STATE OF SOUTH DAKOTA	)	IN MAGISTRATE COURT
	) ss.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
CITY OF RAPID CITY,	)	
	)	51 MAG. NO. 15-000709
Plaintiff,	)	
	)	**MEMORANDUM OF DECISION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	)	
	)	
	)	
TRACE O'CONNELL,	)	
	)	
Defendant,	)	
	)	

This matter having come for a Trial to the Court, on July 22, 2015 at 9:00 a.m., in addition, testimony having been taken at a separate hearing on July 6, 2015 at 1:00 p.m., the City having appeared represented by City Attorney Joel P. Landeen, Defendant appearing through counsel, Michael J. Butler, this Court having heard the testimony of fourteen (14) witnesses, reviewed twelve (12) exhibits, and having considered the arguments from both parties, and good cause showing, this Court issues its Decision:

PROCEDURAL POSTURE

The City of Rapid City (herein after City of Rapid City shall be referred to as "City") filed a charge of disorderly conduct against Defendant, Trace O'Connell, on February 18, 2015. The charge reads as follows:

> That on or about the 24th day of January, 2015, in the City of Rapid City, County of Pennington, State of South Dakota, TRACE O'CONNELL did commit the public offense of DISORDERLY CONDUCT in that he did then and there

intentionally, knowingly, or recklessly utter any words or perform any acts which physically abused or threatened any person or persons in any public place, or which otherwise placed the person or persons in fear of safety of life, limb, health or property to-wit: he caused beer to be spilled upon another person or person, and uttered racially charged and confrontational words within the hearing of minor(s) and adult(s) at the ice arena at the Rushmore Plaza Civic Center, located at 444 Mt. Rushmore Road, Rapid City, South Dakota; contrary to Section 9.08.030(C.) Rapid City Municipal Code.

After the arraignment the parties began preparing for post arraignment hearings. In addition, the matter of a jury trial was considered. A trial by jury is a right reserved by the Defendant. The Defendant did not request a trial by jury, and the Court inquired if there was any reason why a trial to the Court could not be held. The City stated it wished to have a jury trial. A tentative jury trial was scheduled. Tragically, Patrick Duffy, Defendant's attorney at the time, passed away suddenly.

The unfortunate passing of Mr. Duffy prompted a status hearing to consider substitution of counsel by Mr. Butler, who incidentally was the lead attorney at the outset of the case. The Court imparted upon Counsel that the venue, selected to hold the trial, had a limited window of time for use. Further, the witness list contained minor children who would need to be in school, and the Court was reluctant to delay the proceedings if the result would be that the children would need to be pulled from their studies to testify. Further, this Court ruled that after having thoroughly reviewed Defendant's criminal history as well as having considered sentencings for similar offenses in Rapid City, and that the right to jury had not been demanded by Defendant, a trial to the Court would be held. SDCL 9-19-3.1. This Court held it would not impose any actual or suspended internment or a probationary term. This decision was made pursuant to State v. Bowers, 498 N.W.2d 202, 1993; State v. Auen, 432 N.W.2d 236, 1984; and consistent with the

United States Supreme Court holding in Baldwin v. New York, 399 U.S. 66; 90 S.Ct. 1886, 1888, 25 L.Ed, 2d 437, 440 (1970). A trial to the court was conducted on July 22, 2015.

BURDENS

The burden of proof rests solely with the party advancing its position. In this case the City of Rapid City has the burden of proving each and every of the elements of the alleged crime beyond a reasonable doubt. SDCL 9-19-3.1. The Defendant has the right to remain silent and does not need to testify at trial. Moreover, the Defendant need not present any evidence at all; but, rather, the Defendant may hold the City to its burden of proof.

> "[I]n a criminal case the term [presumption of innocence] does convey a special and perhaps useful hint over and above the other form of the rule about the burden of proof, in that it cautions the [trier of fact] to put away from [its] [mind] all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach [its] conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the [trier of fact] of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, nothing but the evidence, i.e., no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases. Wigmore 407.

