

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Appeal No. 30937

STATE OF SOUTH DAKOTA

APPELLEE,

vs.

ALEXANDER ALMAGUER FERNANDEZ,

APPELLANT

APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL
CIRCUIT

UNION COUNTY, SOUTH DAKOTA

THE HONORABLE TAMI BERN

CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed on December 19, 2024.

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PRELIMINARY STATEMENT

The transcript of the jury trial held on August 12 – August 13, 2024, is cited as T followed by the volume number ("T 1" refers to the transcript day #1" and "T 2" refers to the transcript day #2"). Each volume is followed by a page number or numbers and then line number(s).

JURISDICTIONAL STATEMENT

Appellant, Alexander Almaguer Fernandez, appeals from the Judgment and Sentence entered on December 2, 2024 (Appendix 7-10), by the Honorable Tami Bern, Circuit Court First Judicial Circuit, and the jury verdict filed August 13, 2024, finding him guilty of one count of Rape in the Second Degree, three (3) counts of Aggravated Assault (Appendix 5-6).

Fernandez timely filed a Notice of Appeal of his conviction and sentence, on December 19, 2024. On December 27, 2024, the undersigned counsel was appointed to represent Fernandez.

This Court has jurisdiction over the appeal pursuant to SDCL § 23A-32-2.

NOTE: Appellant Attorney Was not Defendant's Trial Attorney!

STATEMENT OF LEGAL ISSUES

1. **WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT FERNANCEZ'S CONVICTION FOR RAPE IN SECOND DECREE. COURT SHOULD HAVE SUSTAINED DEFENSE MOTIONS FOR JUDGMENT OF ACQUITTAL**

The trial court denied Fernandez's motions for judgment of acquittal and the jury entered guilty verdicts on the counts of Rape in the Second Degree and three (3) counts of Aggravated Assault.

State v. Brende, 2013 S.D. 56, 835 N.W.2d 131

SDCL 22-22-1(2)

SDCL 23A-23-1

2. **CAN THE DEFENDANT BE CONVICTED OF VIOLATING SDCL 22-18-1.1(5) AND 22-18-1.1(2)?**

The jury convicted the Defendant of (Count IV) Aggravated Assault 22-18-1(5) (physical menace with a knife and (Count VI) Aggravated Assault 22-18-1(2) (bodily injury with a knife)?

SDCL 22-18-1.1(5)

SDCL 22-18-1.1(2)

3. **WHETHER DEFENDANT WAS EFFECTIVELY REPRESENTED BY COUNSEL.**

Schocker v Flute, SD S. Ct Docket # 30218, October 23, 2024.

4. **WHETHER THERE SHOULD HAVE BEEN A CERTIFIED SPANISH COURT REPORTER IN ADDITION TO INTERPRETER.**

South Dakota Searchlight, June 16, 2024.

5. **WHETHER THE TESTIMONY OF THE STATE'S EXPERT WITNESS WAS RELEVANT OR DID IT HAVE THE PREJUDICIAL EFFECT OF BOLSTERING VICTIM'S TESTIMONY AND SHOULD NOT HAVE BEEN ALLOWED**

State v Buchholtz, 2013 S.D. 96

Daubert v Merrell, 509 U.S. 79.

STATEMENT OF THE CASE

On December 15, 2023, a Complaint was filed in Union County, SD charging the Defendant with various crimes. On December 18, 2023, the State (Union County) filed a Nine (9) Count Information. On July 16, 2024, the State filed an Amended Information charging Appellant Alexander Almaguer Fernandez with one count of Rape in the Second Degree (Count I), one count of Kidnapping (Count II), four counts of Aggravated Assault (Counts IV – VI) and one count of False Imprisonment (Count VII). (Appendix 1-4) Count III aggravated assault was filed pursuant to SDCL 22-28-1.1(8) – impeding normal breathing. Count IV aggravated assault was filed pursuant to 22-18-1.1(5) – physical menace with a knife. Count V aggravated assault was filed pursuant to 22-18-1. (2) – dangerous weapon a belt and buckle. Count VI aggravated assault was charged pursuant to 22-28-1.1(2) - dangerous weapon - a knife. Count VII was False Imprisonment, in violation of SDCL 22-19-17. A jury trial on the Amended Information (Appendix 1-4) commenced on August 12, 2024, and concluded on August 13, 2024. The Honorable Tami Bern presided.

At the conclusion of the State's case, Fernandez's attorney made a motion for judgment of acquittal as to all counts (T 2, p. 100 lines 16-25 – p 102, lines 1 - 4). The Court sustained the Motion for Count II (kidnapping) but denied as to all other counts, (T 2, p. 105, lines 15-16).

On August 13, 2024, the jury found Appellant Alexander Almaguer Fernandez guilty of Count I - Rape in the Second Degree, Count III (2) aggravated assault, Count IV (3) aggravated assault and Count Six (5) aggravated assault. (See Appendix 5-6).

On December 2, 2024, the trial court imposed a sentence of twenty (20) years in the penitentiary – ten (10) years suspended. On counts 3, 4 and 6 the Defendant was sentenced to 10 years on each with 5 years suspended on each to run consecutive with count I and concurrent with each other. (See attached Appendix 7-10).

STATEMENT OF FACTS

Norelis Martinez (NM) and the Defendant, Fernandez, were in a romantic relationship for approximately two (2) years prior to November 30, 2023. They had lived together at various locations but at all times material hereto lived in an apartment in Elk Point, Union County, S.D. NM and the Defendant's relationship began to deteriorate about four (4) months before the alleged charged incidents occurred with each accusing the other of various acts undermining the relationship.

On November 30, 2023, at around 6:00 a.m., NM was very upset and left the apartment taking only car keys and her phone. She drove her car and parked it outside of Elk Point in front of a farm located at 32429 478th Street, Elk Point, SD owned by Mr. Keith Hall.

NM does not speak English. When Mr. Hall observed the car parked on his farm he went out to find out what was going on. He spoke with NM by means of a translator on her phone. NM was distressed T 1, p 34 lines 5-6. He called the sheriff's department

but before they arrived, she had driven to an abandoned farmhouse not too far away.

When the police arrived, Mr. Hall showed them where NM was parked.

Officer Corey Trudeau responded to Mr. Hall's call. He met with Mr. Hall who pointed out where NM had driven her vehicle and turned off its lights. He talked to NM and could see that she was very scared, physically shaking and crying. T 1, p 71 lines 5-8. He was able to communicate with her through phone apps. He took her to the Union County Sheriff's Office. Based on his training, the officer observed marks on NM's neck that were consistent with a fresh strangulation. T 1, p 73 lines 20-25 – p 74 lines 1-9. He also observed a cut mark on her right hip T 1, p 74 lines 10-14. When he told her that the Defendant had been arrested, she reacted with intense sobbing consistent with someone who had been traumatized. T 1, p 75 lines 20-25 – p 76 1-7.

NM testified that she and the Defendant had been in a relationship from February '22 to November '23. T 1, p 38 line 23. She further testified that they lived together. T 1, p 39 line 5. NM testified that she was afraid of the Defendant and threatened to kill her if she ever left. T 1, p 39 lines 8-16. She went on to testify about the events of the early morning of November 30, 2023. She left the house barefoot, with car keys and phone because she was afraid he was going to hit her again. T 1, p 40 lines 14-25 – p 41 lines 1 -3. When she left the home, she didn't know where she was going but stopped at Mr. Hall's farm. After speaking with Mr. Hall, she then drove down the road to where Officer Trudeau found her.

NM then testified about the alleged rape that had occurred within the last ten (10) days prior to November 30th. T 1, p 46 lines 4-25 – p 48 lines 1-2 and at T 1, p 56 lines 1 -25 – p 57 lines 1-3. She then testified about the alleged choking incident. T 1, p

48 lines 8-25 - p 49 lines 1-22. Then she testified about the knife cutting incident. T 1, p 50 lines 2-25 – p 52 lines 1-5. And finally, NM testified about being hit by the Defendant with a belt and buckle. T 1, p 52 lines 6-25 - p 53 lines 1-20.

The State's next witness was Krista Heeren-Graber. She is the Executive Director of the South Dakota Network against family violence and sexual assault. Although not stated in the record, at no time did she testify that she had ever met NM or the Defendant. Her testimony addressed the issue of domestic violence, sexual assault and through the lifespan through the State of South Dakota. (T 1, p 79 lines 17-25). She then testified about what domestic abuse means. (T 1, p 83 lines 11-21). And finally, she testified about the "outsiders' perspective." (T 1, p 87 lines 9-25 – p 88 line 1).

