IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Appeal No. 26691

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

DEREK LEROY BOE,
Defendant and Appellant,

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN BROWN
Presiding Judge

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED MAY 9, 2013

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1. *State v. Buchholz*, 1999 SD 110, 598 NW2d 899
2. *State v. Knecht*, 1997 SD 53, 563 NW2d 413

RELEVANT STATUTES:

1. SDCL 22-18-1.1(2)

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PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, will be referred to as "State." Defendant and Appellant, Derek Boe, will be referred to as "Defendant." References to transcripts and records will be referred to as follows:

Settled Record.....SR

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Each citation will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This four-count Superseding Indictment was filed on February 6, 2012, charging Defendant with Attempted First Degree Murder, Aggravated Assault Domestic Violence, Discharge of Firearm at Occupied Structure or Vehicle, and Possession of a Firearm by a Prohibited Person. SR 24-25. On February 7, 2012, a Part II Information for Habitual Offender was filed based on Defendant's November 25, 2002, Aggravated Assault conviction. SR 27. On December 14,

2012, the jury returned guilty verdicts on all but the Attempted First Degree murder count. SR 360-61.

On April 2, 2013, Defendant was sentenced to twenty years imprisonment in the South Dakota State Penitentiary, with credit for 369 days previously served, for both the Aggravated Assault and Discharge of Firearm convictions, and sentenced to five years imprisonment for Possession of a Firearm by a Prohibited Person. SR 365-66; ST 20:3-21:14. All three sentences run concurrently. SR 364; ST 21:1-24. The sentence was given on April 2, 2013, and filed on April 11, 2013. SR 364.

On May 9, 2013, Defendant filed a timely Notice of Appeal from the Judgment of Conviction. SR 384-85. This Court has jurisdiction pursuant to SDCL 21-34-13.

STATEMENT OF LEGAL ISSUES

I.

Did the trial court abuse its discretion and commit prejudicial error by admitting Defendant's nearly 10 year old aggravated assault conviction as "other acts" evidence.

RELEVANT CASE LAW:

1. *St. John v. Peterson*, 2011 SD 58, 804 NW2d 71
2. *State v. Chamley*, 1997 SD 107, 568 NW2d 607
3. *State v. Lassiter*, 2005 SD 8, 692 NW2d 171
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1. SDCL 19-12-1
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II.

Was the evidence sufficient to support the jury verdict finding defendant attempted to cause, or knowingly caused, bodily injury to another with a dangerous weapon.

RELEVANT CASE LAW:

1. *State v. Buchholz*, 1999 SD 110, 598 NW2d 899
2. *State v. Knecht*, 1997 SD 53, 563 NW2d 413

RELEVANT STATUTES:

1. SDCL 22-18-1.1(2)

STATEMENT OF THE CASE

On February 6, 2012, the Hughes County grand jury indicted Defendant on four felonies, including Aggravated Assault Domestic Violence in violation of SDCL 22-18-1.1(2), for attempting to cause, or knowingly causing bodily injury to Tabetha Key by using a dangerous weapon, and discharge of firearm as occupied vehicle in violation of SDCL 22-14-20. SR 24-25. On April 25, 2013, the court held a pretrial hearing regarding the State's motion to

introduce other acts evidence against Defendant concerning his 2002 aggravated assault conviction.

The State asserted the evidence showed Defendant's intent and motive, and negated a potential defense of accident. SR 217; MT 12–13. Defendant objected to the other acts evidence based on the minimal probative value of the nearly ten year old conviction being substantially outweighed by the danger of unfair prejudice. MT 7:14–10:14; MT 12:6–17; SR 375–77, 388–90. Defendant renewed this objection at trial. TT 404:18–19; TT 429:3–25–430:4, 431:13 to 432:16.

The trial court permitted the 2002 other acts evidence based on similarities of the victims and crimes and the 2002 conviction being relevant to prove motive, intent, and to negate a defense of accident concerning the 2012 charged offense. MT 12:18–13:16; SR 217; TT 400:12–406:2.

On December 11–14, 2012, the case was tried before a Hughes County jury. The jury acquitted Defendant of the attempted murder charge and convicted Defendant on the three remaining felony charges based on his use or possession of a dangerous weapon. SR 361.

STATEMENT OF FACTS

Defendant and Tabetha Key had known each other since

at least 2009, and became involved in a romantic relationship in September 2011. TT 204:6-17; TT 437:25-438:5; ST 16:16-17. They began living together in Defendant's home, along with Defendant's two oldest children and Ms. Key's two children. TT 204:18-205:1-6; TT 438:12-13. Although Ms. Key was married to someone else during this time, her husband was in prison. TT 203:4-19. Defendant and Ms. Key's relationship included verbal arguments, but they were not physically abusive to each other. TT 186:5-8; ST 16:17-19.

In December 2011, Defendant and Ms. Key had an argument causing Ms. Key to begin looking for somewhere else to live. TT 205:7-13; TT 438:14-15. Although the relationship became strained and Ms. Key and her children moved out of Defendant's home sometime after Christmas 2011 to mid-January 2012, Defendant and Ms. Key continued their romantic relationship and Ms. Key indicates she became pregnant with Defendant's child about this time. TT 205:14-25; TT 203:20-204:5.

On the morning of January 21, 2012, Ms. Key met Defendant at the rural Nystrom residence. Defendant had been there since early morning working with Mr. Nystrom on an Old Case tractor. TT 439:2-440:11. Defendant and Ms.

Key also played darts and Ms. Key cleaned out her Blazer vehicle. TT 207:8–208:14; TT 438:16–439:12. The Nystrom residence consists of different buildings, including a shop building with a garage door. TE 20, 21, 22; TT 179:1–180:3; TT 210:15.

Defendant left the premises between 4:00 to 5:00 pm and intended to return later that evening. TT 208:13; TT 440:19–25; TT 446:10–14; TT 490:22–24. Ms. Key remained on the premises first spending time with Brad Nystrom and then in the shop building where she removed several personal items from her vehicle, due to her being in the process of moving, so she could clean and vacuum her SUV vehicle. TT 190:11–12; TT 208:22–25–109:1–2; TT 210:18–20; TT 246:18–19; TE 27, 28, 29, 30.

Defendant and his friend Colin Larson called each other and made plans to have a “boys’ night” with Bruce Nystrom at the Nystrom residence, and Mr. Larson arrived at approximately 7:30 to 8 p.m. TT 188:13, 23–25–TT 189:1–2; TT 209:4–8; TT 447:1–20; TT 492:3–20. Mr. Larson was disappointed to find Ms. Key at the Nystrom residence and asked Mr. Nystrom if he could tell Ms. Key to leave. TT 188:13–18; TT 448:14–17. Mr. Larson and Ms. Key had a heated argument about whether or not she had to leave,

resulting in Ms. Key locking Mr. Larson out of the shop building. TT 188:23-25-189:1-7; TT 189:14-19; TT 210:13-15.

Defendant returned to the Nystrom residence somewhere between 8 to 10 p.m., and began arguing with Ms. Key about whether she had to leave. TT 210:22-24; TT 450:1-4. Ms. Key, Defendant, and Mr. Larson put Ms. Key's things back in her vehicle so she could leave. TT 210: 20-21; TT 450:7-8; TT 452:4-9. When Ms. Key refused to leave voluntarily, Defendant and Mr. Larson hooked a tow chain between Ms. Key's Blazer and Defendant's Suburban, and Defendant used his vehicle to pull Ms. Key's vehicle out of the shop building. TT 198:9-11; TT 200:19-22; TT 450:4-6.

Ms. Key started her vehicle and rammed or backed into the front of Defendant's parked vehicle. TT 198:10-20; TT 200:22-25; TT 211:1-10, 17-19; TT 225:4-15; TT 232:22-23; TT 455:1-3; TT 486:19-25; TT 487:8-11. Ms. Key drove away, and Defendant followed. TT 211:23-25-212:1-3. Ms. Key ended up hitting Defendant's vehicle two more times and landed in the ditch both times, with Defendant pulling her vehicle out of the ditch both times. TT 458: 8-17; TT 459:8-460:10; TT 462:9-463:18; TT 470:19-25; TT 487:12-19. The third and last time Ms. Key hit Defendant's vehicle,

Defendant felt Ms. Key was not going to stop until both vehicles were destroyed. TT 213:9–10, 12–17; TT 463:17–21; TT 485:20–486:5; TT 488:14–489:7.

Defendant grabbed the shotgun that was in his vehicle, intending to break out Ms. Key's front passenger window to get her attention and let in the cold air to provide her incentive to drive back to town. TT 463:20–465:24. Defendant had broken out the front driver's side window of Ms. Key's vehicle two days earlier with his fist for a reason he felt justified it. TT 500:1–501:2. When Defendant struck Ms. Key's front passenger window with the shotgun, the gun discharged accidentally and exploded the front passenger window. TT 465:19–24. Ms. Key jumped out of the car due to fragments getting in her eyes and face. TT 213:10–11, 20–22; TT 226:25–227:1–2.

Defendant was shocked when the gun discharged. TT 465:19–24; TT 466:19–468:16. He threw the gun on the ground, ran to Ms. Key and said, "Will you please get in the vehicle so I can make sure you're okay?" and "I did not want that gun to go off. Please let's just make sure you're okay. Let's get you in the vehicle." TT 469:1–8. Defendant inspected her face and body, frightened at what might have happened to Ms. Key. TT 469:11–14. Defendant's

only concern was that Ms. Key would be okay. TT 469:20–22.

Defendant saw some redness on her chest, but no obvious injuries on her face. TT 470:12–14. Defendant hooked up a tow chain and pulled Ms. Key's vehicle out of the ditch and onto the road after she tried to get out of the ditch herself. TT 215:2–3, 11–13; TT 470:21–471:24. Ms. Key drove away, and then pulled over after driving a distance because she was crying and couldn't see well. TT 215:13–19. Mr. Larson had followed her and he checked on her when she pulled over. TT 194:10–195:1; TT 215:19–20. Ms. Key began screaming at him, telling him that all of this was his fault and to leave her alone. TT 215:21–22.

