IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 27484

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

JEREMIAH BADIT LIAW,

Defendant and Appellant.

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

HONORABLE Larry Long
Circuit Court Judge

APPELLANT'S BRIEF

BEAU J. BLOUIN
Minnehaha County Public Defender
413 North Main Avenue
Sioux Falls, SD 57104

Attorney for Defendant/Appellant

MARTY J. JACKLEY
Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501

AARON MCGOWAN
Minnehaha County State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104

Attorneys for State/Appellee

Notice of Appeal Filed on June 26, 2015

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	i
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF LEGAL ISSUES	2
STATEMENT OF CASE	2
STATEMENT OF FACTS	3
ARGUMENT	11
CONCLUSION	21
REQUEST FOR ORAL ARGUMENT	21
CERTIFICATE OF COMPLIANCE	23
APPENDIX	24

TABLE OF AUTHORITIES

Cases: Page(s)

State v. Bittner, 359 N.W.2d 121 (S.D. 1984) 20

State v. Knoche, 515 N.W.2d 834 (S.D. 1994) 17

State v. Plenty Horse, 184 N.W.2d 654 (S.D. 1971) 20

State v. Schouten, 2005 S.D. 122, 707 N.W.2d 820 12-16

State v. St. Cloud, 465 N.W.2d 177 (S.D. 1991) 17

State v. St. John, 2004 S.D. 15, 675 N.W.2d 426 17

State v. Webster, 2001 S.D. 141, 637 N.W.2d 392 17

United States v. Bailey, 444 U.S. 394 (1980) 16

Other Authorities: Page(s)

SDCL 22-18-26 14

SDCL 22-18-26.1 15

SDCL 22-19-1.1(3) 12-13, 15-16

Model Penal Code § 2.02 16

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 27484

vs.

JEREMIAH BADIT LIAW,

Defendant and Appellant.

PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as "SR." The transcript of the Arraignment Hearing held March 16, 2015, is referred to as "AH." The transcripts of the Jury Trial held March 24, 2015, through March 26, 2015, are referred to as "JT1," "JT2," and "JT3" respectively. Exhibits are referred to as "Ex." followed by the exhibit number. The transcript of the Sentencing Hearing is referred to as "ST". All references will be followed by the appropriate page number or, for videos, time designation.

JURISDICTIONAL STATEMENT

Jeremiah Liaw appeals the following Judgment and Sentence entered May 28, 2015, by the Honorable Larry Long, Circuit Court Judge, Second Judicial

Circuit: Count 2—Kidnapping in the Second Degree, Injury or Terrorize. SR 117.

Liaw's Notice of Appeal was filed June 26, 2015. SR 261. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE

I. WHETHER THE COURT ERRED IN RULING KIDNAPPING IN THE SECOND DEGREE IS A GENERAL INTENT CRIME, AND THEREFORE, ERRED IN REFUSING LIAW'S PROPOSED JURY INSTRUCTIONS ON SPECIFIC INTENT AND VOLUNTARY INTOXICATION.

The trial court refused Liaw's proposed jury instructions on specific intent and voluntary intoxication, ruling that Kidnapping in the Second Degree under SDCL 22-19-1.1(3) is a general intent crime.

State v. Schouten, 2005 S.D. 122, 707 N.W.2d 820

U.S. v. Bailey, 444 U.S. 394 (1980)

SDCL 22-19-1.1(3)

STATEMENT OF CASE

The State charged Defendant and Appellant, Jeremiah Liaw, by Indictment, with the following: Count 1 – Kidnapping in the First Degree—Terrorizing Victim, on or about October 25, 2014, in violation of SDCL 22-19-1(3); Count 2 – Kidnapping in the Second Degree—Injury or Terrorize, on or about October 25, 2014, in violation of SDCL 22-19-1.1(3); Count 3 – Aggravated Assault, Extreme Indifference, on or about October 25, 2014, in violation of SDCL 22-18-1.1(1); and Count 4 – Criminal Trespass, Ordered to Leave, on or about October 25, 2014, in violation of SDCL 22-35-6. SR 18-19.

Jury Trial on the charges began on March 24, 2015, and concluded on

March 26, 2015. *See generally* JT1-JT3. During trial, the court denied Liaw's Proposed Instruction No. 2, and denied, in part, Liaw's Proposed Instruction No. 3. JT3 96-97; SR 73-74. At the conclusion of the State's case, the trial court denied Liaw's Motion for Judgement of Acquittal. JT3 130-133. On March 26, 2015, the jury found Liaw guilty on Count 2—Kidnapping in the Second Degree, and Count 4—Criminal Trespass. JT3 196-197. Liaw was acquitted on Count 1—Kidnapping in the First Degree, and Count 3—Aggravated Assault. JT3 196-197.

Liaw was sentenced by Judge Long on May 26, 2015. *See generally* ST. On Count 2, Kidnapping in the Second Degree, Judge Long imposed fifteen years in the penitentiary and ordered three of those years to be suspended. ST 30. On Count 4, Criminal Trespass, Judge Long imposed two hundred seventeen days in jail, with credit for two hundred seventeen days previously served. ST 30. Judgment and Sentence was entered on May 28, 2015. SR 117.

STATEMENT OF FACTS

On October 25, 2014, at 5:12 p.m., police were dispatched to an unknown problem at 529 North Sherman Avenue in Sioux Falls, SD, after a series of 911 calls were made from the residents at that address. JT3 6; JT3 41-42. The first 911 call was made by the homeowner, Angela Calin, at 5:10 p.m. Calin gave Metro her address and phone number, and explained that "somebody [is] walking through my property and tried to do . . . tried to do something bad. So can you please send somebody over here before he walks away?" Ex. 1 at 0:57-1:10. In the background, Calin could be heard talking with another individual, Liaw, telling

him to “come on, come on. Everything is ok. I am from Europe, you are from Africa. I know, I know, yeah.” Ex. 1 at 0:47-0:57. Communication between Metro and Calin was interrupted due to the phone’s static noise, and the connection was lost shortly thereafter. Ex. 1 at 1:17-1:30.

A few minutes later, at 5:17 p.m., Calin called 911 again, this time from a small grocery store at 318 N. Cliff Avenue, a block away from her residence. JT2 116-120; JT3 6. Calin told Metro that “I called you before I leaving 529 N. Sherman Avenue and ah, ah, very huge and ah, somebody broke into my house, broke into my property. He just stopped by this location and walked away again I was following him because, ah, I did call and nobody showed up yet.” Ex. 2 at 0:04-0:24. Metro asked Calin whether she knew what the individual’s name was, and she responded, “I don’t know his name he just broke in my property, he scared the hell out of me. I just, I run away from my house I just, I run to the first store which I can reach a store, a phone number.” Ex. 2 at 1:59-2:13. Metro told Calin to stay at the store while officers were being notified, and the call ended. Ex. 2 at 2:14-2:24.

Meanwhile, at 5:18 p.m., the home’s other resident, Jean Wolff, called 911. *See* Ex. 3. Wolff told Metro “my friend has an intruder on the property, 529 N. Sherman, and I can’t see where they went to. She tried to call 911 but she walked away with the phone and they are missing now.” Ex. 3 at 0:06-0:16. Moments later, Wolff told Metro that police had arrived and the call was ended. Ex. 3 at 0:16-0:28.

Officer Christopher Jasso arrived on scene at approximately 5:17 p.m. *See* Ex. 6. Officer Jasso first made contact with Wolff outside of the residence. JT3 42. Wolff told Officer Jasso that Wolff and a neighbor, Nikolai Nidalko, were sitting on the back porch when a man walked up to the property. Ex. 6 at 2:46-2:54; *see* SR 112. Wolff told the officer that the man had Calin by the hand and pulled her down the sidewalk to the corner of the block. Ex. 6 at 2:54-3:06; *see* Ex. C. Wolff went into the house to grab her phone, but when she came back outside and walked down to the corner Wolff could not see them anymore. Ex. 6 at 3:06-3:15. *See* JT 43-44.

Moments later, Officer Jasso noticed Liaw standing in a yard three house's to the south of Calin's residence. JT3 44-45; Ex. 5. Officer Jasso approached Liaw and observed that he was extremely intoxicated. JT3 45; 73, 114-115. Officer Jasso noticed Liaw's "balance was off and his speech was slurred."[1] JT3 46. At that point, Officer Jasso grabbed Liaw by the arm and helped him to sit down on the curb. JT3 62-63. Liaw was mumbling something the officer could not understand. JT3 63. Officer Jasso questioned Liaw about Calin's whereabouts, and the following exchange took place:

> OJ: What did you do with the woman buddy?
> Liaw: Huh?
>
> OJ: What did you do with the old lady that you were walking with?
> Liaw: What lady?

[1] After loading Liaw into Officer Deschepper's vehicle, Officer Jasso referred to Liaw as a "drunk fool" and "the walking dead." Ex. 6 at 10:40-10:46.

OJ: The old lady?
Liaw: Did I walk with old lady (inaudible)?

OJ: Yeah you were over here.
Liaw: Huh, I'm done (repeated multiple times).

OJ: What do you mean you are done?
Liaw: Did I walk with old lady?

OJ: Yeah, were you over here?
Liaw: When.

OJ: A little bit ago.
Liaw: Did I?

OJ: Yes I am asking you.
Liaw: Somebody walking by themselves you know.

OJ: Ok were you walking with a little old lady wearing blue jeans?
Liaw: inaudible.

Ex. 6 at 4:03-5:05. Wolff identified Liaw as the person who took Calin down the sidewalk, Ex. 6 at 5:40-5:50, and Officer Jasso continued to question Liaw:

OJ: Jeremiah, can you tell me what's going on?
Liaw: Do I even know what is going on here?

OJ: I don't know that is why I am asking you.
Liaw: (inaudible) what is going on.

OJ: People are accusing you of taking a lady from her house.
Liaw: Me?

OJ: Yeah, do you know [Calin]?
Liaw: [Calin]?
OJ: Yeah, do you know [Calin]?
Liaw: Who, who is [Calin]?

OJ: The lady down here, did you take an old lady from her house?
Liaw: Mahhh.

Ex. 6 at 6:42-7:03.

Less than one minute later, Calin appeared and approached Liaw and the officers on the sidewalk from the south and identified Liaw as "the guy." Ex. 6 at 7:41-8:10; JT3 47. At that time, Officer Jasso took Calin and Wolff back to their house and obtained statements from them. JT3 47-48, 64.

