

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29993

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

ADIL OSMAN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE BRADLEY G. ZELL
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The transcript of the Arraignment Hearing held October 6, 2020, is referred to as "AH." The transcript of the Hearing on the Motion to Suppress held September 3, 2021, is referred to as "MH." The transcript of the two-day Jury Trial held November 17 through November 18, 2021, is referred to as "JT1" and "JT2," respectively. Exhibits are referred to as "Ex." followed by the exhibit number. The transcript of the Plea Hearing concerning the Part II Information is referred to as "PH." The transcript of the Sentencing Hearing is referred to as "ST". All references will be followed by the appropriate page number. Defendant and

Appellant, Adil Osman, is referred to as “Osman.”

JURISDICTIONAL STATEMENT

Osman appeals the Judgment and Sentence entered April 7, 2022, by the Honorable Bradley G. Zell, Circuit Court Judge, Second Judicial Circuit, regarding the following convictions: Count 1 – DWI-Under the Influence, Fourth Offense; and Count 3 – Leaving the Scene of an Accident. SR 207. Osman’s Notice of Appeal was filed May 9, 2022. SR 209. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES

- I. WHETHER THE ADMISSION OF THE PRE-TRIAL SHOW-UP IDENTIFICATION AND THE IN-COURT IDENTIFICATION STEMMING FROM THE IMPERMISSIBLY SUGGESTIVE SHOW-UP VIOLATED OSMAN’S DUE PROCESS RIGHTS.

The trial court denied Osman’s motion to suppress the pre-trial show-up identification and the in-court identification that followed an impermissibly suggestive show-up.

State v Red Cloud, 2022 S.D. 17, 972 N.W.2d 517 (2022)

U.S. Const. amend XIV, §1

S.D. Const. art VI, §2

- II. WHETHER THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF SGT. TREADWAY CONTAINING OUT OF COURT STATEMENTS OF MICHAEL GULEY.

The trial court overruled Osman’s objection to the testimony in question.

State v. Little Long, 2021 S.D. 38, 962 N.W.2d 237 (2021)

SDCL 19-19-801

STATEMENT OF CASE

On September 17, 2020, the Minnehaha County Grand Jury returned a four count Indictment charging Osman with DWI – Under the Influence, DWI – Over 0.08, Leaving the Scene of an Accident, and Open Container. SR 11. A Part II Habitual Criminal Information was filed on September 17, 2020, alleging Osman had been previously convicted of three prior DWI offenses, making this a Fourth Offense DWI. SR 13. Osman was arraigned on the Indictment and the Part II Information on October 6, 2020. *See generally* AH.

On May 13, 2021, Osman filed a Motion to Suppress seeking to exclude the accusing witnesses identification from a show-up and seeking to exclude a subsequent in-court identification. SR 64. A hearing on the motion was held on September 3, 2021. *See generally* MH. On October 18, 2021, the Court issued a memorandum decision denying Osman’s motion. SR92. On October 21, 2021, an Order Denying Defendant’s Motion was filed, incorporating the Court’s findings of fact and conclusions of law as stated in the memorandum decision. SR 100.

Jury Trial on the charges began on November 17, 2021. *See generally* JT1. During the State’s direct-examination of Sgt. Treadway (“Treadway”), he testified as to statements made by Michael Guley (“Guley”), who had previously testified. JT1 83-84. Treadway testified that Guley stated Osman was driving the vehicle in question the evening of the offense. JT1 84. Defense counsel objected on grounds that the testimony contained inadmissible hearsay. JT1 83-84, 87, 104-111. The trial court overruled the objection and admitted the testimony. JT1 83-

84, 87, 104-111. On November 18, 2021, the jury found Osman guilty on Count 1 – DWI-Under the Influence, and Count 3 – Leaving the Scene of an Accident. JT2 87-88. The jury was deadlocked as to Count 2 – DWI – Over 0.08. JT2 88.

On January 13, 2022, a change of plea hearing was held concerning the Part II Information. *See generally* PH. Osman entered an admission to the Part II Information, alleging three prior DWI convictions within ten years, enhancing his DWI conviction in Count 1 to a Class 5 felony, carrying a maximum penalty of five years in prison. PH 3-7. Sentencing was held before Judge Zell on March 29, 2022. *See generally* ST. On Count 1, Judge Zell imposed five years in the South Dakota State Penitentiary with credit for 66 days of jail time previously served. ST 10. On Count 3, Judge Zell imposed 30 days in jail, with credit for 30 days served. ST 10. Judgment and Sentence was entered on April 7, 2022. SR 207.

STATEMENT OF FACTS

On August 5, 2020, at about 12:25 a.m., Troy Mielitz (“Troy”) and Becky Mielitz (“Becky”) were inside their home at when they heard a noise that sounded like an explosion. JT1 32. Both ran to the front door to see what had occurred. Both observed that Troy’s Ford Ranger pickup truck was no longer parked in front of their house, but was now across the street on their neighbor’s curb. JT1 33, 43. The vehicle appeared to have been hit by an SUV that continued to drive forward until it died in the roadway about a block away. JT1 50. Troy stopped to put shoes on and Becky went outside with her cell phone and called police. JT1 33, 43.

When Becky went outside she observed an individual walking from the driver's side door of the SUV toward the passenger side. JT1 50. That individual began running away from the scene. JT1 43-44. Becky was on the phone with Metro Communications as this was happening. Ex. 101, 1. Becky described what she saw. Ex. 101, 1. Becky stated she "just seen some kid running down the street." Ex. 101, 1. She described the individual to Metro as having dark hair and wearing a light-colored shirt. Ex. 101, 1. She provided Metro with her address and police were dispatched to the scene. Ex. 101, 1.

Officer Bridget Devlin ("Devlin") responded to the scene and spoke with Becky and Troy. JT1 60-62. Devlin conducted the accident investigation. JT1 61. As a part of the investigation she searched the SUV that had caused the accident. JT 61. During the search, she located an insurance card and a letter from the DMV, identifying the owner of the vehicle as Ayele Adane ("Adane"). JT1 62. Devlin informed the Becky and Troy of this. JT1 53.

Sgt. Chris Treadway ("Treadway") also responded to the scene. JT1 79. He received several descriptions of the suspect, the most consistent description being, a male or a female wearing light-colored clothing. JT1 89. While en route, he observed an individual (later identified as Osman) that matched this description walking through a yard near the accident site. JT1 80. He did not detain this individual, as he had information other officers were out with a possible suspect. JT1 80. Treadway learned that the vehicle was registered to Mercatos on West 12th St., so he left the accident scene to follow up there. JT1 80.

Law enforcement stopped at least one other individual in the area in an effort to identify the driver. JT1 80. Officer Paul Frerichs ("Frerichs") responded to the scene and contacted a male matching the given description in the area walking in the cemetery. JT1 95. Frerichs determined that he was not a suspect, and let him go. JT1 95.

As Treadway left to follow up with Mercatos, he observed the same individual (Osman) he saw walking through lawns, now running along 14th Street. JT1 81. Treadway stopped Osman near 14th St. and 5th Ave. Treadway observed Osman smelled heavily of intoxicants, had bloodshot eyes, and appeared obviously intoxicated. JT1 82. Treadway then detained Osman as he now believed him to be the driver of the vehicle. JT1 82. During this time, Treadway located a set of keys on Osman's person, but the keys did not have the vehicle key to the SUV. JT1 83. He observed the set of keys to have a large rubber "Fred the Fixer" key ring on it. JT1 83.

Devlin learned from officers on scene that they had detained a suspect (Osman) at 14th St. and 5th Ave. JT1 66. Devlin informed Becky and Troy that officers had found the driver of the vehicle. JT1 68, Ex. 2, Ex. 101. Devlin then drove Becky and Troy to 14th St. and 5th Ave. to conduct a show-up identification. JT1 69. At the time this occurred it was still dark outside, and raining. Ex. 101, Ex. 2. Upon arrival, Devlin told Becky and Troy where Osman was standing, pointing him out for them. JT1 70, Ex. 2, Ex. 101. Osman was the only man of color, and the only individual in plain clothes, surrounded by police. Ex. 101, Ex.

2. Osman was also in handcuffs. Ex. 101, Ex. 2. Troy and Becky then identified Osman as the individual they saw by the vehicle. Ex. 2. During the identification Troy stated that he had believed the suspect to be a female. JT1 39, Ex. 101.

Law enforcement ultimately placed Osman under arrest. JT3 12. Officer Nick Stevens transported Osman to the Minnehaha County Jail where a blood draw was performed. JT3 12. The blood was sent to the state lab and tested by a chemist. JT3 25-26. Osman's blood contained 0.21 percent ethyl alcohol. JT3 30.

Treadway continued his investigation and followed up with the owner of the vehicle. JT1 83. One of the individuals he contacted was Guley. JT1 83.

Treadway questioned Guley about the keys in question. JT1 84. Guley stated Osman should have the keys and described them as having a large, rubber "Fred the Fixer" key chain on the key ring. JT1 84. Treadway also learned that the keys to the vehicle were on the key ring. JT1 84.

