trial, Mr. Jim Chastain and Rapid City Police Department Officer Dalton Santana testified about the body-worn-camera of Rapid City Police Department Officer Zachary Simons, who did not testify.

On February 1, 2024, the Jury returned a verdict finding Mr. Geist guilty of Count I Simple Assault Against a Law Enforcement/Public Officer and Count III Criminal Trespass. aggravated assault. (*JT*, 182, 2-7). A separate trial was held on the Part II Information on May 21, 2024. Mr. Geist was found to be a Habitual Offender on May 21, 2024. On June 25, 2024, Mr. Geist was sentenced to three years in the penitentiary, among other terms. (See Judgment in Appendix). Mr. Geist filed a timely notice of appeal.

STATEMENT OF FACTS

On April 13, 2023 Officer Santana responded to the Mount Rushmore Casino located at 1808 Mount Rushmore Road in Rapid City, South Dakota due to an unwanted subject. He made contact with Mr. Geist shortly after his arrival. Mr. Geist then asked Officer Santana if he wanted to take their conversation outside. Once outside Officer Santana demanded that Mr. Geist walk over to his car or he would walk him over there. Officer Santana then grabbed Mr. Geist’s arm. Mr. Geist instinctively jerked his arm free, at which point Officer Santana flung him to the ground. At this point in time Officer Simons arrived on scene and assisted Officer Santana in handcuffing Mr. Geist.

Officers Santana and Simons began walking Mr. Geist to Officer Santana’s patrol vehicle. The two officers then searched Mr. Geist and confiscated his unopened bottle of liquor. Mr. Geist was adamant that they put the bottle of liquor in his property so that he could have it when he was released. The two officers decided to push Mr. Geist into the

back of the patrol car while Mr. Geist was facing towards them and away from the patrol car. The backseat of Officer Santana's patrol car was a molded plastic seat, when Mr. Geist's feet were taken out from underneath him, he fall back on this solid plastic seat and slid. He had no control over his bodily movements at this point in time. One of Mr. Geist's legs made contact Officer Santana's knee as a result of him being pushed into the car.

Prior to the pre-trial conference the State provide written notice of Its intent to admit Officer Simon's body-worn-camera footage without his testimony using the silent-witness-theory. Defense counsel submitted a written objection for the Court's review. The Court listened to arguments from both parties during the pretrial conference and reserved its ruling for the jury trial.

During the jury trial the state moved to admit Officer Simon's body-worn-camera footage as Exhibit 4, and defense counsel objected. *JT*, 107, 1-12. The Court confirmed that the defense counsel was making the same objection previously discussed at the pre-trial conference, which defense counsel confirmed. The Court the stated that it had already made a ruling overruling the defense counsel's objection and admitted the evidence. *JT*, 107, 11-12.

Both parties then rested. The jury, after a lengthy deliberation found Mr. Geist guilty of Count I attempting to assault Officer Santana and Count III criminal trespass.

STANDARD OF REVIEW

The standard of review in this court is whether the trial court abused its discretion in admitting the evidence. In making such review we are bound by the rule that the question is "not whether the judges of this court would have made an original like ruling, but rather whether we believe a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion." *F.M. Stagle & Co. v. Bushnell*, 16 N.W.2d 914, 916

(S.D. 1944); *Myron v. Coil*, 143 N.W.2d 738 (S.D. 1966); *Davis v. Kressly*, 107 N.W.2d 5 (S.D. 1961).

Generally, the foundational requirements which govern admissibility of photographs apply equally to the admission of videotaped film. *State v. Rife*, 337 N.W.2d 724 (Neb. 1983); *Hendricks v. Swenson*, 456 F.2d 503 (8th Cir. 1972); 60 A.L.R.3d 334 (1974). The foundation necessary for the admission of such evidence is satisfied where the circumstances under which the video tape was taken are shown, and that the video tape accurately portrays the area at the time it was taken. *State v. Newman*, 484 P.2d 473 (Wash.App. 1971).

This Court has held that “to authenticate a photograph or video under the silent witness theory, the proponent must present sufficient foundational facts to the circuit court so that the court, in its discretion, “can determine that the trier of fact can reasonably infer that the subject matter is what its proponent claims.” *State v. Reeves*, 967 N.W.2d 144, 150 (S.D. 2021).

ARGUMENT

The circuit court erred admitting the body camera footage of Officer Simon’s using an unprecedented combination of pictorial-testimony theory and the silent-witness theory to lay the foundation for the video’s admission.

The State in its Notice of Intent to Admit Specified Evidence relied upon *State v. Reeves* to introduce evidence via the silent witness theory of authentication. *STA*, 2. The State told the Court that it would lay an adequate foundation on the basis of the testimony of both Rapid City Police Department Police Video Evidence Technician Jim Chastain and Officer Santana. *Id.* 3. The State intended for Mr. Chastain testify about how “Rapid City Police Department’s Axon body worn cameras work, when they are activated to begin recording, how footage is uploaded to the digital evidence storage system, and that officers are not able

to alter footage” and further “testify about his role as custodian of records and Rapid City Police Department policies regarding body cameras and their functionality” *Id.* 3-4. The State in their notice conceded that this testimony is inadequate to admit the body-worn-camera in question because it needed to have Officer Santana testify that the footage offered “appears to accurately reflect the interactions between law enforcement and the Defendant.” *Id.* 4.

There are two distinct theories to determine if a proper foundation has been laid for the admissibility of electronic recordings, the “pictorial-testimony” theory and the “silent-witness” theory. The foundation required for pictorial-testimony is the admission of evidence about “the circumstances under which the video tape was taken are shown, and that the video tape accurately portrays the area at the time it was taken.” *State v. Lobnes*, 432 N.W.2d 77, 87 (S.D. 1988). The foundation required for the silent-witness is that the proponent must present sufficient foundation facts “that the court, in its discretion, ‘can determine that the trier of fact can reasonably infer that the subject matter is what its proponent claims.’” *State v. Reeves*, 967 N.W.2d 144, 150 (2021). The State in an effort to overcome the deficiencies meeting the foundational requirement under both the pictorial-testimony theory and the silent-witness theory proposed an unprecedented merging of the two theories in order to admit evidence it otherwise would have been unable to admit.

The State conceded that it could not lay the proper foundation under the pictorial-testimony theory because Officer Simons was on a military deployment at the time of the jury trial. Only Officer Simons could adequately provide testimony that the body-worn-camera footage accurately reflects what he observed from his vantage point during the Mr. Geist’s interaction with law enforcement. There was no one else who observed what Officer Simons’ observed.

The State attempted to overcome this admission obstacle by relying on the silent-witness theory to admit the video footage. However, to even rely on the silent-witness theory to admit Officer Simons' body-worn-camera footage the State must first show that Officer Simons is "not available to testify to the accuracy of the scene depicted in the video." *State v. Reeves*, 967 N.W.2d 144, 149. Officer Simons' military deployment does not make him a per se unavailable witness. The State at no time provided defense counsel with any proof that Officer Simons was unavailable other than to state that he was on a military deployment. Officer Santana was asked specifically where Officer Simons was deployed to on cross-examination and stated he was "not sure where exactly." *JT*, 91, 13. He did state that he did not think Officer Simons was in South Dakota, but did not know that for sure. *JT*, 91, 22-25.

