IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

v. No. 26910

SAMUEL MILAND
Defendant and Appellant.

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

HONORABLE JOSEPH NEILES
Circuit Judge

APPELLANT'S BRIEF

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Notice of Appeal was filed on December 19, 2013

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PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Samuel Miland, will be referred to as "Miland." Plaintiff and Appellee, the State of South Dakota will be referred to as "the State." The Complainant below, Officer David Jacobs, will be referred to as "Officer Jacobs". References to the trial record will be designated as "T.R." followed by the appropriate page number. Also, references to the sentencing hearing will be designated as "S.R." followed by the appropriate number.

JURISDICTIONAL STATEMENT

Samuel Miland appeals from a final judgment of conviction for Aggravated Assault following a court trial with the Honorable Joseph Neiles, Second Judicial Circuit Court Judge, Canton, South Dakota, presiding. The trial court signed and filed the judgment on December 4, 2013. Miland timely filed his notice of appeal on December 19, 2013. This appeal is by right pursuant to SDCL § 23A-32-2.

STATEMENT OF THE LEGAL ISSUES

1. WHETHER THE TRIAL COURT ERRED IN DENYING MILAND'S MOTION FOR ACQUITTAL ON THE AGGRAVATED ASSAULT CHARGE DUE TO THE STATE'S FAILURE TO PROVE SERIOUS BODILY INJURY AS SOUTH DAKOTA LAW REQUIRES?

   State v. Janisch, 290 N.W.2d 473 (1980)

State v. Bogenreif, 465 N.W.2d 777 (SD 1991)
SDCL § 22-18-1.1(1)

2. WHETHER TRIAL COURT ERRED IN DETERMINING THAT MILAND'S ACTIONS WERE UNDERTAKEN UNDER CIRCUMSTANCES MANIFESTING EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE.

   SDCL § 22-18-1.1(1)
   O'Brien v. State, 45 P.3d 225, 232 (Wyo. 2002)
   Commonwealth v. O'Hanlon, 539 Pa. 478, 653 A.2d 616 (1995)

STATEMENT OF THE CASE & FACTS

CASE HISTORY

On November 19, 2012, the State charged Miland with three crimes: Possession of Controlled Substance, in violation of SDCL § 22-42-5; Aggravated Assault against a Law Enforcement Officer, in violation of SDCL § 22-18-1.1(1), 22-18-1.05, or in the alternative, SDCL § 22-18-1.1(4), 22-11-4(1); and Resisting Arrest, in violation of SDCL § 22-11-4(1). The State also, pursuant to SDCL § 22-7-18, filed an information alleging that Miland was an habitual offender. Miland pleaded "Not Guilty" to all counts. Miland also requested a bench trial, and his trial was held on June 28, 2013, the Honorable Judge Joseph Neiles presiding. The Court found Miland guilty of Possession of Controlled Substance, Aggravated Assault against Law Enforcement, and Resisting Arrest as charged in the Indictment.

For his conviction of Aggravated Assault against Law Enforcement, on December 2, 2013, the Court sentenced Miland to 40 years in the South Dakota State Penitentiary. Miland timely filed a notice of appeal on December 19, 2013, challenging his conviction on the charge of Aggravated Assault against Law Enforcement.

STATEMENT OF THE FACTS

On October 17, 2012, at about 11:40 pm, Samuel Miland and his friend, Jordan Blevins, visited a Pump & Pak convenience store in Canton, SD. They purchased some snacks and were ready to be on their way. The store clerk called the police because, to her, the two looked suspicious. Officer Jacobs responded to the call and arrived at the store as Miland and Blevins were leaving. The clerk informed Officer Jacobs that two were acting strange and she was suspicious of their plans. T.R. 10. This prompted Officer Jacobs to follow them. T.R. 10. While following them, Officer Jacobs ran a license plate check to determine whether the vehicle had possibly been stolen; it was not. T.R. 10. In spite of this finding, Officer Jacobs kept following the two, and eventually effectuated a traffic stop, alleging that Miland's vehicle's brake lights were not working. T.R. 10-11.

During the traffic stop, Officer Jacobs asked the vehicle's driver, Miland, to come back to the patrol car and started questioning him. T.R. 12. This was Miland's first time inside a police patrol car. S.H. 6. Miland cooperated with Officer Jacobs and voluntarily offered to take a sobriety test when Officer Jacobs questioned him about drinking. T.R. 12. Officer Jacobs also questioned the passenger Blevins, but, believing his story to be inconsistent with Miland's, and seeing a handgun magazine on the car's dashboard, Officer Jacobs was prompted to call for non-emergency backup. T.R. 13, 30. Deputies Colshan and Schurch responded to the call for backup and arrived at the scene immediately. T.R. 14. The deputies asked Miland for permission to search the car, and he consented. T.R. 16. Deputy Schurch searched the car while Officer Jacobs was in his police patrol car with Miland. At the same time, Deputy Colshan was talking to Blevins

in his patrol car, which was parked right behind Officer Jacobs' patrol car. T.R. 15-16. While Deputy Schurch was conducting the search of Miland's vehicle, Miland gave permission for the search to include the trunk his car. Officer Jacobs passed this information to Deputy Schurch. T.R. 16.

While inside Officer Jacobs' patrol car, Miland, in a sudden and inexplicable fit of paranoia and anxiety, struck Officer Jacobs with a fist. T.R. 17, 25, S.H. 6, 11. A physical altercation between the two ensued. Miland was unarmed and used solely his hands throughout the altercation. While struggling with Miland, Officer Jacobs simultaneously summoned for help from Deputies Schurch and Colshan by revving his patrol car's motor and hitting the horn. T.R. 17. During the altercation, Officer Jacobs was able to get his hand on Miland's throat and squeezed as hard as he could to push Miland off of himself. T.R. 18. Throughout the altercation, Officer Jacobs was conscious and could hear his colleagues coming to his aid. Appendix A, pg 2 (Officer Jacobs' Medical Records). Deputy Schurch was the first to make contact with Jacobs' vehicle, but could not open the driver's side door. Almost simultaneously, Deputy Colshan approached on the passenger side and using his asp, shattered the passenger side window, allowing him entrance to the patrol car and with Deputy Schurch's assistance forcibly yanked Miland from the car. Using brutal force, they pushed Miland's head to the curb and attempted to place him in restraints. T.R. 18, 39, 47. The altercation lasted less than a minute. Exhibit No. 1 (video). As the two Deputies were pulling Miland from the front seat, Deputy Colshan struck Miland's head repeatedly with an asp splitting Miland's head open. T.R. 39, 47. While this was occurring, Deputy Schurch, at the urging of Deputy Colshan, was kicking Miland in the ribs. T.R. 32. Officer Jacobs bled

from his nose, but did not suffer any lacerations, difficulty breathing, palpitations, loss of consciousness, or nasal fractures. T.R. 26, *See also* Appendix A, pg 2. (Officer Jacobs' Medical Records).

