IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,	*	
	*	
Plaintiff and Appellee,	*	
	*	Case #30365
v.	*	
	*	
STEVEN TUOPEH,	*	
	*	
Defendant and Appellant.	*	
	*	

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

****

The Honorable
Circuit Court Judge
James Power

****

APPELLANT'S BRIEF

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Notice of Appeal filed on May 30, 2023

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PRELIMINARY STATEMENT

The Arraignment transcript will be referred to as "A" followed by the page number. The trial transcripts will be referred to as "T" followed by the transcript volume number and page number. The settled record will be referred to as "SR" followed by the page number. The transcript regarding the sentencing/motion to vacate hearing transcript will be referred to as "S" followed by the page number. The transcript of the Self-Defense Immunity hearing will be referred to as "I" followed by the page number. Exhibits will be referred to as "E" followed by an exhibit letter or number. References to Immunity Hearing Findings of fact and Conclusions of Law will be referred to as "IFF" and "ICL". Documents in the Appendix will be referred to as "A" followed by the document number. The Appellant will be referred to as the "Appellant" or "Defendant" or "Tuopeh".

Co-Defendant Jeffrey Pour will be referred to as the "Co-Defendant" or "Pour".

JURISDICTIONAL STATEMENT

The trial court entered the Appellant's judgment and sentence in Minnehaha County CR. 21-7351 on May 9, 2023. SR752. A Notice of Appeal was timely filed on May 30, 2023. SR756. This Court possesses jurisdiction of this appeal pursuant to SDCL 15-26A-3, SDCL 23A-32-2, and SDCL 23A-32-9.

The State/Appellee did not file a notice of review per SDCL 15-26A-22. As such, this Court does not have jurisdiction to review State objections to matters of their concern with adverse rulings including the Motion to Vacate the Conviction and Sentence of Count II, Defendant's Proposed Jury Instructions accepted by the trial court, adverse factual findings and legal conclusions regarding the Immunity hearing, and trial evidentiary objections. State v. O'Connor, 344 N.W.2d 684, 685 n.2 (S.D. 1984)("No notice of review was filed pursuant to SDCL 15-26A-22, however, and we thus will not consider this contention").

LEGAL ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED BY REFUSING TO GRANT AN ALTERNATIVE COUNTS INSTRUCTION WHERE ONE DEATH OCCURED.

The trial court refused the instruction.

State v. Well, 2000 S.D. 156,620 N.W.2d 19
Ball v. U.S., 470 U.S. 856 (1985)

II. WHETHER THE TRIAL COURT ERRED BY FAILING TO PROCURE ATTENDANCE OF A DEFENSE WITNESS, CAUSING A RELATED FAILURE TO ESTABLISH HEARSAY OBJECTIONS.

The trial court failed to procure the witness.

Washington v. Texas, 388 U.S. 14 (1967)
State v. Graham, 2012 S.D. 42, 815 N.W.2d 293

III.WHETHER THE TRIAL COURT ERRED OVERULLING A VOUCHING OBJECTION REGARDING PROSECUTOR'S DECLARATION "MY JOB IS JUSTICE", ETC.

The trial court overruled the objection.

Lawn v. U.S., 355 U.S. 339 (1958)
Harris v. Fluke, 2022 S.D. 5, 969 N.W.2d 717

IV.WHETHER THE TRIAL COURT ERRED OVERRULING OBJECTIONS TO SPECULATIVE CAUSE OF DEATH OPINIONS BASED ON POSSIBILITIES.

The trial court overruled the objections.

Scurlocke v. Hansen, 684 N.W.2d 565, 569 (Ne. 2004)
Koenig v. Weber, 174 N.W.2d 218, 224 (SD 1970)

V.WHETHER THE TRIAL COURT ERRED BY REFUSING PROPOSED JURY INSTRUCTIONS ON SPECULATION AND CONJECTURE.

The trial court refused the instruction.

State v. Webster, 2001 S.D. 141, 637 N.W.2d 392
Miller v. State, 338 N.W.2d 673 (S.D. 1976)

VI.WHETHER THE TRIAL COURT ERRED DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT ITS AIDING AND ABETTING THEORY.

The trial court denied the motion.

SDCL 23A-23-1
State v. Jucht, 2012 SD 66, 821 N.W.2d 629

VII. WHETHER THE TRIAL COURT ERRED DENYING A GRANT OF IMMUNITY.

The trial court denied granting immunity.

State v. Smith, 2023 S.D. 32, 993 N.W.2d 576
State v. Hardy, 390 P.3d 30 (Ks. 2017)

VIII. THE TRIAL COURT ERRED ADMITTING PREJUDICIAL "IDENTIFICATION" EVIDENCE USING THE "N" WORD.

The trial court admitted the evidence.

State v. Woodfork, 454 N.W.2d 332 (S.D. 1990)
State v. White, 538 N.W.2d 237 (S.D. 1995)

STATEMENT OF THE CASE

The Defendant and Co-Defendant were indicted by the Minnehaha County Grand Jury on October 28, 2021. SR752. Tuopeh was initially charged with Murder 2nd, Involuntary Manslaughter 1st (Heat of Passion) and Manslaughter 1st (Deadly Weapon). The Defendants were eventually severed, and Pour plead. Tuopeh requested immunity which was denied. The Manslaughter 1st (Deadly Weapon) count was dismissed prior to trial. Offenses of Manslaughter 2nd and Simple Assault (Reckless) were added to the verdict form. The jury found Tuopeh guilty on Murder 2nd and Manslaughter

1st on April 21, 2023. SR752. The trial court vacated the conviction and sentence regarding Manslaughter 1st. He was sentenced to life in prison on April 25, 2023. SR752.

STATEMENT OF FACTS

On October 10, 2021, Appellant Stephen Tuopeh ("Tuopeh") and Jeff Pour ("Pour") were enjoying their evening together along with others at the Red Sea Pub in downtown Sioux Falls. E:T11. T1:27. Security camera footage outside the Pub shows that Tuopeh and Pour were standing outside the Pub with other acquaintances, casually laughing and joking, and drinking bottles of Guinness. E:T11. T1:46, 50. The Pub had hired Sean Tika as security, and Sean was also standing outside the front entrance with the group of men. T1:45-46. Sean was wearing a long-sleeved shirt identifying himself as security down the right sleeve and was also strapped with a firearm on his right hip. T1:47-48.

Suddenly, Sean's attention was drawn to the East, where he watched a man in a white t-shirt walk West past the bar. E:T11. The man in the white t-shirt was decedent Christopher Mousseaux ("Mousseaux"). E:T11. T1:110. Mousseaux then approached the group of men outside the Pub, and the encounter was initially cordial. E:T11. T1:126.

He exchanged knuckles with Pour, shook Tuopeh's hand, and began talking primarily with Pour. E:T11.

After some conversation ensued, Mousseaux's body language suddenly shifted from cordial to hostiel. E:T11. T1:126. He began pulling up on his pants in an aggressive manner as he stepped closer to Pour. E:T11. He was drunk, puffing up his chest, and stepping closer, when suddenly, the conversation abruptly ended because Mousseaux quickly cocked his right arm back and threw his fist forward towards Pour and Tuopeh. E:T11. E:F. T1:127. Pour limboed backwards to avoid Mousseaux's fist. E:T11. Tuopeh also tried to avoid the punch, but it connected with his jaw, causing him to stumble backwards, grabbing at his face. E:T11.

Like a boxer waiting to land the next punch, Mousseaux continued bouncing and jumping, until his shoulders were again square with Tuopeh as they walked off the sidewalk and onto 8th street. E:T11. E:AC-AF. T1:128, 138-142. As Mousseaux and Tuopeh walked into 8th street, Pour slowly stumbled behind as he held his bottle of Guinness in his left hand while he took his right hand and reached into the left side of his black leather jacket. E:T11. E:H. E:AA. T1:131-132. With Tuopeh's back to Pour, Pour then began jogging to catch up to Tuopeh and Mousseaux, as Mousseaux

remained in a boxing stance with Tuopeh in the middle of 8th street. E:T11. E:AC. T1:130.

Once Tuopeh and Mousseaux made it into the center of 8th street, Mousseaux then again threw his right arm forward towards Tuopeh, and Tuopeh ducked down to avoid Mousseaux's assaultive actions. E:T15. T1:143-145. E:AG. The distance between Mousseaux and Tuopeh closed, and Mousseaux's legs shuffled sideways causing his momentum to propel him forward, stumbling and somersaulting onto the ground. E:II. E:T15. Mousseaux then kicked his legs at Tuopeh at the same time Pour finally caught up to the two. E:II. With Tuopeh near Mousseaux's legs, Pour proceeded to start hammering his fist in a downward motion near Mousseaux's head. E:II. T1:146-147. In a matter of seconds, Tuopeh's white sneakers kicked Mousseaux in his lower extremities five times. E:II. But then Tuopeh stopped and stepped back. E:II. T1:146. Pour, though, continued to swing his fist downward onto Mousseaux's head four more times *after* Tuopeh had stopped. E:II.

Tuopeh and Pour then head back over to the sidewalk by the Red Sea Pub where Mousseaux initially assaulted Tuopeh. E:T11. As they walked by the Pub, no one stopped them. E:T11. Even security guard Sean Tika who was armed with a firearm watched Pour and Tuopeh walk past him as they leave

the Pub. E:T11. As they walk by, security footage again captured Tuopeh's white sneakers and they were still white, with no signs of red blood stains on them. E:T11. T1:160-163. E:LL. E:MM.

A short time later, Officers arrived on scene and found Mousseaux laying on his left side. E:T1. T1:15. Officer Taylor observed blood pooling on the ground from the four lacerations behind Mousseaux's right ear. E:T1,2. Officers began conducting CPR until an ambulance arrived to transport Mousseaux to the hospital. T1:17.

Officers then conducted an investigation that led them to arrest Pour and Tuopeh on charges of aggravated assault. SR1. Officers arrested Tuopeh as he was walking along 12th street, and once he was detained, Tuopeh truthfully provided his full name to officers. T1:101-102. Officers verified Tuopeh's address with the property management company and executed a search warrant at his apartment where Tuopeh's wallet, white sneakers, and jeans were seized as evidence. T1:115-121. E:T20-22.

Following Mousseaux's death, coroner Doctor Kenneth Snell conducted an autopsy and determined Mousseaux died from a traumatic brain injury that was caused by a blunt force object. T2:14-15, 36-38. Dr. Snell determined a blunt force object was used because Mousseaux suffered from

complex skull fractures - one above his left eyebrow and another on the back of his head, behind his right ear. T2:16-17. Above the skull fracture on the back of his head were four lacerations with a shallow puncture wound in between which was indicative to Dr. Snell that an object was swung with such force that upon impact it tore Mousseaux's skin as it fractured his skull. T2:16-17, 22-23, 30-31. Dr. Snell observed additional injuries to Mousseaux in his lower extremities; however, Dr. Snell determined that none of the other injuries were the cause of Mousseaux's death. T2:41-48.

Then, in December 2022, the State received a letter from Korderro Robinson ("Robinson"), an inmate at the Minnehaha County Jail who was housed in the same cell block as Pour. T2:134-136. The letter indicated Robinson had information regarding the investigation of Pour. Id. On March 1, 2023, Detective Marino interviewed Robinson, and Robinson shared that Pour told him he used brass knuckles during the assault on Mousseaux and then threw them over a bridge after. T2:136-138. After receipt of this information and prior to trial, the State dismissed Count 3 against Tuopeh - Manslaughter 1st (deadly weapon). T1:6. T2:100, 103. The trial court did not allow admission of

Robinson's statements at trial. T2:96-117. The jury returned guilty verdicts on both Counts 1 and 2. SR:742.

ARGUMENT

I. THE TRIAL COURT ERRED BY REFUSING TO GRANT AN ALTERNATIVE COUNTS INSTRUCTION WHERE ONE DEATH OCCURRED.

This matter involved multiple counts of crimes involving only one death. The Defendant proposed a standard jury instruction regarding Alternative Counts per SDPCJI 1-13-6. T3:21-25. The State objected to the instruction asserting that if this Court reversed on the most severe charge on appeal, the State may not be able to proceed on remand regarding other charges which resulted in an acquittal. T3:22. The trial court refused the instruction. "Failure to give a requested instruction that correctly states the law is prejudicial error." State v. Well, 2000 S.D. 156, ¶12, 620 N.W.2d 192, 194-95. In so doing, the trial court committed reversible error per Well.

This Court examined a trial court's failure to provide an alternative counts instruction in Well. In that case, the State charged the defendant with two counts Aggravated Assault as well as Abuse or Cruelty to a Minor. State v. Well, 2000 S.D. at ¶1, 620 N.W.2d at 193. The defendant proposed an alternative counts instruction that he could only be convicted of either aggravated assault or child

abuse and not both. This was denied by the trial court, which indicated it would only sentence on one conviction if such occurred. Well, 2000 S.D. at ¶19, 620 N.W.2d 192, 196. The jury entered a verdict of guilty to child abuse and one count of Aggravated Assault. The trial court sentenced the defendant on the Child Abuse count, but not on Aggravated Assault. Well, 2000 S.D. 156, ¶9, 620 N.W.2d at 194.

On appeal, the Well Court reversed the matter regarding failure to provide an alternative counts instruction. It reviewed past precedence such as State v. White, 549 N.W.2d 676 (1996) and Wilcox v. Leapley, 488 N.W.2d 654, 657 (S.D.1992). In citing Wilcox, a homicide case, it noted that two convictions arising out of the same factual incidents "could not stand". Well, 2000 S.D. at ¶23, 620 N.W.2d at 197. Evidence supporting two crimes did not exist in Well. As such, the trial erred not providing an alternative count instruction to the jury. Well, 2000 S.D. at ¶24, 620 N.W.2d 192, 197. It further noted that "[s]imply choosing to sentence Well to one crime did not remedy this. *To hold otherwise would impose two felony convictions for a single crime.*" Well, 2000 S.D. at ¶24, 620 N.W.2d at 197 (emphasis *added*). See also Milanovich v. U.S., 365 U.S. 551, 555 (1961) ("We hold . . . that the

trial court erred in not charging that the jury could convict of either larceny or receiving, but not both"). Well demonstrates that convictions and sentences are separate, and not interchangeable, concepts.

The United States Supreme Court examined issues of a single set of facts leading to two convictions in Ball v. U.S., 470 U.S. 856 (1985). In Ball, the defendant was a convicted felon who threatened a neighbor with a revolver. He was found by police with a revolver that had been reported missing. The government charged him with "receiving a firearm in violation of 18 U.S.C. § 922(h)(1) and for possessing it in violation of 18 U.S.C.App. § 1202(a)(1). Ball, 470 U.S. at 856. The defendant was convicted of both counts.

The Supreme Court of the United States reversed the lower court's decision. Utilizing Blockburger v. United States, 284 U.S. 299, 304 (1932), the Court noted that possession of a gun was incidental to its receipt thus constituting the same act. Id. at 861. One conviction could stand - not two. It criticized the notion that tinkering with the sentence (by making each conviction concurrent) presented an adequate remedy. Id at 864. It noted that "'punishment' must be the equivalent of a criminal conviction and not simply the imposition of

sentence. . . Congress does not create criminal offenses having no sentencing component". Id. at 861. The Court ordered that the judgment *and* its sentence be vacated. Id.

The U.S. Supreme Court applied Ball principles eleven years later in Rutledge v. U.S., 517 U.S. 292, 292 (1996). The defendant was charged and convicted with counts of "participating in a conspiracy to distribute controlled substances in violation of 84 Stat. 1265, as amended, 21 U.S.C. § 846, and of conducting a continuing criminal enterprise (CCE) in violation of § 848". Rutledge, 517 U.S. at 294. The court imposed life sentences on each count which ran concurrently. Rutledge, 517 U.S. at 295. It also assessed a mandatory $50 fee on each conviction. Id.

On appeal, the defendant argued two punishments were imposed for the same crime violating his Double Jeopardy and Due Process rights. Id. at 296. See U.S.Const.Amend. V. The government disagreed arguing, inter alia, that multiple convictions were permitted because "doing so would provide a 'backup' conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether—even if the basis for the reversal does not affect his conviction under the lesser." Rutledge, 517 U.S. at 305. The Court rejected the "backup"

argument stating "there is no reason why this pair of greater and lesser offenses should present any novel problem beyond that posed by any other greater and lesser included offenses, for which the courts have already developed rules to avoid the perceived danger." Id. The Court ordered that one of the defendant's convictions be vacated. Id. at 307.

When discussing the proposed alternative count instruction in Tuopeh, the State presented the "backup" conviction argument as a justification to deny the jury instruction. T3:22. The trial court accepted that justification and denied use of the instruction. T3:26. However, that justification has no value per Rutledge. As such, the trial court errored denying the instruction.

In between Ball and Rutledge, a different line of cases arose in South Dakota starting with Wilcox v. Leapley, 488 N.W.2d 654 (S.D.1992). In Wilcox, the defendant was convicted of both Murder 2nd and Involuntary Manslaughter 1st (and Child Abuse). Wilcox, 488 N.W.2d at 655. The trial court sentenced him with two concurrent life sentences. Id. The defendant maintained in a habeas action appeal that "his concurrent life sentences for one homicide violated the double jeopardy clause". Id.; U.S.Const.Amend. V and XIV.

The Wilcox Court agreed, *in part*. The State used the same facts to prove each charge. Id. at 656. There was no legislative intent in the statutes to punish one death twice. Id. at 657. The Court held "double homicide convictions for a single death are improper." Id. However, it chose to vacate only the sentence in the lesser conviction rather than the conviction itself since both convictions were based in "law and fact". Id.

The one conviction one death rule is entirely consistent with the Ball opinion. However, the Wilcox Court starkly deviated from Ball regarding the disposition of the case on reversal.[1] In contrast to Ball, the second conviction would remain.

A defendant still experiences prejudice when a conviction remains, even when a sentence is not entered.

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[1]The deviation may be for a simple reason. Upon review of the appellate briefs in Wilcox, the parties did not bring the Ball case to this Courts' attention, even though Ball arose only 7 years earlier. See Wilcox v. Leapley, S.Ct #17603, Appellant's Brief Table of Authorities. The Court also dealt with the one conviction one death issue subsequently in State v. White, 549 N.W.2d 676 (S.D. 1996). In that case, that appellant similarly did not cite Ball in their appellant's brief. State v. White, S.Ct.#19021 Appellant's Brief Table of Authorities. As such, the result in Wilcox may have been based, in part, on incomplete arguments presented by the parties to the Wilcox Court. See State v. Nohava, 2021 S.D. 34, ¶ 23, 960 N.W.2d 844, 852 ("nothing in the record indicates that the court knew about those details ").

The Court in Ball discussed prejudice occurring to a defendant when two convictions are imposed for a single act:

> The second conviction, whose concomitant sentences is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Ball, 470 U.S. at 864-65.

Even a $50 assessment was regarded as a sufficient adverse consequence per Ball to warrant a reversal. Rutledge, 517 U.S. at 302.

Sentences and convictions are different events with different legal implications. As in Ball, South Dakota too arrives at parole eligibility determinations based on a grid listing of a number prior felony convictions. SDCL 24-15A-31. A conviction by plea alone can activate a recidivist statute even though sentencing has not occurred on the offense. State v. Dassinger, 294 N.W.2d 926, 928 (S.D. 1980).[2]

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[2] In addition, inmates in South Dakota face potential prejudice in their security classifications upon entering

The court below granted Tuopeh's Motion to Vacate Count II. SR752. The Defendant still suffered prejudice from failure to give the alternative count instruction. Use of alternative count instructions, or the lack thereof, fundamentally alters the choices available to the jury. In turn, the process due to a Defendant impermissibly lessens accordingly in violation of U.S.Const.Amend. V and XIV.

The U.S. Supreme Court addressed this issue in Milanovich v. U.S., 365 U.S. 551 (1961). In that case, the defendant (at issue) was charged and convicted with 1) stealing currency as well as 2) receiving and concealing the currency. Milanovich, 365 U.S. at 552. She was sentenced concurrently.

The defendant argued that the trial court should have instructed the jury to consider convictions for either charge but not both. Id. at 555. The remedy should be reversal with instructions to conduct a new trial since "it

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the penitentiary. Housing and programs available to inmates within the penitentiary are directly related to their security classification. SD DOC Policy Male Inmate Classification. 1.4.B.2; A:R. In the present case, the jury considered guilt for Murder 2nd, Involuntary Manslaughter 1st, Involuntary Manslaughter 2nd, and Simple Assault. Classification for such crimes are classified as BV, CV, and 4V, respectfully. Housing is a paramount concern when serving a life sentence.

is now impossible to say what verdict would have been returned by a jury so instructed, and thus impossible to know what sentence would have been imposed." Id. The U.S. Supreme Court agreed noting: "Yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither). Thus we cannot say that the mere setting aside of the shorter concurrent sentence sufficed to cure any prejudice resulting from the trial judge's failure to instruct the jury properly." Id.

As in Milanovich, the Tuopeh's indictment eventually presented two possible charges. Proposed instructions were later granted concerning a continuing string of lesser included offenses. The instructions as given allowed the jury to find guilt on all charges. Use of Instruction 1-13-6 would have forced the jury to focus on delivering a single verdict along the string of possible lesser included offenses. Compare U.S. v. Gaddis, 424 U.S. 544, 550 (1976) (some counts *not* lesser included offenses). This Court should not make "assumptions" that such an error was harmless or later cured by creative sentence tinkering as such assumptions would "usurp the functions of both the jury and the sentencing judge." Id. at 556.

The jury in Tuopeh's case was not instructed to pick one charge for one death as it should have been instructed, as that is what the law requires. Failure to use the instruction needlessly shifts efforts to cure due process errors until after the jury has decided the facts of the case and left the court house. However, use of the instruction grants the jury authority *with* guidance to make such decisions up front with all due finality and efficiency. To maintain and protect the one death one conviction rule, this Court might consider regarding alternative count instructions as mandatory in single homicide cases. Is there a conceivable set of facts where granting the alternative counts instruction in a multi-count single homicide case ever be an abuse of discretion?

Reasonable doubt can exist regarding whether the single death was the product of a depraved mind, a product of the heat of passion, or a death caused by mere recklessness. These are not identical concepts. The defendant had the right to have the jury determine which charge had been proved, to the exclusion of others, if any had been proved at all. The defendant suffered prejudice and is entitled to a new trial, for this reason in addition to others relating to various errors discussed throughout this brief. See State v. Nelson, 1998 S.D. 124, ¶20, 587

N.W.2d 439, 447; Gordon v. U.S., 344 U.S. 414, 420-23 (1953).

The Wilcox Court pronounced "we urge prosecutors to charge defendants in cases such as this in alternative counts." Wilcox v. Leapley, 488 N.W.2d 654, 657 (S.D. 1992). History demonstrates that despite such urging this has not occurred. See State v. White, 1996 S.D. 67, ¶ 27, 549 N.W.2d 676, 682. The urging has not been heard in Tuopeh's case, over 30 years later.

The one conviction one death rule has not changed. However, the harmless error has expanded in scope over time. *Appellate remedies* are now baked into *trial court decisions* regarding jury instructions, instead of merely applying the one death one conviction rule.[3] The alternative count instruction serves to have the jury make a decision the State is unwilling to make, despite its obvious capacity to do so. The State, after all, picks the charges. The jury is able to implement a rule that the State will not enforce themselves, despite this Court's urging. The trial court did not let the jury do its job by

[3] The trial court noted the distinction regarding the severance issue: "I am not going for harmless error." 4-7-22 Motion Hearing Transcript p.26.

refusing the instruction. Reversible error is present here.

II. THE TRIAL COURT ERRED FAILING TO PROCURE ATTENDANCE OF A DEFENSE WITNESS, CAUSING THE RELATED FAILURE TO ESTABLISH HEARSAY OBJECTIONS.

The Defense's theory was that Pour's actions caused the decedent's fatal head injuries, not Tuopeh. The State disclosed Pour admitted to an inmate that he used brass knuckles during the fight. T2:133 et seq. Pour's actions were distinguishable from the Defendant. Tuopeh's actions arose of self-defense concerns, and video evidence showed that any blows from Tuopeh did not approach the head region. IFF:19=22. The defense theory was more than tenuous as shown, inter alia, by the approval of lesser included instructions including Simple Assault (Reckless). The trial court refused to procure a necessary witness's attendance, and refused to admit testimony pursuant to hearsay exceptions, committing reversible error.
The Defendant's right to present a complete defense was denied when the trial court refused to procure the attendance of a defense witness from the penitentiary in Minnehaha County, and then refused to otherwise admit testimony through hearsay exceptions. State v. Huber, 2010 S.D. 63, ¶37, 789 N.W.2d 283, 294; Crane v. Kentucky, 476

U.S. 683, 687 (1986). U.S.Const.Amend. V and XIV. Similarly, Tuopeh's right to compel the attendance of witnesses to support his theory of defense was similarly violated. Washington v. Texas, 388 U.S. 14, 18-19 (1967); U.S.Const.Amend. VI and XIV; S.D. Const. art. VI, § 7. These significant errors cannot be deemed harmless beyond any reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967).