After the State rested. The Defendant moved for a judgment of acquittal as to all counts in the information and specifically Count 2 (kidnapping). (T 2, p 100 lines 16 – 19). The Court sustained the Motion as to Count 2 but found that the State established a prima facie case for the remaining counts. (T 2. p 104 lines 14 – 25 - p 105 lines 1-16).

The defense then put on its evidence. The only witness called was the Defendant Alexander Fernandez. When questioned about NM's testimony about the four distinct incidents, he answered: "All that is false." (T 2, p 113 lines 14 – 25 - p 114 line 1). The defense rested.

The jury returned its verdict finding the Defendant guilty of Count I, rape in second degree, Count III (2) Aggravated Assault (breath impediment), Count IV (3) Aggravated Assault (physical menace), Count VI (5) Aggravated Assault (dangerous weapon -knife). The jury found the Defendant not guilty of Count V (4) Aggravated Assault (dangerous weapon – belt and buckle) and Count VII (6) false imprisonment.

(See Appendix 5-6)

On December 2, 2024, the Court entered its Judgment and Sentence. On Count I (rape), the Defendant was sentenced to serve 10 years in the penitentiary with 5 years suspended. On Counts III, IV and VI, the Defendant was sentenced to 10 years with 5 years suspended on each count to run consecutively with Count I (see attached Appendix 7-10).

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT FERNANDEZ'S CONVICTION FOR RAPE IN THE SECOND DEGREE!

A motion for judgment of acquittal under SDCL 23A-23-1 is the proper vehicle for a sufficiency challenge. The Supreme Court reviews challenges to the sufficiency of evidence *de nova*. *State v. Brende*, 2013 S.D. 56,121, 835 N.W.2d 131, 140. The Court is not required to as itself to decide whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Rather, the Court must decide 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. In order to conclude that the evidence was insufficient to convict, the Court must decide that no rational trier of fact could find guilt beyond a reasonable doubt. The Court does not substitute its judgment for the jury's in resolving conflicts in the evidence, weighing credibility, and sorting out the truth.

The jury found Fernandez guilty of one count of Rape in the Second Degree. A conviction cannot be sustained on mere suspicion or possibility of guilt. The only

evidence offered by the State against Fernandez was the testimony of NM that she had been forcibly raped approximately a week before November 30, 2023. The State did not introduce the Vermillion hospital rape examination conducted on NM on November 30th. Presumably the reports would have been negative of a rape or assault. This should have been considered by the court on the credibility of the evidence when the Defendant testified “All that is false.” T 1. P 114 line 1.

No exhibits were offered by the State to support the rape allegation. The alleged victim’s statements were not in any way corroborated or verified. There were not any marks on the victim showing rape force. The record is totally void of anything but her unsubstantiated statement. There wasn’t even circumstantial evidence offered.

The Court could not have concluded that a reasonable juror could have found the defendant guilty beyond a reasonable doubt with so little evidence, which was disputed. Based upon the lack of direct or circumstantial testimony that the victim was raped, the Court should have sustained the Defendant’s motion for judgment of acquittal and this Court should reverse the conviction on Count 1.

II. CAN THE DEFENDANT BE CONVICTED OF VIOLATING SDCL 22-18-1.1(5) AND 22-18-1.1(2)?

This Court has previously found that these two (2) sections are not inherently inconsistent but has agreed that they can lead to conflicting charges depending on the specific facts of the case. It is time to eliminate the obviously confusing charges to juries. In this case, on one occasion, the Defendant used the blade of a knife to lift the bottom edge of a short dress and made a small cut on her leg (T 1, p 50 lines 2 – 23). One

incident and one knife. Two inconsistent charges.

This Court reviews *de nova* whether an indictment is duplicitous and contains inconsistent charges. Fernandez respectfully asserts that the Indictment in the present case was duplicitous in that it charged him with two (2) inconsistent charges that are really one crime.

Fernandez was found guilty in Counts IV and VI. Under the facts and circumstances in this case it was impossible for the jury to distinguish between a physical menace and an act of assault and as such, they had to convict the jury of both. Defendant was denied due process when the jury was instructed on Counts III and IV and the convictions must be reversed.

III. WHETHER DEFENDANT WAS EFFECTIVELY REPRESENTED BY COUNSEL.

Mr. Angel on cross examination of the alleged victim only asked her five (5) questions about the alleged rape T 1, p 62- lines 7- 15 - p 63 – lines 1- 6

Mr. Angel on cross of the victim only asked her three (3) questions about the aggravated involving the knife T 1, p. 63 – line 7 – 24

And finally, Mr. Angel asked the victim three (3) questions about money that didn't have anything to do with the charges T 1, p 63 lines 7- 25 – p. 64, lines 1 – 9.

Council did not ask any questions relevant to the two (2) other aggravated assault charges that the Defendant was convicted of.

Total cross examination questions - eleven (11).

Even more startling about the ineffective assistance of counsel was his direct examination of the Defendant. His examination is set forth on T 2, p. 111 – lines 4-25.- p. 114 lines 1- 5

At T 2, p. 113 lines 16 – 25, he asked the Defendant if he had heard the victim testify about the four (4) distinct incidents and asked?

Q. "Did any of those four events she described ever happen? (T 2, p 113 lines 24-25).

Defendant answered:

A. "All that is false." (T 2, p. 114, line 1).

Then, he asked one (1) more question about whether he had observed any bruising (T 2, p 114 – lines 2 – 5).

A. Nothing. No.

THEN ENDED HIS DIRECT EXAMINATION:

That's all the questions I have. (T 2, p 114 lines 6-7).

The Defendant was not asked any other questions. He was not asked to explain any specific questions about his defenses to the four incidents that gave rise to the Amended Information. He was not given the opportunity to explain why the victim left the house or why she didn't leave the house. Nothing was asked about why the victim didn't call the police? He was not asked questions about where NM was going or why she left the house on November 30th.

Council did not offer any evidence, testimony or exhibits about the hospital examination of NM on November 30, 2024. Deputy Trudeau testified that the victim was taken to the Vermillion hospital where they conducted a rape kit and a full body pictures of her body, and stuff like that of injuries and stuff (T 1, p 76, lines 14 – 19).

He was then asked if she was seen by a doctor and he answered Yes. (T 1, p 76, lines 21-22).

The results of this examination, if offered into evidence, would have shown a negative result for the rape kit and the alleged injuries.

Council did not object to the calling of the State's Expert witness, Krista Herren-Graber (which he should have). As argued later, her testimony was very prejudicial to the Defendant and was not relevant to the case.

Council's performance was grossly deficient and his lack of cross examining the victim about the history, time and circumstances of the alleged rape and the aggravated assaults constitute ineffective assistance. The prejudicial effect of council's lack of questioning prejudiced the Defendant to the point that he did not receive a fair trial. His lack of asking factual questions to the Defendant about the allegations was ineffective assistance. The jury did not hear what the Defendant's testimony would have been relating to the specific counts were because he was not asked about them by council. (*Schocker v Flute*, SD S. Ct Docket 30218. October 23, 2024.

IV. WHETHER THE TWO (2) INTERPRETERS ACCURATELY TRANSLATED THE VICTIM'S AND DEFENDANT'S TESTIMONY

There isn't any way to prove that the Spanish speaking interpreter accurately translated the victim or the Defendant's testimony at the trial. The Defendant believes that the State's interpreter did not exactly translate the testimony. Rather, she generally interpreted what she understood the witnesses to be saying, which, like the rule against hearsay testimony, invalidates the translation and the oath taken by the interpreter. South Dakota does not have the protection for Defendant's in criminal cases that the victim's testimony was not accurately interpreted. There needs to be a Spanish speaking court reporter recording exactly what the victim said, not what the interpreter says she said.

The Defendant asserts that his right to a fair trial were denied by the Court's failure to have a Spanish speaking court reporter recording exactly what the parties said in Spanish. The defendant does not believe that the testimony was accurately translated.