During this altercation, Officer Jacobs exits his patrol vehicle, and moves to the sidewalk to assist his colleagues in both restraining and placing handcuffs on the passenger Blevins. T.R. 34, 79. The deputies arrested Miland and called for ambulances, one of which took Miland to a hospital in Sioux Falls, approximately 35 miles north of this location in Canton, the second ambulance transported Officer Jacobs to the hospital in Canton. T.R. 19, 21. At the hospital, Officer Jacobs was given an icepack and some aspirin for his injuries and was discharged in less than 25 minutes. *See* Appendix A, pg.1 (Officer Jacobs' Medical Records). After leaving the hospital, Officer Jacobs, together with Canton Police Chief Dave Miller returned to the police station were Officer Jacobs completed his report of the night's events, not leaving for home until about 7:00 a.m. on October 18, 2012. T.R. 22, 27.

The following day, on October 18, 2012, Officer Jacobs visited his "personal doctor," Dr. Michael Olson, in Sioux Falls. T.R. 23. Dr. Olson took x-rays to determine the extent of the injuries. The x-rays revealed no cartilage or bone displacement or any nasal fracture. T.R. 26, 56, 60. The doctor treated the injuries symptomatically; he did not prescribe any medication, just aspirin and ice (typical first aid treatment). T.R. 60. Officer Jacobs saw Dr. Olson three (3) other times. By his second visit to the doctor on November 7, 2012, Officer Jacobs had no more aches or pains from the altercation. T.R. 61.

STANDARD OF REVIEW

This appeal involves both questions statutory interpretation and other questions of law. Statutory interpretation presents questions of law, which require de novo review. *State v. Hess*, 2004 S.D. 60, ¶9, 680 N.W.2d 314, 319. At the close of the State's case, Miland's attorney, Cynthia Berreau, timely moved the court for Miland's acquittal on the Aggravated Assault charge because the State had not adduced sufficient evidence to prove serious bodily injury as South Dakota law requires, which the court denied. "The denial of a motion for judgment of acquittal presents a question of law" and this Court reviews such denial *de novo*. *State v. Disanto*, 2004 S.D. 112, ¶14, 688 N.W.2d 201, 206. This Court must therefore decide anew whether the evidence at trial was sufficient to sustain Miland's conviction for Aggravated Assault. *Id.* In reviewing the sufficiency of evidence, the Court views the evidence in the light most favorable to the State drawing all reasonable inferences and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Stark,* 2011 S.D. 46, ¶ 21, 802 N.W.2d 165, 172.

ARGUMENT

THE COURT SHOULD REVERSE THE CONVICTION BECAUSE THE TRIAL COURT MISCONSTRUED THE ELEMENTS OF AGGRAVATED ASSAULT UNDER SDCL 22-18-1.1(1) AND THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT AGGRAVATED ASSAULT WAS, INDEED, COMMITTED.

SDCL § 22-18-1.1(1) provides that "any person who attempts to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life . . . is guilty of aggravated assault." It follows,

therefore, that for a person to be convicted under this statute, the State has to prove these two elements beyond a reasonable doubt:

1. An attempt to cause *serious bodily injury* or cause of *serious bodily injury*; and
2. Circumstances *manifesting extreme indifference* to the value of human life.

The trial court erroneously interpreted the statute in question and the State's evidence did not satisfy these elements. The evidence was not sufficient to prove that Samuel Miland attempted to or actually caused serious bodily injury or that his actions manifested extreme indifference to the value of human life. Miland's conviction was therefore a legal error that this court must reverse.

A. The plain language of SDCL § 22-18-1.1 Requires the State to Show Samuel Miland Attempted to Cause or Caused "Serious Bodily Injury"

One of the main contentions at trial was whether Jacobs' injuries amounted to "serious bodily injury" as provided under SDCL § 22-18-1.1(1). The word "serious," as used under that statute, connotes a very high degree of injury. *State v. Janisch*, 290 N.W.2d 473, 475 (1980). It is the seriousness of the resultant bodily injury that distinguishes aggravated assault from simple assault. *Id,* at 475. Both the South Dakota legislature and this Court have defined "serious bodily injury" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health, or limb." SDCL § 22-18-2(44A); *Janisch*, 290 N.W.2d at 476; *State v. Bogenreif*, 465 N.W.2d 777, 780 (SD 1991). *See also State v. Battest,* 295 N.W.2d 739, 742 (S.D. 1980) (stating that the injuries, taken together, have to present a danger to life, health, and limb.). The word "serious" is synonymous with great, severe, grave, critical, and grievous. ROGET'S II, THE NEW THESAURAS 888 (3d ed. 1995). For bodily injury to qualify as "serious," it has to be "of a more graver [*sic*] and more serious character than an ordinary battery."

Janisch, 290 N.W.2d at 476 (quoting *State v. McDaniels*, 145 Neb. 261, 266, 16 N.W. 2d 164, 167 (1944)). This court has specifically stated that, "[b]y 'great bodily harm' is meant more than *mere injury by fist*, such as likely to occur in ordinary assault and battery. *Janisch*, 290 N.W.2d at 476, (citing *State v. Peters*, 274 Minn.309, 317, 143 N.W.2d 832, 837 (1966)).

Officer Jacobs' injuries in this case, as a matter of law, do not qualify as "serious bodily injury" inasmuch as they were minor and did not present any danger to life, health, or limb. What occurred between Officer Jacobs and Miland was simply a physical altercation that amounted to no more than an ordinary battery. The State's evidence did not show beyond a reasonable doubt that Miland attempted to kill, disfigure, maim, or otherwise physical or mentally impair Officer Jacobs, a fact that is also borne out by the trivial injuries that resulted from the altercation. Throughout the altercation, Officer Jacobs was conscious and fully in charge of his mental faculties and limbs. In fact, he was able to fight Miland and summon for help from his backup by revving his patrol car motor and honking the horn. The State presented no evidence of extreme physical pain, permanent disfigurement, or loss or impairment of Officer Jacobs' vital bodily organs.

The State's own witness, Dr. Michael Olson, whom Officer Jacobs visited on at least 3 occasions, confirmed the injuries' triviality and transience. Officer Jacobs only sustained what Dr. Olson described as "some bruising, some abrasion on his forehead, some stiffness in his neck and shoulder, and some swelling on his nasal passage." T.R. 59. The injuries were so trivial and superficial that they "were treated symptomatically." T.R. 60. As Dr. Olson testified, Officer Jacobs needed only ice and some aspirin ("typical first-aid type measures") to treat his injuries; no, medicine, hospitalization, or

other medical procedure was necessary. T.R. 60. There was no severe pain or suffering. Officer Jacobs' x-rays revealed no injuries; there was no "fracture or cartilage displacement;" and on his second visit with the doctor on November 7, 2012 his aches and pains were gone. T.R. 61. In addition, although Officer Jacobs stated that he had problems breathing through one of his nostrils following the altercation, this problem was also temporary. From Dr. Olson's uncontroverted testimony, the breathing problem was not permanent, and with no fracture of cartilage displacement, Dr. Olson opined in his testimony this issue would clear *by itself* within a week or two. TR. 61. (Emphasis added). Dr. Olson further opined that Officer Jacobs would make a full recovery from the results of the altercation. T.R. 62.