The silent-witness theory is typically used to admit stationary surveillance footage. This Court adopted a flexible fact-based approach to the silent-witness theory of authentication. *State v. Reeves*, 967 N.W.2d 144, 150. In *Reeves* the Court admitted jail security footage related to an assault that occurred inside a jail. *Id.* 146. The *Reeves* court referenced two out of state cases in their opinion, *State v. Strangle* from New Hampshire and *State v. Luke* from Hawaii. The camera footage in *Strangle* was obtained from security cameras in a store. *State v. Strangle*, 97 A.3d 634, 635 (N.H. 2014). The camera footage in *Luke* was from a home security system. *State v. Luke*, 464 P.3d 914, 922 (H.I. 2020). The facts in these three cases are different than Mr. Geist's case because Officer Simons' body-worn-camera was not an immovable camera with a fixed range it was a camera meant to see move with Officer Simons and see everything he sees during specific interactions. Furthermore, Officer Simons' body-worn-camera is not a camera that is constantly in the on-position recording, it must be manually turned on by an officer. So, while Mr. Chastain may have been able to

testify as to the Rapid City Police Department's policy on when to turn on a body-worn-camera only Officer Simons can testify as to why he failed to turn his body-worn-camera on in accordance with Rapid City Police Department policy. And only Officer Simons can testify to the accuracy of the images in the recording.

The State in their notice stated that Officer Santana would testify that Officer Simons responded to the incident with the Mr. Geist and that based upon Officer Santana's knowledge Officer Simons' body-worn-camera footage is an accurate portrayal of what Officer Simons observed. During the trial Officer Santana did testify on direct that Officer Simons did respond to the call with him. *JT*, 41, 9. He also testified that he turned Officer Simons body-worn-camera on for him. *JT*, 44, 8. He never testified that the images alleged to be from Officer Simon's body-worn-camera were accurate portrayals of the incident.

Mr. Chastain testified that he felt that Exhibit 4 was a "fair and accurate clip of Officer Simon's body cam from April 14, 2023." *JT*, 106, 20-23. On cross-examination Mr. Chastain testified that he did not know why Officer Simon's body camera was not properly turned on. *JT*, 108, 10-20. He couldn't testify if Officer Simon's responded with his lights and sirens on. *JT*, 108, 21-22. And he confirmed that he was not there that night and did not personally observe the actions of that night. *JT*, 109, 20-22.

The circuit court permitted the State to utilize an unprecedented merger of the pictorial-testimony and silent-witness theory to establish proper foundation to admit Officer Simons' body-worn-camera footage as evidence in this matter.

CONCLUSION

The circuit court allowed the State to admit Officer Simon's body-worn-camera footage at trial even though it did not lay the foundation at trial the way it claimed it would in its notice or oral arguments at the pre-trial conference. The State relied solely on Mr.

Chastain's testimony of how the video is stored, even though he confirmed that he was not at the scene of the incident. The State could have recalled Officer Santana to verify that the images admitted into evidence appeared accurate but chose not to do so in spite of the fact that they told the circuit court that this was their intention. For all the aforementioned reasons, this Court should reverse and remand the circuit court's judgment.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellant Geist respectfully requests that he be allowed to present oral argument on this issue.

SIGNED AND DATED this 12th day of November, 2024.

Respectfully submitted,
THE LAW OFFICE OF L. ADAM
BRYSON, PC
401 Third Street, Suite 7
Rapid City, South Dakota 57701
(605) 593-8972 (telephone)

By: */s/ L. Adam Bryson*
L. Adam Bryson
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Garamond typeface in 12-point type. Appellant's Brief contains approximately 3,016 words and 11 pages. I certify that the word processing software used to prepare this brief is Microsoft Word (Version 16.90.2).

By: /s/ L. Adam Bryson
L. Adam Bryson
Attorney for Appellant

THE LAW OFFICE OF L. ADAM
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(605) 593-8972 (telephone)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 12, 2024, a true and correct copy of Appellant's Brief in the matter of The State of South Dakota v. Michael David Geist, was served via electronic mail upon the individuals listed below:

OLIVIA SIGLIN
Pennington County State's Attorney
130 Kansas City Street Suite 300
Rapid City, South Dakota 57701-2818

LARA ROETZEL
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130 Kansas City Street Suite 300
Rapid City, South Dakota 57701-2818

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1302 E. Highway 14 Suite 1
Pierre, South Dakota 57501-8501

SIGNED AND DATED this 12th day of November, 2024.

Respectfully submitted,
THE LAW OFFICE OF L. ADAM
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401 Third Street, Suite 7
Rapid City, South Dakota 57701
(605) 593-8972 (telephone)

By: /s/ L. Adam Bryson
L. Adam Bryson
Attorney for Appellant

STATE OF SOUTH DAKOTA,)
)SS
COUNTY OF PENNINGTON.)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
 Plaintiff,)
)
vs.)
)
MICHAEL DAVID GEIST,)
)
DOB: 10/29/61)
)
Defendant.)

File No. CRI 23-1442

JUDGMENT

Appearance at sentencing:
Prosecutor: Rachel Lindsay Defense attorney: Adam Bryson

Date of sentence: June 25, 2024
Date of offense: April 14, 2023
Charge: Count 1: Simple Assault on a Law Enforcement/Public Officer
Class: 6 Felony SDCL: 22-18-1(1) and 22-18-1.05
Charge: Count 3: Criminal Trespass
Class: 2 Misdemeanor SDCL: 22-35-6(1)
Convicted at jury trial on February 1, 2024.

CRIME QUALIFIER: (CHECK IF APPLICABLE):

- Accessory 22-3-5 Aiding or Abetting 22-3-3 Attempt 22-4-1
 Conspiracy 22-3-8 Solicitation 22-4A-1

Habitual offender convicted at trial on: May 21, 2024
 SDCL 22-7-7 SDCL 22-7-8 SDCL 22-7-8.1

Part 2 Information (DUI) admitted on _____

- Third Offense; SDCL 32-23-4 Fourth Offense; SDCL 32-23-4.6
 Fifth Offense; SDCL 32-23-4.7 Sixth or Subsequent Offense; SDCL 32-23-4.9

Part 2 Information (ASSAULT) admitted on _____

- SDCL 22-18-1

Part 2 Information (VPO DV/ VNCO DV) admitted on _____

- SDCL 25-10-13

The Defendant having pled _____ and the Court finding the plea was made knowingly and voluntarily, and with a sufficient factual basis for the entry of the plea and having asked whether any legal cause existed to show why judgment should not be pronounced, and no cause being offered:

IT IS HEREBY ORDERED THAT the Defendant is sentenced to serve:

3 years in the South Dakota State Penitentiary with 0 suspended and 42 days credit plus each day served in the Pennington County jail.

- Fully Suspended Pen

Check if applicable:

- The sentence shall run concurrent with ____.
- The sentence shall run consecutive to ____.

- That Defendant pay court costs of \$116.50 for Count 1.
- That Defendant pay court costs of \$96.50 for Count 3.
- That Defendant's attorney's fees will be a civil lien pursuant to SDCL 23A-40-11.
- That Defendant pay prosecution costs: UA \$ __, Drug Test \$ __, Blood \$ __, SART Bill \$ __; Transcript \$ __.
- That Defendant pay prosecution costs from dismissed file __; UA \$ __, Drug Test \$ __, SART Bill \$ __; Blood \$ __, Transcript \$ __.
- That Defendant pay the statutory fee of \$ __ DUI, \$ __ DV.
- That Defendant pay fines imposed in the amount of \$ __.
- That the Defendant pay restitution through the Pennington County Clerk of Courts in the amount of \$ __ to __.