Defendant's conviction should be reversed and remanded for retrial with a Spanish court reporter in addition to an interpreter. (See Appendix 11-14)

V. WHETHER THE TESTIMONY OF THE STATE'S EXPERT WITNESS WAS RELEVANT OR DID IT HAVE THE PREJUDICIAL AFFECT OF BOLSTERING VICTIM'S TESTIMONY AND SHOULD NOT HAVE BEEN ALLOWED.

The State called Krista Herren-Graber as a witness and qualified as an expert witness (T 1, p 79 lines 2-25 -p 83, lines 1-8. She had never spoken with the victim or any of the witnesses in the case. She is the Executive Director of the South Dakota Network against family violence and sexual assault. Her testimony was about issues in South Dakota of domestic violence and sexual assaults.

Her testimony had the prejudicial effect of creating the Defendant as a perpetrator and bolstered the testimony of the victim without establishing a basis for it. Her general statements and testimony should not have been allowed. The clear and sole reason for calling her as a witness was to paint the picture of the Defendant being evil and needing to be punished. The prejudice to the Defendant was obvious. Without her testimony, the jury would be left to judge the credibility of the alleged victim's testimony. Allowing her to testify allowed the jury to validate facts that were assumed and not evidence. (See State v Buchholtz, 2113 S.D. 96 and Daubert vs Merrell 509 U.S. 79).

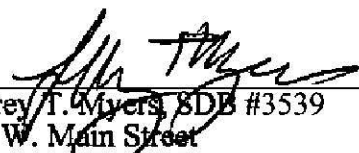
CONCLUSION

Even viewing the evidence in the light most favorable to the State, the evidence submitted to the jury was insufficient for a rational trier of fact to have found beyond a reasonable doubt that the Defendant had raped NM respectfully urges this Court to enter an Order remanding this case to the trial court and directing the trial court to reverse the Judgment and Sentence on counts one and two.

REQUEST FOR ORAL ARGUMENT

Undersigned counsel for Appellant, Alexander Almaguer Fernandez respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 5th day of June 2025.



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CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). The undersigned certifies that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief is 13 pages long, not including the cover sheet, Table of Contents, and Table of Authorities, and contains 3898 words and 19700 characters, no spaces, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, and Certificates of Counsel and Appendix. Counsel relied on the word and character count of Microsoft Word word processing software used to prepare this brief at font size 12, Times New Roman.

Dated this 10th day of June 2025.


Jeffrey T. Myers

CERTIFICATE OF SERVICE AND MAILING

The undersigned hereby certifies that a true and correct copy of this document and the attached appendix was served via the Unified Judicial System's Odyssey e-filing system and first-class mail upon:

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The undersigned further certifies that this document was filed with the South Dakota Supreme Court via the Unified Judicial System's Odyssey e-filing system, emailed to SCClerkBriefs@ujs.state.sd.us, and by mailing the original via first class mail to:

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Dated this 10th day of June 2025.



Jeffrey T. Myers

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STATE OF SOUTH DAKOTA)
)
) ss.
COUNTY OF UNION)

IN CIRCUIT COURT

FIRST JUDICIAL COURT

STATE OF SOUTH DAKOTA,
PLAINTIFF,

V.

ALEXANDER ALMAGUER FERNANDEZ,
204 North Elm St, Elk Point, Elk Point, SD 57025,
DOB: 02/21/1980,
DEFENDANT.

63CRI23-000478

AMENDED INFORMATION

Ct. 1: Rape, Second Degree, SDCL 22-22-1(2)
Ct. 2: Kidnapping, Second Degree, SDCL 22-19-1.1(2)
Ct. 3: Aggravated Assault - Domestic, SDCL 22-18-1.1(8), 25-10-1
Ct. 4: Aggravated Assault - Domestic, SDCL 22-18-1.1(5), 25-10-1
Ct. 5: Aggravated Assault - Domestic, SDCL 22-18-1.1(2), 25-10-1
Ct. 6: Aggravated Assault - Domestic, SDCL 22-18-1.1(2), 25-10-1
Ct. 7: False Imprisonment, SDCL 22-19-17

Kathy Zenner, as prosecuting attorney, in the name of and by the authority of the State of South Dakota, makes and files this Information and charges:

Count I

That on or about the 23rd day of November, 2023, in the County of Union, State of South Dakota, Alexander Almaguer Fernandez, did commit the public offense of Rape, Second Degree contrary to SDCL 22-22-1(2) in that he did accomplish an act of sexual penetration with any person through the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution, to-wit: Alexander Almaguer Fernandez did accomplish an act of sexual penetration with, NM through the use of force, coercion, or threats of immediate and great bodily harm to NM, accompanied by apparent power of execution, in violation of SDCL 22-22-1(2), a class 1 felony, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

Count II

That on or about the 23rd day of November, 2023, in the County of Union, State of South Dakota, Alexander Almaguer Fernandez, did commit the public offense of Kidnapping, Second Degree contrary to SDCL 22-19-1.1(2) in that he did unlawfully hold or retain another person to facilitate the commission of any felony or flight thereafter, to-wit: NM, in violation of SDCL 22-19-

Appendix 000001

1.1(2), a class 3 felony, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

Count III

That on or about the 28th day of November, 2023, in the County of Union, State of South Dakota, Alexander Almaguer Fernandez, did commit the public offense of Aggravated Assault - Domestic contrary to SDCL 22-18-1.1(8), 25-10-1 in that he did attempt to induce a fear of death or imminent serious bodily harm by impeding the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck, or by blocking the nose and mouth, to-wit: Alexander Almaguer Fernandez who is in a significant romantic relationship with NM, did attempt to induce a fear of death or imminent serious bodily harm by impeding the normal breathing or circulation of the blood of NM by applying pressure on the throat or neck, or by blocking the nose and mouth of NM, in violation of SDCL 22-18-1.1(8); 25-10-1, a class 3 felony, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

Count IV

That on or about the 23rd day of November, 2023, in the County of Union, State of South Dakota, Alexander Almaguer Fernandez, did commit the public offense of Aggravated Assault - Domestic contrary to SDCL 22-18-1.1(5), 25-10-1 in that he did attempt by physical menace with a deadly weapon to put another in fear of imminent serious bodily harm, to-wit: Alexander Almaguer Fernandez who is in a significant romantic relationship with NM, did attempt by physical menace with a Knife to put NM in fear of imminent serious bodily harm, in violation of SDCL 22-18-1.1(5); 25-10-1, a class 3 felony, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

Count V

That on or about the 23rd day of November, 2023, in the County of Union, State of South Dakota, Alexander Almaguer Fernandez, did commit the public offense of Aggravated Assault - Domestic contrary to SDCL 22-18-1.1(2), 25-10-1 in that he did attempt to cause, or knowingly cause bodily injury to another with a dangerous weapon, to-wit: Alexander Almaguer Fernandez who is in a significant romantic relationship with NM, did attempt to cause, or knowingly cause bodily injury to NM with a Belt and Buckle, in violation of SDCL 22-18-1.1(2); 25-10-1, a class 3 felony, contrary to the statute in such case, made and provided against the peace and dignity of the State of South

Dakota.

Count VI

That on or about the 28th day of November, 2023, in the County of Union, State of South Dakota, Alexander Almaguer Fernandez, did commit the public offense of Aggravated Assault - Domestic contrary to SDCL 22-18-1.1(2), 25-10-1 in that he did attempt to cause, or knowingly cause bodily injury to another with a dangerous weapon, to-wit: Alexander Almaguer Fernandez who is in a significant romantic relationship with NM, did attempt to cause, or knowingly cause bodily injury to NM with a Knife, in violation of SDCL 22-18-1.1(2); 25-10-1, a class. 3 felony, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

Count VII

That on or about the 23rd day of November, 2023, in the County of Union, State of South Dakota, Alexander Almaguer Fernandez, did commit the public offense of False Imprisonment contrary to SDCL 22-19-17 in that he did knowingly and purposely restrain another person unlawfully so as to substantially interfere with such person's liberty, to-wit: Alexander Almaguer Fernandez did knowingly and purposely restrain NM unlawfully as to substantially interfere with NM's liberty, in violation of SDCL 22-19-17, a class 1 misdemeanor, contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

This Information is based upon the affidavit/report of Officer Corey Trudeau, Elk Point Police Department.

