IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30754

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

CHRISTIAN CLIFFORD,

Defendant and Appellant.

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

HONORABLE SANDRA HANSON
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on July 9, 2024

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 30754

vs.

CHRISTIAN CLIFFORD,

Defendant and Appellant.

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The transcript of the Arraignment Hearing held November 27, 2024 is referred to as "AH." The transcript of the Jury Trial held March 18 through March 19, 2024 is referred to as "JT." The transcript of the Sentencing Hearing held May 29, 2024 is referred to as "ST." All references to documents will be followed by the appropriate page number. Defendant and Appellant, Christian Clifford, will be referred to as "Clifford."

JURISDICTIONAL STATEMENT

Clifford appeals the Judgment and Sentence entered June 11, 2024, by the

Honorable Sandra Hanson, Circuit Court Judge of the Second Judicial Circuit. SR SR 305. Clifford's Notice of Appeal was filed July 9, 2024. SR 310. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUE

I. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY STATEMENTS IN VIOLATION OF CLIFFORD'S 6TH AMENDMENT RIGHT TO CONFRONTATION.

The circuit court admitted the hearsay statement over Clifford's objections.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)

State v. Little Long, 2021 S.D. 38, 962 N.W.2d 237

State v. Johnson, 2009 S.D. 67, 771 N.W.2d 360

STATEMENT OF CASE

On July 26, 2024, a Minnehaha County grand jury returned an Indictment charging Clifford with the following criminal offenses: Count 1- Aggravated Eluding; Count 2 - Reckless Driving; Count 3 - Driving Under Suspension; and Count 4 - Stop Sign Violation. SR 11. The State filed a Part II Habitual Criminal Information the same day, alleging Clifford had been convicted of two prior felony offenses including one crime of violence. SR 13. Arraignment was held on August 9, 2023. *See generally* AH.

Clifford filed several motions in limine. SR 19-28, 30. At issue in this appeal are Clifford's motions requesting the exclusion of specific testimony, including:

- "Any reference, mention, or inference of any BOLO's made in regard to the Defendant";
- "Any reference, mention, or inference of to (sic) any persons by the name of Anna Hall or Lindsey Hall"; and
- "Any reference, mention, or inference of the Defendant being associated with a red Toyota Camry[.]"

SR 30.[1] Clifford's motions were premised on law enforcement's preliminary investigation, specifically, a call for service from either Anna or Lindsey Hall[2] alleging Clifford left the scene of a domestic dispute in a red Toyota Camry. JT 20. Based on the information provided in the call for service, law enforcement issued a be on the lookout bulletin ("BOLO") for Clifford. JT 16-18. Because the State did not intend on calling Anna or Lindsey Hall in their case-in-chief, Clifford sought to exclude testimonial evidence related to the underlying call for service, including the out-of-court statement alleging Clifford was driving a red Toyota Camry. JT 24.

At the pretrial hearing, Clifford provided further argument in support of his motion to exclude the out-of-court statement, arguing the testimony, if admitted through law enforcement witnesses, would violate the rule against hearsay, would violate Clifford's 6th Amendment right to confrontation, and any relevance would be substantially outweighed by the danger of unfair prejudice

---

[1] Clifford's written motion broadly identified SDCL 19-19-404 as the basis for exclusion. SR 30.

[2] The record is not clear on whether Anna Hall, Lindsey Hall, or both were involved in the call for service.

under SDCL 19-19-403. JT 16-18. The State objected to Clifford's motions. JT 15, 20, 23. The circuit court denied Clifford's motion to exclude the testimony. JT 19-20. In denying Clifford's motion to exclude the out-of-court statement claiming Clifford was driving a red Toyota Camry, the circuit court stated:

> The motion will be denied. Although the Court's not fully aware of all the circumstances of the case, it does appear to me that a red Toyota Camry and the defendant allegedly driving it is certainly relevant to the charges against him. It does not appear to me to be a matter of unfair prejudice to him at all that a red Toyota Camry be mentioned in association with him. I do understand defense is arguing that hearsay was what led officers to look for that vehicle in the first place, but I don't believe that the fact that hearsay is ultimately inadmissible in court means that law enforcement officers can't rely upon out-of-court statements when making their investigations. It's just that when they come to present their testimony, they can't do so in the terms of presenting hearsay evidence to, you know, outright testifying as to hearsay, put it that, in front of the jury. So this motion will be denied.

JT 24-25.

During the State's case-in-chief, the prosecutor elicited testimony from Det. Christian O'Brien ("O'Brien") which related to the BOLO, the domestic dispute, and the out-of-court statement alleging Clifford was driving a red Toyota Camry. JT 50. After O'Brien informed the jury that he located a red Toyota Camry which Clifford was "supposedly in at the time," JT 50, the following exchange occurred on direct examination:

> Prosecutor: "And you kind of answered it there, but what was that red Toyota Camy something of interest to you?"
>
> O'Brien: "The reporting party that called in stated that Christian Clifford was in a red Toyota Camry."

Prosecutor: "And you then observed said Camry; correct?"

O'Brien: "Yes."

JT 50. In addition, during the State's direct examination of Det. Nelson Leacraft ("Leacraft"), the State elicited similar testimony:

Prosecutor: "And why were you in that area?"

Leacraft: "I heard Metro Communications dispatch units to that area as a call for service had come in stating that a subject by the name of Christian was there in a red Toyota Camry, which was the subject that my unit was previously aware of and looking for."

Prosecutor: "And is that with regards to a BOLO?"

O'Brien: "Yes."

JT 72. Later in the State's direct examination of Leacraft, the prosecutor asked:

Prosecutor: "And what other information did you receive that day with regards to a one Mr. Christian Clifford?"

Leacraft: "The information was that he was at that current location and driving a red Toyota Camry."

JT 73.

When the prosecutor asked its final witness, Officer Carlos Puente ("Puente"), if there was "any other information provided with that BOLO," Puente told the jury "Yes, sir. We learned that Christian was driving a newer red Toyota Camry." JT 93.

In closing argument, the prosecutor told the jury "the officers knew who

they were looking for" because "[t]hey were given a description of the vehicle he was driving." JT 167. The prosecutor also asked the jury to consider the out-of-court statement as "the circumstantial evidence" corroborating "that red Toyota Camry is associated with Christian Clifford based on the BOLO that you heard testimony to from the officers." JT 184.

The jury found Clifford guilty on all counts of the Indictment. JT 192-193. Clifford was sentenced by Judge Hanson May 29, 2024. *See generally* ST. On Count 1, the circuit court suspended four years in the South Dakota State Penitentiary, ordered to run consecutively to his previous felony convictions. ST 29. The circuit imposed suspended jail sentences on the misdemeanor convictions. ST 30-31.

