IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30294

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

KALEB IRONHEART,

Defendant and Appellant.

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

HONORABLE LAWRENCE LONG
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on March 13, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Sources:

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs. No. 30294

KALEB IRONHEART,

Defendant and Appellant.

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The transcript of the Arraignment Hearing held June 27, 2022, is referred to as "AH." The transcript of the two-day Jury Trial held September 19 through September 20, 2022, is referred to as "JT1" and "JT2," respectively. Exhibits are referred to as "Ex." followed by the exhibit number. The transcript of the Sentencing Hearing is referred to as "SH". All references will be followed by the appropriate page number. Defendant and Appellant, Kaleb Ironheart, is referred to as "Ironheart."

JURISDICTIONAL STATEMENT

Ironheart appeals the Judgment and Sentence entered February 13, 2023, by the Honorable Lawrence Long, Circuit Court Judge, Second Judicial Circuit, regarding the following convictions: Count 1—Robbery - First Degree, and

Count 2 – Aggravated Assault. SR 98. Ironheart's Notice of Appeal was filed March 13, 2023. SR 227. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES

I. **WHETHER THE TRIAL COURT ERRED IN DENYING IRONHEART'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT ONE.**

The trial court denied Ironheart's motion for judgment of acquittal.

State v. Bateson, 266 Kan. 238, 970 P.2d 1000 (1998)
State v. Lewis, 1993-NMCA-165 ,116 N.M. 849 , (N.M. Ct. App.)
State v. Townsend, 925 N.W.2d 280 (Minn. Ct. App.)

SDCL 22-30-2

STATEMENT OF CASE

On June 23, 2022, the Minnehaha County Grand Jury returned a two count Indictment charging Ironheart with Count 1 - Robbery in the First Degree and Count 2-Aggravated Assault (Physical Menace). SR 10. A Part II Habitual Criminal Information was filed pursuant to SDCL 22-7-8.1 on June 23, 2022, alleging Ironheart had three prior felony convictions. SR 12. Ironheart was arraigned on the Indictment and the Part II Information on June 27, 2022. *See generally* AH.

Jury Trial on the charges began on September 19, 2022. *See generally* JT1. The Honorable Lawrence Long, Circuit Court Judge, presided over the matter. *See generally* JT1. At the conclusion of the State's case-in-chief, Ironheart moved

for a judgment of acquittal on counts 1 and 2. JT1 81. As to count 1, Robbery, Ironheart specifically argued that the conduct did not amount to Robbery because the alleged use of force occurred during the escape. JT1 82-83. The Court denied Ironheart's motion as to both counts.JT1 86. On September 20, 2022, the jury found Ironheart guilty on Count 1- Robbery and Count 2- Aggravated Assault. JT2 35.

On January 19, 2023, Ironheart entered an admission to the Part II Information, alleging three prior felony convictions. SH 12. Following the admission, Ironheart proceeded to sentencing[1]. SH 18. On Count 1, Judge Long imposed ten years in the South Dakota State Penitentiary with credit for 247 days of jail time previously served. SH 33. On Count 2, Judge Long imposed 10 years in the South Dakota State Penitentiary with credit for 247 days served. SH 33. The sentences as to Count 1 and Count 2 were ordered to run concurrent to each other. Judgment and Sentence was entered on February 13, 2023. SR 98.

STATEMENT OF FACTS

On June 5, 2022, Frances Gergen ("Gergen) was working as an assistant department head manager at the Hy-Vee Wine and Spirits, in Sioux Falls, South Dakota. JT1 38-39. During his shift, he observed an individual walk toward the wine and whiskey aisle, grab a bottle of Fireball, and quickly leave the store. JT1 40-41. Gergen ran after this individual, and chased him into the parking lot. JT1

[1] Ironheart also entered guilty pleas in other pending matters before the Court.

42. As he was chasing him in the parking lot, Gergen observed the individual pull out a knife. JT1 42. The individual said, "what are you going to do," and then jumped in the back seat of a vehicle. JT1 42-43. The vehicle immediately left. JT1 43. Gergen testified that that vehicle the individual entered was parked just outside the doors, "ready for escape." JT1 45.

Detective Steve Redmond ("Redmond") of the Sioux Falls Police Department was assigned to investigate the June 5th, 2022, incident at Hy-Vee. JT1 70. During the course of the investigation, Redmond was able to identify Ironheart as the suspect who stole the Fireball. JT1 72.

