IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. Appeal No. 27673

ROGER LEE KIHEGA,
Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPELLANT'S BRIEF

Notice of Appeal was filed on December 1, 2015.

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JURISDICTIONAL STATEMENT[1]

The appellant, Roger Lee Kihega ("Kihega"), appeals from the trial court's Judgment of Conviction dated November 5, 2015. Notice of Appeal was filed on December 1, 2015. Jurisdiction is proper pursuant to SDCL § 23A-32-2.

QUESTION PRESENTED

I. Whether Kihega's motion for a judgment of acquittal ought to have been granted when the only evidence against him was the uncorroborated testimony of one of his codefendants.

The trial court was incorrect to deny Kihega's motion for a judgment of acquittal. There was no evidence that tied Kihega to the crime save for the testimony of his codefendant. Accomplice testimony is viewed with distrust and therefore the State must corroborate that testimony. There was insufficient evidence of corroboration.

Authorities: SDCL 23A-22-8; State v. Graham, 2012 SD 42, 815 N.W.2d 293; State v. Janklow, 2005 SD 25, 693 N.W.2d 685 (2005).

II. Whether the trial court abused its discretion in allowing the jury to hear 24 snippets of Kihega's recorded jailhouse conversations with his wife, allowing hearsay testimony from the detective assigned to the case and in allowing an alleged admission by Kihega in response to a question from his wife during the State's rebuttal.

Throughout the trial, the trial court was asked to rule on the introduction of several critical pieces of evidence. In several instances, the trial court's decision was in error and affected Kihega's trial. Among the most prominent examples include: 1) allowing snippets of audio conversations between Kihega and his wife to be played to the jury; 2) allowing Detective Neal to testify regarding hearsay statements made to him about Kihega's residence; 3) allowing a statement by Kihega in which he responded to a question from his wife to be presented as evidence during the State's rebuttal; and 4) allowing Detective Neal to testify about his conversation with Two Hearts after Two Hearts was deemed unavailable under SDCL 19-19-804(2). The trial court abused its discretion in allowing this evidence to be introduced.

[1] References to the Settled Record will be made as "SR at ____." References to the jury trial will be made as "JT at ___," with the appropriate page and line numbers included. References to the sentencing hearing will be made as "SH at ___," with the appropriate page and line numbers included.

Authorities: SDCL 19-19-401; SDCL 19-19-403; SDCL 19-19-801; State v. Stuck, 434 N.W.2d 43 (S.D. 1988).

III. Whether the trial court violated Kihega's right to confront witnesses by allowing a detective to testify that an unavailable accomplice corroborated another accomplice's testimony.

The United States Supreme Court has clearly articulated the rule that a defendant has a constitutional right to confront the witnesses against him. The trial court allowed the State to circumvent this rule by asking a detective questions about conversations with an unavailable codefendant. The questions corroborated the testimony of another codefendant.

Authorities: SDCL 19-19-804; Crawford v. Washington, 541 U.S. 36, (2004); State v. Carothers, 2006 SD 100, 724 N.W.2d 610.

IV. Whether the multiple errors committed by the trial court deprived Kihega of a fair trial.

The errors by the trial court severely impacted Kihega's right to a fair trial. Although not entitled to a perfect trial, Kihega was entitled to a fair one. The multitude of errors denied him that right.

Authorities: State v. Davi, 504 N.W.2d 844, 857 (S.D. 1993); McDowell v. Solem, 447 N.W.2d 646, 651 (S.D. 1989).

V. Whether Kihega's sentence of fifty years with twelve suspended constituted cruel and unusual punishment when it was nearly eight times longer than the sentence received by his codefendant.

Kihega's sentence was nearly eight times longer than his codefendant and over three times longer than the average sentence for armed robbery in Brown County, South Dakota. Although sentencing courts are given wide latitude in sentencing a defendant, in this case the lower court failed to properly account for similar sentences and also for Kihega's mitigation evidence.

Authorities: State v. Bonner, 1998 SD 30, 577 N.W.2d 575; State v. Blair, 2006 SD 75, 721 N.W.2d 55

STATEMENT OF THE CASE

This case is an appeal from a *judgment of conviction* entered on November 5, 2015. On March 26, 2015, Roger Kihega ("Kihega") was arrested and charged with first degree armed robbery and being a felon in possession of a firearm in Brown County, South Dakota. Prior to trial, Kihega sought to sever his trial from his two codefendants, Michael Washington ("Washington") and Gregory Two Hearts ("Two Hearts"). Kihega's motion was granted, and his trial was set for September 16-18, 2015.

The trial commenced as scheduled. At the conclusion of the State's case, Kihega filed a motion for judgment of acquittal. The motion was denied. Kihega renewed his motion after both sides had rested. The trial court again denied his motion.

Ultimately, the jury found Kihega guilty of both charges. On November 5, 2015, he was sentenced by the Hon. Judge Richard A. Sommers to fifty years with twelve suspended for the armed robbery and five years for the felony possession of a firearm. Kihega filed a timely notice of appeal on December 1, 2015.[2]

[2] After trial but prior to sentencing, Kihega pled guilty to Attempted Witness Tampering. This appeal does not pertain to that charge or sentence.

STATEMENT OF THE FACTS

On March 26, 2015, several police officers from the Aberdeen Police Department descended on a home in the southwest part of Aberdeen, South Dakota. JT 130:24-25. The home belonged to an individual named Sandra Emmett ("Emmett"). JT at 110:11-12. The officers were looking for a firearm utilized in a recent gas station robbery in Aberdeen. JT at 130:6-11. To their surprise, the officers located Kihega and Washington in the Emmett residence. JT at 111:1-5. Kihega and Washington were suspects in a separate robbery that had taken place at the Kasino Korner in Aberdeen on January 19, 2015. The Kasino Korner robbery took place at approximately 8:30 p.m. JT at 128:13-16.

Immediately after discovering the two suspects, officers took the two men into custody. Kihega was taken directly to jail. JT 131:5-7. Washington was taken to the Aberdeen Police Department, where he was interrogated by two detectives, Christopher Gross and Jeff Neal. JT 131:16-25. During this initial interrogation, Washington admitted to participating in the casino robbery. JT at 112:14-16. He also claimed that Kihega had been with him when the robbery took place. JT at 112:17-20. At the conclusion of this interview, Washington asked the detectives if he would be released. Instead, both he and Kihega were arrested and charged.

Two Hearts was charged with aiding and abetting armed robbery in connection with the incident. SR at 11. He was interviewed at the South Dakota State Penitentiary where he was being housed for a parole violation. He provided a story similar in nature to Washington's statement.

After the arrests of Kihega and Washington, officers secured a search warrant for the Emmett home. They returned to the residence, this time looking for the weapons used during the Kasino Korner robbery: a 9 millimeter handgun and a 25 caliber handgun. JT at 135:1-9. The warrant also sought ammunition, clothing (including shoes) that may have been worn during the robbery, money bands and cash. Id. In addition to the Emmett home, officers sought and received search warrant for three vehicles hoping to find evidence connecting Kihega to the crime. JT at 137:1-25. Searches of the home and all three vehicles turned up nothing of evidentiary value. JT at 136:-1-9; 137:25-138:4. Apart from Washington's initial statement, there was simply nothing to tie either Kihega or Washington to the crime.

On August 18, 2015, Kihega sought to sever his trial from that of his codefendants. SR at 43. The primary basis for severance was the fact that both Washington and Two Hearts had made incriminating statements about Kihega during their interviews. SR at 43. Despite initial objections from the prosecutor, the trial court granted Kihega's motion. SR at 59.

On the eve of Kihega's trial, Washington struck a plea agreement with the State. The deal, which had originally been fifteen years, now required him to serve just five years. JT at 60:4-25. With parole, Washington will be out in less than three years. In exchange, Washington agreed to testify against Kihega. JT at 65:14-19.

Up until he changed his plea, Washington had maintained that he had lied or been confused during his initial interview with law enforcement. JT at 74:3-5. For six months Washington continued this stance. Id. However, just days before Kihega's trial, Washington was offered the biggest break of his life. JT at 68:3-16.

He received, according to Detective Neal, the best deal that anyone had ever been given. Id.

At trial, the jury heard from nine witnesses. The State called seven of the nine witnesses. Three of them were inside the casino during the robbery. None of these three identified Kihega as one of the robbers. JT at 22:1-5; 80:15-17; 83:9-13. The State called Two Hearts as a witness, but he refused to answer any question posed to him, leaving the trial court with no choice but to hold him in contempt for the duration of the trial. JT at 91-93. Detective Neal testified about the investigation and his two conversations with Washington. Washington himself testified, identifying Kihega as the other casino robber. At the conclusion of the State's case, Kihega moved for a judgment of acquittal. JT at 169. The motion was denied. Id.

During Kihega's case in chief, his friend, Deonte Threatt ("Threatt"), testified. Threatt described being with Kihega in Cokato, Minnesota at approximately 4:45 p.m. on the day of the robbery. JT at 178:22-25. If accurate, it would have been impossible for Kihega to have participated in the robbery in Aberdeen as alleged by the prosecution. JT at 178:13-19.

After approximately four hours of deliberation, the jury found Kihega guilty of armed robbery and of being a felon in possession of a firearm. He then admitted to a Part II information charging him as a habitual offender. Kihega was sentenced on November 5, 2015.

ARGUMENT

I. Kihega's motion for a judgment of acquittal ought to have been granted because the State failed to prove beyond a reasonable doubt that he was guilty of armed robbery and being a felon in possession of a firearm.

Kihega's first claim is that the trial court improperly denied his motion for a judgment of acquittal. The standard of review for denial of a motion for judgment of acquittal is whether the "evidence was sufficient to sustain the convictions." State v. Janklow, 2005 SD 25, ¶ 16, 693 N.W.2d 685 (2005); State v. Running Bird, 2002 SD 86, ¶ 19, 649 N.W.2d 609. When reviewing the sufficiency of the evidence, this Court "considers the evidence in a light most favorable to the verdict." Id. This Court does not resolve conflicts in the evidence, rule on the credibility of the witnesses, inquire as to the plausibility of an explanation, or weigh the evidence. Id.

In this case, the evidence did not support a conviction on either charge. Of the seven witnesses called by the State, only two of them provided any evidence that was relevant to whether Kihega committed the robbery. One was Kihega's codefendant, Washington. The other was Detective Neal. Nearly all of Detective Neal's testimony was based on information he obtained from Washington. The law in South Dakota is clear; a defendant may not be convicted solely on the basis of the testimony of an accomplice. In this case, the overwhelming majority of the evidence presented to the jury was based upon Washington's testimony. With no gun, no testimony from Two Hearts, no confession from Kihega and no witness identification, the State's case rested entirely in the hands of Washington and two dozen audio clips gleaned from thousands of minutes of phone conversations between Kihega and his wife. Removing Washington's testimony from the trial, as the jury was instructed it must,

results in no evidence of Kihega having been involved in the robbery. As a result, the evidence presented did not support a conviction.

a. The evidence was insufficient to support a conviction.

During the trial the prosecution called a total of seven witnesses. Of these witnesses, three were present during the actual robbery. None of the three could identify Kihega as one of the men who robbed the casino. Another witness, Christy Serr, was Washington's attorney. Attorney Serr was only questioned in regards to Washington's sentence. The third codefendant, Gregory Two Hearts, refused to testify at all. That left only Detective Neal and Washington as prosecution witnesses who could provide the jury with anything that may have tied Kihega to the robbery. Each of the other witnesses merely provided evidence that a crime took place.

Washington testified first. He placed himself and Kihega at the robbery and outlined some of the details of his version of events. He stated that Kihega was the other individual who went into the casino and that Two Hearts drove. He stated that the group went to North Dakota and then to Mystic Lake Casino in Minnesota after the robbery before returning to Aberdeen two days later. JT at 43:20-22; 45:7-8.

After Washington testified the State called Two Hearts, who refused to speak at all. JT at 91-93. Detective Neal was then called to the stand. In his cross-examination, Detective Neal candidly admitted that only two individuals identified Kihega as a suspect. JT at 129:18-21. Those individuals were the codefendants, Washington and Two Hearts. Detective Neal was asked about several items he looked for but could not find—items that could have tied Kihega to the robbery. See generally JT at 134-139. Indeed, the best evidence that Detective Neal produced that

placed Kihega with Washington and Two Hearts (apart from Washington) was a receipt from Mystic Lake Casino. However, the receipt merely demonstrated that the men were both at Mystic Lake Casino nearly twelve hours after the robbery.[3] They do not place Kihega in Aberdeen. They certainly do not place him at the Kasino Korner.

b. Washington's testimony was not corroborated by any other evidence which tied Kihega to the robbery.

In South Dakota, the law does not allow a conviction based solely on the statement of an accomplice. SDCL 23A-22-8 states: "A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence which tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." Whether evidence corroborates an accomplice's version of the facts is a question for the jury. State v. Graham, 2012 SD 42, ¶ 39, 815 N.W.2d 293.

The reason for the above rule is clear. The law views an accomplice's testimony with suspicion. State v. Thomas, 2011 SD 15, ¶ 19, 796 N.W.2d 706. The jury was instructed on this point. Jury Instruction # 16. As a result, the State was required to provide the jury some additional evidence which tied Kihega to the crime. The jury was also instructed that the additional evidence must relate to some act or fact which is an element of the offense. Jury Instruction # 15. Finally, the jury was instructed that in order to corroborate Washington's testimony it had to remove his

[3] Mystic Lake Casino is approximately one hour from Kihega's residence in Cokato, Minnesota.

testimony from the case, and then determine whether there was any remaining evidence which connected Kihega to the crime. Jury Instruction # 15.

During his cross-examination, Detective Neal was given several opportunities to advise the jury of steps he took to corroborate Washington's testimony. For example, Washington apparently told Detective Neal that the pair had worn bandanas and that the clothes that were worn during the robbery were in Minnesota. JT at 143:30-144:7. Detective Neal did not follow up on this statement by Washington. He did not follow the route that the group allegedly took on their way to North Dakota. JT at 145:6-8. He did not contact Mystic Lake Casino to ascertain whether any evidence was left in the hotel room. JT at 146:1. Further, Washington testified that he drove himself to Aberdeen and that the group used Two Hearts' vehicle to conduct the robbery. JT at 146:17-23. Moreover, Washington's testimony would have his car parked at the residence for two days. Id. Yet no evidence was presented that Washington's vehicle was at the residence. In fact, Detective Neal received information that no one in the home had seen either Kihega or Washington the entire month of January. JT at 147:10-13. Detective Neal admitted that he failed to obtain a subpoena that would have allowed him to track the cell phone movement of the group as they travelled from Aberdeen to Hankinson, North Dakota and then to Mystic Lake Casino. JT at 149:12-150:1-14. Finally, Detective Neal chose not to make any attempt to locate any gas station at which the group might have stopped during this lengthy escapade. JT at 152:2-4.