Ms. Key then drove to the Kum & Go gas station in Pierre, SD, where she texted or called for Defendant to come and help her. TT 215:23–24; TT 216:13–16; TT 473:10–22. Defendant agreed to come right away and did. TT 216:17–18; TT 474:1–7. Ms. Key bought a green tea and waited outside for Defendant after telling the clerk that she was injured in an accident. TT 216:18–19–217:1–9; TT 235:18–20; TT 237:6–18. Defendant drove Ms. Key to his home where he provided first-aid supplies to Ms. Key to help her care for her injuries. TT 218:4–5; TT 229:17–230:8; TT 474:5–476:10.

Defendant apologized, told Ms. Key he did not mean for the gun to go off, and tried helping her with her minor wounds. TT 475:15–476:10. Ms. Key told him he was doing more harm than good and to just let her do it by herself. TT 475:18–19. Defendant agreed to step away, allowed her to clean herself up, and asked to be told if she needed anything so he could help her. TT 475:20–21. Defendant wanted Ms. Key to go to the emergency room, but she preferred to wait and go to the free clinic because she did not have insurance. TT 245:10–13; TT 504:13–20.

Ms. Key texted her mother to come for her at Defendant's home, and she arrived shortly after receiving Ms. Key's text. TT 218:9–10, 18–19, 23; TT 476:17–477:1. Ms. Key told her mother she was injured accidentally, and spent the rest of the night at her mother's home. TT 218:25–219:2. Ms. Key's mother overheard Ms. Key telling her brother more about what caused her injuries. Her mother said she would report it to the police if Ms. Key did not, so Ms. Key reported it to law enforcement. TT 219:15–220:8.

Ms. Key called the police a second time and told them she did not want any charges pressed against Defendant. TT 220:15–22. Officer Gallagher met with Ms. Key and took her

to the emergency room for medical treatment. TT 221:11–24. Both Defendant and Ms. Key told several people that the shotgun went off accidentally. TT 216:18–217:9; TT 229:7–9; TT 235:18–20; TT 237:6–18; TT 218:25–219:2; TT 184:9–25; TT 413:24–414:3; TT 416:1–7, 17–21; TT 481:21–482:3. Ms. Key also testified at Defendant's sentencing hearing that "with my whole heart I don't think that he had intentions of hurting me or killing me that night. And when it happened and I had nobody else, he is the one who answered my phone call and was there when I needed him." ST 17:14–18.

ARGUMENT

I.

The trial court abused its discretion and committed prejudicial error by admitting Defendant's nearly 10 year old aggravated assault conviction as "other acts" evidence.

A. <u>Other Acts Evidence</u>.

The other acts evidence admitted by the trial court consists of Defendant's nearly ten year old conviction for aggravated assault domestic violence against a girlfriend, Jenny Ponca. Defendant pled guilty to hitting Ms. Ponca twice on the head with the barrel of an unloaded handgun. The circumstances were Ms. Ponca had expressed disapproval

of Defendant's and his friends' drunken behavior at an after-the-wedding-reception-party for one of Defendant's best friends. Defendant's reason for hitting Ms. Ponca on the head was to "show-off" to his friends that he was not going to put up with her disapproval of their "crazy" behavior. TT 401:19-406:2; TT 506:21-508:8; TT 507:18 and 508:7 ("show-off" comment); TT 403:3-5 ("crazy" behavior).

B. <u>Scope of Review</u>.

On evidentiary questions, review is limited to whether the trial court abused its discretion. *State v. Lassiter*, 2005 SD 8, ¶13, 692 NW2d 171,175; *State v. Chamley*, 1997 SD 107, ¶7, 568 NW2d 607, 611. Other acts evidence showing a defendant's propensity to commit a particular crime is irrelevant, and therefore inadmissible. *Lassiter* at ¶13, 175. A new trial for wrongful admission of other acts evidence requires both a trial court's abuse of discretion by admitting that evidence and resulting undue prejudice to the defendant. *Id.* If the admission of other acts evidence resulted in harmless error, then a new trial is not required. *Id.*

The admission of other acts testimony is governed by SDCL §§ 19-12-5 and 19-12-3:

> *Evidence of other crimes, wrongs, or acts* is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, *be admissible for other purposes, such as proof of motive,* opportunity, *intent,* preparation, plan, knowledge, identity, *or absence of* mistake *or accident*.

(Emphasis added) SDCL 19-12-5.

> *Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice*, confusion of

> the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Emphasis added). SDCL 19-12-3.

Trial courts are to follow a two-step analysis when ruling on the admissibility of other acts evidence: (1) the factual inquiry of whether the intended other acts evidence is relevant to a material fact at issue in the case; and (2) the legal inquiry of whether the probative value of the intended other acts evidence is substantially outweighed by the danger of unfair prejudice. *State v. Chamley*, 1997 SD 107, ¶10, 568 NW2d 607, 611; *State v. Lassiter*, 2005 SD 8, ¶15, 692 NW2d 171, 176.

Relevant evidence is any evidence that makes the existence of any fact more or less probable than it would be without the evidence. SDCL 19-12-1. After a trial court determines that proposed evidence is relevant, the scale tips in favor of admitting that evidence unless its probative value is substantially outweighed by the evidence's danger of unfair prejudice. SDCL §§ 19-2-2 and 19-2-3. Unfair prejudice results from evidence that persuades the jury in an unfair and illegitimate way. *St. John v. Peterson*, 2011 SD 58, ¶16, 804 NW2d 71, 76. Unfairly prejudicial evidence is associated with facts that

arouse "hostility or sympathy for one side without regard to the probative value of the evidence." *State v. Moeller*, 2000 SD 122, ¶ 94, 616 NW2d 424, 450; citing McCormick on Evidence § 185 at 780 (4th ed.1992).

The trial court must also identify the specific SDCL 19-12-5 exceptions relied on for admitting the other acts evidence. *Chamley* at ¶10, 612. The trial court in the case at bar identified motive, intent, and absence of accident as the specific SDCL 19-5-2 exceptions relied on to admit the prior acts evidence. MT 12:18-13:16; SR 217. To support a motive exception, the prior act must show either: (a) a direct relationship between the two offenses, such as the prior offense supplying the reason for a retribution or revenge motive in the charged crime; or (b) a relationship between the victims showing the defendant has ill will toward a certain class of people, such as members of a particular church or racial group. *Lassiter* at ¶21-22, 177-78. To support an intent exception, there must be similarity between victims and crimes, and the older the other acts' evidence is, the less likely it is to be found to show intent regarding the charged crime. *Chamley* at ¶12, 612 (similar victims and crimes); ¶16, 613-14 (an act occurring a significant time in the past is

unlikely to show intent for the current charge). To support an absence of accident exception, the other acts evidence must be "reasonably related to the offending conduct." *State v. Lodermeier*, 481 NW2d 614, 625 (SD 1991).

C. <u>The other acts evidence was not relevant to a material fact at issue in the case at bar</u>.

Defendant believes the trial court erred in finding the State met its burden of showing that the 2002 other acts evidence was factually relevant to any material fact at issue in the 2012 incident. Although both victims were involved in romantic relationships with Defendant at the time of each incident, and both incidents involved Defendant's use of a gun, the similarities end there.

In the other acts incident from September 2002, Defendant was intoxicated, acting "crazy" with his friends after a friend's wedding reception party, he had an unloaded handgun in hand, and he struck his girlfriend, Jenny Ponca, on the head twice with the gun barrel to "show-off" to his friends that he was not going to put up with her disapproval of their behavior. He admitted his fault and pled guilty. TT 400:12-406:2 (Jenny Ponca's testimony); TT 506:22-508:8 (Defendant's testimony).

In the incident at bar from January 2012, Defendant was sober, alone with his girlfriend, Tabetha Key, in a rural area, his vehicle had been hit at least two times by his girlfriend's vehicle, he had a loaded shotgun in his vehicle, and he intended to use the shotgun barrel to knock out the front passenger window of his girlfriend's vehicle to get her attention and make her stop colliding into his vehicle. There were no friends present for him to "show-off" for, and as soon as the gun went off he reacted in a shocked and frightened manner, with thoughts focused on Ms. Key's welfare. TT 465:19-24; 466:19-468:16; 469:1-8; 469: 11-14; 469:20-22; 475:15-476:10. Although he admits he was angry with Ms. Key, he denies intending to physically harm her. At sentencing, Ms. Key also stated she believed Defendant did not intend to harm her physically. ST 17:14-18.

The marked dissimilarities between the two incidents, along with the significant time gap between the two offenses, support finding that the jury was unfairly prejudiced by the other acts evidence. The 2002 other acts evidence was not relevant to any material fact at issue in the 2012 incident.

D. <u>The probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice</u>.

The significant and improper impact the 2002 other acts evidence had on the jury was illustrated when the jury room went "dead silent" during jury selection at the mention of Defendant's old conviction for assaulting a prior girlfriend using a gun. TT 44:10, 44:20. The ensuing jurors struggling to separate the two incidents also shows the jurors were unmistakably influenced by hearing of the old conviction, making it difficult to separate the two incidents. TT 44:7–52:4; TT 126:16–133:7.

One of the jurors, excused for cause, stated she could not put aside the old conviction because:

> ...It's a behavior. [Even though it happened ten years ago]...it's human nature...I already heard it and I can't just say, okay, I'm going to ignore it when I know its already happened and now it's ten years later. No, I'm just being truthful. No, I'm just being honest. I heard it. I know what happened, it's a behavior. No, I can't ignore it. I mean I wish I could, but it's going to be there...We're talking about abuse to women. It has been ten years and I mean there's so much evidence, it's a behavior issue.

TT 130:6–131:18; TT 131:24–25. Defendant believes the impact the old conviction had on this particular prospective juror was likely experienced by other jurors,

impermissibly leading them to conclude the old conviction combined with the new charged offense shows the Defendant has a propensity to harm women using a gun because he harmed two different women ten years apart using a gun. In effect, the old conviction planted a bias in the jurors' minds against Defendant and prevented the jury from having an open mind to Defendant's current charged offense.