Witnesses know by the State in regard to this Information:

Nicholas Fenske
Oswaldo Gonzalez
Keith Joseph Hall
Krista K. Herren-Graber
Jacob Limoges
Daniel Luna
N.M. (DOB 8/14/88) - Victim
Javier Murguia
Brian Schnabel
Austin Schuller
Officer Corey Trudeau - EPPD
Kendra Windeshausen

Dated this 16th day of July, 2024, at Elk Point, South Dakota.

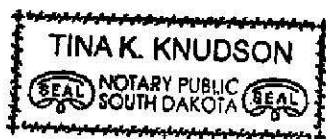

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STATE OF SOUTH DAKOTA)
:ss.
COUNTY OF UNION)

Kathy Zenner, being duly sworn as a prosecuting attorney for the above matter has read the foregoing Information, and the same is true to the prosecuting attorney's own best knowledge, information, and belief.


KATHY ZENNER
UNION COUNTY DEPUTY STATE'S
ATTORNEY

Subscribed and sworn to before me this 16 day of July, 2024.



(SEAL)


Tina Knudson
Notary Public*South Dakota
My Commission Expires: 04/02/2025

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF UNION)

NOTICE OF DEMAND

FOR ALIBI DEFENSE

I, Kathy Zenner, prosecuting attorney in the above matter hereby state:that the alleged offense of Rape, Second Degree was committed on the 23rd day of November, 2023, in Union County, South Dakota, I hereby request that the Defendant and his/her attorney serve upon me a written notice of his/her intention to offer a defense of alibi within ten days as provided in SDCL 23A-9-1. Failure to provide such notice of an alibi defense may result in exclusion of any testimony pertaining to an alibi defense. I, Kathy Zenner, prosecuting attorney in the above matter hereby state:that the alleged offense of

AUG 13 2024

FIRST JUDICIAL CIRCUIT

*

Guilty of the offense of abuse of aggravated assault.

Count 5. Aggravated Assault – Domestic (dangerous weapon – knife)

(You must mark one of the following)

 Not guilty of the offense of aggravated assault.

✓ Guilty of the offense of abuse of aggravated assault.

Count 6. False Imprisonment

(You must mark one of the following)

✓ Not guilty of the offense of false imprisonment.

 Guilty of the offense of abuse of false imprisonment.

Dated at Elk Point, South Dakota this 13 day of August, 2024.

Joshua Marshall

Foreperson

FILED

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF UNION

DEC 02 2024

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

UNION COUNTY CLERK OF COURTS
FIRST JUDICIAL CIRCUIT COURT OF SD

CRIM 23-478

Plaintiff,

vs.

CRIMINAL

JUDGMENT AND SENTENCE

(Suspended Imposition/Deferment)

(Suspended Execution)

Defendant.

The above-entitled matter having come on for hearing and the State of South Dakota being present and represented by A. Jensen, (Deputy) State's Attorney, Asst. Attorney General

and the Defendant being personally present and represented by

Ed Angel with interpreter

And the Defendant having been advised of all his/her constitutional and statutory rights pertaining to the charges contained in the charging document including but not limited to the right against self-incrimination, the right to confrontation and the right to jury trial and the Court having determined that the Defendant has been regularly held to answer for said offense and that the Defendant was represented by competent counsel and the Defendant having ~~(plea)~~ (been found guilty) to Count(s) 1, 2, 3, 5 of the charging document and the Court finding that the Defendant understood the nature and consequence of the plea; that the same was knowing and voluntary and that a factual basis exists for the same, now therefore the Defendant

IS ACCORDINGLY (FOUND GUILTY) (~~NO FINDING OF GUILTY~~) OF THE FOLLOWING OFFENSES:

Count	Nature of Offense	Statute	Date of offense
<u>1</u>	<u>Agg in the 2nd F1</u>	<u>22-22-1(2)</u>	<u>11-23-23</u>
<u>3</u>	<u>Agg Ass Domestic F3</u>	<u>22-18-1.1(8)</u>	<u>"</u>
<u>4</u>	<u>Agg Ass Domestic F3</u>	<u>22-18-1.1(5)</u>	<u>"</u>
<u>6</u>	<u>Agg Ass Domestic F3</u>	<u>22-18-1.1(2)</u>	<u>-1</u>

The remaining charges set forth in the (Information)(Indictment)(Part II Information for Multiple Offender) (Part II Information for Habitual Offender) are dismissed by the State with prejudice.

The matter having come on for sentencing and no legal cause being shown as to why sentence should not now be pronounced, now therefore,

It is ORDERED, ADJUDGED, and DECREED that the said defendant is sentenced as provided this judgment.

It is FURTHER ORDERED, ADJUDGED, and DECREED that the said defendant immediately pay to the Clerk of Courts of this county, court costs for these proceedings in the sum of \$106.50/\$116.50 on each felony count, \$86.50/\$96.50 on each class 1 misdemeanor count and \$68.50/\$78.50 on each class 2 misdemeanor count.

Appendix 000007

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

Jh That the Defendant be imprisoned in the South Dakota State Penitentiary for a term of 80 years (years)(months), there to be kept, fed and clothed according to the rules and discipline governing said institution (and is remanded into the custody of the sheriff of this county effective (immediately) (at M, for transportation to the South Dakota State Penitentiary.)

 That although the Defendant has been convicted of a non-violent Class 5 or 6 felony, the court finds aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation pursuant to SDCL 22-6-11 as follows: (DEPARTURE PREUMPTIVE PROBATION)

Jh That 10 years years of said sentence is suspended pursuant to SDCL § 23A-27-18 and the Defendant is placed upon (probation) / (parole) for a term of 15 years, upon the terms and conditions provided herein. (SUSPENDED EXECUTION)

 That the Court having received a verdict or plea of guilty for a felony not punishable by death or life imprisonment by a person never before convicted of a crime which at the time of conviction thereof would constitute a felony in this state, does suspend the imposition of sentence pursuant to SDCL § 23A-27-13 and the Defendant is placed on probation for a term of years, upon the terms and conditions provided herein. (SUSPENDED IMPOSITION)

 That the Court receiving a plea of guilty for a violation of § 22-42-5 or 22-42-5.1 and the Defendant never having before received a deferred imposition of sentence and no aggravating circumstances existing pursuant to SDCL 22-6-11, and without entering a judgment of guilt, and with the consent of the defendant, defers the imposition of sentence pursuant to SDCL 23A-27-53 and places the defendant on probation as set forth herein including but not limited to requiring the defendant to complete a drug and alcohol evaluation and complete any recommended course of treatment. If after one year, the defendant has successfully completed the course of treatment and complied with all conditions of probation or parole, the court shall dismiss the charge under § 22-42-5 or 22-42-5.1 upon the defendant pleading guilty to ingestion under § 22-42-15 or possession under § 22-42-15.1. If the defendant violates any conditions of probation or parole, the court or the Board of Pardons and Paroles shall revoke the deferred imposition of sentence and impose and execute the sentence. (DEFERRED IMPOSITION)

 Serve days in the (County Jail)(South Dakota State Penitentiary) as a condition of a suspended imposition, deferment or execution of sentence as the case may be pursuant to SDCL § 22-6-1.1 or § 23A-27-18.1. Specific dates are to be arranged with his court services officer.

 days of jail time is credited against this amount imposed. Court services may waive days of this jail term without further order of the Court.

Jh Said sentence is to be served (concurrently)(consecutively) to the sentences imposed on count(s) 3, 4, 6 and consecutively to Count 1 which shall be served in the following order: Count 1 first

 Pay a fine in the sum of \$.

Pay restitution in the sum of \$ _____
CRIMINAL JUDGMENT AND SENTENCE - Page 3 Count(s) 1, 2, 3, 5, 6

The Defendant's privilege to drive in this state is revoked for a term of _____ years following his release from incarceration. After a term of _____, the Defendant may apply for a permit to drive for attendance at work, Defendant's school or counseling pursuant to the requirements and application required by SD law and this court.

AB He/she shall repay this county for all of their court appointed attorney's fees to the County Auditor.

All financial obligations imposed herein shall be due by _____
JP Costs of Prosecution 346.45 Rape Kit 25 x 3 DW. fee
transport 127.25 Expert 567.32
fees

JK 368 Credit for time served.