Meanwhile, Officer Michelle Deschepper, who had arrived on scene, began speaking with Liaw. JT3 81. Officer Deschepper testified that Liaw was highly intoxicated. JT3 84. According to Deschepper, Liaw "had poor mobility and very extremely slurred speech that day." JT3 84. Liaw was hard to understand and could not give his address or describe where he lived. JT 84. Liaw was able to give his name, date of birth, and communicated that the wallet in his pants belonged to his uncle. JT 84. Officer Deschepper gave Liaw a preliminary breath test, which came back at a .38. JT3 115. Officer Deschepper indicated that she planned to take Liaw to the Detox Center, if not the jail. JT3 113. Officer Deschepper testified that it was more likely that Liaw was above a .40 blood alcohol level, and the officer would have been required to take Liaw to the Avera McKennan Emergency Department to get him medically cleared prior to taking him to detox. JT3 115.

At the house, Calin told Officer Jasso that Liaw had grabbed her by the hand and walked her to the end of the block, at the corner of Cliff Avenue and Fifth Street. Ex. 6 at 10:08- 14. Calin told Officer Jasso "he just grabbed me like

that and I said everything is fine guy, everything is fine."[2] Ex. 6 at 10:15-20. Calin said "I tried to calm him down, I said everything is fine, everything is ok, just squeeze my hand, ok here we go nice and easy, we going walking ok." Ex. 6 at 10:28-10:38. Calin told Officer Jasso that Liaw held onto Calin until they reached the end of the block at the corner, at which point Liaw let go and Calin began following him. Ex. 6 at 9:58-10:15. Calin said that "[Liaw] heard me talking on the phone and then he tried to release my hand and then he kept putting his other hand over my shoulder and then he kept going so I decided to step back . . . to see and follow him because I lost connection with the police." Ex. 6 at 10:52-11:15.

At trial, Calin testified that she was inside the house, and Wolff and Nidalko were outside on the back porch when Liaw approached the property. JT2 98-99. Calin heard Nidalko screaming angrily and thought it was unusual so she looked outside and saw Wolff standing on the patio, Nidalko standing next to the garage in the driveway, and Liaw standing roughly three and a half feet from Nidalko in the driveway. JT2 99-102. Liaw was yelling back at Nidalko. JT2 101. According to Calin, both Wolff and Nidalko were yelling at Liaw to leave the property, but he did not move. JT2 102. Calin testified that Nidalko was being aggressive, and she was worried that Liaw might push Nidalko, who was older and "a very weak man." JT2 102. Calin walked in between Nidalko and Liaw,

---

[2] Officer Jasso interviewed both Calin and Wolff in the same room at the same time. Thus, the police audio consists of Calin and Wolff talking over each other. *See* JT3 76-77.

and Liaw grabbed Calin by the hand.[3] JT2 102. At that point, Calin asked Wolff to go get the phone from inside the house. JT2 103. Wolff brought the phone to Calin, who was able to grab the phone from Wolff and call 911 while Liaw was holding onto her. JT2 104; *see* Ex. 1. Calin testified that Liaw held her "so hard," with one hand on her hand, and his other hand around her shoulder. JT2 105, 111. Liaw walked Calin down the driveway, then down the sidewalk on Fifth Street toward Cliff Avenue as Calin spoke with Metro. JT2 107-109; *see* Ex. C[4]. As Calin moved down the sidewalk she lost the connection with Metro. JT2 109. Calin testified that Liaw was talking to her while they walked down the sidewalk, but she could not understand him. JT2 110.

Once Calin and Liaw reached the end of the block at the corner of Cliff Avenue and Fifth Street, Calin testified that Liaw attempted to push Calin out into oncoming traffic. JT2 111-113. Rather than fall to the west in the direction that she was pushed out into the street, Calin stated that she was able to utilize her expert skiing skills and fall in the opposite direction into the retaining wall on the eastern side of the sidewalk. JT2 113-115. After the push, Calin testified that Liaw released her and walked "very, very fast" down the sidewalk on Cliff Avenue toward Sixth Street. JT2 115. Calin followed Liaw and watched him cross Sixth Street and enter an African grocery store. JT2 116-117. Calin waited in the

---

[3] Calin admitted that as Liaw grabbed her hand, Calin told Wolff that she knew Liaw from Morrell's in an effort to calm Nidalko and Wolff down. JT2 103.
[4] Ex. C shows Calin's driveway and the sidewalk on 5th Street leading toward Cliff Avenue.

parking lot until Liaw left the store, and then entered the same grocery store and called 911 again. JT2 117-119; *see* Ex. 2. After talking with Metro a second time, Calin walked back to her house. JT2 120-121. As Calin approached her house, police were already speaking with Liaw, who was sitting in the grass two houses down from her residence. JT2 121.

Lonna Heideman, Director of the Minnehaha County Detox center, testified that a .35 to .40 preliminary breath test is considered a high PBT. JT3 124. Heideman stated that a person could become unconscious, experience a blackout, or not recognize what they are doing or saying at that blood alcohol level. JT3 124. Heideman testified that someone experiencing a blackout would be in a conscious state without realizing what they are doing, and the person would not remember some or all of the events from the day or night prior. JT3 125.

Liaw was ultimately arrested and charged with Kidnapping and Criminal Trespass.[5] JT3 116. Officer Deschepper admitted that Liaw appeared surprised to hear that he was being charged with Kidnapping. JT3 117.

At trial, the Defense proposed a jury instruction providing that Kidnapping in the Second Degree is a specific intent crime.[6] JT3 95-96; *see* SR 53-

---

[5] The prosecution re-indicted Liaw two weeks before trial and added the aggravated assault charge alleging Liaw pushed Calin into oncoming traffic. SR 18-19.

[6] Defendant's Proposed Instruction No. 2 states: "In the crime of Kidnapping in the Second Degree, there must exist in the mind of the perpetrator the specific intent to inflict bodily injury or to terrorize Angela Calin or another. If specific

54, 73. The proposed instruction mirrors South Dakota Pattern Jury Instruction 1-12-2. The trial court, however, ruled that Kidnapping in the Second Degree is a general intent crime and denied Defendant's Proposed Instruction No. 2.[7] JT2 22; JT3 96. In accordance with this ruling, the trial court also denied, in part, Defendant's Proposed Instruction No. 3 on voluntary intoxication. The language of the proposed instruction mirrors South Dakota Pattern Jury Instruction 2-6-1. The trial court denied the third and fourth paragraphs of the proposed instruction which discuss the requirement of specific intent and its relation to voluntary intoxication in making a determination of guilt or innocence. JT3 96-97; SR 74, 94.

At the conclusion of the trial, the jury found Liaw guilty on Count 2—Kidnapping in the Second Degree, and Count 4—Criminal Trespass. JT3 196-197. Liaw was acquitted on Count 1—Kidnapping in the First Degree, and Count 3—Aggravated Assault. JT3 196-197.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING KIDNAPPING IN THE SECOND DEGREE IS A GENERAL INTENT CRIME, AND THEREFORE, ERRED IN REFUSING LIAW'S PROPOSED JURY INSTRUCTIONS ON SPECIFIC INTENT AND VOLUNTARY INTOXICATION.

The trial court erred in ruling Kidnapping in the Second Degree is a general, rather than specific, intent crime. Under SDCL 22-19-1.1(3), the jury was

---

intent did not exist, this crime has not been committed." SR 73.

[7] The trial court admitted that "the question is not as clear as I would like it." JT2 22.

required to find beyond a reasonable doubt that Liaw not only held or confined Calin, but did so with the specific purpose to inflict bodily injury on or to terrorize Calin or another. *See* SR 83. Thus, because the statute requires Liaw to have a specific design to cause a certain result, SDCL 22-19-1.1(3) is a specific intent crime and the trial court erred in ruling otherwise. As a result, the trial court also erred in denying Liaw's Proposed Instruction Nos. 2 and 3 regarding specific intent and voluntary intoxication. The trial court's denial of the proposed jury instructions was prejudicial to Liaw, because had the instructions been given, the verdict probably would have been different on the charge of Kidnapping in the Second Degree.

A. *Kidnapping in the Second Degree under SDCL 22-19-1.1 is a Specific Intent Offense.*

"Statutory interpretation and application are questions of law." *State v. Schouten*, 2005 S.D. 122, ¶ 9, 707 N.W.2d 820, 822 (quoting *Block v. Drake*, 2004 S.D. 72, ¶ 8, 681 N.W.2d 460, 463). "Conclusions of law are reviewed by this Court under the de novo standard, with no deference to the circuit court." *Id*. "Statutory construction is employed to discover the true intent of the legislature in enacting laws, which is ascertained primarily from the language used in the statute." *Schouten*, 2005 S.D. 122, ¶ 9, 707 N.W.2d at 823 (citing *State v. Myrl & Roy's Paving, Inc.*, 2004 S.D. 98, ¶ 6, 686 N.W.2d 651, 653).

SDCL 22-19-1.1(3) provides that "[a]ny person who unlawfully holds or retains another person with any of the following purposes: . . . (3) To inflict

bodily injury on or to terrorize the victim or another . . . is guilty of kidnapping in the second degree." Therefore, under the statute, the State was required to prove beyond a reasonable doubt the following essential elements:

1. That Liaw unlawfully held or retained Calin; and
2. That Liaw's purpose was to inflict bodily injury on or to terrorize Calin or another.

SDCL 22-19-1.1(3); SR 85.

"Specific intent crimes require that the offender have 'a specific design to cause a certain result.'" *Schouten*, 2005 S.D. 122, ¶ 13, 707 N.W.2d at 824 (citing SDCL 22-1-2(1)(b)). "General intent crimes only require that the offender 'engage in conduct' that is prohibited by the statute, 'regardless of what the offender intends to accomplish.'" *Id*. This Court has defined specific intent "as meaning some intent in addition to the physical act which the crime requires, while general intent means an intent to do the physical act—or, perhaps, recklessly doing the physical act—which the crime requires." *Schouten*, 2005 S.D. 122, ¶ 13, 707 N.W.2d at 824 (quoting *State v. Taecker*, 2003 S.D. 43, ¶ 25, 661 N.W.2d at 718).