STATEMENT OF FACTS

On April 6, 2023, a non-testifying reporting party called law enforcement and requested officers respond to a family dispute at 316 S. Prairie Ave. in Sioux Falls, SD. JT 49-50. During the call for service, the non-testifying reporting party alleged Christian Clifford ("Clifford") was driving a red Toyota Camry in the area. *Id.* Law enforcement issued a BOLO bulletin for Clifford. *Id.* At approximately 2:00 p.m., O'Brien responded to the call for service and patrolled the area. *Id.* When he noticed a "native or Hispanic make with short hair" in the driver's seat of the red Toyota Camry, he activated his emergency lights, without his sirens, and attempted to stop the vehicle. JT 51. The vehicle slowly pulled to the side of the road, then sped up and made a left turn. *Id.* The vehicle drove

erratically, passing another vehicle in the roadway and failing to obey a stop sign. JT 53.

Det. Leacraft and Officer Puente, who were also in the area, witnessed O'Brien's attempt to stop the red Toyota Camry. JT 74, 95. Both Leacraft and Puente testified they were able to identify the driver of the red Toyota Camry as Clifford. JT 73, 94-95. Leacraft and Puente witnessed the vehicle pull off the roadway when O'Brien initiated his emergency lights, then turn back into the roadway, turning eastbound at a high rate of speed in a residential area. JT 55, 74, 95, 97. O'Brien estimated the vehicle to be traveling at approximately 60 miles per hour, well above the posted speed limit of 25 miles per hour. JT 55. Sioux Falls Police Department policy prevented law enforcement from engaging in further pursuit. JT 53-54.

Clifford testified in his defense. JT 129. Clifford did not recall any specific details from April 6, 2023, indicating "nothing important was happening in my life at that time for me to remember a specific date. I never would have thought I would have to come back to that date for any particular reason." JT 130. He testified that he was concerned for his freedom, was not in the area of 316 S. Prairie Ave. on the date in question, and that he'd never owned, nor driven a red Toyota Camry. JT 131. Clifford acknowledged his prior felony convictions and his conviction for a crime of dishonesty but told the jury he was innocent of the charges in the Indictment. JT 132.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY STATEMENTS IN VIOLATION OF CLIFFORD'S 6TH AMENDMENT RIGHT TO CONFRONTATION.

A. *Standards of Review*

This Court reviews evidentiary rulings under its abuse of discretion standard. *State v. Malcolm*, 2023 S.D. 6, ¶ 31, 985 N.W.2d 732, 740. When a circuit court's "discretion [is] exercised to an end or purpose not justified by, and clearly against, reason and evidence," it has abused that discretion. *State v. Hankins*, 2022 S.D. 67, ¶ 21, 982 N.W.2d 21, 30 (quoting *State v. Babcock*, 2020 S.D. 71, ¶ 21, 952 N.W.2d 750, 757). Whether Clifford's Sixth Amendment right to confrontation was violated is reviewed de novo. *State v. Little Long*, 2021 S.D. 38, ¶ 29, 962 N.W.2d 237, 249.

B. *The State elicited inadmissible hearsay to associate Clifford with the red Toyota Camry.*

The State's case-in-chief was premised on the veracity of an out-of-court, unsworn allegation asserting Clifford was driving a red Toyota Camry. Hearsay is a statement that: "(1) The declarant does not make while testifying at the current trial or hearing; and (2) A party offers in evidence to prove the truth of the matter asserted in the statement." SDCL 19-19-801(c). Testimony from O'Brien, Leacraft, and Puente included the out-of-court statement which, when offered for its truth, fits squarely within the definition of hearsay. The out-of-court statement was unsworn and offered to establish the truth of its assertion —

that Clifford was driving a red Toyota Camry. The circuit court's evidentiary ruling plainly violated the rule against hearsay. SDCL 19-19-802.

C. *The circuit court's admission of testimonial hearsay violated Clifford's 6th amendment right to confrontation.*

The circuit court's ruling violated Clifford's constitutional right to confrontation provided by the Sixth Amendment of the United States Constitution, which grants the defendant in a criminal case "the right ... to be confronted with the witnesses against him[.]" U.S. Const. amend. VI; *See Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The confrontation clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless [s]he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *State v. Richmond*, 2019 S.D. 62, ¶ 26 935 N.W.2d 792, 800 (quoting *Crawford*, 541 U.S. at 53–54, 124 S.Ct. at 1365). The United States Supreme Court has "loosely defined testimonial as 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Richmond*, ¶ 26, 935 N.W.2d at 800 (quoting *Crawford*, 541 U.S. at 49, 124 S. Ct. at 1363). One subset of testimonial statements includes those which were "made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* ¶ 28, 935 N.W.2d at 800 (citing *Crawford*, 541 U.S. at 51–52, 124 S.Ct. at 1364).

Here, the non-testifying witness's out-of-court statement was provided to law enforcement during a call for service. JT1 49-50. The call for service

requested law enforcement respond to a specific location and initiate an investigation. *Id.* It also prompted law enforcement's BOLO bulletin for Clifford. *Id.* Under these circumstances, it would be reasonable to believe the statement provided to law enforcement during a call for service would be available for use at a later trial. And the non-testifying witness's statement was, in fact, used to prosecute Clifford at trial.

D. *Clifford was prejudiced by the circuit court's admission of a testimonial hearsay statement.*

Clifford must establish reversible error related to the circuit court's evidentiary ruling. *State v. Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d 266, 280. To do so, "[Clifford] must prove not only that the trial court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice." *State v. Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d 237, 255. "Error is prejudicial when, in all probability, it produced some effect upon the final result[.]" *Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d at 281. In all probability refers to a "reasonable probability that, but for [the error], the result of the proceeding would have been different." *State v. Carter*, 2023 S.D. 67, ¶ 26, 1 N.W.3d 674, 686 (alterations in original). In essence, Clifford must show the error reached a level of prejudice which sufficiently "undermine[s] confidence in the outcome." *Id.* (quoting *Owens v. Russell*, 2007 S.D. 3, ¶ 9, 726 N.W.2d 610, 615).

Furthermore, an alleged violation of Clifford's Sixth Amendment right to confrontation, applicable to the states through the Due Process Clause of the

Fourteenth Amendment, requires this court to apply the *Chapman* harmless error standard. "Since this issue involves a federal constitutional question, we apply the *Chapman* harmless error analysis rather than the harmless error analysis developed in the South Dakota cases." *State v. Swallow*, 405 N.W.2d 29, 37 (S.D. 1987) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct 824 (1967)). "The State bears the burden of proving beyond a reasonable doubt the error was harmless." *State v. Johnson*, 2009 S.D. 67, ¶ 25, 771 N.W.2d 360, 370.