Taylor v. Kentucky, 98 S.Ct. 1930, 1934; 436 U.S. 478,484 (U.S. 1978).

This Court takes great care to insure that the proper understanding of reasonable doubt be provided so that anyone who reads this decision fully appreciates the burdens in the legal system. Reasonable doubt is not, "a substantial doubt, a real doubt" *Id.*, at 1936;488. South Dakota's Standard jury pattern provides that reasonable doubt is:

> a doubt based upon reason and common sense — the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

SD Criminal Jury Instruction 1-6-3. It is the prosecutor's burden to prove the elements beyond a reasonable doubt.

TRANSCRIPTS

There were two separate days of testimony from which the Court considered in rendering this decision. Thus, two transcripts were produced and shall be identified as follows:

1. The transcript for the testimony on July 6, 2015 shall be referred as "TrTran.1"
2. The transcript for the Trial on July 22, 2015 shall be referred as "TrTran.2"

DECISION

This Memorandum of Decision is drafted pursuant to SDCL § 15-6-52(a) and the Supreme Court's decision in Poeppel v. Lester, 2013 S.D. 17, ¶11-13; 827 N.W. 2d 580,583-85. This Memorandum of Decision contains this Court's Findings of Fact and Conclusions of Law by reference and as if set out point by point. It is intended that any Finding of Fact may be considered a Conclusion of Law if the context so warrants and vice versa.

FINDINGS OF FACT

1. On January 24, 2015, two separate groups converged on Rapid City to partake in a Rapid City Rush hockey game. The hockey game was held at the Rapid City Civic Center and therefore was a public venue which allowed access to the general public. One group was from Phillip, the second was a group of students from Allen, both South Dakota communities.

2. The Phillip group consisted of about fifteen people. (Tr.Trans.1 p.19 l.10). The group was made up of invitees of the owner of a local steak house in Phillip who had received box seats from Eagle Sales. (*Id.*, at p.18, l.1-12.)(see also Tr.Trans.2 p.69, l.5-14; p.95, l.20-24; p.96, l.7-11). Matthew Reedy, Trace O'Connell, Brian Mills, Bradley Kennedy, Brit Miller, Brad Kuchenbecker, Ross Williams, Jake (LNU), Cory (LNU), Elliot (LNU) and Don Carley all were part of the group. (*Id.*, at p. 19 l. 2-6; Tr.Trans.2 p.70 l.7-8). The Phillip group traveled to Rapid City on the day of the game and made several stops along the way. At each stop the group consumed some alcohol. (Tr.Trans.1 p.44, l.1-25; Tr.Trans.2 p.70 l.9-25).
3. After checking into their rooms, the Phillip group proceeded to the hockey game. (Tr.Trans.1 p.19 l.15-22; Tr.Trans.2 p.71 l.1-6)
4. The Eagle Sales suite offered beer as part of the suite accommodations. (Tr.Trans.2. p.71 l.20-25).
5. The Phillip group, and specifically the Defendant, did consume alcohol offered at the suite. (Tr.Trans.1 p.45 l.1-24).
6. At the game, the Phillip group congregated in certain areas of the suite. (refer to Exhibit "A" for a general layout of the arena seating for sections "Q" and the Suites for Eagle Sales and Wow). Defendant was located on the "steps," which is on the left-hand side of the suite when looking from the audience section back to the suite and as it appears on Exhibit "A". (Tr.Trans.1 p.24 l.11-25); (see also Exhibits "C" and "D"). Exhibit "E" provides a great reference point to see where Defendant was actually located. Looking to the two demonstration models in Exhibit "E", the separation wall is very clear. Looking directly between the two demonstration models and then orienting one's view to the top

of the back wall where the Plexiglas is mounted, there is a colorful wall of blue and orange; that is where the Defendant would have been located on the steps of the suite.

7. Mr. Reedy was sitting at the bar near the center of the Suite and behind the suite seating. (Tr.Trans.1 p.25 l.19-25).