The South Dakota Supreme Court has reversed convictions based on prejudicial error resulting to defendants from trial courts' erroneous decision to admit prior acts evidence. *See e.g.*, *State v. Lassiter*, 2005 SD 8, 692 NW2d 171; *State v. Chamley*, 1997 SD 107, 568 NW2d 607. In *Chamley*, a sexual abuse conviction was reversed and remanded for a new trial because the probative value of the twelve to twenty year old other acts evidence was not substantially outweighed by the danger of unfair prejudice. Although the trial court felt the prior acts were a "mirror image" of the charged offenses because both involved young girls and sexual contacts, the South Dakota Supreme Court disagreed and found "minimal similarity" between them. *Chamley* at ¶7, 611 (mirror image), ¶14, 613 (minimal similarity). The South Dakota Supreme Court reasoned that the slight value of the prior acts evidence was

substantially outweighed by the risk of unfair prejudice. *Chamley* at ¶16, 614.

In *Lassiter*, an aggravated assault conviction was reversed because the circumstances of the defendant's prior aggravated assault conviction in 2000 were admitted improperly to prove identity in an aggravated assault occurring in 2002. *Lassiter* at ¶27, 179. The defendant's 2000 aggravated assault conviction concerned a former girlfriend and was admitted to show the defendant's identity and motive for the 2002 unidentified assailant assault of defendant's girlfriend's new boyfriend at that time. *Lassiter* at ¶14, 175. Although "being jilted" by a girlfriend provided a possible motive for both the 2000 and 2002 crimes, the South Dakota Supreme Court determined that any connection between the two assaults was "simply too remote" and that the 2000 conviction "only tended to prove that because defendant had done it before, he must have done it again." *Lassiter* at ¶23, 178-79. It was specifically determined that admitting the 2000 evidence accomplished just what SDCL 19-12-5 was designed to prevent, meaning showing that the defendant had "a general propensity to commit assaults when rejected by girlfriends." *Lassiter* at ¶24, 179.

Defendant believes the 2002 other acts evidence in the case at bar does not establish motive, intent, or absence of accident for the 2012 charged offense, and its admission constitutes prejudicial error requiring a new trial. The motive exception was not established because there was no direct relationship between the 2002 and 2012 incidents or victims. *Lassiter* at ¶21-24, 177-79 (using other acts evidence to show the motive of reacting badly to being rejected by girlfriends illustrated the need to prevent using the motive label to "smuggle forbidden evidence of propensity to the jury.") The intent exception was not met because Defendant had different states of mind during the 2002 and 2012 incidents and the similar facts were not significant. Defendant's intent in the 2002 incident was to "show-off" to his friends when he was very drunk, and he readily admitted fault; Defendant's sober intent in the 2012 incident was to prevent Ms. Key from continuing to hit his vehicle and to return home, and he consistently denied he intended to hurt Ms. Key physically. The absence of accident exception is not applicable because the 2002 incident is not reasonably related to the offending 2012 conduct.

Although “other acts” jury instruction 48 (SR 321) was read to the jury at the conclusion of the case, Defendant asserts this instruction was insufficient to overcome both the hostility raised toward Defendant and the sympathy garnered for Ms. Key by the 2002 conviction. Defendant believes the jurors were influenced in an illegitimate way by permitting the jury to infer that since Defendant abused a previous girlfriend with a gun in 2002, then Defendant must have abused this girlfriend using a gun in 2012. The 2002 conviction evidence stacked the deck against Defendant and prevented the jury from considering his 2012 charges based exclusively on the facts of the 2012 charged incident.

Defendant seeks a new trial without the unduly prejudicial 2002 aggravated assault conviction evidence for the following reasons:

> In this country, it is a settled and fundamental principle that persons charged with crimes must be tried for what they allegedly did, not for who they are. Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that defendant has engaged in other acts of wrongdoing...he or she is entitled to a fair trial. Constitutional provisions clearly provide that individuals may

> only be convicted for the crimes with which they are charged...Our entire system of justice would deteriorate if we did not jealously protect these constitutional safeguards for all citizens.

(Internal citations omitted) *State v. Moeller*, 1996 SD 60, ¶6, 548 NW2d 465, 468. The 2002 and 2012 offenses were unconnected and the 2002 "other acts" evidence was not relevant to determining if Defendant committed aggravated assault domestic violence against Ms. Key and that he willfully and knowingly discharged a firearm at an occupied vehicle. To any extent the 2002 incident provided probative value concerning the 2012 charged offense, Defendant believes that minimal probative value was substantially outweighed by the danger of unfair prejudice resulting in prejudicial error that requires a new trial without the 2002 evidence.

II.

The evidence was not sufficient to support the jury verdict finding defendant attempted to cause, or knowingly caused, bodily injury to another with a dangerous weapon.

A. Scope of Review.

On sufficiency of the evidence claims, review is limited to whether there is sufficient evidence in the record, if believed by the trier of fact, to sustain a

finding of guilt beyond a reasonable doubt. The most favorable inferences are drawn from the evidence to support the verdict. The appellate court is not to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. No guilty verdict will be set aside if the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustains a reasonable theory of guilt. *State v. Buchholz,* 1999 SD 110, ¶33, 598 NW2d 899 (citing, *State v. Knecht*, 1997 SD 53, ¶22, 563 NW2d 413, 421).

B. <u>The evidence supports finding that Defendant did not intend to injure Ms. Key</u>.

Applying the sufficiency of the evidence standard to the facts of this case, the guilty verdict on the aggravated assault domestic violence is not supported by the evidence. Defendant intended to stop Ms. Key from continuing to collide her vehicle into his vehicle. TT 213:9-10, 12-17; TT 463:17-21; TT 485:20-486:5; TT 488:14-489:7. Defendant intended to convince Ms. Key to return to town instead of the Nystrom residence so he could spend the remainder of the evening with Mr. Larson and Mr. Nystrom. TT 446:22-447:20; TT 450:24-451:11. Defendant provided help to Ms. Key after the gun discharged by talking to her, calming her down, pulling her out of the ditch, promptly responding to her call for help from the convenience store, taking her to his home at her request, and trying, albeit not to Ms. Key's liking, to help her clean and otherwise tend her minor wounds. These actions are not consistent with a person who intended to harm.

The only witnesses to the incident are Defendant and Ms. Key, both of whom indicate Defendant did not intend to injure Ms. Key. His actions following the incident are

consistent with a person who intended no more than verbal harm to Ms. Key, as she intended verbal harm to Defendant and Mr. Larson, and to prevent Ms. Key from further damaging their vehicles. The evidence shows Defendant was angry with Ms. Key for her failure to leave the premises as requested and her persistence in causing damage to both vehicles. The evidence does not show Defendant intended physical harm to Ms. Key. TT 465:19–24; 466:19–468:16; 469:1–8; 469: 11–14; 469:20–22; 475:15–476:10; ST 17:14–18.

CONCLUSION

The trial court abused its discretion and committed prejudicial error by admitting Defendant's nearly ten year old aggravated assault conviction as "other acts" evidence. The evidence was not sufficient to support the jury verdict finding Defendant attempted to cause, or knowingly caused, bodily injury to another with a dangerous weapon. For these reasons, the conviction for aggravated assault domestic violence should be reversed and a new trial granted.

Dated this 28th day of August, 2013.

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CERTIFICATE OF SERVICE

I, Joan Boos Schueller, hereby certify that on the 28th day of August, 2013, I caused a copy of the foregoing **Appellant's Brief** to be served upon

Kelly Marnette
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1302 E Hwy 14 Ste 1
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by depositing a copy of the same in envelopes securely sealed and with first class postage fully prepaid thereon, in the United States mail at the City of Pierre, Hughes County, South Dakota, addressed to the above named addressee at the foregoing address, the same being the last known address of said addressee.

_____
Joan Boos Schueller

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26691

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Presiding Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed May 9, 2013

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OTHER REFERENCES:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26691

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DEREK LEROY BOE,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Derek Boe, will be called "Defendant." Plaintiff and Appellee, State of South Dakota, will be called "State." All other individuals will be referred to by name. The settled record, *State of South Dakota v. Derek Boe*, Hughes County Criminal File No. 12-37, will be referred to as "SR." Items from the settled record are referenced as follows:

Initial Appearance Transcript – January 23, 2012 .....IA

Motion Hearing Transcript – April 25, 2012 ..... MH

Jury Trial Transcript – December 11–14, 2012 .....JT

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All such references will be followed by the appropriate page or exhibit number designation.

JURISDICTIONAL STATEMENT

This matter stems from Defendant's conviction at jury trial for Aggravated Assault Domestic Violence, Class 3 felony, in violation of SDCL 22-18-1.1; Discharge of Firearm at Occupied Structure or Vehicle, Class 3 felony, in violation of SDCL 22-14-20; and Possession of a Firearm by a Prohibited Person, Class 6 felony, in violation of SDCL 22-14-15. SR 363-67; JT 1-608. Defendant admitted a Part II Information for Habitual Offender pursuant to SDCL 22-7-7 on December 14, 2012. JT 602-06. The Honorable John L. Brown, Circuit Court Judge, Sixth Judicial Circuit, signed and filed Judgment of Conviction on April 11, 2013. SR 363-67. Defendant filed Notice of Appeal on May 9, 2013. SR 384-85. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING THE STATE'S MOTION TO INTRODUCE "OTHER ACTS" EVIDENCE UNDER SDCL 19-12-5?

The trial court granted the State's motion to admit other acts evidence under SDCL 19-12-5.

State v. Wright, 1999 S.D. 50, 593 N.W.2d 792

State v. Bowker, 2008 S.D. 61, 754 N.W.2d 56

State v. Dubois, 2008 S.D. 15, 746 N.W.2d 197

SDCL 19-12-5

II

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT OF AGGRAVATED ASSAULT DOMESTIC VIOLENCE?

The trial court denied Defendant's motion for judgment of acquittal and the jury convicted Defendant of Aggravated Assault Domestic Violence.

State v. Barrientos, 444 N.W.2d 374 (S.D. 1989)

State v. Berhanu, 2006 S.D. 94, 724 N.W.2d 181

State v. Motzko, 2006 S.D. 13, 710 N.W.2d 433

SDCL 22-18-1.1(2)

STATEMENT OF THE CASE

This appeal arises from Defendant shooting a firearm into a vehicle occupied by Tabetha Key (hereinafter "Tabetha") on January 21, 2012. JT 1-608. On January 22, 2012, the Defendant was arrested and charged with Aggravated Assault (SDCL 22-18-1.1) and Possession of a Firearm by a Prohibited Person (SDCL 22-14-15). SR 1-2.