Other Conditions:

- _____
- _____

Pursuant to SDCL 22-6-11, a Court shall sentence a Defendant convicted of a Class 5 or Class 6 felony to a term of probation unless the Court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation; and the Court having found the following aggravating factors exist justifying a deviation, to-wit:

- | | |
|--------------------------------------------------------------------|-------------------------------------------------------------|
| <input type="checkbox"/> Failure to comply with terms of probation | <input type="checkbox"/> Criminal history |
| <input type="checkbox"/> Poor performance on bond | <input type="checkbox"/> Multiple files |
| <input type="checkbox"/> Escalating behavior | <input type="checkbox"/> Picking up new files while on bond |
| <input type="checkbox"/> Failure to accept responsibility | <input type="checkbox"/> On Parole when committed offense |
| <input type="checkbox"/> _____ | |

Pursuant to agreement of the parties, the State's Attorney is dismissing all remaining counts to include any Part II information, if applicable.

7/1/2024 3:53:26 PM

Attest:
Ricke, Jolonda
Clerk/Deputy



BY THE COURT:

Robert Gusinsky

HON. ROBERT GUSINSKY CIRCUIT JUDGE

You are hereby notified you have a right to appeal as provided for by SDCL 23A-32-15. Any appeal must be filed within thirty (30) days from the date that this Judgment is filed.

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF PENNINGTON)	SEVENTH JUDICIAL CIRCUIT
<hr/>		
STATE OF SOUTH DAKOTA,)	51CRI23-1442
Plaintiff,)	
)	
vs.)	STATE'S NOTICE OF INTENT
)	TO INTRODUCE SPECIFIED
)	EVIDENCE
MICHAEL DAVID GEIST,)	
Defendant.)	
<hr/>		

The State of South Dakota, by and through Pennington County Deputy State’s Attorney Olivia Siglin, hereby places this Court and Defendant on notice of its intent to introduce specified evidence at the jury trial in this matter. Namely, the State intends to introduce video footage from the body worn camera of Rapid City Police Officer Zachary Simons (“Officer Simons”) through Jim Chastain, Police Video Evidence Technician, in his capacity as a custodian of records. The State will lay adequate foundation to admit the footage under the silent witness theory of authentication and satisfy the requirements of SDCL § 19-19-901.

STATEMENT OF FACTS

Michael D. Geist (“Defendant”) is charged with two counts of Simple Assault on a Law Enforcement Officer, charged in the alternative, and Criminal Trespass. These charges stem from events occurring on or about April 14, 2023, in Pennington County, South Dakota. On that date, at approximately 12:26 AM, Rapid City police officers were dispatched to Mount Rushmore Casino in Rapid City for the report of an unwanted subject with a bottle of alcohol causing a disturbance. Dawn Hall, a casino employee, stated that she had asked Defendant to leave four times and he had refused. Officer Simons and Rapid City Police Officer Dalton Santana (“Officer Santana”) responded to the business and encountered Defendant.

Officer Santana believed Defendant was under the influence of a substance and reached for his arms to detain him in the patrol vehicle. Defendant resisted Officer Santana’s efforts and

had to be taken to the ground. Officer Simons ultimately helped Officer Santana detain Defendant in handcuffs and walk him to the patrol vehicle, where he kicked Officer Santana in the leg. The kick was witnessed by Officer Simons, who was wearing a body worn camera issued by the Rapid City Police Department at the time. Officer Simons is currently deployed to another country through his military service and is not expected to return until May 2024.

PROFFERED EVIDENCE

The State intends to introduce video footage from the body worn camera of Officer Simons through Jim Chastain. Jim Chastain is a Police Video Evidence Technician employed by the Rapid City Police Department who specializes in Records & Technology. He also serves as a custodian of records.

Specifically, the State intends to introduce the first thirty seconds (00:00-00:30) of Officer Simons's body worn camera footage. There is no sound during this portion of the video,¹ it simply provides the finder of fact a visual of what could be seen happening from Officer Simons's viewpoint on April 14, 2023. The body camera footage from Officer Simons is highly probative, as it provides the best angle of Defendant's kick for the jury to see. The State will lay an adequate foundation through witness testimony to admit the video footage into evidence. A copy can be provided to the Court for review prior to trial if desired.

AUTHORITY AND ARGUMENT

In *State v. Reeves*, the South Dakota Supreme Court adopted the "flexible, fact-based approach to the silent witness theory of authentication." *State v. Reeves*, 2021 S.D. 64, ¶ 18, 967 N.W.2d 144, 150. Under the traditional theory underlying authentication of photographic or video evidence, the photograph or video was viewed as "merely illustrative of a witness's testimony"

¹ Audio activates 30 seconds into each Axon body camera recording. Witnesses can provide additional testimony to confirm this information.

and required a “sponsoring witness” to testify it was a fair and accurate representation of the matter based on that witness’s personal observations. *Id.* at ¶ 15 (internal citation omitted). However, under the silent witness theory of authentication, “a photograph or video is a silent witness which speaks for itself, and is substantive evidence of what it portrays independent of a sponsoring witness.” *Id.* (internal citation omitted). Through the silent witness theory, “recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process, satisfying the foundation required by Federal Rule of Evidence 901(b)(9).” *Id.* (citing 2 McCormick on Evidence § 216 (Robert P. Mosteller ed., 8th ed. 2020)). SDCL § 19-19-901(b)(9) is identical to Federal Rule of Evidence 901(b)(9), which provides that evidence may be authenticated by “evidence describing a process or system and showing that it produces an accurate result.” *Id.*

The silent witness theory is flexible and fact-based, allowing the party offering evidence latitude in establishing foundation for the photograph or video. *Reeves*, ¶ 19. “If a circuit court determines that there is adequate foundation for the admissibility of the video, any further ‘concerns that the defendant has regarding the surveillance procedures, and the method of storing and reproducing the video material, are properly the subject of cross examination and affect the weight, not the admissibility, of the video.’” *Id.* (quoting *State v. Stangle*, 166 N.H. 407, 413, 97 A.3d 634, 639 (2014)). The court simply must determine that “the trier of fact can reasonably infer that the subject matter is what the proponent claims.” *Id.* at ¶ 18 (quoting *Stangle*, 97 A.3d at 638).

Here, despite Officer Simons being unavailable for the jury trial, the State will lay an adequate foundation to establish that the clip of body worn camera footage is what the State says it is through the testimony of Chastain and Officer Santana. Jim Chastain can testify how the Rapid City Police Department’s Axon body worn cameras work, when they are activated to begin

recording, how footage is uploaded to the digital evidence storage system, and that officers are not able to alter footage. He can testify about his role as custodian of records and Rapid City Police Department policies regarding body cameras and their functionality. Officer Santana can confirm that Officer Simons responded to the same call involving Defendant on April 14, 2023, and that the footage offered appears to accurately reflect the interactions between law enforcement and Defendant on the date of the charged conduct.