On June 23, 2022, the Minnehaha County Grand Jury returned a two count Indictment charging Ironheart with Count 1 - Robbery in the First Degree and Count 2-Aggravated Assault (Physical Menace). SR 10. A Part II Habitual Criminal Information was filed pursuant to SDCL 22-7-8.1 on June 23, 2022, alleging Ironheart had three prior felony convictions. SR 12. Ironheart was arraigned on the Indictment and the Part II Information on June 27, 2022. *See generally* AH. Jury Trial on the charges began on September 19, 2022. *See generally* JT1.

At trial, following the close of the State's case-in-chief, Ironheart moved for a judgment of acquittal. JT1 81. Ironheart argued that as to Count 1, the Robbery charge, that the use of force occurred as a means of escape, not during the theft. JT1 82. Specifically, Ironheart argued South Dakota Codified Law 22-30-

22, which states that if the use of force is used merely as a means of escape, it does not constitute Robbery. JT1 82-83. Ironheart argued that no force was used during the taking of the Fireball, and that the force occurred as he was getting in to the car. JT1 82-83. The State argued that the force was used to retain the property. JT1 85. The Court denied Ironheart's motion. JT1 86. Ironheart was ultimately convicted of Count 1- Robbery, and Count 2 – Aggravated Assault. JT2 35.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING IRONHEART'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT ONE.

The use of force in this matter was employed merely as a means of escape. Therefore, the trial court erroneously denied Ironheart's motion for judgment of acquittal as to count one. The standard of review for a denial of a motion for judgment of acquittal is de novo. *State v. Frias*, 2021 S.D. 26 ¶21, 959 N.W.2d 62, 68. "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." *Frias*, at ¶21 (citing *State v. Brim*, 2010 S.D. 74, ¶6, 789 N.W.2d 80, 83). "In determining the sufficiency of the evidence, this Court will not resolve conflicts in the evidence, pass on the

[2] The official transcript says Ironheart cited "22-32," however the language of Ironheart's argument covers 22-30-2.

credibility of witnesses, or weigh the evidence." *Id.* (citing *State v. Bausch*, 2017 S.D. 1, ¶33, 889 N.W.2d 404, 413).

At issue is the application of SDCL §22-30-2. South Dakota Codified Law provides,

> To constitute robbery, force or fear of force must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery. The degree of force employed to constitute robbery is immaterial.

SDCL §22-30-2. In this case, there is no dispute as to the facts. Ironheart took the Fireball from the store without force. Ironheart left the store with the stolen merchandise. Gergen chased after Ironheart. Gergen testified that Ironheart used the knife prior to entering the escape vehicle. Based on this, the Court should have granted Ironheart's motion for judgment of acquittal, as no reasonable finder of fact could have found that the force occurred during the course of the theft or to retain the property.

South Dakota's statutory framework concerning the crime of robbery excepts from its definition the use of force that occurs as a means of escape, but includes force to overcome or prevent resistance to the taking. This statutory construction is in contrast to other states. Kristine Cordier Karnez, J.D., Annotation, *Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery*, 93 A.L.R.3d 643 (1979). Many states take a broad, transactional view of robbery and do not exclude the use of force during the escape from their definition. *Id.* Additionally, some states

that do except escape from their robbery definition do so only when the property has been abandoned. *Id.* Other states focus primarily on when the use of theft occurred, whether it preceded the theft or occurred simultaneously. *Id.*

In *State v. Lewis*, 1993-NMCA-165, 116 N.M. 849, (N.M. Ct. App.), the Court of Appeals of New Mexico held that a defendant could not be convicted of robbery where the only force occurred after the victim's money was removed and separated from his person without force. In that case, the victim met a prostitute at a specific hotel room. *Id.* at 850. After the victim and the prostitute finished their business, the victim stayed in bed for a few minutes. *Id.* When he went to retrieve his clothes, he noticed money was missing from his wallet. *Id.* He turned around and the prostitute was pointing a gun at him. *Id.*

A man (the defendant) came out from the back bedroom and the prostitute gave him the gun. *Id.* They ordered the victim out of the room, but he demanded his money back. *Id.* The victim followed the prostitute and the defendant out of the hotel room and to their car. *Id.* He tried to hang on to the car as it drove away, but eventually let go. *Id.*

At issue in *Lewis* was whether the trial court erred in denying the defendant's motion for a directed verdict. *Id.* In its discussion, the Court made clear that New Mexico case law mandates that in order to convict for robbery, the "use or threatened use of force must be the factor by which the property is removed from the victim's possession." *Id.* at 851 (citation omitted). The Court found that the defendant's use of force occurred after the money was taken and

was used "to hold victim at bay as he escaped." *Id.* The Court noted its previous decision interpreting the New Mexico robbery statute, which held that the use of force to retain property or to escape does not satisfy the use of force element. *Id.* at 851-852. Since the defendant's use of force occurred after the money was taken, the Court held that the trial court erred in denying the motion for directed verdict. *Id.* at 852.