Defendant made his initial appearance on January 23, 2012. IA 1-13. The court advised Defendant of his constitutional and statutory rights, the charges of Aggravated Assault and Possession of a Firearm by a Prohibited Person, and the maximum possible penalties for those charges. IA 2-6.

A Hughes County Grand Jury issued a Superseding Indictment charging Defendant with Attempted First Degree Murder (SDCL §§ 22-4-1 and 22-16-4); Aggravated Assault Domestic Violence (SDCL 22-18-1.1); Discharge of Firearm at Occupied Structure or Vehicle (SDCL 22-14-20); and Possession of a Firearm by a Prohibited Person (SDCL 22-14-15) on February 6, 2012. SR 24-25. The State filed a Part II Information alleging Defendant to be a Habitual Offender pursuant to SDCL 22-7-7. SR 26-27. The court arraigned Defendant on the Superseding Indictment and Part II Information on February 7, 2012.[1]

The State filed a Motion to Introduce "Other Acts" Evidence Pursuant to SDCL 19-12-5. SR 46-160. A motion hearing was held on April 25, 2012. MH 1-21. The court granted the State's motion. MH 13.

Jury trial began December 11, 2012. JT 1-608. On December 14, 2012, the jury returned a verdict of guilty to Aggravated Assault Domestic Violence, Discharge of a Firearm at Occupied Structure or Vehicle, and Possession of a Firearm by a Prohibited Person. JT 601; SR 360-61. Defendant was arraigned on the Part II Information for Habitual Offender (SDCL 22-7-7). JT 602-06. Defendant admitted to being a habitual offender. JT 604. On April 2, 2013, the court sentenced Defendant to twenty years in the South Dakota State Penitentiary on the Aggravated Assault Domestic Violence charge; twenty

[1] The transcript of the Arraignment is not part of the record, however the Defendant raises no issues that require this transcript.

years on the Discharge of a Firearm at Occupied Structure or Vehicle count; and five years on the Possession of a Firearm by a Prohibited Person charge. SH 20-21; SR 364-67. These sentences were ordered to run concurrent with each other but consecutive to the sentence imposed in Hughes County file 32C12000401A0. SR 364.

STATEMENT OF FACTS

Defendant and Tabetha had known each other since 2009. JT 204, 438. They began a romantic relationship in September, 2011, and Tabetha and her children moved in with Defendant. JT 204, 438. By December of that same year, severe disagreements arose in the relationship and Tabetha moved out of Defendant's house in January 2012. JT 205. The two continued, however, to spend time together. JT 205-06.

On January 21, 2012, Defendant was at the residence of Brad Nystrom (hereinafter "Nystrom") in rural Hughes County. JT 438-39. Defendant spent the previous night at Nystrom's and the two were working on a tractor. JT 439-40. Tabetha arrived shortly before noon. JT 207, 440. Defendant and Tabetha spent the afternoon together. JT 208, 440. Defendant left around 5:00 p.m. JT 208, 440. Tabetha remained at Nystrom's, cleaning out her Blazer in his shop. JT 181, 208-09. Defendant and Tabetha planned to spend more time together later that evening. JT 491.

Colin Larson (hereinafter "Larson") was a friend of both Defendant and Nystrom. JT 187-88. Larson arrived at Nystrom's residence after being invited to come "hang out with the boys." JT 188, 446-47. When Larson first arrived, Defendant had not yet returned to Nystrom's. JT 188. Larson did not like Tabetha and wanted her to leave. JT 188-89, 196. After getting permission from Nystrom, Larson told Tabetha to leave Nystrom's property. JT 180, 188. Tabetha did not want to leave so she locked herself and her vehicle in Nystrom's shop. JT 189, 197.

Defendant arrived back at Nystrom's residence after dark. JT 209. Defendant went in Nystrom's house and spoke with Larson about the situation with Tabetha. JT 448. Larson again went to the shop to try to get Tabetha to leave. JT 448. When he was unable to get into the shop, Larson obtained a key from Nystrom and opened the side door. JT 448-49. Defendant went out to the shop and found Larson and Tabetha arguing. JT 210, 449. Defendant decided he would physically remove Tabetha from Nystrom's property.

Defendant got into his Suburban and backed it up to the main shop door. JT 449. He obtained a tow chain, hooked it to his Suburban, opened the main shop door, and hooked the chain to Tabetha's vehicle. JT 210, 450. Defendant pulled Tabetha's vehicle from the shop. JT 197, 210-11. After Defendant pulled her Blazer from the shop, Tabetha

struck Defendant's Suburban with her vehicle. JT 211. She then drove to the road and headed north on Nystrom Road. JT 212, 457.

Defendant pulled onto Nystrom Road and followed Tabetha in his Suburban. JT 212, 272. Tabetha realized by going north she would be "in the middle of nowhere" and decided to go south to the highway instead. JT 212. She turned her vehicle around and drove south. JT 212. Defendant was parked across the road, blocking it. JT 212. Tabetha yelled at Defendant to move his vehicle because she wanted to leave. JT 212. Defendant would not move his vehicle. JT 212. Tabetha then hit Defendant's Suburban with her vehicle, hoping to get him to move out of the way. JT 212. Upon impact, Tabetha's vehicle slid into the ditch. JT 212. Defendant's vehicle remained on the road. JT 281, 504.

Tabetha attempted to drive out of the ditch but discovered she was stuck. JT 213. She saw Defendant get out of the car and turned to lock her car door. JT213. Defendant was extremely angry at Tabetha. He grabbed a shotgun from the front seat of his vehicle and approached Tabetha's vehicle on the passenger side. JT 463, 464. Defendant fired the shotgun into the vehicle, shattering the window. JT 384-85, 468. The spray of shot pellets came within inches of Tabetha. JT 385.

Tabetha was injured by flying glass and metal fragments. JT 213, 422-24. She jumped out of the car. JT 213. She had glass in her face. JT 213. Defendant threw the gun down and ran to the other side of

Tabetha's vehicle. JT 227, 468. Tabetha was running in little circles saying "my eyes, my eyes, I can't see." JT 468. Defendant grabbed her face and said, "What an award-winning performance" and shoved her. JT 227. He told her she was okay and asked if she could get to town. JT 470.

Defendant proceeded to hook the chain back up to Tabetha's vehicle and pull her out of the ditch. JT 215, 228. Tabetha drove her vehicle south on Nystrom Road to the highway. JT 275. She drove to Pierre and stopped at a gas station. JT 215, 228-29, 275. She was still having problems seeing and wanted to clean up some of the glass. JT 216. Tabetha called Defendant and asked for help. JT 216. Defendant came to the gas station, picked up Tabetha, and drove her to his house in Ft. Pierre. JT 218, 229.

At Defendant's house Tabetha continued to remove glass from her face and body. JT 218. Defendant yelled at Tabetha and wanted her cell phone. JT 218. Tabetha first texted her mother, asking to be picked up. JT 218, 230. She then gave her phone to Defendant. JT 218. Tabetha's mother picked Tabetha up and they went to her mother's home, where Tabetha spent the rest of the night removing glass from herself with tweezers. JT 218-219. Tabetha only told her mother that friends had been playing with a gun and a window got shot out. JT 219, 235. She did not call law enforcement because she still loved Defendant and did not want him to get in trouble. JT 230.

The next morning Tabetha had a phone conversation with her older brother and explained to him what had happened. JT 219. Tabetha's mother overheard the conversation and insisted that Tabetha call law enforcement. JT 219. Tabetha called law enforcement and reported a gunshot involving Derek Boe. JT 243. She reported that she was in pain. JT 243. She made a second call to law enforcement, stating she did not want to press charges, just wanted someone to know what happened, and she did not want to speak to an officer. JT 220, 243.

Hughes County Deputy Sheriff Bill Gallagher responded to the call and met with Tabetha at her mother's house. JT 243. Deputy Gallagher observed Tabetha's injuries and took pictures. JT 243-45, EX 25, 26. He believed she needed medical attention. JT 245. Deputy Gallagher made arrangement for her to receive medical attention and transported Tabetha to the emergency room. JT 245-46. He also arranged for Tabetha's vehicle to be taken into evidence. JT 249. Deputy Gallagher asked for assistance from the South Dakota Division of Criminal Investigation (DCI). JT 245, 250.

Tabetha was seen by emergency room physician Joseph Villa. JT 421-22. Dr. Villa observed multiple injuries to Tabetha, including glass type shard injuries to her face, upper chest, shoulder, arms and thighs. JT 422. Several x-rays were taken. JT 422. Dr. Villa removed two foreign objects from Tabetha's temple and forehead. JT 423. He

gave those objects to law enforcement. JT 265, 423. Those items were later examined and appeared to be lead. JT 382-83.

DCI Agent Chad Mosteller met with Tabetha at the emergency room. JT 264. He took photos of her injuries. JT 266; EX 31, 32, 33. Agent Mosteller interviewed Tabetha. JT 264. Based upon the information obtained during that interview, Agent Mosteller decided to go to the Nystrom residence to look at the scene and speak with Nystrom. JT 251, 267. DCI Supervisory Special Agent Scott Rechtenbaugh, Agent Mosteller, and Deputy Gallagher went to the Nystrom residence. JT 251, 267, 323.

Upon arrival at the Nystrom residence, law enforcement unexpectedly discovered Defendant there, along with Nystrom, Anna Jensen, and two of Defendant's children. JT 251, 267. Deputy Gallagher spoke with Nystrom, while Agents Mosteller and Rechtenbaugh interviewed Defendant. JT 251, 267. Agent Mosteller began by asking Defendant if he knew why law enforcement was there. JT 268. Defendant claimed he did not know. JT 268. After being advised of his rights, Defendant stated it was because Tabetha's vehicle was banged up from striking his Suburban. JT 268. Defendant went on to describe what had occurred on January 21, 2012. JT 270-82.

During the interview, Defendant described the verbal altercation between Defendant and Tabetha and her refusal to leave Nystrom's. JT 271. Defendant pulled his Suburban up to Tabetha's vehicle to drag

it out of the shop with a chain. JT 271. After Tabetha's vehicle was out of the shop, she backed into him. JT 272. He was not hit very hard. JT 273. Defendant was not injured. JT 295, 464, 490. Tabetha then drove out to the road and he followed her. JT 272.