After learning this information, Treadway went back to re-trace Osman's steps, in an attempt to locate the key. JT1 84. Treadway located the vehicle key about 20-30 feet from where he stopped Osman. JT1 85. This happened about one to two hours after Osman was arrested and law enforcement had left the scene. JT1 92.

On September 17, 2020, the Minnehaha County Grand Jury returned a four count Indictment charging Osman with DWI - Under the Influence, DWI - Over 0.08, Leaving the Scene of an Accident, and Open Container. SR 11. A Part II Habitual Criminal Information was filed on September 17, 2020, alleging

Osman had been previously convicted of three prior DWI offenses, making this a Fourth Offense DWI. SR 13. Osman was arraigned on the Indictment and the Part II Information on October 6, 2020. *See generally* AH.

On May 13, 2021, Osman filed a Motion to Suppress. SR 64. A hearing on the motion was held on September 3, 2021. *See generally* MH. On October 18, 2021, the Court issued a memorandum decision denying Osman's motion. SR92. On October 21, 2021, an Order Denying Defendant's Motion was filed, incorporating the Court's findings of fact and conclusions of law as stated in the memorandum decision. SR 100. Jury Trial on the charges began on November 17, 2021. *See generally* JT1.

At jury trial, Troy and Becky identified Osman as the same individual they saw standing beside the SUV near the scene of the accident. JT1 35, 47. Both witnesses testified that they had no doubt Osman was the individual they saw. JT1

Guley was called as a witness for the State. JT1 72. Guley testified that he is an employee of Mercatos. JT1 73. Guley testified that he knew Osman and had contact with him on August 4, 2020. JT1 74. Guley testified that he was working at Mercatos and that he asked Osman to go and get the store keys for him. JT1 74-75. Guley testified that Adane had the store keys. JT1 75. Guley also testified that the keys to the SUV were on the same key ring as the store key. JT1 75. Guley testified that Osman left to go get the keys and then police officers returned with the keys later that night. JT1 76. During Guley's interaction with

Osman, he (Osman) did not appear to be intoxicated. JT1 77.

The registered owner of the SUV, Adane, was called as a witness. JT1 55. Adane testified that on August 5, 2020, he had just returned home from a 17-hour drive from Atlanta. JT1 56. He testified that Osman came to his home some time that day to retrieve the store key for Mercatos. JT1 56. When Osman arrived, Adane was asleep in his room. JT1 56. Adane testified that he did not even look at Osman, but simply gave him the key. JT1 56.

At trial Treadway testified to the conversation he had with Guley, over Osman's objection. JT1 83. Treadway testified that Guley told him that Osman was driving the vehicle that night. JT1 84.

Osman was ultimately convicted on Count 1 – DWI-Under the Influence, and Count 3 – Leaving the Scene of an Accident. JT2 87-88. The jury was deadlocked as to Count 2 – DWI – Over 0.08. JT2 88.

ARGUMENT

I. THE ADMISSION OF THE PRE-TRIAL SHOW-UP IDENTIFICATION AND THE IN-COURT IDENTIFICATION STEMMING FROM THE IMPERMISSIBLY SUGGESTIVE SHOW-UP VIOLATED OSMAN'S DUE PROCESS RIGHTS.

The trial court's denial of Osman's motion to suppress Becky and Troy's on-site identification and subsequent in-court identification stemming from the impermissibly suggestive show-up identification procedure violated Osman's due process rights under the Fourteenth Amendment to the United States Constitution and Article VI, Section 2 of the South Dakota Constitution.

“A defendant’s due process rights may be violated ‘when law enforcement officers use an identification procedure that is both suggestive and unnecessary.’” *State v. Red Cloud*, 2022 S.D. 17, ¶22, 972 N.W.2d 517, 526 (2022). “Show-up identifications are inherently suspect: ‘the practice of showing suspects singly to persons for purposes of identification has been consistently condemned as an affront to the requirements of due process and good police procedure.’” *Red Cloud* at ¶22, 972 N.W.2d at 526, (citing *State v. Reiman*, 284 N.W.2d 860, 871 (S.D. 1979). The United States Supreme Court has held that “[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification.” *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct 375, 34 L.Ed.2d 401 (1972). The South Dakota Supreme Court echoed those thoughts when it explained:

Identification of an accused in a criminal setting is an area fraught with potential danger. There is, inherent in every such identification, the risk that a witness may be mistaken. This risk often rises to an even greater level at a staged confrontation. A confrontation which is overly suggestible may tend to focus so much on an individual as to remove any alternative, but identification.

State v. Phinney, 348 N.W.2d 466, 468 (S.D. 1984).

The Court must perform a two-pronged analysis of the identification made by the witnesses. “The first step is to determine whether the challenged confrontation between the witness and the suspect was ‘impermissibly suggestive.’” *Graham v. Solem*, 728 F.2d 1533, 1541 (8th Cir. 1984) (citation omitted). “[T]he second inquiry is whether, under the totality of the

circumstances of the case, the suggestive confrontation created a substantial likelihood of irreparable misidentification.” *Graham*, 728 F.2d at 1541. (citation omitted).

This Court has applied the abuse of discretion standard of review to the admissibility of eyewitness identifications. *State v. Abdo*, 518 N.W.2d 223, 226 (S.D. 1994). The question of whether an unreliable eyewitness identification should be admitted is a constitutional due process issue. *Red Cloud* at ¶21. This Court has stated that the “[w]e review ‘the denial of a motion to suppression based on the alleged violation of a constitutionally protected right as a question of law by applying the de novo standard of review.’” *Id.* (citing *State v. Angle*, 2021 S.D. 21, ¶14, 958 N.W.2d 501, 501). Factual findings are reviewed under a “clearly erroneous” standard. *Id.* (citations omitted). Accordingly, Osman urges the Court to apply the de novo standard of review in evaluating the trial court’s denial of his motion to suppress.

A. The show-up identification was impermissibly suggestive.

The show-up identification performed in the present case was impermissibly suggestive as Defendant was the only male of color, he was pulled out of a police car in handcuffs, and the witness were told which one he was.

In *Red Cloud*, *supra*, this Court had the opportunity to review a similar set of circumstances. The facts as laid out in *Red Cloud* show that around 5:00am on July 1, 2019, an individual by the name of Zueger was in his bedroom with his wife when he heard a loud bang coming from his basement. *Red Cloud* at ¶3.

Zueger went to the basement to investigate. *Id.* He turned on a hallway light and observed an individual in the common room stumbling toward him. *Id.* Zueger noticed this individual was carrying a shovel. *Id.* Zueger yelled at the individual multiple times to get out of the house. *Id.* Zueger testified the entirety of the interaction lasted up to 75 seconds. *Id.* at ¶5.

Zueger then called the police and gave a description of the suspect. *Id.* at ¶6. He described the individual as a Hispanic male with short hair and many non-colored tattoos. *Id.* He also reported that the individual was not wearing a shirt and was carrying a spade-like shovel. *Id.* During an interview with law enforcement, Zueger also told them the individual was a tall male, with a muscular build, barefoot, and wearing baggy shorts. *Id.* at ¶7.

Law enforcement received a report from a construction site about a quarter-mile from Zueger's home concerning an individual sleeping in one of the construction trucks. *Id.* at ¶8. This individual was Red Cloud and appeared to match the description given by Zueger. *Id.* At about 8:00a.m. that same day, Officers went to Zueger's home to and informed him and his wife they detained an individual that may or may not be the intruder. *Id.* at ¶9.

Officers transported Zueger and his wife to the site to conduct an identification. *Id.* Upon arrival at the site, two police officers removed Red Cloud, who was handcuffed, from the patrol car and brought him to the front of the car. *Id.* From the front Zueger stated he was 90-95% sure Red Cloud was the intruder. *Id.* When officers turned Red Cloud around, Zueger saw the tattoos on his back

and then stated that he was 110% sure he was the intruder. *Id.*

The circuit court found that the identification procedure was suggestive and this Court agreed. *Id.* at ¶25. However, this court additionally found that under the totality of the circumstances the identification was “sufficiently reliable to outweigh the suggestive and unnecessary nature of the show-up identification conducted.” *Id.* at ¶36.

The circumstances of Defendant’s identification are similar to the circumstances in *Red Cloud*. Law enforcement transported the witnesses to the scene of the arrest, they remained seated in the police car and watched two officers remove Osman, who was handcuffed, from the back of a police car. Lastly, Osman was the only male of color that could be seen. As in *Red Cloud*, everything about that encounter indicated Osman was under arrest. As a result, the show-up identification was impermissibly suggestive.

B. The totality of the circumstances show that both witnesses’ identification were unreliable and tainted, and therefore should be suppressed.