8. To the direct front of Mr. Reedy, and nearest the wall that separates the general audience from the Suite, was Brit Miller and Mr. Kuchenbecker. (Tr.Trans.1 p.26 l.11-19). The positions of these two gentlemen was generally continuous throughout the game. (*Id.* at l.17-23).

9. That same night, a group of excited children came to the game with their chaperones. (Tr.Trans.1 p.56 l.10-21). The children were all students at the American Horse Middle School in Allen, South Dakota. (Tr.Trans.2 p.121 l.8-17; p.136 l.1-10; p.153 l.2-14).

10. When the student group made it to the game, they were seated in Section "Q" in front of both the Eagle Sales Box and the Wow Box suites. (Tr.Trans.1 p.58 l.3-25). Brendan Poor Bear (hereinafter Brendan) was located in Row 14 Seat 4. (Tr.Trans.2 p.123 l.1-13);(see Exhibit "A"). Of all the witnesses who testified, Brendan was farthest away from the Eagle Sales Box Suite. He was seated directly under the Wow Box Suite. (Exhibits "A" and "G"). Brendan's seat would have been butted up against the rear wall of the general admission seating as referenced with the demonstration models seating in the last row illustrated in Exhibit "E". Brendan would have to have seen through Britt Miller and Brian Kuchenbecker, who were standing during portions of the game, to have viewed any actions by Defendant. (See Exhibit "A", "C" and "E"). The Court considered Exhibit "C" extensively as it provides a perfect vantage point with the general admission

seats closest to the Suite wall and the location of Defendant as described by the Matthew Reedy.

11. Taelor Snowball (hereinafter Taelor) was originally located in the lower rows, but then moved to seating on the back wall, Row 14 Seat 18. (Tr.Trans.2 p.138 l.3-25 and p.139 l.1-17); (see also Exhibits "A" and "F"). Kyra Jackson (hereinafter Kyra) was seated to the right of Taelor. (Tr.Trans.2 p.154 l.12-25; p.155 l.1-11). Kriana Running Hawk (hereinafter Kriana) was seated directly in front of Taelor in Row 13 Seat 18. (Tr.Trans.2 p.167 l.12-25; p.168 l.1-15)(see also Exhibit "A"). Mikayla Ghost Bear (hereinafter Mikayla) was seated to the left of Shaparis Cottier and Taelor Row 14 Seat 20.(Tr.Trans.2 p.181 l.1-25); (see also Exhibit "A"). Generally, this group was located within two seats in any direction from Taelor. (See Exhibits "A" and "E")
12. Julia Cunningham (hereinafter Julia) was seated in Row 12 Seat 13. (Tr.Trans.1 p.58 l.23-25);(refer to Exhibit "A"). Consuelo Means (hereinafter Ms. Means) was located in Row 13 Seat 17. (Tr.Trans.2 p.198 l.10-25). The record does not reflect where Justin Poor Bear was located; however, Exhibit "A" places him in front of his son Brendan Row 13 Seat 1.
13. At some point at the beginning of the game, the two groups began to converse with each other. Taelor spoke with one of the individuals in the Suite. The gentlemen inquired as to where they were from, and she and Kyra stated they were from Allen. (Tr.Trans.2 p. 140 l.10-15). Other students were speaking with the individuals in the suite, as well; however, Taelor wasn't "paying attention" to what was actually said. (*Id.*, at l.22-25 and p.141 l.1-17). Taelor indicated the two individuals slapping the walls were the individuals "talking to the kids". (*Id.*, at p.148 l.14 and p.149 l.1-2). Taelor's recollection

was consistent with Matthew Reedy and Britt Miller's memory that some of the children were engaged with Britt Miller and Brian Kuchenbecker. (Tr.Trans.1 p.26 l.11-16 and p.30 l.15-25); (Tr.Trans.2 p.73 l.21-25 and p.74 l.1-24); (also see Tr.Trans. p.35 l.20-25). The chaperones tried to stop the interaction between the students and the Phillip group. (Tr.Trans.1 p.60 l.11-25 and p.61 l.1-15)(also see Tr.Trans.1 p.30 l.9-25). The interaction was not unfriendly. (*Id.*; and p.199 l.7-12). Ms. Means did become concerned however and asked the students "not to talk to them no more." (Tr.Trans.2 p.199 l.18-24).