CONCLUSION

The State hereby provides notice of its intent to introduce specified evidence at the jury trial in this matter, specifically, the first 30 seconds of Rapid City Police Officer Zachary Simons's body camera footage from his interaction with Defendant on April 14, 2023. Though Officer Simons is unavailable to testify due to military deployment, the South Dakota Supreme Court has adopted the silent witness theory for video authentication, and the State will satisfy the requirements of the silent witness doctrine and SDCL § 19-19-901 to admit this footage into evidence. For these reasons, the State requests this Court admit the evidence proffered at trial once a sufficient foundation is laid.

Dated this 12th day of January, 2024.

/s/ Olivia Siglin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the **State's Notice of Intent to Introduce Specified Evidence** upon the person herein next designated, all on the date shown, by electronic service through Odyssey File and Serve, to:

Adam Bryson
Pennington County Public Defender's Office
130 Kansas City Street, Suite 310
Rapid City, SD 57701
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Dated this 12th day of January, 2024.

/s/ Olivia Siglin
Olivia Siglin
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STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
)
Plaintiff,)
)
vs.)
)
)
MICHAEL DAVID GEIST,)
)
)
Defendant.)

OBJECTION TO STATE’S NOTICE OF
INTENT TO INTRODUCE SPECIFIED
EVIDENCE

CRI23-1442

Comes now, Michael Geist, by and through attorney, L. Adam Bryson, and hereby moves for an order denying the State’s notice of intent to introduce specified evidence.

FACTS

The State in its notice relies upon *State v. Reeves* to introduce evidence via the silent witness theory of authentication. *State’s Notice* pg. 2. The State tells the Court that it will lay an adequate foundation on the basis of the testimony of both Rapid City Police Department Police Video Evidence Technician Jim Chastain and Officer Dalton Santana. *Id.* pg. 3. The State intends for Mr. Chastain testify about how “Rapid City Police Department’s Axon body worn cameras work, when they are activated to begin recording, how footage is uploaded to the digital evidence storage system, and that officers are not able to alter footage.” The State intends to have Mr. Chastain further “testify about his role as custodian of records and Rapid City Police Department policies regarding body cameras and their functionality” *Id.* 3-4. The State in their notice concedes that this testimony is inadequate to admit the body-worn-camera in question because they need to have Officer Santana testify that the footage offered “appears to accurately reflect the interactions between law enforcement and the Defendant.” *Id.* 4.

ARGUMENT

There are two distinct theories to determine if a proper foundation has been laid for the admissibility of electronic recordings, the “pictorial-testimony” theory and the “silent-witness” theory. The foundation required for pictorial-testimony is the admission of evidence about “the circumstances under which the video tape was taken are shown, and that the video tape accurately portrays the area at the time it was taken.” *State v. Lohnes*, 432 N.W.2d 77, 87. The foundation

required for the silent-witness there is that the proponent must present sufficient foundation facts “that the court, in its discretion, ‘can determine that the trier of fact can reasonably infer that the subject matter is what its proponent claims.’” *State v. Reeves*, 967 N.W.2d 144, 150. The State in an effort to overcome the deficiencies meeting the foundational requirement under both the pictorial-testimony theory and the silent-witness theory proposes an unprecedented merging of the two theories in order to admit evidence it otherwise would be unable to admit.

PICTORIAL-TESTIMONY

The State concedes that it cannot lay the proper foundation under the pictorial-testimony theory because Rapid City Police Officer Zachary Simons is currently on a military deployment until through May of 2024. Only Officer Simons can adequately provide testimony that the body-worn-camera footage accurately reflects what he observed from his vantage point during the Defendant’s interaction with law enforcement. There was no one else who observed what Officer Simons’ observed.

The State is attempting to overcome this admission obstacle by relying on the silent-witness theory to admit the video footage. However, to even rely on the silent-witness theory to admit Officer Simons’ body-worn-camera footage the State must first show that Officer Simons is “not available to testify to the accuracy of the scene depicted in the video.” *Reeves*, 149. Officer Simons’ military deployment does not make him an unavailable witness.

SILENT-WITNESS

The silent-witness theory is typically used to admit stationary surveillance footage. The South Dakota Supreme Court decided to adopt a flexible fact-based approach to the silent-witness theory of authentication. *Id.* 150. In *Reeves* the court admitted jail security footage related to an assault that occurred inside a jail. *Id.* 146. The *Reeves* court referenced two out of state cases in their opinion, *State v. Strangle* from New Hampshire and *State v. Luke* from Hawaii. The camera footage in *Strangle* was obtained from security cameras in a store. *State v. Strangle*, 97 A.3d 634, 635 (N.H. 2014). The camera footage in *Luke* was from a home security system. *State v. Luke*, 464 P.3d 914, 922 (H.I. 2020). The facts in these three cases are different than the Defendant’s case because Officer Simons’ body-worn-camera was not an immovable camera with a fixed range it was a camera meant to see everything Officer Simmons’ sees during specific interactions. Furthermore, Officer Simons’ body-worn-camera is not a camera that is constantly in the on-position recording, it must be manually turned on by an officer. So, while Mr. Chastain may be

able to testify as to the Rapid City Police Department's policy on when to turn on a body-worn-camera only Officer Simons can testify as to when and why he turned on the body-worn-camera. And only Officer Simmons can testify to the accuracy of the images in the recording.

The State proposes to overcome these differences by allowing Officer Santana to testify that Officer Simons responded to the incident with the Defendant and that based upon Officer Santana's knowledge Officer Simons' body-worn-camera footage is an accurate portrayal of what Officer Simons observed. It is not reasonable to rely upon Officer Santana's opinion regarding the body-worn-camera footage of Officer Simons because Officer Santana was busy dealing with an admittedly unruly individual, whom Officer Santana claims assaulted him. Officer Santana was clearly busy dealing with a volatile high-tension situation in which he would be unable to infer what another man may or may not have seen.

The Defense requests the Court prohibit the State from utilizing an unprecedented merger of the pictorial-testimony and silent-witness theory to establish proper foundation to admit Officer Simmons' body-worn-camera footage as evidence in this matter.

Dated January 19, 2024

/s/ L. Adam Bryson
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned, Lawrence County Chief Deputy Public Defender hereby certifies that he e-filed the foregoing document for re-service by the Clerk of Courts upon:

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Dated January 19, 2024.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30751

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MICHAEL DAVID GEIST,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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Notice of Appeal filed July 8, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT..... 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE LEGAL ISSUE AND AUTHORITIES 2

STATEMENT OF THE CASE..... 2

STATEMENT OF THE FACTS 4

ARGUMENT

 I. THE CIRCUIT COURT PROPERLY ADMITTED
 OFFICER SIMONS’ BODY-WORN CAMERA
 FOOTAGE..... 5

CONCLUSION..... 18

CERTIFICATE OF COMPLIANCE..... 19

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

STATUTES CITED:

SDCL 19-19-901(a) 2, 7
SDCL 23A-32-2 2
SDCL 23A-32-15 2

CASES CITED:

Baez v. Commonwealth, 79 Va. App. 90, 893 S.E.2d 604
(2023).....2, 9, 10, 16
Midland Steel Prods. Co. v. U.A.W. Local 486, 573 N.E.2d 98
(1991)..... 7, 16
Sommers v. State, 2023 WL 6937397 (Md. App. Ct.
Oct. 20, 2023)..... 2, 8, 9
State v. Abraham-Medved, 2024 S.D. 14, 244 N.W.3d 436..... 6
State v. Delehoy, 2019 S.D. 30, 929 N.W.2d 103 6, 17
State v. Luke, 464 P.3d 914 (Haw. Ct. App. 2020)..... 14
State v. Reeves, 2021 S.D. 64, 967 N.W.2d 144..... passim
State v. Shelton, 2021 S.D. 22, 958 N.W.2d 721 6
State v. Stangle, 97 A.3d 634 (N.H. 2014)..... passim
State v. Stokes, 2017 S.D. 21, 895 N.W.2d 351 5

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30751

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MICHAEL DAVID GEIST,

Defendant and Appellant.

