IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29072

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

COLE TAYLOR,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER
Circuit Court Judge

APPELLANT'S BRIEF

TIMOTHY J. BARNAUD
Attorney at Law
704 7th Avenue, Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
ATTORNEY FOR APPELLANT

JASON RAVNSBORG
ATTORNEY GENERAL
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

JOHN H. FITZGERALD
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

Attorneys for Plaintiff and Appellee

Notice of Appeal filed July 25th, 2019

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PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, will be referred to as "State." Defendant and Appellant, Cole Taylor, will be referred to as "Defendant." References to the Lawrence County Criminal File Number 18-646 will be made by "SR." References to the transcripts from the hearings held in this matter will be referred to by the name of the hearing followed by the date on which that hearing was held. Exhibits from the Jury Trial held in this matter will be referred to by Exhibit number. All references will be followed by the appropriate page number(s) and volume number(s) where applicable.

JURISDICTIONAL STATEMENT

An Indictment was filed in Lawrence County Criminal File 18-646 on July 25th, 2018, charging Defendant with COUNT I: Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2), a Class 1 Felony and COUNT 2: Attempted Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2) and SDCL 22-4-1, (1/2

punishment of a Class 1 Felony). SR at 1. A Part II Information alleging two prior felony convictions was also filed on July 26th, 2018, enhancing the penalties for the aforementioned crimes one level. SR at 2. In addition, an Information was filed charging Defendant with two counts of Sexual Contact against Alissa Fendrick in violation of SDCL 22-22-7(4). SR at 4

Defendant appeared at his Arraignment on August 30th, 2018, with his counsel of record and was informed of his constitutional and statutory rights as well as the pleas available to him. ARRAIGNMENT 8/30/18 at 2-4. The trial court reviewed the Indictment and the Part II Information and Information with Defendant and informed him of the maximum penalties at which point the Defendant entered not guilty pleas to all of the charges set forth in the Indictment. ARRAIGNMENT 8/30/18 at 4-7.

On January 14th, 2019, an evidentiary motions hearing was held regarding the State's notice to introduce evidence of prior acts and expert testimony. EVIDENTIARY MOTIONS HEARING 1/14/19 at 2-43. After hearing argument the trial court instructed the parties to brief the matter. The trial court ordered that the expert testimony and prior acts would be allowed at trial. SR at 172 and 176.

A Jury Trial was held on April 8th and 9th, 2019, before the Honorable Michelle Comer. The jury found the Defendant guilty of the crimes of: COUNT I of the Indictment: Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2) and guilty of the two counts in the Information of sexual contact against Alissa Fendrick in violation of SDCL 22-22-7(4). SR at 265. Defendant was found not guilty of Count 2 of the Indictment: Attempted Rape of Melinda Roy. SR at 265.

Defendant appeared at a status hearing on April 25th, 2019. At that hearing he entered an admission to the Part II Information filed against him. STATUS HEARING 4/25/19 at 4-6. A sentencing hearing was set for July 11th, 2019.

Defendant appeared at a Sentencing Hearing on July 11th, 2019, with his counsel of record. Defendant was sentenced on COUNT I: Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2) to 50 years in the penitentiary with 20 of those years suspended and he received credit for 337 days served. SENTENCING 7/11/19 at 38. As to the two counts of Sexual Contact against Alissa Fendrick in violation of SDCL 22-22-7(4) Defendant received 337 days in jail with credit for 337 days served.

On July 25th, 2019, the Defendant filed a timely Notice of Appeal pursuant to SDCL 23A-32-15 and SDCL 23A-32-16. SR at 389.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED 404(B) EVIDENCE TO BE SUBMITTED TO THE JURY?

The trial court allowed 404(b) evidence of a prior acquitted act and a prior dismissed act to be submitted to the jury.

Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970)

Dowling v. United States, 110 S. Ct. 668, 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990)

State v. Most, 2012 S.D. 46, 815 N.W.2d 560

II.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL?