Here, the circuit court's error was not harmless and this Court should remand Clifford's case for a new trial. Based on the arguments and evidence submitted at trial, the question for the jury was reduced to one basic question: Was Clifford driving the red Toyota Camry during this incident? The State's case relied entirely on law enforcement accurately identifying the driver of the red Toyota Camry. Because law enforcement assumed Clifford was driving a red Toyota Camry, their susceptibility to confirmation bias is apparent. The circuit court's admission of the hearsay statement allowed the State to impermissibly impute law enforcement's confirmation bias into the jury's consideration.

The State's rationale for admitting the statement — suggesting it "goes to the effect on the listener" and that "[o]fficers are doing their regular investigative duties when speaking to that third-party witness" — is an untenable position to maintain. JT 24. The prosecutor's closing argument and the testimony from law enforcement belie that notion.

Of course, Clifford recognizes some out-of-court statements are admissible

if not offered for their truth. *See Johnson*, 2009 S.D. 67, ¶ 21, 771 N.W.2d at 369 (finding certain out-of-court statements to be non-hearsay because the veracity of the statements were irrelevant and not offered for their truth). However, in *Johnson*, there were multiple statements at issue, and while this Court acknowledged some of the statements were not offered for their truth, it rejected the State's argument claiming a confidential informant's out-of-court statement claiming he could buy marijuana from the defendant was offered "to establish context and background." *Johnson*, ¶ 24, 771 N.W.2d at 370. When the prosecutor in *Johnson* delivered a closing argument which asked the jury to consider the confidential informant's statement for its truth, this Court found it "improper when the declarant was unavailable and not subjected to cross-examination." *Id.* ¶ 25, 771 N.W.2d at 370.

Like *Johnson*, the State used the hearsay statement as substantive evidence, offered for its truth. It urged the jury to use inadmissible hearsay statements as "circumstantial evidence" confirming "that red Toyota Camry is associated with Christian Clifford based on the BOLO that you heard testimony to from the officers." JT 184. Here, like *Johnson*, the prosecution's use of the statement in closing argument was improper. To properly admit this prejudicial, out-of-court statement, the State should have called the declarant to testify in its case-in-chief and face cross-examination from the defense.

Moreover, the circuit court can exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. SDCL 19-19-

403. Clifford articulated his concerns to the circuit court, explicitly arguing that if the hearsay is admitted through the officers "without actual proper foundation or any actual connection to the vehicle through proper testimony," it "would impermissibly push the jury towards considering of an (sic) improper association as actual evidence." JT 22-23. The circuit court acknowledged it "was not fully aware of all the circumstances of the case[,]" but stated:

> [I]t does appear to me that a red Toyota Camry and the defendant allegedly driving it is certainly relevant to the charges against him. It does not appear to me to be a matter of unfair prejudice to him *at all* that a red Toyota Camry be mentioned in association with him.

JT 24 (emphasis added).

A witness alleging Clifford was driving a red Toyota Camry is relevant to the State's prosecution – *but only if it's true.* The circuit court's comment glaringly reveals Clifford's issue on appeal. If the circuit court was unable to resist the temptation of considering the truth of the hearsay statement in balancing probative value against unfair prejudice, it seems likely the jury would also impermissibly consider the hearsay statement for its truth. *See Little Long*, 2021 S.D. 38, ¶ 39, 962 N.W.2d at 252 (finding an abuse of discretion in admitting hearsay testimony for impeachment purposes because of the potential danger in the jury considering the impeachment testimony for the truth of the matter asserted); *Loeschke*, 2022 S.D. 56, ¶ 45, 980 N.W.2d at 280 (finding error in admitting certain hearsay statements without considering whether the contextual value was outweighed by the potential danger in the jury considering the

statements for the truth of the matters asserted). The circuit court finding no prejudice *at all* in allowing law enforcement to bolster their identification with an out-of-court, unsworn statement was a clearly erroneous legal conclusion.

The circuit court's ruling —an explicit denial of Clifford's motion in limine — is clear, but the analysis in support of its ruling is difficult to decipher:

> I don't believe that the fact that hearsay is ultimately inadmissible in court means that law enforcement officers can't rely upon out-of-court statements when making their investigations. It's just that when they come to present their testimony, they can't do so in terms of presenting evidence to, you know, outright testifying as to hearsay, put it that, in front of the jury. So this motion will be denied.

JT 24-25.

Although the circuit court appears to agree with Clifford's contention that law enforcement can't present hearsay as substantive evidence to the jury, it inexplicably denied Clifford's motion, thereby permitting the State to do exactly what the circuit court's ambiguous comment seemingly disapproved. In addition, the jury was not given a limiting instruction.

Admitting evidence of this nature, in this manner, without in-court testimony from the witness making the assertion, yields a verdict premised on the truthfulness of a hearsay statement. The out-of-court, unsworn statement seeped through the rule against hearsay, prejudicing Clifford's defense, effecting the jury's verdict, and undermining confidence in the outcome of this case.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled

record, Clifford respectfully asks this Court to remand the case to the circuit court with an Order directing the court to reverse the Judgment and Sentence and schedule a new trial.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted this 28th day of October, 2024.

/s/ Christopher Miles
Christopher Miles
Minnehaha County Public Defender
ATTORNEY for APPELLANT

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 3,219 words.

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

Dated this 28th day of October, 2024.

/s/ Christopher Miles
Christopher Miles
Attorney for Appellant

CERTIFICATE OF SERVICE

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

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Dated this 28th day of October, 2024.

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APPENDIX

Judgment & Sentence..A-1

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
		PD 23-006861
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI23002859
vs.	+	JUDGMENT & SENTENCE
CHRISTIAN ELLIOTT CLIFFORD, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on July 26, 2023, charging the defendant with the crimes of Count 1 Aggravated Eluding on or about April 6, 2023; Count 2 Reckless Driving on or about April 6, 2023; Count 3 Driving Under Suspension on or about April 6, 2023; Count 4 Stop Sign Violation on or about April 6, 2023 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on August 9, 2023, Alex Braun appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Clayton Dahl, Deputy State's Attorney appeared for the prosecution and, Jacob Carsten, appeared as counsel for the defendant. A Jury was impaneled and sworn on March 18, 2024 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 March 19, 2024 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, CHRISTIAN ELLIOTT CLIFFORD, guilty as charged as to Count 1 Aggravated Eluding (SDCL 32-33-18.2), guilty as charged as to Count 2 Reckless Driving (SDCL 32-24-1), guilty as charged as to Count 3 Driving Under Suspension and guilty as charged as to Count 4 Stop Sign Violation (SDCL 32-29-2.1)." The Sentence was continued.