The State's own evidence belied the seriousness of the injuries. The evidence of the injuries suffered proved no more than Officer Jacobs' superficial bruising, abrasion, and some swelling, which would normally occur in a simple assault or ordinary battery. The State's allegation that Officer Jacobs suffered a "crooked nose to a certain degree" was discredited by Dr. Olson, who testified that he "did not appreciate a lot of difference" in the appearance of the nose. T.R. 61-62. These injuries were not great, severe, grave, critical, or grievous and, therefore, do not qualify as "serious bodily injury" as required by SDCL § 22-18-1.1(1). For that reason, the trial court erred in finding that there was proof of serious bodily injury beyond a reasonable doubt.

The trial court based its determination of serious bodily injury solely on the fact that Officer Jacobs was "punched" in the face with a fist. T.R. 17, 108. The trial court, without any medical proof, surmised that "a blow" to a person's head presents a legitimate "fear or apprehension that injury can be lifelong; that it can be something that

will go along with the victim of that injury for an extended period of time." T.R. 108. It was solely on that surmising that the judge concluded that the State had proved beyond a reasonable doubt that the Officer Jacobs had suffered grave, serious, grievous bodily harm. T.R. 109. This court's finding, however, has no support in the evidence presented at trial.

Officer Jacobs was fully conscious during and after the altercation. He suffered no concussion, and was in control of his mental faculties throughout the night and after. In fact, after the altercation, Officer Jacobs put Miland in handcuffs; stayed awake the whole night; prepared a report about the incident; and was able to recollect every material detail of what transpired that night. T.R. 19, 22. The court's conclusion that any fistfight may cause lifelong brain injury had no evidentiary basis and was mere conjecture. The State presented no evidence of any brain injury or in any way showed impairment of Officer Jacobs' mental faculties.

The definition of serious bodily injury is not based on the action that causes injury, but on the injury that results from the action. The resultant injury has to give rise to give rise to the apprehension of danger to life, health, or limb. The Court therefore erred in determining that a fist punch to the face gave rise to the apprehension of danger to life, health, or limb without considering the actual injury that arose from the fist punch. Viewing the evidence in the light most favorable to the State, serious bodily injury was not proved beyond a reasonable doubt.

The determination as to whether the bodily injury was serious has to be made on a case-by-case basis. This Court has decided on various occasions whether an injury suffered amounted to serious bodily injury for Aggravated Assault purposes. *State v.*

Janisch is the oft-cited authority for determination of serious bodily injury. 290 N.W.2d 473, 475 (1980). In *Janisch*, the defendant together with an accomplice attacked the victim for about half an hour. They repeatedly struck, kicked, and threw him on a cement floor. The assailants also forced the victim to drop his pants, kneel and lick a urinal. The victim sustained black and blue marks across his head, shoulders, and right thigh. He also had a puffed eye, and swollen or cut lip. His injuries were treated with merthiolate, hydrogen peroxide, Bandaids, and an icepack. The court held that the victim's injuries did not qualify as "serious bodily injury" because they fell short of giving rise to apprehension of danger to life, health, or limb. *Janisch*, 290 N.W.2d at 476.

The *Janisch* case, in various respects, is somewhat similar to the one *sub judice*. Just like the *Janisch* victim who sustained "black and blue marks, a puffed eye, and a swollen or cut lid," Officer Jacobs only sustained what his physician described as "some bruising, some abrasion on his forehead, some stiffness in his neck and shoulder, and some swelling on his nasal passage." These are minor injuries typically sustained in a battery and in no way put Officer Jacobs in fear of danger to his life, health, or limb. Accordingly, just as in *Janisch*, the serious bodily injury element of Aggravated Assault was not satisfied.

This Court's cases that have affirmed a conviction of aggravated assault under SDCL § 22-18-1.1(1) have all involved injuries of a greater degree than those Officer Jacobs sustained from the altercation. In *State v. Bogenreif*, there was an altercation between inmates in a state penitentiary. 465 N.W.2d 777, 780 (SD 1991). In that case, the victim, Allen, suffered a cut lip that left a permanent scar; he lost his front teeth and two other teeth, and had to get dentures. There was also corroborated evidence that even

with the dentures, the victim would have difficulty eating. The court held that permanent loss of teeth and a permanent scar that resulted from a cut lip were sufficient to satisfy a finding of "serious bodily injury." The injuries to Allen were permanent, grave, and resulted in loss of a bodily member.

The injuries in the case at hand, however, do not arise to the degree of seriousness in *Bogenreif*. The altercation produced no permanent injury to Officer Jacobs. The State's own evidence unequivocally showed that Officer Jacobs would fully recover from the incident. That there was no evidence of any scars or permanent loss of any bodily member shows that his injuries were not "serious."

B. Miland's Actions Were Not Undertaken Under Circumstances Manifesting Extreme Indifference to the Value of Human Life.

The State also failed to prove beyond a reasonable doubt the mens rea component of Aggravated Assault —"circumstances manifesting an extreme indifference to the value of human life." SDCL § 22-18-1.1(1). The statute specifically requires the State to show that the accused not only manifested indifference to the value of human life, but also that the indifference was ***extreme***. Emphasis added. The adjective "*extreme*" is not mere statutory surplusage: the legislature specifically employed it to denote the degree of culpability required for aggravated assault. The trial court's conviction of Miland is therefore erroneous inasmuch as it failed to consider fully the requisite mens rea for aggravated assault.

Extreme indifference, of course, is more than just ordinary indifference or even a high degree of indifference —it requires the highest degree of indifference. It is a trite canon of statutory interpretation that the courts should accord words of a statute their plain and ordinary meaning. *Benson v. State*, 2006 S.D. 8, ¶71, 710 N.W.2d 131, 158.

The plain and ordinary meaning of the word "extreme" is "in or to the greatest degree"; "very great or greatest"; "to an excessive degree"; "very severe." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 505 (4th ed. 2001). *See State v. Best*, 56 Conn. App. 742, 755, 745 A.2d 223, 231 (2000) (defining the word "extreme" as "existing in the highest or greatest possible degree," and noting that it was synonymous with "excessive"). Under SDCL 22-18-1.1(1), the word "extreme" therefore envisages a very high degree of culpability.

Manifesting extreme indifference to the value of human life refers to degree of culpability that is higher than negligence[1] or recklessness[2]. *See O'Brien v. State*, 45 P.3d 225, 232 (Wyo. 2002). The South Dakota aggravated assault statute was adapted from the Model Penal Code and, therefore, commentary to the Model Penal Code and cases from other states with similar statutory language are illuminating on the subject. *See State v. Schouten*, 2005 S.D. 122, 707 N.W.2d 820, 824 (citation omitted) (noting that the legislature relied heavily on the Model Penal Code in revising the South Dakota criminal code). In *Commonwealth v. O'Hanlon*, 539 Pa. 478, 653 A.2d 616 (1995), the Pennsylvania Supreme Court held that aggravated assault required a higher degree of culpability, and mere recklessness could not suffice for a conviction. *Id.* at 482, 653 A.2d at 618. The degree of culpability required for aggravated assault was "that which

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[1] Under South Dakota law, criminal negligence is defined under SDCL § 22-1-2(c), which provides that: "[t]he words, "neglect, negligently," and all words derived thereof, import a want of attention to the nature or probable consequences of an act or omission which a prudent person ordinarily bestows in acting in his or her own concerns[.]"

