IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30120

MAXTON JAMES PFEIFFER,
Defendant/Appellant,

v.

STATE OF SOUTH DAKOTA,
Plaintiff/Appellee.

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

HONORABLE JEFFREY CONNOLLY, PRESIDING JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed on September 19, 2022

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PRELIMINARY STATEMENT

In this Appellant's Brief, Maxton Pfeiffer, Defendant below and Appellant herein, will be referred to as "Pfeiffer" or "the Defendant." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." Scott Roetzel, Adam Shiffermiller, and Olivia Siglin, the State's trial attorneys, will be referred to as "Mr. Roetzel", "Mr. Shiffermiller", and "Ms. Siglin."[1]

JURISDICTIONAL STATEMENT

On March 15, 2022, following a seven-day jury trial, the jury returned a verdict of guilty on the charge of First-Degree Manslaughter in violation of SDCL 22-16-15(3). [SR: 1284]. On August 24, 2022, the trial court executed a Judgment sentencing Maxton Pfeiffer to a term of thirty (30) years imprisonment in the South Dakota State Penitentiary, with twenty-three (23) years suspended. [App. 1.1; SR: 1754]. Notice of Appeal from the Judgment was timely filed on September 19, 2022. [SR: 1762]. Pfeiffer brings this appeal as a matter of right pursuant to SDCL 23A-32-2 and SDCL 15-26A-3(1).

[1]All references to the transcripts and documents cited in this brief are as follows: (1) "SR" the Third Clerks Certificate that designates the settled record of Pennington County file number 51CRI18-002863; (2) JTVD designates March 7, 2022, Jury Trial Voir Dire; (3) JTV1" designates day 1 of the jury trial; (4) "JTV2" designates day 2 of the jury trial; (5) "JTV3" designates day 3 of the jury trial; (6) "JTV4" designates day 4 of the jury trial; (7) "JTV5" designates day 5 of the jury trial; (8) "JTSC" designates day 5 of the jury trial transcript labeled Jury Trial Excerpt State's Closing Argument; (9) "PTC" designates the PreTrial Conference held on November 12, 2021; and (10) "App." designates the Appendix.

STATEMENT OF LEGAL ISSUES

1.

Did the trial judge err in refusing to instruct the jury that to find the Defendant guilty of Manslaughter in the First Degree, the State had the burden of proving beyond a reasonable doubt that the Defendant acted with criminal intent?

The trial judge refused the Defendant's requests to instruct the jury that the State had the burden to prove beyond a reasonable doubt that the Defendant acted with criminal intent; the court ruled that the State had no burden to prove the Defendant acted with criminal intent because criminal intent is not an element of the crime of Manslaughter in the First Degree since SDCL 22-16-15(3) is silent as to criminal intent.

Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793 (1994)
Elonis v. United States, 575 US 723, 135 S.Ct. 2001 (2015)
State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808
State v. McCahren, 2016 SD 34, 878 N.W.2d 586

2.

Did the trial judge err in refusing to instruct the jury on the Defendant's theory of defense that ignorance or mistake of fact negated criminal intent?

The trial judge refused the Defendant's request that he instruct the jury on Defendant's theory of defense that his ignorance or mistake of fact negated the criminal intent required to prove his guilt; the court ruled that the Defendant's state of mind was not in issue in the trial.

Crane v. Kentucky, 476 U.S. 683, 687, 106 S.Ct. 2142, 2145.
United States ex. rel Means v. Solem, 646 F.2d 322, 328 (8th Cir.1980).
State v. Birdshead, 2015 S.D. 77, ¶ 27, 871 N.W.2d at 73.
State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808, 815.

3.

Did the trial court err in refusing to allow into evidence a written statement by the Deputy State's Attorney admitting that Pfeiffer had acted in the belief that the gun was not loaded?

The Defendant made a pre-trial motion asking the court to rule that the Deputy State's Attorney's statement in a brief that Pfeiffer had acted "in the belief that the gun was not loaded" was admissible in evidence as an admission by a party-opponent under SDCL 19-19-801(d)(2). After initially granting the Defendant's motion, the court ultimately ruled that the prosecutor's statement was inadmissible because Pfeiffer's state of mind was not in issue in the trial.

Brady v. Maryland, 373 U.S. 83 (1963)
Johnson v. O'Farrell, 240 S.D. 68, 787 N.W.2d 307

4.

Was the evidence presented in the trial legally sufficient to sustain a jury finding that the Defendant recklessly killed Ty Scott?

After the State rested its case-in-chief and again, after the verdict, the Defendant moved for a judgment of acquittal, arguing that the evidence was insufficient to sustain a finding that Pfeiffer had acted with the requisite reckless criminal intent to prove his guilt of first-degree manslaughter.

As to both those motions, the court ruled the evidence was sufficient to sustain a guilty verdict and denied the Defendant's motions for a judgment of acquittal.

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808
State v. Olsen, 462 N.W.2d 474, 476-477 (S.D.1990)

STATEMENT OF THE CASE

On June 28, 2018, Maxton Pfeiffer was indicted by the Pennington County grand jury on one count of Manslaughter in the First Degree in violation of SDCL 22-16-15(3). SDCL 22-16-15(3) in relevant part provides: "Homicide is manslaughter in the first degree if perpetrated… [w]ithout any design to effect death,…but by means of a dangerous weapon [.]"

A seven day jury trial was held in Pennington County on March 7, 2022 with the Honorable Jeffrey Connolly presiding.

The case involved Pfeiffer's unintended firing of a bullet from a semi-automatic pistol that caused the death of his friend, Ty Scott. The fact that Pfeiffer did not intend to fire the gun was undisputed by the State.

Pfeiffer's defense at trial was that his mistaken belief that the gun was not loaded disproved the reckless *mens rea* required to prove him guilty him of first-degree manslaughter.

The State offered no evidence and made no argument to refute, contest, or disprove Pfeiffer's testimony and statements that he had acted in the belief that the gun was not loaded.

Instead, relying on the trial judge's jury instructions, the State argued to the jury that the State had no burden to prove that the Defendant acted with criminal intent and Defendant's guilt was proven if the evidence proved the *actus reus* elements of the crime. [JTSC: State's Closing Argument: 2:21-4:1; 29:7-8].

The State told the jury that if the evidence proved that Pfeiffer's actions violated basic gun safety rules, then that was sufficient to prove his guilt of Manslaughter in the First Degree. [JTV1: 34:8-24, 39:7-13].

The trial judge refused the Defendant's requests that he instruct the jury that the State had the burden to prove criminal intent. [JTV5: 989:4-995:17]. The judge concluded that the State had no burden to prove criminal intent because SDCL 22-16-15(3) is silent as to *mens rea*, and therefore, criminal intent was not an element of the crime of Manslaughter in the First Degree. [JTV5: 986:6-987:5].

At no time during the trial did the trial judge instruct the jury that the State had the burden to prove beyond a reasonable doubt that the Defendant acted with criminal intent.

Instead, over the Defendant's objection, the trial judge instructed the jury that if the State proved the statutory *actus reus* elements of the crime —that the Defendant caused the death of Ty Scott, with no design to effect death, by means of a deadly weapon—then that was sufficient to prove the Defendant's guilt of Manslaughter in the First Degree. [Instruction 16; SR: 1241].

After the State rested its case, the Defendant moved for a judgment of acquittal on the grounds that there was no evidence that would sustain a finding that the Defendant acted with the reckless *mens rea* required to find him guilty of Manslaughter in the First Degree. In opposing that motion, the State argued that if there was evidence that the Defendant did the physical act that caused the gun to fire—touching the trigger—, regardless of his state of mind, then that was sufficient to sustain a finding that he acted

with the general criminal intent required to prove his guilt of the crime charged. [JTV4: 764:15-22]. (*See*: footnote 5).

The court denied Pfeiffer's motion for a judgment of acquittal. [JTV4:766:16-767:3].

After the verdict and prior to sentencing, the Defendant also filed a post-trial motion for a judgement of acquittal, again arguing that the evidence was insufficient to sustain a finding that the requisite reckless criminal intent had been proven beyond a reasonable doubt. [App. 4.1]. The trial judge entered a conclusory Order denying the Defendant's motion for judgment of acquittal. [App. 5.1; SR: 1351].

The Defendant Pfeiffer submits that each of the trial court's assigned errors in the Appellant's Brief is grounded in the trial judge's failure to recognize and apply an established fundamental rule of statutory interpretation: "Unlike our traditional analysis governing other issues of statutory interpretation, the constitutional right to due process may require courts to read a *mens rea* element into a statute defining a criminal offense even though it is silent on this issue." *State v. Jackson*, 2020 SD 53, ¶ 36.

STATEMENT OF FACTS

On the evening of June 13, 2018, in a small apartment in Keystone, South Dakota where a few friends had gathered, eighteen-year-old Maxton "Max" Pfeiffer caused the death of his friend Ty Scott by an unintended discharge of a semi-automatic pistol that Pfeiffer mistakenly believed was not loaded.

At around 8 o'clock that evening, Maxton Pfeiffer arrived at the one-room basement apartment that his friend Cody Siemonsma rented in Keystone, South Dakota, where Pfeiffer and some friends, including Ty Scott, regularly "hung out." Pfeiffer had

graduated from high school some two weeks earlier and he wanted to say good-bye to his friends because he was moving to Idaho the next day. [JTV4: 910:3-911:9].

When Pfeiffer arrived, Cody Siemonsma, Joshio Villalobos, Damon Picotte, Ty Scott, and Elisabeth Black Cloud were sitting in the apartment, watching You Tube videos. When Pfeiffer arrived, the room smelled of marijuana smoke. [JTV4: 911:10-912:12]. Neither Pfeiffer nor Ty Scott smoked any marijuana or drank alcohol that night. [JTV4: 911:10-13; 912:1-6].

There were five firearms that Siemonsma had left unsecured in his apartment: two assault rifles (an AK-47 and an AR-15) and a .243 Winchester hunting rifle that Siemonsma regularly kept in an open closet by the bed, a sawed-off shotgun under his bed, and a Model 1911 .45 caliber semi-automatic pistol Siemonsma had left out on top of his dresser, with a loaded magazine in the handle of the gun. [JTV3: 521:3-5; 533:25-534:9; JTV4: 918:10-23; 921:18-24].

Pfeiffer testified that a few minutes after he arrived and sat down, Damon Picotte showed him a .38 caliber revolver that Picotte had just purchased. After opening the cylinder to make sure there were no bullets in the revolver, Picotte handed the revolver to Pfeiffer, who looked at it and handed it back to Picotte. [JTV4: 914:5-23]. Picotte then either handed the revolver to Joshio Villalobos or laid it down on the TV stand next to Villalobos, and then went outside the apartment to smoke a cigarette. [JTV4: 914:24-915:3].

After Picotte left the apartment, Joshio Villalobos had the revolver and he began "messing around" by pointing the revolver at Siemonsma and Pfeiffer and "dry-firing" the unloaded pistol at them (pulling the trigger without discharging a bullet). [JTV4:

915:10-918:9]. Pfeiffer testified that Pfeiffer was sitting on the bed, next to Siemonsma, across from where Joshio Villalobos and Ty Scott were sitting on a couch. [JTV4: 915:6-25; 919:6-23]. Neither Elisabeth Black Cloud nor Damon Picotte were inside the apartment at that time. [JTV4: 916:7-16].

Pfeiffer testified that after Villalobos pointed and dry-fired the revolver at him and Siemonsma, Siemonsma had taken one of his assault rifles and was pointing it back at Villalobos, pretending he was shooting.[JTV4: 916:17-25; 917:24-918:9].

At that point, Pfeiffer decided that he would also join in what he and his friends believed to be harmless "joking around." Pfeiffer testified that he reached over and picked up Siemonsma's semi-automatic pistol from the dresser; that he took the pistol out its holster and removed the loaded magazine from the handle of the pistol, and laid the magazine on the bed next to him; that he then "racked" (pulled back) the slide of the pistol, expecting that action to eject any live round that might still be in the gun; and when no cartridge was ejected from the pistol, Pfeiffer believed that the gun was unloaded and there was no risk that it could fire a bullet. Without having any intent to fire the gun, Pfeiffer then made a sweeping motion with the pistol in the direction where Villalobos and Ty Scott were sitting. As he did so, the pistol fired and discharged a bullet. [JTV4: 923:15-924:1].

Ty Scott stood up from the couch for a few seconds and then dropped to his knees and fell forward, bleeding, on the floor. [JTV4: 926:19-23].

Pfeiffer described himself as being "just in shock because I had checked the gun and it went off anyways." [JTV4: 926:12-13]. He immediately got up and screamed: "I

checked it. I checked it." [JTV4: 926:16-18]. Siemonsma also testified that Pfeiffer was shouting "It should have been clear." [JTV1: 112:2-3].

Moments later, Pfeiffer and Siemonsma both ran outside the apartment, up the stairs and outside to call "911" on their cell phones. Both those calls were recorded and played in evidence. Siemonsma told the 911 operator to send medical help because one of his friends had just shot his other friend "on accident." [SR: Physical Exhibit List, Ex. 2 and 3, 3-15-22; 911 Calls].

Meanwhile, Pfeiffer, upset and emotionally distraught, told the 911 dispatcher to send medical help because he had accidentally shot his friend. The call lasted about seven minutes. While staying on the line while the 911 operator gave him instructions on what to do, Pfeiffer went back downstairs, knelt down next to Ty, and pressed a towel to the wound in his unconscious friend's chest to try to control the bleeding. [JTV4: 927:6-930-7]. Pfeiffer was holding the towel to Ty's chest when emergency medical personnel arrived. Then Pfeiffer went up the stairs and outside, where he lay on the ground, weeping. [JTV2: 401:2-403:20].

Pfeiffer's statements to law enforcement investigators

After medical personnel had arrived, one of the first law enforcement officers on the scene was a Parks Services Ranger, Steven Wollman. When Wollman arrived at the scene, people were standing about outside and the scene was generally chaotic. He saw Pfeiffer laying on the ground, screaming and weeping hysterically, and Damon Picotte standing near Pfeiffer and yelling at him. [JTV2: 401: 6-402:15].

Wollman helped Pfeiffer off the ground and put Pfeiffer in his patrol car and began questioning Pfeiffer as to what had happened. The questioning was audio-taped

and video-taped and was introduced into evidence at trial. Wollman described Pfeiffer's emotional state as extremely upset, crying uncontrollably, and hysterical during the interview. [JTV2: 401:23-402:20; 405:3-7; 421:14-17; SR: Physical Exhibit List, Ex. 9].

Pfeiffer told Wollman that after one of his friends had jokingly pointed and dry-fired a pistol at him, Pfeiffer picked up a pistol from the dresser; removed the magazine (which he referred to as "the thing") and "jacked" back the slide, thinking that he had cleared the gun of bullets and that the pistol was not loaded.[2] [JTV2: 420:14-421:2]. Wollman testified that Pfeiffer said "I then picked up one too and I take out the thing and jacked a shell out and nothing came out and I looked in there and didn't see anything in there so I did a practice shot." [JTV2: 420:21-24]. [SR: Physical Exhibit List, Ex. 9; Time: 20:42:01].

Later that night, Pfeiffer was interviewed by Deputy Sheriff Kent Pryzmus and Detective Barry Young of the Rapid City Police Department in an interview room in the Public Safety Building. The interview was video- and audio recorded and the recording was offered into evidence at trial. Pfeiffer told Pryzmus and Young that after his friend Joshio had been joking around, pointing the revolver at him, he had picked up Siemonsma's pistol from where it lay on the dresser and after he had removed the magazine from the pistol, he racked back the slide and when no bullet was ejected from the pistol, Pfeiffer believed there was no bullet in the gun. Pfeiffer said he then swept the

[2] During the State's case, the first law enforcement person to enter the apartment, former Highway Patrol woman Paige Erickson, testified that the .45 pistol was on a table or stand, and that there was no magazine in the gun, but when she racked the slide, a live round was ejected from the pistol. [JTV2: 432:8-12]. The State argued that that was circumstantial evidence that indicated that Pfeiffer had failed to remove the magazine from the gun. Pfeiffer was adamant that he removed the magazine from the gun.

gun in the direction of where his friends Villalobos and Ty Scott were sitting, and the gun immediately fired a bullet. Pfeiffer told Pryzmus he did not remember touching the trigger of the gun. [JTV3: 683:20-687:19; SR: Physical Exhibit List, Ex. 55]. After the interview, Pfeiffer was informed by Pryzmus that Ty Scott had died and he was being charged with Manslaughter in the First Degree.

The trial

On August 16, 2021, the Defendant filed a pre-trial motion to dismiss the indictment on the grounds that SDCL 22-16-15(3) was unconstitutionally vague because the statute makes no mention of the *mens rea* required to prove a violation of the statute. [SR: 494].

On November 12, 2021, there was a pre-trial conference in which the parties were heard on the Defendant's motion to dismiss the indictment for vagueness. In that pre-trial conference, the trial judge assured the Defendant that he "absolutely" would instruct the jury that to convict the Defendant, the State had the burden of proving that the Defendant had acted with criminal intent:

> "MR. HANNA: You're not going to intend—instruct the jury that they have to prove criminal intent to convict him of manslaughter?
>
> THE COURT: Yeah, absolutely. Absolutely we'll do that. And I'll tell you likely—we haven't settled that but likely I will—I will tell them they have to prove criminal intent."
>
> [PTC: 53:25-54:6; SR: 3540].

Having a good faith reason, based on the court's statements, to believe that the court intended to instruct the jury that the State had the burden to prove criminal intent, the Defendant withdrew his motion to dismiss the indictment on the grounds that the statute was unconstitutionally vague.

On March 7, 2022, the first day of the trial, outside the presence of the jury, the court, defense counsel, and the State's Assistant Attorney General again engaged in a discussion as to whether proof of *mens rea* was an element of first-degree manslaughter. [JTVD: 106:20-110: 7]. In that discussion, the trial court again assured the parties that the court understood *mens rea* or criminal intent to be an element of first-degree manslaughter:

> "THE COURT: Well, let me – I want to speak to the record more than anything. I understand that those are—as I have proposed them, those are the elements of the actus reus which is one component of criminal liability, but I understand in that discussions I had with [Deputy State's Attorney] Ms. – I suppose Weber at the time, but Blair now—that there's a—there's a separate component, and I suppose you could also call it a separate element of criminal liability which is mens rea. ***."
>
> [JTVD: 110:7-16].[3]

However, as will be discussed more fully in the Appellant's Argument, later during the trial when jury instructions were being settled, Judge Connolly would change his mind and rule that *mens rea* was not an element of first-degree manslaughter and refuse to instruct the jury that the State had any burden to prove beyond a reasonable doubt that the Defendant acted with criminal intent. [JTV5: 979:7-987:5; 988:9-995:17; 1009:2-1016:11].

Pfeiffer's defense at trial was that his mistaken belief that the gun was not loaded disproved the reckless criminal intent required to convict him of first-degree manslaughter.

In trial, the State did not offer any evidence, or make an argument, to refute, dispute, or disprove Pfeiffer's statements and testimony that he acted in the mistaken

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[3] Here, the court is referring to the pre-trial conference of November 12, 2021, in which Deputy State's Attorney Weber represented the State.

belief that the gun was not loaded and that he did not think there was any chance there was a bullet in the gun. Instead, the State argued to the jury that Pfeiffer was guilty of Manslaughter in the First Degree if the evidence proved that Pfeiffer's actions violated basic gun safety rules.[4] [State's opening statement: JTV1: 34:8-24; 39:7-13].

After the State rested its case in chief, the Defendant moved the court to enter a judgment of acquittal, arguing that the State's evidence was insufficient to sustain a guilty verdict because the State had presented no evidence that would support a finding by the jury that the Defendant had acted with the requisite criminal intent required to prove his guilt—specifically, reckless *mens rea.* [JTV4: 760:4-763:20; 765:12-766:15]. In her argument to the court opposing the Defendant's motion for a judgment of acquittal, the State's attorney admitted that Pfeiffer believed the gun was not loaded, but argued that the only elements of the crime the State had a burden to prove were the *actus reus* elements and that the evidence was sufficient to support a finding of criminal intent because Pfeiffer "remembers touching the trigger." [JTV4: 764:7-22].[5]

Without citing any specific evidence presented, the trial court denied the Defendant's motion for a judgment of acquittal. [JTV4: 766:16-767:3].

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[4] MS. SIGLIN: And, members of the jury, that evidence and testimony will prove beyond a reasonable doubt that the defendant, Maxton Pfeiffer, is guilty of first degree manslaughter because he violated all the basic rules of firearm safety when he pointed a loaded pistol at Ty Scott and pulled the trigger causing his death. [JTV1: 39:8-13].

