

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JEREMY LUCERO,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
FALL RIVER COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT A. ROETZEL
Judge

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CONSIDERED ON BRIEFS
AUGUST 25, 2026
OPINION FILED **09/23/26**

MYREN, Justice

[¶1.] Jeremy Lucero pled guilty to possession of a controlled substance, a presumptively probationary felony under SDCL 22-6-11. The circuit court found aggravating circumstances that posed a significant risk to the public and deviated from presumptive probation, sentencing Lucero to five years in prison with three years suspended. Lucero appeals, and we affirm.

Factual and Procedural Background

[¶2.] Police found methamphetamine and drug paraphernalia in Lucero's vehicle, and his urine tested positive for methamphetamine. Lucero was charged with possession of a controlled substance (methamphetamine), ingestion of a controlled substance (methamphetamine), and possession of drug paraphernalia. He ultimately reached a plea agreement with the State, under which he would plead guilty to the possession of a controlled substance in return for the dismissal of all other charges against him. The agreement left both parties free to recommend any sentence.

[¶3.] The State requested a penitentiary sentence, arguing that Lucero presented a danger to the public based on his extensive criminal history and the nature of the charges that were dismissed. The State noted that Lucero had seven prior felony convictions (which included drug-related offenses, burglaries, and theft) and his Level of Services Inventory-Revised (LSI-R)* score was considered high risk.

* One of the factors the court considered in determining aggravating circumstances to deviate from the presumption of probation was Lucero's
(continued . . .)

[¶4.] Lucero’s counsel noted that a conviction for possession of a controlled substance was subject to presumptive probation. Counsel stressed that the Legislature did not provide for a departure from presumptive probation based solely on the existence of criminal history. As evidence that Lucero was not a danger to the public, counsel explained that he had never been charged with violent crimes, claiming that his crimes posed a harm “first and foremost to himself.” Counsel specifically requested a probationary sentence with random drug testing and mandatory counseling to help Lucero stay off drugs. Lastly, counsel argued that although the circuit court could consider criminal history, “I don’t think it’s a factor that should ever be in and of itself enough to rob a person from the opportunity that the [L]egislature intended[.]”

[¶5.] Before imposing sentence, the circuit court began by noting that Lucero was 46 years of age and pled guilty to a presumptively probationary crime. In favor of mitigation, the circuit court stressed that Lucero was cooperative and

(. . . continued)

LSI-R score. While a court is granted considerable discretion in determining what information is relevant to sentencing, the LSI-R score is a risk assessment tool intended for determining supervision levels and responses. *See* SDCL ch. 23A-48 (categorizing probationers by their LSI-R risk level to determine appropriate sanctions and probation responses for violations). The LSI-R has not been validated for use as a tool to determine criminal sentences. While a court may consider the LSI-R score in the context of its relevancy to community supervision, the use of this assessment tool should not be substituted for the court’s need at sentencing to develop a “thorough acquaintance with [a defendant’s] character and history, including information concerning his life and characteristics.” *State v. Bear Robe*, 2024 S.D. 77, ¶ 16, 15 N.W.3d 460, 466. Lucero has not challenged the court’s consideration of the LSI-R score in this case, and the record reflects that the court identified a number of other aggravating circumstances specific to Lucero that the court determined created a “significant risk to the community.”

appeared remorseful. For aggravating factors, the circuit court identified that Lucero had 17 prior felony charges, seven prior felony convictions, a high-risk LSI-R score, and continued to use methamphetamine while awaiting sentencing. The circuit court stated, “[L]ooking at the total picture, the Court is not of the belief that you are going to change your behavior. Again, you admitted to using meth while on bond so you, of all people, should know the consequences of your lengthy history, but you continued to use and didn’t change your ways.” The circuit court next addressed the assertion that Lucero’s criminal history was nonviolent by noting that his history included “burglaries, possession with intent, another burglary.” The circuit court found that this history, combined with Lucero’s use of methamphetamine while on bond, created a “significant risk to the community” and sentenced Lucero to five years in the penitentiary with three years suspended. The circuit court’s judgment of conviction identified the same findings.

[¶6.] Lucero appeals this departure from presumptive probation. He contends the circuit court must point to specific circumstances, beyond the existence of prior convictions and personal use of illegal drugs, that articulate a public safety risk. The State contends that Lucero failed to preserve this issue for appeal because he did not specifically object to the court’s deviation from presumptive probation at the time of sentencing.

Decision

Whether Lucero preserved his ability to contest the circuit court’s deviation from SDCL 22-6-11.