The totality of the circumstances show that both witnesses’ identification were unreliable and tainted, and therefore, should not be allowed to make an in-court identification. An in-court identification is still allowed after an impermissibly suggestive show-up identification “if it is established that, under the totality of the circumstances, it has been purged of any taint arising from the out-of-court identification.” *Reiman*, 284 N.W.2d at 871. “To decide if an identification is reliable, the court should look at the ‘totality of the

circumstances' in light of five factors outlined by the United States Supreme Court." *Abdo*, 518 N.W.2d at 226 (citations omitted). In *Neil*, *supra*, the United States Supreme Court held the factors to be considered were: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; 5) the length of time between the crime and the confrontation. 409 U.S. at 199-200.

In *Red Cloud*, *supra*, this Court considered the *Neil* factors when making its determination: (1) The amount of time Zueger had to observed the suspect was sufficient; (2) Zueger's degree of attention was more than a bystander or casual observer and therefore sufficient to support reliability; (3) The overall description given by Zueger, despite some discrepancies, were sufficient to support a finding of reliability; (4) Zueger appeared to express a high level of certainty at the show-up; and (5) The amount of time between the event and the identification was not "unreasonably remote." *Id.* ¶¶26-34.

By contrast, the circumstances here show that both witnesses only had a brief opportunity to observe individual they saw at the scene. Troy stated he thought he saw a woman. Becky reported she went outside and saw a male, unknown race, wearing a light-colored shirt. Additionally, Becky described the individual as a "kid." The brevity is reflected in the vague description of the suspect.

Here, both witnesses had at most less than a minute and had a half-block

to a full block distance to observe the individual associated with the accident. This is distinguishable from the circumstances in *Red Cloud* where the witness was mere feet away and indoors. Troy and Becky did not have an opportunity to meaningfully observe the individual by the car.

Troy and Becky had divided attention when they observed the suspect a block from their house. They had just been startled with a loud noise and their car was now across the street. In this case, both witnesses were startled by the crashing sound. They had only moments to view anyone associated with the accident. Moreover, since their property was the subject of the crash their attention was divided.

The accuracy of the witnesses' prior description also renders their subsequent identification unreliable. Troy thought he saw a woman. Becky described the individual as a "kid." She could not describe the individual's race, only stating that he was wearing a light-colored t-shirt. Osman, a dark-skinned male, was born in 1978.

Under all of these facts, Troy and Becky's in-court identification was irreparably tainted by the impermissibly suggestive show-up on the night of the accident.

II. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF SGT. TREADWAY CONTAINING OUT OF COURT STATEMENTS OF MICHAEL GULEY.

The trial court erred in admitting the testimony of Sgt. Treadway

containing out of court statements of Michael Guley. Hearsay is “a statement that (1) [t]he declarant does not make while testifying at the current trial or hearing; and (2) [a] party offers in evidence to prove the truth of the matter asserted in the statement.” SDCL 19-19-801. This Court has applied the abuse of discretion standard for evidentiary rulings. *State v. Little Long*, 2021 S.D. 38, ¶29, 962 N.W.2d 237 (2021).

For the sake of convenience, Osman has included a transcript of the objectionable testimony.

State: And what did you learn from Mr. Guley?

Defense Counsel: Objection. Hearsay. Calls for hearsay, I should say.

Court: Overruled.

State: What did you learn from him?

Sgt. Treadway: He stated that this person, Adil Osman, was driving the vehicle.

Defense Counsel: Objection. Hearsay.

Court: Overruled.

JT1 83-84.

Sgt. Treadway proceeded to detail his investigation and conversations with Guley and Adane. Prior to cross-examination of Sgt. Treadway, Osman approached the bench to renew the objection, which was overruled. JT1 87, 104. Osman was given leave to make a thorough record at the close of testimony. JT1 104. Osman renewed his objection at the close of testimony. JT1 104. The Court again overruled the objection. JT1 106-111.

Treadway's statements are hearsay without an exception. The Court ruled that because these witnesses testified at trial and were subject to cross-examination, that Treadway's statements were not hearsay. JT1 106. The Court's ruling was an abuse of discretion and erroneously applied SDCL 19-19-801(d)(1) to the situation. SDCL 19-19-801(d)(1) states that a statement is not hearsay if:

The declarant testifies and is subject to cross-examination about a prior statement, and the statement: (A) Is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or (B) Is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying.¹

The statement concerning Osman being the driver is not within the scope of the non-hearsay definition.

Treadway's statement that Guley stated Osman was the driver was inadmissible hearsay. Guley is the declarant in this matter. This was an out-of-court statement. Guley did not testify that Osman was the driver of the vehicle, nor was this information elicited when he did testify. The opportunity for cross-examination does not cure the Court's error and misconstrues the law. This was not an inconsistent statement that was offered as Guley was not questioned on this topic. Moreover, this was not a statement made under oath and therefore subsection (A) is not applicable. This is not a consistent statement because, again, Guley was not questioned on this topic. Additionally, Osman did not insinuate

¹ Subsection(C) omitted as inapplicable to analysis.

or imply during his cross-examination of Guley that he had fabricated testimony. Given this, subsection (B) does not apply.

The admission of the statement that Osman was the driver of the vehicle unduly prejudiced Osman. “When evidence is improperly admitted at trial, reversal may not always be necessary.” *Little Long* 2021 S.D. 38, ¶49, 962 N.W.2d at 255. “To establish reversible error with regards to an evidentiary ruling, ‘a defendant must prove not only that the trial court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice.’” *Id.* (citing *State v. Lassiter*, 2005 S.D. 8, ¶ 13, 692 N.W.2d 171, 175). “Error is prejudicial when, ‘in all probability ... [i]t produced some effect upon the final result and affected the rights of the party assigning it.’” *Id.* (citing *State v. Packard*, 2019 S.D. 61, ¶27, 935 N.W.2d 804, 812).

In *Little Long*, the Court reviewed the effect of the admitted hearsay testimony against the defendant (“Little Long”) at his trial for the murder of LaKendrick Thornton. The statements in dispute were made by a witness, Margaret Walking Eagle, to Detective Mertes (“Mertes”), during the course of the investigation into the homicide. In an interview, Walking Eagle told Mertes that Little Long had come to her house with a gun and a pair of red tennis shoes. *Id.* at ¶4. Walking Eagle also told Mertes that Little Long told her about the fight leading up to the shooting and that he said that he had “f***ing killed someone tonight.” *Id.*

At trial Walking Eagle was called by the State as a witness. *Id.* at ¶14.

During her testimony, she claimed to have no recollection of the night of the interaction with Little Long or her interview with Mertes. *Id.* at ¶15. The State attempted to refresh her recollection of the interview by showing her the recording, but she still claimed to have no memory. *Id.* The court allowed the State to recall Mertes to testify to the statements Walking Eagle made, allowing them as impeachment. *Id.*

This Court found that the trial court erred in admitting the statements for impeachment purposes, as their probative value was substantially outweighed by the prejudicial effect to Little Long. *Id.* at ¶ 44. However, the error was not reversible, as the record was replete with evidence of Little Long's guilt, not withstanding the inadmissible statements. *Id.* at ¶50.

The record in question contained, both direct and circumstantial evidence of guilt. *Id.* The testimony included two eye-witnesses in the vehicle where the shooting occurred, Thornton's blood in the vehicle in question, cell-phone location data concerning Little Long's location near where Thornton's body was found, and additional corroborating testimony of the eye-witnesses' description of the event. ¶ 51-55.

Compared to *Little Long*, the record in this case was wanting. Becky and Troy gave vague and inconsistent descriptions of the suspect. Becky described the suspect as a "kid" in light colored clothing. Troy thought he was a female. They were only able to observe him for a short time, from a block away, in the middle of the night, while it was raining.

Osman understands that the store keys found on his person is relevant, however the vehicle keys were not found on his person. The vehicle keys were missed by a number of officers on scene at his arrest. They were not found until the scene was empty, one to two hours later.

Adane and Guley were the only two witnesses who knew Osman. Neither one testified that he was the driver. Treadway's testimony that Guley stated Osman was the driver was the most incriminating piece of evidence presented by the State. This tipped the scales from enough doubt to guilty.

Based on these facts, the Court's erroneous admission of the hearsay testimony of Treadway, was prejudicial and requires reversal.

CONCLUSION

The trial court's denial of Osman's motion to suppress Becky and Troy's on-site identification and subsequent in-court identification stemming from the impermissibly suggestive show-up identification procedure violated Osman's due process rights under the Fourteenth Amendment to the United States Constitution and Article VI, Section 2 of the South Dakota Constitution. Additionally, the trial court erred in admitting the testimony of Sgt. Treadway containing out of court statements of Michael Guley.

For the aforementioned reasons, authorities cited, and upon the settled record, Osman respectfully requests this Court remand this case to the trial court with an order directing the trial court to reverse the Judgment and Sentence and order a new trial.

REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Adil Osman, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 12th day of December, 2022.

/s/ Katheryn Dunn

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 4,835 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 12th day of December, 2022.