[5] MS. SIGLIN: "…and by the defendant's own admissions himself in his interviews with law enforcement, it was a game, I didn't expect it to be loaded. It never misfired before so I don't understand how this happened. He remembers touching the trigger and that is enough for the jury to make a conclusion that he had the required general criminal intent to be convicted of this offense." [JTV4, 764: 11-14].

Pfeiffer testified that he had had no intention to cause the gun to fire a bullet and did not think there was any chance there was a bullet in the gun. [JTV4: 936:22-937:8]. He testified how and why he believed that the gun was not loaded when he swept it in the direction of his friends. [JTV4: 921:15-926:2]. He admitted the *actus reus* elements of the crime, but denied that he had been aware of and consciously disregarded a substantial risk that his actions might cause the gun to fire a bullet.

Pfeiffer presented expert witness testimony from Dave Lauck, a nationally recognized expert in the Model 1911 .45 caliber semi-automatic pistol. Lauck testified he had examined the Model 1911 pistol that fired the bullet that struck and killed Ty Scott, as well as the bullet itself. Lauck testified, based on his examination of the pistol and the bullet that was fired from it, that it was his expert opinion that when Pfeiffer had racked back the slide of the pistol to eject any bullet that might be in the chamber of the pistol, there was a mechanical failure to eject the bullet in the chamber due to what he termed "bullet-nose binding;" that due to a failure to modify and extend the port through which the pistol ejected cartridges, the cartridge in the chamber failed to be ejected and struck the sharp inner edge of the pistol's ejection port, which caused the live round to fall back into the chamber of the gun. Lauck had examined the bullet that been removed from the body of Ty Scott and photographed it, and he saw and photographed a visible "nick" or "scuff mark" near the tip of the bullet. It was his opinion that that nick or scuff mark proved that the live round that was in the chamber had collided with the edge of the ejection port when Pfeiffer had racked the slide to eject any live round through that ejection port and this "bullet nose binding" caused the cartridge to fall back into the

chamber of the gun. [JTV4:794:17-824:17; 825:17-832:18; 833:22-834:11; 835:4-836:1; 838:6-840:4].

During the settling of jury instructions, the Defendant requested the court to instruct the jury that the State had the burden to prove criminal intent beyond a reasonable doubt; that recklessness was the minimal standard required to prove criminal intent; and that proof of negligence was insufficient to prove the Defendant's guilt of first-degree manslaughter. The judge denied all such requests and declined to instruct the jury that criminal intent is an element of Manslaughter in the First Degree that the State had the burden to prove because the statute is silent as to criminal intent or *mens rea.* [JTV5: 986:6-987:5]. The court ruled that Instruction 19 on general criminal intent ("In the crime of MANSLAUGHTER IN THE FIRST DEGREE, the Defendant must have criminal intent…") was sufficient to instruct the jury on the issue, without having to give instructions on the State's burden to prove criminal intent.

At no time during the trial did the trial judge ever instruct the jury that the State had any burden to prove beyond a reasonable doubt that the Defendant acted with criminal intent.

Over the Defendant's objection, the trial court instructed the jury that to prove guilt, the only elements of the crime that the State had the burden to prove were the *actus reus* elements of Manslaughter in the First Degree:

> "The elements of the crime of Manslaughter in the First Degree as charged in the Indictment, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:
>
> 1. The Defendant caused the death of **Ty Robert Scott.**
>
> 2. The killing by the Defendant was by means of a dangerous weapon.

3. The Defendant did so without any design to effect the death of **Ty Robert Scott.**"

(Bold face in the original).

[Jury Instruction No. 16; SR: 1241].

Armed with that instruction, the State's Assistant Attorney General told the jury in his final argument "We don't have to show intent" [JTSC: 29:7-8; SR: 1353] and that the Defendant's guilt was proven if the State proved the *actus reus* elements of the crime that the court had identified in Instruction 16. [JTSC: 2:21-3:9; 3:21-4:1; 29:4-11].

During deliberations, the jury asked the court to give further instructions on "criminal intent" and recklessness. [JTV5: 1060:11-1063:20].[6] The judge responded to the jurors' request by sending them a note directing them to rely on the instructions already given.

On March 15, 2022, after deliberating for 14 hours over the course of two days, the jury found Maxton Pfeiffer guilty of Manslaughter in the First Degree and the court ordered Pfeiffer into custody.

The Defendant filed a post-trial motion for judgment of acquittal, again arguing that there was no evidence that would support a finding that the Defendant had acted with the requisite *mens rea* to prove his guilt. [App. 4.1; SR: 1314]. Without citing to any evidence, the court denied the motion for judgment of acquittal. [App. 5.1; SR: 1351].

On August 24, 2022, the trial judge sentenced Maxton Pfeiffer to serve thirty years in prison, with twenty-three years suspended. After a hearing that followed

[6] The jury's request for further instructions as to criminal intent and recklessness read: "Is there any other information you can give us in regards to #19 – specifically criminal intent and #23 – specifically 'reckless' and/or 'reckless with a respect to circumstances when a person consciously and unjustifiably disregards a substantial risk that such circumstance exists.'" [SR: 1268].

immediately after the sentencing, the court denied Defendant's motion for bail pending appeal.[7]

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT THE STATE HAD THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ACTED WITH CRIMINAL INTENT WAS REVERSIBLE ERROR.

A. Standard of review.

Jury instructions are adequate when, considered as a whole, "they give the full and correct statement of the law applicable to the case." *State v. McVay*, 2000 S.D. 72, ¶ 18, 612 N.W.2d 572, 576 (citation omitted). However, "no court has discretion to give incorrect, misleading, conflicting, or confusing instructions." *State v. Cottier*, 2008 S.D. 79, ¶ 7, 755 N.W.2d 120, 125. "Whether the court gave incorrect or misleading instructions to a defendant's prejudice is a question of law reviewed de novo." *State v. Diaz*, 2016 S.D. 78, ¶ 42, 887 N.W.2d 751, 763.

B. Argument

1. The constitutional right to due process requires courts to read a *mens rea* element into SDCL 22-16-15(3), even though the statute is silent on the issue of *mens rea*.

During the settling of jury instructions, the Defendant Pfeiffer objected to Instruction 16, which purported to set out the elements of the crime of first-degree manslaughter, because it failed to instruct the jury that the State had the burden to prove criminal intent. The Defendant requested the court to instruct the jury that in addition to the *actus reus* elements identified in Instruction 16, the State also had the burden to prove

[7] The Defendant's separate appeal of the trial court's denial of bond pending appeal (Appeal No. 30284) is presently pending before this Court.

that the Defendant acted with criminal intent. [JTV5: 979:2-987:5]; and that "[t]o find the defendant guilty of manslaughter in the first degree, the evidence must prove beyond a reasonable doubt that the defendant either recklessly or intentionally did the act of shooting Ty Scott" [JTV5: 984:2-6]; and that the State had the burden of proving the defendant recklessly killed Ty Scott. [JTV5: 1018:25-1019:4].

The court refused all requests for such instructions, ruling that criminal intent was not an element of the crime that the State had the burden to prove.

At no time during the trial did the trial judge instruct the jury that the State had any burden to prove criminal intent beyond a reasonable doubt.

The court's erroneous conclusion that *mens rea* or criminal intent was not an element of first-degree manslaughter because SDCL 22-16-15(3) is silent as to *mens rea* ignored an established fundamental rule of statutory interpretation.

The "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States* v. *Balint*, 258 U.S. 250, 251, 42 S. Ct. 301 (1922). For that reason, criminal statutes are generally interpreted "to include broadly applicable scienter requirements, even where the statute…does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70, 115 S. Ct. 464 (1994).

Because "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence", *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 1797 (1994), "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime" (*Id.* at 606, 114 S. Ct. at 1797) and "silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would

require that the defendant know the facts that make his conduct illegal." *Id.* at 605, 114 S. Ct. at 1797 (citation omitted). *See also: Morissette v. United States,* 342 U.S. 246, 250, 72 S. Ct. 240 (1952); *United States v. United States Gypsum Co.*, 438 U. S. 422, 444–446 (1978); *Carter v. United States*, 530 U. S. 255, 269, 120 S. Ct. 2159 (2000).

In applying this established rule, in *Elonis v. United States*, 575 US 723, 135 S.Ct. 2001 (2015), the Supreme Court read a *mens rea* requirement into a statute that made it a crime to transmit in interstate commerce a threat to injure a person, even though the statute was silent as to criminal intent. "The fact that the statute does not specify any required mental state…does not mean that none exists. We have repeatedly held that mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it." (Internal quotations and citation omitted). *Elonis*, 575 U.S. at 734.

The *mens rea* rule of statutory interpretation, also referred to as the presumption of scienter, was most recently addressed by the United States Supreme Court in *Ruan v. United States*, 597 U.S. ___, 142 S.Ct. 2370 (2022). In *Ruan*, the Supreme Court reaffirmed "the presumption of scienter", with "scienter" being defined as "the degree of knowledge necessary to make a person criminally responsible for his or her acts. . . Applying the presumption of scienter, we have read into criminal statutes that are *silent* on the required mental state—meaning statutes that contain no *mens rea* provision whatsoever—that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct…Unsurprisingly, given the meaning of scienter, the *mens rea* we have read into such statutes is often that of knowledge or intent." (Italics in the

original). (Internal quotations and citations omitted.) *Ruan,* 142 S.Ct.at 2377. See also: *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191, 2195 (2019).

The South Dakota Supreme Court also has recognized and applied the presumption of scienter in cases in which this Court read a *mens rea* element into criminal statutes that were silent as to *mens rea.* This Court has recognized that because *mens rea* is the rule, rather than the exception, in Anglo-American jurisprudence, "there must be 'some indication of [legislative] intent, express or implied, 'to dispense with *mens rea* as an element of a crime.'" *State v. Jones,* 2011 S.D. 60, ¶ 10, 804 N.W.2d at 412-13 (quoting *Staples*, 511 U.S. at 606, 114 S. Ct. at 1797). In *State v. Jones*, this Court read a knowledge requirement into the crime of third-degree rape, even though the statute was silent as to *mens rea.*

In *State v. Barr,* 90 S.D. 9, 237 N.W.2d 888, 892 (1976), this Court held that knowledge is an element of the offense of distributing a controlled substance, even though the language of the statute was silent as to *mens rea* or knowledge. This Court also read a *mens rea* requirement into a statute that was silent as to *mens rea* in *State v. Stone,* 467 N.W.2d 905, 906 (S.D. 1991).

In this case, the presumption of scienter and Defendant's constitutional right to due process required the trial court to read a *mens rea* element into the crime of first-degree manslaughter even though the text of SDCL 22-16-15(3) is silent as to *mens rea.*

2. Settled case law from this Court holds that the State has the burden to prove *mens rea* in a first-degree manslaughter case involving a fatal shooting and that the minimal *mens rea* required to prove that crime is recklessness.

In *State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808, 815 and *State v. Birdshead*, 871 N.W.2d 62, 69 (S.D. 2015), the Supreme Court of South Dakota expressly stated that

to prove a defendant's guilt in a first-degree manslaughter case involving a fatal shooting, the State has the burden to prove at least reckless *mens rea*. In *State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808, 815, this Court ruled that "to convict [the defendant] of manslaughter, there must be sufficient evidence that [defendant] intended to fire the gun or that [defendant] was reckless with respect to the shooting."

State v. Birdshead, 871 N.W.2d 62, 69 (S.D. 2015), also involved a shooting death and a charge of violating SDCL 22-16-15(3). At issue was the question "[w]hether the circuit court erred when it instructed the jury on a reduced mens rea of recklessness for the charge of first-degree manslaughter." *Birdshead*, at ¶ 10. The circuit court instructed the jury: "When a person intentionally or recklessly does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful." This Court upheld the circuit court's *mens rea* instruction as a correct statement of the *mens rea* required to prove a violation of SDCL 22-16-15(3). *Birdshead*, ¶ 15.

What is clear from both *Mulligan* and *Birdshead* is that to prove a defendant's guilt under SDCL 22-16-15(3), the State must prove that the defendant acted with criminal intent, and to do that, the State must prove that the defendant acted with at least reckless *mens rea*, even though the criminal statute is silent as to that *mens rea* requirement.

Here, where it was undisputed by the State that Pfeiffer did not intend to fire the gun, to convict Pfeiffer, there had to be proof beyond a reasonable doubt that he was "reckless with respect to the shooting." *Mulligan*, 736 N.W.2d at 815.

Given the case law from this Court, the trial court's failure to instruct the jury that the State had the burden to prove criminal intent and that recklessness is the minimal *mens rea* required to prove criminal intent was a manifest error of law.

3. Because reckless *mens rea* is an element of second degree manslaughter and second degree manslaughter is a lesser included offense of first degree manslaughter, reckless *mens rea* is also an element of first-degree manslaughter.

The trial judge recognized that reckless *mens rea* is an element of second-degree manslaughter, but erroneously concluded that because *mens rea* is not mentioned in the text of the first-degree manslaughter statute, *mens rea* is not an element of the crime of first-degree manslaughter. The trial court's conclusion ignored the "elements test" of lesser included offenses.

SDCL 22-16-20 defines manslaughter in the second degree, in relevant part, as "Any reckless killing of one human being…" The statutory language makes the *mens rea* of recklessness an element of the crime of manslaughter in the second degree.

SDCL 22-16-20.1, in relevant part, provides: "Manslaughter in the second degree is a lesser included offense of…manslaughter in the first degree."

As a matter of law, a lesser included offense must meet the "elements test" for lesser included offenses. "The elements test is satisfied where: (1) all of the elements of the included offense are fewer in number than the elements of the greater offense; (2) the penalty for the included lesser offense must be less than that of the greater offense; and (3) both offenses must contain common elements so that the greater offense cannot be committed without also committing the lesser offense." *State v. McCahren*, 2016 SD 34, ¶ 8, 878 N.W.2d 586. *See also State v. Giroux*, 2004 S.D. 24, ¶ 5, 676 N.W.2d 139, 141.

Applying the elements test, since manslaughter in the second degree is a lesser included offense of first-degree manslaughter, both first- and second-degree manslaughter must contain common elements, so that first-degree manslaughter cannot be committed without also committing second degree manslaughter. That necessarily means that to convict a defendant of first degree manslaughter, the evidence must prove each of the elements of second degree manslaughter, including reckless *mens rea.*

Since the *mens rea* of recklessness is an element of second degree manslaughter, the *mens rea* of recklessness is also necessarily an element of first degree manslaughter, even though the first-degree manslaughter statute is silent as to *mens rea* or criminal intent. The trial court's refusal to instruct the jury that the State had the burden to prove that Pfeiffer acted with reckless *mens rea* was a clear error of law.

4. The trial court's instructions, considered as a whole, were inadequate, incorrect, conflicting, and confusing.

The court's general statement in Instruction 19 that in the crime of Manslaughter in the First Degree, "the Defendant must have criminal intent" was in direct conflict with Instruction 16, which instructed the jury that the Defendant could be found guilty if the State proved only the *actus reus* elements of the crime, without making any mention of criminal intent.

The entirety of the trial court's instructions dealing with criminal intent consisted of two instructions—Instruction 19 on general criminal intent and Instruction 23, which provided a definition of the words "reckless" and "recklessly." These instructions were inadequate to give the jury a full statement as to the applicable law because neither Instruction 19 nor Instruction 23 made any mention of the State's burden to prove criminal intent.

Instruction 19 instructed the jury as follows:

> "In the crime of MANSLAUGHTER IN THE FIRST DEGREE, the Defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist a specific intent to violate the law. When a person intentionally or recklessly does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful."

Although Instruction 19 instructed the jury generally that "the Defendant must have criminal intent," that instruction gives the jury no instruction as to whether the State had any burden to prove criminal intent, and no direction as to how, or by what standard, or even *if* a jury should determine that the evidence proved the Defendant's criminal intent.

Instruction 23 is a somewhat modified version of the statutory definition of the words "reckless" and "recklessly" found in SDCL 22-1-2(1)(d).[8]

Instruction 23 reads:

> "The words 'reckless' or 'recklessly' (or any derivative thereof) means a conscious and unjustifiable disregard of a substantial risk that one's conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances when a person consciously and unjustifiably disregards a substantial risk that such circumstance exists."

Neither in the court's Instruction 16 as to the *actus reus* elements of the crime, nor in Instruction 19 on criminal intent, nor in any other jury instruction, did the court make any mention of the State's burden to prove criminal intent beyond a reasonable doubt. Since the court failed to instruct the jury that, in addition to proving the *actus reus* elements of the crime, the State also had the burden to prove beyond a reasonable doubt that the Defendant acted with criminal intent, the jury could have reasonably concluded

[8] Instruction 23 omits the first words in the statute: "If applied to the intent with which an act is done or omitted…"

that to convict the Defendant, the State only had the burden to prove the three *actus reus* elements which the court had identified as the elements of the crime in Instruction 16--which is exactly what the State's prosecutor argued to the jury in his final argument:

> MR. ROETZEL: Now, the Court instructed you as far as what the law is in South Dakota regarding manslaughter…The elements of the crime of manslaughter in the first degree as charged in the indictment, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged, the defendant caused the death of Ty Robert Scott; two, the defendant—or the killing by the defendant was by means of a dangerous weapon; and, three, the defendant did so without any design to effect the death of Ty Robert Scott. Those are the elements the State has to prove…The State would assert that they have proven the elements beyond a reasonable doubt. Beyond a reasonable doubt the defendant caused the death of Ty Scott. Beyond a reasonable doubt he did that without the design to effect death. And, three, he did that with a dangerous weapon. In this case, a gun."
>
> [JTSC: 2:21-4:1].
>
> ***
>
> "MR. ROETZEL: "We don't have to show intent…"
>
> [JTSC: 29:7-8].

The court's incorrect and conflicting instructions, taken as a whole, failed to give the jury the full and correct statement of the law applicable to the case and lessened the State's burden of proof.

II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON PFEIFFER'S THEORY OF DEFENSE THAT IGNORANCE OR MISTAKE OF FACT NEGATED CRIMINAL INTENT.

A. Standard of Review

Although errors in instructing the jury do not invariably rise to a constitutional level, "if the error goes to the heart of a defendant's theory of defense it can infringe upon defendant's rights to due process and jury trial." *Miller v. State*, 338 N.W.2d 673, 676 (S.D. 1983)(citation omitted). Since this claim alleges constitutional error, including

denial of the right to present a defense, *de novo review* is warranted. *State v. Dickerson*, 2022 S.D. 23, ¶ 29, 973 N.W.2d 249, 258-59.

B. Argument

"[A] defendant in a criminal case is entitled to an instruction on his theory of the case if there is evidence to support it and a proper request is made." *United States ex. rel Means v. Solem*, 646 F.2d 322, 328 (8th Cir.1980). See also: *State v. Frey*, 440 N.W.2d 721 (1989). "When a defendant's theory is supported by law and has some foundation in evidence, however tenuous, the defendant has a right to present it." *State v. Birdshead*, 2015 S.D. 77, ¶ 27, 871 N.W.2d at 73.

Offering pattern criminal jury instruction 2-8-1, the Defendant requested the Court to instruct the jury on his theory of defense: that he was acting under an ignorance or mistake of fact that negated the criminal intent required to prove first-degree manslaughter:

> "An act is not a crime when committed or omitted under an ignorance or mistake of fact which disproves any criminal intent. Where a person honestly believes certain facts, and acts or fails to act based upon a belief in those fact[s], which, if true, would not result in the commission of a crime, the person is not guilty."
>
> [SR: 1191; Defendant's Proposed Instruction: Theory of defense, mistake of fact (#1204)].

The State objected to the Defendant's request for a theory of defense instruction, arguing that a mistake of fact defense was not available to the Defendant because there was no state of mind element in first-degree manslaughter, and the trial court agreed with the State:

> "MS. SIGLIN: [The Defendant's proposed mistake of fact instruction] is a correct statement of law that doesn't apply to this case. We'd refer the Court to Instruction [2-8-1], the second note says, quote, For this instruction to be applicable there must be a state of mind element.

MR. HANNA: Judge, there is a state of mind element. It is general criminal intent. The state of mind element is recklessness.

THE COURT: Well, under that theory then, every criminal—general intent crime, if a defendant just doesn't believe he's guilty, then I have to give this instruction and instruct the jury he's innocent?

MR. HANNA: No.

THE COURT: Or she's innocent.

MR. HANNA: It is beyond dispute that the prosecutor has to prove recklessness here. Recklessness—recklessness involves a conscious awareness of a substantial risk. That is not an element in every criminal case. It is an element in a manslaughter in the first degree case because they have to prove he either intentionally fired the shot or he recklessly fired the shot.

