

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 30146

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.
MAX BOLDEN
Defendant and Appellant.

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

THE HONORABLE ROBIN HOUWMAN
Circuit Court Judge

APPELLANT'S BRIEF

ATTORNEY FOR APPELLANT

MANUEL J. DE CASTRO, JR.
De Castro Law Office, PLLC
300 N. Dakota Ave., Suite 104
Sioux Falls, SD 57104
Telephone: 605-251-6787
mdecastro1@yahoo.com

KRISTI JONES
Dakota Law Firm, Prof. L.L.C.
224 N. Phillips Ave., Suite 207
Sioux Falls, SD 57104
Telephone: 605-838-5873
kristi@dakotalawfirm.com

ATTORNEYS FOR APPELLEE

MARTY JACKLEY
ERIN HANDKE
Office of the Attorney General
1302 E. Hwy. 1 Ste.1
Pierre, SD 57501
Telephone: 605-773-3215
atgservice@state.sd.us

Notice of Appeal filed on the 25th day of October, 2022

TABLE OF CONTENTS

SECTION	PAGE
JURISDICTIONAL STATEMENT	1
STATEMENT OF LEGAL ISSUES.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
ARGUMENT	10
CONCLUSION	14
CERTIFICATE OF COMPLIANCE	15
CERTIFICATE OF SERVICE	15

APPENDIX

Judgment of Conviction	001
------------------------------	-----

TABLE OF AUTHORITIES

STATUTES CITED	PAGE
S.D.C.L. § 15-26A-3	1
S.D.C.L. § 22-16-4(1)	11
S.D.C.L. § 22-16-5	11
S.D.C.L. § 22-18-4.1	12
CASES CITED	PAGE
<i>State v. Armstrong</i> , 2020 S.D. 6, 939 N.W.2d 9	10
<i>State v. Bausch</i> , 889 N.W.2d 404 (SD 2017)	10
<i>State v. Brim</i> , 789 N.W.2d 80 (SD 2010)	10
<i>State v. Carter</i> , 771 N.W.2d 329 (SD 2009)	11
<i>State v. Derek at the Straight</i> , 2023 S.D. 1, -- N.W.2d --	10

PRELIMINARY STATEMENT

Defendant and Appellant, Max Bolden, is referred to throughout this brief as “Bolden” or “Appellant.” Appellee, State of South Dakota, is referred to as “State” or “Appellee.” The transcript of the jury trial is referred to as “J.T.” and the transcript of the sentencing hearing is referred to as “S.H.” All transcripts of motion hearings are referred to as “M.H.” followed by the date of the hearing. The certified record is referred to as “CR.”

JURISDICTIONAL STATEMENT

Bolden requests a review of the sufficiency of the evidence to convict him of Murder (First Degree) – Premeditated, Class A Felony. Bolden respectfully submits that this Court has jurisdiction pursuant to S.D.C.L. § 15-26A-3.

STATEMENT OF LEGAL ISSUES

I. EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUSTAIN A CONVICTION OF MURDER IN THE FIRST DEGREE AND BOLDEN’S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

State v. Brim, 789 NW2d 80 (SD 2010)
State v. Bausch, 889 NW2d 404 (SD 2017)
S.D.C.L. § 22-18-4.1

The trial court erred in denying Bolden’s Motion for Judgment of Acquittal because the elements of Murder in the First Degree were not established by proof beyond a reasonable doubt.

STATEMENT OF THE CASE

An Indictment was filed with the Minnehaha County Clerk of Courts on November 13, 2019 charging Bolden with the following: Count 1: Murder (First Degree) – Premeditated, Class A Felony, in violation of S.D.C.L. § 22-16-4(1); Count 2: Murder (2nd Degree) – Depraved Mind– Class B Felony, in violation of S.D.C.L. § 22-16-7; Count 3: Possession of Firearm by Convicted Felon – Class 6 Felony, in violation of S.D.C.L. § 22-14-15. A Part II Habitual Offender Information was filed November 14, 2019.

On March 16, 2021, Bolden was arraigned and entered not guilty pleas to all charges as well as to the Part II Habitual Information. A Jury Trial was held beginning August 17, 2022 and lasted through August 25, 2022. After the close of all evidence, including presentation of a self-defense argument, Bolden renewed his Motion for Judgement of Acquittal, which was denied. CR 1157-59.

On August 25, 2022, the jury found Bolden guilty of Count 1: Murder (First Degree); not guilty of Count 2: Murder (Second Degree); and guilty of Count 3: Possession of a Firearm by a Convicted Felon.

On September 13, 2022, Bolden appeared before the trial court and entered an admission to the Part II Information. After said admission, Bolden was sentenced as follows: Count 1: Murder (First Degree), to life in prison without the possibility of parole, with credit for five hundred fifty (550) days served; Count 3: Possession of a Firearm by a Convicted Felon, thirty-

five (35) years in prison suspended, credit for five hundred fifty (550) days served, said sentence to run concurrent to Count 1. Bolden was also ordered to pay restitution in the amount of \$19,059.76 and court costs of \$213.00. Judgment and Sentence was filed September 20, 2022. Notice of Appeal was filed October 19, 2022. This Court has jurisdiction pursuant to S.D.C.L. § 15-26A-3.

STATEMENT OF THE FACTS

It is undisputed that in the early morning hours of October 26, 2019, Benjamin Donahue (“Donahue”) was shot in a parking lot in downtown Sioux Falls, Minnehaha County, and died from his injuries. It is also undisputed that Bolden shot Donahue. The issue at trial revolved solely around whether the killing was legally justifiable.

In the weeks and months leading up to this encounter, Bolden and Donahue had several heated exchanges in which Donahue explicitly and repeatedly threatened Bolden. CR 1011. Donahue accused Bolden of talking to the mother of his child, and warned Bolden to stay away from her or he would “bust” Bolden. *Id.* At some point, Bolden met up with Donahue to let Donahue go through his phone to assure him that, not only was he was not texting his child’s mother, he did not even know her. *Id.* Things calmed down for a while; although not for long.