PRELIMINARY STATEMENT

This brief refers to the State of South Dakota as “the State” and Michael David Geist as “Geist.” References to documents are designated as follows:

- Settled Record..... SR
- Defendant’s Brief..... DB

All document designations are followed by the appropriate page number. This brief also refers to trial exhibits as Ex. followed by the appropriate identifier.

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment and Sentence entered by the Honorable Robert Gusinsky, Circuit Court Judge, Seventh Judicial

Circuit, Pennington County, South Dakota. SR 231-35. Judgment was timely entered on July 1, 2024, and Geist filed a Notice of Appeal on July 8, 2024. *Id.*; SDCL 23A-32-15. Thus, this Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT PROPERLY ADMITTED OFFICER SIMONS' BODY-WORN CAMERA FOOTAGE?

The trial court allowed Officer Simons' body-worn camera footage into evidence, following the testimony of Officer Santana and James Chastain.

State v. Reeves, 2021 S.D. 64, 967 N.W.2d 144

Baez v. Commonwealth, 79 Va. App. 90, 893 S.E.2d 604 (2023)

Sommers v. State, 2023 WL 6937397 (Md. App. Ct. Oct. 20, 2023)

SDCL 19-19-901(a)

STATEMENT OF THE CASE

On April 14, 2023, Geist was charged by Complaint with Simple Assault on a Law Enforcement/Public Officer, in that he did attempt to cause bodily injury to Officer Dalton Santana; or in the alternative, Simple Assault on a Law Enforcement/Public Officer, in that he did intentionally cause bodily injury to Officer Santana, which did not result in serious bodily injury. SR 8. Geist was also charged with Criminal Trespass. *Id.*

On April 25, 2023, Geist waived his right to a preliminary hearing. SR 19. On May 30, 2023, Geist was arraigned and entered a

not-guilty plea. SR 273-80.

On January 12, 2024, the State filed a Notice of Intent to Introduce Specified Evidence, as it wanted to admit Officer Simons' body-worn camera footage. SR 97-100. Officer Simons was deployed to another country through his military service when the trial occurred. SR 98, 91. Geist filed a written objection to the State's Notice. SR 102-05. At the pretrial conference, the Court heard arguments on the State's Notice and Defense's Objection. SR 318-21. The Court reserved its ruling for the jury trial. *Id.*

During the jury trial, the State moved to admit Officer Simons' body-worn camera footage, and Defense Counsel objected. SR 435-36. Defense Counsel argued proper foundation was not laid because "it's [not] appropriate for an evidence technician to admit a body camera when he wasn't at the scene." SR 436. The Court asked if Defense Counsel was making the same objection previously made and discussed at the pretrial conference; Defense Counsel confirmed they were. *Id.* The Court stated, "[f]or the same reason, the objection is overruled" and admitted the evidence. *Id.*

The jury, after a lengthy deliberation, found Geist guilty of Simple Assault on Law Enforcement and Criminal Trespass. SR 162. After being found to be a Habitual offender, Geist was sentenced to 3 years in prison. SR 231-32, 633.

STATEMENT OF THE FACTS

On April 14, 2023, just after midnight, Rapid City Police Officers were called to the Mount Rushmore Casino for a report of an unwanted subject who was causing a disturbance. SR 356; Ex. 1. Police Officer Dalton Santana responded to the business and encountered Geist. SR 364; Ex. 2. Officer Santana noticed Geist appeared intoxicated and was causing problems for the patrons and the casino's cashier. *Id.* Geist asked if Officer Santana wanted him to go outside. SR 368; Ex. 2. Officer Santana thought Geist's suggestion was a good idea, so he agreed. *Id.* Due to Geist's apparent intoxicated state, Officer Santana decided he was going to take him to the detox center. SR 369.

Once outside, Officer Santana asked Geist to walk to the patrol vehicle; Geist refused. *Id.* Officer Santana told Geist, "You can walk over or I can walk you over." *Id.*; Ex. 2. Geist said he was going to have to walk him over. *Id.* When Officer Santana attempted to escort Geist to his patrol vehicle, Geist pulled his arm away and shoved Officer Santana in the shoulder. SR 369-70. Officer Santana conducted "an arm bar takedown and brought Geist onto the ground to prevent a further fight." SR 370.

At that point, Officer Zachary Simons arrived and came to Officer Santana's aid in detaining Geist. *Id.* While still on the ground, Geist "made a comment about kicking [their] ass." SR 371; Ex. 2. The officers got Geist into handcuffs and off the ground; Geist looked at

Officer Simons and said Officer Santana is lucky that Geist did not kick him in the nuts. SR 403; Ex. 2. As the officers attempted to place Geist into the back of the patrol vehicle, he continued to make threats and insult the officers. SR 371; Ex. 2.

When the officers arrived at the patrol vehicle and opened the door to put Geist inside the car, Geist started “tensing up, kind of preventing himself from going in the car, keeping his legs straight.” SR 371. The officers responded by pushing him into the car. *Id.* As they did that, Geist “turned, started yelling a little bit louder, struggling a little bit more, and as [they] pushed him into the car, he kicked out with his leg and kicked [Officer Santana] in the knee.” *Id.*; see Ex. 2, 3, 4.

ARGUMENT

THE CIRCUIT COURT PROPERLY ADMITTED OFFICER SIMONS’ BODY-WORN CAMERA FOOTAGE

The trial court had the discretion to allow into evidence Officer Simons’ body-worn camera footage. Proper foundation was laid for the camera footage under the silent witness theory for authenticating video evidence, and Geist suffered no prejudice from its admission.

A. Standard of Review

“Evidentiary rulings are reviewed for an abuse of discretion and are presumed to be correct.” *State v. Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d 144, 147 (citing *State v. Stokes*, 2017 S.D. 21, ¶ 12, 895 N.W.2d 351, 354). “It is an abuse of discretion for a circuit court to make ‘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. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109], and it is an abuse of discretion for the court to exercise its discretion ‘to an end or purpose not justified by, and clearly against reason and evidence,’ *Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d at 147.” *State v. Abraham-Medved*, 2024 S.D. 14, ¶ 13, 244 N.W.3d 436, 440.

“To necessitate reversal, ‘not only must error be demonstrated, but it must also be shown to be prejudicial.’” *Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d at 147 (quoting *State v. Shelton*, 2021 S.D. 22, ¶ 16, 958 N.W.2d 721, 727). “An error is prejudicial when ‘in all probability [the error] produced some effect upon the jury’s verdict and is harmful to the substantial rights of the party assigning it.’” *Id.* (citation omitted).

B. *Legal Analysis*

1. *The State laid proper foundation for Officer Simons’ body-worn camera footage to be admitted into evidence.*

a. *The theories of authentication.*

There are 2 theories underlying authentication of photographic or video evidence: traditional and silent witness theory. *Reeves*, 2021 S.D. 64, ¶ 15, 967 N.W.2d at 148-49.