The Defendant subpoenaed Pour, Robinson, and Marino. Pour remained silent. T2:93-95. The parties stipulated that Pour was an unavailable witness. T2:93-95. Robinson did not comply with his transport order. SR442.

The Defendant presented an offer of proof to show that a DOC inmate (Korderro Robinson) had information about the case in December, 2022. T2:134-35. 2 months later, Detective Marino met the inmate. Id. The inmate stated he was in the same cell block with Pour at the county jail while Pour's case was still pending. T2:136. Pour stated he had used brass knuckles to beat the victim. Id. Marino confirmed Pour and the inmate were in the same block. Id.

Tuopeh's counsel then wished to proceed to question Robinson. A sheriff's deputy went to retrieve the inmate, but he purportedly refused to go with the Deputy. T2:97. No force was used to transport the inmate that day.

The trial was originally set to run from Monday through Friday, but it was resolving quickly. The State rested its case on Tuesday, and discussion of Robinson's testimony occurred that afternoon. T2:112-13. The defense wished to recess to serve and transport the inmate again. Id. Since compulsory attendance is a fundamental right, the Defendant argued they should continue to try again until successful, since the jury was on notice that the trial would last until Friday. Id.

The trial court denied the request. T2:116-17. It did allow the Defendant to subpoena the inmate that day *knowing such an effort would fail*. T2:117. The Defendant tried, but the Sheriff's Department would not do so. T3:3; E:ZZZ.

The trial court erred in doing so. The Defendant was entitled to compulsory attendance per Washington. See also SDCL 23A-14-3. The trial court specifically possesses the power to "produce" the attendance of inmates in a penitentiary to appear in proceedings in that county. SR442. SDCL 19-5-5. The trial still had 3 days to conclude. The trial court's decision to deny the recess request, and limit service and transport attempts too that day, demonstrates arbitrary decisions by the trial court, including ignoring its own transport order. SR442.

The trial court's action inhibited the Defendant's effort to make a complete record regarding the legality of hearsay objections. The trial court indicated Pour's statements would be double hearsay. However, double hearsay, is admissible when "each statement either meet a hearsay exception or qualify as 'nonhearsay'". State v. Graham, 2012 S.D. 42, ¶ 22, 815 N.W.2d 293, 303. Had Robinson been transported, a proper submission of testimony could have been made leading to the statement's admission into evidence.

Nevertheless, Pour's statement to the inmate was admissible as he was an unavailable witness per stipulation. SDCL 19-19-804. The trial court agreed Pour's admission that he used brass knuckles to beat the decedent demonstrated a statement against his interest. SDCL 19-19-804(b)(3); T2:107. Use of brass knuckles, raised by the State via its Indictment, demonstrates corroborative relevance. SR6. Their action to dismiss Count III after Marino's meeting supports its reliability.

Robinson's statement regarding Pour was similarly admissible. Robinson summoned the State to speak with him. His statements were corroborated by Marino by confirming that both individuals were in the same cell block when a conversation could occur. T2:136.

The trial court's concerns about the inmate's "credibility" would be either confirmed or rebutted if the trial court used its authority to procure the inmate's actual attendance as requested. T2:107 ("the only evidence I have as to that is his criminal record"). This Court would then be able to conduct a meaningful review of the trial court's decision that the inmate's testimony was trustworthy or not. See State v. Talarico, 2003 S.D. 41, ¶47, 661 N.W.2d 11, 26.

Pour's testimony through Marino served a non-hearsay purpose. A defendant is permitted to "discredit the caliber of the investigation or the decision to charge the defendant". Kyles v. Whitley, 514 U.S. 419, 446 (1995) citing Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986). Details of how Marino pursued the investigation are relevant. T2:106-07. Nevertheless, the trial court rejected the "caliber of the investigation" argument as it was not the "jury's job to judge how well the investigation was done". T2:107-08. Marino received a tip regarding the event but took 2 months to investigate. The information eventually pushed greater inculpability towards Pour who used a weapon more capable of causing greater damage to the decedent than the Defendant's sneaker. Questions regarding the delay in seeking out such information, and then

relaying it to the defense were pertinent to the caliber of the States investigation and their charging decisions in this case. The State had charged Tuopeh with using brass knuckles, but later dismissed that count following Robinson's interview, demonstrating a lack of confidence in their initial charging decisions. SR6. The trial court erred in not admitting the inmate's testimony on these grounds, even with a limiting instruction, resulting in reversible error. T2:107.

III. THE TRIAL COURT ERRED OVERULLING VOUCHING OBJECTION REGARDING PROSECUTOR'S DECLARATION "MY JOB IS JUSTICE" ETC.

"Prosecutors must resist the urge to win at all costs and instead must be especially careful to let the evidence speak for itself and 'to choose their words in a closing argument with great care.'" Trump v. State, 753 A.2d 963, 969 (Del. 2000). As such, vouching by a prosecutor for a witness's credibility or a conclusion is generally prohibited. Lawn v. U.S., 355 U.S. 339, 359-60 n. 15 (1958); State v. Goodroad, 455 N.W.2d 591, 594 (S.D.1990); U.S.Const.Amend. XIV. Vouching occurs when a prosecutor acts to place "the prestige of the government behind the witness and implying that the prosecutor knows what the truth is and thereby assures its revelation." Jenner v. Leapley, 521 N.W.2d 422, 427 (S.D. 1994). Use of the

prestige may be explicit or implicit. State v. Nelson, 2022 S.D. 12, ¶ 38, 970 N.W.2d 814, 826.

The prosecutor invoked such prestige regarding paramount issues in this case, depriving the Appellant of his "substantial right" to a fair trial. U.S.Const.Amend. VI & XIV. The Appellant was prejudiced by its affect advancing the State's case to the detriment of the Appellant's defense theories.

An example of vouching was recently seen in Harris v. Fluke, 2022 S.D. 5, 969 N.W.2d 717. In Harris, the defendant was charged for third-degree rape, where both the defendant and victim were extremely intoxicated. The prosecutor relayed to the jury during closing arguments:

> I thought long and hard about this case. I thought long and hard about whether or not this was a case that needed to be heard by a jury. And it's a serious allegation. I thought about the evidence, and I looked at the video, the phone report. I looked at everything and it became clear to me that Mr. Harris did take advantage of [R.K.'s] impairment; that she was incapable of consent; that he knew it; and that a jury needed to hear about it. Harris v. Fluke, 2022 S.D. 5, 969 N.W.2d 717, 719 n.1.

The prosecutor in Harris related various personal facts and conclusions regarding his personal observations before trial, the existence of which cannot be seen in the record

for verification or criticism. Since he was a "prosecutor", a role with all its implicit accessories, the jury could take his conclusions on faith of what was "clear" to him in concluding the defendant's guilt. In dicta, this Court characterized the prosecutor's statement as "improper vouching". See Harris v. Fluke, 2022 S.D. 5, ¶ 9, 969 N.W.2d 717, 720.

In the present case, the State raised the issue of the lack of blood found on the Defendant's shoes after the search of the Defendant's residence. T3:65-67; T2:161-63. The prosecutor questioned Marino to point out the shoes were found 3 days after the event in the Defendant's apartment. The prosecutor used this for the inference that the Defendant cleaned his shoes after the event to hide evidence Id.; T2:161-63.

On cross examination, Marino confirmed through photographs from the Red Sea Pub sidewalk that the Defendant's shoes contained no blood after the event. Id.; E:MM; E:LL. E:T9-10. There was no blood present to be removed prior to the search. Defense counsel criticized the motives of the State for selling an issue as incriminating, when it could not be incriminating. T3:66-67.

During the State's rebuttal argument, the prosecutor presented the following remarks:

> In addition, the defense just said to you that I was trying to sell you something. That's not my job. I'm not a salesman. I don't sell anything. *My job is justice and bringing people to justice who have committed crimes.* I am not here trying to put anything over on you. I'm here to present evidence to you that shows that this defendant committed these crimes. *Selling something is not what I do.* T3:70-71. (emphasis *added.*)

The Defendant objected on vouching grounds and was overruled. T3:71.

Considerations of the prosecutor's identity, job and reputation invokes considerations of evidence which lay outside of the confines of this trial. See Jenner, 521 N.W.2d at 426-47. There was no direct or indirect reputation evidence in the record to establish her job as "justice" nor that "selling" a pretextual argument is not what she does (when the record showed otherwise). Since she was a "prosecutor" as in Harris, a role with the same implicit accessories, the jury could take her conclusions on faith. This jury would thus conclude this "prosecutor knows what the truth is and thereby assures its revelation." Nelson, 2022 S.D. at ¶ 38, 970 N.W.2d at 826. This thought implanted into the

jury's consciousness, prejudiced the Defendant's chances during their deliberations.

Further, the Defendant is entitled to cross examine witnesses against him. U.S.Const. Amend. VI, and XIV; See Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); State v. Dickerson, 2022 S.D. 23, ¶28, 973 N.W.2d 249, 258. The prosecutor cannot be a witness in her own case to be cross examined about her subjective beliefs. People v. Moye, 12 N.Y.3d 743, 744, 907 N.E.2d 267 (2009). Such statements occurred during the rebuttal argument when the Defendant is not able to respond afterward, thus creating exceptional prejudice which went unchallenged. As such, substantial rights such as Due Process, Fair Trial, and Confrontation Clause rights were prejudiced by presenting prosecutorial belief of facts without the opportunity to conduct cross examination. U.S.Const. Amend. V, VI, and XIV. The trial court erred overruling the objection requiring reversal and remand for a new trial.

IV. THE TRIAL COURT ERRED OVERRULING OBJECTIONS TO SPECULATIVE CAUSE OF DEATH OPINIONS BASED ON POSSIBILITIES

The State called Dr. Snell to provide opinions regarding the cause and manner of Mousseaux's death. He also described his opinions through use of metaphors.

T2:30-31. The Defendant objected on grounds of speculation. I:17;T:31. The trial court overruled the objections in error.

Evidence must be relevant and not lead to speculation. See SDCL 19-19-401(a). SR353. Expert testimony should not be received "if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from mere guess or conjecture." Scurlocke v. Hansen, 684 N.W.2d 565, 569 (Ne. 2004). Expert testimony or opinions "based on 'could', 'may', or 'possibly' lacks the definiteness required to meet the claimant's burden . . . the trier of fact is not required to guess". Paulsen v. State, 541 N.W.2d 636, 643 (NE 1996); Koenig v. Weber, 174 N.W.2d 218, 224 (SD 1970); *See* Brady Mem'l Home v. Hantke, 1999 S.D. 77, 597 N.W.2d 677, 680.

Over objection, the State asked at the Immunity hearing and at trial whether the Defendant's foot and/or sneaker possibly caused the decedent's death. I:17; T2:31. Snell indicated it was possible, not probable. T2:45. This prejudiced Tuopeh as the jury was presented with the possibility to consider that Tuopeh's sneaker killed Mousseaux, in the absence of a speculation instruction, in reaching its verdict. This error at trial mirrored the

lower court's Immunity findings that "blows from a foot, fist or a combination thereof were possibilities." IFF:21. Snell's opinions and testimony presented possibilities regarding the defendant's sneaker led only to speculation. Verdicts, like this, cannot be based on speculation. State v. Toohey, 2012 S.D. 51, 816 N.W.2d 120.

The State asked Snell hypotheticals regarding a person falling onto a rock from a second story building. T2:30-31. The Defendant objected on grounds of speculation which was overruled. T2:31. Snell answered in terms of possibilities again. T2:31.

This too was error. SDCL 19-19-702(a) provides the expert's testimony to be helpful to the jury "determine a fact in issue.". State v. Guthrie, 2001 S.D. 61, ¶32, 627 N.W.2d 401, 415. Metaphoric analogies used to assist the opinion which are too inflammatory are not relevant. State v. Kvasnicka, 2013 S.D. 25, ¶31, 829 N.W.2d 123, 130.

These opinions were both inflammatory and not helpful. No fall from a significant (i.e. inflammatory) height occurred here. Similarly, no fall onto a rock occurred. The jury was left to speculate as to how such analogies helped their deliberations since they did not match the facts of this case. These errors, combined with others outlined in this brief, demonstrate prejudicial error

requiring reversal for a new trial.

V. THE TRIAL COURT ERRED BY REFUSING PROPOSED JURY INSTRUCTIONS ON SPECULATION AND CONJECTURE.

The Defendant proposed multiple alternative jury instructions defining speculation and conjecture. SR513; SR532. The State opposed the instructions arguing there was not "any testimony or evidence that would, kind of, trigger instructing the jury as to speculation." T3:12. The trial court rejected the proposals reasoning that speculation and conjecture were sufficiently defined by being adjacent to each other in Preliminary Instruction 5-2-2: "speculation, guess or conjecture". T3:13. The trial court errored in denying these proposed instructions.

Reversible error to refuse to give a proposed jury instruction is shown where the instruction is a correct statement of the law, the instruction was warranted by the evidence, and the error from not giving the instruction was prejudicial. State v. Webster, 2001 S.D. 141, ¶7, 637 N.W.2d 392, 394. If the error of refusing the instruction goes to the heart of a Defendant's case, "it can infringe upon the defendant's right to due process and a fair trial". Miller v. State, 338 N.W.2d 673, 676 (S.D. 1976).

The Defendant presented a theory that demonstrated that, following Mousseaux's attack on him, the actions of

each co-defendant were unique. Objective evidence through videos and forensic reports demonstrated that any actions of Tuopeh did not cause fatal injuries as they were delivered at his lower body. The State pursued a theory that the Defendant, via kicking Mousseaux with his sneakers, caused fatal injury. Snell indicated over objections that the sneakers possibly could cause death.

The Defendant countered that the State's theory, to be successful, would require speculation or conjecture. The law does not permit a verdict be based "on mere suspicion or possibility of guilt." Toohey, 2012 S.D. at ¶22, 816 N.W.2d at 130. In support of the speculation instruction, the Defendant cited Jaramillo v. U.S., 357 F.Supp. 172, 175 (DCNY 1973). With regards to the conjecture instruction, the Defendant cited Oklahoma City v. Wilcoxson, 48 P.2d 1039, 1043 (Ok. 1935); Weed v. Scofield, 73 Conn. 670, 49 Atl. 22 (Conn. 1901). Per Webster, the instructions correctly stated the law.

In addition, the evidence presented to the jury warranted use of any of these proposed instructions. The Defendant objected to Snell's opinion that a sneaker could "possibly" cause fatal injuries. The jury was still left with the possibility to consider that Tuopeh's sneaker killed Mousseaux, the absence of blood stains

notwithstanding. An instruction as to speculation and conjecture would at least provide some "curative" measure to mitigate the effects of evidence based on possibilities. See U.S. v. Barrera, 628 F.3d 1004, 1007-08 (8th Cir. 2011). The jury would less likely conclude something such as "but didn't that nice coroner also tell us it was possible the sneaker killed him". The Defendant was prejudiced by the lack of the instructions.

The lack of instructions prejudiced the Defendant was further prejudiced when the State encouraged the jury to speculate during closing arguments. The State informed "the defense said to you we don't want you to speculate, and *I would like you to* because you are the ones who determine what the evidence is." T3:71 (emphasis *added*).

The State, undeterred by Preliminary Instruction 5-2-2, encouraged the jury to speculate about the evidence. Snell's opinion as to possibilities, presented at trial, fit that category. The Defendant's right to a fair trial was prejudiced by the trial court's failure to present these instructions, and provide some curative effects.

VI. THE TRIAL COURT ERRED DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT ITS AIDING AND ABETTING THEORY.

A trial court shall grant a motion for judgment of acquittal where "the evidence is insufficient to sustain a conviction of the offense or offenses." SDCL 23A-23-1. The State argued that Tuopeh aided and abetted Pour. There was no evidence demonstrated by Tuopeh's actions that he possessed the same requisite intent as Pour. T2:88. The trial court denied the motion and committed error regarding the indicted offenses. *De novo* review should apply. See State v. Berhanu, 2006 S.D. 94, 724 N.W.2d 181.

An aider and abettor is any "person who, with the intent to promote or facilitate the commission of a crime." SDCL 22-3-3. The "accomplice must share the criminal intent of the principal". See State v. Jucht, 2012 SD 66, ¶26, 821 N.W.2d 629, 635. The same intent as Pour's potentially depraved mind was not shown here.

The State presented evidence that Mousseaux died from injuries to his skull. Tuopeh stood by Mousseaux's lower extremities and kicked the decedent for a few seconds toward his lower regions. E:II. No fatal injuries arose from those areas. T2:44-45.

The evidence showed that Pour followed behind Mousseaux and Tuopeh as the latter two hopped toward and into the street. Pour reached into his left side jacket pocket and held something. He also had a beer bottle in

his left hand. T1:132. After Mousseaux fell, Pour situated himself near Mousseaux's head and made several downward thrusting punching motions towards Moussueax's head. E:II. Pour admitted he struck Mousseaux with his fist. T2:129.

Pour chose to pick up a beer bottle as he approached Mousseaux. Pour's intent was to cause more damage. Pour hit Mousseaux in his head. Pour's intent targeted the region displaying the fatal injury. Conversely, Tuopeh initially chose to use his fists and feet. He did not pick up a weapon to cause greater harm. As such, his intent to defend himself was different from Pour's intent. Tuopeh kicked Mousseaux in the lower regions - not the area where the fatal injury occurred. T2:44-45. His intent differed from Pour's intent.

The Defendant argued the actions of each were different and could be distilled. T2:88. Their different actions objectively observed displayed different intents. T2:88. Conversely, the State failed to prove Tuopeh's intent mirrored Pour's intent as required by Jucht. The trial court errored denying the motion for judgment of acquittal.

VII. THE TRIAL COURT ERRED WHEN IT DENIED GRANTING IMMUNITY.

The Defendant petitioned the trial court for an Immunity hearing regarding self-defense per SDCL 22-18-4.8. The trial court scheduled the hearing prior to the trial. It found that the Defendant presented a prima facie case regarding his self-defense theory, but then found that the State met its burden to rebut the self-defense position by clear and convincing evidence. IFF:(Introduction). The State presented no new evidence or testimony in support of that contention. The trial court committed error.

This Court addressed the most recent version of the immunity statute in State v. Smith, 2023 S.D. 32, 993 N.W.2d 576. The Smith decision primarily addressed retroactivity but noted the statute was substantive in nature. Smith, 2023 S.D. at ¶23, 993 N.W.2d at 585. Any failure about not having a *pretrial* hearing was cured by presentation of a self-defense theory at trial. Smith, 2023 S.D. at ¶36, 993 N.W.2d at 588.

In this case, the court held the immunity hearing prior to trial. Any prejudice from Smith is not a central issue in this case. Comparative issues between immunity

hearings versus the jury trial itself still has implications for Tuopeh's case.[4]

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[4] A failure to reach a full decision on immunity, a statutory right, prior to trial still implicates "substantial rights". Our Legislature provided "a substantive right to be free from civil or criminal culpability." Smith, 2023 S.D. at ¶34, 993 N.W.2d at 588. The statute "*presumptively forecloses criminal culpability.*" Id. (emphasis *added*). A right to a fair trial is a substantial constitutional right. However, the right conferred by the immunity statute provides a substantial right *with a potentially greater benefit to the accused* - it removes the need for a jury trial and the risk of punishment entirely.

SDCL 22-18-4.8 defines prosecutions to include arrests and detentions. As such, the earliest parts of a prosecution are protected too. Smith, 2023 S.D. at ¶30, 993 N.W.2d at 587. Immunity hearings should not only occur before a trial, but *sooner rather than later*, in order to protect these concerns. Harmful prejudice occurs not merely by erroneously finding against a defendant, but by failing to find for a worthy defendant *later rather than sooner*.

Under this framework, typical harmless error analysis displayed in Smith in future cases would conflict with the Legislature's intent to present a greater right than a fair trial. It is greater because it can grant relief before the trial by eliminating a need for one. "We can presume that in most instances the Legislature would enact laws dealing with matters of deep concern in South Dakota." State v. Schwartz, 2004 S.D. 123, ¶54, 689 N.W.2d 430, 444 (concurring opinion).

Immunity statutes elsewhere also demonstrate the substantive need to have such hearings earlier in the proceedings. Seen State v. Hardy, 390 P.3d 30 (Ks. 2017). In Hardy, the appellate court noted the immunity "statute does confer a true immunity—carries with it the necessity of a procedural gatekeeping function, typically exercised by a detached magistrate, who will prevent certain cases from ever getting to a trial and a jury." Hardy, 390 P.3d at 38. Accordingly, "district courts must remain sensitive to the fact that the matter being resolved is a question of immunity that ought to be settled as early in the process as possible to fully vindicate the statutory guarantee."

State v. Hardy, 305 Kan. 1001, 390 P.3d 30 (2017)is also displays how burdens of proof shift, and the effects of the State not meeting its burden to rebut a defendant's offering. In Hardy, the district court granted immunity at an evidentiary hearing. The State had argued that an evidentiary hearing was not required. Hardy, 390 P.3d at 34. The district court granted a full hearing inviting any manner of proof.

The victim reached into a car where the defendant was sitting and hit him several times in the face. Hardy, 390 P.3d at 39. The defendant shot the victim twice. Id. The evidence was disputed whether the victim was backing up when the defendant shot him. Id. Despite this dispute, the attack was still regard as ongoing. The difference between the victim's attack and shots fired was seconds. Id. at 35. The lower court's decision granting immunity was affirmed, as the State did not meet its burden that the defendant's "use of force was not justified". Id. at 40.

As in Hardy, the decedent started the fight. IFF:6. The time between decedent's attack and the end of the fight was brief "less than a minute". IFF:13. Video evidence

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Hardy, 390 P.3d at 39; See also State v. Jones, 416 S.C. 283, 300, 786 S.E.2d 132, 141 (2016).

demonstrates physical contact from Tuopeh to Mousseaux lasted only seconds. E:II. After the Mousseaux's initial attack, he moved about in a "tactical retreat" "hopping and skipping". IFF:7-8. The trial court concluded Tuopeh met his burden to prove a prima facie case of self-defense. IFF:(Introduction). The State did not challenge this finding and conclusion via a Notice of Review, thus waiving any challenge before this Court.

The trial court directed the State to try to rebut Tuopeh's theory. Id. The State however declined to present any additional evidence or testimony. I:47-49. As such, the State submitted nothing new to consider. Tuopeh argued that if the State waived presenting additional evidence, then the court's initial prima facie finding should prevail as the ultimate conclusion. I:49-50. See Edwards v. State, 351 So. 3d 1142, 1149 (Fla. Dist. Ct. App. 2022) citing MTGLQ Invs., L.P. v. Merrill, 312 So. 3d 986, 993 (Fla. 1st DCA 2021) ("holding that unsworn representations of counsel about factual matters are not competent evidence absent a stipulation"). The trial court instead found that the State met its burden to rebut. IFF(Introduction); I:57. This conclusion was error prejudicing the Defendant. The result of the prosecution

and trial would be different in that there would be no trial at all.

Rather than address procedural issues regarding the State not presenting proof, the trial court embarked sua sponte raising considerations of aiding and abetting, prior to further consideration of the self-defense burden shifting issue present before it. I:50. Defense counsel disputed this approach. Id. An Immunity hearing addresses self-defense, while aiding and abetting presents considerations of the State's charges and the State's proof presented at trial. I:50-51.

Immunity hearings are an unusual creation. They put the cart before the horse. The State has the burden of proof at trial, and as such, the State normally proceeds first. The State has discretion to pick its charges. See State v. Moeller, 2000 S.D. 122, ¶ 165, 616 N.W.2d 424, 463. With immunity hearings, the Defendant proceeds first and has to meet his burden of proof. The Defendant has a constitutional right to pick and present its theory of defense. See Crane v. Kentucky, 476 U.S. 683, 687 (1986).

A defense of "self-defense" does not involve the actions of others. SDCL 22-18-4.8 refers to a single *person* who uses force but is immune. The immunity is from prosecution of "*the* defendant". SDCL 22-18-4.8 (emphasis

added). The statute does not state "person or persons". A single person is not authorized by SDCL 22-18-4.8 or otherwise lacks standing to assert a defense on behalf of another person.

Aiding and abetting by necessity, however, implicates actions of two people. SDCL 22-3-3; See State v. Jucht, 2012 SD 66, ¶26, 821 N.W.2d 629, 635("accomplice must share the criminal intent of the principal). As such, an aiding and abetting theory advanced at this stage in the proceedings is both premature and waived in this case. It is premature in that it has not been asserted at trial, which had yet to occur. It was waived because the State presented no additional evidence at the hearing to support that theory, *after* the trial court made its initial finding for the Defendant. The self-defense theory only involved Tuopeh's reasonable belief regarding Mousseaux and no one else. As such, the trial court erred in concluding the State met its burden. This matter should be remanded to grant immunity based on the trial court's initial conclusion that the Defendant established a prima facie case, or alternatively, grant a new hearing.