Shortly thereafter, Donahue had a child custody court hearing; after which, Donahue resumed texting Bolden harassing and threatening

messages again: “Oh, you all made me lose my daughter, I don’t care if you all lose a kid, I don’t care.” *Id.* Donahue also wrote Bolden, “When I see you, I am busting your ass since you don’t what to meet up with me, like where you at right now, send your location,” and “You meet up right now because I am going to kill you all niggas, made me lose my – made me lose my baby.” CR 1013. Bolden testified Donahue would text “If you don’t meet up now, I don’t care if you with your kids, I don’t care, whatever, I lost my kid, you going to lose one too.” *Id.*

Bolden testified that during this time Donahue pulled a gun on him in front of Club David. CR 1014. Bolden was outside the club with other people and Donahue came out, pulled out a gun, and cocked it back. *Id.* Bolden testified this scared him “because I don’t know if someone pulled a gun and cocked it back, what you think, someone is going to shoot you. I don’t know. I just put my hands up, like, literally, my brother, pulled a gun in front of all of us...” *Id.*

After this, Donahue’s threats ramped up. He would text Bolden “I am going to catch you, you stay ducking me, you hiding, you stay ducking me, I’m going to catch you, and when I catch you, I’m going to bust your ass, and show you, you ain’t shit.” CR 1015. During this time, Bolden’s friend, Thomas Roberts (aka “Rock the Barber” or “Rock”) also saw the threatening messages Donahue was sending Bolden. CR 1048. Rock testified he was with Bolden and saw Donahue’s message that said something to the effect of “I am

popping your ass on sight, I don't care if you with your kids or your girl." CR 1048.

At trial, several lay witnesses testified that around this same time period, Donahue pulled guns on several people and was known to always have a gun with him. These witnesses were also aware that Donahue was specifically threatening and targeting Bolden. (See testimony of Anthony Derrail Smith, CR 500-09 (testified Donahue pulled a gun on him three times, and always had a gun with him); Eugene Nave, CR 518-19 (testified Donahue had a 9mm); William Campbell, CR 521 (testified Donahue flashed a gun on him shortly before this incident); Joshua Durrah, CR 530-34 (testified Donahue was threatening Bolden that he would shoot him, and Donahue also pulled a gun on him that fall); David Moore, CR 542-44 (testified he was present when Donahue pulled and cocked the gun in front of Club Davids)).

This was the atmosphere of Bolden's life when he entered the 2019 Halloween weekend with an anticipation of laying low and spending time with his family. Bolden, his girlfriend, and his brother took their kids out to the pumpkin patch to get pumpkins to carve. CR 1006. On the morning of October 25, 2019, Bolden and his kids went to get costumes and also went to HyVee for tools to carve the pumpkins. *Id.* Bolden's brother brought his kids over that afternoon, and they all carved pumpkins together until around 9:00 p.m. that evening when his brother and children left the residence. *Id.*

That night, October 25, 2019, Bolden received messages from friends wanting him to go down to Club David to celebrate a friend's birthday. CR 1010. Bolden also received a message from a friend in Mitchell to hang out and have a drink. CR 1014. Since Bolden didn't want to risk running into Donahue, Bolden asked Krista Kruckenberg (hereinafter "Kruckenberg") and Arminka Agic (hereinafter "Agi") to go to Mitchell and they agreed. *Id.* The trio left Sioux Falls around 9:00 p.m. *Id.* When they arrived in Mitchell, they met Bolden's friend at a bar, had some drinks, and hung out for a while. *Id.* Eventually, the three headed back to Sioux Falls, arriving in town a little after midnight. Upon arriving in town, they stopped at a gas station before driving to Bolden's house with the intention of staying in for the rest of the night. CR 1015.

Shortly after arriving home, Bolden received a call about an altercation that was occurring at Club David between two of his friends. CR 1016-17. Bolden told his friend that they will figure it out and hung up. CR 17. Around five minutes later, Bolden received another text that his friend was in the bathroom at gun point. *Id.* Bolden, knowing the people involved, thought he could go down to Club David and diffuse the situation. *Id.* Bolden, Kruckenberg and Agic went down to Club David, arriving around 1:00 a.m. in the morning of October 26, 2019. CR 1018.

The three parked in the parking lot across the street from Club David. CR 1019. Bolden tried to reach the person who texted him but did not get an

answer. *Id.* Bolden, still sitting in the car, told Kruckenberg that something didn't feel right when no one answered his phone call. *Id.* He then saw one of the individuals involved in the altercation, Rock, coming out of Club David and yelled to him. *Id.* Bolden got out of his car to talk to Rock, but when he saw how Rock was acting, Bolden had a bad feeling and got back in the car. *Id.* Bolden told Kruckenberg that something did not feel right; Kruckenberg handed her gun to Bolden, which Bolden placed in his right side back pocket. CR 1020. Bolden got out of the car again and started walking over to see what was going on. *Id.*

Bolden arrived at the street right behind Club David and asked Rock what was going on. *Id.* Rock said, "Oh, fucker, they got me fucked up" and then drove off. *Id.* After Rock drove off, Bolden saw another friend, Darneisha Williams ("Williams") and began talking to her about what was going on. CR 1021. After a brief exchange, Bolden decided to leave and turned to walk back across the street to the parking lot to go home. *Id.* Williams followed close behind him. CR 1022.

As Bolden approached the parking lot, Donahue suddenly popped out from behind a car and came within inches of Bolden. *Id.* Instantly, Bolden was terrified. CR. He testified:

[P]eople got to understand, Benjamin (Donahue) got a reputation. You know what I mean? He a big guy, he really – he really is about the action. I'm not trying to sit here and act like he – act like I was not scared of him. I was really scared of him. I was in fear. I been trying to duck him to make sure that I

don't have no problems with him. Hoping that it clears the air. Staying away from him clears the air. And so when I run into him, I am literally scared. I don't know even know. I'm, like, What the fuck, what the fuck, what the fuck is going to happen?

CR 1022. Despite his efforts to avoid this situation, Bolden, five-foot seven-inches and 170 pounds, finds himself directly in front of a six-foot four-inch 242-pound man who has been threatening to kill him and who is known to always have a gun. CR 961; CR 1015.