Here, SDCL 22-19-1.1(3) is a specific intent offense because the language of the statute not only prohibits the act of holding or confining the victim, but also requires that the offender have a purpose for doing the prohibited—that is, the purpose "to inflict bodily injury on or to terrorize the victim or another." SDCL 22-19-1.1(3). Thus, the statute requires the offender, in addition to committing the prohibited act, to have a specific design to cause a certain result. As such,

Kidnapping in the Second Degree is a specific intent crime, and the trial court erred in its ruling.

In *Schouten*, the defendant was convicted at trial for Assault by Inmate—Intentionally Causing Contact with Bodily Fluids or Human Waste under SDCL 22-18-26 for spitting on a correctional officer while in prison. 2005 S.D. 122, ¶ 1, 707 N.W.2d at 821. The defendant appealed contending that the trial court erred in ruling SDCL 22-18-26 is a general intent crime. *Id*. The statute under which the defendant was convicted, SDCL 22-18-26, provides as follows:

> Any person under the jurisdiction of the Department of Corrections who *intentionally throws, smears, or otherwise causes* blood, emesis, mucus, semen, excrement, or human waste to come in contact with a Department of Corrections employee, or visitor, or volunteer authorized by the Department of Corrections, or person under contract assigned to the Department of Corrections is guilty of a Class 6 felony.

Schouten, 2005 S.D. 122, ¶ 17, 707 N.W.2d at 825 (quoting SDCL 22-18-26) (emphasis in *Schouten*).

This Court held that the trial court did not err when it ruled SDCL 22-18-26 is a general intent crime, because while the statute prohibited the act "of intentionally throwing, smearing, or otherwise causing human waste to come into contact with a Department of Corrections employee[,]" the statute did not require "a specific design or purpose for doing the prohibited." *Id*. at 824-25. Thus, the Court concluded that the statute was a general intent crime because it contained no language requiring the State to "prove 'an additional mental state beyond that accompanying the act' itself." *Id.* at 826 (citing *Taecker*, 2003 S.D. 43,

¶ 26, 661 N.W.2d at 718).

To further illustrate, the Court analyzed a similar statute, SDCL 22-18-26.1, which reads:

> Any person who, *with the intent to assault*, throws, smears, or causes human blood, emesis, mucus, semen, excrement, or human waste to come in contact with a law enforcement officer as defined in subdivision 22-1-2(22), a firefighter, a court services officer or designee, or an emergency medical technician, while performing official duties or actions, is guilty of a Class 1 misdemeanor.

Schouten, 2005 S.D. 122, ¶ 17, 707 N.W.2d at 825 (quoting SDCL 22-18-26.1) (emphasis in *Schouten*). The Court noted that the language "intent to assault" indicated the legislature's intent for the statute "to require a 'specific design to cause a certain result.'" *Id*. "In the case of SDCL 22-18-26.1 the 'certain result' is to cause an assault." *Id*. Therefore, the Court concluded, SDCL 22-18-26.1 is a specific intent crime because it requires both the act of sliming and the intent to cause an assault. *Id*.

Like SDCL 22-18-26.1, the applicable statute in this case also indicates the legislature's intent to require a specific design or "purpose" to cause a certain result. Here, that certain result is to cause bodily injury on or to terrorize the victim or another. *See* SDCL 22-19-1.1(3). SDCL 22-19-1.1(3) is a specific intent crime because it requires not only the unlawful holding or retaining of the victim, but also the specific purpose to cause bodily injury on or to terrorize the victim or another.

Furthermore, unlike the statutes analyzed in *Schouten*, SDCL 22-

19-1.1(3) uses the language "purpose," and avoids the ambiguity and confusion inherent in the term "intent" when determining general versus specific intent. *See Schouten*, 2005 S.D. 122, ¶ 17, 707 N.W.2d at 824; *United States v. Bailey*, 444 U.S. 394, 403-04 (1980). That ambiguity precipitated the Model Penal Code's development of an alternative method to analyze *mens rea*, with the term "purpose" listed at the top of the hierarchy to indicate specific intent. *Bailey*, 444 U.S. at 403-04. "[A] person who causes a particular result is said to act purposely if he consciously desires that result, whatever the likelihood of that result happening from his conduct . . . ." *Id*. at 404; *see* Model Penal Code § 2.02. "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *Id*. at 405.

Here, the use of the word "purpose" in the language of SDCL 22-19-1.1(3) indicates the legislatures intent to require the offender to consciously desire to cause the result of bodily injury or to terrorize the victim or another. Thus, applying the rationale utilized by this Court in *Schouten*, SDCL 22-19-1.1(3) is a specific intent crime and the trial court erred in its ruling.

B. *The Trial Court Erred in Refusing to Give Liaw's Proposed Jury Instructions*

on Specific Intent and Voluntary Intoxication.

This Court reviews a trial court's refusal to give the jury a proposed instruction under an abuse of discretion standard. *State v. St. John*, 2004 S.D. 15, ¶ 8, 675 N.W.2d 426, 427. "A trial court must instruct a jury as warranted by the evidence presented." *State v. St. Cloud*, 465 N.W.2d 177, 181 (S.D. 1991) (citing *State v. Grey Owl*, 295 N.W.2d 748, 750 (S.D. 1980) (citations omitted). "[J]ury instructions are adequate when, considered as a whole, they give a full and correct statement of the law applicable to the case. *Id*. at 181-82 (citing *Grey Owl*, 295 N.W.2d at 751). "Error in declining to apply a proposed instruction is reversible only if it is prejudicial, and the defendant has the burden of proving any prejudice." *State v. Webster*, 2001 S.D. 141, ¶ 7, 637 N.W.2d 392, 394. In order to prove prejudice, Liaw must show that the jury probably would have returned a different verdict if the proposed instruction had been provided. *See State v. Knoche*, 515 N.W.2d 834, 838 (S.D. 1994).

Here, counsel for Liaw proposed a jury instruction providing that Kidnapping in the Second Degree is a specific intent crime.[8] JT3 95-96; *see* SR 53-54, 73. The proposed instruction mirrors South Dakota Pattern Jury Instruction 1-12-2, and states that "there must exist in the mind of the perpetrator the specific

[8] Defendant's Proposed Instruction No. 2 states: "In the crime of Kidnapping in the Second Degree, there must exist in the mind of the perpetrator the specific intent to inflict bodily injury or to terrorize Angela Calin or another. If specific intent did not exist, this crime has not been committed." SR 73.

intent to inflict bodily injury or to terrorize Angela Calin or another."[9] SR 73. The trial court, however, ruled that Kidnapping in the Second Degree is a general intent crime and denied Defendant's Proposed Instruction No. 2.[10] JT2 22; JT3 96.

The trial court erred in refusing to give Defendant's Proposed Instruction No. 2 because SDCL 22-19-1.1(3) is a specific intent crime, and the pattern instruction on specific intent was necessary to provide the jury a full and complete statement of the law applicable to this case. Liaw's intent during the events in question was a central issue in this case.

Furthermore, the refusal to give the jury instruction was prejudicial because there was substantial evidence that Liaw had no particular purpose whatsoever for his actions that evening. Liaw registered a PBT of .38, roughly five times the legal limit to drive, and a blood alcohol level which would have required him to be taken to the Avera Emergency Department to get medically cleared before going to Detox. JT3 115. Heideman, Director of the Minnehaha County Detox Center, testified that a person could become unconscious, experience a blackout, or not recognize what they are doing or saying at that

---

[9] In the notes to South Dakota Pattern Jury Instruction 3-1-1.2, regarding the elements of Kidnapping in the First Degree, the notes state that "[a]n instruction on specific intent should be given as it relates to element 3." Element 3 requires the defendant to have the purpose to cause a certain result. The notes were based upon the 2006 version of the kidnapping statute, but the language remains unchanged as to that element, and mirrors the element requiring the defendant have the purpose to inflict bodily injury or terrorize the victim or another under SDCL 22-19-1.1(3). *See* SR 54.

[10] The trial court admitted that "the question is not as clear as I would like it." JT2 22.

blood alcohol level. JT3 124. Officer Deschepper testified that Liaw was highly intoxicated. JT3 84. According to Deschepper, Liaw "had poor mobility and very extremely slurred speech that day." JT3 84. Officer Jasso had to grab Liaw's arm and help him sit down on the curb, while Liaw mumbled words Officer Jasso could not understand. JT3 62-63. After loading Liaw into Officer Deschepper's vehicle, Officer Jasso referred to Liaw as a "drunk fool" and "the walking dead." Ex. 6 at 10:40-10:46. Officer Deschepper admitted that Liaw appeared surprised to hear that he was being charged with Kidnapping. JT3 117.

Thus, it is highly likely that the jury convicted Liaw of Second Degree Kidnapping after finding that Liaw held Calin and pulled her half of a block to the corner before letting her go, and that Calin was terrorized by Liaw's actions. However, had the trial court provided the jury Defendant's Proposed Instruction No. 2 regarding specific intent, the jury would have understood that those findings were insufficient to convict Liaw of Kidnapping in the Second Degree. The proposed instruction would have informed the jury of the necessity of also finding that there existed in Liaw's mind the specific intent to cause bodily injury on or to terrorize Calin or another. Thus, the trial court's refusal to provide Defendant's Proposed Instruction No. 2 was prejudicial err, because the instruction probably would have changed the verdict.

The trial court also erred in refusing to give the jury the third and fourth paragraphs of Defendant's Proposed Instruction No. 3 on voluntary intoxication. The language of the proposed instruction mirrors South Dakota Pattern Jury

Instruction 2-6-1, and the third and fourth paragraphs of that instruction discuss the requirement of specific intent and its relation to voluntary intoxication in making a determination of guilt or innocence. SR 74, 94. While noting that the proposed instruction is typically given in a case involving a specific intent crime when the defense of voluntary intoxication is raised, the trial court denied the third and fourth paragraphs of the instruction based upon its ruling that Kidnapping in the Second Degree is a general intent crime. JT3 96-97; SR 74, 94.