[2] The definition of "recklessness" can be found under SDCL § 22-1-2(d), which provides thus: The words, "reckless, recklessly," and all derivatives thereof, import a conscious and unjustifiable disregard of a substantial risk that the offender's conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances if that person consciously and unjustifiably disregards a substantial risk that such circumstances may exist[.]

considers and then disregards the threat *necessarily* posed to human life by the offending conduct." *Id.* (Italics in original). Accordingly, "manifest indifference to the value of human life involves deliberation or conscious disregard of danger such that '*life-threatening injury is essentially certain to occur*.'" *Id.* at 482. (Emphasis added). A person manifests an extreme indifference to the value of human life when the events surrounding the imposition of serious bodily injury demonstrate "a blatant disregard for the risk to human life." *State v. Bailey*, 127 N.H. 416, 424, 503 A.2d 762, 769 (1985)

As noted above, the commentary to the Model Penal Code also contains invaluable insight into the meaning of manifesting extreme indifference to the value of human life.[3] Under the Model Penal Code, "extreme indifference" specifies "a special character of recklessness." 2 Am. Law Inst., MODEL PENAL CODE & COMMENTARIES § 211.1 cmt. 4 at 189 (1980). The "extreme indifference" language was adapted from the definition of murder found in Model Penal Code § 210.2(b), and was preceded by such common law phrases as "depraved heart,"[4] "implied malice," "abandoned and malignant heart." *Id. See also O'Brien*, 45 P.3d at 230; *State v. Boone*, 294 Or. 630, 636, 661 P.2d 917, 920 (1983)

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[3] Under the Model Penal Code, a defendant is guilty of aggravated assault "if he '(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." Model Penal Code § 211.1(2). When the SD legislature adopted the MPC definition of Aggravated assault it only left out three words: purposely, knowingly, and recklessly. *State v. Rash*, 294 N.W.2d 416, 417 (S.D. 1980)

[4] South Dakota has retained this language in its statutory definition of second degree murder. SDCL § 22-16-7. Homicide as murder in the second degree. Homicide is murder in the second degree if perpetrated by any act imminently dangerous to others and evincing *a depraved mind*, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child.

Extreme indifference to the value of human life in criminal cases is typically exemplified by such actions firing gunshots in an occupied vehicle; playing a game of Russian roulette; throwing stones into a busy street from a tall building; starting fire on an occupied dwelling, etc. The Model Penal Code uses the "extreme indifference" language not to change the meaning of the previously used cognate common law phrases, but to communicate to jurors in ordinary, simple, and more direct language. 2 Am. Law Inst., MODEL PENAL CODE & COMMENTARIES Part II § 210.2, Comment 4, pp. 25-26 (1980). The "extreme indifference" language in the South Dakota Aggravated Assault statute, therefore, imports a degree of culpability similar to "evincing a depraved mind, without regard for human life" under SDCL § 22-16-7. As the Pennsylvania Supreme Court has noted, "aggravated assault is, indeed, the functional equivalent of a murder in which, for some reason, death fails to occur. *O'Hanlon*, 539 Pa. at 483, 653 A.2d at 618.

The trial court erred in interpreting the "manifesting extreme indifference to the value of human life" standard. In the trial court's opinion, "a showing of indifference" where a person does not care about the consequences of his/her actions satisfies the Aggravated Assault mens rea requirement. T.R. 106. It was this erroneous interpretation that led the court to conclude that Samuel Miland manifested extreme indifference to the value of human life because "a reasonable person under the circumstances would have realized that . . . there was a real chance that somebody was going to be seriously injured." T.R. 106.

The plain statutory text, however, does not support the trial court's interpretation. Manifesting extreme indifference to the value of human life requires more than unreasonableness, in fact, it requires more than recklessness, i.e., "a conscious and

unjustifiable disregard of a substantial risk." *See* SDCL § 22-1-2(d). The State has to "show a blatant disregard to human life" such that "life-threatening injury is essentially certain to occur." *Bailey*, 127 N.H. at 424, 503 A.2d at 769 (1985); *O'Hanlon*, 539 Pa. at 482. Moreover, the State's evidence does not support the conclusion that the circumstances under which the altercation transpired presented a life-threatening danger to anyone's life. Samuel Miland was inside a police patrol car —an unfamiliar environment. He had no deadly weapon or otherwise armed and presented no physical advantage over Officer Jacobs. In addition, Officer Jacobs was not a helpless victim, but a trained police officer who had two other colleagues in his immediate vicinity. This was just a scuffle and fistfight that neither presented a threat to Officer Jacobs' life nor damaged his bodily organs. Officer Jacobs' colleagues immediately intervened and stopped the altercation *in less than one minute*. Miland's fight with Officer Jacobs was just an unreasonable enterprise that presented no probability that life-threatening injury was essentially certain to occur.

In *State v. Shear,* 295 N.W. 2d, 176 (SD 1980), this court decided whether the defendant's actions "manifested extreme indifference to the value of human life." In that case, the defendant, while trying to reach a male whom he assumed was having an affair with his wife, shoved his wife with his armed crossed in a football type position, and hit the male in the chin. The defendant also fired two blasts at an occupied pick-up with a shotgun but did not injure anybody. The wife sustained a fractured rib while the male suffered a scratch on his arm. In reversing the defendant's conviction for aggravated assault, this court held that the defendant's actions towards the wife were not under circumstances manifesting extreme indifference to the value of human life.

From the court's decision in *Shear*, it can be discerned that manifest indifference to the value of human takes more than recklessness, let alone negligence. The defendant in that case consciously and unjustifiably disregarded a substantial risk that shoving his wife in a football type manner would result in serious injury. This, however, was insufficient to qualify as extreme indifference to the value of life. *Shear* presents more egregious facts than the present case. The altercation between Officer Jacobs and Miland was just a scuffle between two men that resulted in no more than superficial injuries to the law enforcement officer --"some bruises, some abrasions, and some neck stiffness." The defendant in *Shear* shoved a helpless woman so hard that she fractured her rib. Because this court ruled that the circumstances in *Shear* did not amount to a manifestation of extreme indifference to the value of human life, it necessarily follows that the circumstances of the present case do not satisfy that standard of culpability.

CONCLUSION

Samuel Miland was convicted on erroneous statutory interpretation and on evidence that a rational finder of fact could not find the evidence presented to be convincing beyond a reasonable doubt that serious bodily injury was caused under circumstances manifesting extreme indifference to the value of human life. Serious bodily injury under the South Dakota aggravated assault statute requires such great bodily harm than mere bruising, abrasion, swelling, or stiffness. The Prosecution's own evidence belies any assertion of serious bodily injury. As the court found, the altercation between the Samuel Miland and Officer Jacobs was simply unreasonable. Unreasonableness, however, is not the standard of culpability that the legislature has

prescribed. The evidence before the court did not satisfy the statutory elements of aggravated assault, and, therefore the conviction was erroneous.

REQUEST FOR ORAL ARGUMENT

Samuel Miland respectfully requests to present oral arguments on the issues raised herein.

Dated this 24th day of April, 2014.

Respectfully submitted

__/s/_____
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AMENDED CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of April, 2014, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. Samuel Miland* was served by electronic mail upon Marty J. Jackley, Attorney General, at atgservice@state.sd.us; and Lincoln County State's Attorney Thomas R Wollman, by hand delivery.