The same basic scenario is present in this case as it was in *Lewis*. Just as in *Lewis*, the property in question was taken without force or fear of force. Also, just as in *Lewis*, the force or threat was used to escape. The difference in this matter is South Dakota's statutory language. South Dakota state law specifically includes the use of force to retain possession or to prevent or overcome resistance to the taking and specifically excludes the use of force as a means of escape. *See* SDCL 22-30-2 *supra*.

In *State v. Townsend*, 925 N.W.2d 280 (Minn. Ct. App.), the Court of Appeals of Minnesota reviewed its robbery statute concerning the use of force "against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away." *Townsend*, 925, N.W.2d at 284. In *Townsend*, an employee at Trader Joe's observed the defendant putting liquor bottles in her handbag. *Id.* at 282. The employee asked the defendant if she was going to pay for the items, and then the defendant started to run away. *Id.* The employee grabbed the back of the defendant's blouse as she ran past him and then grabbed her handbag, which caused her to stop. *Id.*

The employee held the defendant against the wall and attempted to take her handbag. *Id.* The defendant attempted to bite the employee, so he let go. *Id.* The defendant slipped as she tried to leave so the employee grabbed her bag again. *Id.* They continued to struggle as they moved outside until the employee retrieved the remaining liquor bottles and let the defendant go. *Id.* The defendant was charged with robbery and convicted of the same. *Id.* The defendant alleged there was insufficient evidence to support her conviction. *Id.*

The Court reviewed the applicable robbery statute and focused specifically, "whether the evidence was sufficient to prove that Townsend used or threatened the imminent use of force against W.S. to overcome his resistance to Townsend's removal of the liquor bottles from the wine shop." *Id.* at 285. The facts the Court specifically looked at were that the defendant threatened to and attempted to bite the employee which overcame his resistance to the extent that the defendant was able to carry the liquor bottles out of the common hallway and out to the sidewalk. *Id.* The Court found that these facts were sufficient to show that the defendant used or threatened to use force to overcome resistance or compel acquiescence to the carrying away of the liquor bottles. *Id.* at 286.

The *Townsend* case is relevant because it identified a situation where the defendant used force to "overcome resistance and compel acquiescence." Minnesota does not exclude escape from its definition (unlike South Dakota), but includes force used to overcome resistance (like South Dakota). The facts of this case are distinguishable from *Townsend*. The conduct in *Townsend* occurred in the

common hallway, before the defendant was able to exit the store. It also included a physical struggle to retain the liquor bottles. *Townsend* clearly falls within the use of force to overcome resistance. Here, Ironheart did not use force to retain the Fireball; he used it to escape. He was already out the door and in the parking lot. The threat came as he was about to get in the escape car.

In *State v. Bateson*, 266 Kan. 238, 970 P.2d 1000 (1998), the Supreme Court of Kansas addressed the sufficiency of a robbery conviction based on the use of force during the defendant's escape. In that case, the victim was working in the basement of the courthouse, when she returned to her office and observed the defendant bent over behind her desk. *Bateson* at 239. The victim observed that the drawer with her handbag was opened and she was missing cash from her wallet. *Id.* She demanded her money back, but the defendant left and began walking quickly away. *Id.*

The victim chased after the defendant, up the stairs, toward the main floor. *Id.* There were two sets of doors separating the basement from the main floor. *Id.* As the victim opened the second door, it came back rapidly and hit her in the face. *Id.* Although she did not see the defendant, she believed he slammed the door in her face. *Id.* The defendant was convicted of robbery, and appealed alleging insufficient evidence to support the conviction.

The Kansas Supreme Court analyzed its previous decisions concerning use of force during a theft. *Id.* 240-244. Some of the prior decisions cited had similar fact patterns which showed that "violence was contemporaneous with

the taking, as the perpetrator did not have complete control and dominion over the property prior to resorting to violence or threat to accomplish such control." *Id.* at 246. The Court held that the defendant gained peaceful possession of the property and used no violence, except to escape. *Id.* The Court found that he had control of the property when he left the office and was out of the victim's sight when the door slamming occurred. *Id.* The Court found that this violence did not convert the theft to a robbery. *Id.* at 247.