Stripped away from the context of Washington's testimony, Detective Neal's testimony does not provide any evidence which connected Kihega to the robbery.

The same is true of all of the other State witnesses. There was simply no evidence as to Kihega's "opportunity and motive to commit the crime" nor was there evidence of his "proximity to the place where the crime was committed." Graham, 2012 SD 42, ¶ 34. Outside of Washington, the jury heard no evidence of Kihega having been in Aberdeen to commit the crime. Detective Neal conceded during cross-examination that *had* Kihega been in Aberdeen it is likely that he would have been seen by one of the individuals at the Emmett residence. JT at 147:19-24. He also conceded that during his investigation he learned the exact opposite—none of those individuals saw Kihega in Aberdeen for the entire month of January. JT at 18-21. The best the State could provide was the Mystic Lake Casino receipt. This receipt merely proved that Kihega and Washington were both at Mystic Lake Casino nearly twelve hours after the crime was committed.

The physical evidence introduced at trial did not tie Kihega to the crime. Physical evidence can also be utilized to corroborate accomplice testimony. Graham, 2012 SD 42, ¶ 37. In Graham, the State produced testimony from an accomplice that the victim was shot one time and then left at the bottom of a bluff. Id. at ¶ 37. The jury then learned that the victim's body had been discovered in a bluff and that the physical evidence showed she was killed by a single gunshot wound. Id.

Kihega's case was devoid of physical evidence connecting him to the crime. The jury heard of the literally dozens of items that *could have* connected Kihega to the crime, but Detective Neal's investigation produced none of them for the jury to view.

The prosecution relied heavily on snippets of conversations between Kihega and his wife. In these conversations Kihega makes several statements that, on the surface, appear to incriminate him. However, as Detective Neal conceded, Kihega made hundreds of phone calls while in custody. Each of the phone calls lasted approximately fifteen minutes. The sheer number of phone calls and the length of each demonstrate just how desperate the State had become in making a case against Kihega. Nonetheless, it must also be noted that none of the audio snippets contain anything which could be characterized as tying Kihega to the robbery. This is especially true if Washington's testimony is removed as the jury instructions required. Jury Instruction # 15.

The reality is that the State failed to meet its burden of proof in this case. It placed all of its eggs on the testimony of Washington but provided no corroborating evidence that could connect Kihega to the crime. As a result, Kihega's motion for acquittal ought to have been granted. This Court should remand this case back to the trial court with instructions to grant the motion.

II. The trial court abused its discretion by allowing into evidence testimony and exhibits which were prejudicial to Kihega.

Throughout the trial, the trial court was asked to rule on the introduction of several critical pieces of evidence. In several instances, the trial court's decision was in error and affected Kihega's trial. Among the most prominent examples include: 1) allowing snippets of audio conversations between Kihega and his wife to be played to the jury; 2) allowing Detective Neal to testify regarding hearsay statements made to him about Kihega's residence; 3) allowing a statement by Kihega in which he responded to a question from his wife to be presented as evidence during the State's

rebuttal; and 4) allowing Detective Neal to testify about his conversation with Two Hearts after Two Hearts was deemed unavailable under SDCL 19-19-804(2). The first three will be addressed in this Section. The last represents a violation of Kihega's right to confront witnesses and is serious enough to warrant its own Section.

There is no question that trial courts have broad discretion over the introduction of evidence. State v. McNamara, 325 N.W.2d 288, 291 (S.D. 1982). An abuse of discretion "refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Gross v. Gross, 355 N.W.2d 4, 7 (S.D. 1984). Even under this deferential standard of review, the trial court's errors warrant reversal.

a. The trial court should not have allowed the jury to listen to the snippets of audio conversations between Kihega and his wife for reasons of relevance, unfair prejudice, jury confusion and spousal privilege.

Relevant evidence is "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." SDCL 19-19-401. In this case, the twenty-four proffered statements contained no evidence pertinent to whether or not Kihega committed the crimes of first degree burglary or possession of a firearm by a convicted felon. The statements were short snippets of hundreds of phone conversations between Kihega and his wife.

In the criminal context, relevant evidence is that which would assist the jury in determining whether the crime was committed. For example, in State v. Bowker, the defendant was charged with possession of a controlled substance and possession of drug paraphernalia after coming into contact with law enforcement at an apartment in

Sioux Falls, South Dakota. 2008 SD 61, ¶¶ 1-8, 754 N.W.2d 56. The defendant told law enforcement at the time she did not live there. Id. at ¶ 7. At trial, over the defendant's objection for relevancy, the trial court admitted into evidence vehicle financing statements and cell phone records which were found inside the apartment and which contained the defendant's name. The State argued that the financing statements and phone list had probative value to establish that the defendant lived at the apartment or at least spent enough time there to show that the defendant had access to and joint possession of the apartment (which was necessary for the State to prove its case). Id. at 40. This Court affirmed.

None of the audio clips the prosecution introduced in Kihega's case had any connection to the armed robbery. In Bowker, the evidence was necessary to connect the defendant to the apartment at which the drugs were found. In this case, none of the clips can be viewed as connecting Kihega to the crimes for which he was charged. Therefore, they had no relevance and should have been excluded.

As an alternative argument should the Court deem that some or all of the clips are relevant, Kihega argues they should be excluded pursuant to SDCL 19-19-403. Relevant evidence is properly excluded when its value is substantially outweighed by the considerations set forth in Rule 403. State v. Logue, 372 N.W.2d 151, 156 (S.D. 1985).

Rule 403 permits the exclusion of otherwise relevant evidence when its introduction will unfairly persuade the jury to reach a certain conclusion. State v. Fisher, 2011 SD 74, ¶ 33, 805 N.W.2d 571. In this case, the audio clips were statements which were removed from the context of the conversation from which they

came. Introduction of the clips was intended to portray Kihega in a negative light. They contained multiple curse words and displayed Kihega in various states of anger.

A review of the audio clips makes clear that they unfairly prejudiced the jury. For example, many of the clips pertain to Kihega referencing the need for Washington to not testify at Kihega's trial. At least two of the audio clips contain statements in which Kihega discusses his feelings about Washington. Such clips have no bearing on his guilt or innocence and were only intended to make the jury dislike Kihega.

The risk of prejudice in admitting these audio clips substantially outweighed any probative value that they may have had. As such, the trial court erred by admitting them.

i. Playing the audio clips was improper under the spousal privilege rule.

SDCL 19-19-504(b) prevents the introduction of confidential communication between Kihega and his wife. "A communication is confidential if it is made privately by any person to his or her spouse during their marriage and is not intended for disclosure to any other person." SDCL 19-19-504(a). Either the accused or the spouse may claim the privilege. SDCL 19-19-504(c). Kihega recognizes the case of State v. McKercher, 332 N.W.2d 286 (S.D. 1983). However, that case is distinguishable because it involved statements made by the defendant in the physical presence of a jailer. Id. at 287. McKercher did not involve electronic monitoring of phone calls. In another case that did involve electronic monitoring, this Court wrote that such practice, "cannot be justified" without a prior court sanction. Matter of Kozak, 256 N.W.2d 717, 723 (S.D. 1977). Furthermore, the statute provides specific

situations where the privilege does not apply. Phone calls made from a jail are not listed. Therefore, the calls ought to have been excluded.

b. The trial court improperly allowed Detective Neal to testify about hearsay statements related to Kihega's residency.

During his redirect, Detective Neal was asked about Kihega's residence. Detective Neal began his answer: "From what I've heard, talking to different people, it sounds like--." JT at 156:19-24. Whereupon, Kihega objected on hearsay grounds. Id. The trial court overruled the objection and allowed Detective Neal to testify about various statements that he had heard from individuals who advised him that Kihega moved "from place to place."

All of this testimony was inappropriate hearsay. Detective Neal was allowed to testify about specific things that were told to him regarding Kihega's residency. Further, these out-of-court statements were offered to prove the truth of the matter asserted. Clearly, the statements were hearsay. Making matters worse, Kihega had no ability to effectively cross-examine these statements because the declarants were not testifying themselves. Therefore, the trial court abused its discretion by allowing this testimony.

c. The trial court improperly allowed in a statement by Kihega in which he responded to a question from his wife during the State's rebuttal.

On the last day of trial, during its rebuttal, the prosecution called Detective Neal to testify again. The prosecution wished to have Detective Neal testify as to a question that was asked of Kihega by his wife and Kihega's answer to it. According to Detective Neal's testimony, during one recorded phone call, Kihega's wife asked him whether he thought that law enforcement had obtained video of Kihega, Two

Hearts and Washington at a casino together in North Dakota. JT at 213:19-24. Kihega responded to the question by stating: "I'm sure they do." Id. The State characterized this evidence as an adoptive admission pursuant to SDCL 19-19-801(d)(2)(B). The trial court allowed this testimony despite Kihega's objection that it did not meet the definition of an adoptive statement and that it was not proper rebuttal evidence.

i. The State wrongly characterized the statement as an adoptive admission.

In order to convince the trial court that it could introduce the evidence reflected above, the State argued that SDCL 19-19-801(d)(2)(B) authorized its introduction as an adoptive statement. This statute provides that a statement is not hearsay if it is "offered against a party" and is a "statement of which he has manifested his adoption or belief in its truth." SDCL 19-19-801(d)(2)(B). In reality, the plain language of the statute prohibits the introduction of Kihega's alleged admission.

A statement is defined as either "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by him as an assertion." SDCL 19-19-801(a). The evidence the State sought to introduce can only be properly deemed not hearsay if it was an assertion by his wife which Kihega somehow adopted as his own. Clearly, Kihega's wife did not assert any thing. The State improperly characterized this conversation because there was no statement made.

In State v. Brown, this Court dealt directly with the type of statement that is authorized as an adoptive statement. 435 N.W.2d 225 (S.D. 1989). There, the defendant and another male, Heckenlaible, were conversing with a third individual in

the days following a robbery in Volin, South Dakota. When asked by the third individual what they were doing that day, Heckenlaible replied that they were "going out robbing." Id. at 226. The Volin robbery was then discussed and the third individual advised the two men that if they had committed that robbery they would get caught. The defendant responded: "We won't get caught because the best don't get caught." Id.

At trial, the jury heard evidence of Heckenlaible's statement that he and the defendant were "going out robbing." This Court ruled that the evidence was proper because the defendant "did not disavow Heckenlaible's statement (which was made in his presence), and his contribution to the three-way conversation strongly indicates his concurrence." Id.

In this case, the trial court should not have allowed the evidence as an adoptive admission. Unlike in Brown, Kihega's wife asked a question. Thus, Kihega was not adopting a statement as required by the statute. The entire exchange should have therefore been excluded.

ii. The alleged adoptive admission by Kihega was not rebuttal evidence.

The prosecution's purported rationale for offering Kihega's alleged admission during rebuttal was because earlier in the trial Kihega introduced evidence that he was seen in Cokato, Minnesota between approximately 4:30 p.m. and 4:45 p.m. on the night of the robbery. This testimony would make it virtually impossible to have traveled to Aberdeen to commit a robbery at 8:30 p.m. Rebuttal evidence is appropriate to meet new facts put in by a defendant. State v. Harvey, 167 N.W.2d 161 (S.D. 1969). "Rebuttal evidence is evidence which explains, contradicts, or

refutes the defendant's evidence." Schrader v. Tjarks, 522 N.W.2d 205, 209 (S.D. 1994). Importantly, rebuttal evidence should not be used to bolster the prosecution's case. Id.

The trial court deemed the alleged statement by Kihega proper rebuttal evidence. However, comparison of the alleged rebuttal evidence in Kihega's case to those cases in which this Court has upheld certain rebuttal evidence demonstrates that the trial court erred. In State v. Stuck, the defendant was convicted by a jury of aggravated assault. 434 N.W.2d 43 (S.D. 1988). During the State's case in chief, the victim testified about the fight between him and the defendant which resulted in the defendant stabbing the victim in the neck. Id. at 54. The victim stated that after being stabbed he approached the basement door but did not go down the stairs. Id. The State also showed photographs showing blood spatter on the descending stairs. Id. The defendant then testified during his case in chief and gave a "radically different version" of the facts, not mentioning the basement steps at all. Id. The State then recalled the victim during rebuttal and had him explain that the blood of the steps was caused by him coughing up blood at the top of the staircase. Id.

On appeal, the defendant argued that the rebuttal testimony of the victim was improper. This Court found that the testimony was appropriate to contradict the defendant's testimony. If the victim were stabbed where the defendant claimed, there would be blood near that location rather than the stairs. Id. The key point here is that the prosecution was not allowed to introduce this evidence as a means of bolstering its own case. The victim gave one version of events and the defendant gave a vastly different account. The victim was then allowed to testify about the

location of the blood and what caused it to be there in order to refute the defendant's account.

It is the distinction between refuting the defendant's testimony and merely offering up additional evidence that is characterizes rebuttal evidence. During his case in chief, Kihega merely offered evidence that he was in another location approximately four hours prior to the robbery and that it would have been next to impossible for him to have traveled to Aberdeen to participate in the robbery. He did not introduce any evidence disputing Washington's testimony regarding a North Dakota casino. Evidence that he was in perhaps in North Dakota in the hours *after* the robbery do not explain, contradict or refute Threatt's testimony that Kihega was with him in the hours leading up to the robbery. Schrader, 522 N.W.2d at 209. Therefore, the trial court incorrectly allowed this evidence as part of the State's rebuttal.

The alleged statement had the effect of bolstering the prosecution's case. Without question, this evidence could have and should have been introduced during its case in chief. It strengthened the prosecution's case by allowing it to establish that Kihega was at a casino with Washington and Two Hearts in the hours immediately after the robbery. But it did not refute any evidence that Kihega introduced during his case-in-chief.

The case against Kihega was based almost exclusively on Washington's testimony. This makes the introduction of the rebuttal evidence even more prejudicial than it otherwise might. The trial court allowed the State, after having rested, to get a second bite at the apple by offering evidence which did not contradict

anything that Kihega put on during his case in chief. Its only effect was to bolster the State's own case. This Court has deemed that such evidence is not proper for rebuttal.

III. The trial court violated Kihega's right to confront witnesses by allowing Detective Neal to testify about corroborating Washington's initial statement during an interview with Two Hearts.

One of the primary issues leading up to and during trial was the status of Two Hearts, specifically whether or not he would take the stand and testify. Ultimately, Two Hearts refused to answer a single question while on the stand. As a result, the trial court held him in contempt of court and ordered that he be jailed while the trial continued. His refusal to testify rendered Two Hearts unavailable under SDCL 19-19-804(2).