Dated this 24th day of April, 2014.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,892 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

Dated this 24th day of April, 2014.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26910

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SAMUEL MILAND,

Defendant and Appellant.

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

THE HONORABLE JOSEPH NEILES
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed January 2, 2014

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26910

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SAMUEL MILAND,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Samuel Miland, will be referred to as "Defendant" or "Miland." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." References to documents will be designated as follows:

Settled Record ..... SR

Trial Transcript ..... TT

Defendant's Brief..... DB

All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On October 28, 2013, Judge Joseph Neiles entered a Judgment and Sentence resulting from guilty verdicts after a trial to Count I: Possession Of Controlled Drug Or Substance (SDCL 22-42-5); Count II:

Aggravated Assault Against Law Enforcement (SDCL 22-18-1.1(1), 22-18-1.05); and Count IV: Resisting Arrest (SDCL 22-11-4(1). SR 50-54. Miland also plead guilty to a Part 2 Information (SDCL 22-7-8). *Id.*

Defendant filed a Notice of Appeal to this Court in a timely manner on December 18, 2013, and an Amended Notice of Appeal on January 2, 2014. SR 65, 67. This Court has jurisdiction of this matter, pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT ERRED IN DENYING MILANDS MOTION FOR ACQUITTAL ON AGGRAVATED ASSAULT?

The trial court found sufficient evidence and denied Defendant's motion for a judgment of acquittal on this charge.

State v. Plenty Horse, 2007 S.D. 114, 741 N.W.2d 763

State v. Bogenreif, 465 N.W.2d 777 (S.D. 1991)

State v. Miskimins, 435 N.W.2d 217 (S.D. 1989)

II

WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT MILANDS ACTIONS CONSTITUTED EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE?

The trial court found the actions to be extreme indifference to the value of human life.

State v. Fasthorse, 2009 S.D. 106, 776 N.W.2d 233

STATEMENT OF THE CASE AND FACTS

David Jacobs serves as a Deputy for the Canton Police Department. He was on duty the evening of October 17, 2011, wearing his uniform and driving a marked patrol car. TT 9. He received a call from a clerk at a gas station who was nervous about some customers that came into the store. TT 10. Deputy Jacobs went into the convenience store and observed the person the clerk had called about. The individual entered a vehicle and left the store.

Deputy Jacobs followed the vehicle and ran a license plate check. TT 10. He then noticed that a brake light was out on the vehicle he was following. *Id.* He stopped the vehicle because of the break light, and the driver identified himself as Miland TT 11. The officer could smell alcohol emitting from the driver. TT 12. He had Miland enter the squad car and talked to him about the brake light issue. *Id.* When asked by Jacobs as to whether he had been drinking, Miland denied it. TT 12. He also asked Miland about where he was traveling.

There was a passenger in the vehicle that Miland was driving and he too was asked where he was going. TT 12-13. Deputy Jacobs became more suspicious when the two stories did not match up. *Id.* For safety purposes, the Deputy called for backup officers. TT 13.

Deputy Jacobs then asked if he could conduct a search of the vehicle, and Miland agreed. TT 15-16. The search resulted in some open containers and a prescription bottle being found in the vehicle.

TT 16. Miland made a cynical remark to the officer conducting the vehicle search to "make sure to search it real good . . ." TT 16.

Deputy Jacobs continued to engage in a general conversation with Miland while they were in the squad car. Miland asked about the deputy's work and they also talked about the city of Rochester Minnesota. TT 17. The deputy testified that during their conversation, he looked down for just a moment and Miland "launched a brutal attack on me." TT 17. He further testified that Miland's

> . . . first punch landed right square between the eyes on the nose. I don't know how he came over as fast as he did. At that point, I was seeing stars and he continued to beat on my face as fast as he could and as hard as he could for I don't know how long.

TT 17. Deputy Jacobs could not force Miland off, so he honked his horn, pressed on the accelerator pedal to rev-up the motor in an attempt to get the attention of Deputy Michael Schurch, who was conducting the search in the trunk of Defendant's vehicle. *Id.* Deputy Schurch said he heard the loud engine and saw the squad car "shaking pretty furiously and I saw Miland striking Jacobs in the face." TT 31.

Deputy Jacobs testified that Miland's feet or knees were on top of the passenger seat "and he was trying to get his arm behind my head and it appeared to me that he was trying to get around my throat." TT 18. Jacobs next heard somebody yell "watch your eyes" and then heard something hit the window. TT 18. It was Deputy Kolshan from the Lincoln County Sheriff's Office that broke open the passenger's

window in an attempt to enter the vehicle. TT 43-47. Deputy Jacobs said that he was able to grab Miland's throat, but then Miland started kicking him until Deputy Kolshan pulled Defendant out of the car. TT 18. Miland then began to overpower Deputy Kolshan and take command of his police baton. TT 32-33. Fortunately, another officer began kicking Miland until he submitted. The State admitted Exhibit 1, which was a video that provided some perspective of the attack. TT 20.

Jacobs testified that his head, back, shoulders and neck were all hurt, in addition to blood running into his mouth and eyes. TT 19. He was wearing his glasses when Miland starting hitting his face. *Id.* He was taken to the hospital by ambulance. TT 21.

Eight months after the attack, Deputy Jacobs suffers from the effects of the beating. He testified at trial that he still had "difficulty breathing through the left side of my nose, reduced airflow, and I also still suffer from flashbacks, nightmares." TT 24. He also said that his "nose is still crooked." *Id.*

Dr. Olson examined the officer and stated that the x-rays did not reveal any fractures. TT 59. He did say that Deputy Jacobs did have bruising, abrasion, complained of stiffness in his neck and shoulders, in addition to swelling in the left nasal passage. TT 59. Other manifestations from the attack have included complaints of insomnia,

depression and anxiety. TT 61. The doctor also said that it would require plastic surgery to fix Deputy Jacobs' crooked nose. TT 62.

Defendant's urine sample tested positive for methamphetamine. TT 71.

ARGUMENTS

I

THERE WAS SUFFICIENT EVIDENCE FOR DEFENDANT TO BE FOUND GUILTY OF THE CHARGES.

A. *Introduction*

In his brief, Defendant complains that there was not sufficient evidence for him to be found guilty of Count II: Aggravated Assault Against Law Enforcement (SDCL 22-18-1.1(1), 22-18-1.05). DB 9. Specifically, he argues that the State failed to prove any attempt to cause serious bodily injury and circumstances manifesting extreme indifference to the value of human life. DB 10.