Thereafter, on May 29, 2024, the defendant appeared (via Zoom) with his attorney, Jacob Carsten and the State was represented by Deputy State's Attorney, Clayton Dahl; at which time the defendant admitted to the Part II Habitual Criminal Offender Information (SDCL 22-7-7) and was then 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 AGGRAVATED ELUDING / HABITUAL OFFENDER : CHRISTIAN ELLIOTT CLIFFORD shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for four (4) years (credit three (3) days served) with the sentence suspended (consecutive to #49CRI 15-1585 and #51CRI 20-5371) on the following conditions:

1. That the defendant comply with all terms of Parole Agreement.
2. That the defendant enter into and successfully complete Teen Challenge.
3. That the defendant commit no Class I misdemeanors or greater.
4. That the defendant submit to testing of bodily substances, including blood, breath or urine, as directed by the Court, ~~Service~~parole, law enforcement, or correctional Officer, and be responsible for the cost of said testing.
5. That the defendant consent to the search and seizure of his or her person, property, home, and car, at any time or place, with or without a search warrant, whenever reasonable suspicion is determined by a probation officer, law enforcement officer or the Court.
6. That the defendant not possess nor consume alcoholic beverages nor enter establishments where alcohol is the primary item for sale.
7. That the defendant pay $116.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 2 RECKLESS DRIVING : CHRISTIAN ELLIOTT CLIFFORD shall be incarcerated in the Minnehaha County Jail, located in Sioux Falls, State of South Dakota for three hundred sixty (360) days with the sentence suspended (concurrent to Count 1) on the condition that the defendant pay $96.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 3 DRIVING UNDER SUSPENSION : CHRISTIAN ELLIOTT CLIFFORD shall be incarcerated in the Minnehaha County Jail, located in Sioux Falls, State of South Dakota for thirty (30) days with the sentence suspended (concurrent to Counts 1 and 2) on the condition that the defendant pay $78.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 4 STOP SIGN VIOLATION : CHRISTIAN ELLIOTT CLIFFORD shall be incarcerated in the Minnehaha County Jail, located in Sioux Falls, State of South Dakota for thirty (30) days with the sentence suspended (concurrent to Counts 1, 2 and 3) on the condition that the defendant pay $78.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

6/11/2024 2:35:15 PM

BY THE COURT:

Sandra Hanson

JUDGE SANDRA HOGLUND HANSON
Circuit Court Judge

Attest:
Hagert, Eve
Clerk/Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30754

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHRISTIAN ELLIOTT CLIFFORD,

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

THE HONORABLE SANDRA HANSON
Circuit Court Judge

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Notice of Appeal filed July 9, 2024

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Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986) 18, 19

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State v. Eagle Star, 1996 S.D. 143, 558 N.W.2d 70 17

State v. Hauge, 2013 S.D. 26, 829 N.W.2d 145 8

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State v. Krebs, 504 N.W.2d 580 (S.D. 1993) 14

State v. Little Long, 2021 S.D. 38, 962 N.W.2d 237 16

State v. Loeschke, 2022 S.D. 56, 980 N.W.2d 266 16

State v. Otobhiale, 2022 S.D. 35, 976 N.W.2d 759 15

State v. Podzimek, 2019 S.D. 43, 932 N.W.2d 141 9

State v. Richmond, 2019 S.D. 62, 935 N.W.2d 792 9

State v. Spaniol, 2017 S.D. 20, 895 N.W.2d 329 9

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United States v. Watson, 525 F.3d 583 (7th Cir. 2008) 2, 9

OTHER AUTHORITIES CITED:

U.S. Const. amend. VI 9

S.D. Const. art. VI, § 7 9

29A Am. Jur. 2d *Evidence*, § 858 15

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30754

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHRISTIAN ELLIOTT CLIFFORD,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Christian Elliott Clifford, is referred to as "Defendant" or "Clifford." Plaintiff and Appellee, the State of South Dakota, is referred to as "State." All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Minnehaha Co. File No. CRI23-2859)..... SR

Arraignment Transcript dated August 9, 2023.....ARR

Jury Trial Vol. 1 Transcript dated March 18, 2024 .....JT1

Jury Trial Vol. 2 Transcript dated March 19, 2024 .....JT2

Sentencing Transcript dated May 29, 2024..... ST

Appellant's Brief.....AB

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

JURISDICTIONAL STATEMENT

Clifford appeals the Judgment of Conviction entered by the Honorable Sandra Hanson, Circuit Court Judge, Minnehaha County, Second Judicial Circuit. SR 305-06. The Judgment of Conviction was filed on June 11, 2024. SR 306. Defendant filed a Notice of Appeal on July 9, 2024. SR 310-11. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED IN ADMITTING STATEMENTS THAT CLIFFORD ARGUES ARE TESTIMONIAL HEARSAY STATEMENTS IN VIOLATION OF CLIFFORD'S SIXTH AMENDMENT RIGHT TO CONFRONTATION?

The circuit court denied Clifford's motion in limine regarding such statements and allowed their admission at trial.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)

State v. Kihega, 2017 S.D. 58, 902 N.W.2d 517

State v. Whitfield, 2015 S.D. 17, 862 N.W.2d 133

United States v. Watson, 525 F.3d 583 (7th Cir. 2008)

STATEMENT OF THE CASE AND FACTS[1]

On April 6, 2023, at approximately 2:00 p.m., officers from the Sioux Falls Police Department were dispatched to 316 South Prairie

[1] The Statement of the Case and the Facts are combined for brevity and clarity.

Avenue in Sioux Falls. SR 134, 140, 160; JT1 49, 55, 75. Law enforcement had received a report of a family dispute at that location earlier that day involving Clifford, and there was an active BOLO or "be on the lookout" for Clifford. SR 134-35; JT1 49-50. Officers also received information that Clifford was in a red Toyota Camry. SR 135; JT1 50.

Officer Christian O'Brien, Detective Nelson Leacraft, and Officer Carlos Puente responded to 316 South Prairie Avenue. Officer O'Brien approached the location from the north through an alley. He observed a red Toyota Camry backing out of an east/west alley and saw a Native American or Hispanic male with short hair in the driver's seat, although he was unable to identify the driver. SR 135, 147; JT1 50, 62. The Camry backed out onto South Prairie Avenue and Officer O'Brien followed. SR 135-36, 145-46; JT1 50-51, 60-61.