14. This Court finds none of the witnesses had an independent recollection of speaking directly with Defendant. (see the entirety of the transcripts); (also see Tr.Trans.2 p.31 l.3-12).

15. There were seven major events that transpired between the two groups that night, each event is identified as follows: (1). There was an incident regarding beer caps being thrown; (2). There was an incident of Frisbees being thrown; (3). An event occurred wherein the Student group was asked to cheer louder; (4). The first incident of beer pouring; (5). The second incident of beer spilling or splashing; (6) the incident of racial slurs to go back to the reservation; and finally (7) the confrontation of Justin Poor Bear and the Phillip group.

16. This Court finds based upon the testimony that none of the children or chaperones were hit by the bottle caps. This Court reviewed every instance of the word bottle "cap" or "caps" that appeared in the transcript and there is not a single instance of anyone aside from Mr. Kuchenbecker being hit with a beer bottle cap. (see the following Tr.Trans.2 p.8 l.3; p.36 l. 8 and 13; p.75 l.6,13 and 16; p.79 l.21; p.80 l.24; p.201 l.15; and p.237 l.2-3).

17. This Court finds based upon the testimony that none of the children or chaperones were hit by Frisbees. (Tr.Trans.2 p.17 l.14-17; p.36 l.17; p.76 l.5-23; p.77 l.4-8; p.79 l.25; p.157 l.15-19; p.158 l.1; p.169 l.2-8; p.183 l.16-19; p.197 l.3; p.201 l.8-14; p.216 l.10-15; p.237 l.3-5). The Court also finds there was no wrong doing by the Phillip group regarding the Frisbees:

> Q. –with your kids. You didn't see Frisbees being thrown at your kids.
> A. No.
> Q. In fact, when you were interviewed the end of last – this past January, talking about the Frisbees, you talked about a student giving a Frisbee to somebody up in the booth, like maybe handing it up to them and their throwing it out?
> A. Yeah. (Tr.Trans.2 p.216 l.10-18).

18. This Court finds not one witness identified Defendant as the individual who told the children to cheer louder. (Tr.Trans.1 p.48 l.21-24; p.61 l.23-25; p.62 l.1-25); (Tr.Trans.2 p.36 l.5; p.74 l.25; p.75 l.2; p.92 l.25; p.141-42 l.21-9; p.148-49 l.6-5; p.169 l.16; p.183 l.1-14; p.184 l.23-25; p.200 l.16-24 (indicating "they"); p.211 l.6-13). The testimony appears to indicate that either Britt Miller or Brian Kuchenbecker asked the children to cheer louder. (Tr.Trans.2 p.36 l.1-7; **specifically** p.148 l.6-25 and p.149 l.1-5; p.183 l.4-14 (indicating "they").

19. Chronologically, the first beer incident occurred prior to the beer spraying incident, which coincided with the scoring of the point by the Rush hockey team. Taelor recalled this incident without hesitation. When asked if the beer pouring incident occurred earlier than getting sprayed, Taelor stated, "Yeah, that was earlier before that all happened." (Tr.Trans.2 p.145 l.11-17). Taelor recalled an individual standing above her and her testimony reflected:

> Like, it was there for a little bit. Then I told Kyra. We started laughing. We both looked up and then he said "Are you thirsty?" I shook my head no and I just looked straight. (Tr.Trans.2 p.145 l.20-23).
>
> also see
>
> Q. In fact, I think you told the police officer that you thought they were just teasing or joking.
> A. Yeah.
> Q. And when you talked to the police officer, he asked you if anything that- if anything was done that made you feel uncomfortable and you answered no. Do you remember that?
> A. Yes. (Tr.Trans.2 p.150 l.2-9)