"In South Dakota voluntary intoxication is not a defense to a crime involving a general criminal intent, or mens rea, which may be inferred from merely doing the forbidden act." *State v. Plenty Horse*, 184 N.W.2d 654, 658 (S.D. 1971). By contrast, "[t]his court has held that whenever a specific purpose, motive, or intent is necessary to constitute a particular crime, the jury may properly consider the voluntary intoxication of the accused to determine the existence of the required purpose, motive, or intent." *State v. Bittner*, 359 N.W.2d 121, 124 (S.D. 1984) (citing *State v. Kills Small*, 269 N.W.2d 771 (S.D. 1978)).

Here, the refusal of the trial court to provide the full jury instruction on voluntary intoxication, along with its refusal to give the instruction on specific intent, constitutes prejudicial err. In light of the substantial evidence presented at trial with regard to Liaw's level of intoxication at the time of the events, had the jury been provided Liaw's proposed jury instructions, the jury probably would have concluded that the State failed to prove beyond a reasonable doubt that Liaw had the specific intent to cause bodily injury on or to terrorize Calin.

CONCLUSION

The trial court erred in ruling Kidnapping in the Second Degree is a general intent crime. SDCL 22-19-1.1(3) is a specific intent crime because it not only requires the unlawful holding or retaining of the victim, but also requires Liaw to have the specific purpose to cause bodily injury on or to terrorize Calin or another. Thus, the trial court erred in denying Liaw's Proposed Instruction Nos. 2 and 3 regarding specific intent and voluntary intoxication. The trial court's denial of these instructions was prejudicial to Liaw because had the instructions been given, the verdict probably would have been different on Count 2, Kidnapping in the Second Degree.

For the aforementioned reasons, authorities cited, and upon the settled record, Liaw respectfully requests this Court remand this case to the trial court with an order directing the trial court to reverse the Judgment and Sentence on Count 2, Kidnapping in the Second Degree, and order a new trial.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted this 10TH day of November, 2015.

/s/ Beau J. Blouin

Beau J. Blouin
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, South Dakota 57104
(605) 367- 4242
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 5,326 words.

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

Dated this 10TH day of November, 2015.

/s/Beau J. Blouin

Beau J. Blouin
Attorney for Appellant

APPENDIX

Judgment & Sentence……………………………………..…………………………..A-1

APPENDIX

Judgment & Sentence..A-1

111-26-5AO
111-jail
Scan to pen

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT

		SFPD 201477086
STATE OF SOUTH DAKOTA, Plaintiff,	+	CR. 49C14006750 A0
vs.	+	JUDGMENT & SENTENCE
JEREMIAH BADIT LIAW, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on March 11, 2015, charging the defendant with the crimes of Count 1 Kidnapping 1st Degree-Terrorizing Victim on or about October 25, 2014; Count 2 Kidnapping 2nd Degree-Injury or Terrorize on or about October 25, 2014; Count 3 Aggravated Assault-Extreme Indiff on or about October 25, 2014 and Count 4 Criminal Trespass/Ordered to Leave on or about October 25, 2014. The defendant was arraigned upon the Indictment on March 16, 2015, Victoria Reker and Ashley Miles 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, Bonnie Costain, Deputy State's Attorney appeared for the prosecution and, Victoria Reker and Ashley Miles, appeared as co-counsel for the defendant. A Jury was impaneled and sworn on March 24, 2015 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 26, 2015 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, JEREMIAH BADIT LIAW, not guilty as charged as to Count 1 Kidnapping 1st Degree-Terrorizing Victim, guilty as charged as to Count 2 Kidnapping 2nd Degree-Injury or Terrorize (SDCL 22-19-1.1(3)), not guilty as to Count 3 Aggravated Assault-Extreme Indiff and guilty as charged as to Count 4 Criminal Trespass/Ordered to Leave (SDCL 22-35-6)." The Sentence was continued to May 26, 2015, after completion of a presentence report.

Thereupon on May 26, 2015, the defendant 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

SENTENCE

AS TO COUNT 2 KIDNAPPING 2ND DEGREE-INJURY OR TERRORIZE : JEREMIAH BADIT LIAW shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years with three (3) years of the sentence suspended, consecutive to Count 4.

It is ordered that the defendant pay $104.00 court costs and $12,100.00 in attorney fees to the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Paroles.

It is ordered that the defendant is adjudicated liable to pay restitution in the amount of $566.84 through the Minnehaha County (payable to Angela Calin); which shall be collected by the Board of Pardons and Paroles.

AS TO COUNT 4 CRIMINAL TRESPASS/ORDERED TO LEAVE: JEREMIAH BADIT LIAW shall be incarcerated in Minnehaha County Jail, located in Sioux Falls, State of South Dakota for two hundred eighteen (218) with credit for two hundred seventeen (217) days served and with credit for one (1) day served towards court costs in this matter.

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

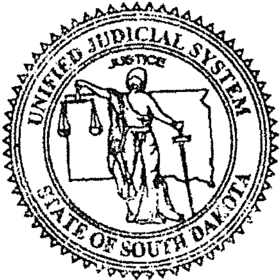
Dated at Sioux Falls, Minnehaha County, South Dakota, this 27 day of May, 2015.

BY THE COURT:

JUDGE LARRY E. LONG
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: ______________ Deputy

FILED
MAY 28 2015
Minnehaha County, S.D.
Clerk Circuit Court



STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY }
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

JUN 17 2015

Clerk of Courts, Minnehaha County
By ______________ Deputy

CERTIFICATE OF SERVICE

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

SHIRLEY A. JAMESON-FERGEL
Clerk of the Supreme Court
SCClerkBriefs@ujs.state.sd.us

MARTY J. JACKLEY
Attorney General
atgservice@state.sd.us
Attorney for Appellee, State of South Dakota

AARON MCGOWAN
Minnehaha County State's Attorney
amcgowan@minnehahacounty.org
Attorney for Appellee, State of South Dakota

Dated this 10TH day of November, 2015.

<u>/s/ Beau J. Blouin</u>
Beau J. Blouin
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, South Dakota 57104
(605) 367- 4242
bblouin@minnehahacounty.org

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27484

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JEREMIAH BADIT LIAW,

Defendant and Appellant.

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

THE HONORABLE LARRY LONG
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

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

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Beau J. Blouin
Minnehaha County Public Defender
413 North Main Avenue
Sioux Falls, SD 57104
Telephone: (605) 367-4242
E-mail: bblouin@minnehahacounty.org

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed June 26, 2015

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF LEGAL ISSUE AND AUTHORITIES 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN INSTRUCTING THE JURY ON SECOND-DEGREE KIDNAPPING. 8

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

PAGE

STATUTES CITED:

SDCL 22-5-5 .... 2, 11, 17

SDCL 22-18-1.1(1) 2

SDCL 22-19-1(3) 2

SDCL 22-19-1.1(3) 2, 9

SDCL 22-35-6 2

SDCL 23A-32-2 2

CASES CITED:

State v. Birdshead, 2015 S.D. 77, 871 N.W.2d 62 .... 2, 13, 19, 20

State v. Bittner, 359 N.W.2d 121 (S.D. 1984) 17

State v. Dillon, 2010 S.D. 72, 788 N.W.2d 360 20

State v. Janklow, 2005 S.D. 25, 693 N.W.2d 685 .... 2, 15, 16, 19

State v. Jones, 2011 S.D. 60, 804 N.W.2d 409 13

State v. Kills Small, 269 N.W.2d 771 (S.D. 1978) 17

State v. Klaudt, 2009 S.D. 71, 772 N.W.2d 117 .... passim

State v. Moschell, 2004 S.D. 35, 677 N.W.2d 551 20

State v. Plenty Horse, 184 N.W.2d 654 (S.D. 1971) 17

State v. Primeaux, 328 N.W.2d 256 (S.D. 1982) 16

State v. Roach, 2012 S.D. 91, 825 N.W.2d 258 13

State v. Waloke, 2013 S.D. 55, 835 N.W.2d 105 13

State v. Walton, 1999 S.D. 80, 600 N.W.2d 524 20

State v. Webster, 2001 S.D. 141, 637 N.W.2d 392 .... 2, 17

State v. Whistler, 2014 S.D. 58, 851 N.W.2d 905 16

OTHER REFERENCES:

South Dakota Pattern Jury Instruction (SDPJI) – Criminal 1-12-2 9

SDPJI – Criminal 2-6-1 .... 10, 11, 17, 18

SDPJI – Criminal 2-6-2 .... 10, 18

SDPJI – Criminal 3-1-1.5 11

SDPJI – Criminal 3-1-1.6 11

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27484

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JEREMIAH BADIT LIAW,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this appeal, Defendant challenges the trial court's refusal to give certain jury instructions. Throughout this brief, Plaintiff and Appellee, State of South Dakota, is referred to as "State." Defendant and Appellant, Jeremiah Badit Liaw, is referred to as "Defendant."

The settled record in Minnehaha County Crim. No. 14-6750 is denoted "SR," followed by the e-record pagination. The transcripts of the three-day jury trial are referred to as "JT1," "JT2," and "JT3." The sentencing transcript is identified as "SNT." Transcript designations are followed by the appropriate page number(s). References to the Appendix to this brief are denoted "APP."

JURISDICTIONAL STATEMENT

Defendant appeals as a matter of right from the final Judgment and Sentence filed in Circuit Court, Second Judicial Circuit, on

May 28, 2015. Notice of Appeal was timely filed on June 26, 2015.

This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN INSTRUCTING THE JURY ON SECOND-DEGREE KIDNAPPING?

The trial court refused Defendant's proposed instruction on specific intent. The court also refused Defendant's version of a voluntary intoxication instruction and gave its own instruction.

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

State v. Janklow, 2005 S.D. 25, 693 N.W.2d 685

State v. Klaudt, 2009 S.D. 71, 772 N.W.2d 117

State v. Webster, 2001 S.D. 141, 637 N.W.2d 392

SDCL 22-5-5

SDCL 22-19-1.1(3)

STATEMENT OF THE CASE

Defendant was charged with Count 1: Kidnapping in the first degree—terrorize (SDCL 22-19-1(3)); Count 2: Kidnapping in the second degree—inflict injury or terrorize (SDCL 22-19-1.1(3)); Count 3: Aggravated Assault—extreme indifference (SDCL 22-18-1.1(1)); and Count 4: Criminal Trespass (SDCL 22-35-6). SR 18-19. These charges stemmed from events occurring on October 25, 2104, in Sioux Falls. Defendant pleaded not guilty to all charges.