The trial court denied Defendant's motion for a mistrial.

State v. Anderson, 1996 S.D. 46, 546 N.W.2d 395

State v. Buchhold, 2007 S.D. 15, 727 N.W.2d 816

State v. Fool Bull, 2008 S.D. 11, 745 N.W.2d 380

State v. Mattson, 2005 S.D. 71, 698 N.W.2d 538

III.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL?

The trial court denied Defendant's motion for a judgment of acquittal.

State v. Edelman, 1999 S.D. 52, 593 N.W.2d 419

State v. Guthrie, 2001 S.D. 401, 627 N.W.2d 401

State v. Hage, 532 N.W.2d 406 (S.D. 1995)

IV.

WHETHER DEFENDANT WAS DEPRIVED OF HIS RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES WHEN THE TRIAL COURT ADMITTED LAB REPORTS WITHOUT TESTIMONY OR FOUNDATION PURSUANT TO SDCL 23-3-19.3?

The trial court allowed lab reports regarding DNA evidence against Defendant to be introduced pursuant to SDCL 23-3-19.3 by affidavit without the witnesses who collected the samples or did the testing being called.

State v. Beck, 2000 S.D. 141, 619 N.W.2d 247

U.S. v. Grimes, 54 F.3d 489 (8th Cir. 1995)

V.

WHETHER THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BASED ON CUMULATIVE ERROR?

The trial court denied Defendant's motion for a mistrial.

McDowell v. Solem, 447 N.W.2d 843 (S.D. 1989)

State v. Davi, 504 N.W.2d 844 (S.D. 1993)

VI.

WAS THE SENTENCE PASSED BY THE TRIAL COURT GROSSLY DISPROPORTIONATE IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS?

The trial court sentenced Defendant to fifty years in the South Dakota State Penitentiary with twenty years suspended.

State v. Chipps, 2016 S.D. 8, 874 N.W.2d 475

State v. Garreau, 2015 S.D. 36, 864 N.W.2d 771.

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

STATEMENT OF THE CASE AND FACTS

On the evening of November 10th, 2017, Defendant and his friend Austin Fichter travelled to Deadwood. JURY TRIAL VOL. 3 at 283-284. They had been invited by Alissa Fendrick and Melinda Roy to attend a concert and enjoy a night of drinking. JURY TRIAL VOL. 3 at 289. The event that the parties attended was known as Hairball, which included a concert with 1970's and 1980's cover bands. JURY TRIAL VOL. 2 at 127. Mr. Fichter and Ms. Fendrick were involved in a sexual relationship at the time of the parties attending Hairball. JURY TRIAL VOL. 3 at 317. Ms. Roy and Defendant had met in April of 2013 and had engaged in a prior consensual sexual encounter. JURY TRIAL VOL. 2 at 125-126.

On the night of November 10th, 2017, the parties met at the Deadwood Mountain Grand as Ms. Fendrick and Ms. Roy had been invited to the VIP party there. JURY TRIAL VOL. 2 at 128. They all planned on spending the night at the Calamity Jane

Room that had been comped for Ms. Fendrick at the Silverado Franklin. JURY TRIAL VOL. 2 at 128. Ms. Fendrick, Ms. Roy, Mr. Fichter and Defendant all consumed alcohol and beer. JURY TRIAL VOL. 2 at 129-135.

Defendant, Mr. Fichter, Ms. Roy and Ms. Fendrick stayed at the Deadwood Mountain Grand until the concert was over and then proceeded to drink at the bar located in the Deadwood Grand Casino. JURY TRIAL VOL. 3 at 289. Mr. Fichter and Ms. Fendrick then left Defendant and Ms. Roy at the bar and went back to their hotel room. JURY TRIAL VOL. 3 at 290. Defendant and Ms. Roy arrived at the room a short time later and they all proceeded to drink Fireball Whiskey together. JURY TRIAL VOL. 2 at 131-132. Defendant and Ms. Roy kissed while in the room. JURY TRIAL VOL. 2 at 132-133. Ms. Roy appeared to kiss Defendant back according to Mr. Fichter. JURY TRIAL VOL. 3 at 292. Shortly after that, Ms. Roy became ill from drinking too much alcohol and vomited. JURY TRIAL VOL. 2 at 134.