In this case, Ironheart had possession as he left the store. He took the property without violence. The force was only used as a means of escape. The primary differences between this case and *Bateson* are the degree of force, and the fact that Ironheart was visible to Gergen. The Kansas Court's findings did focus on the lack of visibility, but also on the fact that the defendant had possession.

There is no evidence of a physical struggle over the bottle of Fireball. Ironheart took the bottle of fireball without force or fear of force. The theft was completed as soon as he exited the store. The point at which the knife was observed was as Ironheart was attempting to get away. This conduct clearly falls within the exception to the Robbery statute. Therefore, the trial court erred in denying the motion for judgment of acquittal as to Count one.

CONCLUSION

The trial court erred when it denied Ironheart's motion to for judgment of acquittal. For the aforementioned reasons, authorities cited, and upon the settled record, Ironheart respectfully requests this Court remand this case to the trial

court with an order directing the trial court to reverse the Judgment and Sentence and order a new trial.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted this 25th day of September, 2023.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 2,627 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Office 2019.

Dated this 25th day of September, 2023.

/s/ Katheryn Dunn
Katheryn Dunn
Attorney for Appellant

APPENDIX

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STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
		PD 22-011920
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI22003660
vs.	+	JUDGMENT & SENTENCE
KALEB NATHANIEL IRONHEART, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on June 23, 2022, charging the defendant with the crimes of Count 1 Robbery 1st Degree-Dangerous Weapon (Inj/Fear Vic) on or about June 5, 2022; Count 2 Aggravated Assault-Physical Menace on or about June 5, 2022 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on June 27, 2022, Melissa Sommers 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, Mark Joyce, Deputy State's Attorney appeared for the prosecution and, Betsy Doyle and Alexander Braun, appeared as co-counsel with the defendant. A Jury was impaneled and sworn on September 19, 2022 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on September 20, 2022 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, KALEB NATHANIEL IRONHEART, guilty as charged as to Count 1 Robbery 1st Degree-Dangerous Weapon (Inj/Fear Vic) (SDCL 22-30-1, 22-30-3(1), 22-30-6 and 22-30-7) and guilty as charged as to Count 2 Aggravated Assault-Physical Menace (SDCL 22-18-1.1(5))." The Sentence was continued to January 19, 2023.

Thereupon on January 19, 2023, the defendant admitted to the Part II Habitual Criminal Offender Information (SDCL 22-7-8.1) and was thereafter 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 ROBBERY 1ST DEGREE-DANGEROUS WEAPON (INJ/FEAR VIC) / HABITUAL OFFENDER : KALEB NATHANIEL IRONHEART shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for two hundred forty-seven (247) days served.

AS TO COUNT 2 AGGRAVATED ASSAULT-PHYSICAL MENACE / HABITUAL OFFENDER : KALEB NATHANIEL IRONHEART shall be imprisoned in the South Dakota State

Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with credit for two hundred forty-seven (247) days served; concurrent to Count 1.

It is ordered that the defendant pay $233.00 in court costs ($116.50 each count) through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

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.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 13 day of Feb, 2023.

BY THE COURT:

JUDGE LAWRENCE LONG
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk

By: _____ Deputy

FILED
FEB 13 2023
Minnehaha County, S.D.
Clerk Circuit Court

CERTIFICATE OF SERVICE

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

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Dated this 25th day of September, 2023.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30294

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

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APPEAL FROM THE CIRCUIT COURT
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MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE LAWRENCE E. LONG
Circuit Court Judge

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Notice of Appeal filed on March 13, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

OTHER STATUTES CITED:

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STATE OF SOUTH DAKOTA

No. 30294

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KALEB IRONHEART,

Defendant and Appellant.

PRELIMINARY STATEMENT

Appellant, Kaleb Ironheart, will be called "Defendant" or "Ironheart." Appellee, State of South Dakota, will be known as "State." Defendant was convicted of Robbery and Aggravated Assault in Minnehaha County Criminal File No. 49CRI22003660 and has filed an appeal. Citations to Appellant's brief will be referred to as "DB." Citations to the settled record will be referred to as "SR." Citations to trial Exhibits will be referred as "Exhibit." All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant's two-day trial began on September 19, 2022. SR:98. Ultimately, the jury returned verdicts of guilty for count 1: Robbery in the First Degree; and count 2: Aggravated Assault – Physical Menace. SR:91, 98. The trial court entered its Judgment and Sentence on

February 13, 2023. SR:98-99. Defendant then filed a Notice of Appeal on March 13, 2023. SR:227. This Court has jurisdiction for this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

I.