A jury trial was held before the Honorable Lawrence Long, Circuit Court Judge, Second Judicial Circuit, on March 24-26, 2015. At the conclusion of the trial, the jury declared Defendant guilty of Counts 2 and 4, and acquitted him of Counts 1 and 3. SR 108; JT3 196-97.

On May 26, 2015, Defendant appeared for sentencing. The prosecutor noted Defendant's numerous misdemeanor arrests and convictions, including theft, domestic assault, and criminal trespass. SNT 4-7. The trial court also recognized Defendant had an exceptionally high number of arrests for entering and refusing to leave property, including residential homes. SNT 28-29. For the kidnapping conviction, the court sentenced Defendant to fifteen years in the penitentiary, with three years suspended. SR 117-18. For the criminal trespass conviction, Defendant received a sentence of 217 days in county jail, with credit for 217 days already served. *Id.* A Judgment and Sentence was filed on May 28, 2015. *Id.* This appeal followed.

Additional procedural facts are presented in the argument section, as necessary.

STATEMENT OF FACTS

In the late afternoon of October 25, 2014, Jean Wolff ("Jean") was sitting on the patio at the home where she lived with her friend, Angela Calin ("Angela"). JT2 48-49; JT3 6. The home, located at 529 N. Sherman Avenue in Sioux Falls, was on the corner of Sherman Avenue and 5th Street. JT2 45; *see* State's Exh. 5 (aerial photograph of

neighborhood). Jean's elderly neighbor, Nikolai Nidalko ("Nikolai"), sat with her on the patio, and Angela was inside the house. JT2 49, 96.

Soon a tall man, later identified as Defendant, walked up the driveway towards the patio. He pointed at Jean and yelled angrily, although Jean could not understand what he was saying. JT2 49. He was not speaking English,[1] but made loud angry sounds. JT2 82. Jean did not know Defendant and was terrified and panicked as he strode quickly and aggressively toward her. JT2 51-52. She and Nikolai waved their arms at Defendant and yelled at him to leave the property but he refused. *Id.*

Hearing the commotion from inside the house, Angela came outside to see what was going on. JT2 53. She saw Defendant standing near the detached garage approximately 3 1/2 feet away from Nikolai, yelling angrily and pointing. JT2 100-01. She did not know Defendant and had never seen him before. JT2 103. Based on the way Defendant was acting, Angela feared he would push Nikolai, a 75-year-old man who was weak and had knee problems. JT2 96, 102. Angela stood between the two men and spoke to Defendant, trying to calm him down. JT2 54, 102-03. Defendant did not calm down and still refused to leave. JT2 55.

---

[1] Although Defendant had been in Sioux Falls for some time and does speak English, he is originally from Kenya. SNT 15, 24.

Suddenly, Defendant grabbed Angela's hand or arm and wouldn't let go. JT2 56, 102. This frightened her so she told Jean to get the phone and call 911. JT2 103. Jean went inside and got the house cordless phone, came back outside and dialed 911. JT2 57. By that time Defendant was holding Angela with both hands—one gripping her arm and the other holding her neck and shoulder. JT2 57, 104-05. He started to pull her down the sidewalk. JT2 108.

Angela, age 57, was very short and Defendant was considerably taller and bigger than her. JT2 105; State's Exh. 6 (video) at 1:54. She tried to escape from him but his grip was too strong. JT2 107-08.

Jean had managed to hand Angela the cordless phone, so Angela was able to speak briefly to the 911 dispatcher as Defendant pulled her down the sidewalk. JT2 108. She gave her address, described Defendant, and requested assistance. State's Exh. 1 (audio). Unfortunately, the call disconnected as they passed the edge of Angela's property, after the cordless phone went out of range of its base unit. JT2 57, 60, 109.

Defendant pulled Angela a block down the sidewalk along 5th Street headed toward Cliff Avenue. JT2 109; State's Exh. 5. Defendant was still very agitated so Angela spoke to him, trying to call him down. JT2 110. Even though she was terrified, Angela tried to remain calm; she felt if she yelled or showed her fear it would make the situation worse. JT3 36-37.

At the corner, Defendant turned them to go south on the sidewalk along Cliff Avenue. JT2 111. This sidewalk was immediately adjacent to the four-lane street, which was busy with heavy traffic. JT2 111-12; State's Exh. 5. Just as a car in the near lane approached them, Defendant released Angela and shoved her toward the street. JT2 112. The car was only a meter away from Angela at the time and she thought she was going to die. JT2 112-13. She was able to save herself and avoid falling into the car's path by planting her foot and pushing herself in the opposite direction. JT2 114-15.

Defendant left her, quickly walking away to the next corner, where he crossed the street. JT2 115-17. Still shaken, Angela decided to follow him from a distance so she could tell police where he went. JT2 116. As Defendant entered a grocery store, Angela hid between cars in the parking lot until he left the store and walked down 6th Street and back toward Sherman Avenue. JT2 118; State's Exh. 5.

Angela entered the store and used their phone to call 911. JT2 119. During the call she explained what happened, noting that he "scared the hell out of [her]." She described Defendant and the direction he went. *See* State's Exh. 2 (audio).

While this was going on, Jean was back at the house, panicked and fearing the worst about what had happened to Angela. JT2 60, 65. As soon as Defendant dragged Angela away, Jean had gone into the house to get her shoes and phone, then attempted to look for Angela

but could not find her. JT2 61-62. She called 911. *Id.*; State's Exh. 3 (audio). Police arrived in the area within minutes of Angela's first 911 call. JT3 6-7. They spoke to Jean, who was still frantic and worried whether anyone had found Angela yet. JT3 43.

Soon thereafter, police saw Defendant a short distance from Angela's house and approached him. JT3 45. When they asked Defendant what he had done with Angela, he denied being with her or on her property. JT3 56-57, 76; State's Exh. 6. Soon Angela returned home. Both she and Jean identified Defendant as the man who had grabbed Angela and taken her down the street. JT3 47.

While talking to the officers, Defendant relayed his name, telephone number, date of birth, and where he worked, among other information. JT3 84, 106. He provided a wallet and ID that did not belong to him, but to his uncle. JT3 107-08; State's Exh. 8. When questioned by the officers who misunderstood his identity, he repeatedly corrected them. *Id.* Officers noted that Defendant was intoxicated and administered a portable breath test (PBT). It gave a reading of .38% blood alcohol content (BAC). JT3 85.

The officers arrested Defendant for kidnapping and failure to vacate property and transported him to jail. JT2 50; State's Exh. 8 (video). An officer also spoke briefly with Angela and Jean about what happened. JT3 48; State's Exh. 6.

Defendant did not testify at trial. Part of his defense was that he was too intoxicated to have had the required "purpose" under the kidnapping statute. He called a licensed addiction counselor from a local detoxification center as an expert to testify generally. JT3 120-21, 128. She did not, however, testify about Defendant or this case in particular. *Id.* The expert described the signs of intoxication and the process for detoxification. JT3 123. She explained that a BAC of .35 to .40 is considered high. JT3 124. She also explained that alcohol's effect on a "seasoned" drinker who has a high BAC level varies, depending on how long the person has been drinking and whether a tolerance to alcohol has been built up. JT3 125.

On cross-examination, Defendant's expert admitted that in her experience at the center, it was "extremely common" to see people with a .35 or .40 BAC level. JT3 126. She testified she has seen people with such levels who have built up their tolerance, and even at these levels they are aware of their circumstances. *Id.* According to the expert, people with .40 BAC levels can exhibit behavior that is purposeful and they can still act with intent. JT3 126-27.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN INSTRUCTING THE JURY ON SECOND-DEGREE KIDNAPPING.

A. Background and standard of review.

The second degree kidnapping statute reads in relevant part:

> Any person who unlawfully holds or retains another person with any of the following purposes:
> . . .
> (3) To inflict bodily injury on or to terrorize the victim or another[ ]
>
> . . .
>
> is guilty of kidnapping in the second degree.

SDCL 22-19-1.1(3).

During trial, Defendant proposed certain jury instructions. One was a pattern jury instruction on specific intent:

Defendant's Proposed Instruction No. 2

> In the crime of Kidnapping in the Second Degree, there must exist in the mind of the perpetrator the specific intent to inflict bodily injury or to terrorize Angela Calin or another.
>
> If specific intent did not exist, this crime has not been committed.

SR 73 (APP 1); *see* SDPJI – Criminal 1-12-2 (attached at APP 2).

Defendant also proposed a voluntary intoxication instruction that was comprised of select portions of two alternate pattern instructions:

Defendant's Proposed Instruction No. 3

> There is evidence in this case that the defendant may have been intoxicated at the time of the alleged commission of the offense.
>
> No act committed by a person while in a state of voluntary intoxication is less criminal because of the intoxicated condition. However, you may consider the fact, if it is a fact, that the accused was intoxicated at the time of the alleged offense in determining the purpose, motive, or intent with which the act was committed, if the act was committed by the defendant.

> An element of the offense of __________ is the defendant had the specific intent to _________ . Even though the defendant may have been intoxicated to some degree, if you find that the state has proved beyond a reasonable doubt that the defendant was capable of forming the specific intent to ________ and had such specific intent and that the state has proved beyond a reasonable doubt all other elements of the offense charged, you may find the defendant guilty.
>
> If you find the defendant at the time of the alleged offense was so intoxicated as to have no volition and had lost control of (his)(her) will and was incapable of forming a purpose or intent, then specific intent is lacking and you must return a verdict of not guilty.

SR 74 (APP 3); *see* SDPJI – Criminal 2-6-1, 2-6-2 (APP 4-6).

After significant consideration, the trial court refused these instructions. JT1 44-47; JT2 10, 22; JT3 94-97, 137-38, 139-40. The court ruled it would not treat kidnapping as a specific intent crime.[2] JT2 22. The court did give, among others, the following pattern instructions:

Instruction No. 18

> Any person who unlawfully holds or retains another person to inflict bodily injury on or to terrorize the victim or another is guilty the [sic] crime of Kidnapping in the Second Degree.

Instruction No. 19

> The elements of the crime of Kidnapping in the Second Degree, as charged in Count 2 of the indictment, each of which the state must prove beyond a reasonable doubt are, at the time and place alleged:

---

[2] The trial court noted, and Defendant's counsel agreed, that this Court does not appear to have ruled whether kidnapping, as charged, is a specific intent crime. JT1 44; JT2 22.