/s/ Katheryn Dunn

Katheryn Dunn
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

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APPENDIX

Judgment & Sentence.....	A-1
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STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

PD20-015570

STATE OF SOUTH DAKOTA,
 Plaintiff,

+

49CRI20005760

vs.

+

JUDGMENT & SENTENCE

ADIL ABDULKADIR OSMAN,
 Defendant.

+

An Indictment was returned by the Minnehaha County Grand Jury on September 17, 2020, charging the defendant with the crimes of Count 1 DWI-Under the Influence on or about August 5, 2020; Count 2 DWI-(Over 0.08%) on or about August 5, 2020; Count 3 Leave Scene of Accident With Unattended Vehicle on or about August 5, 2020; Count 4 Open Container/Broken Seal in Motor Vehicle on or about August 5, 2020; and a Part II Fourth Offense DWI Information was filed. The defendant was arraigned upon the Indictment and Information on October 6, 2020, Katie Dunn appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Nicholaus Michels, Deputy State's Attorney appeared for the prosecution and, Katie Dunn and Alex Braun, appeared as counsel for the defendant. A Jury was impaneled and sworn on November 17, 2021 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on November 18, 2021 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, ADIL ABDULKADIR OSMAN, guilty as charged as to Count 1 DWI-Under the Influence (SDCL 32-23-1(2)) and Count 3 Leave Scene of Accident With Unattended Vehicle (SDCL 32-34-4)." As to Count 2 DWI-(Over 0.08%), the jury was deadlocked; therefore no verdict returned.

The defendant was arraigned upon the Part II Fourth Offense Information on January 13, 2022, Katie Dunn appeared as counsel; and, at the arraignment, the defendant admitted to the Part II Fourth Offense DWI Information (SDCL 32-23-4.6), with sentencing continued.

Thereafter, on March 29, 2022, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

S E N T E N C E

AS TO COUNT 1 DWI-UNDER THE INFLUENCE / FOURTH OFFENSE : ADIL ABDULKADIR OSMAN shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for five (5) years with credit sixty-six (66) days previously served. It is ordered that the defendant shall pay \$116.50 court costs, \$95.00 testing fees, and \$50.00 DWI fee through the Minnehaha County Clerk of Courts; which shall be collected by the Board of

Pardons and Paroles. It is ordered that the defendant's driving privileges are to be revoked immediately and for two (2) years upon release from custody.

The Court finds aggravating circumstances exist that pose a significant risk to the public and requires a departure from presumptive probation pursuant to SDCL 22-6-11 as follows:

- The defendant's inability to comply with Court orders, including 18 violations of the 24/7 program.
- The defendant continued to reoffend while these charges were pending.

AS TO COUNT 3 LEAVE SCENE OF ACCIDENT WITH UNATTENDED VEHICLE : ADIL ABDULKADIR OSMAN shall be incarcerated in the Minnehaha County Jail, located in Sioux Falls, State of South Dakota for thirty (30) days with credit thirty (30) days served. It is ordered that the defendant shall pay \$78.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Paroles.

It is ordered that the attorney fees in this matter shall be converted to a civil lien in favor of Minnehaha County.

It is ordered that the defendant shall provide a DNA sample upon intake into the Minnehaha County Jail or the South Dakota State Penitentiary, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

It is ordered that Count 4 charging ADIL ABDULKADIR OSMAN with Open Container/Broken Seal in Motor Vehicle be and hereby is dismissed.

The defendant shall be remanded into custody following court on the date hereof, to then be transported to the South Dakota State Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 5th day of April, 2022.



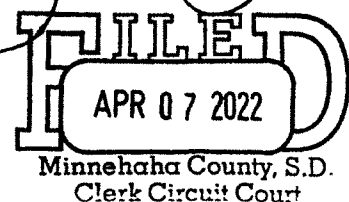
ATTEST:

ANGELIA M. GRIES, Clerk

By: [Signature] Deputy

BY THE COURT:

[Signature]
JUDGE BRADLEY G. ZELL
Circuit Court Judge



IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29993

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ADIL ABDULKADIR OSMAN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE BRADLEY G. ZELL
Circuit Court Judge

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AND APPELLEE

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AND APPELLANT

Notice of Appeal filed May 9, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29993

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ADIL ABDULKADIR OSMAN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Adil Abdulkadir Osman, is called “Osman.” Plaintiff and Appellee, the State of South Dakota, is called “State.” References to documents and Exhibits are as follows:

Minnehaha County Criminal File No. 20-5760 SR
September 3, 2021 Suppression Hearing SH
November 17, 2021 Jury Trial Transcript Volume 1 JT1
November 17, 2021 Jury Trial Transcript Volume 2 JT2
November 18, 2021 Jury Trial Transcript Volume 3 JT3
January 13, 2022 Plea Hearing PH
Osman’s Brief OB
Exhibits Exh

All document designations are followed by the appropriate page numbers. All video designations are followed by the appropriate times

at which they occur in the recording. Exhibit 101 contains files to both a 911 call and a police vehicle recording. Cites to Exhibit 101 will only be to the vehicle recording, and Exhibit 1 will be used for the 911 call.

JURISDICTIONAL STATEMENT

The Honorable Bradley G. Zell, Minnehaha County Circuit Court Judge, filed a Judgment of Conviction on April 7, 2022. SR:207. Osman filed a Notice of Appeal on May 9, 2022. SR:209. This Court has jurisdiction to hear this appeal under [SDCL 23A-32-2](#).

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE IDENTIFICATION PROCEDURE WAS SUGGESTIVE AND UNNECESSARY OR CAUSED A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION?

Osman filed a Motion to Suppress the show-up identification and subsequent in-court identification, arguing it was a due process violation. SR:64. The circuit court denied the Motion. SR:100.

[State v. Clabaugh, 346 N.W2d 448 \(S.D. 1984\)](#)

[State v. Red Cloud, 2022 S.D. 17, 972 N.W.2d 517](#)

II

WHETHER SERGEANT TREADWAY'S STATEMENT THAT ADANE AND GULEY TOLD HIM OSMAN DROVE THE MAZDA WAS HEARSAY AND RESULTED IN PREJUDICE?

Sergeant Treadway testified that Adane and Guley told him Osman was driving the Mazda on the night of his arrest. JT1:83. Osman objected to this testimony as improper hearsay. [Id.](#) The circuit court overruled the objection. [Id.](#)

State v. Hankins, 2022 S.D. 67, 982 N.W.2d 21

State v. K  r, 2017 S.D. 47, 900 N.W.2d 290

State v. Loeschke, 2022 S.D. 56, 980 N.W.2d 266

STATEMENT OF THE CASE

On August 5, 2020, the State filed a Complaint against Osman alleging three counts: Count 1: Driving While Intoxicated Fourth Offense violating [SDCL 32-23-1\(2\)](#); Count 2: Driving While Intoxicated Fourth Offense violating [SDCL 32-23-1\(1\)](#); and Count 3: Leaving the Scene of an Accident violating [SDCL 32-34-4](#). SR:1. On September 17, 2020, the State filed Part II Information alleging three prior Driving While Intoxicated convictions for Osman. SR:13. A grand jury indicted Osman on all three counts that same day, as well as an added Count 4: Open Container Broken Seal in a Motor Vehicle violating [SDCL 35-1-9.1](#). SR:11.

A jury trial occurred on November 17 and 18, 2021. JT1:1; JT2:1; JT3:1. Prior to the jury's verdict, the circuit court acquitted Osman on Count 4. JT3:51. The jury could not reach a unanimous verdict on Count 2, but returned guilty verdicts on Counts 1 and 3. JT3:87-88. Osman pled guilty to the Part II Information on January 13, 2022. PH:7. The circuit court sentenced Osman to five years in the state penitentiary. SR:207.

STATEMENT OF THE FACTS

At about midnight on August 5, 2020, Troy Mielitz had just come home from a night of fishing with his son. JT1:32, 42. He ate dinner on his couch as his wife Becky Mielitz conversed with him, when suddenly the couple heard what sounded like an explosion outside of their front door. JT1:32-33, 42. Troy rushed to the door and opened it. JT1:33. He saw his Ford Ranger, which had been parked in front of his home, rolling across the street toward his neighbor's front lawn. *Id.* A silver 2005 Mazda drove down the road and died in the middle of the intersection at the end of the block. JT1:33, 43; Exh:101 at 1:20.

Becky went outside as Troy headed back in to put on shoes. JT1:33. She headed toward the Mazda, and she saw an individual looking around and inspecting it. SH:7; JT1:43. The individual ran off when he looked over and saw her. JT1:43-44. Troy came back outside and saw the driver look up, see Becky, and flee. JT1:33

Becky called 911. Exh:1. She described the driver as a male with dark hair and a light-colored shirt. Exh:1 at 1:00-1:35. When asked if she had described a "white male," Becky corrected dispatch and said ". . . no, I said you could tell he was wearing like white clothes, maybe a light-colored shirt and pants." Exh:1 at 1:20-1:35. Becky never specified the driver's race during her 911 call, and she only talked about there being one driver, whom she consistently identified as "him" and "he." *See generally* Exh:1.