Detective Leacraft was in a surveillance position and observed the Camry and a marked patrol vehicle headed southbound onto South Prairie Avenue. SR 158; JT1 73. Detective Leacraft had an unobstructed view of the Camry and was able to identify the driver as Clifford. SR 158, 161, 173; JT1 73, 76, 88. He was familiar with Clifford by previously seeing him in person on surveillance and through photos. SR 166; JT1 81.

Officer Puente saw the Camry driving southbound on South Prairie Avenue. SR 179; JT1 94. He also had an unobstructed view of

the Camry and identified the driver as Clifford. SR 179, 198; JT1 94, 113. Officer Puente had familiarized himself with Clifford by looking at a known photo of him. SR 178-79; JT1 93-94.

After the Camry proceeded through the intersection at West 12th Street, Officer O'Brien activated his emergency red and blue lights and attempted to stop the vehicle. SR 136, 138, 146, 159, 180, 182; JT1 51, 53, 61, 74, 95, 97. The Camry appeared to pull over, but did not stop and instead made a left-hand turn onto West 13th Street, rapidly speeding up and kicking up dust. By the time the officers turned onto West 13th Street, the Camry was approximately two blocks away and appeared to have passed a vehicle on the left side of the road, went through a yield sign, and ran a stop sign. SR 136-37, 138, 146-47, 150, 153, 159; JT1 51-52, 53, 61-62, 65, 68, 74. *See also* Exhibits 1, 2, and 3.

The officers did not pursue the Camry per Sioux Falls Police Department policy.[2] SR 138-39, 170-71, 174, 184; JT1 53-54, 85-86, 89, 99. However, Officer O'Brien described the driving of the Camry as "extremely fast and erratic" and dangerous, and he estimated the speed to be approximately 60 miles per hour. SR 138, 139-40, 142; JT1 53, 54-55, 57. Detective Leacraft testified that Clifford's driving was "highly

[2] Officer O'Brien testified that under such policy, officers are only allowed to pursue when the suspect or the vehicle has or is about to commit a dangerous felony and is an ongoing threat to society. He noted the inherently dangerous nature of pursuits and testified they should only be used when "necessary due to the circumstances." SR 138-39; JT1 53-54.

dangerous," and Officer Puente described it as "pretty reckless." SR 175, 182; JT1 90, 97. The legal speed limit was 25 miles per hour as it is a residential area with other cars and people present. SR 140, 160, 176, 182-83; JT1 55, 75, 91, 97-98.

On July 26, 2023, the Minnehaha County Grand Jury indicted Clifford on the following charges:

- Count 1: Aggravated Eluding in violation of SDCL 32-33-18.2, a Class 6 felony;
- Count 2: Reckless Driving in violation of SDCL 32-24-1, a Class 1 misdemeanor;
- Count 3: Driving Under Suspension in violation of SDCL 32-12-65(2), a Class 2 misdemeanor; and
- Count 4: Stop Sign Violation in violation of SDCL 32-29-2.1, a Class 2 misdemeanor.

SR 11-12. That same day, the State filed a Part II Habitual Criminal Information, alleging that Clifford had two prior felony convictions for aggravated assault and aggravated eluding. SR 13. Clifford was arraigned on the charges and the Part II Information on August 9, 2023. SR 376, 381-82; ARR 1, 6-7.

Clifford filed a number of motions in limine which were addressed by the circuit court prior to the start of trial. As relevant to this appeal, Clifford sought to exclude the following:

- Any reference, mention, or inference of any BOLO's made in regards to the Defendant;
- Any reference, mention, or inference of to [sic] any persons by the name of Anna Hall or Lindsey Hall;[3] and

[3] Defense counsel argued that Anna Hall and Lindsey Hall were mentioned in the BOLO and tied to the alleged family dispute. (con't)

- Any reference, mention, or inference of the Defendant being associated with a red Toyota Camry.

SR 30-31. In the motion in limine, Clifford alleged that such statements were inadmissible to prove character under SDCL 19-19-404.[4] SR 31.

At the hearing on Clifford's motion in limine prior to trial, he argued that admission of statements related to the BOLO would be unduly prejudicial and outweigh any probative value, a violation of the Confrontation Clause, and impermissible hearsay. SR 102-03; JT1 17-18. He also argued that the probative value of any references to Clifford's association with the Camry were "outweighed by the unfair prejudice without actual foundation and proper . . . non-hearsay testimony." SR 108; JT1 23.

The circuit court denied Clifford's motion in limine regarding these statements. First, the court reasoned that because the BOLO was the "legal reason for the officers desiring to stop the defendant," it was a part of the circumstances that led to the stop. SR 104; JT1 19. Second, the court held that a passing reference to Anna Hall or Lindsey

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However, the record does not clarify their exact involvement. SR 20; JT1 105.

[4] Clifford did not specify under which subsection of SDCL 19-19-404 he sought exclusion of the statements. SDCL 19-19-404(a)(1) provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." SDCL 19-19-404(b)(1) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

Hall should not cause any sort of unfair prejudice, but cautioned the parties about not going beyond such passing reference.[5] SR 106; JT1 21. Finally, the circuit court stated, "a red Toyota Camry and the defendant allegedly driving it is certainly relevant to the charges against him" and "[i]t does not appear to me to be a matter of unfair prejudice to him at all that a red Toyota Camry be mentioned in association with him." SR 109; JT1 24. In addition, although Clifford claimed that such statements were hearsay, the circuit court stated, "I don't believe that the fact that hearsay is ultimately inadmissible in court means that law enforcement officers can't rely upon out-of-court statements when making their investigations." SR 109-10; JT1 24-25.

A jury trial was held on March 18 and 19, 2024. SR 86, 242; JT1 1; JT2 144. Officer O'Brien, Detective Leacraft, and Officer Puente testified to the incident, as set out above. Clifford testified in his defense; he did not recall where he was on April 6, 2023, as "nothing really happened important that day." SR 215, 219; JT1 130, 134. He denied driving a red Toyota Camry and denied being near 316 South Prairie Avenue. SR 216; JT1 131. Finally, he denied trying to avoid or evade law enforcement on April 6, 2023. SR 218, 219; JT1 133, 134.

The jury found Clifford guilty on all counts. SR 84-85, 291; JT2 193. Sentencing was held on May 29, 2024. SR 325; ST 1. Clifford admitted to the Part II Information. SR 336-40; ST 12-16. The circuit

[5] None of the State's witnesses referenced Anna Hall or Lindsey Hall by name during their testimony at trial.

court ordered a four-year suspended penitentiary sentence on Count 1, consecutive to sentences that Clifford was serving on his two prior felony convictions. SR 353, 356; ST 29, 32. The circuit court also ordered suspended jail sentences on Counts 2, 3, and 4, to run concurrent with the sentence on Count 1. SR 354-55; ST 30-31. A Judgment of Conviction was entered on June 11, 2024. SR 305-06.