Immediately after Two Hearts' refusal to testify, the State called Detective Neal. During its redirect, the State questioned Detective Neal regarding his conversation(s) with Two Hearts. Kihega objected and, outside the presence of the jury, argued that Detective Neal should not be allowed to testify about his conversation with Two Hearts without violating Kihega's rights under the Confrontation Clause.

After the jury returned, the State asked Detective Neal whether he corroborated "some of Mike's admissions about the robbery with Greg Two Hearts." JT at 168:5-8. Detective Neal stated that he did. Id. The result of this exchange clearly violated Kihega's right to confront those witnesses who might testify against him. In Crawford v. Washington, the United States Supreme Court held that the admission of testimony or hearsay statements against a defendant violate the

Confrontation Clause of the Sixth Amendment if the declarant is unavailable to testify at trial and the defendant has not had a previous opportunity to cross-examine him. 541 U.S. 36 (2004). This Court in State v. Carothers held that the admission of a witness' prior statement(s) requires a full and effective cross-examination. 2006 SD 100, ¶ 16, 724 N.W.2d 610.

The effect of the trial court's ruling allowed the State to skirt Crawford to the detriment of Kihega's constitutional rights. It may be argued that the question and Detective Neal's answer was proper because no actual statement by Two Hearts was introduced. However, upon review of the exchange, it is clear that the State was allowed to utilize Detective Neal's interview with Two Hearts to substantiate and corroborate Washington's claims:

> Q: Did you – after talking to [Washington] on March 26, did you corroborate some of Mike's admissions about the robbery with Greg Two Hearts?
>
> A: Yes, I did.
>
> Q: And you specifically spoke to Greg Two Hearts?
>
> A: Yes.

Kihega had no ability to cross-examine Two Hearts about any alleged corroborating statements. This allowed the State an even greater windfall than if Two Hearts had actually testified. The trial court's ruling allowed the State to introduce evidence that the out of court statements by Two Hearts and Washington supported each other. Thus, *everything* the State would have questioned Two Hearts about was brought in via this short exchange from Detective Neal and the prosecutor.

Upholding the decision by the trial court to allow Detective Neal to testify about his conversation with Two Hearts would undermine the Confrontation Clause and a have devastating effect on criminal trials across South Dakota. No longer would prosecutors be required to bring in the bad guys to talk about other bad guys. Instead, the investigating officer could simply testify about what he learned from the bad guys. As long as the officer's testimony did not include an actual statement by the bad guy, then the State is allowed to circumvent the Confrontation Clause, and do so with this Court's tacit approval. This should never be allowed to happen.

The trial court's decision was wrong for a separate reason as well. South Dakota case law does not allow for one accomplice to corroborate the testimony of another accomplice. State v. Dominiack, 334 N.W.2d 51, 54 (S.D. 1983). That is precisely what took place here. Kihega requested and was refused the opportunity to have a jury instruction included which informed the jury on the issue.

The trial court erred by not granting Kihega's motion for judgment of acquittal. The State was required to provide more than Washington's self-serving testimony. It failed to do so. As a result, this Court should remand the case back to the trial court with instructions to grant Kihega's motion.

IV. The cumulative effect of trial court's errors deprived Kihega of his right to a fair trial.

The Court has consistently held that "the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." State v. Davi, 504 N.W.2d 844, 857 (S.D. 1993); McDowell v. Solem, 447 N.W.2d 646, 651 (S.D. 1989). Although a defendant is not

entitled to a perfect trial, he is entitled to a fair one. State v. Smith, 477 N.W.2d 27, 37 (S.D. 1991).

The errors cited herein meet the criteria previously laid out by this Court for retrial. Trial courts are rightly granted considerable discretion regarding the introduction of evidence at trial. However, in a case such as this one, with scant evidence against the defendant save for the self-serving testimony of an accomplice, those decisions take on even greater significance.

V. Kihega's sentence constitutes cruel and unusual punishment.

Kihega argues that his sentence for armed robbery was excessive and therefore violated the Eighth Amendment's prohibition against cruel and unusual punishment. A sentence within the statutory maximum is typically reviewed using an abuse of discretion standard. State v. McKinney, 2005 SD 73, ¶ 10, 699 N.W.2d 471, 476. The analysis changes however, when the defendant challenges his sentence on Eighth Amendment grounds. In that event, the review is focused on the proportionality of the sentence utilizing the following principles:

> To assess a challenge to proportionality we first determine whether the sentence appears grossly disproportionate. To accomplish this, we consider the conduct involved, and any relevant past conduct, with utmost deference to the Legislature and the sentencing court. If these circumstances fail to suggest gross disproportionality, our review ends.

State v. Bonner, 1998 SD 30, ¶ 17, 577 N.W.2d 575. If, on the other hand, the sentence appears grossly disproportionate, this Court will conduct an intra and inter-jurisdictional analysis. Id.

Kihega's sentence is significantly more severe than the sentence received by Washington. Moreover, it is three times as large as the

average sentence for armed robbery in Brown County. Kihega's background and prospects for rehabilitation also support a sentence far less than the one he received. In sum, Kihega's sentence was cruel and unusual and violated his rights under the Eighth Amendment. Therefore, this Court should remand back to the trial court with instructions to resentence Kihega to a less severe sentence.

a. Kihega's sentence is disproportionate to the sentences of other, similarly situated codefendants, including his codefendant.

For the armed robbery, which resulted in a loss of approximately $4,600.00, Kihega received a fifty year sentence with twelve suspended. JT at 97:8-9. For the same conduct, Washington received a fifteen year sentence with ten suspended. Subtracting the suspended time, Kihega received a sentence nearly eight times longer than his codefendant. In Bonner, this Court wrote: "Rarely will disparity be so immediate, when accomplices sentenced for the same offense receive diametrically opposite punishment." 1998 SD 30, ¶ 18. There, the defendant received fifteen years while his codefendants received suspended sentences. In terms of actual custodial time imposed, the disparity between Bonner's sentence and his codefendants is less than the disparity between Kihega's armed robbery sentence and Washington's armed robbery sentence.

The similarities between this case and Bonnor continue. In Bonnor, the Court noted that each of the defendants were similarly culpable for the burglary. Likewise, despite attempts by the State to paint a different picture, Washington always maintained that he acted on his own accord. Both men fired their weapons in the air.

It was Washington, not Kihega, who stole a man's wallet during the burglary. It was Washington, not Kihega, who shoved one of the casino patrons to the ground.

At his sentencing, Kihega also asked the trial court to take judicial notice of ten cases out of Brown County, South Dakota. SH at 57:6-9. The cases were from 2010 forward. SH at 57:3. Each resulted in convictions for armed robbery. As part of his sentencing argument Kihega advised the trial court that three of those sentences involved non-penitentiary sentences and therefore were not considered. SH at 58:7-10. The other seven defendants received sentences that averaged sixteen years. SH at 58:12-13. That figure included one sentence of fifty years. If that sentence was removed from the equation, then the average dropped to ten years. Id. at 17-19. It appears, then, that at least for Brown County, the appropriate sentence for a typical armed robbery conviction is ten years.

Kihega's sentence is not only disproportionate to his codefendant, it is over three times as lengthy as the average sentence for armed robbery in Brown County. Acknowledging the unique circumstances involved in sentencing decisions, this discrepancy in sentencing must result from specific facts related to Kihega that separate him from the other sentences. A review of Kihega's background demonstrates that no such facts exist and therefore the sentence was disproportionate.

b. Kihega's background and his chances for rehabilitation favor a lower sentence.

In order to properly sentence any defendant to a sentence that is proportionate to the "particulars of the offense and the offender, the circuit court must 'acquire a thorough acquaintance with the character and history of the [person] before it.'" State v. Blair, 2006 SD 75, ¶ 75, 721 N.W.2d 55 (quoting Bonner, 1998 SD 30, ¶ 19

(quoting State v. Chase in Winter, 534 N.W.2d 350, 354-55 (S.D. 1995)). To do this, the sentencing court must look at several factors: 1) the defendant's general moral character; 2) his mentality; 3) his habits; 4) his social environment; 5) his tendencies; 6) his age; 7) his aversion or inclination to commit crime; 8) his family; 9) his occupation; and 10) his previous criminal record. At the sentencing hearing, the trial court ignored nearly all of the evidence which supported a less severe sentence. Kihega called six witnesses, including his wife. All of the witnesses described Kihega as a good, loving father. Stories were told of Kihega's kindness, of how he taught his brother-in-law to ride a bike and how to swim, and how he helped his niece come out of her shell. SH at 20:1-7; 28:20-22. There were also several witnesses who testified about Kihega providing them with food, shelter and clothing during difficult times. SH at 32:4-6; 39:25-40:1-5.

As part of the presentence investigation, several letters were submitted on Kihega's behalf. One of those letters was from former Minnesota Timberwolves player Rich Melzer. After retiring from the NBA, Melzer started a children's charity called The Balance Foundation. He called Kihega a "role model in and outside of the inner city community." Other letters also spoke of the impact Kihega has had on the lives of numerous children.

At the sentencing hearing, evidence was introduced regarding Kihega 's upbringing in South Minneapolis. His brother spoke of how Kihega kept him from the inner city, gang-related lifestyle that was so prevalent there. SH at 22:19-25. It was this upbringing, along with his positive attitude, that made Kihega such a presence at Melzer's foundation.

It would be foolhardy to deny that Kihega is not likely to win citizen of the year. He is a habitual offender under the laws of South Dakota. Nonetheless, a significant amount of evidence was introduced which demonstrated that he was a much more complicated individual than simply being a man convicted by a jury of armed robbery. All of this evidence was seemingly ignored by the trial court. Early on in its pronouncement of sentencing, the trial court stated: "Mr. Kihega, what you and Mr. Washington did causes me to shudder…" He then went on to describe how fortunate it was that nobody was killed during the robbery. Of course that is true. However, when one reviews the above statement and considers the disparity in sentence between Kihega and Washington, the only conclusion is that a serious error was made.

Certainly, respect for the Legislature must be considered in making a decision as to Kihega's sentence. Still, as this Court stated in Bonner, that deference has limits: "The Eighth Amendment reflects our nation's belief in the dignity of every human being and the view that legislative and judicial power to punish criminal conduct, though given high deference, is not absolute." For reasons unknown, the trial court somehow deemed that Kihega's alleged actions on January 19, 2015 warranted a penalty nearly eight times as severe as Washington. On its face, this is disproportionate. The disproportionally becomes more pronounced when the evidence that was presented at sentencing is taken into account.

CONCLUSION

The numerous errors committed by the trial court must be corrected. Kihega's request for a judgment of acquittal ought to have been granted because there was insufficient evidence to convict him of either armed robbery or of being a felon in possession of a firearm. The State's case rested entirely on the testimony of Kihega's codefendant. It failed to sufficiently corroborate Washington's testimony as required by the law. Therefore, this Court should reverse the decision to deny Kihega's request for acquittal and remand this case with instructions to grant the motion.

In the alternate, this Court should remand this case for retrial because the trial court's errors severely impacted Kihega's defense. The State should not have been allowed to play the twenty-four carefully selected audio clips for the jury. Detective Neal should not have been allowed to testify as to hearsay statements regarding Kihega's residency, nor should he have been allowed to testify about the conversation between Kihega and his wife. Finally, allowing Detective Neal to show corroboration of the statements between Two Hearts and Washington violated Kihega's right to confront witnesses. The trial court compounded this error by not allowing an additional jury instruction that would have prevented the jury from considering the corroboration from Two Hearts to substantiate Washington's testimony.

Finally, the trial court's sentence on the armed robbery charge was excessive and violated the Eighth Amendment's prohibition against cruel and unusual punishment. The sentence itself is disproportionate when Washington's sentence is considered. Further, Kihega provided more than sufficient evidence of his character

to warrant a lesser sentence. As a result, if Kihega's previous requests are denied, this Court should remand the case for resentencing.

REQUEST FOR ORAL ARGUMENT

Kihega hereby requests oral argument.

Dated this 9th day of March, 2016.

RONAYNE & COGLEY, P.C.

/s/ Thomas J. Cogley

_____

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CERTIFICATE OF COMPLIANCE

Thomas Cogley, attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

a. Appellant's brief does not exceed 32 pages.

b. The body of Appellant's brief was typed in Times New Roman 12 point typeface, with footnotes being in 12 point typeface; and

c. Appellant's brief contains 7,494 words and 38,773 characters with no spaces and 46,762 characters with spaces, according to the word and character counting system in Microsoft Office Professional Edition 2003 for Windows 7 Professional used by the undersigned.

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CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, Roger Kihega, hereby certifies that on the 9th day of March, 2016, two true and correct copies of Appellant's Brief with attached appendix were mailed by first class mail, postage prepaid, to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. Appeal No. 27673

ROGER LEE KIHEGA,
Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPENDIX

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STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF BROWN FIFTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA
Plaintiff,

-vs-

CR15-0311
JUDGMENT OF CONVICTION

ROGER LEE KIHEGA,
Defendant.

****

An Indictment was filed with this Court on April 22, 2015, charging the Defendant with the crimes of First Degree Robbery in violation of SDCL 22-30-1, 22-30-6 & 22-30-7 and Possession of Firearm by Convicted Felon in violation of SDCL 22-14-15. The Defendant was arraigned on said Indictment on June 5, 2015. The Defendant, the Defendant's attorney Tom Cogley and Christopher White, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant. The Defendant pled not guilty to the charges of First Degree Robbery in violation of SDCL 22-30-1, 22-30-6 & 22-30-7 and Possession of Firearm by Convicted Felon in violation of SDCL 22-14-15.

A Jury Trial commenced on September 16, 2015. On September 18, 2015, the defendant was found guilty of First Degree Robbery in violation of SDCL 22-30-1, 22-30-6 & 22-30-7 and Possession of Firearm by Convicted Felon in violation of SDCL 22-14-15, and admitted to being a Habitual Offender in violation of SDCL 22-7,

It is the determination of this Court that the Defendant has been regularly held to answer for said offense and that the Defendant was represented by competent counsel.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of First Degree Robbery in violation of SDCL 22-30-1, 22-30-6 & 22-30-7 and Possession of Firearm by Convicted Felon in violation of SDCL 22-14-15 and is an Habitual Offender as defined in SDCL 22-7-7 through 8.1.

SENTENCE

On November 5, 2015, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

ORDERED that the defendant on the charge of First Degree Robbery be incarcerated in the South Dakota State Penitentiary for a period of fifty (50) years, with twelve (12) years suspended, and with credit of 224 days for time already served through November 5, 2015, and it is

FURTHER ORDERED that defendant promptly pay $104.00 court costs.