B. *Standard of Review*

This Court has held that the standard of review for a sufficiency of evidence case is *de novo*. *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764. The question to be answered is whether the record reflects evidence which, if believed by the trier of fact, is sufficient to sustain the finding of guilt beyond a reasonable doubt. *State v. Augustine*, 2000 S.D. 93, ¶ 26, 614 N.W.2d 796, 800; *State v. Larson*, 1998 S.D. 80, ¶ 9, 582 N.W.2d 15, 17. An appellate court will

not disturb the trial court's decision absent a clear showing of abuse of discretion. *State v. Perovich*, 2001 S.D. 96, ¶ 11, 632 N.W.2d 12, 15. The test is not whether the appellate court would have ruled the same way, but rather if a "judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion." *Id.* at ¶ 11, 632 N.W.2d at 16. The Court does not engage in resolution of conflicts in testimony as Defendant desires. The resolution of conflicts, weighing of evidence, or determining the credibility of specific witnesses is not the appellate court's job. *State v. Hage*, 532 N.W.2d 406, 410-11 (S.D. 1995). Inquiry does not require the appellate court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Plenty Horse*, 2007 S.D. 114 at ¶ 5, 741 N.W.2d at 765 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). This Court has stated:

> [T]he relevant question is 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.

Plenty Horse, 2007 S.D. 114 at ¶ 5, 741 N.W.2d at 765. The determination is not whether most rational triers of fact would find guilt, but if the evidence is so insufficient that "no rational trier of fact could find guilt beyond a reasonable doubt." *Id.*

C. *Analysis*

After the State rested its case, Defendant made a Motion for Judgment of Acquittal. TT 92. This Court has held that if the evidence, which can include circumstantial evidence, is such that an inference supports "a reasonable theory of guilt, a guilty verdict will not be set aside." *State v. Beck,* 2010 S.D. 52, ¶ 7, 785 N.W.2d 288, 292.

Defendant relies heavily on *State v. Janisch*, 290 N.W.2d 473 (S.D. 1980), for the proposition that a beating is insufficient to prove aggravated assault. DB 14. This is derived from the *Janisch* court's holding that the term "serious bodily injury" required more than the kind of injury that could be inflicted by a fist. In *Janisch*, serious bodily injury, as used in SDCL 22-18-1.1, as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health or limb." *Janisch*, 290 N.W.2d at 476; *State v. Bogenreif*, 465 N.W.2d 777, 780 (S.D. 1991); *State v. Eagle Star*, 1996 S.D. 143, ¶ 27, 558 N.W.2d 70, 76. The court went on to find that "great bodily harm" is more than "such as is likely to occur in ordinary assault and battery." *Janisch*, 290 N.W.2d at 476 (citing *State v. Peters*, 143 N.W.2d 832, 837 (Minn. 1966)). That principle was largely overruled in *Bogenreif*, 465 N.W.2d at 780-81, in which this Court expanded the definition of serious bodily injury to include broken teeth and permanent scarring from a cut lip. Defendant's reliance on *Janisch* is misplaced.

Defendant's position is more specifically unsound as the aggravated assault subsection under which he was convicted, SDCL 22-18-1.1(1), which expressly envisions not only the infliction of "serious bodily injury" but the attempt to create such harm. Thus, the elements of the crime that the trier of fact is to consider in this case are: (1) attempted to cause serious bodily injury to another, and (2) under circumstances manifesting extreme indifference to the value of human life. SDCL 22-18-1.1(1). "Attempt" does not require completion of the act intended:

> In drawing a distinction between preparation and attempt, this court has held that it is not necessary that the last further act necessary to the actual accomplishment of the crime be taken to be a requisite to make an attempt. The statutes clearly require only that "any" act towards the commission of the crime be done. *State v. Martinez*, 88 S.D. 369, 220 N.W.2d 530 (1974). Any unequivocal act by defendant to insure that the intended result was a crime and not another innocent act constitutes an attempt. The line between preparation and attempt is drawn at that point where the accused's acts no longer strike the jury as being equivocal but unequivocally demonstrate that a crime is about to be committed. *Martinez*, 88 S.D. at 372, 220 N.W.2d at 531.

State v. Miskimins, 435 N.W.2d 217, 222-23 (S.D. 1989).

Deputy Jacobs testified that Miland's attempt to inflict serious bodily injury started when his,

> . . . first punch landed right square between the eyes on the nose. I don't know how he came over as fast as he did. At that point, I was seeing stars and he continued to beat on my face as fast as he could and as hard as he could for I don't know how long.

TT 17.

The idea that blows from ones fist cannot possibly be considered as causing serious bodily injury is unrealistic in consideration with modern medicine.

> A rule which declares as a matter of law that the force behind a blow to the head which causes unconsciousness cannot serve as the basis for a possible felony conviction, may have had some value in the more robust past, when society was perhaps more tolerant of those who expressed their hostilities and frustrations in fist fights, but it is plainly contradicted by everyday experience.

People v. Muir, 244 Cal. App. 2d 598, 604 (1966). While it

> can be argued that all permanent injury constitutes great bodily harm. It does not follow that all great bodily harm consists of permanent injury. Indeed, many serious bodily injuries leave no lasting effect on the health, strength, and comfort of the injured person.

Owens v. State, 289 So.2d 472, 474 (Fla. 1974).

Therefore, "[t]o constitute the crime of aggravated battery, there is no requirement that, in addition to being 'serious,' the disfigurement of a victim be permanent." *In the Interest of H.S.,* 405 S.E.2d 323, 324 (Ga. 1991); *State v. Frost*, 564 A.2d 70 (Me. 1989); *State v. Salinas*, 549 P.2d 712, 717 (Wash. 1976); *State v. Agren*, 622 P.2d 388, 391 (Wash. 1980). Residual effects from the assault exist for Deputy Jacobs. Eight months after the beating, he still suffered "difficulty breathing through the left side of my nose, reduced airflow, and I also still suffer from flashbacks, nightmares." TT 24. He also said that his nose is crooked. *Id.* The trial court stated on the record the impact of head injuries that have,

> manifest with anxiety attacks, post-traumatic stress disorder,…So any time we're talking about an injury to a person's head and serious injury to their head where there has not be just a bump…but a real blow to their head, I think legitimately there is a fear or an apprehension that that (sic) injury can be life long; that it can be something that will go with the victim of that injury for an extended period of time.

TT 107.

In this case, the evidence was sufficient for the court to conclude that Defendant's actions manifested an intent to inflict serious bodily injury on the officer and acted to carry out that intention. It must be remembered that at the time of the attack, Miland was surrounded by armed law enforcement agents. This did not deter him from attempting a complete knockout of Deputy Jacobs. If Miland had been successful, he would have also had access to the Deputy's gun. The extreme violence of Miland and possible attempt to secure a weapon is further shown by his continued fighting with Deputy Kolshan, who drug Miland out of the car. TT 18. Miland then began to overpower Deputy Kolshan and take command of his police baton. TT 32-33.

"Serious bodily injury" is injury that is grave and gives rise to an apprehension of a threat to life, health or limb (*Bogenreif,* 465 N.W.2d at 780). As required by *State v. Disanto*, 2004 S.D. 112, ¶ 40, 688 N.W.2d 201, 213, Defendant proceeded beyond words or preparation to physical perpetration. Deputy Jacobs testified that Miland's feet or knees were on top of the passenger seat "and he was trying to get his

arm behind my head and it appeared to me that he was trying to get around my throat." TT 18.

In *Bogenreif*, the South Dakota Supreme Court reaffirmed that "whether injuries constitute serious bodily injury is a question for the jury," 465 N.W.2d at 781. The State, therefore, would assert that the trial court properly denied Defendant's Motion for Judgment of Acquittal and allowed the trier of fact to determine, as a question of fact, whether the injuries inflicted upon the victim constituted "serious bodily injury." This Court should not, on appeal, disturb the jury's finding where there is sufficient competent evidence to support it. *Owens*, 289 So.2d at 474. Defendant's conviction of aggravated assault should be affirmed.