VIII. THE TRIAL COURT ERRED ADMITTING PREJUDICIAL "IDENTIFICATION" EVIDENCE USING THE "N" WORD.

The State offered exhibit T37. The Defendant objected on reasons of relevance (Rule 401), undue prejudice (Rule 403), and hearsay. T2:53-54. The trial court found the evidence to be irrelevant and hearsay. T2:56. The trial court still admitted the evidence for identification purposes over Tuopeh's objections. T2:54; T2:56. This error affected the result of the trial.

Trial court decisions regarding the introduction of evidence are reviewed using the abuse of discretion standard. State v. Bunger, 2001 S.D. 116, ¶7, 633 N.W.2d 606, 608. SDCL 19-19-403 provides the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." "Unfair prejudice means 'evidence that has the capacity to persuade by illegitimate means.'" State v. Abdo, 2018 S.D. 34, ¶27, 911 N.W.2d 738, 745. If the trial court misapplies a law in ruling on evidence admission, it has no discretion. State v. Packed, 2007 S.D. 75, ¶24, 736 N.W.2d 851, 859.

T37 was obtained from Tuopeh's apartment following exercise of a search warrant. It contains a photo of a handwritten notebook page designated "Ceno" at the top.

Trial testimony did not address who wrote it, or when it was written, or when it arrived in the apartment, or its underlying purpose.[5] It contains controversial and inflammatory language identifying it with, or to, "Ceno".

The author purports to "Move lek a crook", presenting character evidence that author is, or professes to act, like a crook. E:T37. It then states "these niggas are not me". It further states "my hand free for any motherfuckers tryna fuck with me" suggesting a propensity to fight. It later indicates "Lets say your last breath nigga watchin him take his last breath". In addition, the author states "RIP to my haters them my nigga lucky give a fuck." And "fuck any nigga in my way". Use of such propensity comments laced with racial terms influenced the jury by illegitimate means per Abdo.

In examining the probative value, courts look at State's need for the evidence in the context of other available evidence as an alternative. See U.S. v. Lighty,

[5] The record indicates a sidebar occurred after the objection was made. T2:53-54. Testimony at trial did not discuss the background information regarding the notepaper to the jury prior to its admission. However, the topic of T37's contents was revisited on the record outside the presence of the jury when the Defendant requested a limiting instruction on a different topic. T2:106-07. As such, the trial court was aware of the inflammatory nature of the notepaper's contents during the trial.

616 F.3d 321, 354-55 (4th Cir. 2010)(applying Rule 404(b) and 403 analysis excluded gun evidence from other shooting case when defendant gave the gun in question to police in present shooting case); See also State v. White, 538 N.W.2d 237, 243 (S.D. 1995); State v. Smith, 1999 S.D. 83, ¶ 21, 599 N.W.2d 344, 350.

Tuopeh's identity was not at issue in his trial. Tuopeh's presence at the crime scene and details of his struggle with Mousseaux were admitted by Defense Counsel during opening arguments. T1:10. See U.S. v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986)(attorney statement binding). Photographs of Tuopeh at the scene outside the Red Sea Pub on 8th Street were offered and admitted into evidence early on during the trial. E:T9-10; E:II; T1:33-42; E:E-H. Video footage, giving rise to the photos were similarly offered. E:II. The fight was witnessed by numerous witnesses. E:T9-10. Compare State v. White, 538 N.W.2d 237, 243 (S.D. 1995)("There are no other witnesses,"). Additional evidentiary alternatives to T37 as presented also existed. Within T37 itself, a typewritten letter to Tuopeh from AFLAC listing his name and address of the apartment could have been used instead if identification evidence were truly required. T2:56; E:T37.

The initial investigation led to the identification of Pour and then Tuopeh through a nickname, Ceno. Detective Gross then travelled to Tuopeh's apartment. He encountered Tuopeh who identified himself accurately by name. T1:101.

The trial court gave a limiting instruction to consider T37 for identification only. T2:56. However, the court did not instruct the jury to refrain from reading below where the name Ceno was written, where the inflammatory comments were present. Nor did the court make any attempt to redact the inflammatory portion of the handwritten notepaper below the name Ceno.

The trial court's initial conclusion that T37 was irrelevant was correct. T2:56. Unfortunately, the trial court did not follow that observation to its logical conclusion for Rule 403 purposes. The probative value of the handwritten notepaper as irrelevant evidence was zero. Any prejudice balanced against no probative value mandates that lack of any probative value will be substantially outweighed by unfair prejudice. Its admission constituted a mistake of law, demonstrating error.

The prejudice found in the handwritten letter is colossal. T37 contains the "N" word and other inflammatory material. The "N" word is universally regarded as an inflammatory term. Swinton v. Potomac Corp., 270 F.3d 794,

817 (9th Cir. 2001); Monteiro v. Tempe Union High School Dist., 158 F.3d 1022, 1034 (9th Cir. 1998) (the "N" word "the most noxious racial epithet in the contemporary American lexicon"); State v. Roberts, 291 Or. App. 124, 418 P.3d 41 (2018)(defendant's use of "N" word regarding state witness presented "the risk that the jury would be tempted to deliver a verdict on the improper ground that defendant is a racist who deserves punishment.")

The author's use of the "N" word plus violent references to "RIP his haters" prejudiced Tuopeh's attempt to present a self-defense per Robert. The jury might conclude someone who presents hateful words, moves like a crook, and is looking to kill his haters would not be acting in self-defense. The jury might conclude that someone who watched the "last breath" might have a depraved mind (Count 1). They might conclude the expression of retribution against his haters would exhibit heat of passion (Count 2).

The limiting instruction as given exacerbated the prejudice rather than cured it. Although the trial court declared the evidence irrelevant and hearsay (showing the statements were offered to prove the truth), he still instructed the jury to consider T37 as identification evidence. It is assumed that juries follow the judge's

instructions. State v. Andrews, 393 N.W.2d 76, 79 (S.D. 1986). As such, despite the notepaper's lack of relevance, the instruction encouraged the jury to seek evidence on that same document to identify Tuopeh. They found references to an "N" or group of "N"'s in a case where the Defendant and Co-Defendant were black. They found reference to watching someone's last breath in case where the State sought to prove presence of a depraved mind. These statements were then used to identify the Defendant per the court's instructions *inappropriately* in violation of his right to a fair trial. The limiting instruction, inter alia, lead to his conviction of Count 1 (depraved mind) and Count 2 (heat of passion). This matter should be reversed and remanded for a new trial regarding Count 1 and any other charges still available from the verdict form.

CONCLUSION

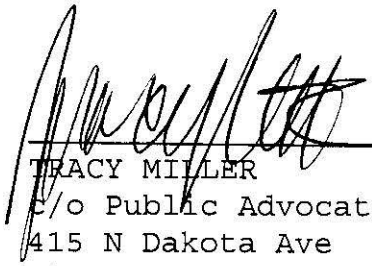
The trial court errored in a number of respects as outlined in the brief. All errors effected the result of this case, beyond any reasonable doubt. All these errors individually and cumulatively prejudiced the Defendant. See Nelson, 1998 S.D. at ¶20, 587 N.W.2d at 447; Gordon v. U.S., 344 U.S. at 420-23. This Court should remand this matter to the trial court for a new immunity hearing, a

judgment of acquittal, or new trial on all remaining charges, with appropriate instructions.

CERTIFICATE OF COMPLIANCE

This brief meets applicable page and word limitations required by this Court per the 10 page increase (50 total).

Dated this 26th day of December, 2023.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of December, 2023, a true and correct copy of the foregoing Appellant's Brief was served electronically on:

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ATGservice@state.sd.us

Daniel Haggar
M.C. States Attorney
415 N Dakota Ave
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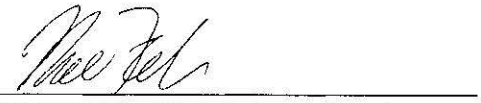
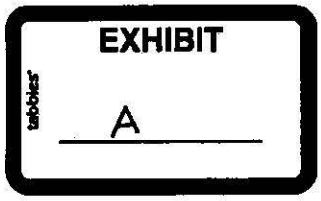
ujsservice@minnehahacounty.org



Attorney for Appellant

APPENDIX #30365



STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
		PD 21-022201
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI21007351
vs.	+	JUDGMENT & SENTENCE
STEVEN TUOPEH, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on October 28, 2021, charging the defendant with the crimes of Count 1 Murder 2nd Degree-Depraved Mind on or between October 10, 2021 and October 13, 2021; Count 2 Manslaughter 1st Degree-Heat of Passion on or between October 10, 2021 and October 13, 2021 and Count 3 Manslaughter 1st Degree-Dangerous Weapon on or between October 10, 2021 and October 13, 2021.

The defendant was arraigned upon the Indictment on November 2, 2021, Mark Kadi 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, Colleen Moran and Audie Murphy, Deputy State's Attorney appeared for the prosecution and, Mark Kadi and Tracy Miller, appeared as counsel for the defendant. A Jury was impaneled and sworn on April 11, 2023 to try Counts 1 and 2. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on April 21, 2023 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, STEVEN TUOPEH, guilty as charged as to Count 1 Murder 2nd Degree-Depraved Mind (SDCL 22-16-7) and guilty as charged as to Count 2 Manslaughter 1st Degree-Heat of Passion (SDCL 22-15-15(2)"; with sentencing continued to April 25, 2023.

Thereupon on April 25, 2023, the Court vacated the Jury's guilty verdict as to Count 2 Manslaughter 1st Degree-Heat of Passion and merged it into a single conviction for Murder 2nd Degree-Depraved Mind and the State dismissed Count 3 Manslaughter 1st Degree-Dangerous Weapon. Thereafter, 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

SENTENCE

AS TO COUNT 1 MURDER 2ND DEGREE-DEPRAVED MIND : STEVEN TUOPEH shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for *life* (credit five hundred fifty-nine (559) days served) without the possibility of parole.

It is ordered that the defendant shall pay $116.50 in court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

MAY 15 2023

It is ordered that the fine and attorney fees in this matter be and hereby are waived.

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

The defendant shall be returned to the Minnehaha County Jail 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 Penitentiary.

5/9/2023 3:23:09 PM

BY THE COURT:

James A. Power

JUDGE JAMES A. POWER
Circuit Court Judge

Attest:
Ward, Kira
Clerk/Deputy

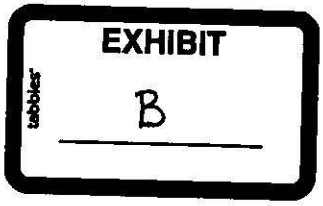
STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY }
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

MAY 10 2023

Clerk of Courts, Minnehaha County

By _____ Deputy

Filed on: 05/09/2023 Minnehaha County, South Dakota 49CRI21-007351



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, PLAINTIFF, VS. STEVEN TUOPEH, DEFENDANT.	49 CRI 21-7351 **MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING MOTION TO RECEIVE IMMUNITY (AMENDED)**

This matter came before the Court for hearing on April 4, 2023, upon the Defendant's Motion to Receive Immunity (Amended). Deputy State's Attorneys Colleen Moran and Audie Murphy appeared on behalf of the State. Mr. Mark Kadi and Ms. Tracy Miller from the Office of Public Advocate appeared on behalf of the Defendant Steven Tuopeh ("Tuopeh"). The Court having received Defendant's Exhibits I-1 (five videos from the night of the incident), I-2 (autopsy report), and I-3 (transcript of co-defendant Jeff Pour's March 15, 2023 plea hearing in 49 CRI 21-7350), and having considered the live testimony of Dr. Kenneth Snell, and Det. Patrick Marino, including their demeanors and tone, as well as the briefs, legal authorities, and arguments submitted, now enters the following findings of fact, conclusions of law, and Order denying Tuopeh's Motion to Receive Immunity (Amended).

Introduction

This case concerns an altercation on October 10, 2021 that resulted in the death of Christopher Mousseaux a few days later. It is undisputed that the physical portion of the

altercation began when Mousseaux threw a punch at Pour and Tuopeh. It ended with Mousseaux on the ground being repeatedly struck by Pour and Tuopeh. The State obtained an indictment against Tuopeh and Pour for second degree murder and first degree manslaughter. On March 25, 2023, Tuopeh filed a motion to receive immunity based on self-defense per SDCL 22-18-4.8. During the April 4, 2023 hearing, the Court found and concluded that Tuopeh presented persuasive evidence that Mousseaux initiated the physical altercation by throwing a punch at Pour and Tuopeh, and that this evidence satisfied Tuopeh's burden to present prima facie evidence that Tuopeh's force constituted self-defense. The Court therefore required the State to rebut Tuopeh's self-defense theory by clear and convincing evidence. SDCL 22-18-4.8. The State relied upon the defense exhibits and testimony already presented. As set forth below, the Court concludes that the State has overcome Tuopeh's self-defense claim by clear and convincing evidence.

Findings of Fact

1. The Court finds that the following facts were either undisputed or established by at least clear and convincing evidence. Any findings that should be characterized as conclusions of law are hereby adopted as a conclusion and incorporated by reference into the conclusions of law below. The Court notes that, by agreement of the parties, it reviewed all of the relevant portions of the five videos on Ex. I-1, not just the portions discussed during the April 4, 2023 hearing.

2. The incident occurred on October 10, 2021 outside the Red Sea Pub in Minnehaha County. The incident occurred at night.

3. Before the incident began, Tuopeh was standing outside the Red Sea Pub along with other men, including co-defendant Jeff Pour. The group was socializing in a friendly manner.

4. Mousseaux walked near the people outside of the Red Sea Pub. Mousseaux was walking alone, and at no point during this incident did anyone appear to be taking Mousseaux's side in the conflict or helping him in any fashion.

5. A conversation began including Mousseaux, Tuopeh, and Pour, along with at least one other person. Those people moved away from the pub entrance a short distance and continued talking. As the conversation began, there were no visible signs of aggression toward each other among the participants.

6. At some point, Mousseaux suddenly threw a punch in the direction of Pour and Tuopeh's faces. It is also possible that he threw a second short jab at Tuopeh. Pour and Tuopeh each visibly reacted to the punch by attempting to move out of its path, and Mousseaux did not land a solid punch on either Pour or Tuopeh. The Court finds that Mousseaux is the party who initiated a physical altercation.

7. After throwing the initial punch or a punch and jab, Mousseaux quickly tried to move away from the scene using a gait best described as a combination of hopping and skipping.

8. Mousseaux moved in a direction further away from the Red Sea Pub and away from Tuopeh and Pour. As Mousseaux moved away, however, he initially kept his vision and sometimes his torso facing Tuopeh and Pour, and Mousseaux's fists were raised in a defensive posture as though he was prepared to resist if Tuopeh or Pour got close to Mousseaux. The Court finds that this portion of Mousseaux's movements constituted a tactical retreat.

9. Tuopeh and Pour followed Mousseaux. This required them to move further away from the pub and sometimes to use a gait faster than a walk, such as a trot or job. The Court finds that they pursued Mousseaux.

10. At one point, Mousseaux made a throwing motion in Tuopeh and Pour's direction, although the Court cannot tell whether he actually threw anything. Aside from that brief throwing motion, Mousseaux continued to retreat away from the pub and Tuopeh and Pour. Mousseaux did not move toward Tuopeh and Pour to re-engage in hand-to-hand combat.

11. After the three men had moved something approximating a block—the exact distance does not matter--Mousseaux turned his back to Tuopeh and Pour and tried to run away. Mousseaux quickly stumbled and fell onto the ground.

12. Once Mousseaux turned, tried to run away and fell, the Court finds that Mousseaux clearly posed no threat to the safety of Tuopeh. Tuopeh was not in any danger of being assaulted at that point, nor was there any imminent threat of a forcible felony being committed against him or Pour, nor was there any threat to any other person or their property. Tuopeh was secure from danger, and it was not reasonable for him to believe that Mousseaux posed a threat, nor was it reasonable for Tuopeh to believe that any physical force was necessary, much less deadly force.

13. Instead of letting Mousseaux get up and continue his retreat, Tuopeh and Pour quickly moved beside Mousseaux and began striking him while he lay on the ground. Tuopeh stood on one side of Mousseaux's body and Pour stood on the other. Both men swung their arms and struck Mousseaux with a punch multiple times. Tuopeh also swung a foot and kicked Mousseaux multiple times. Mousseaux rolled on the ground as though trying to avoid being hit in particular places, but Mousseaux did not raise his legs to kick or make any progress toward standing up. He remained on the ground while being struck. The beating took a small amount of time, perhaps even less than one minute.

14. The Court further finds, that even assuming for the sake of argument that Tuopeh was justified in using some force to defend himself after Mousseaux fell, Tuopeh's kicks and punches far exceeded the amount of force necessary for self-defense, and so the kind and amount of force Tuopeh administered to Mousseaux was neither reasonable nor justifiable.

15. The Court finds that, even if the kicks or punches administered by Tuopeh did not strike Mousseaux on the head, due to the number of kicks and punches administered by Tuopeh, and the force with which those blows were administered, those blows were likely to cause great bodily harm to Mousseaux.

16. After striking Mousseaux, Tuopeh and Pour jogged quickly away from the scene and did not render any aid to Mousseaux or call for help.

17. Mousseaux was taken to a hospital, where his blood alcohol content was a .245%. Mousseaux died on or about October 13, 2021, roughly 3 days after the altercation.

18. Dr. Kenneth Snell, M.D., is a forensic pathologist and serves as the coroner for Minnehaha County. He has performed over 3500 autopsies and examined Mousseaux's body the day after Mousseaux's death.

19. Dr. Snell observed injuries on multiple body parts, including a broken rib,[1] his abdomen, a leg, an arm, and a hand. Dr. Snell persuasively testified that these injuries did not materially contribute to Mousseaux's death.

20. Dr. Snell also observed multiple injuries to Mousseaux's head, including a scalp laceration, contusion skull fracture, and associated bleeding and swelling in Mousseaux's brain. Dr. Snell persuasively testified that these traumatic brain injuries collectively caused

[1] Dr. Snell noted in addition to the broken rib suffered during the altercation, there were other rib fractures that likely occurred during CPR.

Mousseaux's death, and that it is not possible to separate out a single injury or blow to the head as the decisive blow. The Court therefore finds that any blows to Mousseaux's head contributed to his cause of death.

21. Dr. Snell said the head injuries appeared to be the product of blunt force trauma, but could not identify what object caused the trauma. He did not observe any shoe prints on Mousseaux's head, but said that blows from a foot, fist, or a combination thereof were all possibilities.

22. The Court believes it is likely that Tuopeh and Pour each struck Mousseaux's head, but cannot say that the video evidence establishes that Tuopeh struck Mousseaux's head to the level required to be clear and convincing.

23. The Court finds, however, that Tuopeh and Pour acted in concert to pursue Mousseaux and to deliver blows to Mousseaux while Mousseaux was on the ground, and that by acting in concert Tuopeh and Pour made it more difficult for Mousseax to avoid the blows delivered by Tuopeh and Pour. The Court finds that Tuopeh and Pour actively aided and abetted the other's blows to Mousseaux.

Conclusions of Law

1. Any statements below that are actually findings of fact are hereby adopted as a finding of fact and incorporated by reference into the findings above.

2. SDCL 22-18-4.8 requires the defendant asserting self-defense immunity to make a prima facie claim of self-defense. The Court finds that Tuopeh met that burden because the videos show Mousseaux threw the first punch and later made a throwing motion toward Tuopeh.

3. SDCL 22-18-4.8 then imposes on the State the burden of overcoming the assertion of self-defense by clear and convincing evidence. Based on the findings stated above and the reasonable inferences drawn therefrom, the Court concludes that the State has met its burden by proving by clear and convincing evidence that Tuopeh did not act in self-defense.

4. SDCL 22-18-3.1(1) defines deadly force as "force that is likely to cause death or great bodily harm." The Court finds and concludes that the State has proven by clear and convincing evidence that the force applied by Tuopeh to Mousseaux while Mousseaux was on the ground was likely to cause great bodily harm to Mousseaux whether or not Tuopeh's blows actually caused Mousseaux's death.

5. The finding of deadly force by Tuopeh is based on the video showing Tuopeh delivering multiple forceful punches and kicks while Mousseaux was prone, and the litany of injuries Mousseaux suffered.

6. The Court recognizes that 22-18-4.1 permits the use of deadly force in certain instances but finds and concludes that section does not apply to Tuopeh because, when he began to administer blows to Mousseaux, he did not reasonably believe the use of any force—much less deadly force--was necessary to prevent imminent death or great bodily harm to himself or another person. To the contrary, when Tuopeh used force against Mousseaux, Mousseaux had turned his back to run away, had fallen, and was on the ground in a posture that did not pose any threat of imminent death or great bodily harm to Tuopeh.

7. SDCL 22-18-3.1's definition of a "forcible felony" includes "assault" and "any other felony that involves the use of or the threat of physical force or violence against a person. The

Court finds that the initial swing Mousseaux took at Tuopeh and Pour should be characterized as a simple assault, which is a misdemeanor, and did not rise to the level of a forcible felony.

8. The Court recognizes that SDCL 22-18-4.1 permits the use of deadly force "to prevent the imminent commission of a forcible felony." This section does not apply to Tuopeh because the Court finds that Mousseaux's conduct was at most a simple assault and did not at any time rise to the level of imminent commission of a forcible felony. Alternatively, and more particularly, at the point when Tuopeh used physical force, Mousseaux had tried to run away, had fallen on the ground, and posed no threat of imminently committing a forcible felony.

9. In addition, and alternatively, the Court finds that immunity is not available because the amount of force used by Tuopeh either himself or in concert with Pour, including as an aider and abetter, exceeded what any reasonable person in those circumstances could have believed was necessary to defend himself or another, to prevent imminent death or imminent great bodily harm, or to prevent the imminent commission of a forcible felony. One reason is that the force applied by Tuopeh himself, and alternatively in concert with Pour, was applied after Mousseaux had tried to run away and had fallen to the ground. The excessiveness of this force is shown by the type and number of injuries inflicted as well as Mousseaux's subsequent death.

10. The Court recognizes that South Dakota law does not require Tuopeh to retreat since Mousseaux threw the first punch. The Court further recognizes that in some circumstances the law allows a person in Tuopeh's position to pursue an assailant until secure from danger. But this is limited by the principle that such pursuit must appear reasonably and apparently necessary to a reasonable person. The Court concludes that principle does not justify what happened in this case. The Court finds and concludes that once Mousseaux turned his back and tried to run away,

a reasonable person would not have believed it was necessary to continue to pursue Mousseaux. And certainly once Mousseaux fell, a reasonable person would not have believed it was reasonable or apparently necessary to administer any physical force, much less the type and amount of physical force used by Tuopeh, either alone or in concert with Pour.

11. The Court recognizes that the State's burden to rebut self-defense at trial is beyond a reasonable doubt, and that is a higher burden than the State had to meet to prevail on this motion to dismiss. The Court thus concludes that its findings of fact and conclusions of law for purposes of this motion would not be binding upon the finder of fact during a trial of this matter.

Order

The Court therefore finds and concludes that the State has rebutted the Defendant's self-defense theory, and has done so by clear and convincing evidence.

Accordingly, IT IS HEREBY ORDERED that Defendant Tuopeh's Motion to Receive Immunity (amended) is DENIED.

Dated this 11 day of April, 2023.

BY THE COURT:

James A Power

Circuit Judge James Power

ATTEST: **ANGELIA M. GRIES**
Clerk of Courts

By _____ (Deputy)

FILED
APR 11 2023
Minnehaha County, S.D.
Clerk Circuit Court

EXHIBIT
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C

STATE OF SOUTH DAKOTA
: SS
COUNTY OF MINNEHAHA

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MAGISTRATE DIVISION

STATE OF SOUTH DAKOTA, Plaintiff vs. JEFF POUR STEVEN TUOPEH Defendant(s).	PD21-022201 **INDICTMENT** CR21-7351

COUNT 1: MURDER (SECOND DEGREE) - DEPRAVED MIND - CLASS B FEL as to ST, JP
COUNT 2: MANSLAUGHTER (FIRST DEGREE) - HEAT OF PASSION - CLASS C FEL as to ST, JP
COUNT 3: MANSLAUGHTER (FIRST DEGREE) - DANGEROUS WEAPON - CLASS C FEL as to ST

THE MINNEHAHA COUNTY GRAND JURY CHARGES:

COUNT 1

That the Defendant, STEVEN TUOPEH, JEFF POUR, in Minnehaha County, State of South Dakota, on or between the 10th day of October, 2021, and the 13th day of October, 2021 did commit the public offense of Murder in the Second Degree (SDCL 22-16-7), in that the Defendant did kill a human being, CHRISTOPHER MOUSSEAUX, by perpetrating an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular person, , contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota, and prays that the Defendant may be arrested and dealt with according to the law.

COUNT 2

That the Defendant, STEVEN TUOPEH, JEFF POUR, in Minnehaha County, State of South Dakota, on or between the 10th day of October, 2021, and the 13th day of October, 2021 did commit the public offense of Manslaughter in the First Degree (SDCL 22-16-15(2), in that the Defendant did kill a human being, CHRISTOPHER MOUSSEAUX, without any design to effect death, and in a heat of passion, but in a cruel and unusual manner, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota, and prays that the Defendant may be arrested and dealt with according to the law.