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND FINDING SUFFICENT EVIDENCE TO SUPPORT THE CONVICTION OF FIRST DEGREE ROBBERY?

The trial court denied the Motion for Judgment of Acquittal and found sufficient evidence to support the conviction.

SDCL 22-30-2

State v. Quist, 2018 S.D. 30, 910 N.W.2d 900

State v. Foote, 2019 S.D. 32, 930 N.W.2d 650

State v. Delehoy, 2019 S.D. 30, 929 N.W.2d 103

State v. Long Soldier, 2023 S.D. 37, 994 N.W.2d 212

STATEMENT OF THE CASE AND FACTS

On June 23, 2022, the Minnehaha Grand Jury filed a two count Indictment charging Defendant with: count 1: Robbery – First Degree (Dangerous Weapon); and count 2: Aggravated Assault by physical menace with a dangerous weapon. SR:10-11. The State also filed a Part II Information alleging Defendant to be a Habitual Offender (SDCL 22-7-8.1). SR:12. Defendant was arraigned on June 27, 2022, and entered not guilty pleas to both charges. SR:503, 512.

Prior to trial, Defendant filed various motions. These filings included: Notice of Bad Acts; Limine Re: Defendant's Criminal Record; Sequester Witnesses; Additional Peremptory Challenges; Limine Re: Identifying Defendant; and Limine Re: Defendant Being Represented by Public Defender's Office. SR:16-26. Additional pretrial matters included a stipulation by Defendant and the State that Defendant was present at the Hy-Vee grocery store and was depicted in the video identified as Exhibit 1. SR:93.

Defendant's trial began on September 19, 2022. SR:258. The State's first witness, Francis Gergen, works at the Hy-Vee store located at 49th and Louise. SR:294-95. He serves as an assistant head manager for the "wine and spirits" department. SR:295-96. Part of his duties include preventing loss by theft. *Id.* When asked who the liquor bottles belonged to, Mr. Gergen explained that Hy-Vee is "employee-owned, so they belong to all of us employees . . . ." SR:314.

Mr. Gergen testified that he was working in his department on June 5, 2022. SR:296. Around one in the afternoon, he was helping an employee find a certain product when he noticed a person go to the back of the store, and then quickly "loop" to the front. SR:297. Mr. Gergen saw Defendant "grab a bottle of Fireball" and head towards the checkout counter. SR:299. Instead of checking out, Defendant turned to the exit, held up the bottle and said "thanks, f--kers" while heading out the doors. SR:299. There were two sets of doors, and the

second set did not open fast enough for Defendant, so he "banged" it open. SR:299. Mr. Gergen ran after Defendant "trying to retrieve the product" and told him to "give it back." SR:299, 316.

Defendant's escape vehicle was waiting for him right outside the doors, but Defendant did not run to it – he ran past it and headed out to the parking lot. SR:299. Mr. Gergen was chasing Defendant, about six to eight feet behind him. SR:299-300. While running into the parking lot, Defendant was holding the bottle of alcohol in his right hand and switched it to his left hand. SR:299-300. Mr. Gergen then described how Defendant took his right hand and "reached into his pocket and pulled out a knife." SR:300. It was a dark colored pocketknife and at first the blade was not extended. SR:300-01. Mr. Gergen explained that when the knife came out, he immediately stopped chasing Defendant "[b]ecause I love my wife and my daughter." SR:301. He described the knife as the type you "flip it open and the blade comes out" which was about 3 inches long.[1] SR:301. When Defendant "stepped towards" Mr. Gergen, it caused him to stop chasing him. SR:320-21. Mr. Gergen testified that at this point the knife blade was out, and Defendant said, "What are you gonna do? What you gonna do?" and did not surrender the Fireball. SR:299, 301. Mr. Gergen said he realized he needed to "be ready to defend himself

[1] Mr. Gergen was asked if he had any doubt about seeing a knife in Defendant's hand that day, to which he responded, "none whatsoever." SR:325.

and not get hit by the car that was coming." SR:301. Defendant then moved over and entered the passenger side back door of the car, and his driver took off. SR:302. As the car was leaving, Mr. Gergen took a picture of the license plate and then called the police. SR:302.

The Hy-Vee store had security cameras, so there was video collected and turned over to the police. The video would later become State's Exhibit 1 at trial. The knife could not be seen on the video due to a tree that blocked the view of Defendant's hand. SR:305, 340, Exhibit 1. A portion of Exhibit 1 was made into a slow-motion / zoomed-in video and became State's Exhibit 2, which was also admitted and published to the jury. SR:312.