“Under the traditional theory underlying authentication of photographic or video evidence, the photograph or video is viewed as

‘merely illustrative of a witness’ testimony,’ and the evidence ‘only becomes admissible when a sponsoring witness can testify that it is a fair and accurate representation of the subject matter, based on that witness’ personal observation.’” *Id.* ¶ 15, 967 N.W.2d at 148 (quoting *Midland Steel Prods. Co. v. U.A.W. Local 486*, 573 N.E.2d 98, 129 (1991)).

While there are different approaches to the silent witness theory of authentication, this Court adopted a flexible, fact-based approach. *Reeves*, 2021 S.D. 64, ¶ 18, 967 N.W.2d at 150. This Court held, “to authenticate a photograph or video under the silent witness theory, the proponent must present sufficient foundational facts to the circuit court so that the court, in its discretion, ‘can determine that the trier of fact can reasonably infer that the subject matter is what its proponent claims.’” *Id.* (quoting *State v. Stangle*, 97 A.3d 634, 638 (N.H. 2014)). This Court held its decision was “ultimately consistent with the requirements of SDCL 19-19-901(a).” *Id.* This Court further held, “[i]f a circuit court determines that there is adequate foundation for the admissibility of the video, any further ‘concerns that the defendant ha[s] regarding the surveillance procedures, and the method of storing and reproducing the video material, [are] properly the subject of cross-examination and affect[] the weight, not the admissibility, of the video.’” *Id.* ¶ 19, 967 N.W.2d at 150 (quoting *Stangle*, 97 A.3d at 639 (quotation marks omitted) (citation omitted)).

b. The silent witness theory adequately authenticates law enforcement officers' body-worn camera footage.

Geist argues the silent witness theory was improperly applied to the body-worn camera footage admitted in this case, yet other jurisdictions have found the silent witness theory applies to body-worn camera footage of law enforcement officers.

For example, the Appellate Court of Maryland held their circuit court properly exercised its discretion by admitting a law enforcement officer's body-worn camera footage under the silent witness theory of authentication. *Sommers v. State*, 2023 WL 6937397, *14 (Md. App. Ct. Oct. 20, 2023). The State called a witness, whose testimony was strictly to explain the functionality of the camera system, to authenticate the footage. *Id.* at **11-12. The witness testified he was “the body-worn camera lieutenant coordinator for the agency” and was responsible for “reviewing all evidence, video evidence . . . creating an electronic case folder, and then forwarding it to the State’s Attorney’s Office.” *Id.* at *11. The witness also explained the functionality of the body-worn cameras, the data storage process for the recordings, and the mechanisms in place to prevent and track misconduct related to electronic evidence tampering. *Id.* at *12. The witness testified he attended training conventions held by Axon, the provider for the body-worn camera. *Id.*

The defendant objected to the admission of the body-worn camera footage, arguing that there was a lack of authentication because the witness was not an expert, the witness was not present when the video was docked, and the admission without the officer's testimony violated the Confrontation Clause of the Sixth Amendment. *Id.* The circuit court disagreed and found the testimony established a sufficient foundational basis. *Id.* at *13. The court found the witness "provided detailed testimony about the data storage process for the body-worn camera footage. Because [the witness's] testimony established a sufficient foundational basis, the court properly exercised its discretion by admitting the body-worn camera footage" under the silent witness theory of authentication. *Id.* at *14.

In another case, the Virginia Appellate Court held a police officer's testimony satisfied the authentication requirement, under both the traditional and silent witness theories, for admission of video footage from a non-testifying officer's body-worn camera. *Baez v. Commonwealth*, 79 Va. App. 90, 115, 893 S.E.2d 604, 616 (2023). The officer testified about how body-worn cameras worked generally, how the videos were created, and how the footage was uploaded automatically when camera was placed on its charger. *Id.* The officer also testified as to accuracy of portions of events depicted in video. *Id.* The Virginia Appellate Court held, under both the traditional and silent

witness theory, the record contained sufficient evidence to demonstrate a proper foundation to admit the video footage into evidence. *Id.* at 116.

In the present case, Officer Simons' body-worn camera footage was properly authenticated under the silent witness theory. Though Officer Simons was deployed at the time of trial, his body-worn camera footage was authenticated by James Chastain's and Officer Santana's testimony.

c. Officer Simons' body-worn camera footage was authenticated by James Chastain's and Officer Santana's testimony.

Mr. Chastain, the Rapid City Police Department's video evidence technology specialist, testified he is the custodian of records for the department. SR 430. Mr. Chastain stated he is biannually certified by Axon, who is the provider for the body-worn camera and the cloud-based storage system. SR 429. The certification includes a 24-hour long class and an exam to verify his competency. *Id.* Mr. Chastain also attends a yearly conference where he partakes in a 24-hour long training on the various components of the Axon system. *Id.* Axon's training includes:

The function of body cameras, how to change different settings within the cameras[,] . . . working with Evidence.com, which is [the] cloud based storage solution, how to find and manage evidence, how to manage the metadata associated with the evidence, settings for the body cameras, creating user accounts, settings for the rules and permissions that users are put into, . . . [and] sharing digital evidence with other agencies.

Id.

Mr. Chastain explained how the department's body-worn cameras operate:

Each officer is assigned a body camera. When the video comes off of the camera, that video is assigned to that specific user. At the beginning of their shift they retrieve their body camera from a dock in the patrol area over in the police department. They mount it on their uniform. When they leave the building, they're supposed to have it powered on and in standby mode, and that standby mode is constantly recording just the basic buffer. . . . When they arrive on scene at a call for service or they're dealing with somebody in person, they're supposed to start a recording. When that recording starts, there's actually a 30 second pre-buffer on that that is just video only, no audio, that shows what was going on in that 30 seconds prior to the officer activating the camera. They can manually activate it by pushing a button twice on their body camera, it's a big large button on the front, but there's also an automated means of starting those cameras as long as they're in a standby mode.

. . .

[The recording] remains on the camera until the officer gets back to the station at the end of their shows where they place it into a dock. From that dock the evidence is securely transferred from the camera to [their] cloud based storage where it resides for whatever appropriate categories are assigned to it for retention purposes.

SR 431-32. Mr. Chastain stated no one can "alter, erase, duplicate, [or] copy" body-worn camera footage after it is recorded. SR 433.

Mr. Chastain testified he reviewed Officer Simons' body-worn camera and looked at its audit trail. SR 434. Mr. Chastain observed a watermark in the upper right part of the image that matched the serial number for Officer Simons' specific camera. *Id.* Mr. Chastain confirmed based on the date and time of the video and the contents of

the video compared to what was listed in the call for service and case report, he believed the video came from Officer Simons' body-worn camera on April 14, 2023. SR 435.

Officer Santana testified he noticed Officer Simons' body-worn camera was not on when he was kicked by Geist, so he reached over and hit Officer Simons' camera twice to turn it on. SR 373; Ex. 2.