Defendant described pulling his Suburban onto the road. JT 273. Tabetha ran her vehicle into his Suburban, again not very hard, nor did she cause any damage. JT 273-74. Tabetha's vehicle then got stuck in the ditch. JT 274. Defendant backed his Suburban up to the side of Tabetha's vehicle. JT 278. He got out of his vehicle and lowered the tailgate to grab the chain to pull her out. JT 274-75. Defendant claimed the gun came out of the back of his vehicle with the chain and discharged midair, shooting into Tabetha's vehicle and breaking the window. JT 274-75. Defendant gave a detailed description of the positioning of the vehicles, where he was standing, and why he knew her vehicle was stuck in the ditch. JT 279-81. Defendant stated he had never been so mad and "pissed off" at a woman in his life. JT 276, 501.

Agent Mosteller asked what happened to the gun. JT 276. Defendant said it was in the shop on the Nystrom property and gave Agent Mosteller permission to go retrieve the gun. JT 277. Agent Mosteller also received permission from Nystrom to enter the shop to get the gun. JT 183, 282. The agent found the gun inside the door to the shop. JT 283. The shell that was in the gun was the same shell that

had discharged into Tabetha's vehicle. JT 284. The gun was secured as evidence. JT 283, 332.

Agent Mosteller spoke with Defendant about the gun and how it operates. JT 278. Defendant was familiar with the gun and had shot it several times before. JT 278, 288, 442. Defendant had given the gun to his daughter for her fourteenth birthday. JT 407. Because of his prior felony[2], Defendant was unable to purchase the gun himself. JT 441. Therefore, Defendant had a friend purchase the gun in the friend's name but with Defendant's money. JT 441-42. Defendant taught his daughter how to shoot the gun. JT 408. Defendant stated "You can't just pull the trigger. You have to cock it back and lock it." JT 278.

Following Defendant's interview, law enforcement decided to arrest Defendant. JT 251, 288. He was arrested for Possession of a Firearm by a Prohibited Person. JT 480. Deputy Gallagher transported Defendant to the Hughes County Jail. JT 252, 288. During the transport, Defendant admitted he had a prior felony conviction. JT 252. Agent Mosteller remained at the Nystrom residence securing the Suburban as evidence. JT 288. He and Agent Rechtenbaugh then went to the jail to conduct a second interview with Defendant. JT 289.

Defendant's second interview began with Agent Mosteller explaining to Defendant that there were conflicting stories. JT 290. Defendant told a different story to law enforcement than he told to others

[2] The details of Defendant's prior felony will be discussed under Argument I.

at Nystrom's house. JT 290. Defendant changed his story, now giving a second version of what occurred on the road. JT 290. After Tabetha's vehicle became stuck in the ditch, Defendant got out of his vehicle with the gun and went up to her vehicle. JT 291. He wanted her to know how serious he was about her leaving. JT 291. He claimed his intent was just to break her window with the gun. JT 293. He tapped on the window and the gun accidentally went off. JT 291. He stated his finger was not on the trigger. JT 292-93.

Mateo Serfontein is a firearm examiner employed by the DCI forensic lab. JT 363-65. Serfontein has a bachelor's degree in science and has completed a three-year in-service training program in all areas of firearm examination, including crime scene reconstruction, firearm mechanism examinations, tool mark, and serial number restoration. JT 364-65. During his training he examined more than one thousand firearms. JT 365-66. He has applied for membership in the Association of Firearms and Tool Mark Examiners. JT 369.

Serfontein examined the gun Defendant used on January 21, 2012. JT 374. The gun was a 20-gauge single shot firearm. JT 375. Only one shot can be fired before the gun must be reloaded. JT 375. The gun was fully functional. JT 379. There was no indication the gun had malfunctioned when fired on January 21, 2012. JT 379. There is an internal safety mechanism called a transfer bar, which assures the firearm cannot be discharged without the trigger being pulled. JT 375.

Serfontein tested the gun by placing an empty shell in the chamber, cocking the gun and knocking the gun on different objects to assure the gun would not fire without pulling the trigger. JT 375-76.

There are several steps necessary to fire this gun. JT 375. First, one must insert an unfired cartridge into the chamber. JT 375. The gun must then be locked. JT 375. The hammer must be pulled back. JT 375. The trigger must be pulled. JT 375. When the hammer is pulled back, it stays in that position until the trigger is pulled. JT 287. It is visually obvious then the hammer is back. JT 286. The gun cannot fire unless the trigger is pulled. JT 375.

Serfontein is also trained in crime scene investigation. JT 367. On January 24, 2012, he examined Tabetha's vehicle. JT 370. Measurements and photos were taken of the vehicle. JT 345, 370-71; EX 57-66. The vehicle was searched. JT 345, 371. A plastic wad was collected from the front floorboard. JT 371. A piece of the ceiling cloth was removed from the inside roof of the car near where a driver would sit. JT 373-74; EX 3. Serfontein determined the gun was fired from outside the Blazer through the closed passenger side window. JT 371-72. He was unable to determine exactly how far the barrel of the gun was from the vehicle, but it was relatively close. JT 373. The shot came within inches of Tabetha as she sat in the driver's seat. JT 385; EX 60.

ARGUMENT

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S MOTION TO INTRODUCE "OTHER ACTS" EVIDENCE PURSUANT TO SDCL 19-12-5.

A. *Standard of Review.*

It is well established that the trial court's rulings on evidentiary matters are presumed to be correct. *State v. Dubois*, 2008 S.D. 15, ¶ 19, 746 N.W.2d 197, 204. This Court reviews the decision to admit other acts evidence under an abuse of discretion standard. *Id.* (citing *State v. Janklow*, 2005 S.D. 25, ¶ 39, 693 N.W.2d 685, 698). "An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *State v. Bowker*, 2008 S.D. 61, ¶ 38, 754 N.W.2d 56, 68; *State v. Cottier*, 2008 S.D. 79, ¶ 25, 755 N.W.2d 120, 131. The defendant bears the burden of establishing error and then showing that it was prejudicial. *Dubois*, 2008 S.D. 15, ¶ 19, 746 N.W.2d at 204. The test on review is not whether this Court would make a similar ruling, but rather whether a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion. *State v. Chamley*, 1997 S.D. 107, ¶ 7, 568 N.W.2d 607, 611.

B. *Other Act Evidence (2002 Aggravated Assault).*

Jenny Ponca (hereinafter "Jenny") is the mother of four of Defendant's children. JT 400. In 2002, Jenny and Defendant had lived

together, but never married. JT 401. On September 1, 2002, Jenny and Defendant were both present at Defendant's mother's home in Pierre for a social gathering. JT 401-02. Other family and friends were also present. JT 402. Alcohol was being consumed. JT 402.

Defendant got angry with Jenny and began a verbal argument with her. JT 402-03. Defendant had a handgun. JT 403. When Jenny attempted to leave, Defendant pointed the gun at her. JT 484, 506-07. He then hit her in the head twice with the gun. JT 403, 484; EX 72. Jenny went to the emergency room where she was diagnosed with a concussion. JT 403.

Defendant pleaded guilty to Aggravated Assault Domestic Violence as a result of his assault of Jenny. JT 404. Defendant received a sentence of nine years in the South Dakota State Penitentiary. JT 404; EX 16.

C. *SDCL 19-12-5.*

The State sought to introduce evidence of the 2002 aggravated assault under SDCL 19-12-5. SDCL 19-12-5 (Rule 404(b))[3] provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] SDCL 19-12-5 (Rule 404(b)) was adopted verbatim from the Federal Rules of Evidence. "Because the possible uses for other act evidence are limitless, Rule 404(b) only suggests a nonexclusive list of purposes, other than character, for which they may be admissible" *State v. Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d 792, 798.

The State asserted the 2002 aggravated assault was admissible to prove Defendant's intent; motive; common scheme and plan; continuing course of criminal conduct; and absence of mistake or accident. SR 156. The trial court found the other act evidence relevant to show Defendant's intent and motive. MH 13; SR 372-73. The trial court also found the evidence relevant to negate a defense of mistake or accident should Defendant make such a claim.[4] MH 13; SR 372-73.

In *State v. Wright*, 1999 S.D. 50, ¶ 13, 593 N.W.2d 792, 797, this Court reexamined the principles applicable to "other acts evidence" under SDCL 19-12-5. Previously, the Court had stressed that "[g]enerally, evidence of crimes or acts other than the ones with which the defendant is charged are *inadmissible*, unless an exception applies." *Wright,* 1999 S.D. 50 at ¶ 13, 593 N.W.2d at 797-98 (emphasis added) (quoting *State v. Loftus,* 1997 S.D. 94, ¶ 17, 566 N.W.2d 825, 828).

> This view, that the rule is exclusionary, seems to have persisted despite the adoption of the Federal Rules of Evidence in 1978. [However, Rule 404(b)] is not a rule of exclusion. It is a rule of *inclusion* [and] no "preliminary showing is necessary before such evidence may be introduced for a proper purpose."

Id. at 798 (emphasis added) (quoting *Huddleston v. United States,* 485 U.S. 681, 687-88 (1988)). *See also* John W. Larson, *South Dakota Evidence,* § 404.2(1) (1991) ("It must be remembered that FRE 404(b) is an inclusionary rule . . . not an exclusionary rule"). "It is anticipated

[4] Defendant claimed during his opening statement that this was an "accidental discharge of the shotgun" and an "accident." JT 175-76.

that with respect to permissible uses of such evidence, the trial judge may exclude [similar acts] *only* on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time." Fed. R. Evid. 404(b) Advisory Committee's Note (emphasis added). This Court adopted the view that evidence offered under SDCL 19-12-5 is generally admissible. *Wright,* 1999 S.D. 50 at ¶ 13, 593 N.W.2d at 798.

Prior to the admission of other acts evidence, the trial court is required to conduct a two-step balancing procedure on the record. *State v. Owen*, 2007 S.D. 27, ¶ 14, 729 N.W.2d 356, 362-63. The offered evidence must be: (1) relevant to a material issue in the case; and (2) the probative value of this evidence must substantially outweigh its prejudicial effect. *Dubois*, 2008 S.D. 15, ¶ 20, 745 N.W.2d at 205.