At that moment, Bolden wanted to walk right by Donahue and go home, but Donahue was right in his path. CR 1023. Bolden testified Donahue's demeanor was "cocky." *Id.* Donahue said to Bolden "I told you I was going to catch your ass." *Id.* As he said this, Donahue reached for his gun and had his hand on it. *Id.* All Bolden could think of was that Donahue was going to shoot him in the head. *Id.* Bolden put his hand in his back pocket, on the gun Kruckenberg gave him. *Id.* Then he saw Donahue pull his hand out. *Id.* When Donahue pulled his hand out, Bolden drew his gun, closed his eyes, jumped back, and shot. CR 1024. Bolden testified:

And so when he pulled out, I shot, and jumped back, because I feel like he was going to shoot me too because he pulled his gun out. And I promise to God, I am not lying, this man was trying to kill me. Like, I don't know what you all want me to do because that man was trying to kill me.

CR 1024.

When Bolden opened his eyes, he saw Donahue laying on the ground. CR 1025. Bolden was not even sure at first if he had shot Donahue. *Id.* Bolden looked around and saw a gun in Donahue's right hand. *Id.* Bolden switched the gun in his right and over to his left hand and walked all the way around Donahue to pick up Donahue's gun with his right hand, fearing that Donahue was still a threat and would shoot him. *Id.*; CR 1026. When Bolden bent down to pick up the gun, Donahue lunged/jumped, and Bolden shot again. *Id.* This time, Bolden knew for sure he shot Donahue with the second shot, so he quickly left. CR 1028. He testified that he knows he should have stayed, but he was scared he wanted out of there. CR 1028. Bolden drove off, parked the car, got out, and took off. CR 1029.

Bolden testified that he never wanted to hurt Donahue only shot in self-defense. CR 1028. In that moment, he had no other choice to make but to shoot Donahue:

If I had to stay for a minute, I am shot, and I might be dead. Like, looking at it from my perspective, what else can I do? And I wasn't there for that. I didn't have no problems with him. I promise to God, if he didn't stop in front of me and just keep going, guess what I would have did? I would have kept going, and got in my car and went home to my kids. That is what I would have did.

CR 1030.

Sixteen months later, Bolden was arrested and charged with the murder of Donahue.

STANDARD OF REVIEW

"This Court reviews the 'denial of a motion for judgment of acquittal *de novo*.'" *State v. Derek at the Straight*, 2023 S.D. 1, ¶ 20 -- N.W.2d -- (quoting *State v. Armstrong*, 2020 S.D. 6, ¶ 12, 939 N.W.2d 9, 12 (additional citations omitted)).

ARGUMENT

I. EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUSTAIN A CONVICTION OF MURDER IN THE FIRST DEGREE, AND BOLDEN'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

"In measuring the sufficiency of the evidence, [the South Dakota Supreme 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." *State v. Brim*, 789 N.W.2d 80, 83 (SD 2010). "[T]he jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence." *Id.* "In determining the sufficiency of the evidence, the [South Dakota Supreme Court] will not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence." *State v. Bausch*, 889 N.W.2d 404, 413 (SD 2017).

In 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. . . . On review, we accept the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict. We do not resolve

conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal. If the evidence including circumstantial evidence and reasonable inferences drawn there from sustain a reasonable theory of guilt, a guilty verdict will not be set aside.

State v. Carter, 771 NW2d 329, 342 (SD 2009).

"Homicide is murder in the first degree . . . [i]f perpetrated without authority of law and with a premeditated design to effect the death of the person killed" S.D.C.L. § 22-16-4(1). "Premeditated design to effect death" is defined by S.D.C.L. § 22-16-5 as:

an intention, purpose, or determination to kill or take the life of the person killed, distinctly formed and existing in the mind of the perpetrator before committing the act resulting in the death of the person killed. A premeditated design to effect death sufficient to constitute murder may be formed instantly before committing the act.

Bolden asserts this was not murder in the first degree because he was defending himself against Donahue. South Dakota law provides citizens the right to defend themselves, even to the point of deadly force:

A person is justified in using or threatening to use deadly force if the person reasonably believes that using or threatening to use deadly force is necessary to prevent imminent death or great bodily harm to himself, herself, or another, or to prevent the imminent commission of a forcible felony.

A person who uses or threatens to use deadly force in accordance with this section does not have a duty to retreat and has the right to stand his or her ground, if the person using or threatening to use the deadly force is:

- (1) Not engaged in a criminal activity; and

(2) In a place where the person has a right to be.

S.D.C.L. § 22-18-4.1.

Bolden was justified in his use of force against Donahue, and the trial court erred in not granting his renewed motion for judgment of acquittal; as the State did not establish beyond a reasonable doubt that this was not self-defense. Bolden was permitted by statute to use deadly force to protect himself because he was not engaged in criminal activity and was in a place he had a right to be. Bolden did not instigate this altercation; instead, Donahue ambushed him. Bolden testified he wanted to walk right past Donahue and go home to his kids.

When Donahue heckled Bolden, reminded him that he was always going to catch him, and then reached for his gun, Bolden held a reasonable belief that Donahue would cause him great personal injury or death, and his only choice was to shoot him first. In fact, it was more than just a reasonable belief. Based on Donahue's actions that night and the months leading up to it, the threat he posed to Bolden loomed large and certain. Donahue was persistent and explicit in his statements about killing Bolden and had pulled a gun on him before. When Donahue confronted him in the parking lot, seemingly out of nowhere, Bolden testified about the terror he felt. He was certain that if he did not shoot Donahue, Donahue was going to kill him and make good on the threat he'd made clear several times over the past several weeks.

Bolden believed Donahue was going to kill him – and this belief was based in reason. When confronted on a street in the early morning hours by a man hellbent on revenge and armed with a deadly weapon, it was also reasonable for Bolden to believe that his only option to prevent his own imminent death was to use a deadly weapon himself.