Officer Bridget Devlin reported to the scene of the crash. JT1:60; Exh:101 at 1:20. As she arrived, she radioed dispatch and asked for a description of the driver. Exh:101 at 0:30-35. Despite Becky's statements to 911, dispatch described the suspect as a white male in lighter colored clothing who might be with a female. Exh:101 at 0:40-45.

Sergeant Chris Treadway also responded to the call. JT1:79. He received varying descriptions as he proceeded to the crash scene, including that the suspect could be either male or female.¹ JT1:79-80. As he neared the crash scene, he spotted an individual — later determined to be Osman — who would not make eye contact with him. JT1:80, 82. But he did not stop Osman because other officers told him that they had identified a separate suspect. JT1:81. Sergeant Treadway proceeded to the crash scene to gather more information. JT1:81. Officer Paul Frerichs investigated the other suspect, but found that he was playing Pokemon Go in a cemetery and was not suspicious. JT1:96.

At the crash scene, Sergeant Treadway learned that the Mazda was registered to Mercato Liquor Store.² JT1:80. He went Mercato to

¹ It is not clear from the record when or how police began to suspect a female. Becky did not say anything about a female in her 911 call. *See generally* Exh:1. But before Officer Devlin arrived and spoke with Becky and Troy, she asked for a description of the driver, and dispatch mentioned a white male and possible female. Exh:101 at 0:30-45.

² The settled record describes Mercato as simply “a store” or “the store.” The State asks this Court to take judicial notice that Mercato is a liquor
(continued . . .)

gather more information. *Id.* As he traveled, he saw Osman again, this time running away from the area of the crash. JT1:81, 82. He stopped and identified him. JT1:82. Osman smelled heavily of alcohol, had bloodshot eyes, and appeared intoxicated. *Id.* Osman dropped his identification on the ground during their interaction, backed away, and appeared like he wanted to flee. *Id.* To prevent his escape, Sergeant Treadway detained Osman. *Id.*; see generally Exh:3.

After Officer Devlin learned that Osman had been apprehended, she brought Becky and Troy to the arrest scene for a show-up identification. JT1:83. Officer Devlin's patrol car camera recorded Osman during the show-up. Exh:2 at 2:00-50. He had dark hair and wore a greenish-white shirt and light blue jeans with white rips. *Id.* at 2:05-15. Upon arrival, Becky stated "I think that's him." *Id.* at 2:03-08. She requested that law enforcement shine additional light on him and have him turn to the side so she could be certain. *Id.* at 2:08-18. After these extra measures were taken, she positively identified him as the driver. *Id.* at 2:13-18.

(. . . continued)

store. Mercato Liquor & C Store, January 23, 2023 at 10:39 A.M., <https://www.mercatoliquorstore.com> (last visited Jan. 24, 2023).

This Court can take judicial notice of facts generally known or capable of accurate and ready explanation by sources whose accuracy cannot reasonably be questioned. SDCL 19-19-201(b); *State v. Rederth*, 376 N.W.2d 579, 580 (S.D. 1985) (citing *Gravning v. Zellmer*, 291 N.W.2d 751 (S.D. 1980)). The store's website and a general internet search reveal Mercato is a liquor store on West 11th Street in Sioux Falls.

Law enforcement then asked, “[w]hat did the female look like? Was [Osman] by himself?” *Id.* at 2:20-27. Becky clarified that Troy thought he had seen a female, but she only saw Osman. *Id.* at 2:28-31. Becky laughed at Troy when he added that he had first thought Osman was a woman. *Id.* at 2:30-40. Troy agreed that Osman was “a positive match for sure.” *Id.* at 2:40-43.

Prior to Becky and Troy’s arrival, Sergeant Treadway found a large “Fred the Fixer” key ring on Osman that contained multiple deadbolt keys and a car beeper, but no car key. JT1:83, 85. After the identification, he went to Mercato to gather additional information. *Id.* He encountered Michael Guley,³ who informed him that Osman had been driving the Mazda that night and should have had a Fred the Fixer key ring on him with both the car key and keys to Mercato. JT1:84. Sergeant Treadway also called the owner of the Mazda, Ayele Adane, who reiterated that the car key should have been on the Fred the Fixer ring.⁴ *Id.*

Upon learning that the car key should have been on the key ring, Sergeant Treadway went back to the scene of the arrest to see if he

³ Guley’s name in the Jury Trial Transcripts is transcribed as “Guley,” despite his Subpoena listing him as Geulay. SR:62; see *generally* JT:1, JT:2, JT:3.

⁴ Sergeant Treadway testified Guley and Adane told him Osman was driving the Mazda that night. JT1:84. Guley’s testimony at trial was that he asked Osman to go get the store keys from Adane, which were on the same key ring as the car key. JT1:75. Adane’s testimony was that he gave the store keys to Osman. JT1:56.

could locate that key. JT1:85. He found it on the sidewalk twenty to thirty feet from where he arrested Osman. *Id.* He then took the key and successfully fit it into the ignition of the Mazda. JT1:86.

Six months before trial, Osman filed a Motion to Suppress the show-up identification and any in-court identification, which the circuit court denied. SR:100. At trial, the jury learned that the investigation revealed a bottle of vodka in the Mazda, and that Osman had a .21 blood alcohol content on the night of his arrest. JT1:30; JT3:30. The State called Becky and Troy as witnesses, and they both identified Osman to the jury. JT1: 35, 47. Troy described his initial impression of Osman at the time of the crash as a darker-complected, dark-haired individual wearing light-colored clothing. JT1:34. He testified that he had gone back inside to put on shoes as Becky observed Osman outside. JT1:37. He admitted that he did not get as long of a look at Osman as Becky and initially thought Osman might have been female. JT1:38-39.

Becky described observing Osman around the Mazda as she headed toward him and called 911. JT1:43. She testified that Osman looked at her before running off. JT1:43-44. She said she got a fairly good look at him because he stood underneath a bright light not too far from her.⁵ JT1:44. She described being certain that it was Osman at

⁵ At a September 3, 2021 Suppression Hearing, Becky estimated Osman was no more than a half block distance away from her. SH:7-8.

the identification and that she had law enforcement shine light on him and show him at different angles. JT1:47. She testified that she did not take time to put on shoes at the time of the crash and immediately went outside. JT1:43.

Adane and Guley also testified. JT1:54, 72. Adane explained that he drove a 2005 Mazda and Osman took the Mercato store keys from him on the night of the crash. JT1:56. Guley testified that he worked that night at Mercato, and Osman had been hanging around the store when Guley asked him to go get the store keys from Adane. JT1:74-75. He also explained that the store keys were on the same key ring as the car key. JT1:75.

Sergeant Treadway also testified. JT1:78. He described seeing Osman acting suspiciously, and how when he approached him, Osman smelled of alcohol and appeared intoxicated. JT1:80, 82. He explained how he found the Fred the Fixer ring with the Mercato keys and car beeper, but no car key. JT1:83, 85. He testified that he went to Mercato after Osman's arrest. JT1:83. He described how, because Guley and Adane told him that the key ring should have also had a car key, and because they informed him that Osman had driven the Mazda that night, he went back to the scene of the arrest to see if he could locate the Mazda key. JT1:84-85. He ultimately found it twenty to thirty feet from where he apprehended Osman. JT1:84-85.

Osman objected to Sergeant Treadway's testimony describing why he went back to the scene of the arrest, arguing it was hearsay because it relied on Adane and Guley stating that Osman had driven the Mazda that night. JT1:84, 104. The State explained to the circuit court that the questioning was offered not to prove that Osman was driving the Mazda but to illustrate to the jury why Sergeant Treadway went back to search for the car key. JT1:105. The State did not use the statement at closing to argue Osman was the driver. JT3:68-69. Rather, the State focused on Sergeant Treadway returning to the arrest scene and finding the Mazda key. *Id.*

ARGUMENT

I

THE IDENTIFICATION PROCEDURE WAS NECESSARY AND DID NOT CAUSE A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

A. *Background.*

Osman filed a Motion to Suppress the show-up identification and in-court identifications, arguing that allowing them violated due process. SR:64. The circuit court denied the Motion. SR:100. It held that, first, the show-up was not impermissibly suggestive because “[s]ingle-person show-ups have been found to be constitutional and actually in the best interest of both defendants and law enforcement in either confirming or dispelling whether the detained individual is the actual suspect after identification.” SR:97. Second, the court held the

pre-trial identification procedure was not so suggestive that it would result in an irreparable misidentification at trial. *Id.*

At trial, the jury heard testimony about Becky and Troy’s on-site identification of Osman. JT1:35, 46. Becky and Troy also identified Osman in the courtroom. JT1:35, 47. On appeal, Osman argues that the show-up identification was impermissibly suggestive, so it and the subsequent in-court identification violated his due process rights. OB:9.