IT IS FURTHER ORDERED that the defendant on the charge of Possession of Firearm by Convicted Felon be incarcerated in the South Dakota State Penitentiary for a period of five (5) years, with credit of 224 days for time already served through November 5, 2015, and to run concurrent to the burglary charge, and it is

FURTHER ORDERED that defendant promptly pay $104.00 court costs.

IT IS FURTHER ORDERED that defendant reimburse Brown County for court appointed attorney fees and the costs of the investigator, and it is

FURTHER ORDERED that defendant provide a DNA sample, and it is

FURTHER ORDERED that defendant make restitution for UA and blood testing costs, and it is

FURTHER ORDERED that defendant make restitution, joint and several with Michael Washington, to the victim of his crime, and make restitution for counseling costs of Jan Porier

FURTHER ORDERED that supervision of any suspended portion of this sentence be under the Department of Corrections, Board of Pardons & Paroles.

IT IS HEREBY NOTED that pursuant to SDCL 23A-27-48, the defendant was informed in open court of the estimated minimum period he must serve before being eligible for parole.

Dated this 5th day of November, 2015.

BY THE COURT:

Circuit Court Judge Richard A Sommers

ATTEST:
Marla R. Zastrow, Clerk of Courts
By _____, Deputy

No. 15

A person cannot be convicted of a crime upon the testimony of an accomplice unless the accomplice is corroborated by other evidence which tends to connect the defendant with the commission of the offense. The corroborative evidence is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

You are hereby instructed that as a matter of law Michael Washington is to be considered an accomplice.

Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may consist of other evidence of circumstances, the testimony of a witness other than an accomplice, or the testimony or admissions, if any, of the defendant.

In determining whether an accomplice has been corroborated you must first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence his testimony is corroborated. But before you may convict the defendant you must find from all the evidence beyond a reasonable doubt that the defendant is guilty.

No. 16

You are instructed that the testimony of an accomplice ought to be viewed with caution. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with great care and caution and in the light of all the evidence in the case.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27673

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ROGER LEE KIHEGA,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD A. SOMMERS
Circuit Court Judge

APPELLEE'S BRIEF

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AND APPELLANT

Notice of Appeal filed December 1, 2015

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27673

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ROGER LEE KIHEGA,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, State of South Dakota, Plaintiff and Appellee, will be identified as "State." Roger Lee Kihega, Defendant and Appellant, will be designated as "Defendant," or "Kihega." References to the transcripts of the June 5, 2015 arraignment hearing; the August 18, 2015 motion for severance proceeding; September 2, 2015 pretrial motions hearing; the September 16 through 18, 2015 jury trial; and the November 5, 2015 sentencing hearing will be identified as "ART," "MS," "PMH," "JT," and "SNT," respectively. Citations to the settled record, Defendant's brief, exhibits, presentence report and jury instructions will be designated as "SR," "DB," "EX," "PSR," and "JI," respectively. All references will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This appeal stems from Defendant's September 18, 2015 convictions for First Degree Robbery, in violation of SDCL §§ 22-30-1, 22-30-6, and 22-30-7; and Possession of a Firearm by a Convicted Felon, in violation of SDCL 22-14-15. DB 3 n.2; SR 11-12, 244, 606-07; JT 1161-63; SNT 1235-38. On September 18, 2015, Kihega admitted that he was a habitual offender pursuant to SDCL 22-7-7. DB 6; SR 23-29, 216-18, 606-07; JT 1163-65. The Honorable Richard A. Sommers, Fifth Judicial Circuit, Brown County, filed a Judgment of Conviction on November 5, 2015. SR 606-07; SNT 1235-38. On December 1, 2015, Defendant filed a Notice of Appeal. SR 626-27. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL?

Judge Sommers' decisions were correct.

State v. Traversie, 2016 S.D. 19, __ N.W.2d __

State v. Graham, 2012 S.D. 42, 815 N.W.2d 293

II

WHETHER JUDGE SOMMERS PROPERLY ADMITTED CERTAIN EVIDENCE AT TRIAL, WHICH INCLUDED: (A) 24 AUDIO CLIPS OF DEFENDANT'S JAIL TELEPHONE CONVERSATIONS WITH HIS WIFE THAT WERE NOT PROTECTED BY ANY SPOUSAL PRIVILEGE; (B) DETECTIVE

JEFF NEAL'S REDIRECT TESTIMONY THAT KIHEGA MOVED AROUND AND LIVED IN DIFFERENT PLACES; (C) NEAL'S REBUTTAL TESTIMONY THAT DEFENDANT HAD TOLD HIS WIFE, DURING ONE OF THEIR JAIL TELEPHONE CONVERSATIONS, THAT HE WAS "SURE" THAT LAW ENFORCEMENT OFFICIALS HAD A VIDEO OF EVERYBODY AT A NORTH DAKOTA CASINO; AND (D) NEAL'S REDIRECT TESTIMONY THAT HE HAD CORROBORATED SOME OF MICHAEL WASHINGTON'S ADMISSIONS ABOUT THE ROBBERY WITH GREGORY TWO HEARTS, WHO REFUSED TO TESTIFY AT TRIAL?

The trial court's evidentiary rulings were appropriate.

State v. Martin, 2015 S.D. 2, 859 N.W.2d 600

State v. Selalla, 2008 S.D. 3, 744 N.W.2d 802

State v. Brown, 435 N.W.2d 225 (S.D. 1989)

State v. McKercher, 332 N.W.2d 286 (S.D. 1983)

III

WHETHER THE TRIAL COURT VIOLATED DEFENDANT'S CONFRONTATION RIGHTS BY ALLOWING DETECTIVE NEAL TO TESTIFY, DURING REDIRECT EXAMINATION, THAT HE HAD CORROBORATED SOME OF MICHAEL WASHINGTON'S STATEMENTS WITH GREGORY TWO HEARTS, WHO REFUSED TO SAY ANYTHING AT TRIAL?

Judge Sommers' decision was proper, when Defendant opened the door to this testimony at trial.

State v. Golliher-Weyer, 2016 S.D. 10, 875 N.W.2d 28

State v. Martin, 2015 S.D. 2, 859 N.W.2d 600

State v. Selalla, 2008 S.D. 3, 744 N.W.2d 802

State v. Zakaria, 2007 S.D. 27, 730 N.W.2d 140

IV

WHETHER THE CUMULATIVE EFFECT OF THE TRIAL COURT'S SO-CALLED ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL?

This issue was not raised below.

State v. Wright, 2009 S.D. 51, 768 N.W.2d 512

McDowell v. Solem, 447 N.W.2d 646 (S.D. 1989)

V

WHETHER DEFENDANT'S SENTENCE OF FIFTY YEARS IN PRISON FOR FIRST DEGREE ROBBERY, WITH TWELVE YEARS SUSPENDED, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

The trial court's sentencing analysis was appropriate.

State v. McCahren, 2016 S.D. 34, __ N.W.2d __

State v. Rice, 2016 S.D. 18, 877 N.W.2d 75

STATEMENT OF THE CASE

This matter arises from Defendant's involvement with the robbery of the Casino Korner in Aberdeen, South Dakota. SR 11-22, 23-29, 244, 606-07; ART 654-65; JT 731-839, 881-1167; SNT 1169-238; PSR 252-70; EX 1-25. On March 27, 2015, the Brown County State's Attorney filed a Complaint, which charged Kihega with: Count 1--First Degree Robbery, Class 2 felony, in violation of SDCL §§ 22-30-1 and 22-30-6; and Count 2--Possession of a Firearm by a Convicted Felon, Class 6 felony, in violation of SDCL 22-14-15. SR 1-2. Counsel was appointed for Defendant on March 31, 2015. SR 3-4. The same

prosecutor filed an Indictment on April 22, 2015, which charged Kihega with: Count 1--First Degree Robbery, Class 2 felony, in violation of SDCL §§ 22-30-1, 22-30-6, and 22-30-7; Count 2--Aiding, Abetting, or Advising First Degree Robbery, Class 2 felony, in violation of SDCL §§ 22-3-3, 22-30-1, 22-30-6 and 22-30-7; and Count 3--Possession of a Firearm by a Convicted Felon, Class 6 felony, in violation of SDCL 22-14-15. SR 11-12.

On June 5, 2015, the Brown County State's Attorney filed a Part II Information because Defendant previously had been convicted of Aggravated Assault on May 10, 2001, in Brown County; and Escape on June 2, 2008, in Barron County, Wisconsin. SR 23-29, 216-18. The Honorable Richard A. Sommers conducted an arraignment proceeding on the same date. SR 11-12, 244, 606-07; ART 654-65. Kihega filed a number of pretrial pleadings, which included a Motion for Leave to File Notice of Alibi Defense and Notice of Alibi Defense on July 17, 2015; a Motion for Severance (of his trial from that of his two co-defendants) on August 10, 2015; a Motion Renewing Request to Provide Alibi Defense on August 26, 2015; and a Motion in Limine to Prevent Audio Recordings on September 14, 2015. SR 31-34, 43, 65-66, 128. The court reviewed these motions in several hearings; granted Defendant's requests to provide an alibi defense and to sever his trial; but rejected Kihega's Motion in Limine to Prevent Audio Recordings. SR 59-60, 136; MS 48-57, 704-13; PMH 667-97; JT 1060-70.

Judge Sommers conducted a jury trial on September 16 through 18, 2015. JT 731-839, 881-1167; EX 1-25. Kihega made several motions for judgment of acquittal during this proceeding. SR 247-48; JT 1055, 1101. Both parties admitted proposed jury instructions to the court. SR 106-22, 170-214; JT 1101-20; JI 15-16. The jury convicted Defendant of First Degree Robbery and Possession of a Firearm by a Convicted Felon. SR 244; JT 1161-63.

After the conclusion of his trial, Defendant admitted on September 18, 2015, that he was a habitual offender due to his two prior felony convictions. SR 23-29, 216-18, 606-07; JT 1163-65. On November 5, 2015, Judge Sommers held an arraignment and sentencing hearing. DB 3 n.2; SNT 1169-80. During this proceeding, Defendant pled guilty to Attempted Witness Tampering and the State, in exchange, dismissed three drug charges against him. DB 3 n.2; SNT 1169-80. The judge carefully considered sentencing input from both sides and required that Defendant serve fifty years in the penitentiary for First Degree Robbery, and suspended twelve years of this penalty; ordered that Kihega serve a concurrent sanction of five years in prison for Possession of a Firearm by a Convicted Felon; and imposed a consecutive five-year penalty in the penitentiary for Attempted Witness Tampering. SR 23-29, 216-18, 606-07; SNT 1180-238; PSR 252-70. The court filed a Judgment of Conviction on the

same date. SR 606-07. On December 1, 2015, Kihega filed a Notice of Appeal. SR 626-27.

STATEMENT OF FACTS

The events in this case took place on January 19, 2015, when Defendant and his nephew, Michael Washington, robbed the Casino Korner "[b]etween the hours of 8:30 and 9:00 p.m.," which was located in Aberdeen, South Dakota. JT 902-09, 918-60, 964-69, 982-1054, 1099-1100; EX 1-25. Both Defendant and Washington were wearing dark-colored sweatshirts and had concealed their faces during this crime; both men were carrying weapons, which they shot into the ceiling, while yelling at everyone inside the Casino Korner "[g]et the f--k down"; Kihega rushed up to the front counter and told Janis Poirier to give him the money, which amounted about $4,600, while Washington stayed in the back with several other customers; and both of them escaped out the back door and jumped into a truck, or SUV, which was driven by Gregory Two Hearts. JT 902-09, 919-29, 949-50, 964-69, 982-95; EX 1, 3-22. Law enforcement officials eventually discovered Defendant and Washington hiding in the basement of an Aberdeen home on March 26, 2015, about two months after the Casino Korner robbery, and while they were working on another investigation. JT 912-13, 935-37, 994-98, 1014-18.

At trial, Washington, who was twenty-three years old, testified that he had reached a favorable plea bargain with the State after about

six months, which required him to serve five years for armed robbery, rather than fifty years in prison; and that he had agreed to testify against Defendant in exchange for this deal. JT 910-12, 917-34, 939-46, 950-60. This young man explained that he had traveled from Minneapolis, Minnesota to Aberdeen, South Dakota, on January 19, 2015, where he met up with his uncles, Defendant and Two Hearts, who were planning to rob the Casino Korner. JT 920-23, 948, 1032. In addition, Washington indicated that Defendant had given him a 25 caliber pistol; that Kihega had procured a 9 millimeter handgun for his own use; and that both of these men had worn hooded sweatshirts and bandanas to conceal their identities, during the robbery. JT 921-25, 956; EX 1. Washington also stated that Two Hearts had driven them to the Casino Korner in his vehicle; that Defendant and Washington had entered this building by the back door; that both men had fired their guns into the ceiling; and that they had warned "everybody to get on the ground." JT 923-28, 949-50, 998; EX 1.

Along the same lines, Washington emphasized that Defendant had "gone up front" to get the money, while he stayed in the back of the building and was "controlling" the people on the floor. JT 927-29; EX 1. In addition, this young man described how he had stolen "a small silver [cell] flip phone" from one customer on the ground; and that he had taken a wallet from another person, who was "[t]apping in his back pocket," and that this item had contained "some credit cards, checks

and a little over a hundred dollars." JT 926-28, 950; EX 1. Washington also related that Defendant had said "Let's go," and that they had run out the back door and "hopped [into Two Hearts] truck," as part of their escape plan. JT 928-29, 949-50; EX 1.

Washington explained that he and his two companions had headed out of Aberdeen, although he did not know which direction they were traveling; that he had snapped the stolen flip phone in half and tossed it out the window of Two Hearts' vehicle; that this young man had done the same thing with the wallet, the clothes from the robbery, and the money bands; but that he had kept the $100 in cash. JT 929-33, 950, 1030-33. In addition, Washington indicated that he and his cohorts had "wound up at some casino in North Dakota," where they gambled for a few hours, before heading to the Mystic Lake Casino, in Prior Lake, Minnesota, where Defendant got a room, they split up the robbery money, and gambled some more. JT 929-32; EX 23-24. Washington also noted that he had hidden the 25 caliber pistol, which he had used during the robbery, by shoving it into the passenger side headrest of Two Hearts' truck. JT 931-32, 994-95, 998-99.