THE COURT: Nope. No, you don't. That's a misstatement of law. I'm not giving this instruction. I think it's reversible error if I give it. . . I get that recklessness is a component of the mens rea in this case and it's—I looked at this for like two or three hours yesterday, and there is limited instances [sic] where a mistake—or an ignorance or mistake of fact is applicable in a general intent crime. I don't see it here. You've made an adequate record. I'm not giving this instruction in any form. I don't think it's appropriate. We need to move along."

[JTV5:1002:14-1004:4].

With that, the trial court stripped Pfeiffer of "his fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687, 106 S.Ct. 2142, 2145.

The court's belief that there is no state of mind element in first-degree manslaughter was a plain error of law: to prove a defendant's guilt of manslaughter in the first degree in a case involving a fatal shooting, the evidence must prove either "that [the defendant] intended to fire the gun or that [he] was reckless with respect to the shooting." *State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808, 815. Recklessness requires proof of

the defendant's state of mind: that he "consciously disregarded" a substantial risk. SDCL 22-1-2(1)(d).

Furthermore, there is no legal authority whatsoever—and the trial judge cited none—to support the trial judge's notion that when a defendant is charged with a general intent crime, that relieves the State of any burden to prove the Defendant acted with criminal intent. The fact that a defendant is charged with a general intent crime does not relieve the State of its burden to prove the Defendant's general criminal intent—that is, its burden to prove that the defendant either recklessly or intentionally did an act which the law declares to be a crime. Nor is there any legal authority to support the trial judge's unsupported assertion that a mistake of fact defense is not available to a defendant charged with a general intent crime.

"[A]n error of law constitutes an abuse of discretion." *Lewis v. Sanford Medical Ctr.*, 2013 SD 80, ¶ 27, 840 N.W.2d 662. At the very least, the trial court abused its discretion in refusing to instruct the jury on the defendant's theory of defense because the court's refusal was based on a manifest error of law.

III. THE TRIAL COURT ERRED IN REFUSING TO ALLOW INTO EVIDENCE A WRITTEN ADMISSION BY THE STATE'S PROSECUTOR THAT PFEIFFER WAS ACTING "IN THE BELIEF THAT THE GUN WAS NOT LOADED."

A. Standard of Review

While this Court generally reviews evidentiary decisions for an abuse of discretion, *State v. Packed*, 2007 S.D. 75, ¶ 17, 736 N.W.2d 851, 856, the Defendant contends that the exclusion at issue deprived him of his due process right to present exculpatory evidence and his constitutional right to a fair opportunity to present a

defense. Since this claim alleges constitutional error, *de novo review* is warranted. *State v. Dickerson*, 2022 S.D. 23 at ¶ 29.

B. Argument

In a pre-trial motion filed on November 22, 2021, the Defendant moved the court to take judicial notice of a statement contained in a brief submitted by the State's prosecutor and to rule that that statement was admissible as a non-hearsay statement against interest by an authorized representative of a party-opponent that would be offered against the State under SDCL 19-19-801(d)(2).[9] [SR: 882]. See: *Johnson v. O'Farrell*, 240 S.D. 68, ¶ 22, 787 N.W.2d 307.

In a section of the brief setting forth the State's view of the facts of the offense, the Deputy State's Attorney stated: "Defendant killed Ty by recklessly handling a firearm, pointing it directly at Ty and pulling the trigger, *in the belief that the gun was not loaded*." (Italics added).

[SR: 360].

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[9] SDCL 19-19-801(d)(2) provides:

> (d) Statements that are not hearsay. A statement that meets the following conditions is not hearsay:
> ***
> (2) An opposing party's statement. The statement is offered against an opposing party and:
> (A) Was made by the party in an individual or representative capacity;
> (B) Is one the party manifested that it adopted or believed to be true;
> (C) Was made by a person whom the party authorized to make a statement on the subject;
> (D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> (E) Was made by the party's coconspirator during and in furtherance of the conspiracy.

The Defendant submitted that the prosecutor's statement was relevant and exculpatory in that it tended to disprove the Defendant's criminal intent, and that the statement was admissible as a non-hearsay statement by a party-opponent under SDCL19-19-801(d)(2). The State opposed the Defendant's motion, essentially arguing that the Deputy State's Attorney who was lead prosecutor in the case did not mean what she wrote. [SR: 909].

In a memorandum opinion dated February 14, 2022, the trial court rejected the State's arguments and granted the Defendant's motion, ruling that the prosecutor's statement was relevant and admissible as a non-hearsay statement by a party-opponent under SDCL 19-19-801(d)(2). The court's legal analysis, supporting authority, and rationale for granting the Defendant's motion is set forth in the court's Memorandum Opinion and Order Setting Pretrial Hearing. [App. 2.1].

On March 2, 2022, the State filed an application with this Court requesting leave to bring a discretionary interlocutory appeal of the trial court's Order. [SR: 1085]. The next day, March 3, 2022, Judge Connolly entered a Supplemental Order vacating his own prior Order granting the Defendant's motion, and stated that he would make a ruling on the question during the trial. [App. 3.1].

When the Defendant raised the issue again during the trial, the court refused to allow the Prosecutor's statement that Pfeiffer acted "in the belief that the gun was not loaded" into evidence, ruling that the evidence was inadmissible because Pfeiffer's state of mind was not in issue in the trial. [JTV4: 952:2-958:9].

That was an error of law. The State prosecutor's statement that Pfeiffer acted in the belief that the gun was not loaded was directly probative of Pfeiffer's lack of

awareness of a substantial risk and went to disprove the State's burden to prove that he acted with reckless criminal intent. The trial judge's ruling that the prosecutor's statement was inadmissible denied the Defendant his due process right to present exculpatory evidence in his defense and his right to a fair trial. *Brady v. Maryland*, 373 U.S. 83 (1963).

IV. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE JURY'S VERDICT BECAUSE NO RATIONAL TRIER OF FACT COULD HAVE FOUND THAT PFEIFFER ACTED WITH THE RECKLESS *MENS REA* REQUIRED TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

A. Standard of Review

This Court "review[s] the denial of a motion for acquittal de novo…Such a review requires the Court to determine whether the evidence was sufficient to sustain the conviction… In doing so, 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." (Citations and internal quotations omitted.) *State v. Schumacher*, 2021 S.D. 16, ¶ 32.

B. Argument

1. In determining whether the evidence was sufficient to prove that the Defendant acted with the requisite criminal intent, the "act which the law declares to be a crime" was the shooting of Ty Scott.

Whether the evidence was sufficient to sustain a finding that Defendant acted with the requisite criminal intent requires this Court to determine whether there was sufficient evidence for a jury to find beyond a reasonable doubt that Pfeiffer intentionally or recklessly "[did] an act which the law declares to be a crime." [Instruction 19 on criminal intent; SR: 1241].

Before deciding whether the evidence was sufficient to sustain a finding that Pfeiffer acted with that requisite criminal intent, the Court must first decide a question of law: what was the prohibited "act which the law declares to be a crime"? During trial, the Defendant argued that the act which the law declared to be a crime was the reckless shooting of Ty Scott. The State's theory of guilt, which it argued to the jury, was that the prohibited act which the law declares to be a crime was Pfeiffer's failure to conform his conduct to basic gun safety rules. [JTV1:34:8-24; 39:7-13].

Proof that Pfeiffer violated basic gun safety rules was legally insufficient to prove that he acted with criminal intent because the law does not declare the violation of basic gun safety rules to be a crime. There is no such crime as negligent handling of a gun in South Dakota. If Pfeiffer's mistaken belief that the gun was not loaded had been true, and the gun had not fired a bullet, even though he violated basic gun safety rules, no crime would have been committed.

It is the act of doing an intentional or reckless shooting that the law declares to be a crime. See: *State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808, 815: "[T]o convict [the defendant] of manslaughter, there must be sufficient evidence that she intended *to fire the gun* or that she was reckless *with respect to the shooting*." (Emphasis added.) Thus, the "act which the law declares to be a crime" was the shooting itself.

Since it was undisputed by the State that Pfeiffer did not intend to cause the gun to fire, the question then necessarily becomes: what evidence was presented to prove that Pfeiffer recklessly caused the gun to fire— that is, what evidence was presented that would sustain a jury finding that Pfeiffer acted in "conscious and unjustifiable disregard

of a substantial risk" that his actions might cause the gun to fire a bullet? SDCL 22-1-2(1)(d).

The answer is: none.

2. The evidence was insufficient to sustain a jury finding that the Defendant acted with reckless criminal intent because there was no evidence that Pfeiffer consciously disregarded a substantial risk that his actions would cause the gun to fire a bullet.

The State had the burden of proving that Pfeiffer recklessly killed Ty Scott. That means the State had the burden of proving that Pfeiffer acted with "a conscious and unjustifiable disregard of a substantial risk that [his] conduct may cause a certain result or may be of a certain nature." SDCL 22-1-2(1)(d).

If the Defendant mistakenly believed that there was no bullet in the gun when he swept it in the direction of his friends, then he could not have been aware of any risk, let alone a substantial risk, that if he touched the trigger of the gun, it would fire a bullet.

At no time during Pfeiffer's trial did the State offer any evidence, or even make any argument, to disprove or dispute Pfeiffer's out of court statements and trial testimony that he acted in the belief that the gun was not loaded. Nowhere in the State's final arguments to the jury did the State refer to any evidence or make any argument that the Defendant had acted with a conscious disregard of a substantial risk that his actions would cause the gun to fire a bullet. [JTSC: 2:4-29:11].

Instead, armed with the trial court's Instruction 16, the State argued to the jury that if the evidence was sufficient to prove the *actus reus* elements of the criminal statute, then that was sufficient to prove the defendant's guilt of the crime charged. [JTSC: 2:21-4:1; 29:7-8].

Because it was undisputed by the State that Pfeiffer believed the gun was not loaded, no reasonable jury could have found beyond a reasonable doubt that Pfeiffer had consciously disregarded a substantial risk, since one obviously cannot consciously disregard a risk that he is not aware of.

Nowhere in the trial judge's remarks denying Defendant's motions for acquittal did the trial court make any reference to any evidence that Pfeiffer consciously and unjustifiably disregarded a substantial risk that his actions would cause the gun to fire a bullet. There simply was no such evidence, direct or circumstantial, presented in the trial.

Therefore, the evidence was insufficient to sustain a finding that Pfeiffer acted with the reckless *mens rea* required to prove his guilt.

3. Proof of negligence is insufficient to sustain a jury finding that Defendant acted with the reckless *mens rea* required to prove Manslaughter in the First Degree.

The State's theory of guilt, which it presented to the jury at the beginning and the end of its opening statement, was that Pfeiffer was guilty of Manslaughter in the First Degree if the evidence proved that he violated basic gun safety rules. [JTV1: 34:8-24; 39:7-13]. That is actually an argument that the Defendant should be convicted of first-degree manslaughter if the evidence proved that he acted negligently—that is, without due care.

"Recklessness requires more than ordinary negligent conduct. Evidence of carelessness, inadvertence, or other similar behavior is insufficient to sustain a conviction where reckless conduct is required. " *State v. Olsen*, 462 N.W.2d 474, 476 (S.D. 1990). "[F]or someone's conduct to be deemed reckless, they must consciously disregard a substantial risk. Consequently, someone cannot be reckless if they are unaware of the

risk their behavior creates as they cannot disregard that risk if they are unaware of it." *Ibid.*

"Recklessness is morally culpable conduct, involving a deliberate decision to endanger another." (Internal quotations and citation omitted.) *Counterman v. Colorado,* 143 S.Ct. 2106, 2117, 261 L.Ed.2d 775 (2023).

Since the State offered no evidence to prove, or even made any argument, that Pfeiffer was actually aware of a substantial risk that his actions might cause the gun to fire a bullet and that he consciously disregarded that substantial risk, this Court should rule that the evidence was insufficient to sustain a jury finding that the Defendant acted with the reckless *mens rea* required to prove his guilt of Manslaughter in the First Degree.

REQUEST FOR ORAL ARGUMENT

The Appellant-Defendant Maxton Pfeiffer respectfully requests this Court to order oral argument so that this Court will have the opportunity to put this question to the attorney for the State:

What specific evidence was presented that would sustain a jury finding that the Defendant acted with a conscious disregard of a substantial risk that his conduct may cause a certain result—that is, the discharge of a bullet from a gun that he believed was not loaded?

CONCLUSION

In Maxton Pfeiffer's trial, the State did not offer any evidence or argument to dispute Pfeiffer's testimony and statements that he acted in the mistaken belief that the gun was not loaded. Nor did the State offer any evidence or argument to show that

Pfeiffer consciously disregarded a substantial risk that his conduct might cause the gun to discharge a bullet. For those reasons, the evidence was insufficient to support a finding that Pfeiffer acted with the reckless *mens rea* required to prove his guilt of Manslaughter in the First Degree.

Moreover, the trial court's legal rulings that the State had no burden to prove criminal intent because SDCL 22-16-15(3) is silent as to criminal intent and because Manslaughter in the First Degree is a general intent crime were fundamental errors of law that stripped Maxton Pfeiffer of his right to present a defense, his right to due process, and his right to a fair trial.

WHEREFORE, the Defendant Maxton Pfeiffer respectfully requests this Court to reverse his conviction for Manslaughter in the First Degree, and remand to the trial court with instructions to enter a Judgment of Acquittal on that charge. In the alternative, Defendant Pfeiffer requests this Court to reverse the Judgment of Conviction and remand the case for a new trial. Should this Court remand the case for a new trial, the Defendant requests this Court to order that a new judge be appointed to preside over such trial.

Dated this 5th day of September, 2023.

Respectfully submitted,

By: */s/ Dana L. Hanna*

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66(b), Dana L. Hanna, counsel for the Appellee does hereby submit the following:

The foregoing brief is 33 pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 33 pages, 9,705 words in the body of the brief.

Dated this 5th day of September, 2023.

/s/ Dana L. Hanna
Dana L. Hanna

CERTIFICATE OF SERVICE

Dana L. Hanna, hereby certifies that on this 5th day of September, 2023, a true and correct copy of the above *Appellant's Brief* in the matter of *State of South Dakota v. Maxton James Pfeiffer*, Appeal No. 30120, was served via Odyssey E-file and Serve mail upon:

Jennifer Jorgenson
Assistant Attorney General
jenny.jorgenson@ujs.state.sd.us

Marty Jackley
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Pennington County State's Attorney
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/s/ Dana L. Hanna
Dana L. Hanna

APPENDIX

Table of Contents

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH DAKOTA,	)	File No. 18-2863
	)	
Plaintiff,	)	
	)	**JUDGMENT**
vs.	)	
	)	
MAXTON PFEIFFER,	)	
DOB: 2/7/00	)	

Appearance at sentencing:
Prosecutor: Olivia Siglin Defense attorney: Dana Hanna

Date of offense: June 13, 2018 Charge: Manslaughter in the First Degree
Class C Felony
SDCL: 22-16-15(3)
Date of conviction: March 15, 2022
Date of sentence: August 24, 2022

The Defendant having been found guilty at jury trial:

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

Thirty (30) years in the South Dakota State Penitentiary with Twenty-Three (23) years suspended and One Hundred Eighty (180) days credit plus each day served in Pennington County jail awaiting transport to the South Dakota State Penitentiary..
☐Suspended Execution ☐Suspended Imposition ☐Fully Suspended Pen ☐Deferred Imposition

Check if applicable:
☐ The sentence shall run concurrent with .
☐ The sentence shall run consecutive to .

☒ That Defendant pay court costs of $104.00.
☒ That Defendant pay prosecution costs: UA $45.00, Drug Test $, Blood $, Transcript $157.50.
☐ That Defendant pay prosecution costs from dismissed file : UA $, Drug Test $, Blood $, Transcript $.
☐ That Defendant pay the statutory fee of $ DUI, $ DV.
☐ That Defendant pay fines imposed in the amount of $.
☒ That the Defendant pay restitution through the Pennington County Clerk of Courts in the amount of $8,712.67 to Crime Victims Fund.
☐ That Defendant's attorney's fees will be a civil lien pursuant to SDCL 23A-40-11.

SAO
ran
sen
SO
8/6/22

Other Conditions:

☒ No Firearms

☐ _____

Dated this 25 day of August, 2022.

BY THE COURT:

_____

HON. JEFFREY R. CONNOLLY CIRCUIT JUDGE

ATTEST:
Ranae Truman, Clerk of Courts

By: _____
(Deputy)

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

Pennington County, SD
FILED
IN CIRCUIT COURT
AUG 26 2022
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS.		
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA)		51CRI18-002863
Plaintiff,)		**MEMORANDUM OPINION AND ORDER SETTING PRETRIAL HEARING**
vs.)		
MAXTON PFEIFFER,)		
Defendant.)		

Defendant is charged in a single-count indictment alleging Manslaughter in the First Degree. Specifically, the Indictment alleges that on June 13, 2018 defendant "did cause the death of Ty Robert Scott, without any design to effect the death of Ty Robert Scott, by means of a dangerous weapon." The matter is set for a jury trial on March 7, 2022. There are several unresolved pretrial issues the Court will now address this Memorandum Opinion and Order.

PENDING ISSUES

The Court recently requested that the parties confirm the issues which are currently unresolved. They identified the following issues:

- The Defendant's October 15, 2021 Motion in Limine to Preclude Testimony of Cody Gaffre and Other Evidence;
- The State's October 7, 2021 Motion in Limine RE: Defense Allegations of Prosecutorial Misconduct;
- Defendant's November 22, 2021 Motion for Court to Take Judicial Notice of Adjudicative Facts; Motion for ruling that a Statement by the State's Prosecutor is an Admission by a Party-Opponent under S.D.C.L. § 19-19-801 (C) and (D);

C. Prosecutor's Admissions

On November 22, 2022 defendant filed a motion for the Court to take judicial notice of statements made by a prior prosecutor in the matter and to rule that their statements are admissions of a party opponent pursuant to S.D.C.L. § 19-19-801. The state responded, and the defendant replied.

The statement at issue is contained in *State's Response in Opposition to Defendant's Motion to Modify Bond* signed by a Deputy State's Attorney on April 21, 2021. The brief is a six-page document, filed with the Clerk and bears the electronic signature of a Deputy State's Attorney. Defendant had filed a motion to modify the conditions of his pretrial release, specifically the requirement that he be subject to electronic

monitoring. A bond hearing was held on April 23, 2021 and the Court ultimately denied the motion. The State, in the brief in question, asked the "Court to deny Defendant's motion [to modify bond] based on the factors set forth in S.D.C.L. § 23A-43-4." The brief reproduces S.D.C.L. § 23A-43-4, which states:

> **In determining which conditions of release will reasonably assure appearance,** a committing magistrate or **court shall,** on the basis of available information, **take into account the nature and circumstances of the offense charged,** the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and mental condition, the results of any mental health assessment, the length of the defendant's residence in the community, **the defendant's record of convictions,** the defendant's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings, **and the risk that the defendant will flee or pose a danger to any person or to the community.**[1]

In the brief, the State argued that it was "appropriate" to not modify defendant's bond "given the seriousness of the offense charged, the defendant's criminal history, and the risk defendant will pose a danger to the community." Drawing the Court's attention again to S.D.C.L. § 23A-43-4, the State devoted three paragraphs addressing the defendant's convictions, recklessness, the seriousness of the charge, and nature and circumstances of the offense.

The statement Defendant seeks to admit is this:

[1] Emphasis added.

> Defendant killed Ty [the alleged victim] by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded.

Defendant asks the Court to take judicial notice of the brief and the sentence noted above. Defendant also asks the Court to rule that the statement "is admissible against the State as a non-hearsay admission by a party-opponent under S.D.C.L. § 19-19-801(c) and (d). The State responded, and defendant replied. The Motion is **GRANTED.**

The State's objection makes several arguments, all of which are largely uncompelling. First, the State argues, without authority, that neither it nor it's prosecutors are party-opponents for purposes of Rule 801. Numerous courts have held otherwise.[2] And the Court is not aware of any authority which supports the State's position. The statement was made by a Deputy State's Attorney, in a filed brief, against the Defendant's request for modification of his pretrial release, and in an argument explicitly claiming to be the State's view of the "seriousness of offense charged." The context of the brief shows that the State's view, at the time, of the "nature and circumstances of the offense charged" was that Defendant did not believe the gun to be loaded. Indeed, the transcript of the hearing on the motion supports this conclusion. At the hearing, Defendant's counsel specifically argued that the

[2] *See U.S. v. Katter*, 840 F.2d 118, 130 (1st Cir. 1987)(determining that the government is a "a party-opponent" and noting that it found "no authority to the contrary or reason to think otherwise"); *U.S. v. Morgan*, 581 F.2d 933, n. 10 (D.C. Cir. 1978)("We note that the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases, and specifically provide that in certain circumstances statements made by government agents are admissible against the government as substantive evidence"); *U.S. v. Blood*, 806 F.2d 1218 (4th Cir. 1986); *U.S. v. GAF Corp.*, 928 F.2d 1253, 1262 (2nd Cir. 1991); and *U.S. v. Bakshinian*, 65 F.Supp.2d 1104 , (C.D. Cal. 1999).