20. Taelor did not have any beer poured on her, nor Kyra. (Tr.Trans.2 p.146 l.5-10 and p.160 l.1-2). Brendan claimed he observed a person pour beer "into the kids." (Tr.Trans.2 p.125 l.6-25). However, Brendan's testimony conflicts with the two girls whom it was alleged beer was slowly being poured on. (Tr.Trans.2 p.134 l.11-17); (Tr.Trans.2 p.146 l.5-10 and p.160 l.1-2). Brendan thought the pouring was on both boys and girls. (Id., at p.125 l.10-11). Taelor's testimony demonstrates this was not the case, as it was only Taelor and Kyra who were below the person. Brendan's testimony regarding the placement of the two girls is also inconsistent with where the girls were located. (*Id.*, at l.14). Brendan placed the girls in a different row; however the transcripts indicated, as well as Exhibit "A", that the two girls were in the same row as Brendan, Row 14. (see Findings 10 and 11; as well as Exhibit "A"). Further, Brendan testified that the facial hair color of the Defendant was orange. (Tr.Trans.2 p.132 l.14-19; p.220 l.2-6). However, the Defendant's facial hair is not orange, it is dark brown or black. Further, there were several men who came to the front wall of the suite who had facial hair. (Tr.Trans.2 p.91 l.4-16). Even granting out that Brendan may have identified the Defendant, as found in Tr.Trans.2 p.220 l.16-23, Brendan's account of the occurrence of

beer pouring is not reliable and is inconsistent with both girls who would have been the recipients of the pouring. The Court, therefore, gives less weight to Brendan's testimony.

21. Ms. Means also thought she saw beer being poured on the two girls. (Tr.Trans.2 p.210 l.7-11). However, the two girls, Taelor and Kyra, indicated the gentleman was only teasing and actually never poured beer on them. (Tr.Trans.2 p.146 l.1-10). Even when confronted of with her inconsistent testimony, Ms. Means persisted in disregarding what the children had testified to. (Tr.Trans.2 p.210 l7-11). The Court finds Ms. Means testimony is controverted by those witnesses who were actually part of the event; and therefore, this Court finds Ms. Means testimony not credible.

The Court finds Taelor most credible. The Court's notes and memory of her testimony demonstrate her veracity through her mannerisms, choice of words, disposition and recollection of the events that day. (Tr.Trans.2 p.149 l.14-25 and p.150 l.1) The Court bases this Finding on Taelor's testimony, which was consistent with what she told the police when they visited her school to take her statement only days after the event. (Tr.Trans.2 p.150 l.5-9) The Court finds Kyra's testimony regarding this event was credible. (Tr.Trans.2 p.160 l.1-2). Kyra testified:

> Q. Okay. Do you remember a point in the game where you looked up and was somebody standing above you with a beer?
> A. Yes.
> Q. What was that person doing?
> A. He was holding his hand over the glass and he was laughing and he tilt the can.
> Q. Did he say anything when he did that?
> A. No.
> Q. Did he pour any beer out at that time?
> A. No. (Tr.Trans.2 p.159 l.17-25 and p.160 l.1-2).

Both girls showed great courage in testifying to the truth, and this Court took note of their consistencies in recalling this event.