B. *Standard of Review.*

This Court reviews “the denial of a motion to suppress based on the alleged violation of a constitutionally protected right as a question of law by applying the de novo standard of review.” *State v. Red Cloud*, 2022 S.D. 17, ¶ 21, 972 N.W.2d 517, 525 (citing *State v. Angle*, 2021 S.D. 21, ¶ 14, 958 N.W.2d 501, 506). Underlying factual findings of the circuit court are reviewed “under the clearly erroneous standard.” *Id.* (quoting *State v. Doap Deng Chuol*, 2014 S.D. 33, ¶ 19, 849 N.W.2d 255, 261).

C. *Analysis.*

“A defendant's due process rights may be violated ‘when law enforcement officers use an identification procedure that is both suggestive and unnecessary.’ ” *Red Cloud*, 2022 S.D. 17, ¶ 22, 972 N.W.2d at 526 (quoting *Perry v. New Hampshire*, 565 U.S. 228, 238–39 (2012)). “If the identification procedure is both suggestive and

unnecessary, the procedure is improper; thus, ‘the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a ‘substantial likelihood of misidentification.’ ” *Id.* (quoting [Perry, 565 U.S. at 229](#)).

An identification should be suppressed only if “the indicators of a witness’[s] ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion[.]” *Id.* (quoting [Perry, 565 U.S. at 241](#)). The reason for suppressing identifications “is to prevent a substantial likelihood of irreparable misidentification.” [State v. Iron Necklace, 430 N.W.2d 66, 73 \(S.D. 1988\)](#).

1. The show-up was not both suggestive and unnecessary.

In [Red Cloud](#), this Court held that show-up identifications are inherently suspect. [2022 S.D. 17, ¶ 22, 972 N.W.2d at 526](#). Like the circumstances here, *Red Cloud* involved a single suspect taken out of a police car who was shown in handcuffs next to law enforcement. [2022 S.D. 17, ¶ 9, 972 N.W.2d at 522](#). This Court determined that such a procedure is suggestive. [Red Cloud, 2022 S.D. 17, ¶ 25, 972 N.W.2d at 528](#). Further, Officer Devlin identified Osman as “the driver” before taking Becky and Troy to identify him. Exh:101 at 23:10-17.

Even so, “suggestive procedures, without more, do not require a holding that the due process clause has been violated.” [United States v. Hadley, 671 F.2d 1112, 1115 \(8th Cir. 1982\)](#). Rather, the procedure must be both suggestive and unnecessary. [Red Cloud, 2022 S.D. 17,](#)

¶ 22, 972 N.W.2d at 526. Show-ups are not without their virtue — this Court defended them in *State v. Clabaugh*, noting that the best interests of the suspect and law enforcement are served when identification takes place immediately because the risk of misidentification is remote. 346 N.W.2d 448, 452 (S.D. 1984).

Osman's show-up is like that in *Clabaugh*. *Id.* at 450. In *Clabaugh*, law enforcement conducted a show-up involving a man they found wandering the streets whom they suspected in a robbery that had occurred that same night. *Id.* He fit the basic description given by witnesses and was positively identified in a show-up at the scene of his arrest. *Id.* This Court upheld the validity of the procedure. *Id.* at 452. Here, law enforcement detained Osman — who was wandering the street inebriated and fit Becky's basic description to 911 — after seeing him avoiding eye-contact and running away from the area. Exh:1 at 1:00-35; JT1:82. Becky and Troy identified him at the scene of arrest within an hour of the crash. See Exh:101 (the time between Officer Devlin arriving to the crash scene and then taking Becky and Troy to the identification is about 37 minutes).

The fast turnaround afforded Osman the opportunity to quickly be released and allowed law enforcement to promptly determine whether they needed to keep searching for an at-large criminal suspect. *Clabaugh*, 346 N.W.2d at 451-52. Further, unlike *Red Cloud*, law enforcement did not have a photo line-up option available. 2022 S.D.

17, ¶ 25, 972 N.W.2d at 526. The show-up procedure was the best option available to law enforcement at the time for resolving the investigation. See *Clabaugh*, 346 N.W.2d at 451-52. Thus, while under *Red Cloud* the show-up procedure used here was suggestive, it was necessary, and no due process violation occurred. 2022 S.D. 17, ¶ 25, 972 N.W.2d at 526; *Clabaugh*, 346 N.W.2d at 451-452.

2. Even if the show-up was suggestive and unnecessary, there is no substantial likelihood of misidentification.

If a show-up is suggestive and unnecessary, this Court examines whether it created a substantial likelihood of misidentification. *Red Cloud*, 2022 S.D. 17, ¶ 25, 972 N.W.2d at 526. In making this determination, this Court uses a five-factor analysis established in *Neil v. Biggers*. *Red Cloud*, 2022 S.D. 17, ¶ 23, 972 N.W.2d at 526 (citing 409 U.S. 188, 199-200 (1972)). The factors are:

- [T]he opportunity of the witness to view the criminal at the time of the crime;
- the witness' degree of attention;
- the accuracy of the witness' prior description of the criminal;
- the level of certainty demonstrated by the witness at the confrontation; and
- the length of time between the crime and the confrontation.

Id. An identification may be sufficiently reliable even without consideration of every factor. *Red Cloud*, 2022 S.D. 17, ¶ 33, 972

N.W.2d at 528-29. When viewing these factors in their totality, Osman's identification rests in favor of the State.

At the outset of this analysis, the State highlights that Osman conflates Becky and Troy's identifications as if they were one single identification. See OB:14-15. But Becky and Troy are two witnesses who had different experiences. JT1:33, 38-39, 43. Becky immediately got up from her couch, went outside, walked toward Osman, and observed him under a bright streetlight before seeing him look at her and run away. JT1:43-44.

Troy, on the other hand, went back inside to put on shoes, and only caught a brief glimpse of Osman before he ran off. JT1:33, 38-39. Any inconsistencies are therefore not because there is one incoherent identification, but are the result of the differing experiences of two individuals, one of whom got a longer look at the scene than the other. JT1:33, 43-44.

The opportunity to view the criminal at the time of the crime.

Both witnesses saw Osman at the crime scene. JT1:33, 44. Troy got to the door first, opened it, and saw the Mazda roll down the street and die. JT1:33. He went back inside to put on shoes, and when he came back out Osman looked at Becky and ran off. JT1:33. Becky immediately followed Troy after hearing the explosive sound and observed Osman uninterrupted. JT1:43-44. She testified that she got a fairly good look at him because he stood underneath a bright

streetlight. JT1:44. He was not even a half block away from her.
SH:7.

In *Red Cloud*, the witness observed the suspect for about a minute, but he moved around the home and for only a fraction of that time was in full light. 2022 S.D. 17, ¶ 27, 972 N.W.2d at 527. This Court held that each case of identification is factually unique, and that enough opportunities presented themselves for the witness to make a reliable observation. *Id.*

Becky's observations were sufficient for her to correctly determine Osman's sex, hair color, and clothing. Exh:1 at 1:00-35. Troy did not get as long of a look, but managed to observe Osman's dark hair and light-colored clothing. JT1:34. Under *Red Cloud*, both witnesses had an adequate opportunity to observe Osman. 2022 S.D. 17, ¶ 27, 972 N.W.2d at 527.

The witness' degree of attention.

In *Red Cloud*, the witness partially focused on the fact that Red Cloud wielded a shovel as he broke into his home. 2022 S.D. 17, ¶ 30, 972 N.W.2d at 528. Even though the witness often took his attention off Red Cloud and looked at the shovel, this Court determined that because he was not a bystander or casual observer, his degree of attention sufficiently supported the reliability of his identification. *Id.* (citing *Doap Deng Chuol*, 2014 S.D. 33, ¶ 24, 849 N.W.2d at 261–62).

Troy split his attention because he went back inside to put on shoes. JT1:37. All the same, he was not a casual observer or bystander — he was looking at the scene of a crash that wrecked his vehicle. JT:33-34. And *Red Cloud* instructs that some split in attention is acceptable. [2022 S.D. 17, ¶ 30, 972 N.W.2d at 528.](#)

Becky did not split her attention. JT1:43-44. She immediately went outside and observed Osman. JT1:43-44. She was not a bystander or casual observer — she was intensely interested in the fact that her husband’s truck just got hit and the driver that did it was right down the block. JT1:43-44. She was not being threatened or under any immediate danger. JT1:43-44. Thus, under *Red Cloud*, Becky possessed an exceedingly high degree of attention. [2022 S.D. 17, ¶ 30, 972 N.W.2d at 528.](#)

The accuracy of the witness’ prior description of the criminal.

When Becky called 911, she described a male with dark hair wearing light-colored clothing. Exh:1 at 1:00-35. She gave this description right after seeing Osman. *Id.* When asked if she said “white male,” she corrected 911 and said “. . . no, I said you could tell he was wearing like white clothes, maybe a light-colored shirt and pants.” Exh:1 at 1:20-35. Troy offered a less accurate description to law enforcement by saying he saw a female, but did get the clothing and hair color right. JT1:34, 38-39.