After the first shot, Bolden testified he was not sure if he actually hit Donahue. He said it happened so fast; he did not know for sure. He saw Donahue's gun go still in his hand, so he walked around to get the gun away from him. He was still in fear that Donahue could shoot him if the gun was still within his reach or on his person. As Bolden reached to pick up the gun, Donahue's body jumped and, still in fear of his own imminent death, Bolden shot again. Knowing he hit Donahue with the second shot, Bolden immediately left. He testified this was out of pure fear.

There was no conflicting testimony about the origin of the altercation. Multiple witnesses testified that Donahue regularly beat his girlfriend, regularly carried a gun, had threatened multiple people with his gun, and that Donahue had threatened Bolden numerous times. In the days leading up to October 26, 2019, Donahue made multiple posts on his Facebook account threatening people with gun violence. The evidence presented showed that Donahue had a gun on him during the altercation, which Donahue started, when he jumped out of the shadows, confronted Bolden, and drew the deadly

weapon. It was error for the trial court to deny the renewed motion for judgment of acquittal.

CONCLUSION

The trial court erred by denying the renewed motion for judgment of acquittal; as such, the verdict as to first degree murder must be vacated and the case remanded to the trial court for entry of a judgment of acquittal to that charge.

Dated this 26th day of July, 2023.

Respectfully submitted,

**DECASTRO LAW FIRM, PROF. L.L.C.
MANUEL J. DE CASTRO, JR.**

/s/ Manuel J. de Castro, Jr.

300 N. Dakota, Suite 104
Sioux Falls, SD 57104
Ph: (605) 251-6787
Fax: (605) 427-0818

**DAKOTA LAW FIRM, PROF. L.L.C.
KRISTI L. JONES**

/s/Kristi Jones

4900 S. Minnesota Ave., Suite 103B
Sioux Falls, SD 57108
Telephone: 605-838-5873
kristi@dakotalawfirm.com

**Appellant, through counsel, hereby respectfully requests oral
argument in the above-entitled matter.**

CERTIFICATE OF COMPLIANCE

1. I certify that appellant's brief is within the typeface and volume limitations provided for in S.D.C.L. § 15-26A-66(b) using Century Schoolbook typeface in proportional 12-point type. Appellant's brief contains 3,364 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

/s/Kristi Jones
Kristi Jones
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of July, 2023 a true and correct copy of the foregoing brief was served on the Attorney General's Office via email to atgservice@state.sd.us

/s/Kristi Jones
Kristi Jones
Attorney for Appellant

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

PD 2019-021709

STATE OF SOUTH DAKOTA,
 Plaintiff,

+

49CRI19008124

vs.

+

JUDGMENT & SENTENCE

MAX BOLDEN,

Defendant.

+

An Indictment was returned by the Minnehaha County Grand Jury on November 13, 2019, charging the defendant with the crimes of Count 1 Murder (First Degree)-Premeditated on or about October 26, 2019; Count 2 Murder (Second Degree)-Depraved Mind on or about October 26, 2019; Count 3 Possession of Firearm by Convicted Felon on or about October 26, 2019 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on March 16, 2021, Neil Fossum and Erik Van Buren appeared as co-counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Deputy State's Attorneys-Randy Sample and Ryan McFall appeared for the prosecution and, Manny DeCastro and Kristi Jones, appeared as co-counsel for the defendant. A Jury was impaneled and sworn on August 19, 2022 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on August 25, 2022 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, MAX BOLDEN, guilty as charged as to Count 1 Murder (First Degree)-Premeditated (SDCL 22-16-4(1)), not guilty as charged to Count 2 Murder (Second Degree)-Depraved Mind and guilty as charged as to Count 3 Possession of Firearm by Convicted Felon (SDCL 22-14-15)." The Sentence was continued to September 13, 2022.

Thereupon on September 13, 2022, the defendant appeared with counsel, Manny DeCastro and Kristi Jones and the State was represented by Deputy State's Attorneys, Randy Sample and Ryan McFall; at which time the Court advised the defendant regarding the Part II Information and the defendant thereafter admitted to the Part II Habitual Criminal Offender Information (SDCL 22-7-8) and was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

S E N T E N C E

AS TO COUNT 1 MURDER (FIRST DEGREE)-PREMEDITATED / HABITUAL OFFENDER: MAX BOLDEN shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for Life without the possibility of parole (with credit for five hundred fifty (550) days served).

AS TO COUNT 3 POSSESSION OF FIREARM BY CONVICTED FELON / HABITUAL OFFENDER : MAX BOLDEN shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for thirty five (35) years with the sentence suspended (with credit for five hundred fifty (550) days served); concurrent to Count 1.

It is ordered that the defendant is adjudicated liable to pay restitution in the amount of \$19,059.76 and \$213.00 in court costs through the Minnehaha County Clerk of Courts.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary or the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the South Dakota State Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 20th day of September, 2022.



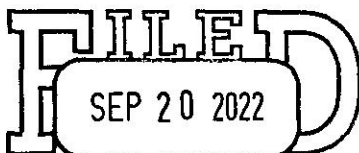
ATTEST:

ANGELIA M. GRIES, Clerk

By: [Signature] Deputy

BY THE COURT:

[Signature]
JUDGE ROBIN J. HOUWMAN
Circuit Court Judge



Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30146

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MAX BOLDEN,

Defendant and Appellant.