[¶7.] This Court has “never required detailed findings of fact to justify a sentence.” *State v. Bear Robe*, 2024 S.D. 77, ¶ 16, 15 N.W.3d 460, 466. However,

SDCL 22-6-11 creates a statutory exception to that rule because it specifically requires a sentencing court to find “aggravating circumstances” that “pose a significant risk to the public and require a departure from presumptive probation[.]” That statute also requires that the “judge must state the aggravating circumstances on the record at the time of sentencing and in the dispositional order.” *Id.*

[¶8.] Over time, we have addressed numerous appeals in which the sentencing court departed from presumptive probation but failed to comply with SDCL 22-6-11’s explicit requirements for findings. *See, e.g., State v. Whitfield*, 2015 S.D. 17, ¶ 20, 862 N.W.2d 133, 140; *State v. Beckwith*, 2015 S.D. 76, ¶ 18, 871 N.W.2d 57, 61–62. Often, these cases involved circumstances where the circuit court’s failure to comply with the statute resulted from mere oversight. In other cases, the circuit courts had incorrectly determined that SDCL 22-6-11 was inapplicable, or we could not discern whether the circuit court had applied SDCL 22-6-11 when imposing sentence. *See State v. Flowers*, 2016 S.D. 63, ¶ 9, 885 N.W.2d 783, 785–86; *State v. Roedder*, 2019 S.D. 9, ¶ 40, 923 N.W.2d 537, 549; *State v. Feucht*, 2024 S.D. 16, ¶ 29, 5 N.W.3d 561, 570. In those instances, had the appealing party drawn the sentencing court’s attention to the oversight, the court likely would have complied with the statutory requirements without the need for an appeal.

[¶9.] Consequently, in *Feucht*, when first presented with an argument that the defendant was required to raise the issue of noncompliance with SDCL 22-6-11 below to preserve the matter for appeal, we announced our intention to enforce our long-standing preservation rules to encourage litigants to seek recourse with the

sentencing court before pursuing the issue on appeal. 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569. In describing the circumstances, we referred to these as errors in the “sentencing procedure.” *Id.* ¶ 22, 5 N.W.3d at 568. Our use of that language has led some parties to perceive that we created a separate class of “procedural errors” which must be specially preserved, or that all challenges to departures from presumptive probation can only be reviewed under the plain error doctrine if no objection to the sentence was made to the circuit court.

[¶10.] These perceptions are unfortunate and incorrect. In *Feucht*, we merely reiterated that we would enforce our long-standing preservation requirements when asked to address alleged errors arising from the sentencing court’s failure to apply SDCL 22-6-11 or to comply with the statutory requirements for findings under that statute. 2024 S.D. 16, ¶ 24, 5 N.W.3d at 569.

[¶11.] For clarity, we restate those preservation principles here. Before seeking appellate review of alleged trial errors, litigants “must make known to the [circuit] courts the actions they seek to achieve or object to the actions of the court, giving their reasons.” *State v. Pretty Weasel*, 2023 S.D. 41, ¶ 29, 994 N.W.2d 435, 441–42 (quoting *State v. Bryant*, 2020 S.D. 49, ¶ 18, 948 N.W.2d 333, 338). Proper preservation gives the court closest to the issue the opportunity to correct an alleged error as efficiently as possible. As in our prior cases, defendants who seek a presumptive sentence need not object to a court’s departure from presumptive probation to preserve an appellate claim that the circuit court abused its discretion when applying SDCL 22-6-11.

[¶12.] Here, the circuit court was clearly applying SDCL 22-6-11 when imposing Lucero's sentence, and Lucero clearly preserved the issue presented in this appeal by requesting a probationary sentence and explicitly presenting the circuit court with the argument he now pursues on appeal.

Whether the circuit court abused its discretion by imposing a penitentiary sentence rather than a probationary sentence.

[¶13.] "We apply the abuse of discretion standard when reviewing a sentencing court's decision to depart from presumptive probation." *Beckwith*, 2015 S.D. 76, ¶ 7, 871 N.W.2d at 59 (citation omitted). 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 and unreasonable." *Id.*

[¶14.] When deciding to deviate from presumptive probation, the circuit court reviewed Lucero's criminal history, considered arguments from both Lucero and the State, and identified mitigating and aggravating factors. The circuit court specifically noted that Lucero was 46 years of age, had 17 felony charges, seven prior felony convictions, a high LSI-R of 33, and admitted to using methamphetamine while awaiting sentencing. The circuit court explained that although Lucero's previous convictions did not include direct violence against another person, they did display a "range of criminal behavior" including burglaries and possession of controlled substances with the intent to distribute. Based on these considerations, the circuit court found that Lucero was a "danger to the community[;] you pose a significant risk to the community[.]" The circuit court's judgment of conviction identified the same aggravating factors to warrant deviation

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from presumptive probation. The circuit court's findings are not inconsistent with the record. The circuit court's ultimate decision to deviate from presumptive probation was properly oriented to the statutory requirements and did not constitute an abuse of discretion. We affirm.

[¶15.] JENSEN, Chief Justice, and SALTER, DEVANEY, and GUSINSKY, Justices, concur.