"Prosecutor . . . states . . . that [Defendant] pulled the trigger on that gun in the belief that the gun was not loaded." The State did not, in response, dispute this statement or argue that the brief was misconstrued. And very importantly, the State has now represented to the Court that "at trial" it will dispute "Defendant's position that he believed the gun not be loaded." Therefore, the statement is relevant. The Court finds that statement that "Defendant killed Ty by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded" is a non-hearsay admission by a party-opponent pursuant to S.D.C.L. § 19-19-801(c) and (d).

Second, the State argues, again without authority, that the "Court cannot now rule that argument or statements made by attorneys in written motion work rises to the level of adjudicative facts that can or should be considered by the jury as evidence." Again, the Court is not aware of any authority which supports the States' position. But more importantly, the Court does not understand that Defendant is even asking the Court to take judicial notice of the disputed fact that *Defendant believed the gun to be unloaded.* Rather, the Court understands Defendant is asking the Court to take judicial notice of the fact that the State *previously stated* that "Defendant killed Ty by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded." Indeed, the Defendant concedes that he is not asking the Court to admit the statement as a judicial admission, but rather as an evidentiary admission.[3]

[3] *See generally* Ediberto Roman, *"Your Honor What I Meant to State Was . . . ": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines As Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law*, 22 PEPP. L. REV. 981 (1995).

"Unlike judicial admissions, evidentiary admissions are merely considered another item in evidence and are not binding or conclusive on the trier of fact. Like any other evidence, evidentiary admissions are subject to contradiction or explanation."[4] Accordingly, the Court is only taking judicial notice of the fact that the State made the statement, "Defendant killed Ty by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded." The Court will not instruct the Jury to conclude that Defendant "knew the gun was not loaded" unless there is a stipulation to that effect.

Third, the State argues that the "rule of completeness" requires the entire *State's Response in Opposition to Defendant's Motion to Modify Bond* to be introduced as evidence. The State's request to submit the entire brief is **DENIED WITHOUT PREJUDICE**. Section 19-19-106 allows the State to "require the introduction" of another "part" of the writing that "in fairness ought to be considered at the same time." The Court has reviewed the entire brief and does not believe that fairness requires the introduction of any other part of the brief, other than the caption and the signature and date information. Either side, however, may submit argument why additional portions of the brief should be introduced.

Fourth, the Sate argues "it would be inappropriate for the court to take judicial notice of Defendant's "belief" at the time he pulled the trigger—that is clearly within the sole purview of the jury as the determiners of fact." Again, the Court does not

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[4] *Id.* at 992.

understand that it is taking judicial notice of the Defendant's belief. The Court is taking judicial notice of the fact the State previously stated, "Defendant killed Ty by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded." The State may proceed with its current interpretation of the case, which will apparently dispute "Defendant's position that he believed the gun not be loaded."

Fifth, the Sate argues that the Court "*may not* take judicial knowledge of a fact that maybe disputed by competent evidence." And in doing so, the State concedes that it "disputes Defendant's position that he believed the gun to not be loaded at the time of trial." Again, both sides may present evidence as to whether Defendant believed the gun to be loaded. By taking judicial notice of the fact the State previously said, "Defendant killed Ty by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded" the Court is simply recognizing that the State made this statement, not that they—or the jury—are bound by it. "Although the government is not bound by what it previously has claimed . . . the jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims."[5]

Sixth, the State argues that admitting the statement would confuse the jury. As part of this argument, the State argues that the "statement" was merely a reiteration of things the Defendant said in his various interviews and as such, the best evidence is

[5] *U.S. v. GAF Corp.*, 928 F.2d 1253, 1260 (2nd Cir. 1991).

the testimony of the officers the Defendant spoke to, not the prosecutors reiteration. This argument is not convincing. There is nothing in the brief which suggest that the prosecutor was "reiterating" Defendant's statements to law enforcement. Rather, the statement, "Defendant killed Ty by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded" is offered as the *States'* view of the "nature and circumstance of the offense charged" in the context of a bond argument. Moreover, when Defense counsel referenced the passage at the hearing as the *prosecutor's statement*, no attempt was made by the State to clarify that it was merely a reiteration of the Defendant's statement.

Conclusion

The prevailing party in each of these matters is asked to present appropriate proposed orders to the Court.

Order

It is **ORDERED** that subject to further order of the Court, a **Pretrial Hearing is scheduled for 3 p.m. on February 25, 2022.**

Dated February 14, 2022.

BY THE COURT:

THE HONORABLE JEFFREY ROBERT CONNOLLY
CIRCUIT COURT JUDGE

ATTEST:
RANAE TRUMAN, CLERK OF COURTS

By _____ Deputy

(SEAL)

Pennington County, SD
FILED
IN CIRCUIT COURT
FEB 14 2022
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff, vs. MAXTON PFEIFFER, Defendant.	)	51CRI18-002863 **SUPPLEMENTAL MEMORANDUM OPINION AND ODER REGARDING THE STATE'S MOTION TO RECONSIDER THE COURT'S FEBRUARY 14, 2022 ORDER REGARDING PROSECUTOR'S ADMISSIONS**

The Court filed a Memorandum Opinion on February 14, 2022. On March 1, 2022 the State orally moved the Court to reconsider its ruling in Section "C. Prosecutor's Admissions," wherein the Court Granted Defendant's November 23, 2021 Motion to Take Judicial Notice of Adjudicative Facts; Motion for ruling that a Statement by the State's Prosecutor is an Admission by a Party-Opponent under S.D.C.L. § 19-19-801 (C) and (D). The State did not present any specific authority regarding the procedure of reconsideration, but the Court acknowledges that "a motion for reconsideration . . . is 'an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.'"[1] The Court now modifies its previous order.

The primary argument the State asserted in its initial written objection was that neither the State's Attorney nor their deputy prosecutors are party-opponents for purposes of Rule 801(d). In its February 14, 2022 Memorandum Opinion, the Court disagreed with the State's argument. The Court understands that the motion to reconsider is also focused on the State's continued assertion that prosecutors are not party-opponents in criminal cases.

[1] *People ex rel. S.M.D.N*, 2004 S.D. 5, ¶ 7 (internal citation omitted).

The State offered no authority to support their position that a prosecutor is not a party-opponent for purposes of Rule 801(d). But *there is* authority to support the position that prosecutors *are* party-opponents in criminal cases. "The Federal Rules of Evidence clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases."[2] Other courts have found "no authority to the contrary or reason to think otherwise."[3] The Court's understanding of this issue has not changed.

Although the Court is not persuaded that its ruling that prosecutors are party-opponents in criminal cases was incorrect, the reconsideration the Court conducted at the urging of the Assistant Attorney General reminds the Court that there is more to the potential admissibility of hearsay statements in this case than the State's status as party opponents. Here, the written passage in question[4] must be a "statement" as defined by Rule 801(a). And it must be offered against the State, at the defendant's trial. The Court has preliminarily resolved those questions in favor of the defendant. And often evidentiary issues can and should be resolved before trial. But upon reconsideration, the Court concludes that in was premature, in this case, for the Court to conclude that the written passage is unequivocally not hearsay pursuant to Rule 801(d)(2). To be clear, the Court could decide that the passage is admissible at trial, but the Court is vacating its pretrial ruling that the passage absolutely *is* admissible as non-hearsay.

Additionally, the Court has reconsidered its observation that the passage "is relevant." Although it appears, based on the representations in the State's December 31, 2021 objection,

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[2] *United States v. Morgan*, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978).
[3] *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988).
[4] The passage is "Defendant killed Ty by recklessly handling a firearm, pointing at directly Ty and pulling the trigger, in the belief that the gun was not loaded."

that the passage *will be* relevant at trial, it is too early for the Court to conclusively decide relevance. A determination of relevance will also benefit from a more developed record.

The Court also ruled that it would take judicial notice of the fact that the statement was made, treating it as an evidentiary admission. Because of the Court's modifications to its ruling, it is simply too early to conclude that the written passage is an evidentiary admission and should be subject to judicial notice. Such a determination can only be made after the Court properly concludes that the written passage is non-hearsay, relevant, and not inadmissible for any other reason.

Order

It is **ORDERED** that the decisions made in Section "C. Prosecutor's Admissions" of the Courts February 14, 2022 Memorandum Opinion are **MODIFIED** in accordance with this Memorandum Opinion. The defendant's underlying motion is **NEITHER GRANTED NOR DENIED** but will be addressed at trial.

Dated March 3, 2022.

BY THE COURT:

THE HONORABLE JEFFREY ROBERT CONNOLLY
CIRCUIT COURT JUDGE

ATTEST:
RANAE TRUMAN, CLERK OF COURTS
By:
Deputy
(SEAL)

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 03 2022
Ranae Truman, Clerk of Courts
By Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTION	)	SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,	*	File No.: 51CRI18-002863
	*	
Plaintiff,	*	**MOTION FOR A JUDGMENT OF**
v.	*	**ACQUITTAL; MOTION TO SET**
	*	**ASIDE VERDICT**
MAXTON PFEIFFER,	*	
	*	
Defendant.	*	

NOW COMES MAXTON PFEIFFER, the Defendant, by and through his attorney, Dana L. Hanna, and pursuant to SDCL §23A-23-3 (Rule 29(c)) and his state and federal constitutional rights to a fair trial and due process, hereby moves the Court to set aside the verdict and enter a judgment of acquittal or, in the alternative, to set aside the verdict and order a new trial. The Defendant Maxton Pfeiffer makes these motions on the grounds that the evidence presented in trial was insufficient as a matter of law to prove that the Defendant acted with criminal intent in causing the death of another person; that the Court's jury instructions were erroneous; and the Court's evidentiary ruling that deprived the Defendant of his right to present evidence of an exculpatory admission by the State violated his rights to due process and a fair trial.

FACTUAL AND LEGAL BACKGROUND

The indictment charged the Defendant Maxton Pfeiffer with one count of manslaughter in the first degree, in violation of SDCL §22-16-15(3), in that he caused the death of another person—Ty Scott—by the use of a deadly instrument without having any design to cause his death. The deadly instrument was a semi-automatic handgun that Maxton Pfeiffer mistakenly believed was not loaded. In the trial, it was undisputed by the State that Pfeiffer did not intend to discharge the gun. At the home of their friend, Cody Siemonsma, Pfeiffer picked up the handgun

from a dresser and while he waved the gun in the direction of Ty Scott and another friend, Joshio Villalobos, as a "joke," the gun discharged a bullet into the chest of his friend Ty Scott, causing his death.

At trial and in his statements to law enforcement investigators, the Defendant Max Pfeiffer stated that he believed there was no live round in the gun because he had removed the magazine from the pistol and had racked the slide to eject a round if one was in the chamber and no round was ejected. He offered expert testimony from a firearms expert who examined the gun and who testified that a mechanical malfunction that was caused by a mis-modification of the pistol had resulted in a failure to eject the round when Pfeiffer had racked the slide back to clear the pistol.

Whether Pfeiffer removed the magazine from the pistol before he racked the slide was a disputed fact in the trial. Whether Pfeiffer did or did not remove the magazine, Pfeiffer's testimony that he subjectively believed the gun was not loaded after he racked back the slide was not disputed by the State.

The Defendant did not deny that he had caused the death of Ty Scott without having any design to cause his friend's death or that he had done so by use of a handgun. His defense was that he had not acted with criminal intent when he caused the gun to fire a bullet.

At the close of the State's direct case, the Defendant moved for a judgment of acquittal, arguing there was no evidence from which a reasonable jury could conclude beyond a reasonable doubt that the Defendant had intentionally shot Ty Scott or that he had recklessly shot Ty Scott in conscious disregard of a substantial risk that a shooting would occur if he pulled the trigger of the gun.

Without identifying or articulating any specific or particular evidence from which a jury could make a finding that Pfeiffer had acted with the necessary criminal intent, the Court denied the Defendant's motion for a judgment of acquittal.

Jury instructions

Whether Pfeiffer acted with criminal intent was the fundamental contested issue in the trial. Criminal intent was the fundamental question of fact for the jury to decide and it was the fundamental disputed question of law for the trial judge to decide. At the State's request and over the objections of the Defendant, the Court instructed the jury that to prove Defendant's guilt, the State had to prove each of the elements of manslaughter in the first degree beyond a reasonable doubt and those elements of the crime charged were (1) the Defendant had caused the death of Ty Scott, (2) that he had done so with having any design to cause the death of Ty Scott, and (3) the Defendant had caused the death of Ty Scott by means of a deadly instrument. Over Defendant's objection, the Court did not instruct the jury that criminal intent is an element of the crime charged that had to be proven beyond a reasonable doubt. The Court stated that the three elements of manslaughter in the first degree, as he instructed, were the "*actus reus*" of the crime and because criminal intent—the "*mens rea*"—was not set forth in the statute, the Court would not instruct the jury that criminal intent was an element of the crime that had to be proven beyond a reasonable doubt.

Instead, the Court's instructions as to the *mens rea* required to prove the Defendant's guilt of manslaughter in the first degree consisted of two separate instructions—an instruction on general criminal intent and an instruction as to the meaning of "recklessness."

Instruction No. 19 on general criminal intent:

> "In the crime of MANSLAUGHTER IN THE FIRST DEGREE, the Defendant must have criminal intent. To constitute criminal intent it is not necessary that there should

exist a specific intent to violate the law. When a person intentionally or recklessly does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful."

Instruction No. 23 on recklessness:

"The words 'reckless' and 'recklessly' (or any derivative thereof) mean a conscious and unjustifiable disregard of a substantial risk that one's conduct may cause a certain result or may be of certain nature.

A person is reckless with respect to circumstance when a person consciously and unjustifiably disregards a substantial risk that such circumstance exists."

While the Court and the State's prosecutor agreed in the instruction conferences that the State had the burden to prove criminal intent, the Court declined the Defendant's request that the Court should so instruct the jury. The jury was not instructed that the State had the burden to prove criminal intent. The Court also declined the Defendant's request that the State had the burden to prove that the Defendant either intentionally shot Ty Scott or that he was reckless with regard to the shooting.

The Court also declined the Defendant's request that the Court instruct the jury on his theory of defense that a mistake of fact can negate criminal intent. The defense theory, as set forth in his requested instruction, was that if the Defendant reasonably but mistakenly believed the gun was not loaded, then he lacked the actual awareness of a substantial risk that the gun was loaded; therefore his firing of the gun was neither intentional nor reckless, and he lacked the criminal intent required to prove manslaughter in the first degree. The Court stated he would not instruct the jury on the defense of ignorance or mistake of fact, as set out in Pattern Jury Instruction No. 2-8-1, because, in the Court's view, that defense was not available to the Defendant, since proof of *mens rea*, or a particular mental state, was not set forth in the statute. The jury was given no instruction that a sincere and reasonable subjective mistake of fact could disprove the criminal intent required to prove manslaughter; i.e., a conscious disregard of a

known substantial risk that if he did a certain act—here, pulling the trigger of the gun—the gun would fire a bullet.

The Defendant made several requests for jury instructions that went to the *mens rea* required to prove manslaughter in the first degree, including requests for instructions that proof that the Defendant had acted negligently, rather than with a conscious disregard of a known substantial risk, was insufficient to prove his guilt of the crime charged. All such requests were denied by the Court. Although the Court did give the jury an instruction on general criminal intent, which instructed the jury that "In the crime of manslaughter in the first degree, the defendant must have criminal intent", the jury was never instructed that it was the State's burden to prove beyond a reasonable doubt that the Defendant acted with criminal intent or that the jury had to acquit the Defendant if the State failed to meet that burden. Nor was the jury instructed that the standard of proof for establishing criminal intent was beyond a reasonable doubt.

The Defendant requested that the Court, in its instruction, in addition to the pattern instruction the Court gave on general criminal intent, should further instruct the jury that "[t]o find the defendant guilty of manslaughter in the first degree the evidence must prove beyond a reasonable doubt that the Defendant either intentionally or recklessly did the act of shooting Ty Scott."

That request was denied by the Court.

Evidence Offered by Defendant as an Admission by a party-opponent to prove lack of criminal intent

Prior to trial, the Defendant made a motion in limine to allow the Defendant to introduce evidence of a written statement made by the then-lead prosecutor in the case that also went directly to the question of whether the Defendant had acted with the *mens rea* required to prove manslaughter by use of a gun. In a written response to the Defendant's motion to change the

conditions of his bond by allowing the Defendant to remove the electronic ankle monitor that the Court had ordered him to wear, the Deputy State's Attorney who was lead prosecutor in the case opposed the Defendant's motion. In her written response, she discussed the facts of the case. In that written response, which the State filed with the Court, the prosecutor affirmed the State's view of the evidence—stating that the Defendant had killed Ty Scott by recklessly pointing the gun at Ty Scott and pulling the trigger "in the belief that the gun was not loaded." In his motion in limine, the Defendant argued that the prosecutor's statement that the Defendant had acted "in the belief that the gun was not loaded" was an exculpatory admission by a party-opponent that went directly to disprove the State's theory that the Defendant had consciously disregarded a known substantial risk that the gun was loaded and would fire a bullet if the trigger was pulled.

The Defendant submitted that the prosecutor's written statement to the Court was admissible as an admission by a party-opponent under SDCL §19-19-801(c) and (d).

In a written order dated February 14, 2022, the Court agreed with the Defendant and granted his motion in limine seeking admission of the prosecutor's written statement as to the Defendant's mental state as an admission by a party-opponent under Rule 801(SDCL §19-19-801(c) and (d)). That part of the Court's Order is attached hereto as 'Exhibit A'. On February 28, 2022, the State moved for a continuance of the trial, which was scheduled to begin March 7, 2022, because the State intended to seek an interlocutory discretionary appeal of the trial court's order from the South Dakota Supreme Court. The trial court denied the motion for a continuance, and on March 2, 2022, the State filed its application for a permission to bring an interlocutory appeal with the Supreme Court. Then, on March 3, 2022, the trial court, acting *sua sponte*, reconsidered its ruling and vacated its order that granted the Defendant's motion to allow him to

offer the prosecutor's statements as a party-opponent's admission, stating that the Court would make a ruling on the question during the trial.

In trial, the Defendant again moved to offer the evidence that the State's attorney had stated to the Court in a legal document filed with the Court that the Defendant had acted "in the belief that the gun was not loaded." The Court then ruled that, while the State, through its prosecutor, is a party-opponent for purposes of Rule 801(b), the prosecutor's written statement was not admissible under that Rule and under Rule 403, it should be excluded because its probative value was outweighed by the risk of confusion of the jury and unfair prejudice to the State.

Jury deliberations and request for further instructions

In the State's final arguments, the prosecutor's argument was consistent with the instruction given to the jury by the Court that all the State had to prove to prove the Defendant's guilt were the three elements that the Court had set out in its instruction—and if the State proved that Maxton Pfeiffer had killed Ty Scott with no design to cause death, and he used a gun, he was guilty of manslaughter in the first degree. Defense counsel argued that Max Pfeiffer was not guilty because there was no evidence from which a jury could conclude beyond a reasonable doubt that he either intentionally fired the gun or that he consciously disregarded a known substantial risk that the gun was loaded.

On the first day of deliberations, the jury sent out a written request to the Court asking for further instructions on the meanings of "criminal intent" and "recklessness." The Defendant again requested the Court to give further instructions as to the *mens rea* required to prove manslaughter in the first degree and that the State had the burden to prove that *mens rea*—i.e.,

criminal intent. The Court declined to give the jury further instructions on those terms, advising the jury that they should rely on the instructions already given.

After deliberating over the course of two days and some 14 hours, the jury returned a verdict of guilty.

LEGAL ARGUMENT

I.

The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that the Defendant had either intentionally or recklessly shot Ty Scott.

There was no allegation by the State or any evidence that the Defendant had intentionally shot Ty Scott. It was undisputed that the shooting was unintentional. Therefore, the question to be decided by the jury was whether Maxton Pfeiffer had recklessly caused the death of Ty Scott. Instead of correctly instructing the jury that proof of criminal intent was an element of the crime that had to be proven, the Court instructed the jury that the State met its burden of proof if the evidence proved that the Defendant committed the act that caused the death of Ty Scott, that he had no design to cause his death, and that he used a deadly instrument in the act of causing the death. For all intents and purposes, in its charge on the elements of the crime that have to be proven, the Court charged the jury as if first degree manslaughter is a strict liability crime. This was a clear error of law that deprived the Defendant of a fair trial.