The footage at the identification illustrated that Osman was indeed a male with light-colored clothing and dark hair. Exh:2 at 2:05-15. In *Red Cloud*, this Court determined a prior description was sufficient even when the witness got the suspect's height, race, and clothing wrong. 2022 S.D. 17, ¶ 32, 972 N.W.2d at 528. Thus, a degree of inaccuracy on the initial description is acceptable. *Id.*

Troy may have believed that Osman was female, but he nevertheless got his hair color and clothing right, and therefore made a sufficiently reliable identification of him. See *id.*; Exh:2 at 2:41-46; JT1:35. Meanwhile, Becky provided an accurate description of Osman to dispatch, and a highly reliable identification of him at both the show-up and trial. Exh:1 at 1:00-35; Exh:2 at 2:13-18; JT1:47-48.

The level of certainty demonstrated by the witness at the confrontation.

At the identification, Becky initially said "I think that's him." Exh:2 at 2:03-07. She requested that law enforcement shine additional light on Osman and turn him so she could observe him at different angles. Exh:2 at 2:06-18. After observing him, she expressed absolute certainty that they had the right man. *Id.* at 2:13-18. She was so confident in her assessment that she laughed at Troy when he said he initially believed Osman was female. *Id.* at 2:30-40.

Law enforcement asked, "[w]hat did the female look like? Was [Osman] by himself?" Exh:2 at 2:23-27. Becky replied "[Troy] thought

he saw a female, I only saw [Osman].” Exh:2 at 2:28-31. Troy clarified he had first thought Osman was female, but after seeing him expressed absolute confidence in the positive match. Exh:2 at 2:40-45.

This Court declined to address this factor in *Red Cloud* beyond highlighting that the witness went from 90 to 95% certainty to absolute certainty that Red Cloud was the right suspect after having police turn him around and seeing the tattoo on his back. 2022 S.D. 17, ¶ 33, 972 N.W.2d at 528-29. Likewise, when Becky had the police turn Osman to differing angles, this created absolute certainty in both her and Troy. See *Red Cloud*, 2022 S.D. 17, ¶ 33, 972 N.W.2d at 528-29; Exh:2 at 2:06-18. Red Cloud’s memorable tattoo was also similar to Osman’s memorable outfit. See *Red Cloud*, 2022 S.D. 17, ¶ 33, 972 N.W.2d at 528-29; Exh:2: at 2:05-15.

In *Neil*, the United States Supreme Court noted in evaluating the totality of the circumstances that a rape victim had “no doubt” that the suspect was her attacker at a line-up identification. 409 U.S. at 200. Here, both Becky and Troy had no doubt that Osman was the individual they saw on their street standing by the Mazda. Exh:2 at 2:10-45.

The length of time between the crime and the confrontation.

Officer Devlin’s patrol car footage showed that not even 37 minutes passed from the time she arrived on the scene to when the show-up identification occurred. Exh:101. In *Red Cloud*, a three-hour

delay was not considered unreasonably remote. 2022 S.D. 17, ¶ 34, 972 N.W.2d at 529. In *State v. Reiman*, ten days from a rape and kidnapping to identification was not too remote. 284 N.W.2d 860, 872 (S.D. 1979). In *Clabaugh*, a same-night show-up was upheld. 346 N.W.2d at 451-52. The length of time here strongly favors that Becky and Troy properly identified Osman.

Weighing all the factors under the totality of the circumstances.

The totality of the circumstances shows that Becky and Troy's identifications do not create a substantial likelihood of misidentification. See *Red Cloud*, 2022 S.D. 17, ¶ 22, 972 N.W.2d at 526. They both had an opportunity to see Osman standing by the Mazda under a bright streetlight not far from their home. JT1:33, 44; SH:7. Both witnesses were more than bystanders or casual observers, and Becky never went back inside or took her attention off Osman once she started looking at him. JT1:33, 43-44, 48; see *Red Cloud*, 2022 S.D. 17, ¶ 30, 972 N.W.2d at 528.

Becky accurately identified Osman as being a male with dark hair and light clothing, and she corrected 911 when asked if she said "white male." Exh:1 at 1:00-35; see *Red Cloud*, 2022 S.D. 17, ¶ 32, 972 N.W.2d at 528. Troy accurately described Osman as having dark hair and light clothes. JT1:34, 38-39; see *Red Cloud*, 2022 S.D. 17, ¶ 32, 972 N.W.2d at 528. Both witnesses expressed full confidence at the identification that law enforcement apprehended the right person.

Exh:2 at 2:10-18, 2:40-45; see *Red Cloud*, 2022 S.D. 17, ¶ 33, 972 N.W.2d at 528-29. Not even an hour passed between when they observed Osman and the identification. See generally Exh:101; see *Red Cloud*, 2022 S.D. 17, ¶ 34, 972 N.W.2d at 529.

Because the identification at trial was rooted the show-up, and the show-up is reliable when looking at the totality of the circumstances, neither identification had a substantial likelihood of misidentification. *Red Cloud*, 2022 S.D. 17, ¶ 22, 972 N.W.2d at 526. Thus, the circuit court properly denied the suppression of the identifications.⁶

II

SERGEANT TREADWAY'S STATEMENT THAT ADANE AND GULEY TOLD HIM OSMAN DROVE THE MAZDA WAS NOT HEARSAY AND DID NOT RESULT IN PREJUDICE.

A. *Background.*

Osman argues the circuit court improperly admitted hearsay at trial. OB:15-16. Sergeant Treadway testified that Adane and Guley told him Osman was driving the Mazda on the night of his arrest. JT1:83. Osman objected to this testimony as improper hearsay. *Id.*

⁶ The circuit court's jury instructions also helped to ensure the reliability of the in-court identification. SR:152-54. It set out seven factors in Jury Instruction No. 25 that went even further in protecting the accused than what this Court commanded in *Red Cloud*. SR:152-53; see *Red Cloud*, 2022 S.D. 17, ¶ 23, 972 N.W.2d at 526. "Juries are presumed to follow the instructions of the [circuit] court." *State v. Richmond*, 2019 S.D. 62, ¶ 42, 935 N.W.2d 792, 803 (quoting *State v. Eagle Star*, 1996 S.D. 143, ¶ 22, 558 N.W.2d 70, 75).

The circuit court overruled the objection. *Id.* The declarants Adane and Guley testified before Sergeant Treadway, but they were not asked if they knew Osman drove the Mazda on the night of his arrest. *Id.*; JT1:55-57, 72-78, 83-84,106-07.

The circuit court determined that Sergeant Treadway's statement was not hearsay because the witnesses in question "were subject to examination and cross-examination" which "allows the opportunity for the out-of-court statements to be questioned or challenged." JT1:107. The court also determined that statement provided context and was not offered to show the truth of the matter asserted. JT1:109.

B. *Standard of Review.*

The standard of review for evidentiary rulings "requires a two-step process: first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was a prejudicial error that in all probability affected the jury's conclusion.'" *State v. Hankins*, 2022 S.D. 67, ¶ 20, 982 N.W.2d 21, 31 (quoting *State v. Thoman*, 2021 S.D. 10, ¶ 41, 955 N.W.2d 759, 772). "The trial court[s] evidentiary rulings are presumed to be correct." *Id.* (quoting *State v. Babcock*, 2020 S.D. 71, ¶ 21, 952 N.W.2d at 757).

"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.'" *Id.* (quoting *Babcock*, 2020 S.D. 71, ¶ 21, 952 N.W.2d 750, 757). Prejudicial error occurs

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.* (quoting [Babcock](#), 2020 S.D. 71, ¶ 21, 952 N.W.2d at 757).

C. *Analysis.*

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.” [State v. Charger](#), 2000 S.D. 70, ¶ 21, 611 N.W.2d 221, 225; [SDCL 19-19-801](#). But “[s]tatements providing context for other admissible statements are not hearsay because they are not offered for their truth.” [State v. Kihega](#), 2017 S.D. 58, ¶ 29, 902 N.W.2d 517, 526 (quoting [United States v. Tolliver](#), 454 F.3d 660, 666 (7th Cir. 2006)).

“When considering whether statements are being used for their truth or for another reason, including as context for an admissible statement, a court should evaluate each statement individually.” [State v. Loeschke](#), 2022 S.D. 56, ¶ 39, 980 N.W.2d 266, 278–79. In doing so, the court should “consider[] the likelihood that particular statements, even if they could be deemed contextual, would be considered by the jury for their truth notwithstanding a limiting instruction.” [Loeschke](#), 2022 S.D. 56, ¶ 40, 980 N.W.2d at 279.

1. The circuit court found the statement was offered for context.

First, there is no question Sergeant Treadway's statement was a statement other than one made by the declarant — the question is whether it was offered for the truth or for context. See *Kihega*, 2017 S.D. 58, ¶ 29, 902 N.W.2d at 526. As the circuit court found, the State did not offer Sergeant Treadway's testimony to assert that Osman drove the Mazda that night; it offered it to explain Sergeant Treadway's actions after Osman had been arrested. JT1:106.