Officer Santana also testified regarding how body-worn cameras work, explaining that typically the cameras are mounted to the officer's load-bearing vest at the center of his chest. SR 363. Officer Santana stated, "during the day when [they] leave the station, go out into the public, [they] turn the camera on. While [they are] out in the public it is always on but not always recording. [They] start a recording when [they] turn it on [by] giv[ing] it a double tap on a large center button on the body camera which will turn it on." *Id.*

Mr. Chastain's and Officer Santana's testimony provided ample foundational facts for the circuit court to determine that the jury could "reasonably infer that the subject matter is what its proponent claims." *Reeves*, 2021 S.D. 64, ¶ 18, 967 N.W.2d at 150 (quoting *Stangle*, 97 A.3d at 638). Mr. Chastain testified as to how body-worn cameras worked, how the videos were created, how it was uploaded automatically when camera was placed on its dock and added to the cloud based storage system, and that no one could "alter or erase" the footage after it was recorded. SR 431-32. Mr. Chastain also testified he

personally reviewed Officer Simons' body-worn camera, and he believed the video was Officer Simons' camera footage from Geist's arrest. SR 434-35. Officer Santana's testimony also provided support for authentication under the silent witness theory for authenticating evidence. He testified about how body-worn cameras worked generally and how Officer Simons' body-worn camera footage of Geist was created, as he was the one who started the recording. Because there were ample foundational facts for the court to determine that the jury could reasonably infer that the video was Officer Simons' body-worn camera footage from Geist's arrest, there was adequate foundation for the admissibility of Officer Simons' body-worn camera footage under the silent witness theory. Therefore, any further concerns Geist had regarding the body-worn camera footage was the subject of cross-examination and affected the weight, not the admissibility, of the footage. *See Reeves*, 2021 S.D. 64, ¶ 19, 967 N.W.2d at 150; *Stangle*, 97 A.3d at 639.

d. The State was not bound by the limits of the traditional theory of authentication.

Geist argues to authenticate evidence under the silent witness theory, "the State must first show that Officer Simons is 'not available to testify to the accuracy of the scene depicted in the video.'" *State v. Reeves*, 967 N.W.2d at 149." DB 7. The State disagrees with this assertion; Officer Simons need not be unavailable for the State to rely on the silent witness theory to authenticate his body-worn camera

footage. To authenticate a video under the silent witness theory, “the proponent must present sufficient foundational facts to the circuit court so that the court, in its discretion, ‘can determine that the trier of fact can reasonably infer that the subject matter is what its proponent claims.’” *Reeves*, 2021 S.D. 64, ¶ 18, 967 N.W.2d at 150 (quoting *Stangle*, 97 A.3d at 638). There is no requirement that anyone be unavailable prior to relying on the silent witness theory of authenticating evidence.

Geist argues the facts in *Reeves*,¹ *Stangle*,² and *Luke*³ are different than the present case because “Officer Simons’ body-worn camera was not an immovable camera with a fixed range it was a camera meant to see move with Officer Simons and see everything he sees during specific interactions.” DB 7. Furthermore, Officer Simons’ body-worn camera is not “constantly in the on-position recording, it must be manually turned on by an officer.” *Id.* The State agrees with most of⁴ Geist’s statements; it is true that Officer Simons’ body-worn camera is movable, its range moves with Officer Simons, and it is not constantly recording. However, these facts have no bearing on

¹ *Reeves*, 2021 S.D. 64, 967 N.W.2d 144.

² 97 A.3d 634 (N.H. 2014).

³ *State v. Luke*, 464 P.3d 914 (Haw. Ct. App. 2020).

⁴ The State disagrees with Geist that the body-worn camera “must be manually turned on by an officer.” DB 7. Testimony established that the officer’s body-worn cameras can be automatically activated by several means including by the activation of their emergency lights, the removal of a gun from the gun rack, a certain speed being reached while driving, or by being involved in an accident. SR 431-32, 437.

authentication under the silent witness theory. The only question when assessing admissibility under the silent witness theory is whether the proponent presented sufficient foundational facts so that the circuit court could determine that the jury could “reasonably infer that the subject matter is what its proponent claims.” *Reeves*, 2021 S.D. 64, ¶ 18, 967 N.W.2d at 150 (quoting *Stangle*, 97 A.3d at 638). Here, there were sufficient facts presented by Mr. Chastain and Officer Santana to establish that the offered exhibit was Officer Simons’ body-worn camera footage from Geist’s arrest.

Geist also argues “only Officer Simons could adequately provide testimony that the body-worn-camera footage accurately reflects what he observed from his vantage point during [] Geist’s interaction with law enforcement. There was no one else who observed what Officer Simons’ [sic] observed.” DB 6. The State disagrees. While it is true that Officer Santana “never testified that the images alleged to be from Officer Simon’s [sic] body-worn-camera were accurate portrayals of the incident,” the State is not relying on the traditional theory to authenticate Officer Simons’ body-worn camera footage. DB 8. Because the State is relying on the silent witness theory, the State only needed to establish facts for the court to determine that the jury could reasonably infer that the exhibit was Officer Simons’ body-worn camera footage from Geist’s arrest. *See Reeves*, 2021 S.D. 64, ¶ 18, 967 N.W.2d at 150 (quoting *Stangle*, 97 A.3d at 638). The State presented

ample evidence to support the finding that the offered exhibit was Officer Simons' body-worn camera footage from Geist's arrest.

Further, the State disagrees with Geist's argument that "only Officer Simons could adequately provide testimony" under the traditional theory to lay foundation for Officer Simon's body-worn camera footage. Officer Santana could have satisfied the authentication requirement under the traditional theory by testifying as the accuracy of the events depicted in video. As Officer Santana was present on the scene, he could have testified that the video was a "fair and accurate representation of the subject matter, based on [his] personal observation[,]'" which would have authenticated the camera footage under the traditional theory. *Reeves*, 2021 S.D. 64, ¶ 15, 967 N.W.2d at 148 (quoting *Midland Steel Prods. Co.*, 573 N.E.2d at 129); *see Baez*, 79 Va. App. at 113. Yet Officer Santana did not testify as the accuracy of the events depicted in Officer Simons' body-worn camera footage, so he did not meet the authentication requirement under the traditional theory.

Because the State presented ample evidence through Mr. Chastain's and Officer Santana's testimony to support the finding that the video presented was Officer Simons' body-worn camera footage from Geist's arrest, the footage is properly authenticated under the silent witness theory. Accordingly, the circuit court properly exercised its discretion in admitting Officer Simons' body-worn camera footage.

2. Geist was not prejudiced by the admission of Officer Simons' body-worn camera footage

Geist does not address prejudice in his brief. See DB. Thus, he failed to establish that the trial court's ruling was, "a fundamental error of judgment" or "a choice outside the range of permissible choices."

Delehoy, 2019 S.D. 30, ¶¶ 21-22, 929 N.W.2d at 109.

Geist has not articulated any unfair prejudice that resulted from the inclusion of Officer Simons' body-worn camera footage. See DB. Officer Santana testified that he observed and felt Geist kick him in an intentional manner. SR 371-72. Further, Officer Santana's body-worn and vehicle's camera footage displayed Geist kicking Officer Santana. See Ex. 2, 3. Thus, even if the trial court had excluded Officer Simons' body-worn camera footage, there was ample other evidence supporting the conviction for assault on a law enforcement officer.

A captured and secured video is arguably one of the most relevant and most probative pieces of evidence available in any criminal case. As opposed to relying on hearsay or eyewitness testimony, an unbiased video capturing the entirety of an alleged offense carries with it an extreme weight of probative value.

No unfair prejudice was properly demonstrated or articulated at trial or in Geist's brief, so the trial court's ruling should stand.