While it is not expressly stated in the statute, criminal intent—the requisite *mens rea*—is unquestionably an element of the crime of manslaughter in the first degree.

The term "elements of crime" is defined in Black's Law Dictionary (Tenth edition) as:

> "The constituent parts of a crime—usu. consisting of the actus reus, mens rea, and causation that the prosecution must prove to sustain a conviction. [ ] The term is more broadly defined by the Model Penal Code in §1.13(9) to refer to each component of the actus reus, causation, the mens rea, any grading factors, and the negative of any defense."

Here, where the crime charged is manslaughter in the first degree by the use of a dangerous instrument, *mens rea*—criminal intent—must be proven and proven beyond a reasonable doubt. That, by definition, makes *mens rea* an element of the crime. The Court's stated rationale for not instructing the jury that criminal intent is an element of the crime that must be proven was that only the *actus reus* was set forth in the statute. But the South Dakota Supreme Court has repeatedly expressed and recognized that to prove a Defendant guilty of manslaughter in the first degree, the State must prove that the Defendant caused a death while acting with criminal intent, either by intentionally committing the act or by recklessly committing the act.

The United States Supreme Court has recognized and stated that even if a statute makes no mention of a *mens rea* element to a crime, unless a contrary intention is clearly expressed, the courts will judicially recognize a *mens rea* element to the crime.

> "Criminal offenses requiring no *mens rea* have a generally disfavored status. The failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law. Moreover, to interpret the statute to dispense with *mens rea* would be to criminalize a broad range of apparently innocent conduct. In addition, requiring *mens rea* in this case is in keeping with the established principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."

Liparota v. United States, 471 U.S. 419, 425-428, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985).

That is exactly what the South Dakota Supreme Court has done in the several opinions in which the Court recognizes and analyzes the need to prove criminal intent by a standard of recklessness (as opposed to negligence) in first degree and second degree manslaughter cases. That Court has judicially interpreted the statutes to include a requisite *mens rea* element of the crime, even though no *mens rea* element is expressly stated in the criminal statute.

Thus, in *State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808. 815, a first degree manslaughter case involving a shooting death, even though the statute makes no mention of a *mens rea* element, the Supreme Court stated that "to convict [the defendant] of manslaughter, there must be sufficient evidence that she intended to fire the gun or that she was reckless with respect to the shooting." See also, *State v. Birdshead*, 871 N.W.2d 62, 69 (S.D. 2015), which also involved a shooting death.

See, also, *State v. Olsen*, 462 N.W.2d 474, 476 (S.D.1990)("[F]or someone's conduct to be deemed reckless, they must consciously disregard a substantial risk."). Recklessness requires more than ordinary negligent conduct.

Awareness and cognizance of the risk, and disregarding that risk, are factors that bring an actor's conduct to the level of recklessness. "The reckless actor is aware of the risk and disregards it; the negligent actor is not aware of the risk but should have been aware of it." *State v. Olsen*, 462 N.W.2d 474, 476-477 (S.D.1990).

Both before the final instructions were given to the jury and after the jury had asked for further instructions on criminal intent and recklessness, the Defendant requested the Court to give the jury more specific instructions on the *mens rea* element, including further instructions on the State's burden to prove recklessness in committing the act that caused the death. Those requests were denied by the Court and the Court gave the jury no instructions as to proof of *mens rea*, other than the two instructions on general criminal intent and the definition of recklessness.

Because of the Court's failure to charge the jury that *mens rea* was an element of first degree manslaughter, the State was able to argue that if the evidence proved the *actus reus*, it had proven the crime. That is, after all, what the Court had charged the jury in its instruction on the elements of first degree manslaughter.

This Court should rule that there was insufficient evidence—indeed, no evidence—upon which a reasonable jury could have found that the defendant had either intended to fire the gun or that he was "reckless with respect to the shooting." (*State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808. 815). The Court should order a judgment of acquittal. If the Court denies the motion, the Defendant would respectfully urge the Court, for the benefit of a clear record, to articulate and identify any evidence in the record upon which a jury could have found that Defendant had acted with the requisite criminal intent to fire the gun or to recklessly disregard a known risk that the gun was loaded.

If the Court declines to order a judgment of acquittal, the Court should set aside the verdict of guilty and order a new trial. The Court's failure to charge the jury that criminal intent is an element of the crime of first degree manslaughter that must be proven beyond a reasonable doubt was a clear error of law that deprived the defendant of a fair trial and due process.

II.

The Court's failure to charge the jury on the Defendant's theory of defense as to ignorance or mistake of law deprived the Defendant of a fair trial.

The Defendant requested the Court to instruct the jury on his theory of defense, which was that he was acting under a mistake of fact that the gun was not loaded and that mistaken belief of fact negated criminal intent.

Pfeiffer requested the Court to give an instruction that was approved as a correct statement of law in *State v. Woodfork*, 454 N.W.2d 332 (S.D.1990) and *State v. Roach*, 2012 S.D. 91, 825 N.W.2d 258, (2012), and is a South Dakota pattern jury instruction: "An act is not a crime when committed or omitted under an ignorance or mistake of fact which disproves any criminal intent. Where a person honestly believes certain facts, and acts or fails to act based upon

a belief in those fact[s], which, if true, would not result in the commission of a crime, the person is not guilty."

"[A] defendant in a criminal case is entitled to an instruction on his theory of the case if there is evidence to support it and a proper request is made." *United States ex. rel Means v. Solem*, 646 F.2d 322, 328 (8th Cir.1980). See also: *State v. Frey*, 440 N.W.2d 721 (1989).

Here, the Defendant Max Pfeiffer testified that he acted under the mistaken belief that the gun was not loaded and that he believed that because he had taken actions that he believed had cleared the gun of any live rounds. He also offered expert testimony as to why he had reason to mistakenly believe that the gun was not loaded.

The Court declined to give the jury any instruction on the law of mistake of fact as negating criminal intent or any instruction on the Defendant's theory of defense.

It is well established that '[a] criminal defendant is entitled to an instruction on his theory of the case when evidence exists to support his theory.' *State v. Charles*, 2001 S.D. 67, ¶19, 628 N.W.2d 734, 738 (citing *State v. Charger*, 2000 S.D. 70, ¶40, 611 N.W.2d 221, 229). Jury instructions are adequate when 'they give the full and correct statement of the law applicable to the case.' *State v. McVay*, 2000 S.D. 72, ¶18, 612 N.W.2d 572, 576 (citation omitted). Although errors in instructing the jury do not invariably rise to a constitutional level, 'if the error goes to the heart of a defendant's theory of defense it can infringe upon defendant's rights to due process and jury trial.' *Miller v. State*, 338 N.W.2d 673, 676 (S.D. 1983) (citing *Zemina v. Solem*, 438 F.Supp. 455 (D.S.D.1977) aff'd, 573 F.2d 1027 (8th Cir.1978)). When there is evidence to support a criminal defendant's theory of the case, he or she is entitled to an instruction on the theory. *Charger*, 2000 S.D. 70, ¶40, 611 N.W.2d at 229.

The Court declined to instruct the jury on the Defendant's theory of defense or give any instruction on mistake of fact. The Court did not decline to give any such instruction because it was an incorrect statement of law or because there was no evidence in the record to support it. The Court stated it was denying the Defendant's requested instruction because the instruction and the mistake of fact theory of defense went to proof of the mental state of the Defendant, which was not set forth in the criminal statute as an element of the crime. This was an error in instructing the jury that went to the heart of the Defendant's theory of defense (*Miller v. State*, 338 N.W.2d 673, 676 (S.D. 1983)), and that error of law deprived the Defendant of a fair trial and due process.

For that reason, the Court should set aside the verdict.

III.

The Court's refusal to allow the Defendant to offer a prosecutor's written statement to the Court that Defendant had acted "in the belief that the gun was not loaded" as an admission by a party- opponent was an abuse of discretion that violated the defendant's rights to due process and a fair trial.

In its written Order of February 14, 2022, (Exhibit 'A") the Court ruled that that the prosecutor's written admission that the Defendant had acted "in the belief that the gun was not loaded" was admissible as an admission by a party-opponent under Rule 801(SDCL §19-19-801(c) and (d)). For all the reasons set forth by the Court in that Order, that was a correct ruling of law. But after the State filed an application for permission to seek an interlocutory appeal of that Order, the Court reversed itself, first vacating its order, then, in trial, denying the Defendant's offer of that exculpatory statement as an admission by a party-opponent. The Court ruled, during the trial, that the prosecutor's statement to the Court that the defendant had acted in the belief that the gun was not loaded, was made by a party-opponent but it was nevertheless inadmissible as an admission by a party-opponent and should also be excluded under Rule 403.

Again, the Court's ruling was based on the Court's misunderstanding as to the constitutional necessity of proving criminal intent as an element of the crime charged.

The Court was clearly in error when it ruled that the statement by the State that defendant believed that the gun was not loaded was not relevant to the elements of the crime that had to be proven. That statement was an exculpatory statement that went to the heart of the Defendant's theory of defense: if he believed the gun was not loaded, then he was not acting in conscious disregard of a substantial risk that the gun was in fact loaded. One cannot consciously disregard a risk that one does not believe to exist. This evidence alone was powerful exculpatory evidence that could well have meant the difference between acquittal and conviction. By depriving the defendant of his right to present that exculpatory evidence as to his lack of criminal intent to the jury, the Court abused its discretion and deprived the Defendant of his right to present a defense, his right to due process, and his right to a fair trial.

CONCLUSION

Each of the aforesaid errors—including the Court's failure to instruct the jury that the Defendant's criminal intent is an element of the crime that must be proven beyond a reasonable doubt, the Court's refusal to instruct the jury on the Defendant's theory of mistake of fact as a defense, and the Court's refusal to allow the Defendant to offer a prosecutor's exculpatory statement as to the Defendant's lack of criminal intent as an admission by the State—deprived the Defendant Maxton Pfeiffer of a fair trial and due process of law.

WHEREFORE, the Defendant Maxton Pfeiffer moves the Court to order a judgment of acquittal; should the Court deny that motion, the Defendant Maxton Pfeiffer moves the Court to set aside the verdict and order a new trial.

Dated this 28th day of March, 2022.

MAXTON PFEIFFER,

By: */s/ Dana L. Hanna*

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for a Judgment of Acquittal; Motion to Set Aside Verdict by electronic filing to the parties listed as follows:

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Dated this 28th day of March, 2022.

/s/ Dana L. Hanna
Dana L. Hanna

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS.		
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA)		51CRI18-002863
)		
Plaintiff,)		
)		**ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL; MOTION TO SET ASIDE VERDICT**
vs.)		
)		
MAXTON PFEIFFER,)		
)		
Defendant.)		

Defendant was convicted by a jury of First Degree Manslaughter. After trial, defendant moved for a judgment of acquittal pursuant to S.D.C.L. § 23A-23-3, or Rule 29. "A challenge to the sufficiency of the evidence being the only ground for the motion, the basis for a Rule 29(a) motion 'need not be stated with specificity.'"[1] Defendant, however, argues that the "evidence presented in trial was insufficient as a matter of law to prove that the Defendant acted with criminal intent," that "the Court's jury instructions were erroneous," and "the Court's evidentiary ruling . . . deprived [him] of his right . . . to due process and a fair trial." "When reviewing the sufficiency of the evidence, the Court considers '[w]hether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'"[2] "Claims of insufficient evidence are 'viewed in the light most favorable to the verdict.'"[3] "If the evidence, including circumstantial evidence and

[1] *State v. Guthrie*, 2001 S.D. 61, ¶ 46.
[2] *State v. Ahmed*, 2022 S.D. 20, ¶ 14.
[3] *State v. Hauge*, 2013 S.D. 26, ¶ 12.

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reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside."[4]

The Court presided over the trial and has reviewed the submissions. The state introduced evidence, which was sufficient to support the jury's verdict. The other issues raised by defendant, concerning jury instructions and evidentiary rulings, are beyond the scope of a motion for a judgment of acquittal. They are appellate issues. Accordingly, defendant's motion is **DENIED.**

Order

It is **ORDERED** that defendant's motion for a judgment of acquittal; motion to set aside verdict is **DENIED.**

Dated April 27, 2022.

BY THE COURT:

THE HONORABLE JEFFREY ROBERT CONNOLLY
CIRCUIT COURT JUDGE

ATTEST:
RANAE TRUMAN, CLERK OF COURTS

By: _____
Deputy
(SEAL)

[4] *Id.*

Pennington County, SD
FILED
IN CIRCUIT COURT
APR 28 2022
Ranae Truman, Clerk of Courts
By _____ Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30120

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MAXTON JAMES PFEIFFER,

Defendant and Appellant.

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

THE HONORABLE JEFFREY R. CONNOLLY
Circuit Court Judge

APPELLEE'S BRIEF

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AND APPELLANT

Notice of Appeal filed September 19, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30120

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MAXTON JAMES PFEIFFER,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Maxton James Pfeiffer, is referred to as "Defendant." Defendant's Brief is denoted as "DB." The settled record in the underlying case is denoted as "SR." Trial exhibits are referenced as "Ex" followed by the exhibit number and time stamp if applicable. All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On August 26, 2022, the Honorable Jeffrey R. Connolly, Circuit Court Judge, Seventh Judicial Circuit, filed a Judgment of Conviction in *State of South Dakota v. Maxton James Pfeiffer*, Pennington County Criminal File Number 51CRI18-002863. SR:1754-55. The same day, the circuit court filed an Order Denying Defendant's Motion to Stay

Execution of Sentence and Order Denying Defendant's Motion for Bail Pending Appeal. SR:1753. Defendant filed two separate Notices of Appeal on September 19, 2022. SR:1762-65. The Notice of Appeal for the Order Denying Bail is appeal number 30284. The Notice of Appeal for the Judgment of Conviction is this case, appeal number 30120. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY REGARDING INTENT?

The circuit court gave separate jury instructions on the actus reus and intent.

State v. Birdshead, 2015 S.D. 77, 871 N.W.2d 62

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808

State v. Ortiz-Martinez, 2023 S.D. 46, ___ N.W.2d ___

SDCL 22-16-15(3)

II.

WHETHER THE CIRCUIT COURT PROPERLY REJECTED DEFENDANT'S PROPOSED MISTAKE OF FACT INSTRUCTION?

The circuit court denied Defendant's proposed mistake of fact instruction, reasoning that it misstated the law.

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

State v. Ortiz-Martinez, 2023 S.D. 46, ___ N.W.2d ___

State v. Waugh, 2011 S.D. 71, 805 N.W.2d 480

United States v. Iron Eyes, 367 F.3d 781 (8th Cir. 2004)

III.

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY PROHIBITING A DEPUTY STATE'S ATTORNEY'S WRITING FROM BEING ADMITTED AT TRIAL AS EVIDENCE?

The circuit court denied Defendant's motion to take judicial notice of what the Deputy State's Attorney wrote, reasoning that the proffered evidence was irrelevant at trial.

Kurtz v. Squires, 2008 S.D. 101, 757 N.W.2d 407

State v. Bausch, 2017 S.D. 1, 889 N.W.2d 404

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

SDCL 19-19-401

SDCL 19-19-403

SDCL 19-19-801

IV.

WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN DEFENDANT'S CONVICTION?

The circuit court denied Defendant's Motion for Judgment of Acquittal, finding the State presented sufficient evidence for the jury to convict Defendant.

In re D.M.S., 170 N.E.3d 61 (Ohio Ct. App. 2021)

Ohio v. Perrien, 152 N.E.3d 897 (Ohio Ct. App. 2020)

State v. Caffee, 2023 S.D. 51, ___ N.W.2d ___

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808

SDCL 22-16-15(3)

STATEMENT OF THE CASE

On June 27, 2018, in *State of South Dakota v. Maxton James Pfeiffer*, Pennington County Criminal File Number 51CRI18-002863, a grand jury issued an Indictment charging Defendant with one count of first-degree manslaughter in violation of SDCL 22-16-15(3), a Class C felony. SR:35. The victim was Ty Robert Scott. SR:35.

The case proceeded to a jury trial on March 7, 2022. SR:3662-877. At the end of the State's case, Defendant moved for judgment of acquittal. SR:3334-37. Defendant argued that the State failed to show Defendant acted recklessly. SR:3334. The circuit court denied the motion and the case proceeded to Defendant's case-in-chief. SR:3340.

Before closing arguments, the parties settled jury instructions. SR:3140-98; *see* SR:1241-67 (Final Jury Instructions). After closing arguments, the case was given to the jury. SR:3232. On March 15, 2022, the jury found Defendant guilty of first-degree manslaughter. SR:1284.

Defendant filed a Motion for Judgment of Acquittal and Motion to Set Aside the Verdict. SR:1314-35. The State opposed the motions. SR:1338-41. The circuit court denied the motions. SR:1351-52.

On August 24, 2022, a sentencing hearing was held before the Honorable Jeffrey R. Connolly, Circuit Court Judge, Seventh Judicial Circuit. SR:3022. The circuit court sentenced Defendant to thirty years in the South Dakota State Penitentiary with twenty-three years

suspended, and credit for time previously served. SR:3135. The circuit court imposed restitution and various costs. SR:3135.

On August 25, 2022, the circuit court entered a Judgment of Conviction, which was filed on August 26, 2022. SR:1753-55. On September 19, 2022, Defendant appealed. SR:1762-66.

STATEMENT OF FACTS

On June 13, 2018, in Keystone, South Dakota, Defendant raised a .45-auto caliber Charles Daly model 1911 semi-automatic pistol and shot nineteen-year-old Ty Robert Scott. SR:1983, 2005, 2913; Ex:2. Defendant admitted at trial that he intentionally picked up the gun, swept the room with it, and pointed the gun in the direction of other people. SR:3521. He admitted that he killed Ty with the gun. SR:3522.

Earlier in the evening on June 13, 2018, Ty, Cody Siemonsma, Joshio Villalobos, and Damon Picotte gathered at Cody's studio apartment to hang out, talk, and watch YouTube. SR:2005-16, 2239, 2957. Elisabeth Black Cloud arrived later and then Defendant arrived sometime around 8:00 p.m. SR:2031, 3485.

Damon testified at trial that he brought to the apartment a newly-purchased .38 Special revolver handgun. SR:2178; *see* SR:2014, 2957. The .38 was passed around by the group. SR:2181. Damon testified that Defendant "dry fired" the .38, meaning Defendant pulled the trigger without a round loaded in the gun. SR:2178, 2185. Damon also testified that he compared his .38 to Cody's .45-auto caliber Charles Daly

model 1911 semi-automatic pistol. SR:2185-86. When Damon finished comparing the guns, Cody inserted the magazine in the .45 and placed it on his dresser. SR:2197. Then, Damon either handed Joshio the .38 or placed it on the television stand. SR:2204-07, 2243. Damon and Elisabeth went outside. SR:2031, 2186-87, 2243.

Defendant subsequently picked up the .45. SR:3495-97. Joshio testified that he was sitting next to Ty on the couch watching YouTube when he heard a gunshot. SR:2245. Joshio testified that Defendant had shot Ty with the .45 from approximately ten feet away. SR:2246. Joshio saw Ty stand up and then fall down. SR:2245. Ty had blood coming out of his mouth. SR:2246. Defendant stated, "I checked. I checked the gun." SR:2246-47. Joshio yelled, "call 911," and ran out of the apartment. SR:2249.

Cody testified that he was exiting the apartment and standing in the hallway when he heard what he thought was a firework. SR:2032, 2043. Cody looked back in his apartment and saw Ty fall. SR:2043. Cody called 911 and testified that he ran outside to wait for the ambulance. SR:2035; Ex:2.

Defendant also called 911. SR:3501; Ex:3. Defendant rendered first aid to Ty as directed by the 911 operator. SR:2293, 3501; Ex:3. Emergency Medical Technicians from the fire department and ambulance

soon arrived. SR:2281; Ex:3 at 0:05:30. EMTs subsequently pronounced Ty deceased.[1] SR:2313.

Law enforcement was dispatched to the scene at about 8:22 p.m. SR:2332. Trooper Paige Erickson of the South Dakota Highway Patrol testified that she was the first law enforcement officer to arrive. SR:2364-67. The scene was chaos with people running around, screaming, and crying. SR:2367. EMTs were already inside the apartment as Trooper Erickson entered. SR:2367-68. An EMT pointed to the .45 laying on a table and asked Trooper Erickson to make sure it was safe. SR:2368; *see* SR:2296. The .45 did not have a magazine in it, but two magazines were beside it. SR:2372; *see* Ex:10-12. The .45 could have a round in the chamber even without a magazine in it, so Trooper Erickson racked the slide back to see inside the .45. SR:2371-72. Indeed, ammunition was inside the .45 and one live round ejected itself onto the floor. SR:2371-72. Trooper Erickson picked up the ejected round and placed it on a table. SR:2372; *see* Ex:10-12. Trooper Erickson locked the slide back and placed the .45 on the table. SR:2372-74; *see* Ex:10-12.