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

THE HONORABLE ROBIN J. HOUWMAN
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Manuel J. de Castro, Jr.
De Castro Law Office, PLLC
300 N. Dakota Ave., Suite 104
Sioux Falls, SD 57104
Telephone: (605) 251-6787
Email: mdecastro1@yahoo.com

Erin E. Handke
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Email: atgservice@state.sd.us

Kristi Jones
Dakota Law Firm, Prof. L.L.C.
224 N. Phillips Ave., Suite 207
Sioux Falls, SD 57104
Telephone: (605) 838-5873
Email: kristi@dakotalawfirm.com

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

ATTORNEYS FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed October 19, 2022

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT.....	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF LEGAL ISSUE AND AUTHORITIES.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
ARGUMENT	
THE CIRCUIT COURT PROPERLY DENIED BOLDEN'S MOTION FOR JUDGMENT OF ACQUITTAL.....	5
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE.....	11
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

STATUTES CITED:	PAGE
SDCL 22-16-4	2, 6
SDCL 23A-32-2	2
 CASES CITED:	
<i>State v. Ahmed</i> , 2022 S.D. 20, — N.W.2d —	5
<i>State v. Burtzlaff</i> , 493 N.W.2d 1 (S.D. 1992)	9
<i>State v. Carter</i> , 2009 S.D. 65, 771 N.W.2d 329.....	6
<i>State v. Falkenberg</i> , 2021 S.D. 59, 965 N.W.2d 580	2, 10
<i>State v. Frias</i> , 2021 S.D. 26, 959 N.W.2d 62	10
<i>State v. Leidholm</i> , 334 N.W.2d 811 (N.D. 1983)	9
<i>State v. Peneaux</i> , 2023 S.D. 15, 988 N.W.2d 263	5
<i>State v. Shaw</i> , 2005 S.D. 105, 705 N.W.2d 620.....	6
<i>State v. Smith</i> , 2023 S.D. 32, — N.W.2d —	2, 10
<i>State v. Stone</i> , 2019 S.D. 18, 925 N.W.2d 488.....	10
<i>State v. Timmons</i> , 2022 S.D. 28, 974 N.W.2d 881.....	5
<i>State v. Wolf</i> , 2020 S.D. 15, 941 N.W.2d 216.....	5

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30146

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MAX BOLDEN,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Max Bolden, is referred to as “Bolden.” Appellee, the State of South Dakota, is referred to as “State.” References to documents are designated as follows:

Settled Record (Minnehaha Criminal File No. 19-8124) SR
Jury Trial Transcript (August 19, 2022).....JT1
Jury Trial Transcript (August 22, 2022).....JT2
Jury Trial Transcript (August 23, 2022).....JT3
Jury Trial Transcript (August 24, 2022).....JT4
Jury Trial Transcript (August 25, 2022).....JT5
Bolden’s Brief.....DB
Exhibits EX

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

JURISDICTIONAL STATEMENT

Bolden appeals from the Judgment of Conviction entered by the Honorable Robin J. Houwman, Circuit Court Judge, Minnehaha County, Second Judicial Circuit. SR 153-54. The Judgment of Conviction and Sentence was filed on September 20, 2022. SR 153-54. Bolden filed a Notice of Appeal on October 19, 2022. SR 158. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT PROPERLY DENIED
BOLDEN'S MOTION FOR JUDGMENT OF ACQUITTAL?

The circuit court denied Bolden's motion for judgment of acquittal.

State v. Falkenberg, 2021 S.D. 59, 965 N.W.2d 580

State v. Smith, 2023 S.D. 32, — N.W.2d —

SDCL 22-16-4

STATEMENT OF THE CASE

The Minnehaha Grand Jury indicted Bolden with three counts: first-degree murder, second-degree murder, and possession of a firearm by a convicted felon. SR 6-7. The State alleged Bolden had three prior felony convictions in a Part II Information. SR 8. After a five-day trial, the jury found Bolden guilty of first-degree murder and possession of a firearm by a convicted felon. SR 142. Bolden subsequently admitted to the Part II Information. SR 153. The circuit court sentenced Bolden to life in prison without the possibility of parole for first-degree murder and

thirty-five years in prison for possession of a firearm by a convicted offender. SR 153-54. The court suspended thirty-five years and ordered his two sentences to run concurrent. *Id.*

STATEMENT OF THE FACTS

On October 25, 2022, Bolden, along with his girlfriend, Krista Kruckenberg, and friend, Arminka Agic went to Mitchell to have a drink with Bolden's friend. JT3: 74. The three spent time in Mitchell and headed back to Sioux Falls. (JT3: 74-75). Once home, Bolden received a phone call from a friend saying another friend had an altercation and someone held him at gun point in the bathroom at Club David.¹ JT3: 82. Because Bolden knew both parties in the altercation, he thought he could defuse the situation. JT3: 82.

Bolden, along with Kruckenberg and Agic, drove the three of them to Club David in a white Ford SUV. JT2: 9-10. Before Bolden got out of the vehicle, Kruckenberg gave him her gun. JT3: 84-85. Kruckenberg and Agic stayed in the vehicle and Bolden went to talk to someone across the street. JT2: 10. After Bolden exited the vehicle, Kruckenberg told Agic "something was about to happen." JT2: 11. Agic thought that meant Bolden and Donahue were to fight. JT2: 11.

¹ Bolden received messages earlier in the day about friends going to Club David to celebrate a friend's birthday. SR3: 75. Bolden did not want to go to Club David because he was avoiding Benjamin Donahue because of previous threats. JT3: 75.

As Bolden was walking back to his vehicle, he met Donahue walking towards the club. JT2: 12. Agic got out of the SUV and started walking towards the two men when she heard gun shots. JT2: 12. Donahue stood for a second before falling to the ground. JT2: 13. Bolden then fired a second shot at Donahue as he laid on the ground. JT2: 14.

Bolden, Kruckenberg, and Agic got back in the vehicle and drove off. JT2: 15-16. After a bit, Bolden stopped the SUV and got out, leaving Kruckenberg and Agic behind with the car. JT2: 17. Kruckenberg drove them back to Agic's house, where she parked the SUV in the garage. JT2: 18. Later, Kruckenberg came over and cleaned the vehicle with bleach. JT2: 22. She told Agic that someone would come get the vehicle later. JT2: 23.

After Bolden left Kruckenberg and Agic, his brother picked him up and they went to Chicago. JT3: 100. On the way to Chicago, Bolden disposed of the gun. JT3: 101. He was ultimately apprehended in Southaven, Mississippi sixteen months later. JT3: 30-31.

When law enforcement arrived at the scene, they spoke with witnesses who saw Bolden shoot Donahue. One of the witnesses was Darneisha Williams who said she saw Bolden shoot Donahue twice. JT2: 110-12. After the first shot she saw blood coming out of Donahue's head. *Id.*

Officers located video surveillance footage of the shooting. The city security cameras located at the Carnegie building pointed at the parking lot. JT2: 42. The footage showed Bolden and Donahue approaching each other and Bolden shooting Donahue. EX 1, 2.