> 1. The defendant did unlawfully hold or retain Angela Calin.
>
> 2. The defendant's purpose was to inflict bodily injury on or to terrorize Angelia [sic] Calin or another.

SR 84-85 (APP 7-8); *see* SDPJI – Criminal 3-1-1.5, 3-1-1.6 (APP 9-10).

The trial court also gave a voluntary intoxication instruction that contained the first two paragraphs of pattern instruction 2-6-1, but excluded the paragraphs referencing specific intent:

> Instruction No. 28
>
> There is evidence in this case that the defendant may have been intoxicated at the time of the alleged commission of the offense.
>
> No act committed by a person while in a state of voluntary intoxication is less criminal because of the intoxicated condition. However, you may consider the fact, if it is a fact, that the accused was intoxicated at the time of the alleged offense in determining the purpose, motive, or intent with which the act was committed, if the act was committed by the defendant.

SR 94 (APP 11); *see* SDPJI – Criminal 2-6-1 (APP 4). The statutory source for this instruction is SDCL 22-5-5, which reads:

> No act committed by a person while in a state of voluntary intoxication may be deemed less criminal by reason of such condition. But if the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which the accused committed the act.

During closing arguments, Defendant's counsel specifically referenced the intoxication instruction as well as the elements

instruction that required Defendant to have the purpose of injuring or terrorizing another. JT3 179-83. She argued that Defendant was so intoxicated that he did not have the purpose required by the statute, and the State failed to meet its burden:

> You can see and hear Jeremiah on those police videos and it's without a doubt he is extremely intoxicated. No one is disputing that.
>
> . . .
>
> Ladies and gentlemen, looking at what we know to be true; the videos, the 911 call, Jeremiah had absolutely no purpose on that day. And to have—or excuse me, to be convicted of either kidnapping charge he had to have a purpose. The State had to prove that purpose beyond a reasonable doubt. Jury Instruction No. 28 states in part, . . . [reads instruction]. The kidnap—to be convicted of kidnapping Jeremiah had to have the purpose to terrorize or injure another. His PBT registered at a .38 but he was probably higher. . . .
>
> You can take into consideration the level of intoxication Jeremiah was on that day to determine whether or not he ever had any purpose in regards to that kidnapping offense.
>
> . . .
>
> But don't be fooled, look at the elements[;] think to yourself could a dead man walking have the purpose of inflicting injury or terrorizing someone?

JT3 178-83.

On appeal, Defendant claims the trial court erred in refusing to instruct the jury on specific intent, and in refusing Defendant's version of the voluntary intoxication instruction. This Court's standard of review is well settled:

> We review a circuit "court's decision to grant or deny a particular instruction" and "the wording and arrangement of its jury instructions" for an abuse of discretion. *State v. Roach*, 2012 S.D. 91, ¶ 13, 825 N.W.2d 258, 263 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 13, 772 N.W.2d 117, 121). "[A] court has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error." *State v. Jones*, 2011 S.D. 60, ¶ 5 n. 1, 804 N.W.2d 409, 411 n. 1. We consider jury instructions "as a whole, and if the instructions when so read correctly state the law and inform the jury, they are sufficient. This is a question of law reviewed de novo." *State v. Waloke*, 2013 S.D. 55, ¶ 28, 835 N.W.2d 105, 113 (quoting *Klaudt*, 2009 S.D. 71, ¶ 13, 772 N.W.2d at 121).

State v. Birdshead, 2015 S.D. 77, ¶ 14, 871 N.W.2d 62, 70.

Moreover, to warrant reversal of a conviction for failure to give a proposed instruction, the defendant has the burden of proving prejudice, *i.e.*, that the jury probably would have returned a different verdict if the requested instruction had been given. *Id.* ¶ 27, 871 N.W.2d at 73.

B. Defendant's claims.

Defendant does not contend the language of the instructions actually given was incorrect or a misstatement of the law. Rather, he claims that his proposed instructions on specific intent and voluntary intoxication were necessary to provide the jury a "full and complete statement" of the law. Appellant's Brief 18, 20. Defendant argues second-degree kidnapping, as charged, is a specific intent crime and the trial court erred in not so instructing. As noted by the trial court below, this Court does not appear to have expressly ruled on that

point. In this case there was no error because the trial court's instructions, considered as a whole, adequately and properly instructed the jury, and the court's refusal to give Defendant's proposals was not prejudicial because it did not affect the jury's verdict.

C. The trial court's instructions adequately and properly informed the jury.

The adequacy of the instructions is illustrated by a comparison of what Defendant proposed and what was instructed:

- <u>Defendant's proposed language on specific intent:</u> In the crime of Kidnapping in the Second Degree, there must exist in the mind of [Defendant] the specific *intent to inflict bodily injury or to terrorize Angela Calin or another*. If specific intent did not exist, this crime has not been committed.

- <u>The court's Instructions 18 and 19:</u> Any person who unlawfully holds or retains another person *to inflict bodily injury on or to terrorize* the victim or another is guilty [of] the crime of Kidnapping in the Second Degree. The elements . . ., each of which the state must prove beyond a reasonable doubt are, at the time and place alleged: 1. [Defendant] did unlawfully hold or retain Angela Calin. 2. [Defendant's] *purpose was to inflict bodily injury on or to terrorize* Angelia Calin or another.

The jury was also instructed that if any member of the jury had "any reasonable doubt upon *any element necessary to constitute the offense* charged," then that juror should vote not guilty. Instruction No. 36 (emphasis added). SR 102; APP 12.

Thus, the jury was instructed that in order to convict, it must find that Defendant had the purpose of inflicting bodily injury or terrorizing Angela Calin or another. This Court has upheld a trial court's refusal to give an instruction on a principle that was "substantially covered, even if implicitly," in an instruction actually given. *Klaudt,* 2009 S.D. 71, ¶ 20, 772 N.W.2d at 123. There, the defendant was charged with rape and requested certain instructions involving consent, which the trial court denied. This Court affirmed, holding that, when considering the instructions as a whole, the theory of consent was sufficiently covered. *Id.* ¶ 21, 772 N.W.2d at 123.

Similarly, in *State v. Janklow*, 2005 S.D. 25, 693 N.W.2d 685, this Court upheld the trial court's denial of proposed instructions already covered by the court's other instructions. In that case Janklow was charged with second-degree manslaughter and claimed he did not consciously commit the crime because he was hypoglycemic at the time. He proposed instructions regarding his defense of unconsciousness. The trial court refused the proposals and this Court affirmed. The Court particularly noted that the jury was instructed on the essential elements of second-degree manslaughter (*i.e.*, a reckless killing); the definition of reckless, which required a "conscious" disregard of a substantial risk; as well as the State's burden of proving beyond a reasonable doubt that the defendant consciously disregarded a substantial risk when he committed the crime. *Id.* ¶ 29, 693 N.W.2d

at 696. Thus, the matter of the defendant's consciousness was already presented in the instructions given. The Court held that, reviewing the jury instructions as a whole, they were an accurate statement of the law and informed the jury. *Id.*

Likewise, here the instructions given by the trial court, as a whole, accurately and adequately informed the jury regarding Defendant's state of mind or purpose when committing the kidnapping. Therefore, the trial court did not err in refusing Defendant's specific intent instruction. *See State v. Whistler,* 2014 S.D. 58, ¶ 19, 851 N.W.2d 905, 912 (taken together, instructions sufficiently informed jury of State's burden to prove each element, including defendant's *mens rea*); *Klaudt*, 2009 S.D. 71, ¶ 21, 772 N.W.2d at 123 (instructions as a whole sufficiently covered consent); *Janklow*, 2005 S.D. 25, ¶ 29, 693 N.W.2d at 696 (instructions as a whole accurately stated law and informed jury).

Nor did the court err in refusing Defendant's version of the voluntary intoxication instruction. Part of Defendant's defense was that he was too intoxicated to have formed the "purpose" to inflict injury on or terrorize Angela Calin or another. The trial court ruled it was treating kidnapping as a general intent crime. Normally, in that instance a voluntary intoxication instruction would be unavailable, as this Court has held voluntary intoxication is no defense to a general intent crime. *State v. Primeaux,* 328 N.W.2d 256, 259 (S.D. 1982);

State v. Plenty Horse, 184 N.W.2d 654, 409 (S.D. 1971). But here the trial court did give an instruction on involuntary intoxication. *See* Instruction No. 28 (SR 94; APP 11). The court's instruction mirrored the language of SDCL 22-5-5. *See supra* at 11. It also mirrored the holdings of this Court. *State v. Bittner,* 359 N.W.2d 121, 124 (S.D. 1984); *State v. Kills Small,* 269 N.W.2d 771, 773 (S.D. 1978). Instruction No. 28 was, therefore, a correct statement of the law and adequately informed the jury that it could consider Defendant's intoxication when determining his purpose in committing the crime.

In preparing Instruction No. 28, the trial court modified a pattern jury instruction, deleting the paragraphs referencing specific intent. Instruction No. 28 (SR 94; APP 11); *see* SDPJI – Criminal 2-6-1 (APP 4). A trial court may draft its own instructions or modify a pattern instruction as long as the jury instructions, read as a whole, correctly state the law and inform the jury. *State v. Webster,* 2001 S.D. 141, ¶ 10, 637 N.W.2d 392, 395 (trial court rejected the defendant's request to use a pattern jury instruction on direct and circumstantial evidence, and gave a modified version of it instead; this Court affirmed).

Because Instruction No. 28 was an accurate statement of the law, Defendant cannot be heard to complain just because his version was not given. Defendant's Proposed Instruction No. 3 was comprised of language taken from two alternate pattern instructions,

SDPJI - Criminal 2-6-1 and 2-6-2. SR 74; *see* APP 4-6. The first two paragraphs of the proposed instruction come from the first pattern, and are identical to the language in the trial court's Instruction No. 28. The third paragraph of Defendant's proposal also comes from the first pattern and addresses Defendant's specific intent (to inflict injury or to terrorize), as well as the requirement that the State prove beyond a reasonable doubt all the elements.

The fourth paragraph of Defendant's Proposed Instruction No. 3 omits language from the first pattern instruction (its last paragraph) and appears to include a piecemeal selection of language from the second alternate pattern instruction. *See* APP 4-6.