D. *The Other Acts Evidence Is Relevant to Prove Defendant's Intent and Motive, and to Negate His Defense of Mistake or Accident.*

The State has the burden of showing the relevance of other crimes, wrongs, or acts. *See* SDCL 19-12-1 (Rule 401), SDCL 19-12-2 (Rule 402), and SDCL 19-12-5 (Rule 404(b)). "Relevance under § 404(b) is established 'only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.' Furthermore, the relevance of § 404(b) evidence is determined by a lower standard of proof than that required for a conviction." *Wright,* 1999 S.D. 50, ¶ 14, 593 N.W.2d at 798 (quoting *Huddleston,* 485 U.S. at 689). Here, Defendant

admitted he committed the other act, both at his arraignment in 2002 (EX 72) and at trial (JT 506-08).

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Bowker*, 2008 S.D. 61, ¶ 39, 754 N.W.2d at 68. This Court has said several times that "the law favors admitting relevant evidence no matter how slight its probative value." *Id.*; *State v. Fool Bull*, 2008 S.D. 11, ¶ 16, 745 N.W.2d 380, 387; *State v. Bunger*, 2001 S.D. 116, ¶ 11, 633 N.W.2d 606, 609. "It is sufficient that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence." *Id.*; *Bowker*, 2008 S.D. 61, ¶ 39, 754 N.W.2d at 68.

When considering whether a prior act is relevant to show intent, the Court should consider the similarity between the prior act and the crimes for which a defendant is now charged. *Chamley*, 1997 S.D. 107, ¶ 12, 568 N.W.2d at 612. When a court determines similarity, evidence of prior acts need not be identical, but only of "similar involvement reasonably related to the offending conduct." *State v. Steichen*, 1998 S.D. 126, ¶ 30, 588 N.W.2d 870, 877; *Loftus*, 1997 S.D. 94, ¶ 25, 566 N.W.2d at 830; *Chamley*, 1997 S.D. 107, ¶ 15, 568 N.W.2d at 613. The focus is on two important factors: (1) similar victims and (2) similar crimes. *State v. Moeller*, 1996 S.D. 60, ¶ 28, 548 N.W.2d 465, 475. The

degree of similarity required for intent and absence of mistake or accident are on the lower end of the spectrum. *State v. Armstrong*, 2010 S.D. 94, ¶ 34, 793 N.W.2d 6, 15 (Zinter, J., concurring).

Both Tabetha and Jenny were women with whom Defendant had an intimate relationship. Defendant had lived with Tabetha and was the father of her child, although they never married. JT 204. Defendant also had children with and had lived with Jenny, although they never married. JT 401. The victims are similar.

The crimes Defendant perpetrated on the two victims are also similar. Both occurred when Defendant was angry. JT 501, 507. Both involved use of a firearm. JT 403, 464. Both resulted in injury to the victim. JT 403, 476. The trial court found the two crimes to be "strikingly similar." MH 13; SR 373.

Defendant relies upon two cases where this Court reversed convictions based upon a trial court's erroneous decision to admit other acts evidence. DB 18-19. The *Chamley* opinion was issued prior to this Court's recognition that Rule 404(b) is a rule of inclusion. *See Wright*, 1999 S.D. 50, 593 N.W.2d 792. *Chamley* involved other acts which were not factually similar and occurred between twelve and twenty years earlier. *Chamley*, 1997 S.D. 107, ¶ 16, 568 N.W.2d at 614. Here, the 2002 aggravated assault and the charges in the current case are similar. Also, less than ten years elapsed between the crimes, during which

Defendant was incarcerated for a significant period of time.[5] This case is distinguishable from *Chamley*.

State v. Lassiter, 2005 S.D. 8, 692 N.W.2d 171, involved first degree burglary and aggravated assault charges. The trial court allowed evidence of a previous aggravated assault conviction to show defendant's identity and motive. *Lassiter* at ¶ 9, 692 N.W.2d at 174. The defendant denied involvement and offered an alibi. *Id.* at ¶ 1, 692 N.W.2d at 173. This Court reversed, finding introduction of the previous assault was not relevant to prove identity because the acts must be unusual or distinctive. *Id.* at ¶ 16, 692 N.W.2d at 176. The acts in *Lassiter* were not unusual or distinctive and did not show the defendant's identity or motive. *Id.* at ¶ 18, 692 N.W.2d at 177.

Lassiter is distinguishable from Defendant's case. First, identity was not an issue and the other act evidence was admissible for purposes other than identity. Indeed, Defendant did not deny he was the person who shot the gun, he only claimed it discharged into the vehicle by accident. The other act evidence was relevant to show Defendant's state of mind. The other act evidence did not have to be unusual or distinctive, just similar.

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[5] Defendant was sentenced to serve nine years in the South Dakota State Penitentiary, with credit for forty-two days, on November 25, 2002. EX 16. His release date is not reflected in the record, however parole eligibility for a violent class 3 first felony is fifty percent. *See* SDCL 24-15A-32.

The trial court found the other act evidence relevant to negate the claimed defense of mistake or accident. MH 13; SR 373. Defendant admitted the gun discharged into Tabetha's vehicle, but he claimed it was an accident. JT 169, 481. Once Defendant claimed this was an accident, the State was entitled to present any evidence tending to show Defendant's intent to harm Tabetha and that the discharge of the gun was no accident. Evidence of Defendant's previous use of a firearm to injure someone with whom he had a domestic relationship was relevant.

E. *Any Prejudicial Effect of the 2002 Aggravated Assault Evidence Is Outweighed by Its Probative Value.*

After determining the relevancy of the "other acts" evidence, the court must balance the probative value of the evidence against the potential for unfair prejudice. Once evidence is found relevant, "the balance tips emphatically in favor of admission unless the dangers set out in Rule 403[6] 'substantially' outweigh probative value." *Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d at 799. This Court has stated:

> To exclude relevant evidence because it might also raise the forbidden character inference ignores the reality that "[a]lmost *any* bad act evidence simultaneously condemns by besmirching character and by showing one or more of 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,' not to mention the 'other purposes' of which this list is meant to be illustrative."

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[6] SDCL 19-12-3 (Rule 403) provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id. at ¶ 15, 593 N.W.2d at 799 (emphasis added). *See also State v. Holland,* 346 N.W.2d 302, 309 (S.D. 1984) ("Damage to the defendant's position is no basis for exclusion; the harm must come not from prejudice, but from 'unfair' prejudice"); *United States v. Rivera,* 83 F.3d 542, 547 (1st Cir. 1996) ("[u]nless trials are to be conducted on scenarios, on unreal facts tailored and sanitized..., the application of Rule 403 must be cautious and sparing"); *State v. Goodroad,* 442 N.W.2d 246, 250 (S.D. 1989) ("evidence is not prejudicial merely because its legitimate probative force damages the defendant's case").

Prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means, resulting in one party having an unfair advantage. Evidence is not prejudicial merely because its legitimate probative force damages the defendant's case. *State v. Smith*, 1999 S.D. 83, ¶ 19, 599 N.W.2d 344, 349-50. "Prejudice does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Iron Shell*, 336 N.W.2d 372, 375 (S.D. 1983). Even though the admission of other acts evidence "will usually result in some prejudice," it will not be admitted only if that prejudice is unfair. *State v. Titus,* 426 N.W.2d 578, 580 (S.D. 1988).

Even if Defendant could show that the trial court erred in admitting such evidence, he must also be able to establish that the error was prejudicial to his case. *State v. Cottier*, 2008 S.D. 79, ¶ 25, 755 N.W.2d at 131; *Dubois*, 2008 S.D. 15, ¶ 19, 746 N.W.2d at 204. Error is said to be prejudicial when "in all probability…it produced some effect upon the final result and affected rights of the party assigning it." *Fool Bull*, 2008 S.D. 11, ¶ 10, 745 N.W.2d at 385; *State v. Reay*, 2009 S.D. 10, ¶ 31, 762 N.W.2d 356, 366. As noted in *Dubois*, 2008 S.D. 15, ¶ 19, 746 N.W.2d at 204, prejudicial error is error "without which the jury would have probably returned a different verdict." *State v. Guthmiller*, 2003 S.D. 83, ¶ 28, 667 N.W.2d 295, 305.

Defendant presents little to support a claim that the jury would have returned a different verdict without the 2002 aggravated assault evidence. Defendant cites to occurrences during jury selection. DB 16-17. First, he claims "the room went dead silent" after his attorney asked during jury selection, "What if I told you he had a firearm in that case, a pistol? How does that make you feel?" JT 44. The question was not posed to any particular prospective juror and no prospective juror answered his question. JT 44. When the attorney began directing the question to particular jurors, he received responses. JT 44-52.

Second, one prospective juror stated she would be unable to follow the judge's instructions about how to consider the 2002 conviction. JT 130-31. Defendant challenged for cause. JT 130. The State did not

object and the prospective juror was excused. JT 131. Defendant now claims the impact of the 2002 conviction on the excused juror was "likely experienced by other jurors, impermissibly leading them to conclude the old conviction combined with the new charged offense shows the Defendant has a propensity to harm women using a gun...." DB 17. But his attorney proceeded to ask several of the jurors individually and all the jurors as a whole whether they felt the same way. JT 132-33. No one else indicated he or she would be unable to follow the judge's instruction to only consider the 2002 conviction for the allowed purposes.

In addition, citing to such random occurrences proves nothing. There is nothing in the record to show that the verdict likely would have been different without this evidence.

Finally, the jury was instructed on other act evidence and how it should be considered. Jury Instruction No. 48 advised the jury:

> Evidence has been introduced that the defendant committed an offense other than that which is now charged. Although evidence of this nature is allowed, it may be used only to show motive, intent, and absence of mistake or accident. You may not consider it as tending to show in any other respect the defendant's guilt of the offence with which the defendant is charged. Before determining whether to consider this evidence, you must first determine if a preponderance of the evidence established that the defendant committed the other act. You are not required to consider this evidence and whether you do is a matter within your exclusive province.