COUNT 3

That the Defendant, STEVEN TUOPEH, in Minnehaha County, State of South Dakota, on or between the 10th day of October, 2021, and the 13th day of October, 2021 did commit the public offense of Manslaughter in the First Degree (SDCL 22-16-15(3)), in that the Defendant did kill a human being, CHRISTOPHER MOUSSEAUX, without any design to effect death, but by means of a dangerous weapon, BRASS KNUCKLES , contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota, and prays that the Defendant may be arrested and dealt with according to the law.

Dated this 28 day of October, 2021

A True Bill
"A TRUE BILL"

This indictment has the concurrence of at least six members of the Minnehaha County Grand Jury.

Quincy Greene
Foreperson
Minnehaha County Grand Jury

Witnesses who testified before the Grand Jury in the matter:

OFFICER SKIDMORE

OFFICER DEVLIN

SEAN TIKA

~~DAVID WRIGHT~~ QDG

OFFICER GOOCH

OFFICER LEACRAFT

DETECTIVE MARINO

DR. SNELL

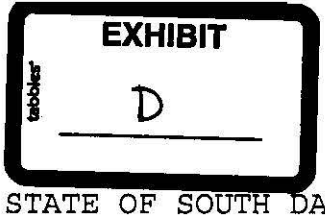
JEFF POUR 05/13/1993 401 S. SNEVE AVE. #2, SIOUX FALLS, SD <no zip>
STEVEN TUOPEH 10/27/1994 405 S. SYCAMORE AVE. #203, SIOUX FALLS, SD 57103

DEMAND FOR NOTICE OF ALIBI

The undersigned (Deputy) State's Attorney states that the charged offense is alleged to have occurred on the ____ day of _____, _____, at or about _____ o'clock __.M., at _____. Pursuant to SDCL 23A-9-1, demand is herby made upon defendant and defendant's counsel to give notice of intent to offer a defense of alibi.

_____
(Deputy) States Attorney
Minnehaha County, South Dakota

FILED
OCT 28 2021
Minnehaha County, S.D.
Clerk Circuit Court



STATE OF SOUTH DAKOTA)
)SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, *

Plaintiff, * CR. 21-7351

V. * MOTION IN LIMINE OPINION EVIDENCE

STEVEN TUOPEH, * AND POSSIBILITIES

Defendant. *

* *

COMES NOW, Steven Tuopeh, by and through his attorney(s), Mark Kadi, of the Minnehaha County Public Advocate's Office, moves this court in Limine for an Order prohibiting the State from introducing certain opinion evidence, from lay witnesses, or other unqualified witnesses, or evidence as to possibilities, as follows:

1) To be admissible, evidence must be relevant.
2) To be relevant, evidence "must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." SDCL 19-12-1 (emphasis *added*).
3) Expert testimony should not be received "if it appears the witness is not in possession of such facts as will enable him or her to express a

reasonably accurate conclusion, as distinguished from mere guess or conjecture." Scurlocke v. Hansen, 268 Neb. 548 (2004).

4) The State has presented opinions as to cause and manner of death from lay witnesses in this case.

5) At the grand jury proceeding, for example where defendant's counsel is not present to object, the State presented the following testimony of Patrick Marino from Grand Jury Transcript P.30:

Q: And what *did you find out about the victim?*

A: For several days he was in the ICU, excuse me, unit, with life threatening injuries, and then ultimately, he had passed and died.

Q: *as a result of the injuries that he suffered from these two individuals assaulting him?*

A: *Yes.*

6) Marino does not possess sufficient qualifications to present that opinion as to such qualifications, and his statements were objectionable regarding foundation and relevance. The act of relaying the source of such information would also be objectionable on hearsay and confrontation clause

grounds.

7) Requisite qualifications regarding cause and manner of death opinions are significant. See State v. Boyer, 2007 S.D. 112, ¶ 22, 741 N.W.2d 749, 756 ("Dr. Randall is a licensed and 11board certified forensic pathologist who performed B.P.'s autopsy."); State v. Holland, 346 N.W.2d 302, 310 (S.D. 1984)(" Dr. Thomas Henry, a forensic pathologist with ten (10) years of forensic pathology experience, performed an autopsy on the body of the deceased. That Dr. Henry is a forensic pathologist with experience in working for law enforcement agencies and for the Federal Bureau of Investigation and has testified regarding his findings in previous criminal matters."); For additional forensic qualification case examples see Methodist Hosp. v. Ball, 362 S.W.2d 475, 484 (Tn.App. 1961)("participated in the performance of over 4000 autopsies"); Martini v. Post, 178 Wash. App. 153, 163, 313 P.3d 473, 478-79 (2013)("Dr. Kiesel had worked in forensic pathology for 27 years and, in doing so, became familiar with performing detailed death scene investigations and determining the cause of death. He was also board certified, was a diplomat of the American Board of Pathology in

Anatomic and Forensic Pathology, and had been the chief medical examiner for the Pierce County Medical Examiner's Office.")

8) Although Marino presents with experience in law enforcement and criminal homicide investigations, he does not present with sufficient qualifications to present opinions as to cause and manner of death. See Dye v. Wayne Cty., 397 N.W.2d 188, 190-91 (1986)("While Kobe had considerable experience in counseling and suicide prevention, and considerable contact with suicidal persons, *nothing in the record suggests that she was an expert in forensic pathology or other forensic sciences* such that she could determine when a death was a suicide.")(emphasis *added*).

9) Expert testimony or opinions "based on 'could', 'may' or 'possibly' lacks the definiteness required to meet the claimant's burden . . . the trier of fact is not required to guess". Paulsen v. State, 541 N.W.2d 636, 643 (NE 1996); Koenig v. Weber, 174 N.W.2d 218, 224 (SD 1970); *See* Truck Ins. Exch. V. CNA, 624 N.W.2d 710 (SD 2001)(causation must be established to a reasonable degree of medical probability not just possibility); Brady Memorial Home v. Hantke, 597 N.W.2d 677 (SD 1999)(speculative

testimony of physicians regarding possible causes of injury was insufficient); Day v. John Morrell & Co., 490 N.W.2d 720 (SD 1992)(testimony that it is possible that an given injury caused condition is insufficient); Hanten v. Palace Builders, Inc., 558 N.W.2d 76 (SD 1997)(claimant failed to establish causation where expert's opinion only rose to level of possibility, not probability); Armstrong v. Minor, 323 N.W.2d 127, 128 (SD 1982)(trial court did not err in personal injury tort case where it sustained defense objections to opinions of plaintiff's physician in that "experts are qualified to express their opinions based upon medical certainty or medical probability, but not upon possibility."); Thomas v. St. Mary's Church, 283 N.W.2d 254, 258 (SD 1979); Vaux v. Hamilton, 103 N.W.2d 291 (ND 1960)(trial court erred admitting response to "Doctor, can you state with a reasonable degree of medical certainty that there is a distinct possibility that this might happen?")

10) As such, opinions and testimony presenting possibilities lead only to speculation. Verdicts cannot be based on speculation. Degen v. Bayman, 90 S.D. 400, 407, 241 N.W.2d 703, 706 (1976); See also State v. Toohey, 2012 S.D. 51, 816 N.W.2d 120.

11) As such, opinions from lay witnesses such as Marino should be excluded.

WHEREFORE, the Defendant asks that this court grant its motion in limine precluding admission of such evidence.

Respectfully submitted this 31st day of January, 2023.

Mark Kadi
Public Advocate's Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 31, 2023, a true and correct copy of the Motion Limine Regarding Opinion Evidence was emailed to Minnehaha County Deputy States Attorneys, Colleen Moran and Audie Murphy, Attorney for the State, and Betsy Doyle, Attorney for Co-Defendant.

Dated this 31st day of January, 2023.

Mark Kadi
Public Advocate's Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.org

STATE V TUOPEH 21-7351 1-13-6 AMENDED PROPOSED JURY INSTRUCTION: ALTERNATIVE COUNTS – SAME OCCURRENCE, ONE CRIME

Instruction No. _____

The defendant is charged with Murder 2nd Degree, Manslaughter 1st Degree and Manslaughter 2nd Degree. These charges are presented in the alternative and in effect allege that the defendant committed an unlawful act which constitutes either the crime of Murder 2nd Degree, Manslaughter 1st Degree, or Manslaughter 2nd Degree. If you find that the defendant committed an act or acts constituting one of the crimes so charged, you then must determine which of the offenses so charged was thereby committed.

In order to find the defendant guilty, you must all agree as to the particular offense committed and, if you find the defendant guilty of one of such offenses, you must find the defendant not guilty of the others.

Authorities:

SDCJI 1-13-6 (Modified); Ball v. United States, 470 U.S. 856, 861 (1985)("'punishment' must be the equivalent of a criminal conviction and not simply the imposition of sentence."); Rutledge v. United States, 517 U.S. 292, 305 (1996)("Finally, the Government argues that Congress must have intended to allow multiple convictions because doing so would provide a "backup" conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether—even if the basis for the reversal does not affect his conviction under the lesser. Brief for United States 20-22. We find the argument unpersuasive,"); Wilcox v. Leapley, 488 N.W.2d 654, 657 (S.D. 1992)("At this time, we hold that double homicide convictions for a single death are improper. *In the future, we urge prosecutors to charge defendants in cases such as this in alternative counts.*")(emphasis *added*); State v. White, 1996 S.D. 67, ¶ 27, 549 N.W.2d 676, 682 ("Unfortunately, this directive was not followed in White's case"); State v. White, 1996 S.D. 67, ¶¶ 33-34, 549 N.W.2d 676, 683 ("I have news for the Supreme Court. Our 'directive' to prosecutors will not be followed in the next case either, nor the next. The reason is obvious. We have no teeth in the directive. In fact, the Court continues to condone the prosecutor's overreaching by permitting the conviction to remain and requires removal of the sentence *only*. How this court can condone and leave of record an 'improper conviction' is beyond my understanding. Obviously, we need to send directives with votes, not just words. To make

Filed: 4/12/2023 8:56 AM CST Minnehaha County, South Dakota 49CRI21-007351

matters worse, the 'State concedes that the trial court improperly convicted and sentenced White to two punishments for a single crime as explained in Wilcox....' When the State, through the Attorney General's Office, concedes an improper conviction and sentence, we should require that the trial court vacate both. Otherwise, to quote from our Chief Justice, 'it's like punching marshmallows,' and accomplishes nothing.") (concurring opinion); State v. Jensen, 1998 S.D. 52, ¶ 68, 579 N.W.2d 613, 625 ("Any error that resulted in this case was harmless," from failing to require homicide counts be plead in the alternative).

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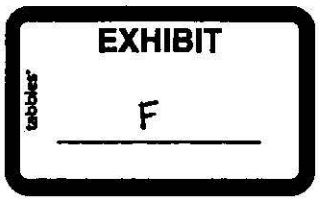


STATE OF SOUTH DAKOTA)
)SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, *

Plaintiff, * CR. 21-7351

V. * MOTION TO VACATE

STEVEN TUOPEH, * CONVICTION FOR

Defendant. * MANSLAUGHTER 1ST DEGREE

* *

Steven Tuopeh, by and through his attorney(s), Mark Kadi, of the Minnehaha County Public Advocate's Office, respectfully requests the Court to Vacate the Defendant's Conviction for Manslaughter 1st arising from the jury's verdict of April 19, 2023, as said conviction violates the Defendant's Right to Due Process and Freedom from Double Jeopardy per U.S.Amend. V, XIV; S.D. Art.VI, §9, based on the following grounds:

1. The jury convicted the Defendant of Murder 2nd Degree and Manslaughter 1st Degree on April 19, 2023.
2. "The same facts and actions committed by [Tuopeh] were used to convict him of both statutory offenses". Wilcox v. Leapley, 488 N.W.2d 654, 656 (S.D. 1992).
3. The South Dakota Supreme court has held that "double homicide convictions for a single death are improper." Wilcox v. Leapley, 488 N.W.2d 654, 657 (S.D. 1992).

4. That Court stated "[i]n the future, we urge prosecutors to charge defendants in cases such as this in alternative counts."; Wilcox v. Leapley, 488 N.W.2d 654, 657 (S.D. 1992); See also State v. White, 1996 S.D. 67, ¶ 27, 549 N.W.2d 676, 682 ("Unfortunately, this directive was not followed in White's case").

5. This court rejected an instruction that the jury should select one homicide count and to acquit the Defendant of any other homicide counts.

6. The jury convicted the Defendant of both charges.

7. Punishment "must be the equivalent of a criminal conviction and not simply the imposition of sentence." Ball v. United States, 470 U.S. 856, 861 (1985)

8. The "second conviction, even if it results in no greater sentence, is an impermissible punishment." Ball v. U.S., 470 U.S. 856, 864-65 (1985).

9. The U.S. Supreme Court has rejected the notion that a legislature "intended to allow multiple convictions because doing so would provide a 'backup' conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether—even if the basis for the reversal does not affect his conviction under the lesser." Rutledge v. United States, 517 U.S. 292, 305 (1996).

10. The conviction for Manslaughter 1st must be vacated per Rutledge v. United States, 517 U.S. 292, 307 (1996) citing Ball, 470 U.S.at 864.

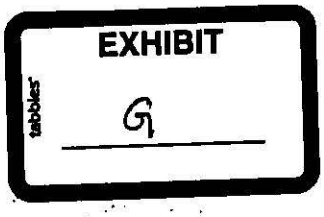
Dated this 20th day of April, 2022.

Mark Kadi
Public Advocate's Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Defendant's Motion to Vacate Manslaughter 1st Conviction upon Deputy Minnehaha County States' Attorneys, Colleen Moran and Audie Murphy, by email on April 20, 2023.

Mark Kadi c/o
Minnehaha Co Public Advocate



STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Petitioner,	*	CR. 21-7351
V.	*	SUBPOENA
STEVEN TUOPEH, Defendant.	*	

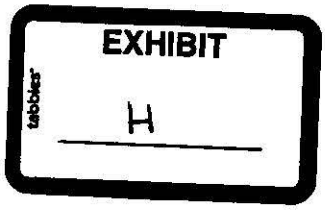
TO: Jeff Pour
Minnehaha County Jail
305 W. 4th Street
Sioux Falls, SD 57104

YOU ARE HEREBY COMMANDED and required to appear before the Honorable James Power, Judge in the Second Judicial Circuit, at the Minnehaha County Courthouse, located at 425 North Dakota Avenue, Sioux Falls, South Dakota on Tuesday, April 11, 2023, at 8:30 AM and every day thereafter to then and there give testimony as a witness in a jury trial, in above-entitled matter.

YOU ARE FURTHER ORDERED to immediately contact the Office of the Public Advocate at 605-367-7392 to provide current phone information where you can be reached throughout the pendency of the trial.

Dated this 28th day of March, 2022.

MARK KADI
TRACY MILLER
Minnehaha County Public Advocate Office
Attorneys for Defendant



STATE OF SOUTH DAKOTA)
) SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, *

Plaintiff, * CR. 21-7351

v. *

STEVEN TUOPEH, * TRANSPORT ORDER

*

Defendant. *

* *

Based upon oral motion by defense counsel and good cause appearing,

IT IS HEREBY ORDERED that the South Dakota State Penitentiary shall transport Korderro Robinson, from the South Dakota State Penitentiary to the Minnehaha County Court house, when called to testify at the above-entitled matter, which commences on Tuesday April 11, 2023, located at 425 North Dakota Avenue, Sioux Falls, South Dakota, for the purpose of giving testimony as a witness in the above-named Defendant's trial. Upon completion of Mr. Robinson's testimony, he shall be transport back to the South Dakota State Penitentiary.

4/4/2023 8:19:18 AM

BY THE COURT:

James A. Power

JUDGE JAMES POWER
Circuit Court Judge

Attest:
Ward, Kira
Clerk/Deputy

EXHIBIT
tabbies
I

Oberfoell, Stephanie

From: Yu, Mary
Sent: Tuesday, April 18, 2023 3:13 PM
To: Oberfoell, Stephanie
Subject: RE: Tuopeh subp- Korderro Robinson-state Pen--RUSH

All our servers are done for the day. No one is available to serve the State Pen.

Mary Yu
Civil Division
Minnehaha County Sheriff Office
320 W 4th St
Sioux Falls, SD 57104
605-367-4331

From: Oberfoell, Stephanie <soberfoell@minnehahacounty.gov>
Sent: Tuesday, April 18, 2023 2:36 PM
To: Civil Division <CivilDivision@minnehahacounty.org>
Subject: *Tuopeh subp- Korderro Robinson-state Pen--RUSH*

Hi,

Can you please serve this subpoena on Korderro Robinson at the SD State Pen Today.
This subpoena is for 8:30 am tomorrow for trial.
Thank you so much.
Steph

Stephanie Oberfoell
Public Advocate
415 N. Dakota Ave, 3rd floor
Sioux Falls, SD 57104
(605) 367-7392-phone
(605) 367-7415-fax
soberfoell@minnehahacounty.org

EXHIBIT
PENGAD 800-451-6989
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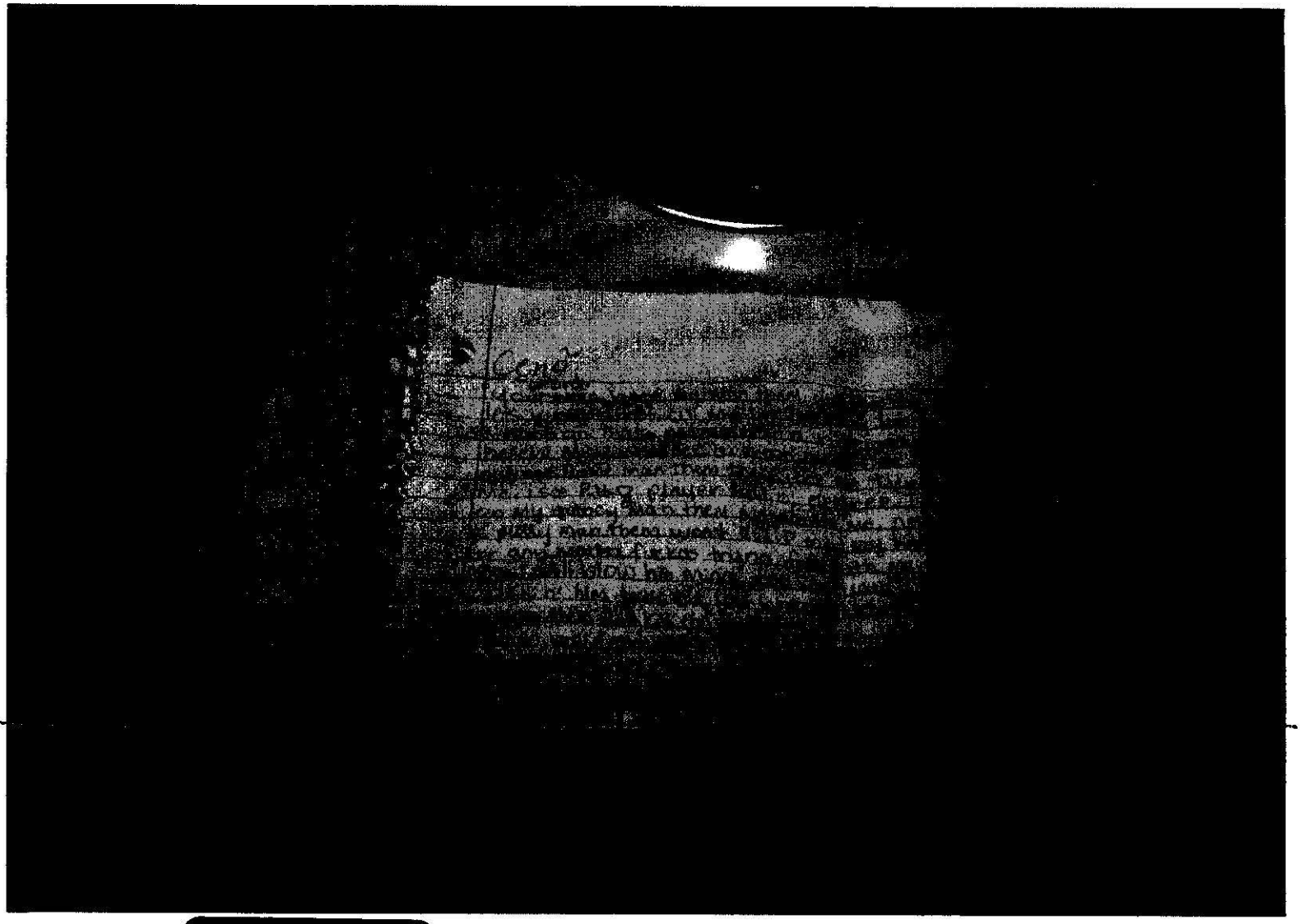
APR 17 2023
49CR121-735
Minnehaha County, S.D.
Clerk Circuit Court



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30365

SUPREME COURT
STATE OF SOUTH DAKOTA
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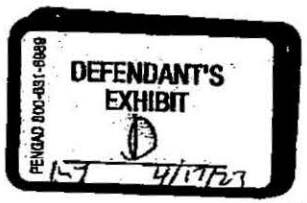
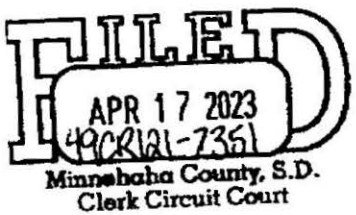
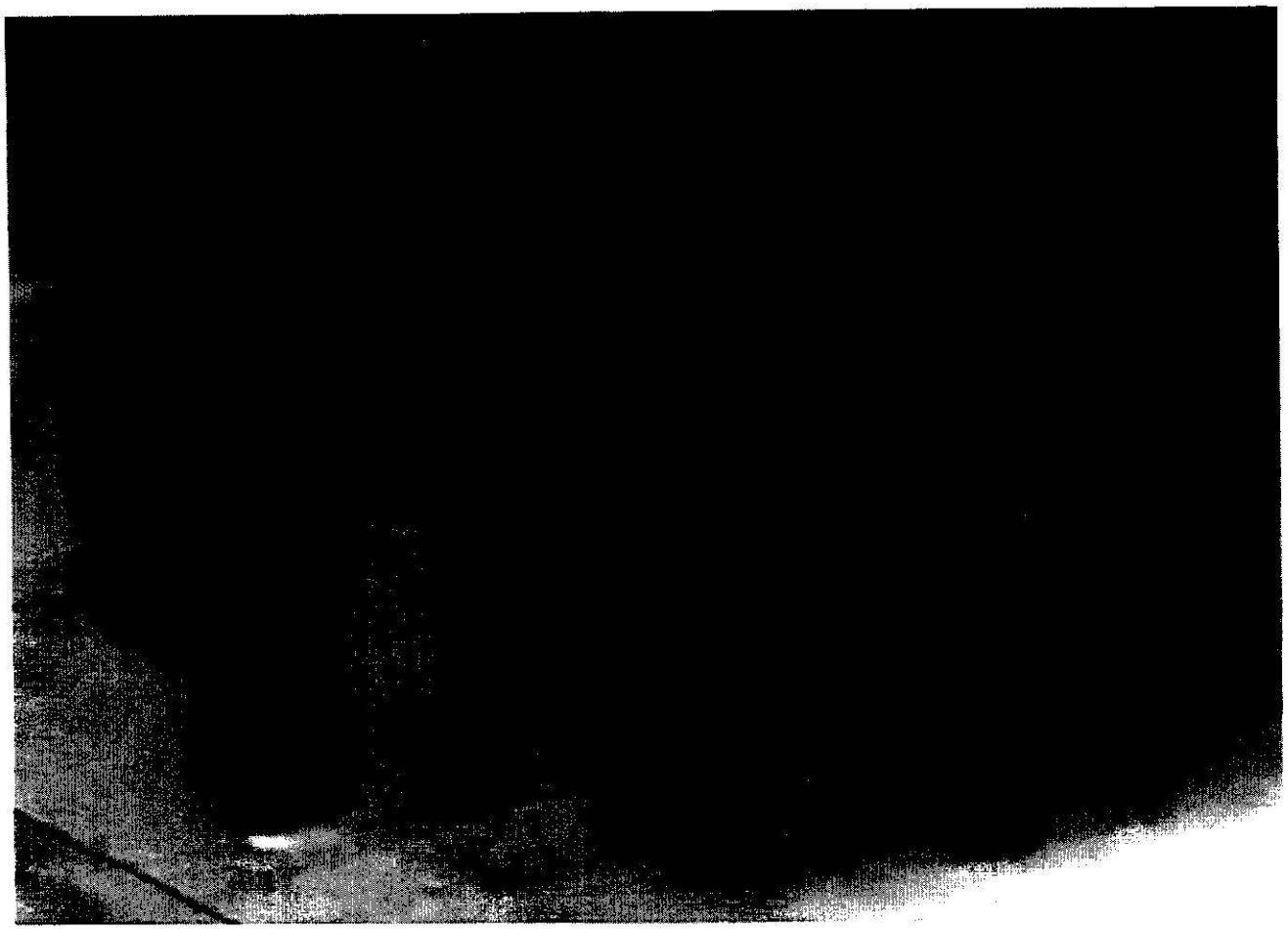
JUN 12 2023