JPB

~~422.50~~
cost of exp. covered
9000
2500

THE DEFENDANT SHALL ABIDE BY THE FOLLOWING TERMS AND CONDITIONS AS A REQUIREMENT OF ANY SENTENCE SUSPENDED PURSUANT TO SDCL § 23A-27-18, OR PROBATION IMPOSED PURSUANT TO SDCL § 23A-27-12 or 13:

1. During the period of said probation or suspended sentence, he/she shall be under the supervision of the Chief Court Service Officer of this circuit or the Board of Pardons and Paroles, as the case may be, or their representatives and shall obey all of their rules and regulations and all conditions imposed by them even though they may not have been specifically set out by this Court. If ~~deemed appropriate by court services, he/she shall participate in and successfully complete Hope Court Probation.~~ If he/she has financial obligations under this judgment, they shall work out a payment schedule with their probation or parole officer and if deemed necessary by them, shall execute a wage assignment form.
2. He/she shall be subject to random search and seizure by their probation or parole officer or any law enforcement officer upon reasonable suspicion that they are violating any provision of this sentence or of any probation or parole agreement.

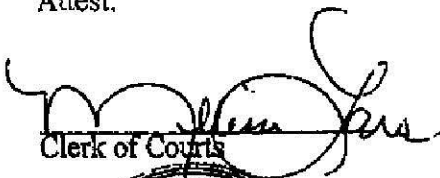
3. By Comply Psycho-Sexual Res; DV course in
Register as a sex offender as required by law

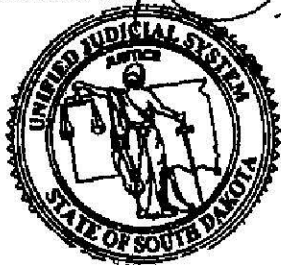
The Court reserves control and jurisdiction over the defendant for the period of the sentence imposed and may revoke any suspension or probation at any time and reinstate the sentence without diminishment or credit for the time that he/she was on probation and reserves the right to amend any or all of the terms of this sentence at any time; and

THE DEFENDANT WAS ADVISED THAT HE/SHE HAS A RIGHT TO APPEAL FROM THIS JUDGMENT WITHIN 30 DAYS AFTER IT IS SIGNED, ATTESTED AND FILED, THAT IF THEY WAIT MORE THAN 30 DAYS IT WILL BE TOO LATE TO APPEAL, AND THAT IF THEY ARE INDIGENT, THIS COURT WOULD APPOINT AN ATTORNEY TO HANDLE THAT APPEAL FOR THEM.

Date of Sentence: 12-2-24

Attest:


Clerk of Courts



BY THE COURT:


Hon. Tami A. Bern
Circuit Court Judge

SD courts aim to improve language access as diversity, interpreter needs grow

BY: MAKENZIE HUBER - JUNE 16, 2024 10:00 AM

📷 📄 📧 📞 📺 📱



📷 An equal justice statue stands outside the doors of the Minnehaha County Courthouse in Sioux Falls. (Makenzie Huber/South Dakota Searchlight)

Interpreter use in South Dakota courtrooms has more than doubled in the last decade, according to the Unified Judicial System.

Requests for translation services, which cost the state more than \$26,000 a year in 2022 and 2023, increased from 1,566 in 2013 to 3,570 in 2023.

UJS expects further growth in requests as South Dakota becomes more diverse. More than 17,500 South Dakotans speak English as a second language.

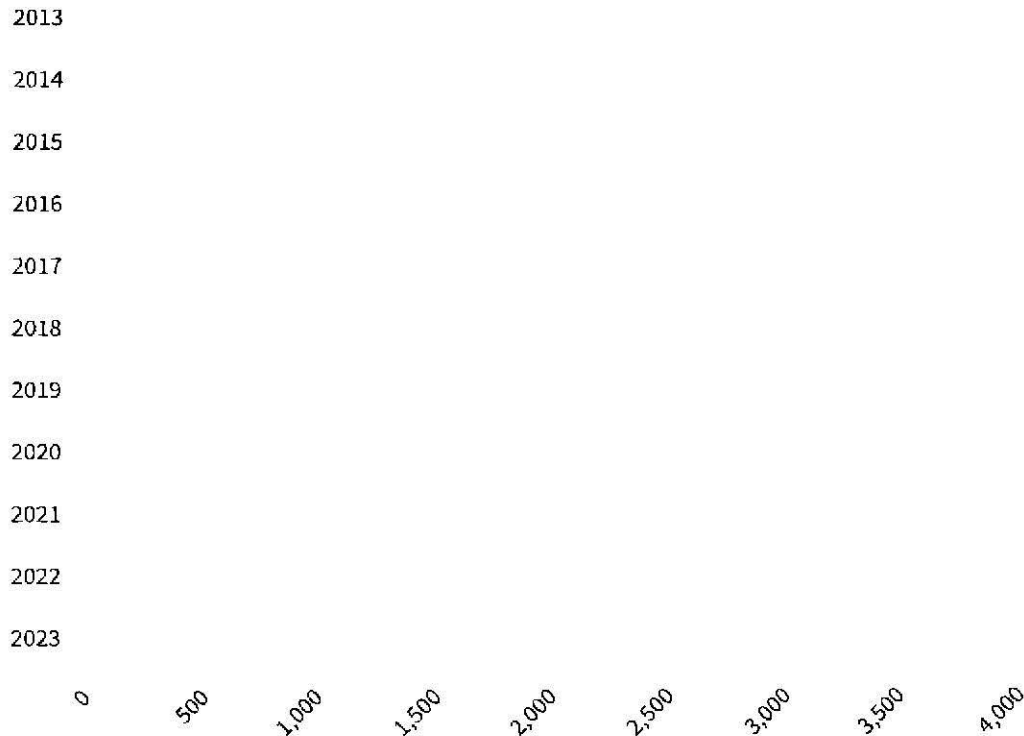
than “very well,” according to a UJS report.

The court system started working to improve language access in the courts over a decade ago. Historically, the state has approached language access “ad hoc,” said Greg Sattizahn, the state court administrator.

South Dakota interpreter requests

SDS

Requests and use of interpreters in South Dakota courts increased 128% between fiscal years 2013 and 2023. The South Dakota Unified Judicial System expects interpreter requests to increase further by the end of fiscal year 2024.



Source: South Dakota Unified Judicial System

The state has taken a more strategic approach to language access since then, Sattizahn said, including implementing a statewide language access plan in 2021.

“We wanted to make sure we develop the capacity to meet the demands and expectations – and understood how to work with interpreters,” Sattizahn said. “This is an area we have to continue to grow in and be responsive to with the demands we’re seeing. It’s not static.”

Appendix 000012

Both Sattizahn and critics of the courts' current language access system say the courts have a long way to go, especially in recruiting quality interpreters and ensuring accurate interpreting.

South Dakota lacks training for interpreters

Interpreters are professionals contracted out by UJS to interpret a person's testimony or case verbatim if the person or judge determines they do not speak English well enough.

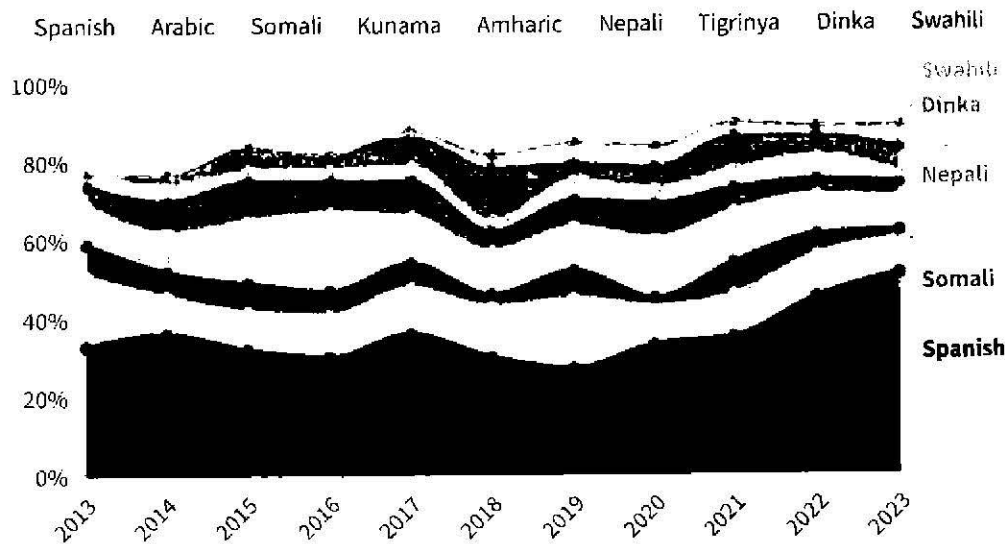
Of the more than 3,500 instances of interpreter use in 2023, according to UJS, 51% were Spanish, followed by 9% Arabic, 6% Swahili and 6% Dinka (spoken by the Dinka people, an ethnic group native to South Sudan in northeast Africa).