22. Although the pouring event did not occur, there was an incident wherein the girls and many other individuals were sprayed with beer. (Tr.Trans.2 p.185 l.1-9; p.143 l.13-25; p.145 l.1-4; p.159 l.2-16). The children's and Julia's testimony demonstrates that the beer was only sprayed on a certain group in the general admission, and the only person who could have delivered the sprayed beer was the Defendant. However, this Court does not even need to provide reference back to the individual testimony to substantiate the Defendant was the cause of the beer being sprayed, because Matthew Reedy was an eye witness to the event. (Tr.Trans.1 p.34 l.2-20). The Court considered Kriana's testimony to identify the Defendant, but Defendant's own witness testified it was Trace O'Connell. (Tr.Trans.2 p.171 l.13-25 and p.172 l.1-14). This Court finds the that the Defendant, at the time when a score by the Rush just prior to the score that tied the game, joined with the crowd in celebration and making a movement like he was roping, sprayed many in his suite including: Mikayla, Taelor, Kyra, Kriana, Julia, Ms. Means, and quite possibly more students. (Tr.Trans.2 p.143 l.24-25; p.159 l.2-8; p.171 l.3-10; p.185 l.1-14 and Tr.Trans.1 p.63 l.9-12; p.64 l.1-25) (also see Tr.Trans.1 p.34 l.21-25). The Court finds the event was a celebratory reaction to the score. (Tr.Trans.1 p.64 l.24-25; p.65 l.1-8; p.34 l.21-25; p.35 l.1-9).

23. The Court identified only one person who claimed she could recognize the Defendant's voice and believed he said "go back to the rez." (Tr.Trans.2 p.208 l.3-7). Ms. Means did not actually see the Defendant say this repugnant and racial slur. (*Id.*, at l5-7). However, Ms. Means claims that in just that brief encounter with the Phillip group in a hockey game filled with hundreds of people all cheering, talking and chanting, she recognized one single voice out of the entire crowd. (*Id.*, at l.8-14). Interestingly enough, she

claimed "the person that did it was probably the one that was talking the most, and I could recognize his voice without even having to turn around." (*Id.*, at l.12-14). The Court finds her testimony less than convincing. The testimony throughout the proceedings demonstrated Britt Miller and/or Brian Kuchenbecker were the ones who spoke the most as they were the ones interacting with the students and pounding on the walls. (see Findings 13 and 18).

The Court finds Ms. Means testimony regarding identifying Defendant through his voice is not credible. When Ms. Means claimed a person was "standing in the corner over Mikayla" and he was "pouring the beer on her", she testified that "I couldn't hear" because it was pretty loud in there. (Tr.Trans.2 p.205 l.17-25). Either it was so loud she could not hear what the individuals were saying in the Suite, or she could hear the Defendant and was mistaken about how loud it was in the arena. This inconsistent testimony demonstrates her inability to correctly recall the facts. Moreover, the beer pouring has been demonstrated to be inaccurate and uncorroborated.

24. The incident involving the confrontation of Mr. Justin Poor Bear and the Phillip group is unfortunate to say the least, for Mr. Poor Bear's understanding of what happened was based upon the flawed recollection of Ms. Means who believed she saw something that never actually occurred. (Tr.Trans.2 p.212 l.13-18). The Court finds it was Ms. Means who incorrectly informed Justin Poor Bear that the children had beer poured on them. (*Id.*). During testimony, Ms. Means demonstrated she had a compromised recollection of the events. She stated that during the confrontation, the Defendant told Justin Poor Bear "to get his fucking ass up there and they were gonna deal with it." (Tr.Trans.2 p.207 l.19-23). However, this alleged aggression against Mr. Poor Bear was never told to the police

until days after the incident. (Tr.Trans.2 p.213-215). The Court finds Ms. Means is an unreliable witness. The Court therefore finds that there was no aggressive action taken by the Defendant prior to or after Mr. Poor Bear confronted the Phillip group. (Tr.Trans.1 p.67 l.18-25 and p.68 l.1-5; p.36 l.4-25 and p.37 l.1); (Tr.Trans.2 pp.19-21); (see also Tr.Trans.2 p.31 l.10-25 and pp.32-35); (see specifically Tr.Trans.2 p.35 l.1-9).