Shirley A. Jameson-Legg
Clerk







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SUPREME COURT
STATE OF SOUTH DAKOTA
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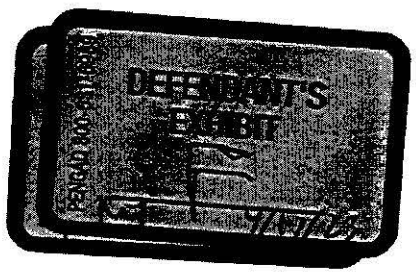

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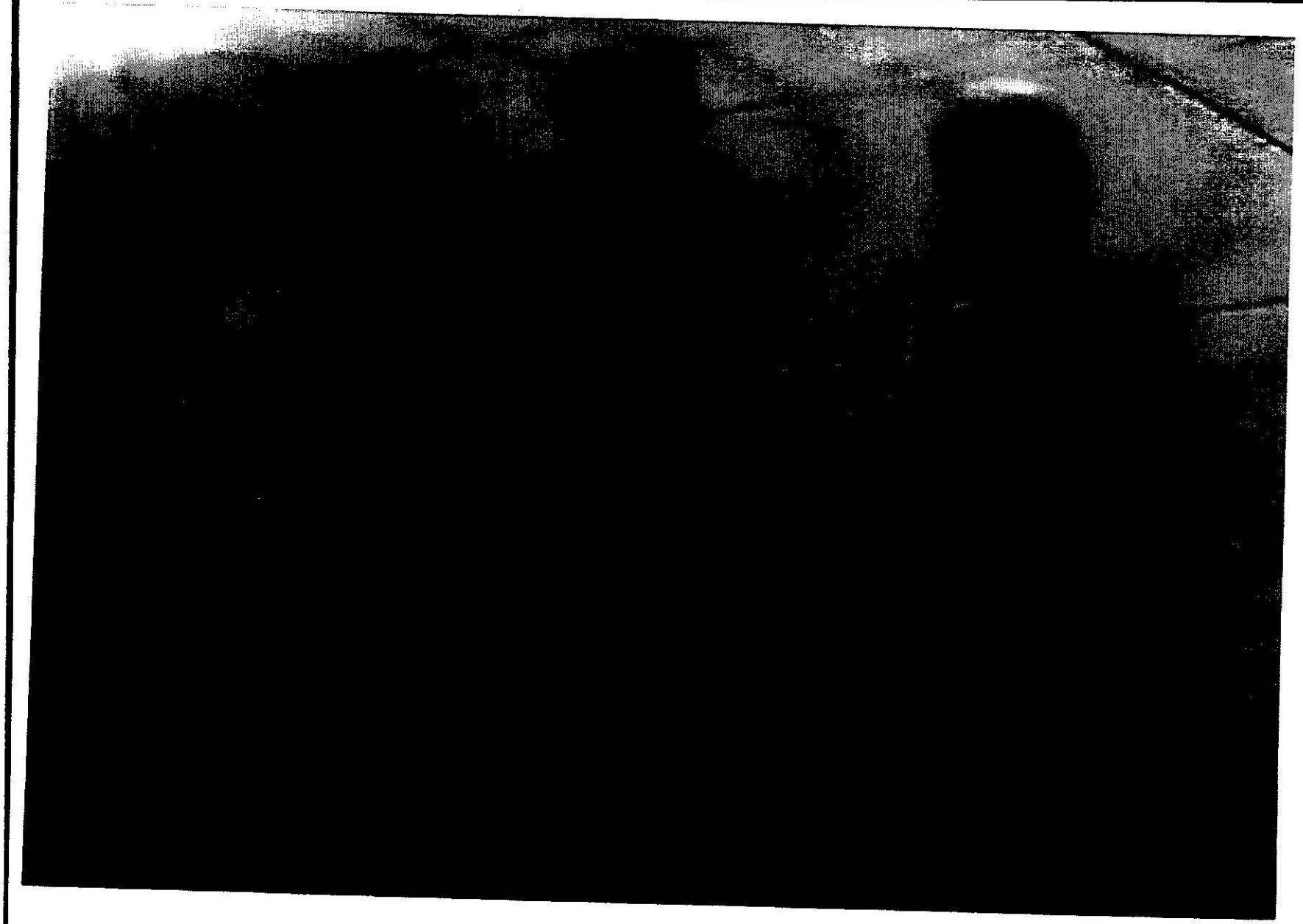
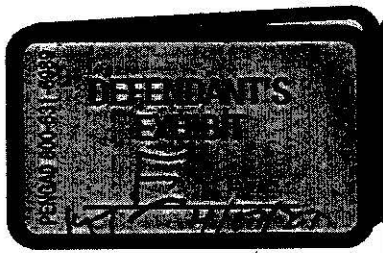
Minnehaha County, S.D.
Clerk Circuit Court





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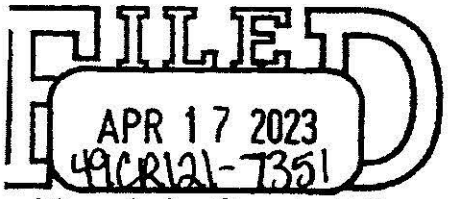

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STATE OF SOUTH DAKOTA
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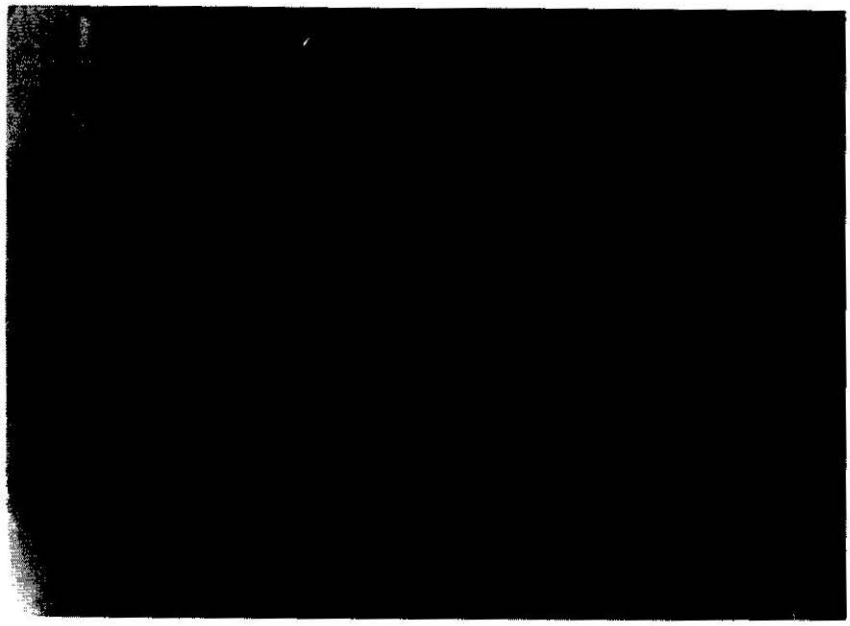

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STATE OF SOUTH DAKOTA
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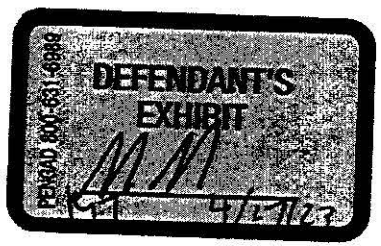

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49CR21-7351
Minnehaha County, S.D.
Clerk Circuit Court


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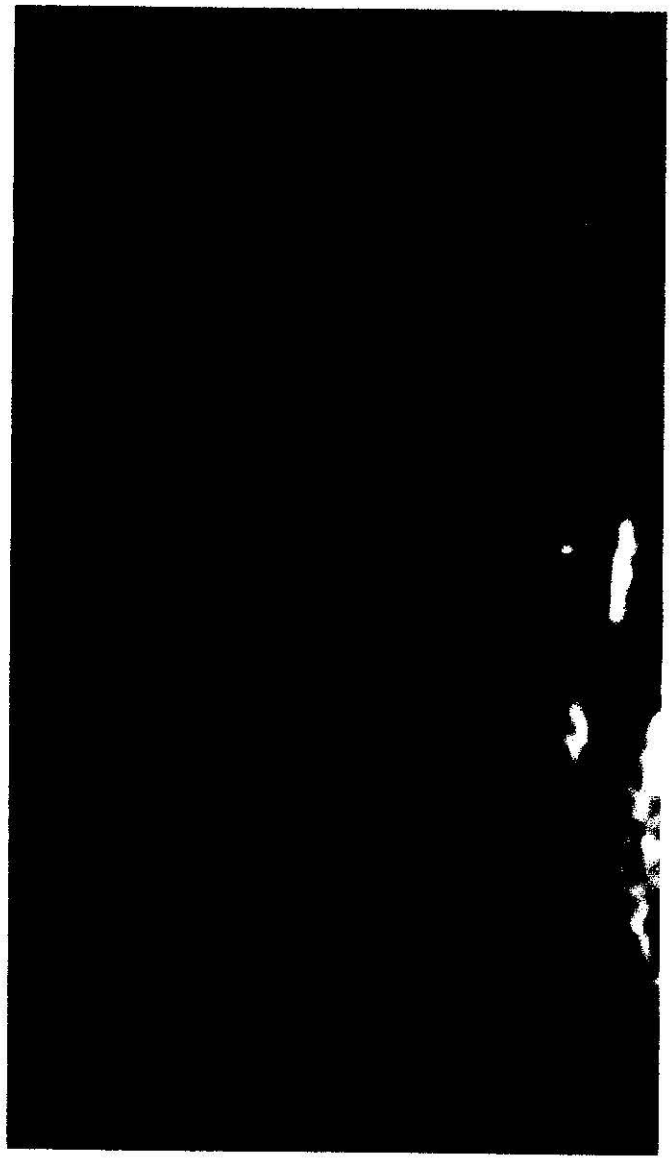

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17603

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

SEP 03 1991

Clerk

DANIEL WILCOX,

Plaintiff and Appellant,

vs.

WALTER LEAPLEY, Warden, SOUTH DAKOTA PENITENTIARY,

Respondent and Appellee.

17603

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Richard D. Hurd, Circuit Court Judge

APPELLANT'S BRIEF

RITA D. HAVERLY
Hagen & Wilka, PC
100 S. Phillips Ave., Suite 418
Sioux Falls, SD 57102
Attorney for Plaintiff and Appellant

MARK W. BARNETT
Attorney General
State Capitol Building
Pierre, SD 57501
Attorney for Respondent and Appellee

The Notice of Appeal was filed on the 28th day of June, 1991

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ORIGINAL

APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUN 09 1995

Clerk

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DAVID KEITH WHITE,

Defendant and Appellant.

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

HONORABLE R. D. HURD
CIRCUIT COURT JUDGE, PRESIDING

DELMAR WALTER
Minnehaha County Public Defender
413 North Main Avenue
Sioux Falls, SD 57102
Telephone: (605) 367-4242

19021
ORIGINAL

MARK BARNETT
ATTORNEY GENERAL
500 East Capitol Avenue
Pierre, SD 57501-5070

and

DAVID NELSON
Minnehaha County State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57102
Telephone: (605) 367-4226

Notice of Appeal Filed January 3, 1995

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TABLE OF AUTHORITIES

1.4.B.2 Male Inmate Classification

I Policy Index:

Date Signed:	*08/26/2020*
Distribution:	*Public*
Replaces Policy:	*4B-2*
Supersedes Policy Dated:	*10/21/2019*
Affected Units:	*Adult Male Institutions*
Effective Date:	*08/26/2020*
Scheduled Revision Date:	*August 2021*
Revision Number:	*24*
Office of Primary Responsibility:	*Classification and Transfer Manager and DOC Administration*

II Policy:

The Department of Corrections (DOC) male inmate classification system is based predominantly on prediction of risk; including risk of escape, violence, dangerousness and repeat criminal behavior. The Department will exercise response to risk, commensurate with each inmate's assessed risk, to the degree possible, consistent with this policy. The male classification system will consider an assessment of risk and efficient management of the male inmate population. Inmates are assigned an appropriate level of supervision based in part on classification and shall not be kept in a more secure status than the potential identified risk requires.

III Definitions:

Admission:
Includes all offenses served by the inmate while under continuous supervision of the DOC, including parole violations, suspended sentence violations and separate counts under one institutional number.

Comprehensive Offender Management System (COMS):
Comprehensive Offender Management System. Computerized inmate records system used to maintain individual offender records, support DOC operations and provide a source for aggregate and statistical data.

Custody Level:
Level of restriction of inmate movement within a DOC institution. This is divided into Maximum, High Medium, Low Medium, Minimum. Each inmate housed in a DOC institution is assigned a custody level.

Direct Supervision:
A method of inmate management that ensures continuing, direct contact between the inmate and staff member. Staff shall not be separated from the inmate by a physical barrier. Requires staff to provide frequent, nonscheduled observation, including personal interaction.

LSI-R:
Level of Service Inventory-Revised. An assessment used to measure an inmate's risk to reoffend, and to define the inmate's programming needs.

Minimal Non-Direct Supervision:
Periodic checks on the inmate. The inmate's activities may be independent of supervisor direction and observation.

Mixed:
Inmates with a parole violation, suspended sentence violation or a finding of non-compliance who receive an additional conviction and sentence to prison where at least one of the prison sentences is a new system offense. Inmates with mixed sentences may have multiple parole dates.

New System:
Inmates sentenced to the South Dakota prison system for an offense committed on or after July 1, 1996.

Old System:
Inmates sentenced to the South Dakota prison system for an offense committed prior to July 1, 1996.

Security Perimeter:
Fences and walls (including the exterior wall of a building) that provide for the secure confinement of inmates within a facility. All entrances and exits of a security perimeter are under the control of facility staff.

Sex Offender Behavior Issues:
Inmates identified by the SOMP (Sex Offender Management Program) staff as having a sexual behavior issue (SBI). Inmates with an SBI will receive a sexual behavior code of something other than a "1" (2,3 or 4).

Violent Offender:
An inmate serving a current sentence for a conviction of certain identified crimes of violence, as specified and determined by the Department of Corrections. Attempt, conspiracy, aiding and abetting are counted the same as the principle felony.

Classification of Violent Crimes:
(See SDCL § 24-15A-32 and DOC Crime Codes and Classification document)

UJS CODE	CRIME	CLASSIFICATION	SDCL
ABEL	Abuse or Neglect of Elder or Adult w/ Disability	6V (After 7/1/07)	22-26-2
AWIF	Aggravated Assault	3V	22-18-1.1
AGLO	Aggravated Assault Against Law Enforcement	2V	22-18-1.05
AGCS	Aggravated Assault-Baby	1V (Before 6/30/12)	22-18-1.1(7)
AGAC	Aggravated Assault – Baby Subsequent	2V	22-18-1.1(7)
AGBC	Aggravated Battery on Infant	2V (After 7/1/12)	22-18-1.4

AGBS	Aggravated Battery on Infant Subsequent	1V (After 7/1/12)	22-18-1.4
AGIN	Aggravated Incest- Foster Child	3V (After 7/1/12)	22-22A-3.1
AGIN	Aggravated Incest - Related Child	3V (After 7/1/12)	22-22A-3
ARS1	Arson 1st	1V (Before 7/1/06)	22-33-9.1
ARN1	Arson 1st	2V (After 7/1/06)	22-33-9.1
ARS2	Arson 2nd	2V (Before 7/1/06)	22-33-9.2
ARN2	Arson 2nd	4V (After 7/1/06)	22-33-9.2
ARS3	Arson 3rd	4V (After 7/1/06 Rescind)	22-33-3 (Repealed 7/1/06)
BRG1	Burglary 1st	2V	22-32-1
BRG2	Burglary 2nd	3V (Before 7/1/06)	22-32-3
CABU	Child Abuse-Victim age 7 or older	4V (After 7/1/01)	26-10-1
CABU	Child Abuse-Victim under the age of 7	3V (After 7/1/01)	26-10-1
ARA1	Committing A Felony While Armed – 1st Offense	2V	22-14-12
ARA2	Committing A Felony While Armed – 2nd Offense	1V	22-14-12
CPED	Criminal Pedophile	1V (After 7/1/06 Rescind)	22-22-30.1
SHMV	Discharge of Firearm at Occupied Structure (With Bodily Injury)	4V (Before 7/1/06)	22-14-20
SHMV	Discharge of Firearm at Occupied Structure (With Bodily Injury)	3V (After 7/1/06)	22-14-20
SHMV	Discharge Firearm at Occupied Structure or Motor Vehicle	5V (Before 7/1/06)	22-14-20
SHMV	Discharge of Firearm at Occupied Structure or Motor Vehicle	3V (After 7/1/06)	22-14-20
DMMV	Discharge Firearm from Moving Vehicle	6V (After 7/1/01)	22-14-21
ECRT	Encouraging a Riot W/O Participating	5V	22-10-6.1
INCS	Incest	4V (Before 7/1/01)	22-22-19.1 Repealed 07/01/06
INCT	Incest	5V (After 7/1/06)	22-22-19.1 Repealed 07/01/06
KDNP	Kidnapping	1V (BEFORE 7/1/06)	22-19-1 (1)
KDN1	Kidnapping	CV (AFTER 7/1/06)	22-19-1 (1)
KDN2	Kidnapping 2nd	3V (AFTER 7/1/2006)	22-19-1.1
KDN2	Kidnapping 2nd W/Serious Bodily Injury	1V	22-19-1.1
KDNA	Kidnapping – With Gross Physical Injury	AV (BEFORE 7/1/01)	22-19-1 (2)
AKDN	Kidnapping – With Gross Physical Injury	BV (AFTER 7/1/01)	22-19-1 (3)
MAN1	Manslaughter 1st	1V (BEFORE 7/1/06)	22-16-15
MNAS	Manslaughter 1st	CV (AFTER 7/1/06)	22-16-15
MAN2	Manslaughter 2nd	4V	22-16-20
MURD	Murder 1st	AV	22-16-4
M1st	Murder 1st With Sentence	CV	22-16-4

MUR2	Murder 2nd	BV	22-16-7
MURF	Murder 2nd	BV	22-16-9 (Repealed 7/1/06)
M2ST	Murder 2nd with sentence	CV	22-16-7
PGMR	Photographing A Child in Obscene Act	4V (After 7/1/01)	22-22-23
RAP1	Rape 1st	1V (BEFORE 7/1/06)	22-22-1(1)
RPF1	Rape 1st	CV (AFTER 7/1/06)	22-22-1(1)
RPE1	Rape 2nd	2V (BEFORE 7/1/06	22-22-1(2)
RPF2	Rape 2nd	1V (AFTER 7/1/06)	22-22-1(2)
RPE5	Rape 3rd	3V (BEFORE 7/1/06)	22-22-1(5)
RAP6	Rape 3rd	3V (BEFORE 7/1/06)	22-22-1(6)
RPIC	Rape 3rd	2V (AFTER 7/1/06)	22-22-1(3)
RPDI	Rape 3rd	2V (AFTER 7/1/06)	22-22-1(4)
RPF4	Rape 4th	3V	22-22-1(5)
RIOT	Riot	4V	22-10-1
AGGR	Riot – Aggravated	3V	22-10-5
RBR1	Robbery 1st	2V	22-30-7
RBR2	Robbery 2nd	4V	22-30-7
MLC1	Sexual Contact with Child Under Age 16	3V	22-22-7
ADCS	Sexual Contact with Child Under Age 16 (Subsequent Offender)	2V	22-22-7
SXCN	Sexual Contact with Person Incapable of Consenting	4V	22-22-7.2
ASLF	Simple Assault 3rd	6V (After 7/1/01)	22-18-1
ASIN	Sliming/Assault by Inmate	6V (After 7/1/01)	22-18-26
STSC	Stalking Subsequent Offenses	5V	22-19A-3
	Threatening to Commit A Sexual Offense	4V	22-22-45
VROR	Violation of Restraining Order/Stalking	6V	22-19A-2

IV Procedures:

1. Authority:

A. The South Dakota DOC Male Inmate Classification policy and accompanying attachments is solely a guide for staff.

B. No inmate has an implied right or expectation to be housed in any particular facility, to participate in any specific program or to receive any specific service. Inmates are subject to transfer from any one facility, program or service at the discretion of a Warden or Secretary of Corrections (See SDCL § 24-2-27).

C. Neither this policy nor its application may be the basis for establishing a constitutionally protected liberty, property or due process interest.

2. Classification Staff:

A. Case managers and senior case managers.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30365

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEVEN TUOPEH,

Defendant and Appellant.

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

THE HONORABLE JAMES A. POWER
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed May 30, 2023

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30365

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEVEN TUOPEH,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Stephen Tuopeh, is called "Tuopeh." Plaintiff and Appellee, the State of South Dakota, is called "State." References to documents and video exhibits are as follows:

Minnehaha County Criminal File No. 21-7351 ..... SR

Tuopeh's Appellant Brief ..... TB

August 4, 2022, Motions Hearing ..... MH

March 15, 2023, Jeff Pour Change of Plea Hearing ..... PLEA

April 4, 2023, Motions Hearing ..... IMMUNITY

April 17, 2023, Jury Trial Transcript JT1

April 18, 2023, Jury Trial Transcript JT2

April 19, 2023, Jury Trial Transcript JT3

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Banquet Footage T15

Zoomed-in Banquet Footage .....I-1(Banquet)

Alley Footage..... I-1 (Alley)

Shop N' Cart Footage.....T16

909 E. 8th St. Footage.....T17

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. Photograph exhibits are listed as "Exh(s)."

JURISDICTIONAL STATEMENT

The Honorable James A. Power, Second Circuit Court Judge, filed a Judgment of Conviction on May 9, 2023. SR:753. Tuopeh filed a Notice of Appeal on May 30, 2023. SR:756. This Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. THE CIRCUIT COURT CORRECTLY DENIED TUOPEH'S MOTION FOR JUDGMENT OF ACQUITTAL.

After the State presented its case in chief, Tuopeh motioned for judgement of acquittal. JT2:86. The circuit court denied the motion. JT2:90-92.

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

State v. Frias, 2021 S.D. 26, 959 N.W.2d 62.

II. THE CIRCUIT COURT CORRECTLY ADMITTED A PHOTOGRAPH EXHIBIT FROM TUOPEH'S NOTEBOOK.

Tuopeh objected to the admission of the notebook photo from his apartment with writing under the name "Ceno." JT2:53-54. The circuit court overruled the objection and provided a limiting instruction. JT2:56.

State v. Evans, 2021 S.D. 12, 956 N.W.2d 68.

III. THE CIRCUIT COURT DID NOT COMMIT ERROR BY DECLARING KORDERRO ROBINSON UNAVAILABLE AND DID NOT PREVENT TUOPEH FROM DISPUTING HEARSAY OBJECTIONS.

The circuit court issued a subpoena ad testificatum and transport order for inmate Korderro Robinson. SR:442, 511-12. Robinson refused to leave his cell or testify at trial. JT2:97. The circuit court declared Robinson unavailable. *Id.*

State v. Lindner, 2007 S.D. 60, 736 N.W.2d 502.

State v. Smith, 2023 S.D. 32, 993 N.W.2d 576.

IV. THE CIRCUIT COURT CORRECTLY REFUSED TO GRANT DEFENDANT'S PROPOSED JURY INSTRUCTIONS.

Tuopeh proposed jury instructions on speculation, conjecture, and alternative counts. SR:513, 532-33; JT3:21-25. The circuit court rejected his proposed instructions. JT3:13, 22, 25.

State v. Kryger, 2018 S.D. 13, 907 N.W.2d 800.

Ball v. United States, 470 U.S. 856 (1985).

Rutledge v. U.S., 517 U.S. 292 (1996).

Wilcox v. Leapley, 488 N.W.2d 654 (S.D. 1992).

V. THE CIRCUIT COURT PROPERLY OVERRULED TUOPEH'S SPECULATION OBJECTIONS TO DR. SNELL'S TESTIMONY.

Tuopeh objected to expert testimony regarding kicks to the victim's head at his immunity hearing and trial. IMMUNITY:16; JT2:31. The circuit court overruled both

objections. JT2:30-31. Dr. Snell testified at trial that blunt force trauma to the head caused by an object was Mousseaux's cause of death. JT2:37.

State v. Carter, 2023 S.D. 67.

State v. Nelson, 2022 S.D. 12, 970 N.W.2d 814.

VI. THE CIRCUIT COURT CORRECTLY DENIED IMMUNITY.

Prior to trial, Tuopeh motioned to receive immunity from prosecution under SDCL 22-18-4.8. SR:396. An Immunity Hearing was held on April 4, 2023. IMMUNITY:1. The circuit court issued Findings of Fact and Conclusions of Law alongside an Order denying immunity. SR:523.