CONCLUSION

The trial court was not unreasonable in its evidentiary ruling, and Geist has not met his burden in establishing that unfair prejudice resulted from the admission of Officer Simons' body-worn camera footage. For the above stated reasons, the State respectfully requests that the Court affirm the trial court's evidentiary ruling and Geist's 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 3,855 words.

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

Dated this 9th day of December 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 9th, 2024, a true and correct copy of Appellee’s Brief in the matter of *State of South Dakota v. Michael David Geist* was served by electronic mail on Adam Bryson at adam@brysonlawoffice.com.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30751

MICHAEL DAVID GEIST
Defendant/Appellant

vs.

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

HONORABLE ROBERT GUSINSKY, CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... **I**
ARGUMENT..... **1**

TABLE OF AUTHORITIES

CASES CITED:

Baez v. Commonwealth, 893 S.E.2d 604, 614 (Va. Ct. App. 2023).....2
Sommers v. State, 2023 WL 69373973
State v. Reeves, 967 N.W.2nd 144, 148 (S.D. 2021).....5

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

NO. 30751

MICHAEL DAVID GEIST,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

ARGUMENT

The Appellant, Michael Geist, respectfully submits the following Reply Brief.

1. The State did not lay proper foundation for Officer Simons' body-worn-camera footage to be admitted into evidence.
 - c. Officer Simons' body-worn-camera footage was not properly authenticated by James Chastain's and Officer Santana's testimony.

The State in its Appellee Brief provides two intermediate appellate decisions to support its position that Officer Simons' body-worn-camera footage was properly admitted into evidence by the silent-witness theory. These decisions are not binding on the South Dakota Supreme Court and are merely persuasive arguments. This Court need not follow other state appellate courts into folly. The cases cited by the State in their brief are also distinguishable from Mr. Geist's case.

The Virginia case, *Baex v. Commonwealth*, held that the testimony required to admit body-worn camera footage without the officer wearing the body-worn camera's testimony the state needed general testimony on how body-worn-cameras work and that the videos are

automatically uploaded when placed on the charger at the end of the day. *Baez v. Commonwealth*, 893 S.E.2d 604, 615 (Va. Ct. App. 2023) However, the Virginia court went on to say that these factors coupled with law enforcement officer's further testimony confirming the accuracy of portions of events depicted in the video were enough to authenticate the video. *Id.* 615-616. This additional qualification shows that the Virginia Court of Appeals requires more than just testimony about the body-worn camera system in order to admit the footage via the silent witness theory. The testimony provided by the law enforcement officer in the Virginia case included testimony that the officer was "present at the scene and that the body-worn camera footage accurately depicted the events that took place the night of the traffic stop." *Id.* 615. Specifically, the Virginia law enforcement officer identified the defendant in the body-worn camera footage as well as the non-testifying officer. *Id.* He also testified that he saw the defendant and the non-testifying officer "standing beside each other as she conducted her search." *Id.*

Applying the Virginia holding to Mr. Geist's case the state falls short of their authentication burden because there is no testimony coupled with testimony about how the body-worn camera system works to corroborate the accuracy of scene depicted on the body-worn camera footage. The State did not illicit through Officer Santana that the footage purported to be from Officer Simons' body-worn camera that it showed Mr. Geist, Officer Santana, or that it accurately depicted the scene that night. The only testimony Officer Santana provided was that he noticed Officer Simmons' body-worn camera was not recording and pushed the button on Officer Simmons' body-worn camera twice to start the recording. JT 44, 3-8. Mr. Chasten testified on cross-examination that he was "not there that night" and "personally did not observe the actions of that night." *Id.* 109, 20-22. Neither

witness the State used to admit Officer Simons' body-worn camera into evidence provided any testimony relevant to the actual video footage itself.

The Maryland case, *Sommers v. State*, is such an insignificant case that it is an unreported opinion that holds no precedential value in the State of Maryland. This opinion holds that if the witness can provide detailed testimony about the data storage process for the body-worn camera footage then the footage is admissible under the silent-witness theory. *Sommers v. State*, 2023 WL 6937397 38-39. Interestingly the Maryland opinion states that recordings may be authenticated under the silent-witness theory when they are recording on equipment that operates automatically. *Id.* 35.

In Mr. Geist's case the record clearly shows that Officer Simmons' body-worn camera did not operate automatically. In fact, Officer Santana testified that he is the one that activated the recording on Officer Simmons' body-worn camera. JT 44, 3-8. Additionally, Mr. Chasten was unable to explain why Officer Simmons did not activate his body-worn camera himself. *Id.* 108, 17-20. The facts of Mr. Geist's case do not fit the holding of the Maryland case, as Officer Simmons' body-worn camera equipment did not operate automatically.

This Court first addressed the silent-witness theory in order to provide the foundational requirements needed to admit photographs and videos not recorded by human operators. *State v. Reeves*, 967 N.W.2nd 144, 148 (SD 2021). Body-worn cameras are recorded by human operators and do not fit the *Reeves* holding. Body-worn cameras are activated by the officer pressing the button twice, when officers activate their emergency lights, when they remove a patrol rifle from a gun rack, or when they're involved in an accident. JT 102, 21-25. In Mr. Geist's case Officer Simons' body-worn camera was activated manually by a human

being when the button was pressed twice. In all cases a body-worn camera's recording is activated by a human action.

- d. The State was not bound by the limits of the traditional theory of authentication.

The State has conceded that they admitted Officer Simmons' body-worn camera footage under the silent-witness theory and not the traditional theory. Mr. Geist accepts their concession.

2. Geist was prejudiced by the admission of Officer Simons' body-worn-camera footage.

Mr. Geist was prejudiced by the admission of Officer Simmons' body worn camera footage, especially in the State's closing arguments at trial. The State explained why Officer Santana's body-worn camera footage does not show what happens down at the foot level. JT 137, 5-7. The State then highlights that you can see Mr. Geist moving his leg in Officer Simmons' body-worn camera footage. *Id.* 137, 13. The State further highlights Officer Simmons' body-worn camera footage by playing it during its closing argument. *Id.* 141, 7.

CONCLUSION

There are no state supreme court decisions or Federal appeals court decisions on the admissibility of body-worn cameras using the silent witness theory. Mr. Geist submits that it is not appropriate to use the silent witness theory to admit body-worn camera footage because the body-worn cameras are operated by human beings. They are literally attached to human beings and meant to record the scene as observed by those human beings. Body-worn cameras are not constantly recording. They don't record from fixed locations. They are mobile and travel with the law enforcement officers. The only proper way to verify the

accuracy of the footage is by testimony of an individual who was at the scene of the recording. The State did not provide any such testimony in Mr. Geist's case.

As a result, inadmissible evidence was admitted into Mr. Geist's trial. That evidence, while not the only video evidence, was the evidence the State touted during its closing argument in an effort to obtain a conviction for Simple Assault on a Law Enforcement Officer. The jury deliberated for a lengthy period of time even with this evidence. They may very likely have reached a different conclusion had Officer Simmons' body-worn camera footage not been admitted. For all the aforementioned reasons, this Court should reverse and remand the circuit court's judgment.

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Garamond typeface in 12-point type. Appellant's Brief contains approximately 1,548 words and 9 pages. I certify that the word processing software used to prepare this brief is Microsoft Word (Version 16.90.2).

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The undersigned hereby certifies that on December 24, 2024, a true and correct copy of Appellant's Brief in the matter of The State of South Dakota v. Michael David Geist, was served via electronic mail upon the individuals listed below:

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