ARGUMENT

THE CIRCUIT COURT DID NOT ERR AS IT DID NOT ADMIT TESTIMONIAL HEARSAY STATEMENTS IN VIOLATION OF CLIFFORD'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

A. Standard of Review.

It is well-established that a trial court's evidentiary rulings are presumed to be correct and are reviewed by this Court for an abuse of discretion. *State v. Bausch*, 2017 S.D. 1, ¶ 12, 889 N.W.2d 404, 408. "An abuse of discretion is a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Id.* (citing *State v. Hayes*, 2014 S.D. 72, ¶ 22, 855 N.W.2d 668, 675). Clifford bears the burden of establishing error and showing it was prejudicial. *Bausch*, 2017 S.D. 1, ¶ 12, 889 N.W.2d at 408. "'Error is prejudicial when, in all probability . . . it produced some effect upon the final result and affected rights of the party assigning it.'" *Bausch*, 2017 S.D. 1, ¶ 12, 889 N.W.2d at 408-09 (citing *State v. Hauge*, 2013 S.D. 26, ¶ 24, 829 N.W.2d 145, 152).

"The question of whether a defendant's Sixth Amendment right to confrontation was violated is a constitutional question which we review de novo." *State v. Podzimek*, 2019 S.D. 43, ¶ 13, 932 N.W.2d 141, 146 (citing *State v. Spaniol*, 2017 S.D. 20, ¶ 23, 895 N.W.2d 329, 338). "When a defendant has shown his constitutional right to confrontation has been violated, he is entitled to a new trial unless the improperly admitted evidence constitutes harmless error." *State v. Richmond*, 2019 S.D. 62, ¶ 35, 935 N.W.2d 792, 802.

B. Clifford's Sixth Amendment rights were not violated by the circuit court's admission of the statements at issue.

The Sixth Amendment of the United States Constitution provides criminal defendants the right to confront the witnesses against them. U.S. Const. amend. VI.[6] This is commonly referred to as the Confrontation Clause. "[T]he Confrontation Clause bars the admission of a witness's 'testimonial statement' unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine him or her." *United States v. Watson*, 525 F.3d 583, 588 (7th Cir. 2008)(citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374 (2004)).

"[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Ohio v. Clark*, 576 U.S. 237, 245, 135 S.Ct. 2173, 2180 (2015). "[T]he question is whether, in light of all

[6] The South Dakota Constitution similarly provides that "[i]n all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face[.]" S.D. Const. art. VI, § 7.

the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Id.* (citing *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 1155 (2011)). "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant* at 359, 131 S.Ct. at 1155.

The United States Supreme Court has considered testimonial statements to include, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford* at 68, 124 S.Ct. at 1374. A testimonial statement is also a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" or one "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Id.* at 51-52, 124 S.Ct. at 1364.

In addition, "the Sixth Amendment does not bar out-of-court statements when the statement is not offered to prove the truth of the matter asserted; thus, the Sixth Amendment poses no bar to the admission of non-hearsay statements." *State v. Kihega*, 2017 S.D. 58, ¶ 36, 902 N.W.2d 517, 528 (citing *United States v. James*, 487 F.3d 518, 525 (7th Cir. 2007)). Hearsay is defined as a statement that "[t]he declarant does not make while testifying at the current trial or hearing"

and "[a] party offers in evidence to prove the truth of the matter asserted in the statement." SDCL 19-19-801(c).

However, if a statement is not offered to prove the truth of the matter asserted, but if offered for some other purpose, it is not hearsay. *State v. Whitfield*, 2015 S.D. 17, ¶ 13, 862 N.W.2d 133, 138.

> Not all out-of-court statements are hearsay. The hearsay rule only prohibits admission of evidence of out-of-court statements offered to prove the truth of the out-of-court declaration . . . Utterances made contemporaneously with or immediately preparatory to an act which is material to the litigation that tends to explain, illustrate or show the object or motive of an equivocal act and which are offered irrespective of the truth of any assertion they contain, are not hearsay and are admissible.

State v. Charger, 2000 S.D. 70, ¶ 26, 611 N.W.2d 221, 226-27 (citing *State v. Kelley*, 953 S.W.2d 73, 85 (Mo. App. 1997)). Therefore, if an out-of-court statement is not offered to prove the truth of the matter asserted, "the Confrontation Clause is satisfied if the defendant had the opportunity to cross-examine the person *repeating* the out-of-court statement." *State v. Johnson*, 2009 S.D. 67, ¶ 23, 771 N.W.2d 360, 369 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (1985)) (emphasis in original).

i. The Confrontation Clause does not apply as the statements are not testimonial hearsay.

The statements at issue in this appeal were admitted through the testimony of three law enforcement officers at trial:

Officer O'Brien Direct Examination

Q. And what happened when you arrived at that location?

A. When I arrived, I proceeded from the backside of Munchies, which is located just to the north, and proceeded through the north/south alley there. As I went through that alley, I then got to the alley that runs east and west, and as Officer Puente turned in front of me, I turned my view towards the 316 South Prairie address and located a red Toyota Camry that Christian Clifford was supposedly in at the time.

Q. And you kind of answered it there, but why was that red Toyota Camry something of interest to you?

A. The reporting party that called in stated that Christian Clifford was in a red Toyota Camry.

SR 135; JT1 50.

Officer O'Brien Cross Examination

Q. Now you had said that you were looking for a red Toyota Camry; is that accurate?

A. Correct.

Q. Specifically, you were told that Christian Clifford would be in a red Camry.

A. Yes.

Q. You didn't have any verification of that?

A. I had only the information provided to me by dispatch.

SR 143; JT1 58.

Detective Leacraft Direct Examination

Q. And why were you in that area?

A. I heard Metro Communications dispatch units to that area as a call for service had come in stating that a subject by the name of Christian was there in a red Toyota Camry.

Q. And is that with regards to a BOLO?

A. Yes.

Q. And when you say "Christian," is that Mr. Clifford?

A. Yes, it is.

...

Q. And what other information did you receive that day with regards to a one Mr. Christian Clifford?

A. The information was that he was at that current location and driving a red Toyota Camry.

SR 156-57; JT1 71-72.