State v. Smith, 2023 S.D. 32, 993 N.W.2d 576.

VII. THE CIRCUIT COURT CORRECTLY OVERRULED TUOPEH'S VOUCHING OBJECTION.

During closing argument, the State said "I'm not a salesman. My job is justice[,]" in response to remarks made by Tuopeh. JT3:67-71. Tuopeh objected, alleging improper vouching, but the circuit court overruled the objection. JT3:71.

State v. Manning, 2023 S.D. 7, 985 N.W.2d 743.

State v. Nelson, 2022 S.D. 12, 970 N.W.2d 814.

STATEMENT OF THE CASE

On October 28, 2021, a Grand Jury charged Tuopeh with three Counts: Count 1: Second Degree Murder (Depraved Mind) violating SDCL 22-16-7; Count 2: First Degree Manslaughter (Heat of Passion) violating SDCL 22-16-15(2); and Count 3: First Degree Manslaughter (Dangerous Weapon) violating SDCL 22-16-15(3). SR:6.

A jury trial occurred on Counts 1 and 2 on April 17 through 19, 2023. SR:697, 999, 1171, 1312. The jury returned guilty verdicts on both Counts. SR:742. The State dismissed Count 3. SR:752. At sentencing, the circuit court vacated Count 2 (First Degree Manslaughter), merged it into Count 1 (Second Degree Murder). SR: 752. The circuit court sentenced Tuopeh to a term of life in prison on Count 1, the mandatory minimum sentence. *Id.*; SENT:11; SDCL 22-6-1.

STATEMENT OF THE FACTS

I. Killing Mousseaux

Christopher Mousseaux walked through downtown Sioux Falls on the evening of October 10, 2021. T11:0:00-10; JT1:31-32. He traveled past the Red Sea Pub, where Steven Tuopeh and Jeff Pour stood with a group of people. T11:0:00-10; JT1:31-32. One of the members of the group waived Mousseaux down. T11:0:05-15.

Mousseaux approached the Red Sea Pub crew, and began exchanging fist bumps and handshakes with Tuopeh and Pour. T11:0:15-35; JT1:31-32. But the conversation took an ugly turn. Tuopeh set his drink down in a nearby alley and returned to the group. T11:0:40-1:10. Mousseaux started aggressively pulling up his pants. T11:1:00-1:40. Mousseaux then threw a right hook at Pour. T11:1:40 48. Pour dodged, and Mousseaux landed a glancing blow on

his chin. T11:1:45-50; SR:132. The follow-through of the punch struck Tuopeh in the face. T11:1:45-50; SR:132.

Mousseaux started backpedaling away from Tuopeh and Pour. T11:1:45-55. He turned his back to run, but the duo began to pursue him, and Mousseaux turned back around to face them as he moved into the street. T11:1:45-55. Mousseaux continued to retreat, but he kept his attention on Tuopeh and Pour with his fists up in a defensive posture. I-1(Alley):6:55-7:05; SR:525.

Tuopeh caught up to Mousseaux, and the two briefly traded blows. T17:0:00-10. After the exchange, Mousseaux continued his retreat, moving backward while facing Tuopeh. T17:0:00-10. Pour trailed behind but continued his pursuit. T17:0:00-10. Eventually, Tuopeh and Pour both caught up to Mousseaux, about 300 feet away from the Red Sea Pub. T15:0:00-5; JT1:113. Mousseaux turned his back on his pursuers and attempted to run, but he tripped and landed face down in the middle of the street. T15:0:05-7.

Tuopeh and Pour pounced on the grounded Mousseaux, and both immediately started throwing punches. T15:0:05-07. Pour punched while Tuopeh rained a combination of punches and kicks down upon Mousseaux. T15:0:05-20. After brutalizing Mousseaux, the pair ran away together and left him in the middle of the street. T15:20:00-25. They headed back toward the direction of the Red Sea Pub. T17:35-40.

II. The Investigation

Not long after the beating, Officers Jordan Taylor and Rachel Schmeical responded to a call for a possible stabbing or car-on-pedestrian collision outside of the Red Sea Pub. JT1:15, 21-22; *See generally* T1. They arrived to an unresponsive Mousseaux laying in the middle of the street with blood pouring from his head. JT1:15, 22; T1:0:00-30. Law enforcement performed chest compressions on Mousseaux, who had vomited into the pool of blood. T1:0:35-55, 1:45-3:52; JT1:17, 22. Officer Taylor applied a defibrillator to Mousseaux. T1:1:30-55; JT1:16. EMTs arrived and transported Mousseaux to the hospital. JT1:24.

Law enforcement took photographs of the crime scene, collected two swabs of Mousseaux's blood from the pavement, and obtained security camera footage from nearby businesses. JT1:65, 70, 82, 87, 105, 108. Still images were taken from Red Sea Pub footage, which depicted the yet unknown attackers to law enforcement. JT1:87; Exhs. T9, T10. On October 12, 2021 — two days after the attack on Mousseaux — Detective Christopher Schoepf obtained footage from a nearby Shop N' Cart gas station. JT1:87; *See generally* T16. It depicted two people with similar clothing to the Red Sea Pub footage. JT1:107; T16:0:00-45; Exhs. T9, T10. They drove a silver Buick LaCrosse with dealer plates. T16:0:00-45; JT1:88-89. Detective Nelson Leacraft eventually located the Buick near a Sioux Falls residence, and he spoke

with Pour as Pour exited the home. JT1:94, SR:125. Pour agreed to come to the police station for an interview. SR:115, 125.

Detective Patrick Marino interviewed Pour on October 12, 2021. *See generally* Exh. 4, SR:115. During the interview, Pour relayed that law enforcement told him his car made him a person of interest. SR:116. But Pour explained to Detective Marino that the vehicle was actually his girlfriend's, and he had loaned the car to a friend named "Ceno."[1] Pour detailed that Ceno lived in Sioux Falls near 12th and Kiwanis. SR:120. After initially denying involvement, Pour admitted that he was at the Red Sea Pub and Mousseaux threw a punch at him. SR:127-28. Pour also explained that after the punch, Mousseaux started running and eventually fell down. SR:132, 134. But Pour denied attacking Mousseaux after he fell, and said he did not know what happened with Ceno. SR:133-35.

Pour told Detective Marino that after chasing Mousseaux, he went back to the Red Sea Pub and drove home shortly after. SR:138-39. At this point in the interview, he identified pictures of Ceno for Detective Marino. SR:141, 150. Detective Marino then revealed that he knew Pour punched Mousseaux after the latter fell. SR:152-155. He asked Pour if he tried to take anything out of his pockets before the attack, which Pour denied. SR:155-56. Detective Marino then showed Pour a still photo of Ceno from the Red Sea Pub Footage. SR:156; Exh. QQ. He

[1] The interview transcript transcribes this name as "Ceano" based on Pour's spelling. SR:117-18.

explained that the photo showed that Ceno had two rings with a sharp point sticking out of them on the fingers of his right hand. SR:156; Exh. QQ. Pour could not say what Ceno held. SR:157. At the conclusion of the interview, Detective Marino placed Pour under arrest. SR:170.

Based on information provided by Pour, law enforcement developed Tuopeh as a suspect through a Facebook profile associated with the name "Ceno Woo." JT1:94. The "Ceno" profile had pictures and a date of birth that matched police records for Tuopeh. JT1:95-96. Detective John Gross received information that Tuopeh frequented a gas station on 12th and Kiwanis. JT1:99-100. Detective Gross conducted surveillance in the area of the gas station and eventually located Tuopeh walking through a Walgreens parking lot. SR:99-100. Detective Gross approached Tuopeh and arrested him. SR:101. Tuopeh had no visible injuries when Detective Gross encountered him. SR:101.

Detective Patrick Marino executed a search warrant of Tuopeh's home after his arrest. JT1:116. The search uncovered a wallet with an I.D. for "Steven Tuopeh," and a pair of tennis shoes that matched those worn by one of the assailants in the Red Sea Pub footage. JT1:117; Exhs. T20, T22. A pair of blue jeans with blood stains was also found. JT1:120; Exh. T40. A notebook from the apartment revealed apparent rap lyrics written under the name "Ceno," and law enforcement took a photo of it next to an Aflac policy they found for "Steven Tuopeh." *See* Exh. T37.

III. Autopsy

After surviving for three days in the hospital, Mousseaux died on October 13, 2021. SR:455; Exh. T25. Medical intervention prior to Mousseaux's death included intubation, cardiac electrodes being placed on his body, and the use of an oxygen sensor. JT2:16; SR:456; Exh. T8. Dr. Kenneth Snell performed an autopsy on October 14, 2023. JT1:15; SR:455. Mousseaux had rib and skull fractures, as well as hemorrhaging in the skull. JT2:15; SR:455. His blood alcohol content was 0.245. SR:459; JT2:35. He had a large contusion on the left side of his body below his ribs, three abrasions on his legs, bruising on both hands and his face, a fracture in his left hand, and abrasion wounds on his right ribs and wrist.[2] JT2:17-19, 21-22; Exh. T34. He had multiple fractured ribs on the right side of his body. JT2:25.

Dr. Snell observed several lacerations on Mousseaux's head from blunt force injuries. JT2:16; Exhs. T30, T31. He found one laceration on the upper left side of Mousseaux's forehead. JT2:17, Exh. T28. Four were located on the back of the head, and two of those were close together with a puncture wound in between them. JT2:17; Exh. T30. Removal of the skin to examine Mousseaux's skull revealed fracturing, including a deep, circular fracture under the laceration on the front of

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[2] At trial, Dr. Snell testified that a laceration is a cut resulting from blunt force, a puncture is a piercing of the body from blunt force, a contusion is a bruise, and an abrasion is the top layer of skin being removed from a blunt force blow. JT2:16-18.

his head. JT2:26; Exh. T32. The back of the skull displayed a complex fracture with several intervening lines. JT2:26.

Dr. Snell's autopsy revealed that the frontal fracture resulted in subarachnoid hemorrhaging, which is bleeding of the brain underneath a membrane called the arachnoid.[3] JT2:27. This fracture punctured all the way into Mousseaux's brain area. JT2:26; Exhs.T28, T32. The fracture in the back of the skull also resulted in subarachnoid hemorrhaging. JT2:27. Further skull autopsy revealed bruising on the back right side of Mousseaux's brain, and a tremendous amount of swelling that forced his brain tissue down his spinal cord canal. JT2:27. Removing of the top portion of the skull showed the extent of Mousseaux's fracture pattern in the back side of his skull, as well as interior bleeding within the skull. JT2:32-33, Exh. T33.

Dr. Snell examined Mousseaux's brain tissue under a microscope, which revealed hemorrhaging in the brain tissue itself and a resulting lack of oxygen. JT2:34. He diagnosed Mousseaux with a traumatic brain injury, which included swelling of the brain, bruising and bleeding of the brain, and multiple skull fractures and lacerations. JT2:36; SR:455. Dr. Snell declared Mousseaux's cause of death to be a traumatic brain injury due to assault. JT2:37-38; SR:455. At trial, Dr.

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[3] Dr. Snell testified at trial about the dura, the outer membrane of the brain, and the arachnoid, a membrane between the brain and the dura. JT2:26-27. Bleeding underneath the arachnoid is called "subarachnoid." JT2:27.

Snell testified that that injury was caused by a blunt force object. JT2:37.

IV. Severance and Immunity

The State initially charged Tuopeh and Pour as Co-Defendants, and the circuit court denied Tuopeh's Motion to Sever. MH:20. But Pour eventually reached a settlement agreement with the State, and the cases were severed. PLEA:10; JT1:1. Prior to trial, Tuopeh motioned to receive immunity from prosecution under SDCL 22-18-4.8. SR:396. An Immunity Hearing was held on April 4, 2023. IMMUNITY:1. The circuit court issued Findings of fact and Conclusions of Law alongside an Order denying the immunity Motion. SR:523. The circuit court reasoned that Tuopeh met his prima facie burden because Mousseaux threw the first punch and later made a throwing gesture at Tuopeh. SR:528.

But the circuit court also determined that the State overcame the burden of clear and convincing evidence because it showed that Tuopeh used deadly force, either by himself or in concert with Pour, at a point when he did not face an imminent threat of any force from Mousseaux. SR:529-30. Further, the circuit court found that Mousseaux never engaged in conduct rising to the level of a forcible felony under SDCL 22-18-4.1 that justified the use of deadly force. SR:529-30. Finally, the circuit court held that, although Tuopeh did not have a duty to retreat, his pursuit of Mousseaux went beyond what was reasonably necessary to secure himself from danger. SR:530.

V. Guilty Verdict

A jury trial occurred April 17 to 19, 2023. JT1:1; JT2:1; JT3:1. The State presented evidence from law enforcement who secured the scene and investigated the murder. JT1:14, 20, 23, 26, 51, 61, 67, 79, 85, 95, 103. The security recordings piecing together the pursuit and beating of Mousseaux were offered, as were photograph exhibits of the crime scene, photos and videos used in identifying Tuopeh, and photos from the search of Tuopeh's apartment. *E.g.*, T1, T11, T15-17; Exhs. T2, T8-10, T28, T30-34, T37, QQ. Tuopeh objected to the admission of T-37, a photo of a notebook from Tuopeh's apartment with the name "Ceno" written in it, which was juxtaposed with an Aflac policy for "Steven Tuopeh." *See* T37. Tuopeh alleged irrelevance, prejudice, and hearsay. JT2:54; *See* T37. The circuit court overruled the objection and provided a limiting instruction that the contents of the writing underneath the name "Ceno" were irrelevant and hearsay, but the exhibit could be used to establish that documents from the apartment showed Tuopeh went by "Ceno." JT2:56.

The State presented evidence on how forensic specialists collected DNA samples from Mousseaux and Tuopeh, and that blood found on Tuopeh's jeans matched Mousseaux's DNA. JT1:65; JT2:68, 80; Exhs. T38, T40. The State offered the testimony of Dr. Snell, who described his autopsy process and findings. JT2:9-48; Exh. T25. Tuopeh objected to Dr. Snell's testimony as speculative regarding cause of death, which

the circuit court overruled. JT2:30-31. At the conclusion of the State's case in chief, Tuopeh motioned for judgment of acquittal, which the circuit court denied on the grounds that a rational trier of fact could convict Tuopeh on the evidence presented. JT2:86-92

Prior to trial, the circuit court had issued subpoena ad testificatum and transport order for an inmate named Korderro Robinson. SR:442, 511-12. Tuopeh wanted Robinson to provide testimony that Pour told him he used brass knuckles in the attack on Mousseaux. JT2:99. Robinson had previously made this claim in an interview with Detective Marino. JT2:133-36. But Robinson refused to leave his cell to testify at trial. JT2:97. The circuit court declared Robinson unavailable. JT2:97.

The circuit court heard argument on potential hearsay exceptions for Robinson, including Tuopeh's assertion that Pour made a corroborated statement against his interest under SDCL 19-19-804(b)(3). JT2:113-14. The circuit court ruled that the statement was not sufficiently corroborated and that no hearsay exception existed. JT2:114. It also ruled that using Detective Marino to enter Robinson's statement into evidence would constitute hearsay within hearsay, and it did not allow the statement to be heard by the jury. JT2:115.

During closing argument, Tuopeh emphasized that his sneakers were found without blood. JT3:67. Tuopeh argued "there's no evidence, whatsoever, that the sneakers were cleaned. None. But they try to sell

you with that anyway." JT3:67. The State's prosecutor responded, "the defense just said to you that I was trying to sell you something. That's not my job. I'm not a salesman. My job is justice and bringing people to justice who have committed crimes." JT:70-71. Tuopeh objected, arguing that this constituted vouching, but the circuit court overruled the objection. JT3:71.

Prior to jury deliberations, Tuopeh proposed custom instructions on speculation and conjecture, and wanted to include a jury instruction alternative counts. JT3:12-14, 21-25. The circuit court refused the instructions, reasoning that the pattern instructions on speculation and conjecture were already sufficient, and that an alternative counts instruction was not appropriate because jurors do not make sentencing decisions. *Id.* The jury ultimately returned guilty verdicts for Second Degree Murder and First-Degree Manslaughter. SR:742.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED TUOPEH'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Factual Background

After the State presented its case in chief, Tuopeh motioned for judgment of acquittal. JT2:86. Tuopeh argued that Dr. Snell testified that the fatal injuries occurred to the head, and that the video evidence showed Pour alone delivered blows to the head, and that he reached into his jacket for something before doing so. JT2:86-88. The circuit court denied the Motion, reasoning that when viewing the evidence most

favorably to the State, a rational trier of fact could find that Tuopeh struck a number of intense blows while Mousseaux was on the ground, and that even if he did not hit Mousseaux's head, he aided and abetted Pour in doing so. JT2:90-92; *see* TB:35.

B. Standard of Review

"This Court reviews 'a denial of a motion for judgment of acquittal de novo.' " *State v. Peneaux*, 2023 S.D. 15, ¶ 24, 988 N.W.2d 263, 269 (quoting *State v. Timmons*, 2022 S.D. 28, ¶ 14, 974 N.W.2d 881, 887 "[A] motion for a judgment of acquittal attacks the sufficiency of the evidence[.]" *Id.* "In measuring the sufficiency of the evidence, [this Court] ask[s] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *State v. Frias*, 2021 S.D. 26, ¶ 21, 959 N.W.2d 62, 68). "'[T]he jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence[,]' and 'this Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.' " *Id.*

C. Argument

Tuopeh argues that the circuit court erred in not granting his Motion because the State did not meet its burden on an aiding and abetting theory of the case. TB:35-36. He contends that he only kicked Mousseaux's lower extremities and thus did not have the same intent as Pour, who he claims struck the killing blow to Mousseaux's head.

TB:36. He also asserts that Pour reached into his jacket before joining Tuopeh in the attack, which demonstrated Pour alone had the intent to cause a potentially fatal injury. TB:37.

"Homicide is murder in the second degree if perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child." SDCL 22-16-7. "A depraved mind requires, 'less culpability than the element of premeditation required for first-degree murder.' " *State v. Frias*, 2021 S.D. 26, ¶ 23, 959 N.W.2d at 69 (quoting *State v. Harruff*, 2020 S.D. 4, ¶ 39, 939 N.W.2d 20, 30). "If a person is able to act with a lack of regard for the life of another, then that person can be convicted of second-degree murder." *Id.* (quoting *State v. Laible*, 1999 S.D. 58, ¶ 13, 594 N.W.2d 328, 332). "'[W]hether conduct is imminently dangerous to others and evincing a depraved mind regardless of human life is to be determined from the conduct itself and the circumstances of its commission.' " *Id.* (quoting *Laible*, 1999 S.D. 58, ¶ 13, 594 N.W.2d at 332).

Tuopeh's arguments ignore that "'the jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence[,]' and 'this Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.' " *Peneaux*, 2023 S.D. 15, ¶ 24, 988 N.W.2d at 269 (quoting *Frias*, 2021 S.D. 26, ¶ 21, 959 N.W.2d at 68).

The State provided the jury with video evidence that clearly shows Tuopeh both punching and kicking the fallen Mousseaux after pursuing him for an entire block. I-1(Banquet):0:00-10; T18:1:45-2:15. The jury saw that Mousseaux had been retreating and turned around to run away before falling and being punched and kicked by Tuopeh. I-1(Banquet):0:00-10; T18:1:45-2:15.

The State also showed a photograph of Tuopeh outside the Red Sea Pub with two rings around his right fist with a point coming off them. Exh. QQ. The shape of the object around Tuopeh's knuckles matched the pattern of the lacerations on Mousseaux's head, which Dr. Snell described. Exhs. QQ, T28, T30; JT2:16. The point on the object matched Mousseaux's frontal skull fracture. Exhs. QQ, T:32. Tuopeh is pictured with the object in his right hand — the same hand he used to punch the grounded Mousseaux. Exh. QQ; I-1(Banquet):0:00-10. Tuopeh held the object near his right pocket, and the State presented evidence showing that Tuopeh's jeans had blood stains near the right pocket and that the blood from the jeans matched Mousseaux's DNA. Exhs. QQ, T40; JT2:80.

Dr. Snell testified that a traumatic brain injury was the cause of death, and a blunt object must have caused it. JT2:37-38. The circuit court did not abuse its discretion in concluding that a rational jury could look at this evidence in a light most favorable to the state and find that Tuopeh had the requisite intent for second degree murder, either as

principal or aider and abettor. JT2:90-92; *Peneaux*, 2023 S.D. 15, ¶ 24, 988 N.W.2d at 269; *Frias*, 2021 S.D. 26, ¶ 23, 959 N.W.2d at 69; *State v. Jucht*, 2012 S.D. 66, 821 N.W.2d 629 (Holding that an aiding and abetting conviction requires that a defendant possess the underlying mental state required of the principal).

The jury also heard Tuopeh's defense. They heard him tell them not to believe their lying eyes — he never threw a punch and only kicked at Mousseaux's body. JT3:63. They heard his argument that Mousseaux still posed a threat while he was backpedaling away for an entire block and turning around to run. JT3:63. They heard him insist that Pour pulled an object from his coat pocket that glinted off his knuckles in the video of the attack. JT3:63. They heard Tuopeh claim that the fact that his shoes were not found covered in blood means he did not strike a blow to Mousseaux's head. JT3:66-67. They found him guilty beyond a reasonable doubt because they did not believe these arguments. SR:742. The State's evidence was simply too strong.

The jury was properly instructed on self-defense, speculation, the beyond a reasonable doubt standard, the elements of the crimes, the requisite intent for second degree and first-degree manslaughter and aiding and abetting. SR:700, 706, 708, 712, 716, 720-26. The jury is presumed to have understood and followed these instructions. *State v. Brim*, 2010 S.D. 74, ¶ 18, 789 N.W.2d 80, 86. After hearing Tuopeh's arguments and looking at the State's evidence, the jury found Tuopeh

guilty beyond a reasonable doubt. SR:742. This included finding that he acted with a depraved mind. SR:706, 708, 712-13, 716, 720. This Court should follow its prior wisdom and not re-weigh the evidence and credibility of witnesses on appeal. *Peneaux*, 2023 S.D. 15, ¶ 24, 988 N.W.2d at 269.

II. THE CIRCUIT COURT CORRECTLY ADMITTED A PHOTOGRAPH EXHIBIT FROM TUOPEH'S NOTEBOOK.

A. Factual Background

Tuopeh objected to the admission of the notebook photo from his apartment with writing under the name "Ceno" next to an Aflac policy for "Steven Tuopeh," arguing that it violated SDCL 19-19-401 and SDCL 19-19-403, and it was hearsay. JT2:53-54; Exh. T37. The circuit court overruled the objection and provided a limiting instruction that the contents of the writing underneath the name "Ceno" were irrelevant and hearsay, but the exhibit could be used to establish that documents from the apartment showed Tuopeh went by "Ceno." JT2:56.

B. Standard of Review

"[This Court] review[s] evidentiary rulings for abuse of discretion." *State v. Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d 576, 584 (quoting *State v. Shelton*, 2021 S.D. 22, ¶ 16, 958 N.W.2d 721, 727). "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 *State v. Rodriguez*, 2020 S.D. 68, ¶ 41, 952 N.W.2d 244, 256). "To warrant reversal, 'not only must error

be demonstrated, but it must also be shown to be prejudicial.'" *Id.* (quoting *State v. Stone*, 2019 S.D. 18, ¶ 22, 925 N.W.2d 488, 497). Error is prejudicial when it "in all probability . . . produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (quoting *State v. Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d 21, 30). "The trial court[']s evidentiary rulings are presumed to be correct." *State v. Guzman*, 2022 S.D. 70, ¶ 60, 982 N.W.2d 875, 894 (quoting *State v. Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d 100, 105).

C. Argument

The allegation of prejudice in exhibit T37 arises from the fact that it contains apparent rap lyrics. *See* Exh. T37; JT2:106-07; TB:43-45. The jottings in the exhibit contain rhymes and plays on words such as "They hate me, I see P.H.D, player hatin' degree" and "two clips nine, I will blow his mind." *See* Exh. T37. Motifs of violence, criminality, and racial slang associated with the rap genre are present in the exhibit. Exh. T37; *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 573 (1994); *see also Freeman v. Spencer Gifts, Inc.*, 333 F. Supp. 2d 1114, 1118 (D. Kan. 2004). The circuit court agreed with Tuopeh that the jottings underneath the name "Ceno" were irrelevant and hearsay, but it allowed the exhibit to show that "Ceno" was a pseudonym that Tuopeh used. JT2:56.

Relevant evidence has any tendency to make a fact of consequence more or less likely. SDCL 19-19-401. The notebook was highly relevant

for the jury because law enforcement testified about the search for a man named "Ceno," who was initially believed to be Tuopeh due to a social media profile. JT1:94; Exh. T37. The association of Tuopeh with the alias was confirmed by the notebook in his apartment. JT1:94; Exh. T37. This connected Tuopeh to other evidence, such as the recordings of him attacking Mousseaux and the photos of him outside the Red Sea Pub with the spiked rings around his knuckles. *See generally* T11; Exh. QQ.