After that, Ms. Roy stayed in the room and Ms. Fendrick, Mr. Fichter and Defendant went out to the Saloon Number 10 Bar. JURY TRIAL VOL. 3 at 292-293. Ms. Fendrick and Mr. Taylor, who had also kissed while in the room, were dancing together on the dance floor. JURY TRIAL VOL. 3 at 293-294; and JURY TRIAL VOL. 2 at 182-183. Ms. Fendrick felt the grinding while dancing was going too far and she stopped dancing with Defendant who did not try to continue dancing with her. JURY TRIAL VOL 3 at 294-295.

At that time, Ms. Fendrick realized that she lost her key or her debit card and she and Mr. Fichter went to look for it. JURY TRIAL VOL. 2 at 180-181. Mr. Taylor returned to the room where Ms. Roy answered the door naked and invited him in. JURY

TRIAL VOL. 2 at 135-136. Ms. Roy then claims that the two had sexual intercourse but, that it was against her will. JURY TRIAL VOL. 2 at 140-143.

Shortly after Defendant arrived at the hotel room, Ms. Fendrick and Mr. Fichter arrived at the room and Defendant answered the door. JURY TRIAL VOL. 3 at 301-302. There were no signs of a struggle or anything out of the ordinary and Ms. Roy was in bed. JURY TRIAL VOL. 3 at 302-303. Ms. Fendrick and Mr. Fichter did not claim to have heard any commotion during the night when all four people were in the room. JURY TRIAL VOL. 3 at 302-304; and JURY TRIAL VOL. 2 at 187. Ms. Roy claims that Defendant again tried to assault her when all four people were in the room the next morning but, none of the other people in the room heard it. JURY TRIAL VOL. 2 at 145 and 187; and JURY TRIAL VOL. 3 at 302-304. In fact, all four of the friends were actually in the bed together at that time. JURY TRIAL VOL. 2 at 187.

The next morning all four of the friends were joking and laughing about partying too hard. JURY TRIAL VOL. 3 at 319-320. The mood in the room seemed good to Mr. Fichter. JURY TRIAL VOL. 3 at 319. However, on November 12th, 2017, Ms. Roy contacted law enforcement at the urging of Ms. Fendrick, who was friends with Ms. Roy's boyfriend at the time, and reported that she had been raped by Mr. Taylor. JURY TRIAL VOL. 3 at 271; and JURY TRIAL VOL. 2 at 187.

An Indictment was filed in Lawrence County Criminal File 18-646 on July 25th, 2018, charging Defendant with COUNT I: Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2), a Class 1 Felony, and COUNT 2: Attempted Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2) and SDCL 22-4-1, (1/2 punishment of a Class 1 Felony). SR at 1. A Part II Information alleging two prior

felony convictions was also filed on July 26th, 2018, enhancing the penalties for the aforementioned crimes one level. SR at 2. In addition, an Information was filed charging Defendant with two counts of Sexual Contact against Alissa Fendrick in violation of SDCL 22-22-7(4). SR at 4

Defendant appeared at his Arraignment on August 30th, 2018, with his counsel of record and was informed of his constitutional and statutory rights as well as the pleas available to him. ARRAIGNMENT 8/30/18 at 2-4. The court reviewed the Indictment and the Part II Information and Information with Defendant and informed him of the maximum penalties at which point the Defendant entered not guilty pleas to all of the charges set forth in the Indictment. ARRAIGNMENT 8/30/18 at 4-7.