SR 321. Defendant has not shown that the jury was unable to follow the court's instructions. The Court has repeatedly said that "juries are

presumed to follow the instructions of the trial court." *State v. Jemison*, 1999 S.D. 29, ¶ 10, 590 N.W.2d 897, 899 (Amundson, J., dissenting); *State v. Eagle Star*, 1996 S.D. 143, ¶ 22, 558 N.W.2d 70, 75; *Boykin v. Leapley*, 471 N.W.2d 165, 169 (S.D. 1991). In light of the instruction given to the jury, Defendant has failed to show that the trial court abused its discretion in admitting evidence of the 2002 aggravated assault. *State v. Lowther*, 434 N.W.2d 747, 753 (S.D. 1989); *State v. Anderson*, 2000 S.D. 45, ¶ 106, 608 N.W.2d 644, 672; *State v. White*, 538 N.W.2d 237, 245 (S.D. 1995).

II

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT OF AGGRAVATED ASSAULT DOMESTIC VIOLENCE.

A. *Standard of Review.*

In evaluating the sufficiency of the evidence, the issue is whether there is evidence in the record which, "if believed by the jury is sufficient to sustain a finding of guilt beyond a reasonable doubt." *State v. Motzko*, 2006 S.D. 13, ¶ 6, 710 N.W.2d 433, 436-37 (citing *State v. Pasek*, 2004 S.D. 132, ¶ 7, 691 N.W.2d 301, 303). This Court accepts the evidence, and the most favorable inferences fairly drawn therefrom, which will support the verdict. *Motzko,* 2006 S.D. 13, ¶ 6, 710 N.W.2d at 436-37. This Court does not resolve conflicts in the evidence, or pass on the credibility of the witnesses, or weigh the evidence. *Id.* "No guilty verdict will be set aside if the evidence, including circumstantial evidence and

reasonable inferences drawn therefrom, sustains a reasonable theory of guilt." *State v. Shaw*, 2005 S.D. 105, ¶ 44, 705 N.W.2d 620, 632-33; *State v. Moran*, 2003 S.D. 14, ¶ 39, 657 N.W.2d 319, 328-29.

B. *Sufficiency of the Evidence.*

Defendant claims there is insufficient evidence to support the jury verdict of Aggravated Assault Domestic Violence because Defendant's actions after the gun discharged were not consistent with someone who wanted to harm Tabetha. DB 23. Defendant ignores his actions prior to harming Tabetha and the elements of the aggravated assault statute.

Defendant was convicted of Aggravated Assault Domestic Violence[7] (SDCL 22-18-1.1(2)), which provides:

> Any person who attempts to cause, or knowingly causes, bodily injury to another with a dangerous weapon is guilty of aggravated assault.

The State must prove beyond a reasonable doubt that Defendant attempted to cause, or knowingly caused, bodily injury to Tabetha, with a dangerous weapon. "Knowingly" in this statute denotes "acts or circumstances where the result is likely to occur." *State v. Berhanu*, 2006 S.D. 94, ¶ 18, 724 N.W.2d 181, 186.

Aggravated assault by "knowingly" causing bodily injury to another is a general intent crime, not a specific intent crime. *State v. Barrientos*, 444 N.W.2d 374, 376 (S.D. 1989).

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[7] Defendant does not challenge that he and Tabetha were involved in a domestic relationship. *See* Jury Instruction #30. SR 339.

> Specific intent has been defined as 'meaning some intent in addition to the intent to do the general 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.

Id. at 376 (citations omitted). The trial court instructed the jury that Aggravated Assault Domestic Violence is a general intent crime. *See* Jury Instruction No. 20. SR 349. Defendant did not object to this instruction. JT 540.

Defendant claims he did not intend to harm Tabetha.[8] DB 23. The word "intent" does not appear in SDCL 22-18-1.1(2). To convict one of "knowingly" committing this offense, the State need not prove that the defendant was certain that the prohibited result would occur. *Barrientos*, 444 N.W.2d at 375. "All that is necessary is proof that the defendant was cognizant of certain facts which should have caused him to believe that the prohibited result would occur." *Id.* Intent to cause bodily injury is not an element of aggravated assault by "knowingly" causing bodily injury to another. *Id.* at 376.

A review of the evidence shows that Defendant fired a shotgun into the vehicle occupied by Tabetha and she was injured. Defendant admitted the firearm discharged into the vehicle. JT 465-68. The jury found beyond a reasonable doubt that Defendant knowingly discharged

[8] Defendant also makes reference to Tabetha's statement at the sentencing hearing where she states she doesn't believe Defendant intended to hurt her. SH 17. This speculative statement was not part of the record before the jury and should not be considered when determining the sufficiency of evidence.

the firearm when it convicted Defendant of Discharge of a Firearm at Occupied Structure or Vehicle. *See* Jury Instruction No. 45 and Verdict Form. SR 324, 360. Defendant has not challenged the sufficiency of the evidence for that verdict. Defendant admitted the firearm is a dangerous weapon. JT 521. Defendant admitted Tabetha was injured when he admitted helping remove some pieces of glass from her skin. JT 476. The only thing Defendant did not admit to was that he intended to harm Tabetha, which is not an element of the crime. There was sufficient evidence presented to show that Defendant, in shooting the firearm into the vehicle, should have known Tabetha would be injured. The evidence the State presented and reasonable inferences drawn therefrom support the verdict for Aggravated Assault Domestic Violence. *State v. Berhanu*, 2006 S.D. 94, ¶ 16, 724 N.W.2d 181, 185.

CONCLUSION

The State respectfully requests that Defendant's convictions and sentences be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 6,793 words.

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

Dated this _____ day of October, 2013.

_____
Kelly Marnette
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of October, 2013, two true and correct copies of Appellee's Brief in the matter of *State of South Dakota v. Derek Boe* were served by United States mail, first class, postage prepaid, upon Brad A. Schreiber and Joan Boos Schueller, The Schreiber Law Firm, 740 East Sioux Avenue, Suite 110, Pierre, South Dakota 57501.

_____
Kelly Marnette
Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Appeal No. 26691

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

DEREK LEROY BOE,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN BROWN
Presiding Circuit Court Judge

APPELLANT'S REPLY BRIEF

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STATE STATUTES

I. PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, will be referred to as "State." Defendant and Appellant, Derek Boe, will be referred to as "Defendant." References to transcripts and records will be referred to as follows:

Settled Record .....SR

Motions Hearing Transcript..... MT

Trial Transcript..... TT

Sentencing Transcript..... ST

Trial Exhibit..... TE

State's Appellate Brief..... SB

Each citation will be followed by the appropriate page number(s).

II. ARGUMENT.

The trial court abused its discretion and committed prejudicial error by admitting Defendant's nearly ten year old aggravated assault conviction because that evidence was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice.

State admits it carries the burden of showing the relevance of the 2002 conviction in relation to the 2012 incident. SB 18; SDCL §§ 19-12-1, 19-12-2, 19-12-5; State v. Wright, 1999 SD 50, ¶14, 593 N.W.2d 792, 798. Defendant submits that State has not met its burden. Furthermore,

even if the 2002 conviction is determined relevant, which Defendant does not concede, Defendant believes he has met the burden of showing the probative value of the 2002 conviction is substantially outweighed by the danger of unfair prejudice. State v. Wright, 1999 SD 50, ¶26, 593 N.W.2d 792, 803 (On appeal, the burden shifts to the defendant to establish prejudicial error); SDCL 19-12-3.

A. The 2002 conviction was not relevant to a material fact regarding the 2012 incident.

The 2002 conviction is not relevant to the 2012 incident because it does not make the existence of any material fact more or less probable regarding the 2012 incident. SDCL 19-12-1. State sought to admit the 2002 conviction using the deplored "smorgasbord" approach by listing intent, motive, common scheme or plan, continuing course of conduct, and absence of mistake or accident as possible uses for admitting the 2002 conviction in hopes that at least one of the grounds would be found applicable. SB 17; SR 156; State v. Steichen, 1998 SD 126, ¶53, 588 N.W.2d 870, 879 (Amundson, J., dissenting). State claims the 2002 conviction was "relevant to show Defendant's state of mind" at the time of the 2012 incident based on his "previous use of a firearm to injure someone with whom he had a domestic relationship." SB at 21, 22.

This Court has cautioned prosecutors against abusing the use of SDCL 19-12-5 and advised trial courts to monitor "scrupulously" any introduction of other acts evidence to ensure it is used only for the limited purpose of its admittance. State v. Loftus, 1997 SD 94, ¶30, 566 N.W.2d 825, 832. In the case at bar, the 2002 conviction was admitted to show motive, intent, and to negate a defense of accident. MT 12:18-13:16; SR 217; TT 400:12-406:2.

Defendant believes there was no legally supportable and legitimate reason to introduce the 2002 conviction. This evidence appears to have been used for the wrongful purpose of showing propensity, specifically that since Defendant harmed a girlfriend in 2002 using an unloaded handgun, he must have, about ten years later, harmed another girlfriend using a loaded shotgun. Introducing this type of propensity or character evidence is exactly what SDCL 19-12-5 was designed to prevent. State v. Lassiter, 2005 SD 8, ¶23-24, 692 N.W.2d 171, 178-79.

State cites several distinguishable and unpersuasive cases to support its position that the 2002 conviction was relevant to the 2012 incident for purposes of motive, intent, and absence of accident. SB 18-19; MT 12:18-13:16; SR 217; State v. Wright, 1999 SD 50, 593 N.W.2d 792; State v. Bowker, 2008 SD 61, 754 N.W.2d 56; State v. Fool Bull,

2008 SD 11, 745 N.W.2d 380; State v. Bunger, 2001 SD 116, 633 N.W.2d 606; and State v. Steichen, 1998 SD 126, 588 N.W.2d 870.

In Wright, a 3-2 split decision on a parental child abuse case, two prior acts of child abuse were admitted for the relevant purposes of proof of design or plan, and absence of mistake or accident. Wright, at ¶19, ¶21, ¶23, ¶26, 801-03. Two prior incidents of parental corporal punishment were determined relevant to establishing whether the parent's actions constituted non-criminal discipline or felony child abuse. Wright at ¶23, 802. Parental discipline of a child is not similar to this case involving all adults, and two Justices strongly dissented regarding admitting the prior child abuse acts as evidence:

> These prior bad acts were used to poison the proceedings and the jury, from the beginning, that Mr. Wright was a bad man, who did it before and who did it again. I am not saying Mr. Wright was right, but the system was wrong to stack the deck against him and pretend to give him a "fair trial." A fair and impartial jury should have determined whether he committed the acts as charged and whether there was sufficient justification for his conduct. It did not, but it was not the jury's fault. They were poisoned from the beginning and Mr. Wright was wronged by the system. He never had a chance to get a fair trial in this case. Therefore, we should reverse and remand for a fair trial.