Relevant evidence may be excluded if it is substantially outweighed by a risk of unfair prejudice. SDCL 19-19-403. But this Court has "often commented that the potential for unfair prejudice can be alleviated by the giving of a limiting instruction." *State v. Evans*, 2021 S.D. 12, ¶ 36, 956 N.W.2d 68, 82 (citing *Steichen v. Weber*, 2009 S.D. 4, ¶ 19, 760 N.W.2d 381, 391). This Court "presume[s] that juries understand and abide by curative instructions." *Smith*, 2023 S.D. 32, ¶ 55, 993 N.W.2d at 594 (quoting *State v. Dillon*, 2010 S.D. 72, ¶ 28, 788 N.W.2d 360, 369). A defendant may request a limiting instruction, or a trial court may provide one *sua sponte*. *See Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363, 377; *see also State v. Rose*, 324 N.W.2d 894, 896 (S.D. 1982).

By providing a limiting instruction that the notebook was only to be considered for using the name "Ceno," the circuit court ensured that potential unfair prejudice did not outweigh — let alone substantially

outweigh — the relevance of using the notebook to tie Tuopeh to the name "Ceno." JT2:56; *Evans*, 2021 S.D. 12, ¶ 36, 956 N.W.2d at 82. Because the jury is presumed to have understood and followed the limiting instruction, the presence of the rap lyrics did not produce an effect upon the jury's verdict or harm Tuopeh's substantial rights. *Smith*, 2023 S.D. 32, ¶¶ 22, 55, 993 N.W.2d at 584, 594. The circuit court therefore did not abuse its discretion in allowing the exhibit. *Id.* And even if the circuit court's ruling were outside of the range of admissible choices, the weight of the evidence enumerated under Issue I forecloses on any argument that Tuopeh may have been prejudiced by the admission of the notebook. *Supra.*

III. THE CIRCUIT COURT DID NOT COMMIT ERROR BY DECLARING KORDERRO ROBINSON UNAVAILABLE AND DID NOT PREVENT TUOPEH FROM DISPUTING HEARSAY OBJECTIONS.

A. Factual Background

The circuit court issued a subpoena ad testificatum and transport order for inmate Korderro Robinson. SR:442, 511-12. Tuopeh wanted Robinson to testify that Pour told Robinson he used brass knuckles on Mousseaux. JT2:99. Robinson previously made this claim in an interview with Detective Marino. JT2:133-36. But Robinson refused to leave his cell or testify at trial. JT2:97. The circuit court therefore declared Robinson unavailable. JT2:97.

The circuit court heard argument on potential hearsay exceptions regarding Robinson's unavailability, and Tuopeh asserted Robinson's

claim constituted a statement by Pour against his own interest under SDCL 19-19-804(b)(3). JT2:113-14. But the circuit court ruled that the statement was not sufficiently corroborated. JT2:114. The circuit court also opined that using Detective Marino to enter Robinson's statement into evidence would constitute hearsay within hearsay. JT2:115. It therefore did not allow the jury to hear Detective Marino testify that Robinson said Pour said he used brass knuckles. JT2:115.

B. Standard of Review

The decision to declare Robinson unavailable was an evidentiary ruling. *See* SDCL 19-19-804. "[This Court] review[s] evidentiary rulings for abuse of discretion." *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584. Thus, the same standard of review and prejudice standards under Issue II(B) apply to this issue. *Supra*.

C. Argument

Tuopeh argues that the circuit court "refused to procure a necessary witness's attendance" and therefore his "right to present a complete defense was denied." TB:21. But the circuit court did not refuse to procure Robinson — it issued a subpoena for his testimony that Robinson refused to obey. SR:442; JT2:97. Rather than forcibly transport Robinson so he could refuse to testify in person, the circuit court's solution was to declare Robinson unavailable and determine if a hearsay exception existed under SDCL 19-19-804. JT2:97-98.

"SDCL 19-19-804 provides the circumstances under which a declarant is considered unavailable[.]" *State v. Rodriguez*, 2020 S.D. 68, ¶ 47 n. 10, 952 N.W.2d at 257 n. 10. One of the circumstances listed is when a witness "refuses to testify about the subject matter despite a court order to do so." SDCL 19-19-804(a)(3); *see also State v. Dikstaal*, 320 N.W.2d 164, 166 (S.D. 1982). Robinson's refusal fell squarely under this scenario contemplated by SDCL 19-19-804. The circuit court therefore appropriately applied SDCL 19-19-804(a)(3) and did not make a ruling "outside of the range of permissible choices" in declaring him unavailable. *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584.

After declaring Robinson unavailable, the circuit court allowed Tuopeh an opportunity to show if a hearsay exception existed for Robinson's statement to be allowed through Detective Marino. JT2:99, 134-35. Tuopeh argued, as he does now on appeal, that Pour's statement to Robinson fell under the exception of a statement against interest made under circumstances that clearly indicate trustworthiness. JT2:102-03; TB:24. The circuit court, citing *State v. Lindner*, determined that Pour's statement was not made under sufficiently reliable circumstances because it was not "corroborated by circumstances clearly indicating its trustworthiness." JT2:114; 2007 S.D. 60, ¶ 8, 736 N.W.2d 502, 506.

The circuit court correctly determined that Robinson's statement was not corroborated by circumstances clearly indicating its

trustworthiness. *Lindner*, 2007 S.D. 60, ¶ 8, 736 N.W.2d at 506. He was never a cellmate of Pour's, and instead simply lived on the same cell block. JT2:99. Tuopeh could not provide a date as to when the alleged statement was made, and instead provided a broad timeline of sometime between February 2022 and February 2023. *Id.* Robinson also first alerted law enforcement via letter that he had information regarding Pour and did so in an effort to achieve a sentence modification. *Id.* at 100-01. Robinson also has crimes of dishonesty on his record. *Id.* at 102. Given the dubious circumstances surrounding Robinson's claim, no clear indication of trustworthiness existed, and the statement could not be admitted.[4] [5] *Id.* at 114; *Lindner*, 2007 S.D. 60, ¶ 8, 736 N.W.2d at 506. The circuit court therefore did not make a ruling "outside of the range of permissible choices" by not allowing Robinson's testimony through Detective Marino. *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584.

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[4] Because Robinson's statement was inadmissible, it was not necessary to do a double hearsay analysis on Pour's alleged underlying statement. *See State v. Graham*, 2012 S.D. 42, ¶ 21, 815 N.W.2d 293, 303. But even if an evaluation was necessary, no evidence exists on the record corroborating that Pour claimed to have brass knuckles, so Pour's alleged hearsay statement is also not trustworthy. *Lindner*, 2007 S.D. 60, ¶ 8, 736 N.W.2d at 506.

[5] Tuopeh argues that he should have been allowed to use Pour's hearsay statement to illustrate that it took two months for Detective Marino to conduct the Robinson interview after receiving a tip. TB:25. But Detective Marino interviewed Robinson of March 1, 2023, and Tuopeh had been indicted since October 28, 2021. SR:6. Making an issue of this timeline would therefore only function to impermissibly confuse or mislead the jury about the caliber of investigation regarding an uncorroborated hearsay statement that was alleged well after the charges were filed. JT2:107; *See State v. Babcock*, 2020 S.D. 71, ¶ 26, 952 N.W.2d 750, 758; *see also* SDCL 19-19-403.

Tuopeh argues that he could not fully establish hearsay objections due to Robinson's absence because he "could not make a complete record regarding the legality of hearsay objections." TB:21, 24. But everything Tuopeh argues in his brief he was permitted to argue below. JT2:97-114, 134-35. Robinson's refusal to testify did not prevent Tuopeh from establishing hearsay objections. JT2:97-114, 134-35. Nor was Tuopeh prevented from making arguments about Pour having brass knuckles to the jury because of Robinson's absence. JT3:59. Thus, even if the circuit court's ruling had been outside the range of permissible choices, Tuopeh cannot show that it "produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584.

IV. THE CIRCUIT COURT CORRECTLY REFUSED TO GRANT TUOPEH'S PROPOSED JURY INSTRUCTIONS.

A. Factual Background

Tuopeh proposed jury instructions on speculation, conjecture, and alternative counts. SR:513, 532-33; JT3:21-25. The circuit court rejected his proposed instructions on speculation and conjecture, reasoning that the pattern instructions adequately explained the concepts to the jury. JT3:13. The circuit court also rejected including an instruction on alternative counts, reasoning the jury had no reason to be instructed on sentencing issues because that was beyond its role of determining innocence or guilt of the charged crimes. JT3:22, 25. Tuopeh renewed his objection to not having an alternative counts

instruction through a Motion to Vacate after trial, which the circuit court also denied. SR:749-50; SENT:9.

B. Standard of Review

"'A trial court has discretion in the wording and arrangement of its jury instructions, and therefore [this Court] generally review[s] a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard.'" *State v. Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d 145, 150 (quoting *State v. Roach*, 2012 S.D. 91, ¶ 13, 825 N.W.2d 258, 263). "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." *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584 (quoting *Rodriguez*, 2020 S.D. 68, ¶ 41, 952 N.W.2d at 256).

"'[The] jury instructions are to be considered as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient.'" *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51 (quoting *Roach*, 2012 S.D. 91, ¶ 13, 825 N.W.2d at 263). "Error in declining to apply a proposed instruction is reversible only if it is prejudicial, and the defendant has the burden of proving any prejudice.'" *Id.* (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 25, 693 N.W.2d 685, 695. "In order to show prejudice, the defendant must show that 'the jury would have returned a different verdict if the proposed jury instruction

had been given.'" *Id.* (quoting *State v. Engesser*, 2003 S.D. 47, ¶ 43, 661 N.W.2d 739, 753).

Argument

i. Speculation and Conjecture

A circuit court does not err simply by refusing "to amplify instructions which substantially cover the principle embodied in the requested instruction." *Id.* (*State v. Klaudt*, 2009 S.D. 71, ¶ 20, 772 N.W.2d 117, 123).

In *State v. Kryger*, this Court held that an identical pattern jury instruction for speculation and conjecture as the one used here was "a proper and accurate statemen[t] of the law." 2018 S.D. 13, ¶¶ 39, 45, 907 N.W.2d 800, 813-14. If instructions "'correctly state the law and inform the jury, they are sufficient.'" *Id.* at ¶ 41, 907 N.W.2d at 814 (quoting *State v. Jensen*, 2007 S.D. 76, ¶ 19, 737 N.W.2d 285, 291). The circuit court did not make a choice outside the range of permissible choices by choosing the pattern instruction on speculation and conjecture, and Tuopeh did not suffer prejudice from an instruction that accurately states the law. *Id.* at ¶ 43, 814; *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584.

ii. Alternate Counts

Tuopeh wanted the circuit court to provide an alternate counts instruction to the jury so he would not be sentenced twice for one death. SR:533; JT2:22-25; TB:10. But his position overlooks that the circuit

imposes the sentence in a non-capital case, and jurors have no input on the court's sentencing decision. SDCL 23A-27-1; *see State v. Robert*, 2012 S.D. 60, ¶ 6, 820 N.W.2d 136, 139; SR:737. To include Tuopeh's proposed alternate counts instruction would therefore have incorrectly stated the law to the jury. *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51. The circuit court did not make a decision "outside the range of permissible choices" by not including a jury instruction about sentencing. *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584 (quoting Rodriguez, 2020 S.D. 68, ¶ 41, 952 N.W.2d at 256).

Tuopeh also fails to carry his burden to show how he suffered prejudice. *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51. The circuit court acted appropriately when it vacated his conviction on Count 2, merged it into Count 1, and sentenced him on Count 1 alone. SR:752-53. In *Ball v. United States*, the United States Supreme Court evaluated a scenario where "a single act is relied upon to establish a convicted felon's unlawful receipt and his unlawful possession of the same firearm[.]" 470 U.S. 856, 859 (1985).

The Court held that, under the Omnibus Crime Control and Safe Streets Act of 1968, "a convicted felon may be prosecuted simultaneously for violations of §§ 922(h) and 1202(a) involving the same firearm." *Id.* at 859. But the Court held with regards to sentencing that "Congress intended a felon in Ball's position to be convicted and punished for only one of the two offenses if the possession of the firearm is incidental to

receiving it." *Id.* at 861. The Court opined that issuing concurrent sentences did not remedy the problem, and that the proper course of action was "to vacate one of the underlying convictions[,]" and "enter judgment on only one count." *Id.* at 864-65. The South Dakota Supreme Court utilized this remedy in *Wilcox v. Leapley* on two sentences for one death when it remanded a sentence "with the direction that [the lower court] vacate the sentence on the lesser offense of first-degree manslaughter and enter judgment on the greater offense of second-degree murder." 488 N.W.2d 654, 657 (S.D. 1992)

In *Rutledge v. U.S.,* the Supreme Court evaluated a similar situation when "a jury found petitioner guilty of one count of participating in a conspiracy to distribute controlled substances in . . . . and one count of conducting a continuing criminal enterprise (CCE) 'in concert' with others . . . ." 517 U.S. 292, 292 (1996). The lower court had "entered judgment of conviction on both counts and imposed a sentence of life imprisonment without possible release on each, the sentences to be served concurrently." *Id.* The Court held that "[b]ecause the Court here adheres to the presumption that Congress intended to authorize only one punishment, one of petitioner's convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense and must be vacated under *Ball.*" *Id.* at 293-94 (citing 470 U.S. at 864).

In *State v. Well*, this Court examined the issue of multiple convictions for one set of facts regarding aggravated assault with a dangerous weapon and abuse or cruelty to a minor. 2000 S.D. 156, ¶ 1, 620 N.W.2d 192, 193. The lower court in *Well* denied a jury instruction "requesting that if Well was found guilty of one of the aggravated assault charges he could not also be found guilty on the abuse count and vice versa" on the grounds that "if convicted of both, he would only be sentenced on one so he would not suffer any prejudice." *Id.* at ¶ 19, 196. This Court held "without two separate factual incidents, or statutorily intended multiple punishments for the same facts, two convictions cannot stand." *Id.* at ¶ 23, 197. This Court also held that "simply choosing to sentence Well to one crime did not remedy this. To hold otherwise would impose two felony convictions for a single crime." *Id.* at ¶ 25, 197.

The problem in *Well* is not applicable to the actions of the circuit court here because it did not sentence Tuopeh for one crime as a solution to having two convictions for one set of facts. *Id.*; SR:752. Instead, the circuit court did what it was supposed to do – it vacated Count 2 First Degree Manslaughter, merged it into Count 1 Second Degree Murder, and sentenced Tuopeh on Count 1. *Wilcox*, 488 N.W.2d at 657; *Rutledge*, 517 U.S. at 293-94; *Ball*, 470 U.S. at 864; SR:752. Tuopeh therefore only had a Judgment of Conviction entered on Count 1, and thus has been sentenced to one sentence on one conviction for one

death. SR:753; *see Wilcox*, 488 N.W.2d at 657. The circuit court's jury instructions correctly stated the law, and Tuopeh suffered no prejudice from the lack of an instruction outlining sentencing to the jury. *Hauge*, 2013 S.D. 26, ¶ 17, 829 N.W.2d at 150-51.

V. THE CIRCUIT COURT CORRECTLY OVERRULED TUOPEH'S SPECULATION OBJECTIONS TO DR. SNELL'S TESTIMONY.

A. Factual Background

At Tuopeh's Immunity Hearing, Dr. Snell testified that a blunt force object must have caused Mousseaux's frontal skull injury IMMUNITY:16. The State asked Dr. Snell if a foot could have been the cause of the injury. IMMUNITY:17. Tuopeh objected as to speculation, which the circuit court overruled. IMMUNITY:17. Dr. Snell answered that the right type of shoe could cause the frontal skull damage. IMMUNITY:17.

At trial, Dr. Snell again testified about the complex fracture in the front of Mousseaux's skull and how it had a punched-out, circular shape. JT2:31. He explained how he most commonly sees that fracture type when someone has been hit by a hammer. JT2:31. He testified that another way the injury could appear is if someone fell from a high distance onto a rock. JT2:31. After Dr. Snell testified about these scenarios, the State asked if a kick to the head could make the fracture worse. JT2:30-31. Tuopeh again objected as to speculation. *Id.* The circuit court overruled the objection. JT2:30-31. Dr. Snell ultimately

concluded that blunt force trauma to the head caused by an object was Mousseaux's cause of death. JT2:37.

B. Standard of Review

"'Trial courts enjoy broad discretion in ruling on the admissibility of expert opinions.'" *State v. Carter*, 2023 S.D. 67, ¶ 45 (quoting *Garland v. Rossknecht*, 2001 S.D. 42, ¶ 9, 624 N.W.2d 700, 702). "Such determinations will not be reversed 'absent a clear abuse of discretion.'" *Id.* Thus, the same standard of review and prejudice standards under Issue II(B) apply to this issue. *Supra.*

C. Arguments

i. Kicks to the Head

Tuopeh argues that "the State asked at the [i]mmunity hearing and at trial whether [Tuopeh's] foot and/or sneaker possibly caused the decedent's death." TB:31. It is true that the State asked at the immunity hearing whether a foot could be the cause of death. IMMUNITY:17. But at trial, the State only asked Dr. Snell whether a kick to the head could make a pre-existing fracture worse. JT2:31. Dr. Snell's testimony was that an object causing blunt force trauma to the head was the cause of death. JT2:37.

Regarding both the trial and immunity hearing, Tuopeh argues "the jury was presented with the possibility to consider that Tuopeh's sneaker killed Mousseaux, in the absence of a speculation instruction,[6]

[6] As discussed under Issue V., the jury was instructed on speculation.

in reaching its verdict." TB:31. But the immunity hearing's purpose was to allow Tuopeh to make a prima facie case of self-defense and have the burden shifted onto the Sate to rebut that by clear and convincing evidence. SDCL 22-18-4.8. Thus, the testimony made at the immunity hearing was not "presented to the jury with the possibility to consider Tuopeh's sneaker killed Mousseaux." TB:31. Instead, it was presented to the circuit court, which determined that the rebuttal had been made and the case could proceed to trial by jury. SR:523-31.

At trial, the State did not ask the jury to speculate — it provided a definitive cause of death through the expert testimony of Dr. Snell. JT2:37. Dr. Snell testified a head injury caused by a blunt force object killed Mousseaux, and the State presented video and photograph evidence of Tuopeh punching Mousseaux and having fortified knuckles. JT2:30-39; I-1(Banquet):0:00-10; Exhs. T28, T30, T32. The State asked Dr. Snell whether a kick to the head could make a pre-existing fracture worse, not whether it possibly caused his death. JT2:31. The testimony regarding kicks was relevant to Mousseaux's frontal skull fracture, which was shaped like the point coming off Tuopeh's knuckles in the photo exhibit. Exhs. QQ, T32; *see SDCL* 19-19-401. Tuopeh has simply failed to show how the admission of Dr. Snell's testimony was a choice outside the range of permissible choices or that he was prejudiced by it. *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584.

ii. Falling on Rocks

Tuopeh argues "hypotheticals regarding a person falling onto a rock from a second story building[,]" did not help the jury determine a fact at issue as required by SDCL 19-19-702(a), which requires that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TB:32. But evidence is relevant if "it has any tendency to make a fact more or less probable," and "the fact is of consequence in determining the action." SDCL 19-19-401. The fact of consequence here is whether Tuopeh used a blunt force object to cause the injury to Mousseaux's forehead that Dr. Snell said was the cause of death. JT2:37.

Tuopeh argued that he only kicked Mousseaux's body. JT3:63. But the State showed a video of Tuopeh throwing punches and presented images of the injuries on Mousseaux's head. I-1(Banquet):0:00-10; Exhs. T28, T30, T32. The State also showed a photograph of Tuopeh standing with an object on his knuckles. Exh. QQ. Dr. Snell's testimony about falling onto rocks illustrated that a blunt force object traveling at high velocity caused Mousseaux's fatal brain injury, which is a scenario in line with Tuopeh using a weapon to bludgeon Mousseaux's head instead of merely kicking at his body. JT2:30-32, 37.

In *State v. Kvasnicka*, this Court ruled that testimony was irrelevant when it was generally about the damage a vehicle could do and not specifically about the defendant's use of her vehicle. 2013 S.D. 25,

¶ 31, 829 N.W.2d 123, 130. Dr. Snell's testimony helped the jury look at Tuopeh's actions specifically. It helped them evaluate Mousseaux's injuries in the context of Tuopeh punching him and then being photographed with fortified knuckles. I-1(Banquet):0:00-10; Exhs. T28, T30, T32. Dr. Snell's testimony was closer to the situation in *State v. Nelson*, where this Court ruled it was not an abuse of discretion for the lower court to allow a prosecutor to ask an expert a hypothetical about blood alcohol content in different situations because the hypotheticals were within the area of the expert's expertise and the hypotheticals had an evidentiary basis. 2022 S.D. 12, ¶ 40, 970 N.W.2d 814, 827. Thus, Tuopeh has failed to show the circuit court made a choice "outside the range of permissible choices" in allowing Dr. Snell's comparison of Mousseaux's forehead injury to falling on rocks from a distance. *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584 (quoting *Rodriguez*, 2020 S.D. 68, ¶ 41, 952 N.W.2d at 256).

VI. THE CIRCUIT COURT CORRECTLY DENIED IMMUNITY.

A. Factual Background

Tuopeh appeals the circuit court denying him immunity from prosecution under SDCL 22-18-4.8. TB:37-38. Prior to trial, Tuopeh moved to receive immunity. SR:396. An Immunity Hearing was held on April 4, 2023. IMMUNITY:1. The circuit court issued Findings of Fact and Conclusions of Law alongside an Order denying immunity. SR:523. The circuit court reasoned that Tuopeh met his prima facie burden

under SDCL 22-18-4.8 because Mousseaux threw the first punch and later made a throwing gesture at Tuopeh. SR:528.

But the State overcame the burden of clear and convincing evidence shifted back onto it. SR:530. The State showed that Tuopeh used deadly force, either by himself or in concert with Pour, at a point when he did not face an imminent threat of force from Mousseaux. SR:529-30. Further, the circuit court found that Mousseaux never engaged in conduct rising to the level of a forcible felony under SDCL 22-18-4.1 that justified Tuopeh's use of deadly force. SR:529-30. Finally, the circuit court held that Tuopeh's pursuit of Mousseaux went beyond what was reasonably necessary to secure himself from danger. SR: 530. The circuit court concluded that the State would have to meet a higher burden of beyond a reasonable doubt at trial. SR:531. The question presented is whether the circuit court properly applied SDCL 22-18-4.8.

B. Standard of Review

This Court has not yet determined the standard of review for a circuit court's decision to grant or deny immunity under SDCL 22-18-4.8. The State suggests the court's "findings of fact are reviewed under the clearly erroneous standard," but that this Court give "no deference to the court's conclusions of law." *State v. Grassrope*, 2022 S.D. 10, ¶ 7, 970 N.W.2d 558, 560 (quoting *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239). "[O]nce those facts have been determined, 'the application of a legal standard to those facts is a question of law reviewed

de novo.'" *State v. Heney*, 2013 S.D. 77, ¶ 8, 839 N.W.2d 558, 561–62 (quoting *State v. Hess*, 2004 S.D. 60, ¶ 9, 680 N.W.2d 314, 319).

C. Argument

SDCL 22-18-4.8 provides, in relevant part, "in a criminal prosecution, once a prima facie claim of self-defense immunity has been raised by the defendant, the burden of proof, by clear and convincing evidence, is on the party seeking to overcome the immunity from criminal prosecution provided for in this section." The circuit court issued Findings and Facts and Conclusions of Law detailing how the State overcame immunity. SR:523-40.

The circuit court's findings of fact were thorough and accurate. SR:523-40. They describe the altercation between Tuopeh and Mousseaux in great detail and go on to summarize the testimony provided at the hearing by Dr. Snell. SR:523-40. The circuit court ultimately found "that Tuopeh and Pour acted in concert to pursue Mousseaux and deliver blows to Mousseaux while [he] was on the ground . . . [.]" SR:528. The circuit court recognized that the use of deadly force is permitted "in certain instances" and that the law does not require Tuopeh retreat, but that Tuopeh's pursuit and "amount of force" was not necessary. SR:529-30. Ultimately, the circuit court determined the State met its burden. SR:531.

The circuit court properly denied Tuopeh immunity because it determined that the State overcame the burden of clear and convincing

evidence imposed by SDCL 22-18-4.8. SR:523, 531. Afterwards, the jury in this case, like that in *Smith*, heard Tuopeh's self-defense arguments and convicted him under the higher burden of beyond a reasonable doubt. SR:742; 2023 S.D. 32, ¶ 36, 993 N.W.2d at 588.