Based upon the Findings the **Court Concludes**:

1. This Court has jurisdiction over the subject matter of this case.
2. It is intended that any Finding of Fact may be considered a Conclusion of Law if the context so warrants and vice versa.
3. This Court concludes the City of Rapid City must prove beyond a reasonable doubt the following elements of the crime alleged against the Defendant, Trace O'Connell: commit the public offense of DISORDERLY CONDUCT in

    a. That on or about the 24th day of January, 2015, in the City of Rapid City, County of Pennington, State of South Dakota, TRACE O'CONNELL did
    b. intentionally, knowingly, or recklessly
    c. utter any words or perform any acts which physically abused or threatened any person or persons
    d. in any public place,
    e. or which otherwise placed the person or persons in fear of safety of life, limb, health or property.
    Section 9.08.030(C.) Rapid City Municipal Code.

4. This Court notes that under RCMC there are several subsections; however, this crime was charged out under subsection "C" only. No other amended complaints were filed; and therefore, this Court will restrict its decision on this subsection.
5. This Court concludes the City has demonstrated that this event was in "any public place" beyond a reasonable doubt. (see Finding 1).

6. This Court concludes the City has proven that the Defendant, Trace O'Connell was present at the hockey game on January 24, 2015, in Pennington County, South Dakota. (see Findings 2 and 6).

7. The City isolated only two events that identified Defendant as a participant on January 24, 2015. This Court will focus on those two events to determine if the City has met its burden in proving all the remaining elements beyond a reasonable doubt. (see Findings 22 and 24).

8. This Court concludes the beer "pouring" incident in Finding 21 did not occur. The Court concludes the beer "spraying" incident in Finding 22 did occur. The City must prove the Defendant's actions were made intentionally, knowingly, or recklessly. This Court consulted the Rapid City Municipal Code of Ordinances for definitions of "intentionally, knowingly or recklessly" as found in RCMC. The ordinances did not provide any definition for the terms in that subsection of the code; therefore, this Court shall consider South Dakota statutes regarding the term "intentionally, knowingly or recklessly".

> SDCL §22-1-2. Definition of terms. Terms used in this title mean:
>
> (1) If applied to the intent with which an act is done or omitted:
>
> (a) The words, "malice, maliciously," and all derivatives thereof import a wish to intentionally vex, annoy, or injure another person, established either by proof or presumption of law;
>
> (b) The words, "intent, intentionally," and all derivatives thereof, import a specific design to cause a certain result or, if the material part of a charge is the violation of a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, a specific design to engage in conduct of that nature;
>
> (c) The words, "knowledge, knowingly," and all derivatives thereof, import only a knowledge that the facts exist which bring the act or omission within the provisions of any statute. A person has knowledge if that person is aware that the facts exist which bring the act or omission

within the provisions of any statute. Knowledge of the unlawfulness of such act or omission is not required;

(d) The words, "reckless, recklessly," and all derivatives thereof, import a conscious and unjustifiable disregard of a substantial risk that the offender's conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances if that person consciously and unjustifiably disregards a substantial risk that such circumstances may exist;

(e) The words, "neglect, negligently," and all words derived thereof, import a want of attention to the nature or probable consequences of an act or omission which a prudent person ordinarily bestows in acting in his or her own concerns;

(f) If the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, intent, or malice also constitutes sufficient culpability for such element. If recklessness suffices to establish an element of the offense, then knowledge, intent or malice also constitutes sufficient culpability for such element. If knowledge suffices to establish an element of an offense, then intent or malice also constitutes sufficient culpability for such element. If intent suffices to establish an element of an offense, then malice also constitutes sufficient culpability for such element;

9. As provided in the statutory definitions, there is a progression in levels of severity based upon how the act unfolded. For example, if the action could has been charged out as negligent, but the fact finder determined that the action was actually reckless, knowingly or intentionally committed, then the requirements for finding a negligent act will be established. Thus, the burden increases based upon the terms used in the charging ordinance. Here, the words used in the charging ordinance are: "intentionally, knowingly and recklessly".