On January 14th, 2019, an evidentiary motions hearing was held regarding the State's notice to introduce evidence of prior acts and expert testimony. EVIDENTIARY MOTIONS HEARING 1/14/19 at 2-43. The two prior acts that were noticed under Rule 404(b) were one involving Tayla Brooks, a case that was ultimately dismissed against Defendant without being prosecuted. EVIDENTIARY MOTIONS HEARING 1/14/19 at 19-20. The other was in regard to Portia Crane, a case that went to trial in which Defendant was acquitted on all counts of rape. EVIDENTIARY MOTIONS HEARING 1/14/19 at 20-21. After hearing argument the trial court instructed the parties to brief the matter. The trial court ordered that the expert testimony and prior acts would be allowed at trial and issued findings of fact and conclusions of law as well as an order to that effect. SR at 172 and 176.

A Jury Trial was held on April 8th and 9th, 2019, before the Honorable Michelle Comer. At trial, the trial court allowed Tayla Brooks and Portia Crane, now Portia

Radtke, to testify regarding prior acts of the Defendant. Ms. Radtke's testimony exceeded the scope of the noticed 404(b) when she testified. JURY TRIAL VOL. 3 at 259. Ms. Radtke and the State did not dispute that Defendant was acquitted of the rape charges that she was testifying took place. JURY TRIAL VOL. 3 at 260-266. Ms. Radtke then claimed a separate rape, one that was not noticed as a prior act, took place between her and Defendant in August of 2013. JURY TRIAL VOL. 3 at 269. Defense counsel requested a mistrial based on the 404(b) evidence exceeding the scope of what was authorized by the court but, this motion was denied. JURY TRIAL VOL. 3 at 414.

In addition the State introduced lab reports as DNA evidence in the case at hand without calling the witnesses who had collected samples and done testing. EXHIBITS 13-14 and Exhibit 3. The defense objected on the grounds of foundation, Sixth Amendment right to confront and cross-examine witnesses and chain of custody. JURY TRIAL VOL. 2 at 222-226. The trial court overruled the objections citing SDCL 23-3-19.3 as statutory grounds for depriving Defendant of his right to confront and cross-examine witnesses and improperly admitted the exhibits. JURY TRIAL VOL. 3 at 354; and JURY TRIAL VOL. 2 at 222-226.

At the close of evidence, Defendant moved for a judgment of acquittal based on insufficient evidence. JURY TRIAL VOL. 3 at 378. Defendant also moved for a mistrial based on the error regarding the 404(b) evidence, as well as witness misconduct by Ms. Fendrick coaching Mr. Fichter. JURY TRIAL VOL. 3 at 378 and 414. The Court denied Defendant's motions. JURY TRIAL VOL. 3 at 379-381 and 414-415.

The jury found the Defendant guilty of the crimes of: COUNT I of the Indictment: Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2) and guilty of the

two counts in the Information of sexual contact against Alissa Fendrick in violation of SDCL 22-22-7(4). SR at 265. Defendant was found not guilty of Count 2 of the Indictment: Attempted Rape of Melinda Roy. SR at 265.

Defendant appeared at a status hearing on April 25th, 2019. At that hearing he entered an admission to the Part II Information filed against him. STATUS HEARING 4/25/19 at 4-6. A sentencing hearing was set for July 11th, 2019.

Defendant appeared at a Sentencing Hearing on July 11th, 2019, with his counsel of record. Defendant was sentenced on COUNT I: Rape of Melinda Roy- Second Degree- in violation of SDCL 22-22-1(2) to 50 years in the penitentiary with 20 of those years suspended and he received credit for 337 days served. SENTENCING 7/11/19 at 38. As to the two counts of Sexual Contact against Alissa Fendrick in violation of SDCL 22-22-7(4) Defendant received 337 days in jail with credit for 337 days served.

On July 25th, 2019, the Defendant filed a timely Notice of Appeal pursuant to SDCL 23A-32-15 and SDCL 23A-32-16. SR at 389.

ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT ALLOWED 404(B) EVIDENCE OF A PRIOR ACQUITTED ACT AND A PRIOR DISMISSED ACT TO BE SUBMITTED TO THE JURY.