South Dakota has nearly 80 interpreters, according to UJS, but circuit courts frequently reach out to interpreters in other states or through remote services. Of the statewide roster, 25 are Spanish interpreters, four are Arabic, one is Swahili and none are Dinka.

Most common languages interpreted in SD courts

SDS

Between fiscal years 2013 and 2023, Spanish, Arabic and Kunama are the most commonly requested languages for an interpreter in South Dakota courts. Statewide interpreter usage has grown from 1,566 in 2013 to 3,570 in 2023.



Source: South Dakota Unified Judicial System

South Dakota doesn't provide support or training for interpreters, said Sandra Guzman, a Spanish legal interpreter and translator based in Sioux Falls.

"In South Dakota, there is nothing provided for people to educate themselves in the field for court interpreting," said Guzman, who is an immigrant from Chile.

That makes it difficult for potential interpreters to learn about the profession, she said, and contributes to South Dakota's dearth of legal interpreters.

Appendix 000014

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30937

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ALEXANDER ALMAGUER FERNANDEZ,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
UNION COUNTY, SOUTH DAKOTA

THE HONORABLE TAMI BERN
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Notice of Appeal filed December 19, 2024

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N THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30937

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ALEXANDER ALMAGUER FERNANDEZ,

Defendant and Appellant.

PRELIMINARY STATEMENT

The Defendant will be referred to by Fernandez. The victim will be referred to by her initials “N.M.”

References to the Settled Record, 62CRI23-478, are denoted “SR.”
References to the Appellant’s Brief are denoted “AB.” The proper page number(s) follows the references.

JURISDICTIONAL STATEMENT

This is an appeal of an amended judgment and sentence entered on December 2, 2024. SR:567-70. Fernandez timely filed a notice of appeal on December 19, 2024. SR:588; [SDCL 23A-32-15](#).
Consequently, this Court has jurisdiction to hear this appeal under [SDCL 23A-32-2](#).

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT FERNANDEZ'S CONVICTION FOR SECOND DEGREE RAPE?

The circuit court denied the motion for judgment of acquittal regarding second degree rape.

- [State v. Tuopeh, 2025 S.D. 16, 19 N.W.3d 37](#)

II.

WHETHER THE AMENDED INFORMATION WAS MULTIPLICITOUS?

The circuit court did not rule on this issue.

- [State v. Babcock, 2020 S.D. 71, 952 N.W.2d 750](#)
- [State v. Muhm, 2009 S.D. 100, 775 N.W.2d 508](#)

III.

WHETHER FERNANDEZ RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL?

The circuit court did not rule on this issue.

- [State v. Washington, 2024 S.D. 64, 13 N.W.3d 492](#)

IV.

WHETHER A SPANISH-SPEAKING COURT REPORTER WAS NECESSARY?

The circuit court did not rule on this issue.

- [State v. McMillen, 2019 S.D. 40, 931 N.W.2d 725](#)

V.

WHETHER KRISTA HEEREN-GRABER'S TESTIMONY WAS RELEVANT AND DID NOT IMPROPERLY BOLSTER N.M.'S TESTIMONY?

The circuit court did not rule on this issue.

- [*State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808](#)

STATEMENT OF THE CASE

On July 16, 2024, the State filed an amended information charging Fernandez with rape in the second degree (Count I), kidnapping (Count II), five counts of aggravated assault (Counts III-VI), and false imprisonment (Count VII). SR:215-18. A preliminary hearing was held on December 15, 2023, and probable cause was found. SR:20, 98-154.

A jury trial began on August 12, 2024. SR:446. At the conclusion of the State's case, Fernandez made a motion for judgment of acquittal on all counts. SR:803. The circuit court granted the motion as to kidnapping but denied it as to all other counts. SR:808. On August 13, 2024, the jury found Fernandez guilty of rape in the second degree and three counts of aggravated assault. SR:442-43. The jury found Fernandez not guilty of one count of aggravated assault. SR:443.

On December 2, 2024, the circuit court entered its amended judgment and sentence. SR:567-70. On Count I, Fernandez was sentenced to serve twenty years in the penitentiary with ten years suspended. SR:568. On Counts III, IV, and VI, Fernandez was

sentenced to ten years with five years suspended to run concurrently.

Id. Counts III, IV, and VI were to run consecutively with Count I. *Id.*

STATEMENT OF THE FACTS

Fernandez and N.M. were in a romantic relationship and were living together for approximately two years in an apartment in Elk Point, SD. SR:740-41, 815.

On November 30, 2023, N.M. thought Fernandez was going to hit her again; accordingly, she hastily left the apartment while Fernandez was in the bathroom. SR:742-43. N.M. decided she “want[ed] to live and [] did not deserve everything [Fernandez] was doing.” SR:743. N.M. sought refuge but did not know where to go; she thought if she went to the police station Fernandez would come after her. SR:744. So, she drove down a country road and parked. *Id.*

After she stopped a man, later identified as Keith Hall, approached her and asked, “what was happening” because she appeared “cold and frightened.” SR:735-36, 744. N.M. only spoke Spanish and Hall did not; therefore, he had a hard time understanding what she was saying. SR:735-37. However, Hall knew she was distraught, so he called the police. SR:736-37.

Officer Cory Trudeau, a patrolman with the Elk Point Police Department, arrived, and N.M. told Officer Trudeau she left her home because her partner was going to hurt her and she wanted to seek refuge. SR:747, 770. Officer Trudeau noticed N.M. was shaking, crying,

and sparsely dressed. SR:772-73. So, Officer Trudeau asked N.M. to come to the Union County Sheriff's Office; she complied. SR:774.

In the ten days prior to November 30, 2024, N.M. experienced significant abuse at the hands of Fernandez. SR:748-65. Due to the abuse she experienced, she is unsure when the events detailed below occurred. SR:749.

N.M. testified that Fernandez hit her on her face, pushed her on top of the bed, and continued hitting her on both sides of her face. SR:748. N.M. told him to stop hitting her. *Id.* At that point, Fernandez turned her over face down, put her hands behind her back, took off her underwear, and had sex with her. *Id.* While Fernandez was penetrating N.M., he told her “[t]hat’s the way that they have sex with dogs and the prostitutes.” SR:749, 758, 765. Fernandez hit her again and said her “family would never see [her] again.” SR:749. When Fernandez was finished raping her, he grabbed N.M. and told her he did not want her crying. SR:765.

In another act, Fernandez grabbed N.M. by the neck and pushed her up against the wall. SR:750. Fernandez told N.M. he wanted to kill her. *Id.* N.M. tried to push him away by his chest, but she could not get his hands off her neck. *Id.* Eventually, Fernandez let her go, she fell onto the ground, and he kicked her. SR:751. N.M. testified that when she fell onto the ground, she was dizzy and her “sight got dark.” *Id.* N.M. was scared she was going to die because she could not breathe. *Id.*

At trial, the State entered three exhibits that show the injuries N.M. sustained when Fernandez strangled her. SR:756, 760-61; Exhibit 15, 18, 26, 33.

In a third incident, N.M. testified that as she was setting food on the table, Fernandez looked at her, grabbed a knife and stated, “You know how many things I’d like to do to you now? I want to do so many things to you.” SR:752. Fernandez then took the knife, lifted her dress with the knife, and put the knife next to her skin. SR:752, 765. Fernandez then used the point of the knife to cut her. SR:752. At trial, the State presented three exhibits depicting the injuries Fernandez caused to N.M.’s body with the knife. SR:753; Exhibits 3-5.

ARGUMENTS

I.

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT FERNANDEZ’S CONVICTION FOR SECOND DEGREE RAPE.

A. *Background.*

At the close of the State’s case-in-chief, Fernandez moved for a judgment of acquittal. SR:803. On appeal, Fernandez argues due to “the lack of direct or circumstantial testimony that the victim was raped,” his motion for judgment of acquittal should have been sustained. AB:8.