The State's second witness was Steve Redmond, who is a detective with the Sioux Falls Police Department. SR:326. While investigating this case, Detective Redmond viewed the store video and recognized the robber as Kaleb Ironhorse. SR:329.

Upon the conclusion of Detective Redmond's testimony, the State rested its case and Defendant made a motion for judgment of acquittal. SR:338. As for the Robbery charge, defense counsel claimed the bottle of liquor was not taken by "using fear or force." SR:339. He also claimed that "no knife was actually used" and if a knife had been used "it was employed merely as a means of escape." SR:339. The trial court denied the motion stating that there was "sufficient evidence, which if believed by the jury, will support convictions on both counts." SR:343.

Defendant then stated he did not have any evidence to present and rested his case. SR:345. Defendant renewed his motion for a directed verdict, which was again denied. SR:346.

On the second day of trial, the jury heard closing arguments. The jury returned verdicts of guilty on count 1: Robbery – First Degree; and count 2: Aggravated Assault. SR:489.

Defendant was sentenced on January 19, 2023. SR:517. During sentencing, the court referenced Defendant's nineteen pending cases that would be addressed at that time. SR:548. The court then sentenced Defendant to ten years in the penitentiary for the Robbery conviction and ten years in the penitentiary for the Aggravated Assault conviction. SR:549. The two sentences were ordered to run concurrently to each other. *Id.*

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND FINDING SUFFICENT EVIDENCE TO SUPPORT THE CONVICTION OF ROBBERY IN THE FIRST DEGREE.

A. *Introduction.*

Defendant argues that the trial court erred when it denied his motion for judgment of acquittal, because he claims there was insufficient evidence for his conviction of count 1: Robbery in the First

Degree.[2] DB:5. This Court has held that "If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside." *State v. Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d 900, 904 (quoting *State v. Martin*, 2017 S.D. 65, ¶ 6, 903 N.W.2d 749, 751).

B. *Standard of Review.*

In examining the denial of a judgment of acquittal, or the finding that sufficient evidence exists, the same review standard applies: "whether there is evidence in the record which, if believed . . . is sufficient to sustain a finding of guilt beyond a reasonable doubt." *State v. Foote*, 2019 S.D. 32, ¶ 7, 930 N.W.2d 650, 652 (citing *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342).

This Court reviews "the denial of a motion for acquittal de novo." *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at 904 (quoting *State v.*

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[2] SDCL 22-30-1 states:

> Robbery is the intentional taking of personal property, regardless of value, in the possession of another from the other's person or immediate presence, and against the other's will, accomplished by means of force or fear of force, unless the property is taken pursuant to law or process of law.

SDCL 22-30-6 states:

> Robbery, if accomplished by the use of a dangerous weapon, or by the use of a physical object simulating a dangerous weapon, is robbery in the first degree. Robbery, if accomplished in any other manner, is robbery in the second degree.

Traversie, 2016 S.D. 19, ¶ 9, 877 N.W.2d 327, 330). This Court must "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.'" *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at 904 (further citation omitted). When conducting its review, "this Court 'will not resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence'" because those tasks rest solely with the trier of fact. *Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d at 330 (quoting *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83).

C. *The Trial Court Did Not Err by Denying Defendant's Motion for Judgment of Acquittal and Finding Sufficient Evidence Existed for His Conviction of Count 1, Robbery in the First Degree.*

Defendant's brief admits that he "took the fireball . . . [and] left the store with the stolen merchandise." DB:6. He also acknowledges that while being chased by Mr. Gergen, he "used the knife prior to entering the escape vehicle." *Id.* Defendant then claims that "no reasonable finder of fact could have found that the force occurred during the course of the theft or to retain the property." *Id.* Defendant's view results from a misapplication of SDCL 22-30-2 which states:

> To constitute robbery, *force or fear of force must be employed* either to obtain *or retain possession of the property* or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery.

> The degree of force employed to constitute robbery is immaterial.

Id. (emphasis added).

Defendant cites the New Mexico Court of Appeals case of *State v. Lewis*, 867 P.2d 1231 (N.M. Ct. App. 1993). The facts involve a victim that did not know another person had stolen money from his billfold. *Lewis*, 867 P.2d at 1232. After the money had been taken, the victim confronted the prostitute and her partner, who pointed a gun at the victim. *Id.* The court held that "after the money was separated from the victim" the gun was used simply "to hold victim at bay as he escaped"; thus, no robbery occurred. *Id.* at 1233.