Wright at ¶43-45, 805 (Sabers, J., dissenting).

Defendant's romantic relationships with Ms. Ponca in 2002

and Ms. Key in 2012 were voluntary relationships involving adults, and it is inappropriate to consider Ms. Ponca or Ms. Key similar to the Wright child victims of parental abuse.

In Bowker, a possession of controlled substances case, the trial court denied defendant's motion to suppress a "sizable" phone list entitled "[defendant's]Pimp Lists." State v. Bowker, 2008 SD 61, ¶37, ¶40, 754 N.W.2d 56, 68-69. The evidence was determined relevant because it contained vehicle financing statements, cell phone records, and "owe sheets" evidencing possession of property and drug activity. Bowker at ¶40, 68-69. There were no documentary exhibits or other similarities in analysis between the Bowker case and Defendant's case, making this case of no real assistance in deciding the issue at bar.

In Fool Bull, a rape case, the trial court admitted evidence that the victim, who did not have Chlamydia, a sexually transmitted infection, prior to the rape, had Chlamydia after the rape. State v. Fool Bull, 2008 SD 11, ¶12-13, 745 N.W.2d 380, 385. Although defense counsel did not preserve a relevancy objection for appeal, the Court determined the evidence relevant because penetration was a key element of the rape charge and State was not bound to stipulate to the fact of penetration despite the mutual-

consent defense. Fool Bull, ¶15, 386. In the case at bar, defense counsel not only preserved the relevancy objection for appeal, but the facts of this case and Fool Bull are not similar. MT 7:14-10:14; MT 12:6-17; SR 375-77, 388-90; TT 404:18-19; TT 429:3-430:4; TT 431:13-432:16. The State was allowed to admit the Chlamydia evidence since it was determined relevant to prove defendant's sexual penetration, and none of that analysis is instructive to the case at bar.

In Bunger, a multiple-count sexual contact with children case on intermediate appeal by the State, the dispute focused on the admissibility of the minor child victim's bra found in the defendant's bedroom dresser drawer. State v. Bunger, 2001 SD 116, ¶6, 633 N.W.2d 606, 607. The trial court suppressed the bra, finding that the bra being in defendant's possession was not relevant, and State appealed. Id. This Court, in another 3-2 split decision, found the bra was relevant because it connected the defendant to the child and its suggested erotic attraction to the child is "highly relevant" in child sexual contact cases. Bunger at ¶12, 609-10. Another strong dissent from two Justices followed:

> [T]his majority opinion stands for the proposition that if one is charged with a sex crime, any and all evidence, no matter how

> remotely related to sex, such evidence can be used by the State in prosecuting that person... The rules of evidence ... serve [] to ensure that the defendant is tried on the merits of the crime as charged and to prevent a conviction based on evidence of other crimes or wrongs. [These rules] reflect [ ] long-established notions of fair play and due process, which forbid judging a person on the basis of innuendoes arising from conduct which is irrelevant to the charges for which he or she is presently standing trial. Basing its decision with these rules in mind, the trial court held that Jane Doe VI's bra, found in Bunger's bedroom, was not relevant to the charges against Bunger ... Because the court ruled the evidence was not relevant, and therefore inadmissible, this [Rule 403] balancing test was not required.

(Internal citations omitted) Bunger at ¶24-26, 611-12 (Amundson, J., dissenting). Defendant's 2002 conviction, dissimilar to Bunger, was not needed to establish a connection between Defendant and Ms. Key or to establish the intent element necessary in a child sex abuse case such as Bunger. Ms. Key was fully capable and available to testify as to what occurred between her and Defendant during the 2012 incident, which is a very different situation than cases involving child sexual abuse victims, making the Bunger case non-persuasive.

In Steichen, a ten-count rape and sexual contact case involving child victims, another 3-2 split decision, the Court found prior acts admissible based on motive and other grounds, but not for lack of mistake or accident. State v.

Steichen, 1998 SD 126, ¶20, ¶21, ¶26, 588 N.W.2d 870, 875-76. Due to a lack of forensic evidence to establish defendant's intent to commit rape, prior acts of child sex abuse were admitted to establish defendant's motive. Steichen at ¶21, 875. The defendant's denial of the charges, however, showed that the trial court's decision to admit the evidence based on lack of mistake or accident was error, but not reversible error. Steichen at ¶26, 876. A dissenting opinion states:

> The majority claims motive was relevant to prove intent in the present case. The Majority attempts to distinguish Moeller on the basis that forensic evidence was available to establish intent, while, in the present case there was no such forensic evidence. In Moeller, the victim, of course, was not available to testify. In the present case, the victims were available to testify and did, in fact, testify. Such testimony serves the purpose the forensic evidence served in Moeller. The majority's attempt to distinguish Moeller on such a basis is simply a ruse, the result of which is to allow in propensity evidence.

(Internal citations omitted) Steichen at ¶54, 880 (Amundson, J., dissenting). The victim in the case at bar, Ms. Key, contrary to the child victim mentioned above, testified at trial. There were multiple similar prior incidents introduced in the Steichen case, compared to a solitary and dissimilar incident in the case at bar. There was no legitimate need for the State to introduce evidence

of Defendant's 2002 conviction regarding the 2012 incident, except for the prohibited purpose of submitting propensity evidence. Defendant has a right to be tried singularly for the offense charged, without the unduly prejudicial inclusion of the 2002 conviction which deprived him of a fair trial.

None of the cases cited above by State is on point to support State's claim that Defendant's 2002 conviction is relevant to the 2012 incident. As indicated above in Wright, Bunger, and Steichen, this Court has been divided regarding the admission of other acts evidence, showing the indisputable and great need for meticulous review of trial court decisions admitting other acts evidence. State stretches logic beyond reason by claiming that because drunken Defendant knocked a girlfriend on the head a couple times several years ago with an unloaded handgun it shows he also intended to discharge a loaded shotgun near a later girlfriend in a vehicle. State's failure to meet its burden of showing relevance indicates Defendant's conviction should be reversed and there is no need to apply the SDCL 19-12-3 balancing test and its analysis below.

B. **The probative value of the 2002 conviction is substantially outweighed by the danger of unfair prejudice**.

If Defendant's 2002 conviction, however, is found to be relevant, then the burden shifts to Defendant to show that the probative value of the 2002 conviction is substantially outweighed by the danger of unfair prejudice. SDCL 19-12-3. In Loftus, State's cited case involving a felony with a firearm, aggravated assault, and other charges including robbery and attempted rape, the trial court admitted uncharged acts relating to a similar, unsolved incident occurring in a different city. SB 17, 19; State v. Loftus, 1997 S.D. 94, ¶16, 566 N.W.2d 825, 826. This Court identified two types of prejudicial tendencies influencing jurors: (1) convicting an accused for reasons other than the charged crime; and (2) inferring that since the accused committed another crime, he must have committed the charged crime. Loftus at ¶27, 831. Both of those improper and unduly prejudicial inferences apply to the case at bar.

In Loftus, the defendant's crucial admission that he was at the scene of both robberies, along with the close proximity and similarity of the two crimes, resulted in a ruling that the probative value of the other acts' evidence exceeded its prejudicial effect. Loftus at ¶28, 832. The Loftus case is distinguishable from the case at bar because Defendant's identity has never been at issue and there is

no close proximity between Defendant's 2002 conviction and the 2012 incident. The two crimes in Loftus occurred 56 days apart and shared many factual similarities, including the unknown assailant wore all black clothes and a ski mask, the assailant instructed the victims to lock the door, only include currency, find a safe on the premises, remove money from both victims' purses, and both victims were tied up in a virtually identical fashion. Loftus at ¶26, 831.

A list of similarities, as was found above in Loftus, is not found in the case at bar. If the 2002 conviction had involved an intentional discharge of a gun, or even an accidental discharge of a gun, then perhaps the probative value of the evidence would substantially outweigh the danger of unfair prejudice. It is, however, uncontroverted that there was no discharge of a gun in the 2002 incident. A drunken after-the-wedding-party-reception act in 2002 to "show-off" to friends has no similarity whatsoever to the 2012 event occurring in an isolated rural area when Defendant was sober and confronting his girlfriend to prevent her from returning to his friend's home and prevent her from continuing to collide into his vehicle. The 2002 conviction is of no consequence or reasonable relation to the 2012 incident, which supports finding that its

admission was unduly prejudicial and denied Defendant his right to a fair trial. The fact of the 2002 conviction being unduly prejudicial is shown by the honest and forthcoming prospective juror who stated during voir dire that she could not overlook the 2002 conviction when reviewing evidence concerning the 2012 incident. TT 130:6-131:18; TT 131:24-25.

That juror's comments during voir dire show that the other acts evidence was unduly prejudicial. Inclusion of the 2002 conviction gave the State an unfair advantage that persuaded the jury by illegitimate means. Defendant should receive a new trial without the unduly prejudicial 2002 conviction being used in evidence to ensure that Defendant receives a fair trial.

III. CONCLUSION.

The trial court abused its discretion and committed prejudicial error by admitting Defendant's 2002 aggravated assault conviction because that evidence was not relevant to the 2012 incident and its probative value was substantially outweighed by the danger of unfair prejudice. Appellant is entitled to a new trial, without the unduly prejudicial 2002 conviction evidence.

Dated this _____ day of November, 2013.

THE SCHREIBER LAW FIRM, Prof. L.L.C.
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_____

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CERTIFICATE OF SERVICE

I, Joan Boos Schueller, hereby certify that on the _____ day of November, 2013, I caused a copy of the foregoing **Appellant's Reply Brief** to be served upon

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by depositing a copy of the same in envelopes securely sealed and with first class postage fully prepaid thereon, in the United States mail at the City of Pierre, Hughes County, South Dakota, addressed to the above named addressee at the foregoing address, the same being the last known address of said addressee.

_____
Joan Boos Schueller