B. *Standard of review.*

“This Court reviews ‘a denial of a motion for judgment of acquittal de novo.’” [State v. Tuopeh](#), 2025 S.D. 16, ¶ 45, 19 N.W.3d 37, 54 (quoting [State v. Peneaux](#), 2023 S.D. 15, ¶ 24, 988 N.W.2d 263, 269).

“[A] motion for a judgment of acquittal attacks the sufficiency of the evidence[.]” *Id.* (quotation omitted). “In measuring the sufficiency of the evidence, we ask 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.* (quotation omitted). “[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.* (quotation omitted). “It is the jury’s responsibility, not [this Courts], ‘to decide what conclusions should be drawn from evidence admitted at trial.”’ [State v. Hillyer, 2025 S.D. 30, ¶ 21, - N.W.3d - \(quoting State v. Bolden, 2024 S.D. 22, ¶ 39, 6 N.W.3d 238, 246-47\).](#)

C. *Fernandez’s conviction was supported by sufficient evidence.*

Second degree rape is defined as “an act of sexual penetration accomplished with any person . . . [t]hrough the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim’s presence, accompanied by apparent power of execution[.]” [SDCL 22-22-1\(2\)](#). The jury was instructed that second degree rape consists of two elements, each of which the State must prove beyond a reasonable doubt: (1) Fernandez accomplished an act of sexual penetration with N.M. and (2) Fernandez accomplished sexual penetration through the use of force, coercion, or threats of immediate

and great bodily harm against N.M., accompanied by apparent power of execution. SR:411.

At trial, N.M. testified that Fernandez forced her to have sex with him approximately a week before November 30, 2023, at her apartment in Elk Point. SR:748-50. N.M. testified that Fernandez

started hitting me on my face, and hit me on the face, and pushed me on top of the bed, and grabbed me here (indicating) and continued to hit me on both sides of my face. I told him not to continue hitting me. He turns me over face down, and puts my hand behind my back, and he took down my underwear I had on, and he had sex with me.
...

He had my arm behind me when -- when I tried to move my arm it was going to dislocate, and he told me, "That's the way that they have sex with dogs and the prostitutes."
...

[He] threaten me and hit me, and said my family would never see me again.

SR:748-49. Later, N.M. testified that when she told Fernandez no, he "twisted [her] arm so [she] couldn't move[.]" and Fernandez's "penis penetrated [her] vagina[.]" SR:758.

Fernandez asserts the State did not introduce any exhibits, including the Vermillion hospital rape examination, to support the second degree rape conviction. AB:8. This is true; however, specific evidence is not required to sustain a conviction, all that is needed is to show that 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.” *Tuopeh*, 2025 S.D. 16, ¶ 45, 19 N.W.3d at 54.

N.M. testified that Fernandez forced her to have sex with him by grabbing her, twisting her hands behind her back, hitting her on both sides of her face, and preventing her from moving. SR:748-49, 758. Based on the evidence presented at trial, there was sufficient evidence that Fernandez used force and coercion to sexually penetrate N.M. Because a rational trier of fact could find that Fernandez perpetrated second degree rape against N.M., the circuit court did not error by denying Fernandez’s motion for judgment of acquittal.

II.

THE AMENDED INFORMATION WAS NOT MULTIPLICITOUS.

A. *Background.*

Fernandez asserts the amended information “was duplicitous in that it charged him with two [] inconsistent charges that are really one crime. . . . [I]t was impossible for the jury to distinguish between a physical menace and an act of assault and as such, they had to convict the jury of both.” AB:9.¹ By not raising this argument at the circuit court level, Fernandez has waived it, limiting any potential review to plain error. See *State v. Podzimek*, 2019 S.D. 43, ¶ 27, 932 N.W.2d 141,

¹ The State construes Fernandez’s argument as referring to Counts IV and VI of the amended information. SR:215-17. Counts IV and VI of the amended information are counts 3 and 5 of the verdict. SR:442-43.

149 (declining to address the claim because it was not raised below); *State v. Wright*, 2009 S.D. 51, ¶ 68, 768 N.W.2d 512, 534 (“Even a fundamental right may be deemed waived if it is raised for the first time on appeal.” (citation omitted)).

B. *Standard of review.*

Discretionary review under the plain-error doctrine should be applied “cautiously and only in exceptional circumstances.” *State v. Krueger*, 2020 S.D. 57, ¶ 38, 950 N.W.2d 664, 674 (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729). To establish plain error, a defendant “must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30.

“‘Duplicity’ is the joining in a single count of two or more distinct and separate offenses[.]” *State v. O’Brien*, 2024 S.D. 52, ¶ 29, 11 N.W.3d 881, 890 (quoting *State v. Brende*, 2013 S.D. 56, ¶ 12, 835 N.W.2d 131, 137). “In other words, a duplicitous [] information includes a single count that captures multiple offenses[.]” *Id.* (citation omitted).

“Multiplicity, on the other hand, is the splintering of a single offense into separate counts[.]” *State v. Babcock*, 2020 S.D. 71, ¶ 31, 952 N.W.2d 750, 760 (quoting *State v. Muhm*, 2009 S.D. 100, ¶ 19, 775 N.W.2d 508, 514). “The ‘principal danger that the multiplicity doctrine addresses’ is

the risk that a defendant might receive multiple punishments for a single offense.” *State v. Manning*, 2023 S.D. 7, ¶ 37, 985 N.W.2d 743, 755 (quoting *U.S. v. Roy*, 408 F.3d 484, 492 (8th Cir. 2005)). Because Fernandez is arguing he was charged with “inconsistent charges that are really one crime[,]” the State believes he is arguing the amended information was multiplicitous.²

C. *The amended information was not multiplicitous.*

As to Count IV of the amended information, Fernandez was convicted of aggravated assault, under [SDCL 22-18-1.1\(5\)](#), for attempting by physical menace with a knife to put N.M. in fear of imminent bodily harm. See SR:414-15. At trial, the State presented evidence that as N.M. was setting food on the table in her apartment, Fernandez looked at her, grabbed a knife, and stated, “You know how many things I’d like to do to you now? I want to do so many things to you.” SR:752. Fernandez then took the knife, lifted her dress with the knife, and put the knife next to her skin. SR:752, 765.

As to Count VI of the amended information, Fernandez was convicted of aggravated assault, under [SDCL 22-18-1.1\(2\)](#), for attempting to cause or knowingly causing bodily injury to N.M. with a knife. See

² If the Court finds that Fernandez is arguing the amended information was duplicitous, the State requests an opportunity to submit supplemental briefing. Nonetheless, the amended information was not duplicitous because it did not contain a single count that captured multiple offenses.

SR:418-19. The State supported this count with evidence that Fernandez used the point of a knife to cut N.M. SR:752, 765.³

The evidence presented at trial supports that the aggravated assaults were separate actions constituting different crimes. Fernandez (1) put N.M. in fear of imminent bodily harm by physical menace and (2) knowingly caused bodily injury to N.M. with a knife. Because the assaults were the product of two distinct criminal offenses, each is separately punishable under [SDCL 22-18-1.1](#). Because the charges were not multiplicitous, the circuit court properly submitted the aggravated assault charges to the jury.

III.

ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT RIPE FOR DIRECT APPEAL.

A. *Background.*

Fernandez alleges he was denied the effective assistance of counsel because of errors committed by his trial counsel during the: (1) cross examination of N.M.; (2) direct examination of Fernandez; and (3) direct examination of Krista Herren-Graber. AB:9-11.

B. *Standard of review.*

It is well settled that “[a]bsent exceptional circumstances, [this Court] will not address an ineffective assistance claim on direct appeal.”

³ The State entered three exhibits that illustrate the cuts Fernandez made to N.M.’s body. SR:753; Exhibit 3-5.

State v. Washington, 2024 S.D. 64, ¶ 39, 13 N.W.3d 492, 503 (quoting *State v. Dillon*, 2001 S.D. 97, ¶ 28, 632 N.W.2d 37, 48). “The rule is a practical one, necessitated by the fact that ‘the record on direct appeal typically does not afford a basis to review the performance of trial counsel.’ ” *Id.* (quoting *State v. Alvarez*, 2022 S.D. 66, ¶ 34, 982 N.W.2d 12, 20). Consequently, “[t]he preferred arena for an ineffective assistance of counsel claim is a habeas corpus proceeding[,]” where “attorneys charged with ineffectiveness can explain or defend their actions and strategies, and thus a more complete picture of what occurred is available for review.” *Id.* (quoting *Dillon*, 2001 S.D. 97, ¶ 28, 632 N.W.2d at 48). It is “only when trial counsel was so ineffective and counsel’s representation so casual as to represent a manifest usurpation of the defendant’s constitutional rights” that this Court will depart from [their] general rule declining to address ineffective assistance of counsel claims on direct appeal. *Id.* ¶ 39, 13 N.W.3d at 504 (quoting *State v. Arabie*, 2003 S.D. 57, ¶ 20, 663 N.W.2d 250, 256).