Lewis does not apply to Defendant's case. The statute for robbery in New Mexico "consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence." N.M. Stat. Ann. § 30-16-2 (1978); *Lewis*, 867 P.2d at 1233. That is distinguishable from South Dakota's robbery statute which also includes the use of force or fear of force while trying to *retain* possession of the property. SDCL 22-30-2 (emphasis added).

Defendant also referenced *State v. Townsend*, 925 N.W.2d 280, 286 (Minn. Ct. App. 2019), *aff'd*, 941 N.W.2d 108 (Minn. 2020). That court defined personal property as anything other than real property, including property that belonged to a business. It also held that

robbery "does not require that the use of force or threats actually precede or accompany the taking." *Townsend*, 925 N.W.2d at 284. It affirmed the robbery conviction of one who took personal property and "threatened the imminent use of force against [the victim] to overcome his resistance to, or compel his acquiescence in, the carrying away of that property." *Id.* at 286. In Defendant's case, the State likewise argued that the use of a knife was the "force or fear of force . . . [to] retain possession of the property weapon." SDCL 22-30-2.

Defendant's brief also cites the Kansas case of *State v. Bateson*, 970 P.2d 1000 (Kan. 1998). Robbery in Kansas is defined as: "the taking of property from the person or presence of another by force or by threat of bodily harm to any person." Kan. Stat. Ann. § 21-3701(b)(3); *Bateson*, 970 P.2d at 1001. Again, the statute does not mention "force or fear of force . . . to obtain or *retain* possession of the property." SDCL 22-30-2. Here, Bateson took the victim's property from her handbag while the victim was absent from her office. *Bateson*, 970 P.2d at 1004. Bateson then walked rapidly away and went up the stairs. *Id.* The victim ran after him but did not catch him. *Id.* She did not see him go through the door but was hit by the door while trying to reach him. *Id.* at 1005. She thought Bateson may have slammed the door on her. *Id.* The court held the conduct did not convert the theft into a robbery. *Id.* Defendant's reliance on *Bateson* is unfounded. Not only does the Kansas robbery statute differ from South Dakota's, but being bumped

by a door is not the same as Defendant drawing his knife to prevent the reclaiming of stolen property.

Defendant views all his actions outside the store as an escape. He claims he "did not use force to retain the Fireball . . . ." DB:10. If he did use force to retain his theft of the Fireball, it is robbery under SDCL 22-30-2. The correct interpretation and application of SDCL 22-30-2 is at the heart of this case. When interpreting a statute, this Court will read it as a whole, giving words their plain meaning. *State v. Thoman*, 2021 S.D. 10, ¶ 17, 955 N.W.2d 759, 767. If "the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *State v. Armstrong*, 2020 S.D. 6, ¶ 16, 939 N.W.2d 9, 13.

In *State v. Long Soldier*, 2023 S.D. 37, 994 N.W.2d 212, the defendant wanted a narrow interpretation of the robbery statute. He argued that if he stopped using force and fear before taking the victim's purse, he should avoid culpability for robbery. *Id.* ¶ 25, 994 N.W.2d at 221. This Court disagreed and pointed out that "rewarding a defendant for incapacitating his victim in pursuit of the victim's property and allow them to avoid culpability for robbery would be unjust . . . ." *Id.* In like manner, rewarding Defendant for pulling a knife to incapacitate his victim's attempt to retrieve his property and call it an escape would

be unjust. SDCL 22-1-1 requires the penal statutes be construed "with a view to . . . promote justice." *Id.*

State's Exhibits 1 and 2 show Defendant running out the doors of the Hy-Vee store with Mr. Gergen chasing him. Mr. Gergen testified that he was "trying to retrieve the product" and told Defendant to "give it back." SR:299, 316. While on the run, Defendant never abandoned the stolen property, but rather escalated his safeguarding it, passing the Fireball from his right hand to his left in order to get his knife out. SR:300. At a point in the chase, Defendant suddenly stops running, pivots and confronts the pursuing Mr. Gergen with his knife. Exhibit 2, 00:38–01:08. Everything changed when Defendant produced the knife. Mr. Gergen comes to a stop for fear of never seeing his family again. SR:301; see also Exhibit 2, 00:57–01:24. Defendant knew Mr. Gergen wanted his Fireball back. With the knife blade exposed, Defendant conveys that Mr. Gergen may have to fight to the death to get it back. Defendant then mocks Mr. Gergen's surrendered retrieval attempt: "[w]hat are you gonna do . . . [w]hat you gonna do?" SR:299-300. Upon Defendant securing the bottle and pulling his knife, the theft of Fireball became the robbery of Fireball.