Sergeant Treadway testified that he learned at the crash scene that the Mazda belonged to Mercato Liquor Store. JT1:80. He left the crash scene to go to Mercato and gather more information. *Id.* On his way, he arrested Osman and found a Fred the Fixer ring on him that had deadbolt keys and a car beeper but no car key. JT1:82-83, 85. After the show-up, he went to Mercato and spoke with Guley, who told him Osman had driven the Mazda that night and should have had a Fred the Fixer ring on him with both the car key and the store keys. JT1:84. Sergeant Treadway called Adane, who reaffirmed that the car key should have been on the Fred the Fixer ring. *Id.*

Sergeant Treadway used this information as a basis for his decision to go back to the scene of the arrest. JT1:85. He found the Mazda key on the sidewalk twenty to thirty feet from where he arrested Osman, which he then took to the Mazda and successfully fit it into the ignition. JT1:85-86. The jury would not have had context for his

decision to return to the arrest scene, or how he found the car key, had they not known that he thought it might be there.

Further, the State never asserted that Guley and Adane's statements to Sergeant Treadway proved that Osman drove the vehicle. JT1:27-28, 84-85; JT3:68-69. As the circuit court determined, the State questioned Sergeant Treadway about what Adane and Guley told him to provide context for "why he went back to the scene to look for the car key." JT1:27-28, 84-86, 106. The State in no way attempted to bolster Sergeant Treadway's statement as if it were the truth. The State did not argue that, based on what Sergeant Treadway said, Osman was in fact an occupant in the vehicle.

Instead, "the prosecutor's opening and closing remarks aligned with [the officer's] testimony giving context to the circumstances related to the crimes charged." [*State v. Kiir*, 2017 S.D. 47, ¶ 16, 900 N.W.2d 290, 296](#) (where this Court analyzed out-of-court statements admitted through an officer's testimony and determined the prosecutor did not use the witnesses' statements to prove the truth of the matter asserted); *see* JT1:27-28; JT3:68-69. The circuit court here explained, "the jury could infer that the keys were given to Mr. Osman to drive the vehicle[,]" after "Mr. Guley said, go and get the keys," and Adane said he gave the keys to Osman — "those are the dots . . . those pieces connected together." JT1:108-09.

Further, Adane and Guley's statements to Sergeant Treadway about Osman having driven the Mazda that night could also be considered admissible res gestae evidence. See [Kiir, 2017 S.D. 47, 900 N.W.2d 290](#). The res gestae rule "permits the admission of evidence that is 'so blended or connected' in that it 'explains the circumstances; or tends logically to prove any element of the crime charged.'" [Kiir, 2017 S.D. 47, ¶ 14, 900 N.W.2d at 295](#) (quoting [State v. Wright, 2009 S.D. 51, ¶ 55, 768 N.W.2d 512, 531](#)). Sergeant Treadway went back to the arrest scene to look for the key because of Adane and Guley's statements to him, so the statements explain the circumstances of how he found the key to the Mazda. [Id.](#); JT1:85.

2. The circuit court properly evaluated the statement for its truth.

Second, the circuit court did not fail to evaluate Osman's objection and fully consider his argument. It discussed the objection for over four pages of the trial transcript and finally determined, "I stand by that objection that you made and the ruling I made upon it that it is not hearsay." JT1:110. It went further: "even if" it were "being offered for the truth of the matter asserted," any prejudice to the defense could "be cured at this point [by] calling the witnesses. I know they are under subpoena and have not been released from their subpoena[.]" [Id.](#) Osman did not call Adane or Guley again.

3. Osman did not suffer prejudice.

Lastly, even if this Court determines Sergeant Treadway's statement was inadmissible hearsay, there is no prejudicial error. "When hearsay statements are erroneously admitted, 'reversal may not always be necessary.'" *Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d at 280 (quoting *State v. Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d 237, 255). Prejudicial error occurs when "in all probability [the error] produced some effect upon the jury's verdict" *Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d at 31 (quoting *Babcock*, 2020 S.D. 71, ¶ 21, 952 N.W.2d at 757). But the State presented overwhelming evidence against Osman.

Law enforcement arrested Osman near the crash scene while he ran away from the area within an hour of it happening. JT1:82; Exh:101. He had a .21 BAC and appeared intoxicated to Sergeant Treadway and on the video exhibits. JT1:82; JT3:30; *see generally* Exh:3. A search of the Mazda revealed a bottle of vodka. JT:11. The key to the Mazda was found twenty to thirty feet from the arrest scene on the sidewalk. JT1:85. Adane testified that he gave Osman the key ring with the store key that night, and Guley testified that the key ring also had the Mazda key on it. JT1:56, 75. Becky and Troy both identified Osman as the person they saw run away from the crash, and he fit Becky's description to 911. JT1:35, 47; Exh:1 at 1:00-35.

Sergeant Treadway not saying why he returned to the arrest scene and simply saying he went back and found the Mazda keys would not have made a difference given this mountain of evidence proving Osman's guilt beyond a reasonable doubt, particularly when this Court has reasoned that direct and circumstantial evidence have equal weight, and circumstantial evidence can be more reliable than direct. *State v. Hall*, 353 N.W.2d 37, 42 (S.D. 1984); *State v. Hage*, 532 N.W.2d 406, 411 (S.D. 1995). Osman simply cannot show that Sergeant Treadway's statement substantially affected the jury's verdict.

CONCLUSION

Based on the foregoing arguments and authorities, the State requests that Osman's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in [SDCL 15-26A-66\(b\)](#) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 6,301 words.

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

Dated this 26th day of January 2023.

/s/ Jacob R. Dempsey
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 26, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Adil Abdulkadir Osman* was served via electronic mail upon Katheryn L. Dunn at kdunn@minnehahacounty.org.

/s/ Jacob R. Dempsey
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29993

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

ADIL OSMAN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

HONORABLE BRADLEY G. ZELL
Circuit Court Judge

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 29993

vs.

ADIL OSMAN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In an attempt to avoid repetitive arguments, Defendant and Appellant, Adil Osman ("Osman"), will limit discussion to the issues that need further development or argument. Any matter raised in Osman's initial brief, but not specifically mentioned herein is not intended to be waived. Osman will attempt to avoid revisiting matters adequately addressed in Appellant's brief.

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "State's Brief." All citations will be followed by the appropriate page number. Osman relies upon the Jurisdictional Statement, Statement of the Case, Statement

of Facts, and Statement of Legal Issues presented in his initial brief filed with the Court on December 12, 2022.

ARGUMENT

I. THE ADMISSION OF THE PRETRIAL SHOW-UP IDENTIFICATION AND THE IN-COURT IDENTIFICATION STEMMING FROM THE IMPERMISSIBLY SUGGESTIVE SHOW-UP VIOLATED OSMAN’S DUE PROCESS RIGHTS.

The State argues the circumstances presented in this case are comparable to *State v. Clabaugh*, 346 N.W.2d 448 (S.D. 1984). In *Clabaugh*, two men robbed a Taco John’s restaurant. *Id.* at 450. Three restaurant employees witnessed the robbery. *Id.* As the suspects drove away, one employee observed the vehicle license plate number and reported it to police. *Id.*

Police were able to locate the vehicle, which contained two people, and gave chase. *Id.* Once stopped, the car only had one person inside. *Id.* The police began to search the area for the second suspect. *Id.* During the search, they located one individual on foot, which was Clabaugh. *Id.* He fit the basic description given by the witnesses. *Id.* Police detained Clabaugh until one of the witnesses arrived on scene and identified him as one of the robbers. *Id.* The show-up in occurred 30-35 minutes after the robbery. *Id.* at 451. At the time of the show-up, Clabaugh was not in handcuffs or in “any form of visible custody.” *Id.* The Court affirmed the trial court’s ruling that the procedure used by the police was proper.

Clabaugh is not on point. First, factually, at the very least, Clabaugh was not in

handcuffs or any form of visible custody. Here, Osman was handcuffed and pulled from the back of a police car. More importantly, the Court in *Clabaugh* failed to conduct the proper due process analysis. The factual record in *Clabaugh* lacks sufficient information that is necessary for consideration under the proper totality analysis set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 201 (1972). Based on this, *Clabaugh* is unsuitable for comparison.

II. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF SGT. TREADWAY CONTAINING OUT OF COURT STATEMENTS OF MICHAEL GULEY.

Osman relies on the argument submitted in his initial brief, filed with the Court on December 12, 2022.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Osman respectfully requests this Court remand this case to the trial court with an order directing the trial court to reverse the Judgment and Sentence and order a new trial.

Respectfully submitted this 24th day of February, 2023.

/s/ Katheryn Dunn

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Reply Brief contains 389 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 24th day of February, 2023.

/s/ Katheryn Dunn

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Reply Brief were electronically served upon:

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