The trial court did not err in refusing to give Defendant's proposed language beyond what the court actually instructed in Instruction No. 28. The trial court's instruction was a correct reflection of the statute and case law on voluntary intoxication. Furthermore, as discussed above, the concepts addressed in the language rejected by the trial court were already sufficiently covered by the other instructions.

C. Defendant fails to show prejudice in the trial court's refusal of his instructions.

With regard to both his proposed instructions, Defendant fails to prove the trial court's decision to deny them was prejudicial. At trial, the jury heard evidence regarding Defendant's intoxication, including testimony of his high BAC level and his outward signs of intoxication.

Defendant's expert testified in general regarding intoxicated individuals and their characteristics and behavior.

In addition, the jury heard Jean and Angela describe Defendant's angry demeanor and actions as he came onto the property, and as he grabbed Angela and dragged her down the sidewalk. He walked on his own and did not appear to have trouble crossing the street after he pushed Angela towards the Cliff Avenue traffic. The jury also heard how panicked and frightened the women were as a result of Defendant's actions. In addition, the jury heard evidence of Defendant's interaction with the officers.

During closing argument, Defendant's counsel pointed to the evidence of his intoxication and also specifically argued that Defendant was too intoxicated to form the purpose to terrorize or injure another. She urged the jury to find that the State therefore failed to prove one of the crucial elements. JT3 178-83.

The jury heard Defendant's theory of the case and defense through testimony and his counsel's argument, and found Defendant guilty of second-degree kidnapping. *See Birdshead,* 2015 S.D. 77, ¶ 30, 871 N.W.2d at 74 (jury heard testimony and other evidence regarding self-defense); *Janklow,* 2005 S.D. 25, ¶ 29, 693 N.W.2d at 696 (defendant was allowed to present extensive medical testimony and closing arguments regarding his defense). It is the function of the jury to weigh all the evidence and determine whether the elements of the

offense were met. *State v. Moschell,* 2004 S.D. 35, ¶ 40, 677 N.W.2d 551, 564. Moreover, the jury is presumed to have followed the instructions given by the trial court. *State v. Dillon,* 2010 S.D. 72, ¶ 29, 788 N.W.2d 360, 369. In reaching its guilty verdict, the jury determined the State proved all elements, including that Defendant had the required purpose. There is no indication the jury would have returned a different verdict had Defendant's proposed instructions been given. Thus, he fails to demonstrate prejudice. *See Birdshead,* 2015 S.D. 77, ¶ 30, 871 N.W.2d at 74 (prejudice standard not met, where defendant was allowed to present self-defense theory and jury rejected it); *State v. Walton,* 1999 S.D. 80, ¶ 14, 600 N.W.2d 524, 528–29 (same); *Klaudt,* 2009 S.D. 71, ¶ 31, 772 N.W.2d at 126 (no prejudice in refusing defendant's proposals, where trial court's instructions adequately explained the law and defendant was able to argue to the jury the principles embodied in the rejected instructions).

CONCLUSION

The trial court's instructions, as a whole, correctly and adequately stated the law and informed the jury regarding Defendant's purpose in committing the crime of kidnapping, and regarding the jury's ability to consider his intoxication in determining that purpose.

No prejudicial error is shown that warrants reversal. The State respectfully requests that the Judgment and Sentence be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ *Patricia Archer*
Patricia Archer
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 uses Bookman Old Style typeface in 12 point type, and is within the word limitation provided for in SDCL 15-26A-66(b). Appellee's Brief contains 4,635 words.

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

Dated this 24th day of December, 2015.

/s/ Patricia Archer
Patricia Archer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of December, 2015, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Jeremiah Badit Liaw* was served via electronic mail upon Beau J. Blouin, Attorney for Appellant, at bblouin@minnehahacounty.org.

/s/ Patricia Archer
Patricia Archer
Assistant Attorney General

APPENDIX

Table of Contents

PAGE

Defendant's Proposed Instruction No. 2 1

SDPJI – Criminal 1-12-2 2

Defendant's Proposed Instruction No. 3 3

SDPJI – Criminal 2-6-1 4-5

SDPJI – Criminal 2-6-2 6

Trial Court's Instruction No. 18 7

Trial Court's Instruction No. 19 8

SDPJI – Criminal 3-1-1.5 9

SDPJI – Criminal 3-1-1.6 10

Trial Court's Instruction No. 28 11

Trial Court's Instruction No. 36 12

INTENT — SPECIFIC

Defendant's Proposed Instruction No. 2

In the crime of Kidnapping in the Second Degree, there must exist in the mind of the perpetrator the specific intent to inflict bodily injury or to terrorize Angela Calin or another.

If specific intent did not exist, this crime has not been committed.

Reference:

Morisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 LEd 288 (1951)

State v. Schouten, 2005 S.D. 122, 707 N.W.2d 820

State v. Primeaux, 328 N.W.2d 256 (S.D. 1982)

State v. Poss, 298 N.W.2d 80 (S.D. 1980)

State v. Rash, 294 N.W.2d 416 (S.D. 1980)

Refused
LJ 3/26/15

FILED
14-6750
MAR 26 2015
Minnehaha County, S.D.
Clerk Circuit Court

INTENT — SPECIFIC

Instruction No. _____

In the crime of ____________________, there must exist in the mind of the perpetrator the specific intent to _________________.

If specific intent did not exist, this crime has not been committed.

Reference:

Morisette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 LEd 288 (1951)
State v. Schouten, 2005 S.D. 122, 707 N.W.2d 820
State v. Primeaux, 328 N.W.2d 256 (S.D. 1982)
State v. Poss, 298 N.W.2d 80 (S.D. 1980)
State v. Rash, 294 N.W.2d 416 (S.D. 1980)

Comment:

In case of a crime involving specific intent, the court on its own motion must give an appropriate instruction on the specific intent required as an essential element of the crime.

In a case of crime involving specific intent, do not give an instruction as to general intent.

Add instruction on "Intent — How Manifested".

(Revised 2006)

2-6-1/2-6-2

INTOXICATION

Defendant's Proposed Instruction No. 3

There is evidence in this case that the defendant may have been intoxicated at the time of the alleged commission of the offense.

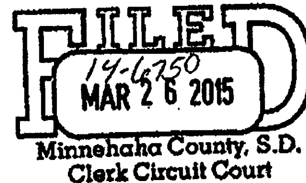
No act committed by a person while in a state of voluntary intoxication is less criminal because of the intoxicated condition. However, you may consider the fact, if it is a fact, that the accused was intoxicated at the time of the alleged offense in determining the purpose, motive, or intent with which the act was committed, if the act was committed by the defendant.

An element of the offense of ________________ is the defendant had the specific intent to ________________. Even though the defendant may have been intoxicated to some degree, if you find that the state has proved beyond a reasonable doubt that the defendant was capable of forming the specific intent to ______________________ and had such specific intent and that the state has proved beyond a reasonable doubt all other elements of the offense charged, you may find the defendant guilty.

If you find the defendant at the time of the alleged offense was so intoxicated as to have no volition and had lost control of (his)(her) will and was incapable of forming a purpose or intent, then specific intent is lacking and you must return a verdict of not guilty.

Reference 2-6-1:

SDCL 22-5-5
State v. Balint, 426 N.W.2d 316 (S.D. 1988)
State v. Smith, 344 N.W.2d 505 (S.D. 1984)
State v. West, 344 N.W.2d 502 (S.D. 1984)
State v. Bittner, 359 N.W.2d 121 (S.D. 1984)
State v. Soft, 329 N.W.2d 128 (S.D. 1983)
State v. Primeaux, 328 N.W.2d 256 (S.D. 1982)
State v. Howard, 323 N.W.2d 872 (S.D. 1982)
State v. Kills Small, 269 N.W.2d 771 (S.D. 1978)
State v. Plenty Horse, 85 S.D. 401, 184 N.W.2d 654 (S.D. 1971)
Utsler v. State, 84 S.D. 360, 171 N.W.2d 739 (S.D. 1969)
State v. Kapelino, 20 S.D. 591, 108 N.W. 335 (1906)
8 A.L.R.3rd 1236



Minnehaha County, S.D.
Clerk Circuit Court

Reference 2-6-2:

State v. Bush, 260 N.W.2d 226 (S.D. 1977)

Refused
LJ 3/26/15

INTOXICATION

Instruction No. _____

There is evidence in this case that the defendant may have been intoxicated at the time of the alleged commission of the offense.

No act committed by a person while in a state of voluntary intoxication is less criminal because of the intoxicated condition. However, you may consider the fact, if it is a fact, that the accused was intoxicated at the time of the alleged offense in determining the purpose, motive, or intent with which the act was committed, if the act was committed by the defendant.

An element of the offense of ________________ is the defendant had the specific intent to ________________. Even though the defendant may have been intoxicated to some degree, if you find that the state has proved beyond a reasonable doubt that the defendant was capable of forming the specific intent to ______________________ and had such specific intent and that the state has proved beyond a reasonable doubt all other elements of the offense charged, you may find the defendant guilty.

If you find that the state has failed to prove beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant had the specific intent required, you must find the defendant not guilty.

Reference:

SDCL 22-5-5
State v. Balint, 426 N.W.2d 316 (S.D. 1988)
State v. Smith, 344 N.W.2d 505 (S.D. 1984)
State v. West, 344 N.W.2d 502 (S.D. 1984)
State v. Bittner, 359 N.W.2d 121 (S.D. 1984)
State v. Soft, 329 N.W.2d 128 (S.D. 1983)
State v. Primeaux, 328 N.W.2d 256 (S.D. 1982)
State v. Howard, 323 N.W.2d 872 (S.D. 1982)
State v. Kills Small, 269 N.W.2d 771 (S.D. 1978)
State v. Plenty Horse, 85 S.D. 401, 184 N.W.2d 654 (S.D. 1971)
Utsler v. State, 84 S.D. 360, 171 N.W.2d 739 (S.D. 1969)
State v. Kapelino, 20 S.D. 591, 108 N.W. 335 (1906)
8 A.L.R.3rd 1236

Comment:

This instruction is derived from former Instruction 2-14-6 which existed prior to 1978 and was based upon California Criminal Jury Instruction 4.21; 21 Am.Jur.2d Criminal Law § 107-108; 29 Am.Jur.2d Evidence § 439; 22 C.J.S. Criminal Law § 65; Criminal Law Key 52-55; 8 A.L.R.3d 1236.