Three other witnesses, who were in the Casino Korner, when the robbery occurred on January 19, 2015 testified for the State at trial, and substantiated Washington's version of events, although none of them could identify the Defendant and his partners in crime. JT 900-09, 964-69; EX 1. Poirier explained that she had been working at this

business when two men rushed in through the back door between 8:30 and 9:00 p.m.; that one of the robbers, who had a "medium to small" build and a Native American accent, had come up to the counter and demanded that she "[g]et the money"; and that she could not identify either of these men because they were wearing hoods and "some type of mask[s]"; and that both of them had exited out the back door. JT 900-09, 983; EX 1. In addition, Steven Petrik, a customer, testified that he had been gambling on a video lottery machine that same evening, when "[t]wo guys came in, told us to get on the floor" and robbed the place; that he had heard two gunshots before one of these men pushed him down and stole his wallet and "TracFone flip phone"; and that the robbers were probably 5' 8" tall, wearing black clothes, and that they had left by the back door. JT 964-66; EX 1. Thomas Reiker, another patron, stated that he had heard two gunshots, while he was at the Casino Korner on the night of the robbery; that the robbers had told everybody "to get down"; that he thought that he had put his "hand over his wallet," before one of these guys had stolen it; and that this item had contained his driver's license, credit cards and "a $100 bill." JT 967-69; EX 1.

Moreover, Gregory Two Hearts, who transported Defendant and Washington to the Casino Korner and drove the getaway vehicle, was called as a witness for the prosecution at trial. JT 972-79. As part of this process, the State granted Two Hearts use immunity for his

testimony at trial, except for any perjured statements. JT 972-79. Two Hearts, however, refused to say anything during an in-chambers hearing before he testified, when Judge Sommers asked him if he "intended to exercise [his] Fifth Amendment Rights to remain silent." JT 973-74. The prosecution also called Two Hearts to the stand at trial but he refused to respond to any questions; and was placed under a contempt order and returned to jail. JT 977-79.

Providing more details, Jeff Neal, a detective for the City of Aberdeen stressed that he had investigated the Casino Korner robbery, in which "roughly $4,600" had been stolen, by obtaining both the interior and exterior surveillance footage for this business (Exhibit 1), which showed two suspects, who had concealed their faces with dark-colored sweatshirt hoods. JT 981-84, 993-94, 1013-16, 1099-1100. In addition, this detective emphasized that photographs had been taken of the interior portion of the Casino Korner, which showed a 9 millimeter bullet hole in a ceiling vent and a 25 caliber bullet hole in the ceiling itself; that a 9 millimeter shell casing and 25 caliber shell casing had been discovered on the floor of the building; that a slug from a 25 caliber bullet had been found lodged under a shingle, in the Casino Korner's roof by repairmen; and that no 9 millimeter slug had ever been located. JT 985-93; EX 3-22. Neal also indicated that a $10,000 reward had been offered for information about the robbery, but that it had taken approximately two months before any arrests were made

because of the large number of suspects in this case. JT 994, 1014-15. This detective further noted that Washington had eventually agreed to cooperate with the prosecution after he received a beneficial plea deal and the "biggest break that he would ever get in his life." JT 993-89, 1008-10, 1013-20.

Furthermore, Neal explained that Defendant's jail telephone calls with his wife had been recorded and monitored pursuant to standard police practices; that both Kihega and his wife had been notified about this procedure in advance before they communicated with each other; and that twenty-four audio clips from these calls revealed that Defendant had repeatedly told Washington to "keep his f--king mouth shut"; that Kihega had warned his nephew that he would "knock his f--king voice box out" and "fire on his ass"; that Defendant had said that "silence is their weapon"; and that he had assured his wife that the police had a video of everyone at a casino in North Dakota. JT 1002-13, 1038-40, 1099-1100; EX 25. In addition, this detective detailed that the police had not been able to find the weapons, ammunition, clothing, bandanas, gloves, cell phones, money, money bands, or stolen wallet in this case. JT 1021-25, 1028-32, 1042-43. Neal, however, stated that he had contacted a cell phone company to locate the item that Washington had stolen from one of the customers at the Casino Korner, which had disclosed that there "was pinging a few miles north of Aberdeen"; that this detective had found Defendant's room check-in

receipt and players card from the Mystic Lake Casino, where Kihega and his companions had stayed after the robbery; and that he had checked to see if Washington's 25 caliber gun was hidden in the headrest of Two Hearts' truck, but had only been able to find "pulled apart" fabric and a hiding place between two pieces of foam. SR 238-43; JT 931-32, 994-95, 998-99, 1000-02, 1032; EX 23-24.

Lastly, the defense presented the alibi testimony of Denote Threatt at trial, who claimed that he had seen Defendant at his home, in Cokato, Minnesota, at around 4:30 p.m. on January 19, 2015, which supposedly meant that Kihega would not have had enough time to travel to Aberdeen (which was located about four hours away), and rob the Casino Korner later that evening. JT 902, 1014, 1060-70.

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

A. Introduction.

Defendant contends, in his first issue, that Judge Sommers made a mistake when he rejected the defense's motions for judgment of acquittal. DB 7-12, 29; JT 1055, 1101. In addition, Defendant protests that his convictions for first degree robbery and for being a felon in possession of a firearm cannot be based solely upon the testimony of Washington, who was one of his accomplices; Detective

Neal's input at trial; and the "two dozen audio clips gleaned" from Kihega's jail telephone conversations with his wife. DB 7-12, 29; EX 25. Defendant also alleges that Neal admitted during cross-examination, that only Washington and Two Hearts had identified Kihega as a suspect in this case; that Two Hearts had refused to testify on September 17, 2015; that the trial record is "devoid of physical evidence," because Neal could not locate "literally dozens of items that could have linked" Defendant to the robbery of the Casino Korner; that the best evidence, which the detective could find, was a Mystic Lake Casino receipt that showed that Kihega and Washington had been in Minnesota nearly twelve hours after the crime spree in Aberdeen, South Dakota. DB 7-12; EX 23-24. Defendant further insists that the jury had to "strip away" Washington's testimony from its decision because of Jury Instructions 15 and 16, which reflected that Washington's accomplice testimony needed to be viewed with "suspicion" and corroborated. DB 9-12; SR 195-96.

B. Standard of Review.

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Traversie,* 2016 S.D. 19, ¶ 9, __ N.W.2d __. The relevant question is "whether, after viewing the evidence in the light most favorable to the [State] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Fischer,* 2016 S.D. 1, ¶ 26, 873 N.W.2d 681, 692. The prosecution

may prove all elements of an offense with circumstantial evidence. *Id.* "Evidence is sufficient to corroborate the testimony of an accomplice if it tends to affirm the truth" of what this individual is saying, and establishes the guilt of the accused. *State v. Graham,* 2012 S.D. 42, ¶ 34, 815 N.W.2d 293, 306-07. "There is no requirement that every material fact testified to by an accomplice must be corroborated." *Id.* at ¶ 39.

C. Legal Analysis.

The State asserts that the jury could have reasonably concluded, based upon the entire evidentiary picture at trial, that Defendant had robbed the Casino Korner on January 19, 2015, and that he was a felon in possession of a firearm. DB 7-12, 29; SR 11-12, 195-96, 244; JT 881-1163; EX 1-25; JI 15-16. *Traversie,* 2016 S.D. 19, ¶ 9. As previously noted, Washington, who was twenty-three years old and Defendant's nephew, testified that Kihega had planned the robbery in question and had asked him if he wanted to participate; that Defendant had given him a 25 caliber pistol and that Kihega had used a 9 millimeter handgun during the Casino Korner robbery; and that both men had worn hooded sweatshirts and bandanas to hide their faces. JT 911, 921-25, 956; EX 1. In addition, Washington indicated that Two Hearts had driven everyone to the Casino Korner in his SUV, or truck; that Defendant and Washington had entered the building by the back door; that both men had fired their weapons into ceiling; and that they

had yelled at everybody inside to get on the floor. JT 900-09, 923-28, 949-50, 964-69; EX 1. *Fischer,* 2016 S.D. 1, ¶ 26, 873 N.W.2d at 692. Washington also related that Defendant had gone to the front of the Casino Korner to get the money, while he stayed in the back to control the customers; that he had stolen "a small silver flip phone," and a wallet, which contained some credit cards, checks and about $100, from several people; and that he and Kihega had rushed out the back door and jumped into Two Hearts' truck, as part of their get-away scheme. JT 926-29, 949-50, 965-69; EX 1. *State v. Charger,* 2000 S.D. 70, ¶ 39, 611 N.W.2d 221, 229 (jury is a lie detector in the courtroom). Washington further noted that he had snapped the stolen cell phone in half and tossed it out the window of Two Hearts' vehicle during their trip to "some casino in North Dakota"; that he had disposed of the clothing from the robbery, the money bands, and stolen wallet in the same way; but that he had kept $100 in cash. JT 929-33, 950, 1028-31.

Moreover, Defendant is trying to minimize the fact that not every detail, or every material element of Washington's accomplice testimony, needed to be validated by corroborating evidence, and that corroboration can be established by both direct and circumstantial evidence. DB 7-12, 29; JT 910-60; EX 1. *Graham,* 2012 S.D. 42, ¶ 34, 815 N.W.2d at 306-07; *State v. Corean,* 2010 S.D. 85, ¶ 59, 791 N.W.2d 44, 63 (natural inferences drawn from the evidence count as

corroboration for an accomplice's testimony). *State v. Olhausen,* 1998 S.D. 120, ¶ 10, 587 N.W.2d 715, 718 (citing SDCL 23A-22-8). In addition, Washington's account dovetailed with the testimony, which Detective Neal provided at trial about his investigation of the Casino Korner crimes; Poirier's input and that of several customers, who were impacted by the robbery on January 19, 2015; the photographs of the bullet holes in the ceiling of the Casino Korner; the two shell casings from a 9 millimeter handgun and a 25 caliber pistol, which were discovered at the crime scene; and the slug from a 25 caliber bullet, which was found in the roof of the building. JT 900-60, 981-1054, 1099-1100; EX 1-22. *State v. Chipps,* 2016 S.D. 8, ¶ 51, 874 N.W.2d 475, 492 (in some instances circumstantial evidence may be more reliable than direct evidence); *State v. Smithers,* 2003 S.D. 128, ¶ 39, 670 N.W.2d 896, 902 (the sufficiency of corroborating evidence is a jury question); *State v. Phyle,* 444 N.W.2d 380-83 (S.D. 1989) (jury chose to believe sum of evidence). Washington's testimony about how he had hidden the 25 caliber pistol from the robbery, by stashing it in the passenger side headrest of Two Hearts' truck, also matched Detective Neal's report that the fabric on this headrest had been "pulled apart, so that I could stick my hand in between the two pieces of foam," although there was no gun inside. JT 932, 998-99.

Furthermore, Neal testified that there was other evidence, which linked Defendant and Washington to the Casino Korner robbery,

despite his admission during cross-examination that only two suspects, Washington and Two Hearts (who refused to testify at trial), had identified the Defendant as an accomplice in this case. JT 1015-16, 1018, 1028, 1043. *Graham,* 2012 S.D. 42, ¶¶ 29, 34, 38-39, 815 N.W.2d 305-07; *Smithers,* 2003 S.D. 128, ¶ 39, 670 N.W.2d at 902. This detective emphasized that he had not been able to locate any cell phones from the robbery, but that he had contacted a cell phone company and used GPS coordinates to find "a ping" from a cell phone, which Washington had stolen from one of the customers at the Casino Korner; and that this "reading" had been coming from "a few miles north of Aberdeen." JT 994-95. Neal also stated that he had obtained Defendant's check-in receipt and player's card from the Mystic Lake Casino; that this detective had tried to find the guns in question by contacting a pawn shop computer data base, Leads Online, which had been unsuccessful; and that Washington had never been able to tell the police exactly where he had thrown the clothing, flip phone, wallet and money bands out the window of Two Hearts' truck. SR 238-43; JT 929-31, 950, 1000-02 1021-25, 1028-31; EX 23-24. *Corean,* 2010 S.D. 85, ¶¶ 56, 59, 791 N.W.2d at 62-63.

Finally, Neal confirmed that inmates at the Brown County Jail are allowed to make phone calls, which are charged to their accounts; that both parties to these calls are routinely informed that they are being recorded and monitored; that 24 audio clips of Defendant's jail

telephone calls with his spouse (Exhibit 25) reflected that Kihega had told his wife that he was going to "be gone for a little while this time"; that Defendant had wanted his spouse to send a kite to Washington, which told him to "shut up"; that Kihega had said "that silence is their weapon"; that Defendant had asked his wife to tell "Mike [that] he is f--ked" for talking to the cops; that Kihega had said "I'm sure they do," when his wife asked if there was a video of everyone at a casino in North Dakota; and that he had admitted that identification was needed to check-in at the Mystic Lake Casino. JT 1002-13, 1038-40, 1099-1100; EX 23-25. *State v. Zakaria,* 2007 S.D. 27, ¶¶ 19-21, 730 N.W.2d 140, 146 (defendant made incriminating admissions in videotaped conversations with girlfriend); *State v. McKercher,* 332 N.W.2d 277-88 (S.D. 1983) (statements in jail telephone conversations are not confidential, or protected by any spousal privilege). *But see State v. Thomas,* 2011 S.D. 15, ¶¶ 27-30, 796 N.W.2d 706, 715. It also bears remembering that the jury was properly instructed in Jury Instructions 15 and 16, that the testimony of an accomplice should be viewed with "caution," rather than "suspicion"; and that Washington's testimony needed to be "removed from the case," although it then had to "determine [if] any remaining evidence connected" Kihega to his crimes. DB 9; SR 195-96. *Traversie,* 2016 S.D. 19, ¶ 12; *Corean,* 2010 S.D. 85, ¶ 59, 791 N.W.2d at 63. Thus, Kihega's own deceitful tactics snarled him in the net of guilt.

II

JUDGE SOMMERS PROPERLY ADMITTED CERTAIN EVIDENCE AT TRIAL, WHICH INCLUDED: (A) 24 AUDIO CLIPS OF DEFENDANT'S JAIL TELEPHONE CONVERSATIONS WITH HIS WIFE THAT WERE NOT PROTECTED BY ANY SPOUSAL PRIVILEGE; (B) DETECTIVE NEAL'S REDIRECT TESTIMONY THAT KIHEGA MOVED AROUND AND LIVED IN DIFFERENT PLACES; (C) NEAL'S REBUTTAL TESTIMONY THAT DEFENDANT HAD TOLD HIS WIFE, DURING ONE OF THEIR JAIL TELEPHONE CONVERSATIONS THAT HE WAS "SURE" THAT LAW ENFORCEMENT OFFICIALS HAD A VIDEO OF EVERYBODY AT A NORTH DAKOTA CASINO; AND (D) NEAL'S REDIRECT TESTIMONY THAT HE HAD CORROBORATED SOME OF MICHAEL WASHINGTON'S ADMISSIONS ABOUT THE ROBBERY WITH GREGORY TWO HEARTS, WHO REFUSED TO TESTIFY AT TRIAL.