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[1] Donald Habbe, an expert in forensic pathology, performed an autopsy on Ty. SR:2928-31. He determined that a bullet went through Ty's right arm, through his lungs, through his heart, exited his left chest, and entered the side of his left arm. SR:2932. Dr. Habbe concluded that the cause of death was a gunshot wound to the chest. SR:2938.

As more law enforcement arrived, Defendant was placed in a patrol vehicle belonging to Ranger Steve Wollman of the United States National Parks Service. SR:2331, 2343. During trial, a video recorded from inside the patrol vehicle was played for the jury. SR:2343, 2347, 2255-56; *see* Ex:9. The following exchange occurred:

> Ranger Wollman: What's going on?
>
> Defendant: Me, Ty, Joshio, and Cody and then ah they were just sitting there, and they were all holding guns and stuff.
>
> Ranger Wollman: Okay.
>
> Defendant: And then they were all empty. And then they're pointing them at each other, and then he points one at me, and then they're just joking. They're just sitting there shooting it like a cap gun.
>
> Ranger Wollman: Who?
>
> Defendant: Joshio or so I don't know. I don't know. I don't remember. I wasn't.
>
> Ranger Wollman: Okay.
>
> Defendant: I then I picked one up too and I take out the thing and jack a shell out and nothing came out and I looked in there and didn't see anything in there, so I did a practice shot.

Ex:9 at 20:41:20-42:17.

A few hours after the shooting, Deputy Sheriff Kent Przymus of the Pennington County Sheriff's Office conducted an interview of Defendant at the Public Safety Building in Rapid City, South Dakota. SR:2941-51; *see* Ex:55 at 01:50:30. Defendant's interview was played for the jury. SR:2955. Defendant stated that Damon gave him the .38, Defendant

looked at it, gave it back to Damon, and Damon gave it to Joshio. Ex:55 at 01:59:00. Joshio then was "popping fake shots" at Defendant. Ex:55 at 02:00:50. Defendant reported that he grabbed the .45, took out the magazine, racked the slide back on the gun, nothing came out, so he "assumed it was good." Ex:55 at 02:01:00. Law enforcement clarified, "Do you remember seeing that chamber actually empty or just nothing came out?" Ex:55 at 02:11:30. Defendant responded, "Nothing came out. I didn't get inside and look at it." Ex:55 at 02:11:30. Defendant stated he then waved the gun around to mess with Joshio as a joke and it went off. Ex:55 at 02:01:20, 02:03:20. Defendant stated that he did not remember pulling the trigger and had his finger on the guard, but he "could have done it, though." Ex:55 at 02:03:30, 02:11:40. Defendant revealed that he was familiar with semiautomatic handguns and shot plenty of them. Ex:55 at 02:06:55.

Mateo Serfontein, a forensic firearm's expert, testified that he worked for the South Dakota Division of Criminal Investigation in the Pierre, South Dakota, lab as a forensic firearms and tool mark examiner. SR:2902-05. Serfontein performed an examination on the .45 and did not observe any functioning or mechanical issues. SR:2916. The .45 ejected properly and loaded through the magazine properly. SR:2917. Serfontein testified that if a round was found in the chamber after the .45 was shot, the magazine was in the .45. SR:2910; *see* SR:2963.

Serfontein also compared markings on bullets from the .45 with the bullet removed from Ty at autopsy. SR:2921. He concluded that the bullet that killed Ty was fired from the .45. SR:2921.

Irving Stone, an expert in firearms and firearm functionality, testified about gun safety. SR:2825, 2829-39. He testified that the number one rule is "do not point the firearm at anything you do not plan to shoot, period." SR:2825-26. The second rule is always check that the firearm is unloaded. SR:2826. The third rule is "you keep your finger off the trigger until you're ready to shoot." SR:2826.

Stone also testified about how to shoot the .45. SR:2830-86. First, to load the .45 that has a magazine in it, a person racks the slide, lets the slide come forward to pick up a round from the magazine, and the slide puts the round in the chamber. SR:2862. Two safeties—a grip safety and a thumb safety—must be disengaged. SR:2837-39; *see* SR:2974. Then, about four and a half pounds of pressure is required to pull the trigger. SR:3846. When both safeties are disengaged and the trigger is pulled, a bullet will shoot out and the casing will extract. SR:2835. The slide will automatically come back and grab the next round out of the magazine and load the round in the chamber. SR:2834-37. If the .45 is fired without a magazine in it, the only way a round could be found in the chamber is by pulling the slide back and physically dropping a round into the chamber. SR:2860.

To make the .45 safe, Stone testified that first he would remove the magazine. SR:2826, 2854. He would pull the slide back with his finger off the trigger while pointing the gun in a safe direction. SR:2854. If a round was in the chamber, it would eject out. SR:2836. He would lock the slide back. SR:2854. He would visually look down in the chamber and stick his finger in the chamber. SR:2854-55. If the round did not eject, Stone stated that he would absolutely see the round in the chamber. SR:2856-57. Stone concluded that the .45 extracted live rounds properly and was a safe weapon. SR:2859.

Defendant's counsel called Dave Lauck, an expert in firearms and the model 1911 pistol, to testify at trial. SR:3362, 3368. Lauck testified that when he inspected the .45, it was in reasonably clean condition. SR:3372-74, 3399. Lauck fired the .45 and agreed that it functioned correctly. SR:3426.

At first, Lauck testified that he believed that on June 13, 2018, the .45 malfunctioned and experienced "bullet-nose binding." SR:3413-14. Lauck contended that when Defendant racked the slide to eject the round, the gun malfunctioned, and a live cartridge fell back in the chamber when the slide was released. SR:3413-14. The slide snapped forward, the extractor snapped over the cartridge, and the gun was ready to fire. SR:3413-14.

Yet, Lauck admitted on cross-examination that the evidence he observed of bullet-nose binding in the .45 could have occurred before Ty

was shot or when the lab conducted testing on the gun. SR:3421. Lauck also admitted that he could not say for certain if the gun malfunctioned on June 13, 2018. SR:3422.

Even Lauck agreed that Defendant "violated at least three out of the four primary safety rules." SR:3417. If Defendant cleared the .45, Ty would not be dead. SR:3453. Lauck would never clear a weapon in a well-lit area without a visual inspection that the round was extracted. SR:3437. Lauck testified that the trigger must have been "moved to the rear" and both safeties disengaged for the .45 to fire. SR:3442. Lauck agreed that four and a half pounds of pressure was required for the trigger to be "moved to the rear." SR:3442-43.

Lastly, Lauck testified that if a magazine was in the .45 when Defendant shot Ty, a bullet would be loaded in the chamber whether or not there was bullet-nose binding. *See* SR:3452-53. If there was bullet-nose binding, then the bullet that had bullet-nose binding would be in the chamber. SR:3452-53. If there was not bullet-nose binding and a shell was ejected or no shell was in the chamber to eject, the .45 would cycle a round from the magazine into the chamber. SR:3452-53.

Defendant testified at trial. SR:3477. Defendant testified that he has hunted and shot handguns.[2] SR:3483. He acknowledged that a gun

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[2] Cody also testified that Defendant was familiar with guns and Defendant owned his own guns. SR:2040-41. Cody testified that he would go coyote hunting with Defendant often, sometimes every weekend. SR:2040.

should never be pointed in the direction of anybody, and a gun should always be treated as if it is loaded. SR:3515. Defendant understood that the magazine must be taken out of the gun before he racked the slide to make it safe. SR:3496. Defendant testified that he grabbed the .45 and took it out of the holster. SR:3495-97. Defendant testified that he did not hold the .45 up and look into it and "[he] didn't take a long time to really look at what [he] was doing" when he racked the slide. SR:3520. Defendant admitted he intentionally picked up the .45, swept the room, and pointed it in the direction of other people. SR:3521. He admitted that he intended to engage in the motions of a practice shot. *See* SR:3521-22. He admitted that he killed Ty with the .45. SR:3522.

ARGUMENTS

I.

THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY REGARDING INTENT.

A. *Background.*

On appeal, Defendant argues that the circuit court erred regarding Jury Instructions 16, 19, and 23. He argues that the reckless instruction should have been listed as a fourth element in Instruction 16 and the State's burden of proof should have been repeated in Instructions 19 and 23. DB:18, 20. In support of his arguments, Defendant cites *State v. Mulligan*, 2007 S.D. 67, 736 N.W.2d 808, and *State v. Birdshead*, 2015 S.D. 77, 871 N.W.2d 62, but both cases support

the circuit court's instructions. No relief is justified because the instructions as a whole correctly state the law and inform the jury.

During the settling of jury instructions, the parties did not dispute the following language of Instruction 16:

> The elements of the crime of Manslaughter in the First Degree as charged in the Indictment, each of which the State must prove beyond a reasonable doubt, are that at the time and place alleged:
>
> 1. The Defendant caused the death of Ty Robert Scott.
>
> 2. The killing by the Defendant was by means of a dangerous weapon.
>
> 3. The Defendant did so without any design to effect the death of Ty Robert Scott.

SR:3154-55, 3160-62.

However, Defendant proposed that either of the following sentences be added as a fourth element: "in doing the act of the shooting of Ty Robert Scott, the defendant acted with criminal intent;" or "the State has the burden of proving that the defendant recklessly killed Ty [Robert] Scott." SR:3155-56. Defendant preferred the "recklessly killed" fourth element, but the "criminal intent" element was an alternative. SR:3156. Defendant reasoned that criminal intent is an element that the State must prove beyond a reasonable doubt so it should be included with the other elements. SR:3159. Defendant argued that the jury would be misled or confused if criminal intent was a separate instruction. SR:3160.

The State opposed the request, arguing that the actus reus and intent elements have historically been split into different instructions, which is reflected in the South Dakota Criminal Pattern Jury Instructions ("Pattern Instruction"). SR:3160. The State further argued that the correct mens rea is general intent, which means a person intentionally or recklessly does an act, but criminal intent is not one of the elements. SR:3160. Lastly, the State argued that other proposed instructions sufficiently instructed the jury on intent. SR:3160.

The circuit court held that intent would be addressed as a separate instruction. SR:3161. The circuit court reasoned that the Pattern Instruction does not include the mens rea element with the actus reus elements, and it was unaware of any case that did so. SR:3161.

When settling Instruction 19, the intent instruction, Defendant proposed the following language: "to find the defendant guilty of manslaughter in the first degree the evidence must prove beyond a reason[able] doubt that the defendant either intentionally or recklessly did the act of shooting Ty Scott." SR:3163. Defendant relied on *Mulligan* and *Birdshead*. SR:3163. Defendant also proposed the following language: "the State has the burden of proving that the defendant acted with criminal intent beyond a reasonable doubt, of proving beyond a reasonable doubt that the defendant acted with criminal intent." SR:3164.

The State opposed Defendant's request, arguing that the instructions in *Birdshead* are not the instructions Defendant was requesting and do not support Defendant's request. SR:3165-66. The State also argued that the instructions are read as a whole. SR:3166.

The circuit court held that it was not going to give a different instruction than Instruction 27 in *Birdshead*. SR:3169. The circuit court reasoned that Defendant relied on *Birdshead* for his argument, so it would give the instruction from *Birdshead*. SR:3169-70.

Instruction 19, which was read to the jury, states:

> In the crime of MANSLAUGHTER IN THE FIRST DEGREE, the Defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally or recklessly does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know the conduct is unlawful.

SR:1250; *see* SR:3170.

When settling Instruction 23, the reckless definition instruction, Defendant proposed the following:

> The words "reckless" or "recklessly" means a conscious and unjustifiable disregard of a substantial risk that one's conduct may cause a certain result or may be of a certain nature.
>
> A person is reckless with respect to circumstances when the person consciously and unjustifiably disregards a substantial risk that such circumstances may exist. For conduct to be considered reckless it must create a high degree of risk of which the actor is actually aware.

> Evidence of negligence, carelessness, inadvertence or other similar behavior is insufficient to sustain a conviction where reckless conduct is required.
>
> The difference between reckless behavior and negligent behavior is primarily measured by the state of mind of the individual. It is the concept of conscious disregard that distinguishes recklessness from negligence. The negligent actor fails to perceive a risk that he ought to perceive. The reckless actor perceives or is conscious of the risk, but disregards it.
>
> Evidence that the defendant failed to perceive a risk that he ought to have perceived is insufficient to prove that the defendant acted recklessly.

SR:1027, 3183.

The State opposed Defendant's request, arguing Pattern Instruction 1-11-3 was appropriate and is how the instructions were given in *Birdshead*. SR:3185. The circuit court denied Defendant's proposed instruction, reasoning that it would give the Pattern Instruction. SR:3185-86.

Instruction 23, which was read to the jury, states:

> The words "reckless" or "recklessly" (or any derivative thereof) mean a conscious and unjustifiable disregard of a substantial risk that one's conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances when a person consciously and unjustifiably disregards a substantial risk that such circumstance exists.[3]

SR:1253.

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[3] Instruction 23 mirrors SDCL 22-1-2(1)(d).

B. *Standard of Review.*

This Court generally reviews a circuit court's denial of a proposed jury instruction for an abuse of discretion. *State v. Ortiz-Martinez*, 2023 S.D. 46, ¶ 36, ___ N.W.2d ___ (quoting *State v. Schumacher*, 2021 S.D. 16, ¶ 25, 956 N.W.2d 427, 433). "Error in declining to apply a [correct] proposed instruction is reversible only if it is prejudicial, and the defendant has the burden of proving any prejudice." *Id.* (quotation omitted). But "a court has no discretion to give incorrect or misleading instructions." *State v. Nelson*, 2022 S.D. 12, ¶ 42, 970 N.W.2d 814, 828. This Court "considers jury instructions as a whole, and if they correctly state the law and inform the jury, they are sufficient." *Ortiz-Martinez*, 2023 S.D. 46, ¶ 36 (quoting *Nelson*, 2022 S.D. 12, ¶ 42, 970 N.W.2d at 828 (cleaned up)). This is a question of law reviewed de novo. *Birdshead*, 2015 S.D. 77, ¶ 14, 871 N.W.2d at 70.

C. *The Circuit Court Properly Informed the Jury on Intent and the State's Burden of Proof.*

A jury found Defendant guilty of first-degree manslaughter in violation of SDCL 22-16-15(3). SDCL 22-16-15(3) provides, "[h]omicide is manslaughter in the first degree if perpetrated . . . (3) without any design to effect death, . . . but by means of a dangerous weapon." SDCL 22-16-15(3). A firearm is a dangerous weapon as a matter of law. SDCL 22-1-2(10).

First-degree manslaughter is a general intent crime. *Birdshead*, 2015 S.D. 77, ¶ 15, 871 N.W.2d at 70; *see also Kleinsasser v. Weber*, 2016 S.D. 16, ¶ 24, 924 N.W.2d 455, 464; *Mulligan*, 2007 S.D. 67, ¶ 19, 736 N.W.2d at 813. General intent crimes require the defendant to either 1) intend the physical act that is prohibited by the statute, regardless of what the defendant intends to accomplish, or 2) recklessly do the physical act which the crime requires. *State v. Liaw*, 2016 S.D. 31, ¶ 11, 878 N.W.2d 97, 100; *Birdshead*, 2015 S.D. 77, ¶ 15, 871 N.W.2d at 70; *State v. Schouten*, 2005 S.D. 122, ¶ 13, 707 N.W.2d 820, 824.

For example, in *State v. Mulligan*, the defendant argued the State did not prove intent for first-degree manslaughter in violation of SDCL 22-16-15(3). *Mulligan*, 2007 S.D. 67, ¶ 7, 736 N.W.2d at 812. This Court held that to convict the defendant of first-degree manslaughter, "there must have been sufficient evidence to find that she intended to fire the gun or that she was reckless with respect to the shooting." *Id.* ¶ 9, 736 N.W.2d at 813. One of the jury instructions regarding criminal intent stated:

> In the crime of first degree manslaughter the defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful.

Id. ¶ 19, 736 N.W.2d at 816-17. This Court analyzed the instructions and held the State presented sufficient evidence to support the conviction. *Id.*

The circuit court has discretion in the wording and arrangement of its jury instructions and the instructions are reviewed as a whole. *Birdshead*, 2015 S.D. 77, ¶ 14, 871 N.W.2d at 70. In *Birdshead*, the defendant was convicted of first-degree manslaughter in violation of SDCL 22-16-15(3). *Id.* ¶ 12, 871 N.W.2d at 69. On appeal, the defendant argued that the circuit court erred in the way it instructed the jury on the mens rea element. *Id.* First, the defendant argued that first-degree manslaughter required proof of a greater mens rea than "recklessness" because second-degree manslaughter is defined as the "reckless killing of one human being." *Id.* ¶ 13, 871 N.W.2d at 69. Second, Defendant argued that by including "recklessness" in the definition of criminal intent, the circuit "court's jury instructions deprived him of the right to have the State prove every element of the offense." *Id.* ¶ 13, 871 N.W.2d at 70. This Court rejected Defendant's arguments, holding that the circuit court's instructions were sufficient. *Id.* ¶ 15, 871 N.W.2d at 70.

When affirming *Birdshead*, this Court reasoned that when reading the instructions as a whole, the "mens rea instruction did not lessen the State's burden." *Id.* The circuit court instructed the jury on the elements of the offense under SDCL 22-16-15(3). *Id.* It also instructed

the jury that "[t]he State has the burden of proving every element of the offense charged beyond a reasonable doubt." *Id.* Lastly, the circuit court instructed that the defendant could be found guilty by recklessly doing the prohibited act under SDCL 22-16-15(3). *Id.* This Court determined that the jury was properly instructed. *Id.*

Here, the circuit court's instructions, considered as a whole, adequately provide a correct statement of the law. Like *Birdshead*, the jury was instructed on first-degree manslaughter and that Defendant could be found guilty by recklessly doing the prohibited act under SDCL 22-16-15(3). The circuit court gave an intent instruction that was almost identical to the one that this Court held was proper in *Mulligan*, which also tracks Pattern Instruction 1-11-3 and SDCL 22-1-2(1)(d). This case is like *Birdshead* where the jury was instructed that the State has the burden of proving every element of the offense charged beyond a reasonable doubt. Here, the jury was given multiple instructions regarding reasonable doubt. *See* SR:1244 ("INSTRUCTION NO. 13 . . . This presumption follows the Defendant throughout the trial and must continue unless you are satisfied from all the evidence beyond a reasonable doubt that the Defendant is guilty."); SR:1245 ("INSTRUCTION NO. 14 The State has the burden of proving every element of the offense charged beyond a reasonable doubt."); SR:1246 ("INSTRUCTION NO. 15 The State has the burden of proving the Defendant guilty beyond a reasonable doubt. A reasonable doubt is a

doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt."); SR:1247 ("INSTRUCTION NO. 16 . . . the State must prove beyond a reasonable doubt . . ."). Neither *Birdshead* nor *Mulligan* holds that the intent instruction must be included with the actus reus instruction. Like *Birdshead*, here, Defendant's arguments should be rejected because the circuit court properly instructed the jury.

Defendant references that the State argued during closing that "We don't have to show intent . . . ." DB:22. Defendant failed to object to this statement, likely because a full reading of what the State argued shows that it was arguing that it did not have to prove that Defendant specifically intended to kill Ty:

> We have to show his acts were an intentional act or a reckless act . . . .
>
> Guns don't kill people, people kill people. And in this case, [Defendant] killed Ty. And the elements the State has to prove, the three elements he admitted on cross-examination. This isn't an intentional act. We don't have to show intent, but he set in motion with a loaded gun and recklessly killed his friend. For that, we're asking you to find him guilty of first degree manslaughter.

SR:1379-81. Furthermore, failure to object to the statement waives any issue with the closing argument for appellate review. *See, e.g., State v.*

Bryant, 2020 S.D. 49, ¶ 18, 948 N.W.2d 333, 338 (In order to "preserve issues for appellate review litigants must [timely] make known to the [circuit] courts the actions they seek to achieve or object to the actions of the court, giving their reasons.").

Regardless, right before the State gave its closing argument, the circuit court instructed the jury that it "must accept the law as stated in these instructions," closing arguments are not evidence, and it should disregard any argument which has no basis in the evidence. SR:1260, 1262. This Court generally presumes that juries follow the circuit court's instructions and have no reason to believe they failed to do so in this case. *Nelson*, 2022 S.D. 12, ¶ 41, 970 N.W.2d at 828; *see also State v. Janis*, 2016 S.D. 43, ¶¶ 25-28, 880 N.W.2d 43, 83-84 (holding that despite improper conduct by the prosecutor, the result of the trial was not affected when the circuit court gave the jury a correct instruction on the elements of the offense and jury's duties).