Defendant asks this Court to ignore the moment he interrupted his escape and applied "force or fear of force . . . [to] retain possession of the property" he stole. SDCL 22-30-2. The statute also states the "degree of force employed to constitute robbery is immaterial." *Id.* After

Defendant successfully ended the resistance to his theft, by fear of force, Defendant reengaged his escape by getting into the car and being driven away. Defendant's actions outside the store are a clear example of force to "retain possession of . . . property" and not a force being "employed merely as a means of escape." SDCL 22-30-2. This Court has held that "[i]n construing a statute, we presume 'that the [L]egislature did not intend an absurd or unreasonable result' from the application of the statute." *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 15, 739 N.W.2d 475, 480 (quoting *State v. Wilson*, 2004 S.D. 33, ¶ 9, 678 N.W.2d 176, 180). Interpreting SDCL 22-30-2 in the manner Defendant suggests leads to absurd results where the plain language of the statute is simply ignored. This absurd application cannot be said to be the legislative intent.

It is for the jury to resolve conflicts in evidence, weigh the evidence, and determine witness credibility. *Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d at 330. From the above facts, viewed in the light most favorable to the prosecution, this Court can find that the State made a prima facie case in which a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at 904; *see also State v. Sabers*, 442 N.W.2d 259, 266 (S.D. 1989).

The trial court did not err in denying Defendant's Motion for Judgment of Acquittal and finding of sufficient evidence to support the convictions.

CONCLUSION

Based on the above argument and authorities, the State respectfully asks this Court to affirm Defendant's conviction and sentence.

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 2,964 words.

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

Dated this 6th day of November 2023.

/s/ John M. Strohman
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of November 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kaleb Ironheart* was served electronically through Odyssey File and Serve upon Christopher Miles at cmiles@minnehahacounty.org.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30294

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

KALEB IRONHEART,

Defendant and Appellant.

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

HONORABLE LAWRENCE LONG
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal Filed on March 13, 2023

TABLE OF AUTHORITIES

Cases: Page(s)

Statutes:

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 30294

vs.

KALEB IRONHEART,

Defendant and Appellant.

PRELIMINARY STATEMENT

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

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "State's Brief." All citations will be followed by the appropriate page number. Ironheart relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his initial brief, filed with the Court on September 25, 2023.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING IRONHEART'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT ONE.

The State's brief acknowledges that Ironheart had committed a theft and was "escaping" from Hy-Vee. SB 12. Ironheart agrees the act of exiting the store with the Fireball was, in fact, an escape. However, it is the State's contention that Ironheart "interrupted his escape" and applied "force or fear of force . . . to retain possession" of the Fireball, thereby accomplishing an act contemplated by South Dakota's robbery statute. SB 12; SDCL 22-30-1. But Ironheart asserts the actions he took after exiting the store were "merely employed" as a means of furthering the escape. SDCL 22-30-2. After the theft occurred, the escape occurred. During the escape, an aggravated assault, which was a distinct and separate act from the theft, occurred. Accordingly, the aggravated assault should not be associated with the taking of property. Certainly, the alleged "force or fear of force" in this case was more closely associated with the "escape" from Hy-Vee than the "taking" of the Fireball. SDCL 22-30-2.

While Ironheart maintains the facts underpinning his conviction on Count 1 of the Indictment do not amount to robbery under SDCL 22-30-1, it is apparent that SDCL 22-30-2 is an ambiguous statute with an internal contradiction. The statute's plain language presents the critical question in this case: Did Ironheart use force, or fear of force, to retain possession of the property, or as a means of escape? Here, both parties are able to use language from the same statute to argue in favor of different conclusions. Due to the contradictory nature of this criminal statute, Ironheart requests this Court

apply the rule of lenity, which "requires a criminal statute be construed in a defendant's favor" when, " 'after considering [the statute's] text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.' " *United States v. Smith*, 756 F.3d 1070, 1075 (8th Cir. 2014) (quoting *United States v. Castleman*, 572 U.S. 157, 172-73, 134 S. Ct. 1405, 1416, 188 L. Ed. 2d 426 (2014)). Applying the rule of lenity and construing SDCL 22-30-2 in favor of Ironheart should result in the robbery conviction being vacated.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Ironheart respectfully requests this Court to reverse and remand this matter with an Order directing the circuit court to vacate the Judgment and Sentence on Count 1 of the Indictment.

Respectfully submitted this 4th day of December, 2023.

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1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 395 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 4th day of December, 2023.

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

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