A. Background.

Defendant attacks Judge Sommers, in his second issue, because he supposedly made improper rulings at trial, with respect to four critical pieces of evidence. DB 12-21, 29. Specifically, Defendant professes that this judge should not have admitted: (1) "snippets of audio conversations" between Kihega and his wife; (2) Detective Neal's redirect testimony about Defendant's various residences; (3) this investigator's rebuttal testimony about Kihega's reply to his wife, during one of their telephone conversations, that he was "sure" that the police had a video of everyone at a casino in North Dakota; (4) Neal's redirect testimony about the steps he had taken to corroborate Washington's story with Two Hearts on March 31, 2016, who refused to testify at trial and was deemed unavailable under SDCL 19-19-804(2). DB 12-13, 29.

Kihega also urges that the so-called errors affected the result of his trial. DB 12-13, 29.

B. Standard of Review.

Trial judges have the discretion to allow an ordinarily inadmissible inquiry, when an adversary "opens the door" to that line of testimony. *State v. Golliher-Weyer*, 2016 S.D. 10, ¶ 15, 875 N.W.2d 28, 33; *State v. Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d 600, 603-05. Admissions made by a defendant, during jail telephone conversations with his spouse, are not confidential, or protected by the spousal privilege. *McKercher,* 332 N.W.2d at 286-88. Rebuttal evidence explains, contradicts, or refutes the defendant's evidence at trial. *Sorensen v. Harbor Bar, LLC,* 2015 S.D. 88, ¶ 31, 871 N.W.2d 851, 857. A statement is not hearsay if it is offered against the party and he has manifested his adoption or belief in its truth. *State v. Brown,* 435 N.W.2d 225, 229 (S.D. 1989).

C. Legal Synopsis.

1. <u>The admission of 24 audio clips of Kihega's jail telephone conversations with his wife was appropriate at trial.</u>

Judge Sommers properly admitted 24 audio clips of Defendant's jail telephone conversations with his wife. DB 13-16, 29; SR 102, 207; JT 1002-13, 1038-40, 1099-1100; JI 27; EX 25. *State v. Karlen,* 1998 S.D. 12, ¶ 33, 589 N.W.2d 594, 601. Detective Neal explained at trial that there was no expectation of privacy in Kihega's jail telephone

exchanges with his wife, because inmates at the Brown County Jail can make collect calls, or purchase a phone card, which they can use from their cells to call family and friends; and that both parties are advised at the beginning of these telephone calls that they are being recorded and monitored by law enforcement personnel. JT 1002-03; EX 25. *McKercher,* 332 N.W.2d at 286-88. In addition, this investigator indicated that it was standard police procedure to monitor and record inmate jail telephone calls in major or severe cases. JT 1038-40; EX 25. Neal also noted that inmates, like Defendant, who are making these telephone calls have an account in their name for expenses, and that all of the 24 audio clips in question could be traced to Kihega and his wife, except for one exchange to another male, whom the police could not identify. JT 1004-05; EX 25.

Furthermore, it is well established that statements made by a criminal Defendant, like Kihega, during jail telephone conversations with his wife, are not confidential; that these exchanges are not protected by the spousal privilege; and that they are admissible at trial. *Karlen,* 1998 S.D. 12, ¶ 33, 589 N.W.2d at 601. Put differently, these disclosures are not private, or intended to go undisclosed to any other person, so they do not constitute privileged conversations. SR 102, 207; JT 1002-13, 1038-40, 1099-1100; JI 27; EX 25. *Id.* (citing *McKercher,* 332 N.W.2d at 286-88). Defendant also was a jail detainee, who under these circumstances knew or should have known, that his telephone

discussions with his wife could have been overheard and monitored by the police, and that they were not protected by any spousal privilege. JT 1002-13, 1038-40, 1099-1100; EX 25. Consequently, no unfair prejudice resulted from the admission of Exhibit 25 into evidence at trial and this grievance should be rejected.

2. Detective Neal's redirect testimony, which related to Kihega's various residences, was admissible at trial.

Judge Sommers determined that Defendant had opened the door, during Neal's cross-examination at trial, with respect to the fact that this detective had "heard [from] talking to different people," that Kihega moved around and lived in various places. DB 16-19; JT 1029-30, 1032-34, 1037, 1042-43. *Golliher-Weyer,* 2016 S.D. 10, ¶ 15, 875 N.W.2d at 33; *State v. Letcher,* 1996 S.D. 88, ¶¶ 25-26, 552 N.W.2d 402, 406-07. In addition, this judge pointed out that the prosecution was using Neal's redirect testimony to clarify that Defendant did not necessarily have "consistent residences," and stayed in different places in both Minnesota and South Dakota. DB 16, 29; JT 1029-30, 1032-34, 1037, 1042-43. *Martin,* 2015 S.D. 2, ¶¶ 7-10, 859 N.W.2d at 603-05; *Letcher,* 1996 S.D. 88, ¶¶ 25-26, 552 N.W.2d 406-07. Judge Sommers' approach also was consistent with similar situations, in *Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d at 603-05 and *State v. Selalla,* 2008 S.D. 3, ¶¶ 47-52, 744 N.W.2d 802, 816-18, in which the hearsay statements of unavailable declarants were admissible at trial, after the defense opened

the door to this evidence, based upon the rule of completeness (SDCL 19-19-13). The court also was giving both parties, including the State, the opportunity to develop the entire evidentiary picture at trial, in a fair manner. JT 1037, 1042-43. *Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d at 603-05; *Selalla,* 2008 S.D. 3, ¶¶ 47-52, 744 N.W.2d at 816-18.

Lastly, Defendant cannot show that Neal's input, during redirect examination at trial, was so prejudicial that "in all probability," it would have changed the result of his trial. DB 16-29; JT 1029-30, 1032-34, 1037, 1042-43. *State v. Reay,* 2009 S.D. 10, ¶¶ 48, 50, 762 N.W.2d 356, 370; *Selalla,* 2008 S.D. 3, ¶¶ 47-52, 744 N.W.2d at 816-18; *Zakaria,* 2007 S.D. 27, ¶¶ 17-21, 730 N.W.2d at 145-46. Denote Threatt, who testified for the defense at trial, provided substantially the same evidence, when he said that Kihega "leaves when he wants to" for other places and that no one really knows where he is going. JT 1037, 1042-43, 1062, 1069-70. *State v. Shepard,* 2009 S.D. 50, ¶¶ 14-16, 768 N.W.2d 165, 166-67; *Davi v. Class,* 2000 S.D. 30, ¶ 50, 609 N.W.2d 107, 118. Thus, Defendant cannot manufacture any error on such flimsy grounds.

3. Detective Neal's rebuttal testimony, in which he said that Defendant had assured his wife (in one of their jail telephone calls) that the police had a video of everyone at a casino in North Dakota, amounted to an adoptive admission, or statement against interest.

Judge Sommers reasoned that Detective Neal's rebuttal testimony, in which he detailed that Defendant had assured his wife, during one of

their jail telephone conversations, that the police had a video of everybody at a casino in North Dakota, constituted an adoptive admission at trial. SR 102, 207; DB 16-21, 29; JT 1060-70, 1091-1100; JI 27. *Sorensen,* 2015 S.D. 88, ¶ 31, 871 N.W.2d at 857 (rebuttal evidence explains, contradicts, or refutes a defendant's evidence); *Brown,* 435 N.W.2d at 229 (citing SDCL 19-16-3(2)). As previously noted, Defendant presented alibi evidence from Denote Threatt at trial, in an attempt to establish that Kihega was in Cokato, Minnesota, at around 4:45 p.m., on January 19, 2015, and that he would not have been able to travel to Aberdeen, South Dakota (which was located about 4 hours away), or to rob the Casino Korner later that evening. JT 1063-64. In response, the State advised this judge, during an in-chambers hearing, that Defendant had "opened the door pretty wide" with his alibi evidence to the suggestion that Kihega "wasn't even in town during the robbery"; and that the prosecution was going to call Detective Neal as a rebuttal at trial to show that Kihega was actually in a casino in North Dakota (just as Washington testified) after the robbery. JT 1063-64, 1091-1100. *Golliher-Weyer,* 2016 S.D. 10, ¶ 15, 875 N.W.2d at 33; *Martin,* 2015 S.D. 2, ¶¶ 9-10, 859 N.W.2d at 603-05; *Brown,* 435 N.W.2d at 22; SDCL 19-19-801(d)(2)(B). Judge Sommers also found that the Defendant could not have it both ways and claim that his alibi testimony showed that he was somewhere else other than the crime scene; and simultaneously prevent the State from establishing that

Kihega had said that he was "sure" that the police had a video of everyone at a casino in North Dakota. JT 1095-1100. *Martin,* 2015 S.D. 2, ¶¶ 9-10, 859 N.W.2d at 603-04; *Selalla,* 2008 S.D. 3, ¶¶ 47-52, 744 N.W.2d at 816-18; *Brown,* 435 N.W.2d at 229; *McKercher,* 332 N.W.2d at 287-88. The court ruled that this evidence rebutted the Defendant's alibi that he was always in Minnesota during the timeframe of the robbery and escape. JT 1096-1100. *State v. Williams,* 2008 S.D. 29, ¶ 22, 748 N.W.2d 435, 442 (trial judges have wide discretion in introducing rebuttal testimony); *Brown,* 435 N.W.2d at 229 (adoptive admission existed); SDCL 19-19-801(d)(2)(B).

In the alternative, Judge Sommers was right for the wrong reason because Defendant's admission (during his jail telephone discussion with his wife) that he was certain that the police had a video of everybody at a North Dakota casino, amounted to a statement against interest. DB 16-21, 29; JT 1092-1100. *Johnson v. O'Farrell,* 2010 S.D. 68, ¶ 22, 787 N.W.2d 307, 315 (a party opponent's own admissions are not hearsay); *State v. Johnson,* 2009 S.D. 67, ¶ 20, 771 N.W.2d 360, 368-69; *State v. Linder,* 2007 S.D. 60, ¶¶ 8-9, 736 N.W.2d 502, 505-07 (citing *State v. Brings Plenty,* 490 N.W.2d 261, 266 (S.D. 1992)); SDCL 19-19-804(3); *State v. Midgett,* 2004 S.D. 57, ¶ 28, 680 N.W.2d 288, 294. Stated differently, the nature of this phone call related to the fact that Defendant's wife was wondering if law enforcement officials "really [had] a video" and that Kihega had said that "I'm sure they do," which

was relevant to show that he was in North Dakota after the robbery. JT 1099-1100. *Linder,* 2007 S.D. 60, ¶¶ 8-9, 736 N.W.2d at 506-07 (admissions against interest expose the declarant to criminal liability); *McKercher,* 332 N.W.2d at 287-88. Accordingly, this claim is without merit.

4. Detective Neal's redirect testimony, in which this detective said that he had corroborated some of Washington's admissions about the robbery with Gregory Two Hearts, who refused to say anything against his cohorts, was admissible at trial.

Defendant has combined the fourth subpart of his second issue with the third protest in his brief. DB 1, 13, 21-23, 29. State also has taken the same approach, in its brief, and incorporates Issue III herein by reference for the sake of brevity.

III

THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S CONFRONTATION RIGHTS BY ALLOWING DETECTIVE NEAL TO TESTIFY, DURING REDIRECT EXAMINATION, THAT HE HAD CORROBORATED SOME OF MICHAEL WASHINGTON'S STATEMENTS ABOUT THE ROBBERY WITH GREGORY TWO HEARTS, WHO REFUSED TO SAY ANYTHING AT TRIAL.

A. Introduction.

As noted above, Defendant has combined subpart 4 of his second issue with his third complaint, because it "represents a violation of Kihega's right to confront witnesses and is serious enough to warrant its own Section." DB 1, 13, 21-23, 29. In particular, Defendant argues that Judge Sommers violated his confrontation rights, by permitting

Detective Neal "to testify about corroborating Washington's initial statements during an interview with Two Hearts," who refused to testify at trial. DB 1, 13, 21-23, 29. Defendant also posits that the effect of the trial court's ruling was to allow the State to circumvent the confrontation clause; that "everything," which the State would have questioned Two Hearts about "was brought in via this short exchange," so the prosecution received "even a greater windfall" than if Two Hearts had actually testified at trial; and that this approach has "a devastating effect upon criminal trials across South Dakota," because an investigator can simply testify "about what he learned from the bad guys." DB 22-23. Kihega further alleges that "one accomplice cannot corroborate the testimony of another accomplice," and that he was "refused the opportunity to have a jury instruction, which informed the jury on [this] issue." DB 23.

B. Standard of Review.

Courts have the discretion to allow an ordinarily inadmissible inquiry when an adversary "opens the door to that line of inquiry." *Golliher-Weyer,* 2016 S.D. 10, ¶ 15, 875 N.W.2d at 33. The context provided by a witnesses' redirect examination may provide answers for a point in dispute, which were raised during cross-examination. *Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d at 603-05; *Selalla,* 2008 S.D. 3, ¶¶ 47-52, 744 N.W.2d at 816-18; *Letcher,* 1996 S.D. 88, ¶¶ 25-26, 552 N.W.2d at 406-07. The admission of a co-defendant's statement without

the opportunity to cross-examine is subject to harmless error analysis. *Zakaria,* 2007 S.D. 27, ¶¶ 17-21, 730 N.W.2d at 145-46 (citing *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

C. Legal Analysis.

Judge Sommers refused to let the Defendant simultaneously use the confrontation clause as both a shield and a sword at trial, with respect to the steps that Detective Neal had taken to corroborate Washington's description of the robbery, after the defense opened the door to this line of inquiry. JT 1030-34, 1036-38, 1043-54. *Golliher-Weyer,* 2016 S.D. 10, ¶ 15, 875 N.W.2d at 33; *Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d at 603-05; *Selalla,* 2008 S.D. 3, ¶¶ 47-52, 744 N.W.2d at 816-18 (rule of completeness applies). In particular, this judge indicated that Defendant had opened the door, during Neal's cross-examination at trial, with regard to the fact that this investigator had tried to corroborate Washington's account of the Casino Korner robbery with Two Hearts at the penitentiary on March 31, 2015, by repeatedly asking Neal if he had "substantiated," or "corroborated" Washington's version of events. JT 1030-34, 1036-38, 1043-54. *Golliher-Weyer,* 2016 S.D. 10, ¶ 15, 875 N.W.2d at 33; *Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d at 603-05; *Selalla,* 2008 S.D. 3, ¶¶ 47-52, 744 N.W.2d at 816-18; *State v. Buchholtz,* 2013 S.D. 96, ¶ 12, 841 N.W.2d 449, 454. *But see Johnson,* 2009 S.D. 67, ¶¶ 22-26, 771 N.W.2d at 369-71. Judge Sommers also observed that the State was simply following up on the

fact that Neal had taken steps to corroborate Washington's story with Two Hearts, despite the contrary impression created by the defense's cross-examination of this investigator at trial. JT 1030-34, 1036-38, 1043-54. *Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d at 603-05; *Selalla,* 2008 S.D. 3, ¶¶ 47-53, 744 N.W.2d at 816-18. The court further ruled that Neal's testimony was not being offered by the State for the truth of the matter asserted but to rehabilitate this witness, so it did not constitute hearsay (which the defense conceded, JT 1052); and that no confrontation clause violation existed because the prosecution was prohibited from going "into the specifics of what Mr. Two Hearts said," and could only ask if Two Hearts had corroborated some of Washington's statements, without revealing any details. JT 1030-34, 1036-38, 1043-54. *Martin,* 2015 S.D. 2, ¶¶ 8-10, 859 N.W.2d at 603-05; *Selalla,* 2008 S.D. 3, ¶¶ 47-53, 744 N.W.2d at 816-18; *Letcher,* 1996 S.D. 88, ¶¶ 25-26, 552 N.W.2d at 406-07.