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED BOLDEN'S MOTION FOR JUDGMENT OF ACQUITTAL.

Bolden argues the circuit court erred when it denied his motion for judgment of acquittal. DB 6. He claims the State did not prove he was not acting in self-defense when he shot Donahue. DB 12. But his argument disregards the evidence viewed in the light most favorable to the jury's verdict and ignores evidence presented to the jury. Based on evidence in the settled record, the circuit court properly denied Bolden's motion for judgment of acquittal.

A. Standard of Review.

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Peneaux*, 2023 S.D. 15, ¶ 24, 988 N.W.2d 263, 269 (citing *State v. Timmons*, 2022 S.D. 28, ¶ 14, 974 N.W.2d 881, 887). “A motion for a judgment of acquittal attacks the sufficiency of the evidence.” *Id.* “When reviewing the sufficiency of the evidence, [this] Court considers ‘whether 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.’” *State v. Ahmed*, 2022 S.D. 20, ¶ 14,

— N.W.2d — (quoting *State v. Wolf*, 2020 S.D. 15, ¶ 13, 941 N.W.2d 216, 220). This Court “accepts the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict.” *Id.* “This Court does not ‘resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence on appeal.’” *Id.* Further, a “conviction may be supported by circumstantial evidence even when all the elements of the crime are established circumstantially.” *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 45, 705 N.W.2d 620, 633).

B. The State Presented Sufficient Evidence to Convict Bolden of First-Degree Murder.

For the jury to convict Bolden of first-degree murder, the State needed to prove: 1. Bolden caused the death of Donahue, 2. Bolden did so with a premeditated design to effect the death of Donahue, and 3. Bolden was not acting in self-defense. SDCL 22-16-4; SR 127.

The State’s evidence included testimony from several people, including testimony from two eyewitnesses and law enforcement. See JT2, JT3, JT4, JT5. The testimony painted a picture for the jury of the events of that night that led to Donahue’s death. Agic had been hanging out with Bolden and his girlfriend, Kruckenberg. JT2: 74. They went to Mitchell to see some friends and then came back to Sioux Falls. JT2: 74. Bolden then received a phone call from one of his friends, telling him

another friend had been attacked in the bathroom at Club David. JT3: 82. Bolden decided to go to the club to try to diffuse the fight. JT3: 82.

Once they got to the club, Kruckenberg handed Bolden a gun before he exited the vehicle. JT3: 84-85. Kruckenberg and Agic stayed in the SUV; Kruckenberg told Agic something was about to happen. JT2: 11. Agic saw Bolden meet Donahue on his way back to the vehicle. JT2: 12. Agic got out of the SUV and started walking towards the two men when she heard a gunshot. JT2: 12. She saw Donahue fall to the ground and Bolden shoot him again. JT2: 12.

Law enforcement arrived on the scene. EX 4, 5. As part of the investigation, they spoke with witnesses at the scene. JT2: 76. No one saw Donahue with a gun. JT2: 76. Darneisha Williams was at Club David that night with her cousin. JT2: 109. She was walking back to her car and was behind Bolden. JT2: 110. Williams saw Bolden and Donahue meet face to face and heard Donahue say, “maybe we should just quash this.” JT2: 110. Then she heard a gun go off. *Id.* She saw Donahue fall to the ground; he was bleeding from his head. JT2: 111. Bolden stood over Donahue and shot him again. JT2: 110-12. He left in his vehicle with Agic and Kruckenberg. JT2: 112-13. Williams watched Kruckenberg grab something off the ground near Donahue’s body and

leave. JT2: 115. Williams saw only one gun that night; the gun Bolden used to shoot Donahue.² JT2: 116.

C. The State Proved Bolden Was Not Acting In Self-Defense.

Bolden does not deny shooting Donahue. Instead, he claims the State failed to prove he was not acting in self-defense when he shot Donahue. DB 11. His theory of the case was he acted in self-defense. He asserted that theory through his own testimony and the testimony of his witnesses. *See* JT3. Bolden presented the tumultuous history he had with Donahue, including previous threats Donahue made towards Bolden.³ JT3: 75-80. Because of their previous issues, Bolden claimed he was fearful Donahue would shoot him that night at Club David. JT3: 87-89. Bolden testified he thought Donahue was pulling a gun on him, so he shot Donahue. JT3: 89. After the first shot, Donahue fell to the ground. JT3: 90. Bolden claimed he did not know if he hit Donahue with the first shot because he did not see a wound. JT3: 90. He moved the gun from his right hand to his left hand and bent down over Donahue. JT3: 90. He claimed Donahue “lunged” at him, so he fired another shot at Donahue. JT3: 90. Bolden asserted Donahue had a gun that night. JT3: 91.

² Security video from the scene corroborated the State’s witnesses’ versions of events from that night. EX 2.

³ Bolden testified that Donahue accused him of having a relationship with the mother of Donahue’s children. JT3: 76. Bolden claimed Donahue threatened him multiple times and even pulled a gun on him. JT3: 76-79.

But the State's evidence told a different story. No one, other than Bolden, saw Donahue with a gun that night. JT2: 76. And Williams saw blood oozing out of Donahue's head after Bolden fired the first shot. JT2: 111. Security footage that was played for the jury also does not support Bolden's version of events. EX 2. The footage shows the two men meeting and Bolden shooting Donahue. EX 2. After the first shot, Bolden stepped back from Donahue and then fired the second shot. EX 2. Bolden did not crouch down to check on Donahue. EX 2. Bolden then got in his SUV and drove off. EX 2. Even when a person is "physically and psychologically abused [by another] over an extended period of time[,]" "the evidence must still be considered in the context of self-defense."⁴ *State v. Burtzlaff*, 493 N.W.2d 1, 8 (S.D. 1992) (quoting *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983)).