In holding that no prejudice resulted from the defendant not being afforded an immunity hearing in *Smith*, this Court reasoned "the State ultimately met its burden of proving beyond a reasonable doubt that Smith is guilty, and that the homicide was not justified, as the jury returned a verdict of guilty on the charges for second-degree murder and aggravated assault. The State's proof of Smith's guilt beyond a reasonable doubt exceeded the 'clear and convincing' burden that would have been on the State at a pretrial hearing to rebut the statutory immunity created by SDCL 22-18-4.8." 2023 S.D. 32, ¶ 36, 993 N.W.2d at 588. Under this reasoning, a finding of guilt beyond a reasonable doubt by a jury ratifies a finding of clear and convincing evidence by the circuit court. *Id.* Thus, the jury's finding of guilt showed that the circuit court correctly denied Tuopeh immunity. *Smith*, 2023 S.D. 32, ¶ 36, 993 N.W.2d at 588.

VII. THE CIRCUIT COURT PROPERLY OVERRULED TUOPEH'S VOUCHING OBJECTION.

A. Factual Background

While discussing his sneakers during closing argument, Tuopeh argued "there's no evidence, whatsoever, that the sneakers were cleaned. None. But they try to sell you with that anyway." JT3:67. The State's

prosecutor responded, "the defense just said to you that I was trying to sell you something. That's not my job. I'm not a salesman. My job is justice and bringing people to justice who have committed crimes." JT3:70-71. Tuopeh objected, arguing that this constituted vouching, but the circuit court overruled the objection. JT3:71.

B. Standard of Review

"If an issue of prosecutorial misconduct is preserved with a timely objection at trial, [this Court will] review the trial court's ruling under the standard of abuse of discretion." *State v. Hayes*, 2014 S.D. 72, ¶ 24, 855 N.W.2d 668, 675 (quoting *State v. Ball*, 2004 S.D. 9, ¶ 49, 675 N.W.2d 192, 207. The same standard of review and prejudice standards under Issue II(B) apply to this issue. *Supra.*

C. Argument

"[P]rejudice can result from the prosecution placing the prestige of the government behind the witness and implying that the prosecutor knows what the truth is and thereby assures its revelation." *Nelson*, 2022 S.D. 12, ¶ 38, 970 N.W.2d at 826 (quoting *State v. Westerfield*, 1997 S.D. 100, ¶ 12, 567 N.W.2d 863, 867). "If a prosecutor conveys this message explicitly or implicitly, they are improperly vouching." *Id.* "Improper vouching 'invite[s] the jury to rely on the government's assessment that the witness is testifying truthfully.' " *State v. Manning*, 2023 S.D. 7, ¶ 38, 985 N.W.2d 743, 755 (quoting *State v. Snodgrass*, 2020 S.D. 66, ¶ 45, 951 N.W.2d 792, 806). "It is well established that it

is within 'the exclusive province of the jury to determine the credibility of a witness.' " *Id.*

The State's closing argument here does not meet this Court's definition for vouching because the State did not make its statement about a witness's testimony. *Id.* Instead, the prosecutor offered the statement about herself — she was not involved in sales, but rather viewed her profession as bringing people to justice if she believes a crime has been committed. JT:70-71. Her statement was in response to a closing remark from defense counsel that the State was selling something. The State did not improperly bolster witness testimony with that statement. *Manning*, 2023 S.D. 7, ¶ 42, 985 N.W.2d at 756.

Tuopeh argues that this Court characterized the following closing argument as "improper vouching" in *Harris v. Fluke*:

> I thought long and hard about this case. I thought long and hard about whether or not this was a case that needed to be heard by a jury. And it's a serious allegation. I thought about the evidence, and I looked at the video, the phone report. I looked at everything and it became clear to me that Mr. Harris did take advantage of [R.K.'s] impairment; that she was incapable of consent; that he knew it; and that a jury needed to hear about it.

2022 S.D. 5, ¶ 2 n. 1, 969 N.W.2d 717, 718 n. 1. But Tuopeh is wrong to assert that this court opined this closing argument was "improper vouching." *See generally id.* This Court used the term "improper vouching" throughout the opinion because that is how the issue was framed in lower court proceedings. *See generally id.* The opinion actually focused on whether the argument about vouching was res

judicata for habeas purposes. *Id.* at ¶ 9, 720. This Court never offered an opinion on whether the closing argument was improper vouching and did not expand the definition of vouching. *See generally id.*

In opinions where this Court has defined vouching, it is in the context of a government official offering an assessment of witness testimony. *Manning*, 2023 S.D. 7, ¶ 38, 985 N.W.2d at 755; *Snodgrass*, 2020 S.D. 66, ¶ 45, 951 N.W.2d at 806. But even mistakenly inaccurate statements about witness testimony have not even been considered vouching. *Nelson*, 2022 S.D. 12, ¶ 38, 970 N.W.2d at 826. In *Nelson*, the State incorrectly believed the defendant was drinking at 7 p.m. and argued that to the jury. *Id.* This Court opined no vouching happened because "the State was not suggesting that it 'had some superior knowledge or criterion, not available to the jury, to establish the witness was testifying truthfully.' " *Id.* (quoting *Lodermeier v. Class*, 1996 S.D. 134, ¶ 17, 555 N.W.2d 618, 624).

Here, no vouching occurred because the State never improperly bolstered witness testimony. *Manning*, 2023 S.D. 7, ¶ 42, 985 N.W.2d at 756. Thus, the circuit court overruling Tuopeh's objection was not "outside the range of permissible choices," or harmful to his substantial rights. *Smith*, 2023 S.D. 32, ¶ 22, 993 N.W.2d at 584 (quoting *Rodriguez*, 2020 S.D. 68, ¶ 41, 952 N.W.2d at 256).

CONCLUSION

Based upon the foregoing arguments and authorities, the State requests that Tuopeh'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 9,726 words.

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

Dated this 8th day of February, 2024.

/s/ Jacob R. Dempsey
Jacob R. Dempsey
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 8, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Steven Tuopeh* was served via electronically through Odyssey File and Serve upon Mark Kadi at mkadi@minnehahacounty.gov.

/s/ Jacob R. Dempsey
Jacob R. Dempsey
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	*	
	*	
Plaintiff and Appellee,	*	
	*	Case #30365
v.	*	
	*	
STEVEN TUOPEH,	*	
	*	
Defendant and Appellant.	*	
	*	

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

The Honorable
Circuit Court Judge
James Power

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Notice of Appeal filed on May 30, 2023

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	*	
	*	
Plaintiff and Appellee,	*	Case #30365
	*	
v.	*	REPLY BRIEF
	*	
STEVEN TUOPEH,	*	
	*	
Defendant and Appellant.	*	
	*	

PRELIMINARY STATEMENT

The Appellant renews factual statements and legal arguments originally presented in the Appellant's brief. Reference to the trial court's record remains the same, and the Appellant and Appellee briefs will be "AT" and "AE".

ARGUMENT

The Appellee cites State v. Manning, 2023 S.D. 7, 985 N.W.2d 743, for its argument that vouching did not occur because a witness's testimony was not bolstered. AE:42. To the contrary, the vouching related to testimony produced by Detective Marino concerning the absence of blood stains found on the sneakers days later. AT:28; T2:161-63. He was the "witness". The point that the absence of blood stains did not actually incriminate Tuopeh was only revealed during Marino's cross-examination. Id.

Manning is distinguishable in that plain error analysis was used in that case. The defendant did not make an objection to a prosecutor's statement. The plain error test remained the only available remedy. Manning, 2023 S.D. at ¶ 40, 985 N.W.2d at 756. Presently, the Defendant objected to vouching during the trial. AT:29; T3:71.

Vouching analysis is not limited to prosecutor comments just about witness testimony only. In U.S. vs. Young, 470 U.S. 1 (1970), the United States Supreme Court noted that prosecutors "sometimes breach their duty to refrain from overzealous conduct *by commenting on the defendant's guilt* and offering unsolicited personal views on the evidence." Young, 470 U.S. at 7 (emphasis *added*). In Young, that Court ultimately denied relief since there was no trial objection to the prosecutor's statements, and plain error analysis was employed. Id. at 16. The Court noted a manifest injustice did not occur. Id. at 15. The prosecutor's comment had followed an inappropriate defense comment. Id. However, that Court noted the prosecutor's statement still constituted error and "crossed the line of permissible conduct established by the ethical rules of the legal profession". Id. at 14.

Since an objection was made here, this Court may now skip over any distracting need to "overlook the absence of

any objection by the defense." Id. Plain error need not be proven here. Since Due Process and Fair Trial rights are implicated[1] here via Young[2], this Court must decide whether the error did *not* contribute to the trial's end result *beyond any reasonable doubt*. See Chapman v. California, 386 U.S. 18, 24 (1967). The error did contribute to the result here, in light of the prosecutor's assurance that she was "justice" bringing predetermined guilty people before the jury who committed crimes, without salesmanship. AT:29; T3:70-71. This is especially so in light of all the other accumulating errors outlined in the Appellant's brief. See State v. Nelson, 1998 S.D. 124, ¶20, 587 N.W.2d 439, 447; Gordon v. U.S., 344 U.S. 414, 420-23 (1953).

The Appellee appears to suggest the alternative counts instruction was unnecessary because it only is required in

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[1] This Court review issues of constitutional law de novo. Benson v. State, 2006 S.D. 8, ¶ 39, 710 N.W.2d 131, 145

[2] Young has not been abrogated by the United States Supreme Court. Nor has Ball v. U.S, 470 U.S. 856 (1985), Rutledge v. U.S., 597 U.S. 292 (1996), or Milanovich v. U.S., 365 U.S. 551 (1961). This Court must adhere to its own decisions, and those of the United States Supreme Court. See State v. Nelson, 2022 S.D. 12, ¶ 47, 970 N.W.2d 814, 829. Decisions from other state or federal courts may be ignored. Id.

capital cases. AE:30. Case precedence shows this is not the case. The Appellant cited, inter alia, State v. Well, 2000 S.D. 156, 620 N.W.2d 19, in his brief. AT:10-12. Well did not involve a death penalty conviction. Id.; Well, 2000 S.D. 156, ¶9, 620 N.W.2d at 194. As such, the jury was required to receive the instruction regardless of whether they had any role regarding sentencing, other than merely provide a conviction to precede sentencing.

The Appellee indicates the trial court's granting of the motion to vacate the Count 2 Involuntary Manslaughter conviction was correct. AE:30. As such, the State in Pierre now contradicts the State's position in Minnehaha County during trial. T3:22; S:7-18. It therefore concedes the issue presented by the Appellant during the jury instruction portion of the trial. AT:10 et seq. However, it still does not acknowledge or even truly address the prejudice to the Defendant regarding how failure to provide the alternate count instruction altered the jury's choice during deliberations. AT:17; Milanovich v. U.S., 365 U.S. 551, 556 (1961). At trial, the jury could check off the two most serious charges and go home with no further deliberation. They were not required during deliberations to choose only one from all four potential guilty verdict

choices, or not guilty. Judgment of acquittal issues aside, three charging choices would be available on remand.

The State suggests no prejudice occurred from the trial court's immunity decision since the result of the hearing was ratified by the jury via the greater burden of proof required at trial. AE:40. This approach, of course, ignores the impact of all errors within the course of the trial. More importantly, this perspective also precedes a potential pattern of cases in the future where appellate attention towards immunity hearings would be minimized since any error could be consumed by an eventual verdict.

In a literal sense, future immunity hearings might not be scheduled prior to trial, if any error would ultimately be consumed by the trial anyway, per this Court's ruling here. For example, preliminary hearings and grand jury proceedings may serve via a dismissal or no bill to release a defendant prior to any trial if the rules of evidence are applied. SDCL 23A-4-6; SDCL 23A-5-15. However, if the rules are not applied, a defendant may remain in custody until trial. Any error at these earlier proceedings might *now* be cured by higher standards of proof at trial. See generally State v. Lownes, 499 N.W.2d 895, 900-02, (1993); State v. Carothers, 2006 S.D. 100, P9, 724 N.W.2d 610, 616. Appellate relief reversing a case regarding earlier

probable cause proceedings may no longer be applied. Overburdened lower courts may rationalize they need not prioritize compliance with evidence rules at such hearings or proceedings, believing no reversible error may be found by this Court, as such would be cured or would not change the result at trial[3].

Substantial rights may still be available to defendants, although not just through federal constitutional law, but through statutory grants of rights. State v. Burkett, 2014 S.D. 38, ¶31, 849 N.W.2d 624, 632 (the "challenge is not guaranteed *by statute* or due process")(emphasis *added*). Cases may be reversed solely due to statutory violations. See State v. Nelson, 1998 S.D. 124, 587 N.W.2d 439 (trial court disregard of state jury procedures cumulatively warrants new trial); State v. Nachtigall, 2007 S.D. 109, 741 N.W.2d 216 ("Because the statutory violation alone requires reversal, we need not consider the remaining issue of whether Nachtigall's due process rights were violated."). Constitutional Due Process rights, however, are accorded to defendants when the failure to implement state statutes present "procedural

[3] Overwhelming evidence as alleged by the State may no longer be solely determinative. See Neels v. Fluke, 2023 WL 2529236, at *11 (D.S.D. 2023).

errors so obvious as to result in an unfair hearing." Rennich-Craig v. Russell, 2000 S.D. 49, ¶ 19, 609 N.W.2d 123, 127, citing Eagles v. U.S. ex rel. Samuels, 329 U.S. 304, 314 (1946).

South Dakota's Immunity statute grants substantive rights. AT:n.4.; State v. Smith, 2023 S.D. 32, ¶34, 993 N.W.2d 576, 588. It was enacted per a rational basis. These rights can functionally exonerate a defendant prior to trial, as early as his arrest, resulting in his release, easing both docket and jail congestion. See SDCL 22-18-4.8. This Court should not view such hearings and their chronological advantages as being easily dispensable from an appellate perspective, in light of the benefits which can accrue to worthy defendants. AT:n.4.

With regards to Robinson's potential testimony regarding Pour's statements, the State argues that the defense had the opportunity to argue everything he currently did in his brief at trial. AE:27. Unfortunately, the Appellant did not have any first-hand evidence to match his arguments, as attorney statements are not evidence (although an offer of proof was still attempted). State v. Horse, 2024 S.D. 4, ¶ 25. The trial court did not cause Robinson to be brought to the trial pursuant to its statutory and constitutional obligation, even with its

original order, leading to the absence of evidence.[4] AT:21-22; Washington v. Texas, 388 U.S. 14, 18-19 (1967); U.S.Const.Amend. VI and XIV; S.D. Const. art. VI, § 7.

The State further argues that inmate Robinson had a criminal record, so as to justify the lower court's ruling regarding credibility on that basis. AE:26. Although judges are presumed to know the law, the trial court did not abide by standard criminal jury instructions on the topic. See State v. Berget, 2013 S.D. 1, ¶ 87, 826 N.W.2d 1, 27. A criminal record is not determinative of a witness's credibility alone. S.D. Criminal Jury Instruction 1-15-10 provides:

> If you find that a witness has been convicted of a crime you may consider that fact only for the purpose of determining the credibility of that witness. [It is not evidence of the defendant's guilt of the offense charged. You must not draw any inference of guilt against the defendant from such prior conviction.] The conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances you may take into consideration *in weighing the testimony of the witness*. (emphasis *added*); See also SDCL 19-14-12.

As such, testimony was needed to make a sufficient finding of a lack of credibility. A view of Robinson in person showing his demeanor, pursuant to court order, would have

[4] See *supra* note 1.

provided the trial court the opportunity to determine his credibility, including and despite the criminal record. It chose not to apply such an obvious and available means to achieve such an end, when 3 more days were available. AT:23; T2:112-17. Its choice was arbitrary. The result prejudiced presentation of Tuopeh's theory of defense[5]: Tuopeh's actions differed from Pour's via the latter using a dangerous metal weapon in the area where death occurred.

The Appellee often mischaracterizes factual events in its Appellee Brief. Regarding T37, the State indicates the notepaper contains "apparent rap lyrics". AE: 9, 21. The minimal foundation preceding its introduction did not establish who wrote the statement or what purpose the writing served. AT:44-45. Its "apparent" nature as a rap lyric was not established. It was merely irrelevant as ruled by the trial court, but was admitted nevertheless. AT:48-49; T2:54; T2:56.

The Appellee mischaracterizes that the lower court's limiting instruction regarding T37 as "the exhibit could be used to establish that documents from the apartment showed that Tuopeh went by 'Ceno'". AE:13. The instruction did not present this augmented and paraphrased explanatory

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[5] See *supra* note 1; Crane v. Kentucky, 476 U.S. 683, 687 (1986).

statement entirely. The lower court merely indicated it was for "identification" without more limits, in a trial where identification was not an issue. T2:56. Any notion that the content of the letters should not be considered is not the same as the trial court instructing the jury to not read the documents' contents at all. T2:56.

The Appellee alleges that the jury was properly instructed on conjecture and speculation via the preliminary instructions, citing State v. Kryger, 2018 S.D. 13, 907 N.W.2d 800. AE:19, 29. Although listed in the preliminary instructions, the problem remains that conjecture and speculation remained undefined. That status presented prejudice in this case, as the prosecutor specifically invited the jury to speculate despite the presence of the undefined preliminary instructions. AT:35; T3:71. Therefore, more definition was necessary. AT:35; T3:71. In Kryger, the prosecutor did not invite the jury to disregard their preliminary instructions on speculation, thus demonstrating a distinction from the present case.

Further prejudice from speculation is demonstrated by the Appellee's act to speculate now on appeal, and not at trial, that alleged rings[6] on Tuopeh's hand caused a

[6]A computer search of PDF trial transcripts does not reveal the presence of the word "ring".

puncture injury to the decedent's head. AE:18. The State had called Snell to issue a causation opinion. However, the state did not inquire, nor did Snell testify specifically, regarding whether any alleged rings caused a puncture wound to the head.

Rather, the State took the opportunity to inquire whether a fall from a height of a second story building onto a rock would cause the injury. AT:32; T2:30-31. The facts in the record, however, demonstrate such an event did not occur. AT:32. In their appellate brief now, they seek to enlarge Snell's general opinion about a blunt object causing death, to a specific opinion about a specific object which was not stated by the required expert during the trial. AE:18. Even if the State could ask Snell at trial about a fact pattern which did not happen (two story fall onto rock), their new ring theory should not present anything other than speculation regarding facts not in evidence on appeal. "Arguments not raised at the trial level are deemed waived on appeal." State v. Hi Ta Lar, 2018 S.D. 18, 908 N.W.2d 181, 187. Please disregard it.

The Appellee discusses Marino's interview with Pour. AE:8-9. A review of the trial record, and the Appellee's Brief citations, reveal that the jury did not receive such details of the interview at trial. The details were

discussed, inter alia, on April 7, 2022, when the trial court reviewed whether the Defendants should be severed. As such, reference to such topics impermissibly refers to matters outside the record, as far as how it may have been regarded by the jury.[7]

The Appellee mischaracterizes the Appellant Counsel's account of Tuopeh's actions toward the decedent with "lying eyes". AE:19. The notion that the defense indicated Tuopeh never threw a punch, remains in the context that he never threw a punch *that hit the decedent's head*. This is where the fatal injury occurred. Three (3) punches were thrown at the decedent's body below the head, where the fatal injury did not occur. (E:II:4 seconds, 7 seconds, 12 seconds). As such, Tuopeh's punches could not have caused the fatal injury.

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[7] If pre-trial severance motion hearing unsworn hearsay allegations could conceivably be appropriately brought up on appeal now, which is objected to, please note that subject to this objection, Pour denied to Marino during his interview that Tuopeh possessed brass knuckles or a weapon. Motion for Severance Hearing, April 7, 2022, Transcript Page 11; Exhibit #2 (unredacted transcript), page 46-47. Pour indicated any shiny or silver area observed was a part of Tuopeh's jeans, and not a brass knuckle. Adoption of a ring theory was affirmatively denied by Pour, in favor of a *possible* reflecting "light, he ain't have nothing on him." Id. at page 43. Pour remained silent at trial. T2:93-95.

The Appellee criticizes the Appellant's response to the State's aiding and abetting theory. Yet, an objective video displays the conflict in the street. It demonstrates beyond any dispute (for the jury) that the struggle lasted only a few seconds. Compare State v. Strozier, 2013 S.D. 53, ¶ 27, 834 N.W.2d 857, 865 ("The jury also heard evidence that *he then went back* to his motel room and obtained the knife *before returning* to the scene and stabbing Thornton and Iron Hawk") (emphasis *added*). It also demonstrates undisputedly that Tuopeh stopped any kicking (or punching). (E:II:13 seconds). Yet Pour continued to strike the decedent four (4) more times in the region of his head. (E:II:13-17 seconds). Also, in this case, the trial court specifically found that Tuopeh initially acted in self-defense, a legal status which seemingly contradicts a finding of a depraved mind.[8] The

[8] Although premeditation may occur conceivably in an instant in Murder 1st cases, Tuopeh was not charged with such an offense here, in an alleged assault that only lasted seconds. See SDCL 22-16-5. The trial court's finding at the immunity hearing that Tuopeh defended himself due to the decedent's initial attack was not challenged by the State on appeal via, inter alia, a notice of review. It possesses a res judicata effect and remains the law of the case. Neels v. Dooley, 2022 S.D. 4, ¶ 11, 969 N.W.2d 729, 733; In re Pooled Advoc. Tr., 2012 S.D. 24, ¶ 23, 813 N.W.2d 130, 139. This Court may not raise or address an issue not brought before it by the parties (aside from

cessation of any action by Tuopeh, to a non-fatal area, while Pour continued to strike the decedent's head where the fatal injury occurred, demonstrates a difference of intent through different actions performed by each defendant. "The defendant needs to have agreed to participate and take some action in a meaningful way." Com. v. McKay, 50 Mass. App. Ct. 604, 609, 740 N.E.2d 1009, 1013 (2000). In light of the brief nature of the conflict, Tuopeh's cessation of the conflict prior to Pour, and

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jurisdiction). United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (U.S. 2020); see also Ally v. Young, 2023 S.D. 65, ¶ 50, 999 N.W.2d 237, 254, reh'g denied (Jan. 19, 2024). Also, Tuopeh could still follow the decedent to protect himself. See State v. Cottier, 2008 S.D. 79, ¶ 12, 755 N.W.2d 120, 127. See also State v. Max Bolden, S.Ct. #30146, Minnehaha County Cr.#19-8124, currently before this Court on appeal. The jury in Bolden was presented with Jury Instruction #23 regarding the elements of Murder 2nd which listed depraved mind "and 4. The killing was not in self-defense." Appendix "A". As such, South Dakota criminal law and its applications demonstrate depraved mind and self-defense elements traditionally cannot coexist. Regarding Bolden's instruction #23, this Court may take judicial notice on appeal of the Unified Judicial System's records, and other trustworthy sources of information. Nauman v. Nauman, 336 N.W.2d. 662, 665 (SD 1983); Danforth v. Egan, 119 N.W. 1021. 1024 (SD 1909); McClain v. Williams, 73 N.W. 72, 74 (SD 1909).

Pour's infliction of the fatal blows, there was no agreement present here to kill with Tuopeh.

CONCLUSION

The Appellant was denied a fair trial in the court below, or was denied judgment of acquittals, due to trial court errors. This Court should remand the matter to enter judgments of acquittal, or to order a new trial.

CERTIFICATE OF COMPLIANCE

This Reply Brief meets applicable page (15) and word limitations (3780) required by this Court.

Dated this 5th day of March, 2024.

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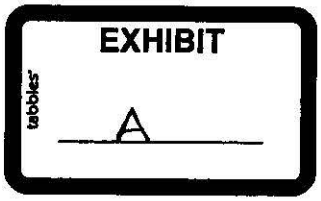
APPENDIX #30365



STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. **MAX BOLDEN,** Defendant.	CR. 19-8124 **JURY INSTRUCTIONS**

Instruction No. 11

In this case, the Defendant Max Bolden is accused by the State of South Dakota in an indictment charging that on or about 26th day of October, 2019, in Minnehaha County, South Dakota:

Count 1: Murder in the 1st Degree

That the Defendant Max Bolden did kill a human being, Benjamin Donahue, III, without authority of the law and with a premeditated design to effect the death of Benjamin Donahue, III or of any other human being, and thereby did commit the offense of Murder in the 1st Degree;

Count 2: Murder in the 2nd Degree

That the Defendant Max Bolden did kill a human being, Benjamin Donahue, III, by perpetrating an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular person, and thereby committed the offense of Murder in the 2nd Degree.

killed. A premeditated design to effect death sufficient to constitute murder may be formed instantly before the act which caused the death is carried into execution.

Instruction No. 21

In the crime of first-degree murder, there must exist in the mind of the perpetrator the specific intent to effect the death of another human being. If specific intent did not exist, this crime has not been committed.

Instruction No. 22

Homicide, the killing of one human being by another, is Murder in the 2nd Degree when perpetrated by an act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person.

Instruction No. 23

The elements of the crime of Murder in the 2nd Degree as charged in Count 2 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:

1. The defendant caused the death of Benjamin Donahue, III;
2. The defendant did so by an act imminently dangerous to others evincing a depraved mind, without regard for human life;
3. The defendant acted without the design to effect the death of Benjamin Donahue, III; and
4. The killing was not in self-defense.