Officer Puente Direct Examination

Q. And what was the nature of that dispatch?

A. That was a call of a BOLO subject that we were looking for in the area.

Q. And who was it with regards to that BOLO was related to?

A. Clifford, Christian Clifford.

Q. Was there any other information provided with that BOLO?

A. Yes, sir. We learned that Christian was driving a newer red Toyota Camry.

SR 178; JT1 93.

The above statements are not testimonial hearsay. Law enforcement had received information regarding Clifford's alleged involvement in a family dispute at 316 South Prairie Avenue, as well as his connection with a red Toyota Camry, which led to the issuance of the BOLO. The information was not provided through prior testimony

at a preliminary hearing, before a grand jury, at a formal trial, or through police interrogation, and was not a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford* at 51, 124 S.Ct. at 1364. Similarly, it was not "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Id.* at 52, 124 S.Ct. at 1364. Rather, the information was provided through a call for service seeking a law enforcement response.

In addition, the statements were not offered to prove the truth of the matter asserted (i.e., that Clifford was involved in a family dispute or that he was driving a red Toyota Camry), but rather were offered to show why law enforcement responded to the area, why they attempted to stop the Camry when they observed Clifford inside, and Clifford's intent in fleeing after the attempted stop. And as noted by the circuit court, the BOLO provided a legal reason for the officers to stop the Camry.[7] SR 104; JT1 19.

Officer O'Brien testified that law enforcement was dispatched to 316 South Prairie Avenue after receiving a report of Clifford returning to that address following a family dispute, and that there was an active BOLO for Clifford. SR 134-35; JT1 49-50. Detective Leacraft testified

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[7] Although Clifford has not challenged the validity of the attempted stop, it should be noted that "[i]n accord with the Fourth Amendment, a police officer may not stop a vehicle without a reasonable basis for doing so." *State v. Krebs*, 504 N.W.2d 580, 584 (S.D. 1993)(citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968)).

that there was a call for service regarding Clifford being in the area, and that his unit was looking for Clifford with regard to the BOLO. SR 156-57; JT1 71-72. Officer Puente testified that dispatch received a call of a BOLO subject that law enforcement was looking for in the area. SR 178; JT1 93. The testimony of the officers provides context for their response and actions when they arrived in the area and saw the red Toyota Camry. Clifford also had the opportunity to cross-examine the officers during trial.

The testimony of the officers could also be considered *res gestae*. "'*Res gestae*,' also known as intrinsic evidence, is evidence of wrongful conduct other than the charged criminal conduct offered for the purpose of providing the context in which the charged crime occurred." *State v. Otobhiale*, 2022 S.D. 35, ¶ 16, 976 N.W.2d 759, 767 (citing 29A Am. Jur. 2d *Evidence*, § 858). *Res gestae* evidence is admissible "where such evidence is 'so blended or connected' with the one[s] on trial . . . that proof of one incident involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged." *Otobhiale*, 2022 S.D. 35, ¶ 17, 976 N.W.2d at 767 (citing *State v. Hoadley*, 2002 S.D. 109, ¶ 37, 651 N.W.2d 249, 258). Again, the information regarding Clifford's alleged involvement in a family dispute and association with a red Toyota Camry is connected with Clifford's charges in that it provides the context for and circumstances of the attempted stop of the Camry and subsequent flight by Clifford.

Finally, it is important to note that while law enforcement may have had information regarding Clifford's alleged involvement in a family dispute, he was not charged with anything related to that dispute and there was no testimony at trial about the dispute itself, other than as it related to the BOLO and the law enforcement response. Rather, the crimes that Clifford was charged with in this case occurred *after* law enforcement responded to that area and personally observed him driving the Camry and then fleeing from the attempted stop.

The statements at issue were offered and admitted for a legitimate, non-hearsay purpose. Because the statements are not testimonial hearsay, the Confrontation Clause does not apply; thus, Clifford's Sixth Amendment rights were not violated.

ii. There was no abuse of discretion or prejudicial error by the circuit court's admission of the statements at issue.

"To establish reversible error with regards to an evidentiary ruling, 'a defendant must prove not only that the trial court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice.'" *State v. Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d 266, 280 (citing *State v. Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d 237, 255). "Error is prejudicial when, in all probability, it produced some effect upon the final result and affected rights of the party assigning it.'" *Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d at 281 (citing *Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d at 255).

The central issue at trial was who was the driver of the red Toyota Camry. The State had to prove, and the jury had to find, beyond a reasonable doubt that Clifford was the driver of the Camry in order to convict him of any or all of the charges.

Detective Leacraft and Officer Puente both identified Clifford as the driver of the Camry. SR 158, 161, 173, 179; JT1 73, 76, 88, 94. They were familiar with his appearance, having reviewed surveillance and photos of Clifford prior to their response. SR 166, 178-79; JT1 81, 93-94. The dash cam videos also show their clear, unobstructed view of the driver of the Camry. Exhibits 2 and 3. Finally, they identified Clifford in court during the trial. SR 157, 180; JT1 72, 95.

In addition, the jury was instructed on how to consider the officers' identification of Clifford. Instruction 31 provided as follows:

> Witnesses Nelson Leacraft and Carlos Puente have identified the defendant as Christian Clifford. As with any other witness, you must first decide whether the witnesses have testified honestly and truthfully. But you must do more than that. You must also decide whether the identification is accurate. In deciding those questions you should carefully consider all of the circumstances under which the witnesses made the observation of the driver, and all of the circumstances under which the witnesses later identified the defendant as that person.

SR 74. "Juries are presumed to follow the instructions of the trial court." *State v. Eagle Star*, 1996 S.D. 143, ¶ 22, 558 N.W.2d 70, 75. There is no evidence that the jury failed to do so in this case.

Clifford argues that the State urged the jury to consider the "inadmissible hearsay statements" as "circumstantial evidence." AB 12.

During his closing argument, the prosecutor did state "[t]he circumstantial evidence would be that the red Toyota Camry is associated with Christian Clifford based on the BOLO that you heard testimony to from the officers." SR 282; JT2 184. However, Clifford fails to mention that the prosecutor first referred the jury to the direct evidence in this case – "the videos and the testimony from the officers, the eye witnesses that were there." SR 282; JT2 184.

Clifford has not shown that there would have been a different result had the statements at issue been excluded. There was sufficient other evidence provided through the testimony of Detective Leacraft and Officer Puente, the dash cam videos, and their identification of Clifford both as the driver of the Camry and in court, to support the jury's verdict. Therefore, there was no prejudicial error in the admission of the statements at issue.