Furthermore, Defendant cannot establish any prejudice here when the State followed Judge Sommers' directive and restricted its redirect examination of Neal to a generalized statement that he had tried to corroborate Washington's account, by talking to Two Hearts on March 31, 2015 at the prison; Kihega did not follow up and propose any jury instruction, during the final settlement of instructions, with respect to whether one accomplice can corroborate the testimony of another accomplice; and the jury was properly informed, in Jury Instructions 15

and 16, about the weight, which should be given to such testimony, and how to decide if there was any remaining evidence to connect Kihega with his crimes. SR 170-71, 195-96; JT 1052-54, 1100-05, 1117-18, 1120. *Traversie,* 2016 S.D. 19, ¶ 12; *Buchholtz,* 2013 S.D. 96, ¶ 11 n.1, 841 N.W.2d at 451 n.1; *Selalla,* 2008 S.D. 3, ¶¶ 36-39, 744 N.W.2d at 813-14) (no prejudice, or plain error, existed); *Zakaria,* 2007 S.D. 27, ¶¶ 18-21, 730 N.W.2d at 143-46; *State v. Lachowitzer,* 314 N.W.2d 307, 309 (S.D. 1982). Washington's account also was corroborated by Defendant's own admissions, during his jail telephone conversations with his wife; the evidence discovered at the crime scene, including two shell casings, which matched the weapons in question, and the slug that was found in the Casino Korner's roof; the testimony of Poirier and two customers, who were in this business at the time of the robbery and had their personal items stolen, which included a flip phone, wallet, credit cards and about $100; the disguises, which the robbers were wearing, as depicted in the surveillance video; the hiding place in the headrest of Two Hearts' truck, where Washington said that he had hidden his gun; and the Mystic Lake documents. JT 910-60, 964-69, 981-1054, 1099-1100; EX 1-25. *Chipps,* 2016 S.D. 8, ¶ 51, 874 N.W.2d at 492-93; *Zakaria,* 2007 S.D. 27, ¶¶ 18-21, 730 N.W.2d at 143-46; *McKercher,* 332 N.W.2d at 287-88. *But see Thomas,* 2011 S.D. 15, ¶¶ 27-30, 796 N.W.2d at 715. Thus, no errors of constitutional magnitude exist on this score.

IV

THE CUMULATIVE EFFECT OF THE TRIAL COURT'S SO-CALLED ERRORS DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL.

A. Background.

Defendant claims, in his fourth issue, that the cumulative effect of Judge Sommers' purported mistakes deprived Kihega of a fair trial. DB 23-24. Defendant also insisted there was "scant evidence" against him, except for the "self-serving testimony of an accomplice," so the trial court's so-called errors had an even greater impact and denied him "the constitutional right to a fair trial." DB 23-24.

B. Standard of Review.

This Court has previously held that the cumulative effects of errors by a trial judge may support a finding that the defendant was denied his constitutional right to a fair trial. *State v. Perovich,* 2001 S.D. 96, ¶ 30, 632 N.W.2d 12, 18. The question is whether a review of the entire record shows that a fair trial was conducted below. *State v. Davi,* 504 N.W.2d 844, 857 (S.D. 1993).

C. Legal Synopsis.

Judge Sommers did not commit any errors, prejudicial or otherwise here, and none of Kihega's allegations support the conclusion that he was denied his constitutional rights to a fair trial. DB 23-24; JT 881-1167; EX 1-25. *State v. Wright,* 2009 S.D. 51, ¶ 69, 768 N.W.2d 512, 534; *Perovich,* 2001 S.D. 96, ¶ 30, 632 N.W.2d at 18; *McDowell v.*

Solem, 447 N.W.2d 646, 651 (S.D. 1989). The prosecution presented ample evidence of Defendant's guilt at trial, as demonstrated by a review of the entire record and as presented throughout this brief; and Kihega cannot show that the cumulative effect of any so-called mistakes somehow compromised this proceeding, even if Washington's accomplice testimony contributed to the end result. JT 881-1167; EX 1-25. *Chipps,* 2016 S.D. 8, ¶ 51, 874 N.W.2d at 492-93; *State v. Owens,* 2002 S.D. 42, ¶ 105, 643 N.W.2d 735, 759; *McDowell,* 447 N.W.2d at 651. Defendant also is entitled to a fair but not a perfect trial. *Davi,* 2000 S.D. 30, ¶ 51, 609 N.W.2d at 118; *McDowell,* 447 N.W.2d at 651. In short, Kihega has failed to establish any cumulative errors here and his convictions should be affirmed.

V

DEFENDANT'S SENTENCE OF FIFTY YEARS IN PRISON FOR FIRST DEGREE ROBBERY, WITH TWELVE YEARS SUSPENDED, DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

A. Overview.

Defendant argues, in his final issue, that his sentence of fifty years in the penitentiary, with twelve years suspended, for First Degree Robbery is excessive and amounts to cruel and unusual punishment. DB 24-30. In addition, Defendant contends that his sentence is "nearly eight times longer" than the penalty which Washington received, and that it is "over three times as lengthy as the average sentence for armed

robbery in Brown County," which Kihega calculates as about ten years. DB 25-26. Defendant also relies upon *State v. Blair,* 2006 S.D. 75, ¶ 27, 721 N.W.2d 55, 63-64, for the proposition that he is a "more complicated individual than simply being a man convicted by a jury of armed robbery," because: Kihega is a good father; had an intercity upbringing in south Minneapolis, but kept his brother out of a gang-related lifestyle; helped other family members and provided people with food, shelter and clothing during difficult times; and helped start a children's charity. DB 27-28.

B. Standard of Review.

In determining whether a sentence is grossly disproportionate, this Court examines "the gravity of the offense and the harshness of the penalty." *State v. McCahren,* 2016 S.D. 34, ¶ 34, __ N.W.2d __; *Traversie,* 2016 S.D. 19, ¶ 16; *State v. Rice,* 2016 S.D. 18, ¶ 13, 877 N.W.2d 75, 80. "This comparison rarely leads to an inference of gross disproportionality and typically marks the end" of any appellate review. *Traversie,* 2016 S.D. 19, ¶ 16; *State v. Garreau,* 2015 S.D. 36, ¶ 9, 864 N.W.2d 771, 774. Some factors, which are considered when judging the gravity of an offense include its violent versus non-violent nature; the value of the goods stolen; the level of intent required; other conduct relevant to the crime; and sentence enhancements due to recidivism. *Traversie,* 2016 S.D. 19, ¶ 16. As for the harshness of a penalty, this Court evaluates its "relative position on the spectrum of all permitted

punishments"; and if this sanction appears to be grossly disproportionate, it is compared to those, which have been imposed on criminals in the same and other jurisdictions. *McCahren,* 2016 S.D. 34, ¶¶ 35-36; *Rice,* 2016 S.D. 18, ¶ 13, 877 N.W.2d at 80.

C. Legal Analysis.

1. Defendant's sentence of First Degree Robbery is neither grossly disproportionate, nor does it constitute an abuse of discretion.

a. *Gross Disproportionality*.

Defendant's sentence for First Degree Robbery is not grossly disproportionate to his crime because the gravity of First Degree Robbery, which is a Class 2 felony, is relatively high on the spectrum of criminality, and Kihega was the mastermind, or ring leader of the Casino Korner robbery, and stole approximately $4,600; Defendant procured the weapons, which he shared with his co-defendant, Washington, and fired into the ceiling of this business while innocent bystanders were present; and Kihega was a habitual offender with two prior felony convictions in different states, unlike Washington who cooperated with the State, pled guilty, and received a five-year sentence for armed robbery. SR 11-12, 23-24, 606-07; JT 900-09, 921-22, 926, 940-47, 950-55, 983-1054, 1099-1100, 1163-65; SNT 1182-1238; PSR 252-70; EX 1, 25. *McCahren,* 2016 S.D. 34, ¶ 35; *Traversie,* 2016 S.D. 19, ¶¶ 16-17; *Rice,* 2016 S.D. 18, ¶¶ 13-18, 23, 877 N.W.2d at 80-82 (multiple defendants may have different levels of culpability for the

same crime). Equally important, Judge Sommers pointed out, during the November 5, 2015 sentencing hearing, that Defendant's criminal behavior had put other members of the community, who were in the Casino Korner on January 19, 2015, at risk because of the weapons used during the robbery, which could have injured other people, or someone could have been armed and fought back against their attackers, despite Kihega's charity work and assistance to his family members. SR 606-07; SNT 1236-37; PSR 252-70. *Stark v. Weber,* 2016 S.D. 38, ¶¶ 17-18, __ N.W.2d __; *Traversie,* 2016 S.D. 19, ¶¶ 16-17 (serious crimes warrant serious penalties). The court also did not impose the harshest punishment possible upon Defendant, because it suspended twelve years of Kihega's fifty-year sentence for First Degree Robbery, which resulted in a sanction of thirty-eight years in prison with parole eligibility (9/25/2045) "on that 75 percent of the time." SR 606-07; SNT 1236-37; PSR 252-70. *McCahren,* 2016 S.D. 34, ¶ 36 (possibility of parole is a factor); *Traversie,* 2016 S.D. 19, ¶¶ 18-19; *Chipps,* 2016 S.D. 8, ¶ 37, 874 at 488.

b. *Abuse of Discretion*.

Likewise, Judge Sommers did not abuse his discretion, when he required that Defendant (DOB 3/19/1981) serve a fifty-year sentence for First Degree Robbery, with twelve years suspended, because "trial courts of this state exercise broad discretion when deciding the extent and kind of punishment to be imposed." *McCahren,*

2016 S.D. 34, ¶ 37; *Rice,* 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83. In addition, this judge carefully considered a number of sentencing factors, which included Defendant's age; that Kihega had been convicted of a serious robbery offense, which put the lives of other innocent bystanders at risk; that Defendant had experienced a difficult and violent upbringing; and that Kihega had an extensive criminal history, before crafting any final sentence in this case. SR 606-07; JT 1163-65; SNT 1235-38; PSR 252-70. *McCahren,* 2016 S.D. 34, ¶¶ 35-37; *Traversie,* 2016 S.D. 19, ¶ 17 (serious crimes deserve serious sentences); *Rice,* 2016 S.D. 18, ¶ 27, 877 N.W.2d at 84-85. Defendant's penalty also is not grossly disproportionate to the gravity of his offense of robbery, and no inter- and intra-jurisdictional analysis is necessary. DB 24-30; SR 606-07; JT 1163-65; SNT 1235-38; PSR 252-70. *Chipps,* 2016 S.D. 8, ¶ 42, 874 N.W.2d at 490. As such, no relief is justified on this record.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully requests the Defendant's convictions be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 8,349 words.

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

Dated this 18th day of May, 2016.

/s/ Ann C. Meyer
Ann C. Meyer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of May, 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Roger Lee Kihega* was served via electronic mail upon Thomas J. Cogley at tom@ronaynecogley.com.

/s/ Ann C. Meyer
Ann C. Meyer
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. Appeal No. 27673

ROGER LEE KIHEGA,
Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPELLANT'S REPLY BRIEF

Notice of Appeal was filed on December 1, 2015.

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ARGUMENT[1]

I. The evidence was insufficient to sustain Kihega's conviction.

a. Jury Instruction 15 required the jury to remove Washington's testimony from the case and determine whether any remaining evidence connected Kihega to the crime.

The evidence at trail plainly did not support the jury's verdict. The prosecution's case rested entirely on the testimony of Kihega's co-defendant, Washington. South Dakota law does not allow a conviction based only on the statement of an accomplice. SDCL 23A-22-8. Indeed, the jury was instructed that Washington's testimony should be removed from the record and independent evidence tying Kihega to the crime must exist. Jury Instruction 15. Had the jury followed this instruction, Kihega would have been acquitted.

Appellee mischaracterizes Kihega's argument regarding Washington's testimony. Kihega is not claiming that "every detail" of Washington's testimony "needed to be validated by corroborating evidence. . ." Appellee's Brief at 16. However, the jury ought to have followed the instructions contained in Jury Instructions 15 and 16. It had to find some evidence connecting Kihega to the crime which was independent of Washington. Kihega argues that there is none.

Appellee goes to great lengths to suggest that evidence independent of Washington's testimony connected Kihega to the crime. The first part of its analysis, however, cites to the testimony from Washington. Appellee's Brief at 15-16. Appellee's claim that Washington's testimony "dovetailed" with the testimony of

[1] Throughout this reply brief, Kihega will refer to the State of South Dakota as "Appellee." Consistent with Kihega's initial brief, Michael Washington will be referred to as "Washington", Detective Jeff Neal will be referred to as "Detective Neal" and Gregory Two Hearts will be referred to as "Two Hearts.

Detective Neal is a red herring. It has no bearing on Kihega's argument that Washington's testimony must be removed and the remaining evidence must demonstrate some connection between Kihega and the crime. The remaining evidence fails to accomplish that. Demonstration of the commission of the offense charged is insufficient. Jury Instruction 15. The remaining evidence must "connect [Kihega] to the commission of the offense." Id.