Even if Instruction 16 included Defendant's proposed reckless element and reasonable doubt was repeated more, the jury would not have returned a different verdict. "To warrant reversal, defendants must show that refusal to grant an instruction was prejudicial, meaning 'the jury . . . probably would have returned a different verdict if [the] requested instruction had been given.'" *Birdshead*, 2015 S.D. 77, ¶ 27, 871 N.W.2d at 73 (quoting *State v. Pellegrino*, 1998 S.D. 39, ¶ 9, 577 N.W.2d 590, 594). Again, the jury instructions, considered as a whole,

adequately provide a correct statement of the applicable law. Additionally, for the reasons set forth *infra*, Issue IV.C., the State presented proof beyond a reasonable doubt that Defendant acted reckless. The circuit court did not abuse its discretion and Defendant has failed to show prejudicial error.

II.

THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S PROPOSED MISTAKE OF FACT INSTRUCTION.

A. *Background.*

On appeal, Defendant argues that the circuit court erred by declining to instruct the jury on mistake of fact. But Defendant's proposed instruction is not supported by the law. Therefore, the circuit court did not abuse its discretion in declining to give the instruction.

During the settling of jury instructions, Defendant requested the circuit court to instruct the jury on his theory of defense. His theory was that if he mistakenly believed the gun was unloaded, he did not act with criminal intent because his mistaken belief "means he [was] not consciously aware of or consciously disregarding a known risk that the gun could be loaded." SR:3173-74. He offered a four-paragraph proposed instruction:

> It is the Defendant's theory of defense that he acted under an ignorance or mistake of fact which disproves any criminal intent. A defendant's evidence of mistake of fact may cast doubt on whether he or she had the mental state required for the commission of a particular crime.

> An act is not a crime when committed under an ignorance or mistake of fact which disproves criminal intent. Where a person honestly and reasonably believes certain facts, and acts or failed to act based upon a belief in those facts, which, if true, would not result in the commission of a crime, the person is not guilty.
>
> The Defendant Maxton Pfeiffer has offered evidence to show that when he touched the trigger of the .45 caliber pistol, causing it to discharge, he acted in the mistaken belief that the gun was not loaded.
>
> The burden is on the State to disprove the Defendant's theory of defense beyond a reasonable doubt. If the State fails to prove beyond a reasonable doubt that the Defendant was not acting upon an honest and reasonable mistaken belief that the gun was not loaded, then you must find the defendant not guilty.

SR:1025.

The State objected, arguing that the proposed instruction misstates the law, amplifies certain principals covered in other instructions, and mistakes the State's burden of proof. SR:3175.

The circuit court denied the proposed instruction, reasoning that the instruction misstated the law and Defendant's cited specific intent cases were distinguishable. SR:3177.

B. *Standard of Review.*

The standard of review *supra*, Issue I.B., is incorporated here by reference.

C. *Defendant's Mistake of Fact Instruction is Not Supported by Law.*

A defendant's theory of defense must be supported by law and have some foundation in the evidence. *State v. Reay*, 2009 S.D. 10, ¶ 34, 762 N.W.2d 356, 366. For a mistake of fact instruction to be given, the

evidence in support of that instruction must utterly negate criminal intent. *See State v. Waugh*, 2011 S.D. 71, ¶ 25, 805 N.W.2d 480, 486 ("[C]onsent may be a defense when there is evidence offered and received that the victim did indeed consent; however, that evidence would also have to utterly negate any element of force, coercion, or threat."). "[I]f a defendant reasonably though mistakenly believes facts that negate the mental state necessary for conviction of the offense with which he or she has been charged, the crime simply has not been committed." *United States v. Iron Eyes*, 367 F.3d 781, 784 (8th Cir. 2004) (quoting *United States v. Quarrell*, 310 F.3d 664, 675 (10th Cir. 2002)). A mistake of law is not a defense. *State v. Pentecost*, 2016 S.D. 84, ¶ 33, 887 N.W.2d 877, 886 (citation omitted).

A mistake of fact defense was unavailable to Defendant because Defendant's offered mistaken facts do not utterly negate intent. Both Defendant's proposed intent instruction and the final instruction state the intent element as follows: "When a person intentionally or recklessly does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful." SR:1026, 1250. Both also state that reckless means "a conscious and unjustifiable disregard of a substantial risk that one's conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances when a person

consciously and unjustifiably disregards a substantial risk that such circumstance exists." SR:1027, 1253; *see* SDCL 22-1-2(1)(d).

Defendant claims that his mistaken belief the gun was unloaded means his conduct was not reckless. Defendant's assertion is incorrect. Whether or not Defendant believed the gun was loaded does not amount to a mistake of fact that would utterly negate recklessness. *See Illinois v. Greene*, 2020 WL 6163465, at *10 (Ind. Ct. App. 2020) (holding that the trial court properly denied the defendant's "mistake of fact" instruction, reasoning that the defendant's belief the gun was unloaded failed to defeat the mental state for reckless discharge of a firearm). Even if the jury found that Defendant believed the gun was unloaded, the jury still could have found that Defendant acted recklessly—he consciously and unjustifiably disregarded a substantial risk that his conduct may cause. *See infra*, Issue IV.C. (analyzing evidence in support of recklessness). Any mistaken belief about the legal validity of his "defense" is a mistake of law that does not utterly negate general intent.

Even if the mistake of fact instruction should have been given, and Defendant's alleged mistaken facts could utterly negate recklessness, Defendant suffered no prejudice. Defendant's belief was unreasonable. SR:1025 (Defendant's proposed instruction stating Defendant's belief must be reasonable); *see Iron Eyes*, 367 F.3d at 784. The State presented evidence that Defendant owned guns, was familiar with semiautomatic handguns, shot many semiautomatic handguns, and

knew a magazine must be taken out of a gun to make it safe. Yet, Defendant did not take the magazine out of the gun or unload the gun. Defendant claimed he racked the slide back, nothing came out, so he "assumed it was good." Despite testimony that a person should always look into a gun to make sure the gun was unloaded, Defendant admitted that he did not look inside the barrel. Defendant never took the magazine out of the gun, meaning that when Defendant "racked the slide," he loaded the gun with a bullet from the magazine. The State presented overwhelming evidence that Defendant's alleged belief the gun was unloaded was unreasonable. Defendant has not shown prejudice—that the jury would have returned a different verdict if the proposed instruction had been given—so reversal is unwarranted. *See Ortiz-Martinez*, 2023 S.D. 46, ¶ 36; *Birdshead*, 2015 S.D. 77, ¶ 27, 871 N.W.2d at 73.

The circuit court did not abuse its discretion in refusing to give Defendant's proposed instruction because the instruction has no support in law. *See Nelson*, 2022 S.D. 12, ¶ 42, 970 N.W.2d at 828. Defendant failed to show his proposed instruction was valid under the law and was appropriate under the circumstances. Therefore, the circuit court properly refused the instruction. And even if the circuit court should have given the instruction, Defendant suffered no prejudice.

III.

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY PROHIBITING A DEPUTY STATE'S ATTORNEY'S WRITING FROM BEING ADMITTED AT TRIAL AS EVIDENCE.

A. *Background.*

On appeal, Defendant argues that the circuit court abused its discretion by prohibiting the jury from hearing what a Deputy State's Attorney wrote in an April 21, 2021, bond pleading. SR:360-64. The Deputy State's Attorney wrote, "Defendant killed Ty by recklessly handling a firearm, pointing it directly at Ty, and pulling the trigger, in the belief that the gun was not loaded." SR:361. The circuit court correctly found that the proffered evidence was neither relevant nor did the probative value substantially outweigh its prejudicial effect. Further, the circuit court's ruling had no impact on Defendant's right to present his defense.

On November 22, 2021, Defendant requested the circuit court take judicial notice of adjudicative facts—the Deputy State's Attorney's April 21, 2021, writing—and rule that the writing was admissible as a non-hearsay statement against interest by a party opponent pursuant to SDCL 19-19-801. SR:882-85. The State filed a brief in opposition, arguing that the Deputy State's Attorney is not a party opponent for purposes of SDCL 19-19-801, arguments made by counsel are not evidence, and the writing regarded a fact subject to reasonable dispute. SR:909-13.

The circuit court ultimately held that a ruling on the admissibility of the evidence would be made at trial. SR:1088-89. At trial, after Defendant's last witness, Defendant moved the circuit court to take judicial notice of what the Deputy State's Attorney wrote. SR:3526. Defendant argued the writing was an admission by a party opponent and relevant because "[i]t goes directly to the mental state of the defendant." SR:3526-27. Defendant asked the circuit court to take judicial notice, advise the jury of the writing, and instruct the jury to consider the writing as an admission by the State, but also instruct that the jury can give the writing whatever weight, if any, it wished. SR:3527; *see* SR:1029 (Defendant's proposed jury instruction on the issue).

The State opposed the motion, arguing that federal cases holding a prosecutor's statements qualified as an admission by a party opponent were distinguishable from this case. SR:3527-28. The State objected based on lack of foundation, hearsay, relevance, and SDCL 19-19-403. SR:3527-28.

The circuit court denied the motion, holding that the statement was irrelevant. SR:3530-31. The circuit court reasoned that Defendant's state of mind may be relevant here, but the Deputy State's Attorney's position a year ago in a bond hearing regarding Defendant's state of mind is not relevant. SR:3531-32. Additionally, the circuit court held that the writing was excludable under SDCL 19-19-403. SR:3532. The circuit court further reasoned that it was not being offered against the opposing

party for purposes of Rule 801 because the State did not present evidence at trial that Defendant believed the gun was loaded. SR:3530. It reasoned that what the Deputy State's Attorney wrote in a brief does not come in at trial simply because the State is a party opponent, and the statement regarded the same subject matter. SR:3531.

B. *Standard of Review.*

This Court reviews "a circuit court's evidentiary rulings under an abuse of discretion standard with a presumption that the rulings are correct." *State v. Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d 800, 807 (quoting *Birdshead*, 2015 S.D. 77, ¶ 36, 871 N.W.2d at 75-76). An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109. To prevail on a challenge to a circuit court's evidentiary ruling, Defendant must show that the circuit court erred, and the error was prejudicial. *State v. Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d 237, 255.

C. *Defendant has Not Shown that the Circuit Court Abused its Discretion in Applying the Rules of Evidence.*

"Evidence is relevant if: (a) [i]t has any tendency to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action." SDCL 19-19-401. Yet,

the circuit court may exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect. SDCL 19-19-403.

Defendant's sole argument on appeal is "the State prosecutor's statement that [Defendant] acted in the belief that the gun was not loaded was directly probative of [Defendant's] lack of awareness of a substantial risk and went to disprove the State's burden to prove that he acted with reckless criminal intent." DB:27-28. Defendant merely summarizes the circuit court proceedings, states the writing was probative, and alleges the circuit court violated his due process rights by prohibiting the evidence. DB:27-28. Failure to adequately present arguments and authority in a brief constitutes waiver on appeal. *Kern v. Progressive N. Ins. Co.*, 2016 S.D. 52, ¶ 35, 883 N.W.2d 511, 518; *State v. Fool Bull*, 2009 S.D. 36, ¶ 46, 766 N.W.2d 159, 169 (quoting *Pellegrino*, 1998 S.D. 39, ¶ 22, 577 N.W.2d at 599); SDCL 15-26A-60(6).

Regardless, the circuit court correctly found that the proffered evidence was neither relevant nor did the probative value substantially outweigh its prejudicial effect. The evidence was irrelevant. What a Deputy State's Attorney wrote in a bond pleading about Defendant killing Ty "in the belief that the gun was not loaded" does not have any tendency to make this fact more probable when the fact was never disputed at trial. SR:361. The State did not present evidence or argue at trial that Defendant believed the gun was loaded. Further, as the circuit court correctly noted, the State's understanding of what the Deputy State's

Attorney asserted in a bond pleading was not relevant at trial nor admissible. SR:3531-32. Therefore, the circuit court properly held that the evidence was irrelevant.

Even if the evidence was relevant, the probative value was not substantially outweighed by its prejudicial effect. The proffered evidence would have caused a danger of unfair prejudice, confusion of the issues, misled the jury, caused undue delay, wasted time, and been needless presentation of cumulative evidence. *See* SDCL 19-19-403. What the Deputy State's Attorney wrote in a bond pleading was not the State conceding Defendant's subjective intent for trial. The State understood the Deputy State's Attorney's writing as a reiteration of Defendant's statement to law enforcement. If the proffered evidence came in, the State may have called the Deputy State's Attorney as a witness to explain the context of what she wrote, which would lead to confusing the issues, undue delay, and wasted time. An extreme danger existed that the jury would have confused the issues and burdens since what a prosecutor's position or understanding is in a bond hearing is different from the burden of proof and what is at issue at trial.

Furthermore, based on the evidence already presented to the jury, the proffered evidence would cause undue delay, waste time, and result in needless cumulative evidence being presented to the jury. Defendant testified that he believed the gun was unloaded. Other witnesses also testified that Defendant stated right after the shooting that Defendant

checked the gun. Lastly, the jury heard Defendant's statements during two encounters with law enforcement that he thought the gun was unloaded.

The circuit court further correctly prohibited the proffered evidence from being presented because the statement was not being offered against the State. Pursuant to SDCL 19-19-801(d)(2), an opposing party's statement that is offered against an opposing party can be admissible under certain circumstances. Here, the proffered evidence was not offered against the State because the State did not present evidence at trial that Defendant believed the gun was loaded. Thus, the statement was not admissible under SDCL 19-19-801(d)(2).

Even if the statement were offered against interest, the State had to knowingly ratify the allegation of the Deputy State's Attorney. This Court has analyzed when a pleading drafted by an attorney can be used as a statement against interest against the attorney's client. *Kurtz v. Squires*, 2008 S.D. 101, ¶¶ 16-21, 757 N.W.2d 407, 413-15. In *Kurtz v. Squires*, Kurtz filed a complaint in a different lawsuit where she claimed she was permanently injured. *Id.* ¶ 17, 757 N.W.2d at 414. After the circuit court denied Squires's motion to admit the statement under Rule 801(d)(2), Squires appealed. *Id.* ¶ 16, 757 N.W.2d at 413-14. This Court held that "[t]he party offering a party-opponent pleading as a statement against interest must be able to show that the party knowingly sanctioned or ratified the admission." *Id.* ¶ 18, 757 N.W.2d at 414. This

Court reasoned that because Squires failed to show that Kurtz personally directed or knowingly ratified the allegation of permanent injury in the prior lawsuit, the circuit court did not abuse its discretion by holding the pleading was inadmissible. *Id.* ¶¶ 18, 23, 757 N.W.2d at 414-16.

Here, like *Kurtz*, the statement was made by an attorney in a pleading. Like *Kurtz*, the State did not knowingly sanction or ratify the statement. Indeed, the State adamantly argued that it believed the Deputy State's Attorney was reiterating Defendant's statement to law enforcement and was not its belief about Defendant's intent. SR:911. Even if the statement were construed as the Deputy State's Attorney stating what the State's belief was, the State's denial about this belief shows that it was not ratifying the statement. *See* SR:911. As correctly noted by the circuit court, the State's understanding of what the Deputy State's Attorney's assertion was in a bond pleading was not admissible. *See* SR:3531-32. The circuit court is the gatekeeper of evidence and has broad discretion in determining whether to exclude or admit evidence. *Kryger*, 2018 S.D. 13, ¶ 19, 907 N.W.2d at 809. Like *Kurtz*, the circuit court did not abuse its broad discretion by excluding the proffered evidence.

D. *Defendant has Not Shown that the Circuit Court's Rulings Prevented him from Presenting his Defense.*

Even if the circuit court abused its discretion, Defendant has not shown that his right to present a defense was impacted or he was

prejudiced by the exclusion of the proffered evidence. "Error is prejudicial when, in all probability . . . it produced some effect upon the final result and affected rights of the party assigning it." *State v. Bausch*, 2017 S.D. 1, ¶ 12, 889 N.W.2d 404, 408-09.[4]

One of Defendant's theories of defense was that Defendant believed the gun was unloaded. Defendant was given an opportunity to present a full defense regarding his belief. To support his theory, Defendant presented expert testimony on how bullet-nosed binding can impact clearing a gun. Defendant was also able to tell the jury what he believed to be true. What the Deputy State's Attorney wrote was based off what Defendant told law enforcement. What Defendant told law enforcement regarding his belief was admitted at trial. Several witnesses testified that Defendant stated that he believed the gun was unloaded. Defendant had multiple other avenues by which he could present his belief. *See id.* ¶ 12, 889 N.W.2d at 410. The proffered evidence was merely more cumulative evidence that Defendant thought the gun was unloaded. Admission of another statement would not have changed the jury's verdict.

The exclusion of the proffered evidence had no impact on Defendant's other defense strategies. One of Defendant's strategies was

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[4] Defendant has the burden of proving prejudice related to any evidentiary error or violation of his right to present a defense. *Bausch*, 2017 S.D. 1, ¶ 13, 889 N.W.2d at 409.

to cast doubt on the way law enforcement conducted the investigation and the reliability of the evidence. *See, e.g.*, SR:3372-75 (Defense expert testified that law enforcement was incompetent based on the way they handled the gun.). Defendant cross-examined law enforcement to cast doubt on whether the magazine was still in the gun when Defendant racked the slide. Defendant also sought to show that he did not act with a conscious disregard of a substantial risk by 1) testifying that he did not have training with firearms and did not own a .45, and 2) by attempting to keep out evidence regarding what he knew about risks associated with guns. SR:3482, 3515.

Ultimately, even if the jury heard that the State believed at one point that Defendant believe the gun was unloaded, the jury would not have changed its conclusion that Defendant was guilty. *See supra*, Issue II.C.; *infra*, Issue IV.C. Even if there were an evidentiary error, Defendant has failed to show that he was deprived of his right to present a defense or resulting prejudice.

IV.

THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN DEFENDANT'S CONVICTION.

A. *Background.*

Defendant claims there was insufficient evidence presented at trial to support his conviction, specifically the mens rea element. DB:28. But when viewing the evidence in light most favorable to the State, sufficient evidence exists to support Defendant's conviction.

B. *Standard of Review.*

This Court reviews the denial of a motion for judgment of acquittal de novo. *Little Long*, 2021 S.D. 38, ¶ 68, 962 N.W.2d at 258. This Court's "task is to determine whether the evidence was sufficient to sustain the conviction." *State v. Solis*, 2019 S.D. 36, ¶ 17, 931 N.W.2d 253, 258 (quotation omitted).

> To do so, [this Court] ask[s] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 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.

Id. (cleaned up). Likewise, "this Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or reweigh the evidence." *State v. Fasthorse*, 2009 S.D. 106, ¶ 6, 776 N.W.2d 233, 236 (citations omitted).

C. *The State Presented Sufficient Evidence of Mens Rea to Support Defendant's Conviction.*

The jury found Defendant guilty of first-degree manslaughter in violation of SDCL 22-16-15(3). SDCL 22-16-15(3) provides, "[h]omicide is manslaughter in the first degree if perpetrated . . . (3) without any design to effect death, . . . but by means of a dangerous weapon." SDCL 22-16-15(3). The circuit court properly instructed the jury on the elements of the crime, the definition of reckless, and the State's burden of proof.

For a conviction to stand on appeal for first-degree manslaughter, "there must have been sufficient evidence to find that [Defendant] intended to fire the gun or that [he] was reckless with respect to the shooting." *Mulligan*, 2007 S.D. 67, ¶ 9, 736 N.W.2d at 813. In *State v. Mulligan*, Defendant claimed that when she handed the victim a gun, the gun discharged—killing the victim. *Id.* ¶ 2, 736 N.W.2d at 811. The State presented evidence that the defendant had reasons to kill the victim. *Id.* ¶ 13, 736 N.W.2d at 815. The State also presented evidence that the gun could not have fired accidentally. *Id.* ¶ 16, 736 N.W.2d at 816. The gun would not fire unless the trigger was pulled with significant force—at least four to five pounds of pressure. *Id.* Further, the State presented evidence that the gun was held between two towels when fired, evidence inconsistent with the defendant's first version of what occurred. *Id.* This Court held that there was sufficient evidence, reasoning, in part, "that the circumstantial evidence of intent together with the physical evidence can be used to support a rational theory of guilt." *Id.* ¶ 21, 736 N.W.2d at 817.