If the offense charged does not involve a specific intent, the first two sentences may be used.

This instruction may be adapted for use when the defense is intoxication or like condition resulting from drugs.

For definition of intoxication, SDCL 22-1-2(21), 22-1-2(54).

An instruction on intoxication as a defense must be given in all cases involving a specific intent where there is evidence of any intoxication, even though that intoxication was slight. See *State v. Plenty Horse, supra.*

The Committee has no preference over alternate 1 or 2.

(Revised 1997)

INTOXICATION (Alternate)

Instruction No. _____

If you find that the defendant was intoxicated at the time of the act charged, you are instructed that voluntary intoxication does not constitute a defense, excuse, or justification of the crime. It is to be considered only for the purpose of determining whether the defendant was capable of forming and having the specific intent required to constitute the offense charged. If you find the defendant at the time of the alleged offense was so intoxicated as to have no volition and had lost control of (his)(her) will and was incapable of forming a purpose or intent, then specific intent is lacking and you must return a verdict of not guilty.

Reference:
State v. Bush, 260 N.W.2d 226 (S.D. 1977)
(This instruction was #11 in *Bush*)
See references to instruction 2-6-1

(Revised 1996)

Instruction No. 18

Any person who unlawfully holds or retains another person to inflict bodily injury on or to terrorize the victim or another is guilty the crime of Kidnapping in the Second Degree.

Instruction No. 19

The elements of the crime of Kidnapping in the Second Degree, as charged in Count 2 of the indictment, each of which the state must prove beyond a reasonable doubt are, at the time and place alleged:

1. The defendant did unlawfully hold or retain Angela Calin.
2. The defendant's purpose was to inflict bodily injury on or to terrorize Angelia Calin or another.

KIDNAPPING — SECOND DEGREE — STATUTE

Instruction No. _____

Any person who unlawfully holds or retains another person

(to hold for ransom or reward, or as a shield or hostage)
(to facilitate the commission of any felony or flight thereafter)
(to inflict bodily injury on or to terrorize the victim or another)
(to interfere with the performance of any governmental or political function)
(to take or entice away a child under the age of fourteen years with intent to detain and conceal such child)

is guilty the crime of kidnapping in the second degree.

Reference:
SDCL 22-19-1.1

(New 2007)

KIDNAPPING — SECOND DEGREE — ELEMENTS

Instruction No. _____

The elements of the crime of kidnapping in the second degree, each of which the state must prove beyond a reasonable doubt are, at the time and place alleged:

1. The defendant did unlawfully hold or retain ______________________.
2. The defendant's purpose was to
   (hold ______________________ for ransom or reward)
   (hold ______________________ as a shield or hostage)
   (facilitate the commission of any felony or flight thereafter) (inflict bodily injury on or to terrorize ______________________ or another)
   (interfere with the performance of any governmental or political function)

(2. The defendant's purpose was to take or entice away ______________________.

(3. The defendant's intent was to detain or conceal ______________________.)

(4. ______________________ was under the age of fourteen years.)

Reference:
SDCL 22-19-1.1

(New 2007)

Instruction No. 98

There is evidence in this case that the defendant may have been intoxicated at the time of the alleged commission of the offense.

No act committed by a person while in a state of voluntary intoxication is less criminal because of the intoxicated condition. However, you may consider the fact, if it is a fact, that the accused was intoxicated at the time of the alleged offense in determining the purpose, motive, or intent with which the act was committed, if the act was committed by the defendant.

Instruction No. 36

If under the court's instructions and the evidence you find beyond a reasonable doubt that the defendant committed the acts constituting the elements of the offense charged in the indictment, then it is your duty to find the defendant guilty of the offense charged.

If any member of the jury, has any reasonable doubt that the defendant committed the offense charged in the indictment, or any reasonable doubt upon any element necessary to constitute the offense charged as defined for you by the court, then it is that juror's duty to give the defendant the benefit of the doubt and vote for a verdict of not guilty.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 27484

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

JEREMIAH BADIT LIAW,

Defendant and Appellant.

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

HONORABLE Larry Long
Circuit Court Judge

APPELLANT'S REPLY BRIEF

BEAU J. BLOUIN
Minnehaha County Public Defender
413 North Main Avenue
Sioux Falls, SD 57104

Attorney for Defendant/Appellant

MARTY J. JACKLEY
ATTORNEY GENERAL

PATRICIA ARCHER
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

AARON MCGOWAN
Minnehaha County State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104

Attorneys for State/Appellee

Notice of Appeal Filed on June 26, 2015

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
PRELIMINARY STATEMENT	1
ARGUMENT	2
CONCLUSION	4
CERTIFICATE OF COMPLIANCE	6

TABLE OF AUTHORITIES

Cases: Page(s)

State v. Klaudt, 2009 S.D. 71, 772 N.W.2d 117 3

State v. Schouten, 2005 S.D. 122, 707 N.W.2d 820 4

United States v. Bailey, 444 U.S. 394 (1980) 4

Other Authorities: Page(s)

SDCL 22-19-1.1(3) 2-4

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 27484

vs.

JEREMIAH BADIT LIAW,

Defendant and Appellant.

PRELIMINARY STATEMENT

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

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "State's Brief." All citations will be followed by the appropriate page number. Liaw relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in Defendant's Brief, filed with

the court on November 10, 2015.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING LIAW'S PROPOSED JURY INSTRUCTIONS ON SPECIFIC INTENT.

The State does not appear to dispute Liaw's contention that Kidnapping in the second degree—inflict injury or terrorize, under SDCL 22-19-1.1(3), is a specific intent crime. Rather, the State argues that the jury instructions provided by the trial court, particularly Instructions 18 and 19, were an adequate and accurate statement to the jury regarding the *mens rea* requirement for Kidnapping in the second degree. *See* State's Brief 14-16.

Instruction No. 18 provides:

> Any person who unlawfully holds or retains another person to inflict bodily injury on or to terrorize the victim or another is guilty the crime of Kidnapping in the Second Degree.

SR 84.

Instruction No. 19 provides:

> The elements of the crime of Kidnapping in the Second Degree, as charged in Count 2 of the indictment, each of which the state must prove beyond a reasonable doubt are, at the time and place alleged:
>
> 1. The defendant did unlawfully hold or retain Angela Calin.
>
> 2. The defendant's purpose was to inflict bodily injury on or to terrorize Angela Calin or another.

SR 85.

Defendant's Proposed Instruction No. 2 provides:

> In the crime of Kidnapping in the Second Degree, there must exist in the mind of the perpetrator the specific intent to inflict bodily injury or to terrorize Angela Calin or another.
>
> If specific intent did not exist, this crime has not been committed.

SR 73; *see* SDPJI—Criminal 1-12-2.

According to the State, Instructions 18 and 19 adequately informed the jury with regard to the *mens rea* requirement for Kidnapping in the Second Degree, and rendered unnecessary Defendant's Proposed Instruction No. 2 on specific intent. The State cites cases in which "[t]his Court has upheld a trial court's refusal to give an instruction on a principle that was 'substantially covered, even if implicitly,' in an instruction actually given." State's Brief 15 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 20, 772 N.W.2d 117, 123).

Here, Instructions 18 and 19 were inadequate to inform the jury on the meaning of specific intent. The distinction between general and specific intent in determining whether or not Liaw was guilty of Kidnapping in the second degree was an important issue in this case. The trial court itself, after reviewing the elements of the charge as well as Instructions 18 and 19, ruled that Kidnapping in the second degree was a general intent offense. Therefore, under the trial court's interpretation of the elements of SDCL 22-19-1.1(3), if the jury found that Liaw intentionally held or confined Calin in the manner proscribed by the statute, and the confinement caused injury or terrorized Calin, Liaw was guilty of the charge. However, being a specific intent crime, "there must exist in the mind of the

perpetrator the specific intent to inflict bodily injury or to terrorize Angela Calin or another." SR 73. Here, the jury may have erroneously believed, as the trial court did, that determining Liaw's "purpose" under the statute could be derived from what resulted when Liaw intentionally held or confined Calin. Specific intent requires more.

If the trial court interpreted the jury instructions as given to demonstrate SDCL 22-19-1.1(3) is a general intent crime, it is not plausible to contend that the jury instructions adequately informed the jury of the specific intent requirement necessary to find Liaw guilty. In discussing the Model Penal Code's development of alternative methods to analyze *mens rea*, this Court has observed the "ambiguity and confusion in defining and applying general and specific intent . . . ." *State v. Schouten*, 2005 S.D. 122, ¶ 15, 707 N.W.2d 820, 824 (citing *United States v. Bailey*, 444 U.S. 394, 403 (1980)). Analyzing *mens rea* and correctly applying general and specific intent is a difficult task for attorneys and judges, let alone lay jurors introduced to the concepts for the first time. Thus, in order to adequately inform the jury of the *mens rea* required to find Liaw guilty, the pattern jury instruction on specific intent was a necessary instruction. *See* Defendant's Proposed Instruction No. 2; SR 73; SDPJI—Criminal 1-12-2.

CONCLUSION

The trial court erred in ruling Kidnapping in the Second Degree is a general intent crime. SDCL 22-19-1.1(3) is a specific intent crime because it not only requires the unlawful holding or retaining of the victim, but also requires

Liaw to have the specific intent to cause bodily injury on or to terrorize Calin or another. Applying specific and general intent is a confusing and difficult task for jurors, and Defendant's Proposed Instruction No. 2 was necessary to adequately inform the jury of the meaning of specific intent. Thus, the trial court's refusal to provide these instructions was prejudicial to Liaw and denied him a fair trial.

For the aforementioned reasons, authorities cited, and upon the settled record, Liaw respectfully requests this Court remand the case with an order directing the trial court to reverse the Judgment and Sentence on Count 2, Kidnapping in the Second Degree, and order a new trial.

Respectfully submitted this 8th day of January, 2016.

/s/ Beau J. Blouin

Beau J. Blouin
Minnehaha County Public Defender
413 N. Main Avenue
Sioux Falls, South Dakota 57104
(605) 367- 4242
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 901 words.

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

Dated this 8th day of January, 2016.

/s/ Beau J. Blouin

Beau J. Blouin
Attorney for Appellant