II

MILANDS ACTIONS CONSTITUTED EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE.

Defendant claims that the State failed to demonstrate that Miland's attempted actions constituted extreme indifference to the value of human life. DB 10. In *State v. Fasthorse,* 2009 S.D. 106, 776 N.W.2d 233, Defendant Fasthorse argued the same view in that his victim had a,

> relatively short three-hour hospital stay, the nurse's description of A.S.'s condition as "good" except for some minor scratches and abrasions, and lack of life-threatening injuries demonstrate that no serious bodily injuries…

Fasthorse, 2009 S.D. 106 at ¶ 10, 776 N.W.2d at 237.

Fasthorse went on to argue that these facts did not demonstrate an attempt to cause serious bodily injury with circumstances manifesting extreme indifference to the value of human life.

> Trial testimony established that Fasthorse punched, choked, and threatened to shoot and kill A.S. He also tripped her and dragged her back to the vehicle. This evidence was sufficient for the jury to determine that Fasthorse 'attempt[ed] to cause serious bodily injury ... under circumstances manifesting extreme indifference to the value of human life' to A.S.

Fasthorse, 2009 S.D. 106 at ¶ 11, 776 N.W.2d at 237.

Examine the facts of Defendant Miland's attack on the deputy. The deputy was armed with a gun and other law enforcement officers were nearby. Despite being outnumbered and outgunned, Miland's attempted a vicious attack to render the victim unconscious.

> . . . first punch landed right square between the eyes on the nose. I don't know how he came over as fast as he did. At that point, I was seeing stars and he continued to beat on my face as fast as he could and as hard as he could for I don't know how long.

TT 17.

Deputy Jacobs testified that Miland's feet or knees were on top of the passenger seat "and he was trying to get his arm behind my head and it appeared to me that he was trying to get around my throat." (Emphasis added) TT 18. This occurred while another officer was trying to break the car window to enter the vehicle. *Id.*

The trial court stated that it evaluated all the "circumstances surrounding the injury in trying to decide whether a person is

manifesting extreme indifference to the value of human life." TT 105. It was the court's opinion that Defendant probably did not think he was going to escape. TT 106. Specifically the judge stated:

> So I think the facts of this case support totally a finding of the Court and this assault took place under circumstances manifesting extreme indifferences to the value of human life. He was indifferent to what the consequences of this assault were going to be under these circumstances. I think he was trying to overpower the officer to perhaps try to get his weapon and perhaps then to assault the other officers, but it was certainly a situation where, under the circumstances of this case, I think that that (sic) supports that.

TT 107.

CONCLUSION

The State respectfully requests that the Defendant's conviction be affirmed on the basis of the foregoing arguments and authorities.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 3,060 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this _____ day of May, 2014.

_____
John M. Strohman
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of May, 2014, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Samuel Miland* was served via electronic mail upon Cynthia Berreau, Attorney at Law at

cb.berreaulaw@midconetwork.com

_____
John M. Strohman
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

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SAMUEL MILAND
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APPEAL FROM THE CIRCUIT COURT
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APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

To avoid repetitive arguments, Appellant will limit his discussion in the Reply Brief to portions of the issues, which need further development or argument. Any matter or argument raised earlier in Appellant's Brief but not specifically mentioned in this brief is not intended to be waived. Appellant will attempt to avoid revisiting matters adequately addressed in the initial briefs of the parties. All references to the parties will be the same as used in Appellant's Brief. Reference to Appellant's Brief will be referred to as "AB", followed by the page number. The brief filed by Appellee/State will be citied as "SB," followed by the page number.

Appellant relies upon the **Jurisdictional Statement**, **Statement of the Case**, and **Statement of Facts** presented in the Appellant's Brief that was filed with the Court on April 28, 2014.

ARGUMENT

THE CONVICTION SHOULD BE REVERSED BECAUSE SOUTH DAKOTA LAW HAS A STRINGENT DEFINITION OF SERIOUS BODILY INJURY AND THE STATE FAILED TO PROVE AN ATTEMPT TO CAUSE SUCH INJURY OR THAT SUCH INJURY WAS SUSTAINED.

a. Serious Bodily Injury is Strictly defined under South Dakota law.

From the outset, it should be pointed out that it is not Miland's position, as Appellee maintains, that *State v. Janisch*, 290 N.W.2d 473 (S.D. 1980), stands for the proposition that a beating is insufficient to prove aggravated assault. S.B. 8. It is not Appellant's contention that *Janisch* stands for the categorical proposition that injury caused by hand may not cause serious bodily injury, but rather that *Janisch* supplies the definition of serious bodily injury. That definition has been codified under South Dakota

law and the seriousness of injuries in the present case, whether attempted or completed, should be determined using that standard. *See* SDCL § 22-1-2(44A).

In *Janisch*, this Court, after considering various interpretations of serious bodily injury employed in sister jurisdictions, adopted a "*more stringent*" definition of serious bodily injury. *Janisch,* 290 N.W.2d at 476. The Court specifically noted that although the legislature had, at the time, not supplied the definition of serious bodily injury, the word "serious" as employed under that statute meant something more than is ordinarily understood. The Court further noted that in enacting that provision, the legislature intended to require "*more serious bodily injury than simple assault*" because most assaults would undoubtedly result in some bodily injury, if only a bruise or black eye." *Id,* at 475. In determining the definition of "serious bodily injury," this Court considered interpretations from other states with similar statutes, and found that there were two lines of authority that explained the meaning of serious bodily injury — one more stringent than the other. The Court rejected the moderate interpretation that defined serious bodily injury as injury "of a more graver [sic] and more serious character than ordinary battery" or as "more injury by fist, such is likely to occur in ordinary assault and battery.

The Court instead adopted what it referred to as a "*more stringent*" definition and stated that serious bodily injury is such injury as is grave and not trivial, and gives rise to apprehension of danger to health, life or limb. It deemed this to be a more fitting definition because the offense of aggravated assault was "included with other offenses that by their very nature indicated imminent threat to the life or limb of the victim." The Court was further "impressed by the difference in the penalty that the legislature saw fit to impose which was up to ten times more severe than that imposed for simple assault."

Maintaining fidelity to its holding in *Janish,* this Court has reiterated the definition of serious bodily injury in subsequent aggravated assault cases, including *State v. Bogenrief*, 465 N.W.2d 777 (S.D. 1991). In *Bogenreif*, the evidence in that case showed that the victim "suffered loosened teeth, abrasions around his cheeks, and a very extensive laceration of his lip." The cut lip was jagged and irregular, and the muscles that permit smiling or frowning were severed. Nerve endings in the area of the victim were disturbed, causing sensitivity to heat and cold. The lip damage, which extended completely through the lip, resulted in a permanent scar. The evidence further showed the victim's teeth and his bite had been altered; some of his teeth had been moved in their sockets; and that the teeth had to be removed and replaced with dentures. It was further proved that three days after the incident, the victim was in so much pain that he could not close his mouth.