Also, Bolden neglects the significance of the evidence of his flight from the scene. After he shot Donahue the second time, he left Club David with Kruckenberg and Agic. After driving for a bit, he pulled over and got out of the vehicle. JT2: 17. He apologized to Kruckenberg and Agic and said he had to "get the hell out of here." JT2: 37. Kruckenberg and Agic took the vehicle to Agic's where it was hidden in her garage. JT2: 18. Kruckenberg cleaned it out with bleach, and it wasn't discovered for two weeks, after law enforcement obtained a search

⁴ Testimony at trial and Bolden's brief suggest Donahue regularly beat his girlfriend but had no history of physical abuse toward Bolden. Bolden's fear of Donahue was based on threats of physical violence resulting in psychological fear of him. DB 13.

warrant for her house. JT2: 19. Bolden, on the other hand, left town and was apprehended in Mississippi sixteen months later. JT3: 30-31. “Evidence of flight or concealment immediately after the events charged in the indictment[] may be relevant to show consciousness of guilt.”

State v. Falkenberg, 2021 S.D. 59, ¶ 43, 965 N.W.2d 580, 592 (quoting *State v. Stone*, 2019 S.D. 18, ¶ 26, 925 N.W.2d 488, 498). *See also*, *State v. Smith*, 2023 S.D. 32, ¶ 50, — N.W.2d —.

Additionally, the jury was thoroughly instructed on Bolden’s claim of self-defense. It received seven jury instructions on self-defense. *See* Jury Instructions 25, 26, 27, 28, 29, 30, and 31; SR 129-32. The jury was specifically instructed that, when a claim of self defense is raised, the burden rests on the prosecution to prove, beyond a reasonable doubt, that Bolden did not act in self-defense. *See* Jury Instruction 27, SR 130.

Ultimately, it is for the jury to decide whether a murder was justified. *Smith*, 2023 S.D. 32, ¶ 50, — N.W.2d — (citing *State v. Frias*, 2021 S.D. 26, ¶ 29, 959 N.W.2d 62, 70). “The jury had the opportunity to consider all the evidence, including conflicting witness testimony, to weigh the credibility of the witnesses, and to make its determinations as to whether [Bolden] was acting reasonably in self-defense.” *Id.* In viewing the evidence in light most favorable to the verdict, the evidence supports the jury's determination that Bolden was not acting in self-defense and committed first-degree murder.

CONCLUSION

The State respectfully requests that Bolden's conviction and sentence be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Erin E. Handke

Erin E. Handke

Assistant Attorney General

1302 East Highway 14, Suite 1

Pierre, SD 57501-8501

Telephone: (605) 773-3215

E-mail: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 2,201 words.

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

Dated this 8th of September 2023.

/s/ Erin E. Handke

Erin E. Handke

Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 8, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Max Bolden* was served electronically through Odyssey File and Serve upon Kristi Jones at kristi@dakotalawfirm.com and Manuel J. de Castro Jr. at mdecastro1@yahoo.com.

/s/ Erin E. Handke

Erin E. Handke

Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 30146

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

Max Bolden,
Defendant and Appellant.

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

HONORABLE ROBIN HOUWMAN,
Circuit Court Judge

APPELLANT'S REPLY BRIEF

ATTORNEY FOR APPELLANT

MANUEL J. DE CASTRO, JR.
de Castro Law Office, PLLC
300 N. Dakota Avenue, Suite 104
Sioux Falls, South Dakota 57104
Telephone: 605-251-6787
Mdecastro1@yahoo.com

KRISTI JONES
Dakota Law Firm, Prof. L.L.C.
224 N. Phillips Ave., Suite 207
Sioux Falls, SD 57104
Telephone: 605-838-5873
Kristi@dakotalawfirm.com

ATTORNEYS FOR APPELLEE

MARTY JACKLEY
ERIN HANDKE
Office of the Attorney General
1302 E. Hwy. 1, Suite 1
Pierre, SD 57501
Telephone: 605-773-3215
atgservice@state.sd.us

Notice of Appeal filed on the 19th day of October, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF LEGAL ISSUES	2
PROCEDURAL STATEMENT	2
STATEMENT OF FACTS	3
LEGAL ANALYSIS	3
CONCLUSION	5
REQUEST FOR ORAL ARGUMENT	5
CERTIFICATE OF SERVICE	5
CERTIFICATE OF COMPLIANCE	6

TABLE OF AUTHORITIES

STATUTES

PAGES

SDCL 15-26A-3

2, 3

SDCL 22-14-15

1, 2

SDCL 22-16-4(1)

1, 2

SDCL 22-16-7

1, 2

CASES:

State v. Carter, 771 NW2d 329, 342 (SD 2009)

2, 4

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30146

STATE OF SOUTH DAKOTA,
Plaintiff/Appellee,

vs.

MAX BOLDEN,
Defendant/Appellant.

PRELIMINARY STATEMENT

Defendant and Appellant, Max Bolden, will be referred to throughout this brief as “Bolden” or “Appellant”. The Appellee, State of South Dakota, will be referred to as “State” or “Appellee”. The transcript of the Jury Trial will be referred to as “J.T.” and the transcript of the Sentencing Hearing will be referred to as “S.H.”. All transcripts of Motions Hearings will be referred to as “M.H.” followed by the date of the hearing.

JURISDICTIONAL STATEMENT

An Indictment was filed with the Minnehaha County Clerk of Courts on November 13, 2019 charging Bolden with the following: Count 1: Murder (First Degree) – Premeditated, Class A Felony, in violation of SDCL 22-16-4(1); Count 2: Murder (2nd Degree) – Depraved Mind– Class B Felony, in violation of SDCL 22-16-7; Count 3: Possession of Firearm by Convicted Felon – Class 6 Felony, in violation of SDCL 22-14-15. A Part II Habitual Offender Information was filed on November 14, 2019.

On March 16, 2021, an Arraignment was held and Bolden entered Not Guilty pleas to all charges as well as the Part II Habitual Information.

A Jury Trial was held beginning on August 17, 2022, and lasting through August 25, 2022. On August 25, 2022, the jury found Bolden Guilty of Count 1: Murder (First Degree); Not Guilty of Count 2: Murder (Second Degree); and Guilty of Count 3: Possession of a Firearm by a Convicted Felon.