While not a sufficiency of the evidence issue, in *State v. Caffee*, the circuit court considered the defendant's assertion that a shooting was accidental when imposing a sentence for first-degree manslaughter in violation of SDCL 22-16-15(3). *State v. Caffee*, 2023 S.D. 51, ¶ 13, ___ N.W.2d ___. In *State v. Caffee*, the defendant intentionally possessed a gun, kicked in a locked door, unholstered the gun, and put his finger on

the trigger. *Id.* The defendant shot the victim as she was calling for help. *Id.* The defendant presented to the circuit court a report from David Lauck where Lauck opined that the gun was prone to accidental discharge. *Id.* ¶ 12. The defendant then argued the shooting was accidental, it was the gun's fault the victim is dead, and he only meant to hit the phone out of the victim's hand when he shot her. *Id.* ¶ 13. The circuit court reasoned, "whether or not you intentionally shot her or you were intentionally pistol-whipping a phone out of her hand really doesn't matter. She is dead simply because of your intentional actions." *Id.*

In *In re D.M.S.*, the Ohio Court of Appeals held the State presented sufficient evidence to establish probable cause that the actions of the juvenile, if committed by an adult, would constitute reckless homicide. *In re D.M.S.*, 170 N.E.3d 61, 64 (Ohio Ct. App. 2021). Ohio defines reckless as follows: "A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist." *Id.* at 68. In *In re D.M.S.*, the State presented evidence that the juvenile knew how to handle guns, was playing with a gun, pointed it at his friend, pulled the trigger while near his friend, and it could be inferred from the evidence that the magazine was in the gun. *Id.* at 69-70. The Ohio Court of Appeals held that the juvenile did not intend to kill his friend, but he created a substantial risk of harm to his

friend and heedlessly disregarded that risk by pointing the gun at his friend which resulted in his friend's death. *Id.* at 71.

Here, Defendant only challenges whether there was sufficient evidence to show he acted with general intent. Like *Mulligan*, there is sufficient evidence to support a rational theory of guilt. Defendant was reckless with respect to the shooting. Defendant consciously and unjustifiably disregarded the substantial risk of death that existed by pointing a gun—a deadly weapon as a matter of law—at Ty and pulling the trigger. The State presented evidence that Defendant was familiar with semiautomatic handguns, shot plenty of them, and owned guns himself. Defendant agreed that he understood the magazine must be taken out of the gun before he racked the slide to make it safe. Defendant's insistence that the magazine was not in the gun and that he unloaded the gun is evidence that he was aware of the risks of pulling the trigger on a gun. *See Ohio v. Leannais*, 2019-Ohio-2568, 2019 WL 2635959, at *6 (Ohio Ct. App. 2019) (The defendant's "admissions that he should have checked the chamber evidences the fact that he was aware of the risks involved in pulling the trigger."). Defendant acknowledged that a gun should never be pointed in the direction of anybody, and a gun should always be treated as if it were loaded. *See, e.g., Ohio v. Perrien*, 152 N.E.3d 897, 909 (Ohio Ct. App. 2020) (evidence of a defendant's knowledge of firearm safety principles supports that defendant disregarded a known risk that the victim could be killed by

pointing a loaded gun at the victim with his finger near the trigger); *Guzman v. Texas*, 188 S.W.3d 185, 193-94 (Tex. Crim. App. 2006) (rejecting the defendant's argument that, because he thought the gun was unloaded after he had removed the clip, he did not actually consciously disregard a known risk; the defendant testified that he was fully aware that pointing a gun at someone's head and pulling the trigger is a very dangerous act, constituting an admission that he had a reckless state of mind). Based on this evidence, the jury could have determined that that Defendant knew the substantial risk associated with guns was so great that even a subjectively perceived unloaded gun should be treated as loaded.

Overwhelming evidence showed that Defendant consciously and unjustifiably disregarded the substantial risk. Like *Caffee*, Defendant intentionally possessed the gun and took it out of the holster. Defendant admitted that he did not look inside the barrel to see if there was a bullet. *See Ohio v. G.G.*, 2012-Ohio-5902, 2012 WL 6483635, at *3 (Ohio Ct. App. 2012) ("A known risk of handling and manipulating a gun while [pointing it in the direction of a child,] without checking the chamber to see if a bullet is still in the firearm, is that the firearm will discharge in the direction of the child."). Defendant knew the magazine must be taken out of the gun to make it safe but did not take the magazine out.

Like *Caffee* and *Mulligan*, Ty is not dead because it was the gun's fault. The gun functioned as it should. The jury heard no evidence that

something other than Defendant's finger caused the gun to discharge "(i.e., dropping the gun and the gun firing upon hitting the floor, or bumping into an obstacle that came into contact with the trigger causing the gun to go off)." *Perrien*, 152 N.E.3d at 910. Indeed, Defendant admitted that he must have pulled the trigger and did a practice shot.

Ty is dead because Defendant never took the magazine out of the gun and did not look inside the gun to see if it was unloaded. He intentionally possessed a gun, intentionally pointed the deadly weapon at Ty, an action he admitted a person should never do, disengaged two safeties, and pulled the trigger by pressing the trigger with four and a half pounds of pressure. *See New Hampshire v. Mentus*, 35 A.3d 572, 576-77 (N.H. 2011) (holding that a jury could have found the defendant guilty of reckless manslaughter even if the gun misfired when the defendant knew a gun should always be pointed in a safe direction, knew a gun should always be treated as if it were loaded, but admitted that he did not follow these rules when he pointed the gun at the victim). Whether Defendant subjectively believed the gun was unloaded is not a determinative fact in finding recklessness. Like *Caffee*, where it did not matter whether the defendant allegedly only meant to intentionally pistol-whip a phone out of a victim's hand, here, it does not matter that Defendant claims he only intentionally meant to do a "practice shot" at Ty. Defendant's conduct was reckless.

Defendant consciously and unjustifiably disregarded a substantial risk that his conduct caused. Defendant's actions of intentionally pointing a deadly weapon at someone and pulling the trigger is an unjustifiably high-risk-of-harm conduct. The substantial risk, a risk Defendant knew, is why even someone who subjectively believes a gun is unloaded should still treat the gun as loaded. The State's evidence supports a finding that Defendant handled the dangerous weapon in a reckless manner and Defendant's reckless conduct resulted in Ty's death. Defendant is entitled no relief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,872 words.

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

Dated this 18th day of October 2023.

/s/ Jennifer M. Jorgenson
Jennifer M. Jorgenson
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 18, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Maxton James Pfeiffer*, was served via Odyssey File and Serve upon Dana L. Hanna at dhanna@midconetwork.com.

/s/ Jennifer M. Jorgenson
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IN THE

SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 30120

MAXTON PFEIFFER,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Maxton Pfeiffer, will be referred to as "Defendant." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." References to documents in the record herein will be designated as "S.R." followed by the appropriate page number. References to the transcript of the trial transcripts will be referred to as "T.T.", followed by the appropriate page number.

ISSUE I.

COURT'S FAILURE TO INSTRUCT ON PROOF OF CRIMINAL INTENT

For the reasons outlined in Appellant's initial brief, it is clear that *mens rea* is an element of the crime of first-degree manslaughter and must be proven beyond a reasonable doubt. The trial judge's ruling that criminal intent is not an element of first-degree manslaughter was a prejudicial error of law that deprived the Defendant of due process and a fair trial, exacerbated by the prosecution's assertion in closing argument that "we don't have to show intent." (T.T. 1353).

There is no clear evidence of a legislative intent to make first degree manslaughter a strict liability crime; "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, at 606, 114 S. Ct. at 1797. See also *State v. Jones*, 2011 S.D. 60, ¶ 110, 804 N.W. 2d at 412-413. In its brief, the State makes no suggestion or claim that there is any evidence of a legislative intent to relieve the State of its burden to prove *mens rea,* thereby making first degree manslaughter a strict liability crime. This is unsurprising, as this Court has previously held that first degree manslaughter *does* contain an implicit *mens rea* element of either recklessness or

intentionality. *State v. Mulligan*, 2007 S.D. 67, 736 N.W. 2d 808, 815. As this court has explained: "except for strict liability offenses some form of mental state is a prerequisite to guilt." *State v. Huber*, 356 N.W.2d 468, 472 (S.D. 1984), citing LaFave Scott, *Handbook on Criminal Law* § 28, at 201 (1972). In this case, that mental state is recklessness, due to the reasons set forth in Appellant's initial brief.[1]

Because *mens rea* is an element of the crime of first-degree manslaughter, the trial court's instructions were inadequate to instruct the jury on criminal intent. Jury Instruction No. 16, listing the elements of the crime, caused the jury to believe that recklessness need not be proven. Failing to instruct the jury that recklessness was an element of the crime, and that the State was required to prove it beyond a reasonable doubt, was error. See *State v. Huber*, 356 N.W.2d 468, 471 (S.D. 1984): "As an essential element of the crime, the term "knowingly" should have been included in the jury instructions." *Id. at* 471. In this case, the term "recklessly" should have been included in Jury instruction 16, as an element of the crime, as was requested by Defendant.

Throughout the trial—prior to trial, during the settling of final instructions, and again, during deliberations, when the jury requested further instruction from the court on criminal intent and recklessness—the defendant requested the court instruct the jury that criminal intent is an element of manslaughter in the first degree, and that the State had the burden to prove it beyond a reasonable doubt. The State objected, contending that criminal intent is not an element of the first-degree manslaughter and therefore, the State had no burden to prove criminal intent to establish Defendant's guilt. The trial judge

[1] Recklessness is an implicit element of first-degree manslaughter because it is a listed element of second-degree manslaughter, which is a lesser-included offense by statute. *Appellant's Brief*, pp 19-20.

refused to instruct the jury that the State had any burden to prove criminal intent and expressly ruled that criminal intent is not an element of first-degree manslaughter:

> SIGLIN: "But criminal intent is not one of the elements of manslaughter."
>
> COURT: "It's not in the pattern jury instruction, and although recklessness is an element in the text of second-degree manslaughter, first degree manslaughter does not mention recklessness, so it is not an element of the crime." T.T. 1029:9.

The State contends that the court's general instruction on criminal intent (Instruction No. 19: "In the crime of manslaughter in the first degree, the defendant must have criminal intent...") was sufficient to instruct the jury. That instruction was not sufficient, because it gave the jury no instruction that the State had any burden to prove criminal intent. The omission of an instruction that criminal intent was an element of the crime charged would have reasonably been interpreted by the jury to mean that criminal intent was not an element and did not have to be proven, which is exactly what the State proceeded to argue in closing statement ("We don't have to show intent." T.T. 1353).

The Applellee's brief cites to *State v. Birdshead*, 2015 SD, 77, 871 N.W.2d 62 (S.D. 2015), and reasons that the trial court had no duty to instruct the jury that the *mens rea* standard from that case needed to be proven beyond a reasonable doubt. The defendant did not, in the trial or in his brief, argue that *Birdshead* was an incorrect statement of the applicable *mens rea*. The Defendant argued that the State had the burden to prove that standard of *mens rea* and the court refused to give any such instruction.

The court's failure to give the jury any instruction on how the *Birdshead* standard defining criminal intent was to be applied to the facts in the case was reversible error.

Jury instruction No. 19 generally defined criminal intent as either the intentional or reckless doing of an act the law declares to be a crime. However, the court failed to

instruct the jury that the State had the burden to prove criminal intent; nowhere in the instructions did the court ever tell the jury that recklessness was an element of the crime which must be proven beyond a reasonable doubt. Jury Instruction No. 16, containing the actus reus elements of the crime, misled the jury that Defendant could be found guilty simply for doing the act - i.e., causing the death of the decedent, without any *mens rea* element. This error was aggravated by the trial court's ruling while settling instructions that criminal intent is not an element of first-degree manslaughter. Jury Instruction No. 19 should therefore have been given as requested by the defense and failure to do so misled the jury and amounted to prejudicial error.

ISSUE II.

MISTAKE OF FACT

The State asserts that the trial judge did not err in refusing the Defendant's jury instruction on the Defendant's mistake of fact theory of defense because the proposed instruction is not supported by the law.

There was no dispute in the trial as to whether Defendant subjectively believed that the gun was not loaded. It was not denied in the trial, nor in the Appellee's brief. Moreover, that fact was expressly admitted in a court document written and filed by the State's lead prosecutor in the case. See: Issue No. 3, Appellant's brief.

Nevertheless, the State asserts: "Whether or not Defendant believed the gun was loaded does not amount to a mistake of fact that would utterly negate recklessness." (Appellee's Brief, p. 27.) In support of this assertion the State cites language from an unpublished opinion, *Illinois v. Greene*, 2020 WL 6163465 at *10 (Ind. Ct. App. 2020). Defense is unable to locate this case, but its precedential value is so limited as to be

virtually worthless. The State cites this case for the proposition that "For a mistake of fact instruction to be given, the evidence in support of that instruction must utterly negate criminal intent." This is not necessarily the law in South Dakota regarding a mistake of fact jury instruction. The law in South Dakota is that "When a defendant's theory is supported by law and has some foundation in the evidence, however tenuous, the defendant has a right to present it." *State v. Roach*, 2012 S.D. 91, 825 N.W.2d 258, 263 (S.D. 2012). And, "A criminal defendant is entitled to an instruction on his theory of the case when evidence exists to support his theory." *State v. Charles*, 2001 S.D. 67, 628 N.W.2d 734, 738 (S.D. 2001).

The South Dakota case cited by the State to support its argument that a mistake of fact instruction can only be given if it utterly negates recklessness is *State v. Waugh*, 2011 S.D. 71, ¶ 25, 805 N.W.2d 480, 486. Waugh is a rape case and the issue on appeal was a challenge to the sufficiency of the evidence based on consent. The case does not deal with jury instructions at all, much less a mistake of fact instruction. It is not a case involving jury instructions, mistake of fact, *mens rea*, or recklessness and should not be applied here. The only South Dakota cases that use the language "utterly negates" are rape cases wherein the defendant requested a consent instruction or a mistake of fact instruction on the issue of consent. *State v. Faehnrich*, 359 N.W.2d 895, 900 (S.D. 1984), *State v. Roach*, 825 N.W.2d 258, 264 (S.D. 2012) *State v. Woodfork*, 454 N.W.2d 332, 333-34 (S.D. 1990). In those cases, the trial court refused to instruct the jury as to the defense of consent because there was ample evidence presented to the jury of force and coercion. In both *Roach* and *Woodfork*, despite the victim's injuries and other evidence of force and coercion, mistake of fact instructions *were* given. In *Faehnrich*, like *Waugh*,

the defendant did not request a mistake of fact instruction at all. *State v. Faerhnrich*, 359 N.W. 2d 895, 899. None of these were disputed mistake of fact cases. The South Dakota caselaw the State cites for its argument on this issue has no application to the issue of mistake of fact regarding recklessness in a first-degree manslaughter case. The only two cases that use the "utterly negate" language (*Woodfork* and *Roach*), where the defense requested a mistake of fact instruction, the court gave it: " Instead, the court gave Roach's third proposed instruction, a "mistake of fact" instruction, similar to the South Dakota Criminal Pattern Jury Instruction 2–8–1" *State v. Roach*, 825 N.W.2d 258, 262, ¶12 (S.D. 2012). "The record reflects that the following instruction was given to the jury: An act is not a crime when committed or omitted under an ignorance or mistake of fact which disproves any criminal intent. Where a person honestly and reasonably believes certain facts, and acts or fails to act based upon a belief in those facts, which, if true, would not result in the commission of a crime, the person is not guilty." *State v. Woodfork*, 454 N.W.2d 332, 334 (S.D. 1990).

These cases are also much different than the one at bar because the evidence of force and coercion in those cases was overwhelming. Whereas here, the evidence that Defendant thought the gun was unloaded was uncontroverted and even endorsed at one point by the prosecution.

The State, in its brief, asserts that when the Defendant proposed his request for a mistake of fact instruction, "[t]he State objected, arguing that the proposed instruction misstated the law..." Appellee's Brief, pg. 25. In fact, the State's attorney expressly

stated that the instruction was a correct statement of the law but argued that it had no application to the case because the Defendant's state of mind was irrelevant:

> Mr. HANNA: [Is] it a correct statement of the law? The second paragraph is a direct quote from the pattern jury instructions. So, there's no dispute that that part is, in fact, a correct statement of the law. The last paragraph I believe is also a direct statement of the law, which is that the State has the burden to disprove the defendant's theory of defense of mistaken belief in fact. But the second part, the pattern instruction is absolutely a correct statement of law.
>
> MS. SIGLIN: It is a correct statement of law that doesn't apply to this case. We'd refer the Court to Instruction 281, the second note says, quote, for this instruction to be applicable there must be a state of mind element.
>
> MR. HANNA: Judge, there is a state of mind element. It is general criminal intent. The state of mind element is recklessness.
>
> THE COURT: Well, under that theory then, every criminal -- general criminal intent crime, if a defendant just doesn't believe he's guilty, then I have to give this instruction and instruct the jury he's innocent?
>
> MR. HANNA: No.
>
> THE COURT: Or she's innocent?
>
> MR. HANNA: No. It is beyond dispute that the prosecutor has to prove recklessness here. Recklessness -- recklessness involves a conscious awareness of a substantial risk. That is not an element in every criminal case. It is an element in a manslaughter in the first-degree case because they have to prove he either intentionally fired the shot or he recklessly fired the shot.
>
> THE COURT: Nope. No, you don't. That's a misstatement of law. I'm not giving this instruction. I think it's reversible error if I give it. It's not a specific intent crime. (T.T. 1002: 5-25, 1003: 1-15).

Defendant's proposed mistake of fact instruction was a correct statement of the law. The first two paragraphs of the defendant's requested instruction are verbatim quotes from the pattern criminal jury instructions. The court's ruling in denying the mistake of fact instruction was incorrect. The State *did* have to prove that the shot was fired either intentionally or recklessly. State v.Mulligan, 736 N.W. 2d 808, 813, ¶9. Even the

prosecution agreed in their closing argument: "We have to show that his acts were an intentional act or a reckless act..." (Excerpt of transcript of State's closing argument, 27:14-15).

The Defendant testified that he removed the magazine from the pistol, that he racked the slide to eject any bullet, and that no bullet was ejected, causing him to subjectively believe the gun was unloaded. Defendant also offered evidence to show that his belief the gun was unloaded was reasonable; he offered expert testimony that the ejection system for the gun had malfunctioned as a result of bullet nose binding, which gave rise to his reasonable but mistaken belief that the gun was unloaded and incapable of firing a bullet. The State asserts that "Even if the jury found the Defendant believed the gun was unloaded, the jury could still have found that Defendant acted recklessly..." (Appellee's Brief, pg. 27). Defendant argues that had the jury been allowed to make this determination itself, aided by an appropriate mistake of fact instruction, it would have reached a different verdict.

"Ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged." *State v. Toben*, 2014 S.D. 3, 842 N.W.2d 647, 651 (S.D. 2014). The essential mental state required here was recklessness, and Defendant's mistaken belief that the gun could not fire a bullet negated that mental state, this was a question for the jury.

Just as in *State v. Toben*, where "It would be insufficient for the State to show that Toben knowingly possessed a substance, but *negligently* believed it to be a harmless substance," here it is insufficient for the State to have proven Defendant negligently fired the gun. *State v. Toben*, 2014 S.D. 3, 842 N.W.2d 647, 651 (S.D. 2014) Additionally, it

would be insufficient for the State to show that Defendant *should have known* the gun would fire a bullet. *Id.*, at 651. Due to the absence of a mistake of fact instruction, the jury was unaware of these things and therefore improperly instructed. Failure to give the instruction denied Defendant "a meaningful opportunity to present a complete defense." *State v. Roach*, 825 N.W.2d 258, 264 (S.D. 2012), citing *Klaudt,* 2009 S.D. 71, ¶ 13, 772 N.W.2d at 121."

Failure to give Defendant's mistake of fact instruction deprived the defendant of his constitutional rights to due process and a fair trial. The mistake of fact was the entire foundation of his defense and went "to the heart" of his theory of defense. *Miller v. State*, 338 N.W. 2d 673, at 676. (S.D. 1983). Trial counsel said as much during settling of jury instructions: "I don't understand the argument that his mental state is not a factor in the case, it is what the case is now all about...if you do not instruct the jury on his theory of defense, which is ignorance or mistake of fact, you have gutted the defense." (T.T. 999:15-20). Given the undisputed fact that Defendant had an honest subjective belief that the gun was unloaded and could not fire, the jury would likely have returned a different verdict had the mistake of fact instruction been given.

CONCLUSION

For the foregoing reasons, in addition to the reasonas stated inhis initial brief, Appellant requests his conviction be reversed and a new trial granted.

Dated this 11th day of March 2024.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains approximately 2,838 words and is 9 pages in length.

I certify that the word processing software used to prepare this brief is Microsoft Word Version 16.44.

/s/ Conor Duffy
Conor Duffy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of March 2024, a true and correct copy of the foregoing Appellant's Reply Brief was served via Odyssey File and Serve, at the e-mail addresses listed below, upon these individuals:

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