In determining whether the injuries suffered in this case amounted to serious bodily injury as a matter of law, this Court reiterated its "stringent" position in *Janisch* that for bodily injury to qualify as serious, the injury has to be "grave, *and* . . . give rise to the apprehension of a threat to life, health or limb. Emphasis in original. Accordingly, the Court held that "evidence of the loss of teeth, coupled with a cut lip which resulted in a permanent scar [was] sufficient to sustain a jury's finding of serious bodily injury."

This "stringent" definition, without any alteration, has been adopted by the legislature and codified under SDCL 22-1-2(44A). The conjunction "and" used in the definition indeed emphasizes the magnitude of injury that qualifies as "serious" — not only does the injury have to be grave, but it also has to give rise to apprehension of danger to life, health or limb. In other words, grave injury in and of itself does not

suffice for purposes of serious bodily injury. If that grave injury presents no threat to life, health, or limb, then, the definition of serious bodily injury is not satisfied. In light of that definition; therefore, whether injury is inflicted by fist or any other instrumentality, it has to be grave and has to give rise to the apprehension of danger to life, health or limb.

b. Attempt to cause serious bodily injury

Appellee contends that there was proof of an attempted aggravated assault. As the aggravated assault statute specifically provides; however, both the unsuccessful attempt and the completed offense of aggravated assault has to satisfy the "serious bodily harm" element. SDCL § 22-18-1.1(1). The State, therefore, had to prove that, by his actions, Miland unequivocally demonstrated that he was about to cause such injury as is grave, and not trivial, ***and*** that such injury would give rise to an apprehension of a threat to life, health or limb. Emphasis added.

This Court discussed the issue of attempted aggravated assault in *State v. Fasthorse*, 2009 S.D. 106, 776 N.W.2d 233. In that case, the evidence showed that the defendant, Fasthorse, in a bid to rape the victim, tripped her and dragged her to a vehicle from which she had run. The evidence further showed that Fasthorse "punched, choked, and threatened *to shoot and kill*" her. Although the Court did not definitively decide whether the victim suffered serious bodily injury as a matter of law, it held that Fasthorse's actions constituted an attempt to cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life.

In contrast to *Fasthorse*, the facts of the present case fall short of establishing an attempt to cause serious bodily harm under circumstances manifesting extreme indifference to the value of human life. Jacobs was not a defenseless victim, but an

armed, trained police officer who had fellow armed, trained police officer in his immediate vicinity. T.R. 17. The State presented no evidence to prove that Miland was trying to kill, maim, or physically or mentally incapacitate Jacobs in a manner that meets the serious bodily injury standard. When Miland struck Jacobs in the face, Jacobs immediately retaliated by putting his hands around Miland's throat and squeezing as hard as possible and pushed Miland off. T.R. 18. There was no evidence that Miland tried to shoot, kill, maim, or otherwise permanently impair Jacobs.

The fact that Miland struck Jacobs and struggled with him in the scuffle in of itself does not lead to the conclusion that Miland attempted to cause serious bodily injury. It is worthy to note that the case Appellee relies on to support the proposition a fistic encounter may cause serious bodily injury, *People v. Muir,* 244 Cal.App.2d 598 (1966), heavily focused on the nature of the strike. In *Muir*, a case decided 14 years before *Janisch*, the California Court of Appeal was dealing with "the force behind blow to the head *which cause[d] unconsciousness*." *Muir*, 244 Cal.App.2d at 604. Emphasis Added. In fact, in that case, the evidence was inconclusive as to whether the victim was struck by an object or a hand. *Id,* at 598. The evidence showed that someone had struck the victim on the head with such force that the victim *lost consciousness* and that the only thing she could remember thereafter was going to the telephone to call for help. Emphasis added. The Court also found that she had been "pitifully wounded" and that there was "another gap in her memory." *Id.*

The *Muir* facts are grievous and find no parallel in the present case. The Court's decision in that case focused on the force behind a blow to the victim's head, which was manifested in the victim's loss of consciousness and spans of amnesia. It was these facts

that led the *Muir* Court to conclude that a blow to the head, which causes unconsciousness, may serve as a basis for a felony conviction under a statute that penalizes assault by means of force *likely* to produce great bodily injury. In reaching this conclusion, the Court noted that although under that California statute "guilt did not depend on the injuries suffered by the victim, . . . the extent of the injuries suffered is often indicative of the amount of force used." *Muir*, 244 Cal.App.2d 603.

The evidence in the present case and the nature of Jacobs' injuries do not support any assertion that there was an attempt to cause serious bodily injury as required by South Dakota law. Miland, using his hands, struck Jacobs in the face. Unlike in *Muir*, there was no evidence that the force used in striking Jacobs was of such great force as to cause serious bodily injury. Jacobs was conscious throughout the altercation and thereafter. In fact, the trifling and ephemeral nature of Jacobs' injuries and all the medical reports and testimony regarding the incident indicate that the force used was incapable of causing injury that is grave and not trivial and that gives rise to the apprehension of danger to life, health, or limb.

In addition, the Trial Court did not make any particular finding on what Jacobs was trying to do or was attempting to do. The Court merely found that by his actions towards Jacobs, Miland did not care about the consequences of his actions. T.R. 106. The Court made no reference as to whether Miland unequivocally demonstrated that he was about to cause serious bodily injury. The Trial Court simply stated that:

> "[A] reasonable person in the circumstances of [Miland], sitting in a patrol car with a police officer, certainly would have known that the other officers were going to come to the aid of the officer being assaulted, and, certainly, a reasonable person under those circumstances would have realized that, based upon that, there was a real chance that somebody was going to be seriously injured, whether it be himself or the officers."

As far as determining what Miland was attempting to do, the Court merely conjectured that "he was trying to overpower the officer to *perhaps* to *try* to get his weapon and *perhaps* then to assault the other officers." This determination; however, is based on a tenuous string of inferences that is not supported by evidence on the record, and certainly, does not establish an attempt to cause serious bodily injury beyond a reasonable doubt. There was no evidence whatsoever that Miland ever tried to obtain Jacobs' weapon and assault the other officers. Accordingly, there is no proof that Miland unequivocally demonstrated that he was about the cause a grave injury that gives rise to the apprehension of a threat to life, health, or limb.

CONCLUSION

Under South Dakota law, for a person to be convicted for aggravated assault, the State has to prove beyond a reasonable doubt that the person caused or attempted to cause serious bodily injury under circumstances manifesting extreme indifference to the value of human life. Both this Court and the legislature have determined that a stringent definition of serious bodily injury has to be satisfied for a person to be convicted for aggravated assault. Miland's conviction under the aggravated assault statute must be reversed because the States evidence fell far short of showing that Miland caused or attempted to cause serious bodily injury as stringently defined by South Dakota law.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of June, 2014, a true and correct copy of Appellant's Reply Brief in the matter of *State of South Dakota v. Samuel Miland* was served by electronic mail upon Marty J. Jackley, Attorney General, at atgservice@state.sd.us; and Lincoln County State's Attorney, Thomas R. Wollman, by hand delivery.

Dated this 14th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 2,136 words from the State of the Preliminary Statement through the Conclusion. I have relied on the word count of a word processing program to prepare this certificate.

Dated this 14th day of June, 2014.

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