When isolated from Washington, Detective Neal's testimony did nothing to connect Kihega to the crime. Appellee cites the following facts from Detective Neal's testimony which it claims connected Kihega to the crime: 1) he contacted a cell phone company and used GPS coordinates to find "a ping" from a cell phone and this cell phone was pinging a few miles north of Aberdeen; 2) that he had unsuccessfully tried to find the guns used the robbery; 3) that he had located Kihega's receipt and player's card from Mystic Lake casino; and 4) that Washington could not tell him where exactly he had thrown out the clothing, flip phone, wallet and money bands out the window. Appellee's Brief at 18. Even under the most deferential standards, this evidence does not demonstrate Kihega's "opportunity and motive to commit the crime" nor was there evidence of his "proximity to the place where the crime was committed." State v. Graham, 2012 SD 42, ¶ 34.

The audio clips are likewise unhelpful to tie Kihega to the crime. While several of the comments may be suggestive of *some* criminal activity, none of the statements incriminate Kihega in the robbery. The jury was required to remove Washington's testimony and determine if Kihega could somehow be tied to the

robbery, not simply criminal activity in general. The audio clips simply do not do what Appellee wishes they do.

Later in its brief, Appellee sets forth additional facts which it alleges corroborates Washington's testimony. Appellee's Brief at 18. The issue with these facts is the same as indicated previously - without Washington's testimony, none of it points to Kihega's participation in the crime. The jury simply could not have done what it was instructed to do (remove Washington's testimony from the case to determine if other evidence was presented to tie Kihega to the robbery) and still be able to find Kihega guilty.

II. The trial court committed several errors which prejudiced Kihega.

a. The bulk of the audio clips that were admitted were either not relevant or ought to have been excluded by SDCL 19-19-504(b).

Kihega asserts that the audio clips of conversations between he and his wife were protected by the spousal privilege rule codified at SDCL 19-19-504(b). This statute clearly spells out the situations in which the privilege does not apply and the audio clips do not meet any of those exceptions. SDCL 19-19-504(c).

Appellee's argument that this was not a confidential communication is belied by the definition given under the statute. "A communication is confidential if it is made privately by any person to his or her spouse during their marriage and is not intended for disclosure to any other person." SDCL 19-19-504(a). The statute sets forth a subjective standard for what is confidential. There is no evidence that Kihega intended his conversations with his wife to be disclosed to anyone else. As such, the privilege applies and the clips should not have been played.

b. Allowing Detective Neal to testify that various people had told him that Kihega had multiple residences was inappropriate hearsay to which Kihega did not open the door.

Appellee concedes that the testimony of Detective Neal that other individuals had told him that Kihega moved "from place to place" constituted hearsay. It argues, however, that Kihega opened the door to it. In support, it relies on State v. Martin, 2015 SD 2, 859 N.W.2d 600 and State v. Selalla, 2008 SD 3, 744 N.W.2d 802. However, these two cases do not help Appellee because they are easily distinguishable.

In Selalla, the Court ruled that the defendant opened the door by selectively asking the officer only the exculpatory statements offered by a non-testifying co-defendant. 2008 SD 3, ¶ 51. Kihega never attempted to ask Detective Neal any questions about his conversations with Two Hearts. Therefore, it cannot be said that the "rule of completeness" is applicable to this case.

Martin involved the same issue as Selalla. There, the defendant questioned an officer about the unavailable witness' action as related to a killing. Martin, 2008 SD 2, ¶¶ 9-11. Thereafter, the prosecution on redirect began to ask the officer about other statements made by the unavailable witness, statements which included that the defendant "finished off the victim with a shovel." Id. Like Selalla, Martin involved a defendant who was attempting to utilize some statements of an unavailable witness but not others.

In both Martin and Selalla, it could rightly be said that the tactic opened the door to additional inquiry about what else an unavailable witness said. Kihega never

attempted to elicit any exculpatory statements from these unknown witnesses. Therefore, the redirect questioning was hearsay that ought to have been excluded.

The trial court's decision prejudiced Kihega because it provided the jury with an alternative explanation for why Detective Neal was unable to locate anything tying Kihega to the robbery in the Emmett residence. Kihega was wholly unable to question or attack this point because the statements were not only hearsay, but the declarant(s) was not even identified. This is not the type of harmless error identified in State v. Reay, 2009 SD 10, 762 N.W.2d 356, Selalla or State v. Zakaria, 2007 SD 27, 730 N.W.2d 140. Law enforcement's investigation, and therefore the prosecution's case, was devoid of anything connecting Kihega to the crime except Washington's testimony. This exchange between Detective Neal and the prosecutor provided the jury with an explanation as to why. That, in and of itself, is not problematic. The issue arises when the explanation is provided through a method that is beyond the purview of the rules of evidence.

c. The evidence introduced during Kihega's case-in-chief demonstrated that he could not have driven to Aberdeen in time to participate in the robbery, and therefore the trial court allowed improper rebuttal testimony by the prosecution.

During Kihega's case in chief, Deonte Threatt ("Threatt") testified that he had been with Kihega at his residence in Cokato, Minnesota. Threatt also testified that he left Kihega's residence between approximately 4:30 p.m. and 4:45 p.m. and that Kihega was still there. JT at 178:22-25. This testimony would make it virtually impossible to have traveled to Aberdeen to commit a robbery at 8:30 p.m.

During rebuttal, the prosecution called Detective Neal to testify about a conversation between Kihega and his wife in which Kihega expressed his belief that

police had a video of he and Washington together in North Dakota several hours after the robbery. Appellee argues that the trial court was correct to allow this as rebuttal evidence. It argues that Kihega cannot "have it both ways and claim that his alibi testimony showed that he was somewhere else other than the crime scene; and simultaneously prevent the State from establishing that Kihega had said he was 'sure' that the police had a video of everyone at a casino in North Dakota." Appellee's Brief at 25.

Rebuttal evidence is appropriate to meet new facts put in by a defendant. State v. Harvey, 167 N.W.2d 161 (S.D. 1969). "Rebuttal evidence is evidence which explains, contradicts, or refutes the defendant's evidence." Schrader v. Tjarks, 522 N.W.2d 205, 209 (S.D. 1994). Importantly, rebuttal evidence should not be used to bolster the prosecution's case. Id. Again, Kihega never attempted to show that he was never with Washington, and he never at any time attempted to establish that he was not in North Dakota in the hours *after* the robbery. The evidence introduced simply suggested that Kihega was in Cokato in the hours leading up to the robbery. He never alleged, as Appellee suggests, that he was "always in Minnesota during the timeframe of the robbery and escape." Appellee's Brief at 26.

If indeed Kihega had presented evidence which aligned with Appellee's characterization, then clearly it would be proper rebuttal evidence for the State to demonstrate that he was not in fact in Minnesota in the hours after the robbery. Schrader, 522 N.W.2d at 209. But, when Kihega did not introduce such evidence, Detective Neal's testimony regarding the casino in North Dakota has the effect of

bolstering the prosecution's claim by putting him with Washington in the hours after the robbery.

Appellee next claims that the trial court was correct in letting this evidence in because it was a statement against the interest of a party. This argument does not negate or undercut Kihega's claim that it was outside the scope of permissible rebuttal evidence. Further, it does not address Kihega's claim that the entire exchange between him and his wife ought to have been excluded as hearsay. In other words, Appellee addresses Kihega's statement ("I'm sure they do") but not the words of his wife which preceded the statement. Thus, the argument fails for two reasons.

III. The harm caused by the trial court's error in letting Detective Neal testify about corroborating statements with Two Hearts prejudiced Kihega.

Perhaps the most serious of the trial court's errors occurred when it allowed Detective Neal to testify about corroborating Washington's statements with Two Hearts. Appellee dismisses Kihega's argument that this violated his confrontation clause rights by claiming that Kihega opened up the door to this line of questioning. To support this argument, Appellee again cites to Selalla and Martin. These cases are just as unhelpful to this analysis as they were to the issues related to Kihega's residency.

In both Martin and Selalla, it could rightly be said that the defendant's questioning opened the door to additional inquiry about what else the unavailable witness in each case said. Kihega did no such thing. On cross-examination, he did not attempt to cherry-pick certain of Two Hearts' statements and then argue that the others should be left out. He simply ran through a litany of things that Detective Neal

could have done to corroborate Washington's statement. He also asked Detective Neal if any of the search warrants that were obtained uncovered any evidence connecting Kihega to the crime. He never asked Detective Neal about a single statement offered by Two Hearts. The closest Kihega came to referencing Two Hearts was when he asked Detective Neal whether it was correct that of all the people interviewed during the investigation, only two people ever pointed towards Kihega as participating in the robbery and when he asked questions about Washington's statements (which included references to Two Hearts). JT at 135:18-20; JT at 138:21; JT at146:11-12.

The limited amount of evidence in this case was such that Detective Neal's statement that he had corroborated Washington's story with Two Hearts severely prejudiced Kihega. State v. Martin, 2015 SD 2, ¶ 7. The clear inference from this testimony was that Two Hearts corroborated those portions of Washington's story which implicated Kihega when in fact it is entirely possible that Two Hearts' testimony corroborated evidence unrelated to Kihega. Two Hearts' refusal to testify, coupled with the trial court allowing this line of questioning, deprived Kihega of his right to confront and, if necessary, impeach, Two Hearts' statements to law enforcement.

IV. Kihega was denied a fair trial as a result of the numerous errors committed by the trial court.

To be clear, Kihega believes that any of the issues raised in this appeal constitute a basis for a new trial. However, as an alternative argument, the multitude of the errors committed by the trial court necessitates a new trial. Despite Appellee's claims to the contrary, the jury trial record does not contain "ample evidence of

[Kihega's] guilt at trial. . ." The clearest indication of this fact is the plea deal offered to Washington. As outlined during his cross-examination, Washington's initial plea offer had him in prison for 15 years. JT at 60:7-8. By the time Kihega's trial commenced, Washington's offered sentence was down to just 5 years for armed robbery provided he testify against Kihega. JT at 48:1-4. There is no legitimate reason to believe that the prosecution had "ample" evidence against Kihega when it was willing to allow Washington a sentence that will have him parole eligible in 2.5 years in exchange for his testimony against Kihega.

Washington's testimony was crucial because the prosecution lacked any independent evidence tying Kihega to the crime. Even with Washington's testimony, the jury deliberated for approximately 4.5 hours before reaching a verdict. JT at 27: 3; JT at 287:18. In such a case, the trial court's decisions can have a tremendous impact on the result. That is what took place here. The cumulative effect of the trial court's errors deprived Kihega of a fair trial and ultimately led to an unjust verdict. This Court should remand for a new trial on this basis, if not on any of the individual grounds also cited by Kihega.

V. The trial court's sentence of Kihega was an abuse of discretion.

Kihega's initial brief argued that the sentence was a violation of the Eighth Amendment's prohibition regarding cruel and unusual punishment. His primary argument was premised on this Court's holding in State v. Bonner, that "[R]arely will disparity be so immediate, when accomplices sentenced for the same offense receive diametrically opposite punishment." 1998 SD 30, ¶ 18, 577 N.W.2d 575. Given that Washington received a sentence that was approximately eight times less severe than

Kihega's sentence for the same offense, it seemed clear that Kihega's sentence was grossly disproportionate under Bonner.

Kihega's brief was filed on March 9, 2016. One week prior, on March 2, 2016, this Court issued an opinion in which it departed from the rationale in Bonner in regards to a co-defendant's sentence. State v. Rice, 2016 SD 18, ¶ 16, 877 N.W.2d 75. In Rice, the Court announced that Bonner's analysis would no longer be followed in Eighth Amendment cases.

Counsel for Kihega actually finished the drafting portion of the brief on approximately the day before Rice was made public in order to begin preparations for a two day motions hearing on a first degree rape case. The brief was filed on March 9, 2016 after counsel's office staff assembled and bound the document. Having finished the brief and moved on to preparation for another important case, counsel was not aware of the Rice decision until much later in March and after Kihega's initial brief was due.

In light of the unique circumstances of this case, Kihega believes that it would be appropriate for this Court to review his sentence for an abuse of discretion in addition to the Eighth Amendment challenge. Many of the arguments raised by Kihega which are personal to him are akin to the factors reviewed in an abuse of discretion standard. Further, Appellee's brief argued that the trial court did not in fact abuse its discretion in sentencing Kihega. Appellee's Brief at 36-7. Thus, there would be no prejudice were the Court to undertake this analysis.[2]

[2] If Appellee believes it necessary to file a responsive brief more substantive than its initial response, counsel for Kihega has no objection.

Even when viewed under the deferential abuse of discretion standard it is apparent that Kihega's sentence was too harsh. In Rice, the Court did not altogether abandon Bonner. Indeed, "some of the legal concepts Bonner incorrectly attributed to an Eighth Amendement analysis are nevertheless relevant to the question whether a particular sentence is an abuse of discretion." Rice, 2016 SD 18, ¶ 21. The disparity between Washington's sentence and Kihega's is still relevant. Id. at ¶ 24 ("Generally, similiarly situated defendants should receive similar sentences.").

It cannot be said that Kihega was significantly more culpable than Washington in this crime. Washington always maintained that he acted on his own accord. Both men fired their weapons in the air. It was Washington, not Kihega, who stole a man's wallet during the burglary. It was Washington, not Kihega, who shoved one of the casino patrons to the ground. None of the evidence in this case supports a conclusion that Washington was acting upon Kihega's orders. Therefore, unlike in Rice, the culpability of the two men was very similar.

Kihega's initial brief set forth several factors personal to him which weighs in favor of a lesser sentence. All of that evidence was discarded by the trial court when it pronounced sentencing. This Court should remand for resentencing so that the trial court can properly consider Kihega's mitigating evidence.

CONCLUSION

Kihega's request for a judgment of acquittal ought to have been granted. The prosecution failed to meet its burden of proving his guilt beyond a reasonable doubt. Nothing in Appellee's brief changes this fact. Therefore, Kihega requests that the Court reverse the trial court's decision to deny Kihega's motion for acquittal.

Alternatively, Kihega deserves a new trial because of the numerous prejudicial errors committed by the trial court. As an additional alternative argument, Kihega's sentence should be remanded for additional, appropriate consideration by the trial court.

REQUEST FOR ORAL ARGUMENT

Kihega hereby renews his request for oral argument.

Dated this 17th day of June, 2016.

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CERTIFICATE OF COMPLIANCE

Thomas Cogley, attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

a. Appellant's reply brief does not exceed 20 pages.

b. The body of Appellant's brief was typed in Times New Roman 12 point typeface, with footnotes being in 12 point typeface; and

c. Appellant's brief contains 3,104 words and 16,217 characters with no spaces and 19,489 characters with spaces, according to the word and character counting system in Microsoft Office Professional Edition 2003 for Windows 7 Professional used by the undersigned.

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CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, Roger Kihega, hereby certifies that on the 17th day of June, 2016, two true and correct copies of Appellant's Reply Brief were mailed by first class mail, postage prepaid, to:

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