10. This Court first examines the term "reckless" as it relates to the Defendant's actions. "A person is reckless with respect to circumstances if that person consciously and unjustifiably disregards a substantial risk that such circumstances may exist." SDCL 22-1-2(1)(d). The Court concludes that Defendant's actions of spraying beer were the result

of an excited reaction to a very important score in the Rapid City Rush hockey game. Not only the defendant, but the whole arena erupted when the score occurred. (see Finding 22); (Tr.Trans.1 p.64 l.24-25; p.65 l.1-8; p.34 l.21-25; p.35 l.1-9). This Court has reasonable doubt that the Defendant's celebratory roping reaction to the score was consciously done. A majority of the arena, including the children, stood up and demonstrated elation. The action was not the result of an unjustifiable disregard of a substantial risk to the children's safety. The action was a celebration, a knee-jerk reaction to an exciting event in a close hockey game. The Court notes that even Krya thought the action was celebratory and not on purpose. (Tr.Trans.2 p.162 l.11-23) The Court concludes that the action was involuntarily made. The action falls more in line with a negligent action rather than a reckless action.

11. The term "knowingly" connotes "[a] person [having] knowledge if that person is aware that the facts exist which bring[s] the act or omission within the provisions of any statute. SDCL 22-1-2(1)(c). As with the term "reckless", this Court concludes that Defendant's action was involuntarily made and was a reaction to an important score in the hockey game. (see Finding 22); (Tr.Trans.1 p.64 l.24-25; p.65 l.1-8; p.34 l.21-25; p.35 l.1-9).

12. The term "intentionally" has consistently been misunderstood in the past and even to this day, the courts must deal with the application of the term. State v. Huber, 356 N.W.2d 468, 472 (S.D. 1984); see also State v. Vargas, 2015 S.D. 72 ¶12-13. To have an intent to commit a crime one's actions will generally fall within two categories, specific "intent" or general "intent". (*Id.*) This Court concludes that the crime charged does not have a separate element of a requisite mental state beyond that accompanying the act and thus, is a general intent crime. *Id.*, at 473. The City must prove the action was committed

intentionally in so far as the Defendant had the intent "to do a physical act – or, perhaps, recklessly doing the physical act – which the crime requires." *Id.*, at 472.

13. Again, as stated in the examination of recklessly and knowingly, this Court concludes that the actions of the Defendant were an involuntary reaction to an important score in the hockey game. Defendant did not intentionally do a physical act of spraying beer; but, rather he reacted to a score by making a celebratory roping movement with his arm and unfortunately, he had a beer in his hand. (see Finding 22); (Tr.Trans.1 p.64 l.24-25; p.65 l.1-8; p.34 l.21-25; p.35 l.1-9); see also (Tr.Trans.2 p.77 l.11-25 and p.78 l.1-6; p.85 l.23-25 and p.86 l.1-18).

14. Based upon this Courts Findings and Conclusions, this Court finds the City has not met its burden in proving beyond a reasonable doubt that the Defendant acted in an "intentionally, knowingly or recklessly" manner. The City has the burden of proving each and every element of the crime alleged against the Defendant, and this Court concludes the City has not met its burden for this element arising from this event and therefore finds the Defendant not guilty of the crime of disorderly conduct as it relates to this event.

15. This Court concludes that the City has not met its burden in proving beyond a reasonable doubt that the Defendant intentionally, knowingly, or recklessly uttered any words or performed any action which physically abused or threatened any person or persons in any public place, or which otherwise placed the person or persons in fear of safety of life, limb, health or property. (see Finding 24). The City has not proven that Trace O'Connell uttered any racially charged and confrontational words within the hearing of minor(s) and adult(s) at the ice arena. Aside from the unreliable testimony of Ms. Means, not one

person testified to having identified the Defendant as having uttered any racially charged words nor provoke aggression toward any adult in the arena. (See Finding 24). Therefore, this Court finds the Defendant not guilty of the charge of disorderly conduct regarding this event.

Dated this 31st day of August, 2015.

BY THE COURT:

Eric J. Strawn
Magistrate Judge

ATTEST:

Clerk of Courts

By: Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT
SEP - 1 2015
Ranae Truman, Clerk of Courts
By Deputy