On September 13, 2022, Bolden appeared before the trial court and entered an Admission to the Part II Information. After said Admission, Bolden was sentenced as to Count 1: Murder (First Degree), to Life in Prison, without the possibility of parole, and credit for five hundred fifty (550) days served; Count 3: Possession of a Firearm by a Convicted Felon, to thirty-five (35) years in prison, with said sentence suspended, and credit for five hundred fifty (550) days served, said sentence concurrent to Count 1. Bolden was also ordered to pay restitution in the amount of \$19,059.76 and court costs of \$213.00. Judgment and Sentence was filed on September 20, 2022. Notice of Appeal was filed on October 19, 2022. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

- 1. Evidence at trial was insufficient to sustain a conviction of murder in the first degree, and Bolden's motion for judgement of acquittal should have been granted.**

State v. Carter, 771 NW2d 329, 342 (SD 2009)

PROCEDURAL STATEMENT

An Indictment was filed with the Minnehaha County Clerk of Courts on November 13, 2019 charging Bolden with the following: Count 1: Murder (First Degree) – Premeditated, Class A Felony, in violation of SDCL 22-16-4(1); Count 2: Murder (2nd Degree) – Depraved Mind– Class B Felony, in violation of SDCL 22-16-7; Count 3: Possession of Firearm by Convicted Felon – Class 6 Felony, in violation of SDCL 22-14-15. A Part II Habitual Offender Information was filed on November 14, 2019.

On March 16, 2021, an Arraignment was held and Bolden entered Not Guilty pleas to all charges as well as the Part II Habitual Information.

A Jury Trial was held beginning on August 17, 2022, and lasting through August 25, 2022. On August 25, 2022, the jury found Bolden Guilty of Count 1: Murder (First Degree); Not Guilty of Count 2: Murder (Second Degree); and Guilty of Count 3: Possession of a Firearm by a Convicted Felon.

On September 13, 2022, Bolden appeared before the trial court and entered an Admission to the Part II Information. After said Admission, Bolden was sentenced as to Count 1: Murder (First Degree), to Life in Prison, without the possibility of parole, and credit for five hundred fifty (550) days served; Count 3: Possession of a Firearm by a Convicted Felon, to thirty-five (35) years in prison, with said sentence suspended, and credit for five hundred fifty (550) days served, said sentence concurrent to Count 1. Bolden as also ordered to pay restitution in the amount of \$19,059.76 and court costs of \$213.00. Judgment and Sentence was filed on September 20, 2022. Notice of Appeal was filed on October 19, 2022. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF FACTS

Appellant hereby incorporates his previously set forth Statement of Facts from Appellant's Brief.

LEGAL ANALYSIS

1. Evidence at trial was insufficient to sustain a conviction of murder in the first degree, and Bolden's motion for judgement of acquittal should have been granted.

Appellant hereby incorporates his previously set forth Legal Analysis from Appellant's Brief.

In 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. . . . On review, we accept the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict. We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal. If the evidence including circumstantial evidence and reasonable inferences drawn therefrom sustain a reasonable theory of guilt, a guilty verdict will not be set aside.

State v. Carter, 771 NW2d 329, 342 (SD 2009).

The State argues that the evidence was sufficient to convict Bolden of First-Degree Murder, however they neglect the fact that there was no testimony, nor evidence, that Bolden did so with a premeditated design to effect the death of Donahue.

The State argues that the testimony of two eyewitnesses and law enforcement “painted a picture” for the jury of the events that night and supports a conviction for First-Degree Murder. However, Arminka Agic testified that she was in the car with Krista Kruckenberg and she saw Bolden and Donahue and heard a gunshot. She wasn’t close to the scene and didn’t hear anything that was said, nor did she see if Bolden switched hands as he testified with the gun in an attempt to pick up Donahue’s gun, when his gun accidentally went off again when Donahue moved and startled Bolden.

Daneisha Williams, who was walking behind Bolden, saw Donahue and Bolden meet face to face and heard them arguing with each other. Williams heard the gun go off and Donahue fall to the ground. She didn’t recall if he switched hands with the gun as she was “traumatized” by what she saw she said. In any event, she got in the vehicle with Bolden, Agic, and Kruckenberg.

Bolden testified that he was afraid of Donahue as outlined in Appellant’s Brief and that he shot Donahue when Donahue pulled a gun on him. Donahue fell to the ground and Bolden walked around Donahue switching the gun into his other hand in an attempt to pick up Donahue’s gun so he wouldn’t get shot walking away. Bolden testified that

Donahue then moved or twitched, and Bolden was startled and accidentally shot Donahue the second time. None of the evidence the state presented showed a) that Bolden had a premeditated design to kill Donahue as he didn't even know he'd see Donahue that evening, let alone intend to kill him, nor did he intend to kill him when he did see him and b) that Bolden's actions weren't justified that evening. Thus, it was an error for the trial court not to grant Bolden's Motion for Judgment of Acquittal.

CONCLUSION

The trial court erred by not granting the Motion for Judgment of Acquittal and as such the verdict as to first degree murder must be vacated and the case remanded to the trial court for entry of a Judgment of Acquittal.

Dated this 20th day of October, 2023.

/s/ Manuel J. de Castro, Jr.
Manuel J. de Castro, Jr.
Attorney for Appellant
300 N. Dakota, Suite 104
Sioux Falls, SD 57104
Ph: (605) 251-6787
Fax: (605) 427-0818

Appellant, through counsel, hereby respectfully requests oral argument in the above-entitled matter.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served one (1) copy of Appellant's Reply Brief upon the persons herein next designated all on the date below by email to said addresses, to wit:

Ms. Erin Handke
atgservice@state.sd.us

Mr. Daniel Haggar
dhaggar@minnehahacounty.org

which email address is the last email address of the addressee known to the subscriber.

Dated this 20th day of October, 2023.

/s/ Manuel J. de Castro, Jr.
Manuel J. de Castro, Jr.

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Reply Brief contains 1466 characters.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 20th day of October, 2023.

/s/Manuel J. de Castro, Jr.
Manuel J. de Castro, Jr.