C. *Even if there was a violation of Clifford's Sixth Amendment rights, admission of the statements at issue constitutes harmless error.*

If this Court finds that the statements at issue fall within the confines of the Confrontation Clause and that their admission violated Clifford's Sixth Amendment rights, then this Court must consider whether the admission constituted harmless error. "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986).

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to review courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684, 106 S.Ct. at 1438.

The statements at issue were admitted to provide the context of the law enforcement response, not to prove that Clifford was the driver of the Camry. The State presented direct evidence through the testimony of Detective Leacraft and Officer Puente identifying Clifford as the driver of the Camry, which corroborated the information they had regarding Clifford's association with the Camry. These officers were familiar with Clifford and testified that they observed him in the driver's seat of the Camry, which can also be seen in the dash cam videos. SR 166, 178-79; JT1 81, 93-94; Exhibits 2 and 3. Clifford had the opportunity to cross-examine all of the officers and testify in his defense. Without considering the statements at issue, there was sufficient evidence presented at trial to support the jury's verdict; thus, their admission constituted harmless error in light of all of the other evidence before the jury.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 4,493 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 365.

Dated this 10th day of December, 2024.

/s/ Angela R. Shute
Angela R. Shute
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of December, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Christian Elliott Clifford* was served via electronic mail upon Jacob Carsten at jcarsten@minnehahacounty.gov.

/s/ Angela R. Shute
Angela R. Shute
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30754

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

CHRISTIAN CLIFFORD,

Defendant and Appellant.

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

HONORABLE SANDRA HANSON
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

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CHRISTIAN CLIFFORD,

Defendant and Appellant.

PRELIMINARY STATEMENT

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

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "SB." All citations will be followed by the appropriate page number. Clifford relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his initial brief, filed with the Court on October 28, 2024.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY STATEMENTS IN VIOLATION OF CLIFFORD'S 6TH AMENDMENT RIGHT TO CONFRONTATION.

The State's brief fairly construes Clifford's argument on appeal, generally. Clifford acknowledges, as he did in his initial brief, that not all hearsay is impermissible. However, Clifford reiterates that the hearsay that was provided to the jury of Clifford's association with a red Toyota Camry is impermissible hearsay, was testimonial in nature, and was offered and argued for the truth of the matter asserted. Further, while the State argues that the statements were *res gestae* and intrinsic to the State's case to provide the purpose of the attempted stop, "'[r]*es gestae*' is a theory of relevance which recognizes that certain evidence is relevant because of its unique relationship to the charged crime . . .." *State v. Otobhiale*, 2022 S.D. 35, ¶ 16, 976 N.W.2d 759, 767 (quoting 29A Am. Jur. 2d Evidence § 858 Westlaw (database updated May 2022) (quotations removed). While *res gestae* may be applicable to the admissibility of a declarant's personal knowledge of Clifford's association with the red Toyota Camery, it does not go so far as to side-step the constitutional requirements of confrontation. If that were the case, trials would be decided solely by law enforcement who investigated allegations rather than by those witnesses with actual, personal knowledge and, or those making the accusations.

The issue before the Court is not whether the evidence was possibly relevant, but rather that Clifford was not afforded an opportunity to cross-examine the declarant of that information. Cross-examination of the officers' belief of Clifford's association with the vehicle does not allow cross-examination of the declarant. No evidence in the settled record suggests either were unavailable, and, at no point, were subject to cross-examination by Clifford. The admission of this prior statement through the officers was improper and prejudiced Clifford.

Clifford agrees that "juries are presumed to follow the instructions of the court," SB, Pg. 17; *State v. Eagle Star* 1996 S.D. 143, 22, 558 N.W.2d, 70, 75, but the jury was not instructed by the trial court to consider the BOLO and the out-of-court statements with any other instructions than were given for the general considerations of evidence. Rather, the jury was instructed to "consider *all of the circumstances* under which the witnesses made the observation of the driver, and *all of the circumstances* under which the witnesses later identified the defendant as that person." SR 74 (emphasis added). Through this instruction, the jury was explicitly instructed to consider the impermissible hearsay and to consider the fact that the "reporting party that called in stated that Christian Clifford was in a red Toyota Camry;" JT 50, that officers received information that Clifford "was at that current location and driving a red Toyota Camry;", JT 72, and "learned that Christian was driving a newer red Toyota Camry." JT 93. This was the

information that the jury was required to consider by the trial court's instruction, and, presuming that the jury properly followed the trial court's instructions, effected their deliberations.

The State argues that "the statements were not offered to prove the truth of the matter asserted . . ., but rather were used to show" several other, potentially permissible uses of hearsay, and the State also argued at trial that the statements were to be elicited for "the effect on the listener." JT, Pg. 24. The State's argument during trial to the jury, however, clearly demonstrates that the statements were used to prove the truth of the matter asserted, specifically to prove identity, as the State called on the jury to "remember circumstantial and direct evidence" and specifically argued that "the circumstantial evidence would be that that red Toyota Camry is associated with Christian Clifford based on the BOLO." JT, 184.

The State further argues that the BOLO and the officers' testimony of Clifford's association with the red Toyota Camry was used to provide context of the officer's actions, SB, Pg. 15, but this argument ignores the distinction between the existence of a BOLO and the contents of such. Clifford argued at trial for the exclusion of both any mention of the BOLO, JT 16, as well as for the exclusions of the content of the BOLO, specifically for the exclusion of "any association of Mr. Clifford with the red Toyota Camry or any Toyota Camry" as it was impermissible hearsay. JT, 23. While the existence of the BOLO may have been permissible solely for the purpose of providing context

for the jury as the State argued at trial, JT, 24, the association of Clifford with a red Toyota Camry was solely used to prove the truth of the matter asserted.

The trial court allowed both the existence of the BOLO, JT, 19, and the contents of the BOLO, JT 24. It was the second ruling, in allowing in the contents of the BOLO, and specifically information regarding the red Toyota Camry, to be used for as evidence of Clifford's identity as the driver of the vehicle without allowing any confrontation of the declarants, Clifford's right to confrontation was violated.

CONCLUSION

For the aforementioned reasons herein and within the Appellant Brief, authorities cited, and upon the settled record, Clifford respectfully asks this Court to remand the case to the circuit court with an Order directing the court to reverse the Judgment and Sentence and schedule a new trial.

Respectfully submitted this 12th day of March, 2025.

/s/ Jacob Carsten
Jacob Carsten
Minnehaha County Public Defender
ATTORNEY for APPELLANT

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 Book Antiqua typeface in 12-point type. Appellant's Brief contains 918 words.

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

Dated this 12th day of March, 2025.

/s/ Jacob Carsten
Jacob Carsten
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the APPELLENT REPLY BRIEF were electronically served upon:

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