C. *Fernandez’s claim should not be heard on direct appeal.*

Here, Fernandez’s challenge to his trial counsel’s performance highlights why this Court’s prefers that ineffective assistance of counsel claims be addressed in a habeas corpus proceeding, where a proper record can be developed to facilitate meaningful review. Although Fernandez asserts that his trial counsel erred, his attorney’s actions may have been part of a deliberate trial strategy. Hence, Fernandez’s

claims are better addressed in a habeas corpus proceeding where his trial counsel can explain their strategy.

Additionally, Fernandez did not claim his trial counsel was so ineffective as to represent a manifest usurpation of his constitutional rights. *See* AB:9-11. Thus, this Court should not hear Fernandez’s claim on direct appeal.

IV.

A SPANISH-SPEAKING COURT REPORTER WAS UNNECESSARY.

A. *Background.*

Fernandez “asserts that his right to a fair trial were denied by the Court’s failure to have a Spanish[-]speaking court reporter recording exactly what the parties said in Spanish.” AB:11. Fernandez failed to raise this issue at the circuit court level.⁴ On appeal, Fernandez does not seek plain error review of his claim regarding an ineffective court reporter; thus, this Court is not obligated to conduct such a review.

State v. Mulligan, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818 (refusing to apply plain error review in the absence of a party’s request). Nor does Fernandez cite to any legal authority whatsoever in support of his assertion, further waiving this issue. *See State v. Fool Bull*, 2009 S.D. 36, ¶ 46, 766 N.W.2d 159, 169 (“The failure to cite supporting authority

⁴ The sole Court Reporter Endorsement submitted by Fernandez was for Molly Olson, who was the court reporter and transcriptionist at trial. SR:446, 610-13, 800, 863, 864-65.

is a violation of [SDCL 15-26A-60\(6\)](#) and the issue is thereby deemed waived.”). Nonetheless, the State will review this alleged issue for plain error.

B. *Standard of review.*

As stated above, to establish plain error, a defendant “must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” [McMillen, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30.](#)

C. *A Spanish-speaking court reporter was unnecessary.*

Fernandez argues there should have been a Spanish-speaking court reporter at trial, instead of an interpreter translating the statements into English for the court reporter. AB:11-12. Fernandez only cites to an article by South Dakota Searchlight to support his argument. See AB:12 (citing Makenzie Huber, *SD Courts Aim to Improve Language Access as Diversity, Interpreter Needs Grow*, S.D. Searchlight (June 16, 2024), <https://southdakotasearchlight.com/2024/06/16/sd-courts-aim-to-improve-language-access-as-diversity-interpreter-needs-grow/>). The article addresses South Dakota’s lack of support or training for interpreters. The article does not mention the relevance of employing a Spanish-speaking court reporter. Fernandez asserts “[t]here isn’t any way to prove that the Spanish-speaking interpreter accurately translated the victim or the Defendant’s

testimony at the trial.” AB:11. Accordingly, Fernandez failed to meet his burden of showing error.

Because there was no error, there was no plain error either, as plain error requires an error to be “clear or obvious.” *Washington*, 2024 S.D. 64, ¶ 70, 13 N.W.3d at 513 (quoting *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 732).

“Plain error review requires [Fernandez] to establish prejudice.” *State v. Guziak*, 2021 S.D. 68, ¶ 22, 968 N.W.2d 196, 202 (citing *State v. Olvera*, 2012 S.D. 84, ¶ 13, 824 N.W.2d 112, 115). “To prevail on the prejudice prong, [Fernandez] must show that the error ‘affected the outcome of the proceedings.’” *Id.* (quoting *State v. Jones*, 2012 S.D. 7, ¶ 17, 810 N.W.2d 202, 206). In other words, to show prejudice, Fernandez must establish “a ‘reasonable probability’ that, but for the error, the result of the proceeding would have been different.” *Id.* ¶ 21, 968 N.W.2d at 202-03 (citation omitted).

While Fernandez claims his right to a fair trial was compromised, he does not identify any way in which the absence of a Spanish-speaking court reporter adversely affected him. See AB:11-12. The court reporter’s duty is to create a verbatim record of the trial, not to serve the needs of the jury, who is the finder of fact. As such, it is inconceivable how the failure to have a Spanish-speaking court reporter affected the outcome of the proceedings. Thus, Fernandez’s argument fails, and whether the alleged error seriously affected the fairness, integrity, or

public reputation of the judicial proceedings need not be addressed. *See id.* ¶ 26, [968 N.W.2d at 204](#).

V.

KRISTA HERREN-GRABER’S TESTIMONY WAS RELEVANT
AND DID NOT IMPROPERLY BOLSTER N.M.’S TESTIMONY.

A. *Background.*

Fernandez argues Krista Herren-Graber’s testimony “should not have been allowed” because it “had the prejudicial effect of creating the Defendant as a perpetrator and bolstered the testimony of the victim without establishing a basis for it.” AB:12. At trial there was no objection to Herren-Graber’s testimony or qualification as an expert witness. *See* SR:781-91. Because Fernandez does not request plain error review of his claim, this Court is not obligated to apply it. [Mulligan, 2007 S.D. 67, ¶ 25, 736 N.W.2d at 818](#) (refusing to apply plain error review in the absence of a party’s request). Nonetheless, the State will review this alleged issue for plain error.

B. *Standard of review.*

As previously discussed, to establish plain error, a defendant “must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” [McMillen, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30](#).

When a reviewing court assesses plain error in the context of an

evidentiary decision, “the question before [the Court] is not whether the trial court erred in admitting the testimony, because the court was not given the opportunity to make that decision. Instead, the precise question before [the Court] is whether the trial court’s failure to *sua sponte* strike the testimony or to provide a cautionary instruction constituted plain error.” [State v. Rudloff, 2024 S.D. 73, ¶ 42, 15 N.W.3d 468, 483](#) (citation omitted).

C. *Herren-Graber’s testimony was proper.*

If this Court reviews Fernandez’s claim, he has not met his burden under plain error review. Here, Herren-Graber testified to generalities within intimate partner violence and did not discuss Fernandez or N.M. specifically. SR:781-91. Further, Herren-Graber testified that “[e]veryone is different, so everyone will have different recreations to intimate partner violence.” SR:791. Additionally, as stated in Fernandez’s attorney’s closing statement, Herren-Graber testified

about statistics, like how the average person leaves their abuser seven to eight times before they leave for good. And she talked about the cycle of violence, a tension building phase, an explosion, and then, the respite or honeymoon phase. But, Ms. Graber also acknowledged that she was speaking in generalities.

Nothing she talked about she said specifically applied to this case. There’s no indication that she spoke with [N.M.], spoke with Mr. Fernandez, or even [read] the reports in relation to this week leading up to November 30th. And, in fact, if [N.M.] was telling the truth, we don’t have either of those things. [N.M.] talked about leaving one time. And the cycle of violence that Ms. Graber described, we don’t have those phases. We, supposedly, have a week of horrors. No tension building phase, no respite or honeymoon phase. So I would

submit to you that, as knowledgeable as Ms. Graber may be, her testimony does not add anything to this case.

SR:852-53. Fernandez's attorney discredited Herren-Graber's testimony by pointing out inconsistencies between the generalities she described and N.M.'s experience. Therefore, Fernandez failed to show how he was prejudiced by Herren-Graber's testimony.

The circuit court did not commit plain error by failing to *sua sponte* strike Herren-Graber's testimony or to provide a cautionary instruction.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that Fernandez'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 3,898 words.

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

Dated this 22nd day of July 2025.

/s/ Renee Stellagher
Renee Stellagher
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 22, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Alexander Almaguer Fernandez*, was served via Odyssey File and Serve upon Jeffrey T. Myers at JTMyersLaw@gmail.com.

/s/ Renee Stellagher
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