The State has offered instances of prior bad acts related to sexual assault pursuant to SDCL 19-19-404(b) against Defendant. The first involved Portia Mae Crain, now Portia Radtke on November 20th, 2013, and the second involved Tayla Lynn Brooks on December 29th, 2014. SR at 61. At trial Ms. Radtke, without warning or notice, started

talking about a prior act, an alleged rape from August of 2013. JURY TRIAL VOL. 3 at 269. Defendant argues first, that these accusations were inadmissible because they are demonstrably false. Second, these prior acts were not relevant to the facts in this case. Finally, the admission of these prior acts was unduly prejudicial to Defendant effectively resulted in a trial within a trial.

The admission of other acts evidence is governed by SDCL 19-19-404(b) as follows:

> (b) Crimes, wrongs, or other acts.
>
> (1) Prohibited uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted uses; notice in a criminal case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
>
> (A) Provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) Do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

SDCL 19-19-404.

As the Court is aware, "to determine the admissibility of other acts evidence, the trial court must determine: (1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *State v. Most*, 2012 S.D. 46, ¶¶ 16-17, 815 N.W.2d 560, 565. In determining the admission of the prior acts the trial court must also be weigh the remoteness of the acts, the

facts of the case and the nature of the prior acts. *Id*. "Remoteness and similarity must be considered together because the two concepts are so closely related; the remoteness of a prior crime takes on increased significance as the similarity between the prior crime and the charged offense increases." *Id*.

Defendant does not dispute that the State provided notice of the other acts that they intended to offer in a timely manner except for the testimony by Ms. Radtke that was a complete surprise to Defendant and the State and was outside the scope of the 404(b) noticed for trial.

Defendant disputes that the noticed 404(b) evidence or the surprise testimony from Ms. Radtke is relevant or admissible for any purpose in the case at hand. In regard to Portia Radtke, that matter was tried before a Lawrence County Jury and Defendant was acquitted of the charges. SR at 25. Pursuant to the law set forth in *Dowling v. United States*, 110 S. Ct. 668, 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990), the prior acts noticed in regard to Portia Radtke were not admissible for any purpose. To admit them was a violation of the Due Process Clause under the fundamental fairness test and also a violation of the collateral estoppel component of the Double Jeopardy Clause. *Id.*; See Also *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970).

In Lawrence County Criminal File 14-47, Defendant was charged with Rape, Second Degree, pursuant to the Indictment. SR at 25. The case went to a jury trial and Defendant was acquitted of all charges pursuant to the Verdict form. SR at 25. Defendant received a Judgment of Acquittal. SR at 25. "The collateral-estoppel doctrine prohibits the Government from re-litigating an issue

of ultimate fact that has been determined by a valid and final Judgment." *Dowling v. United States*, 110 S. Ct. 668. 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970).

In the current case the State used the rape allegations made by Portia Crane Radtke against Defendant in Lawrence County Criminal File 14-47 as prior acts evidence against Defendant in the current matter. JURY TRIAL VOL. 3 at 249-270. Ms. Radtke also managed to slip in an unnoticed 404(b) act that surprised the State, the Defendant and the Court when she randomly started talking about an incident in August of 2013.

The State convinced the trial court that its noticed 404(b) in regard to Ms. Radtke was used to prove preparation, plan, motive and knowledge pursuant to SDCL 19-19-404(b) (2). SR at 176. The State was incorrect in asserting that the 404(b) evidence offered in regard to Ms. Radtke was admissible and the trial court erred in allowing it. SR at 176. The reason being that the State is prohibited from re-litigating an issue of ultimate fact that has been determined by a valid and final judgment. *Dowling v. United States*, 110 S. Ct. 668. 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970).

Yet, the State contended that Defendant did rape Ms. Radtke in spite of his acquittal and convinced the trial court to force Defendant to re-litigate the rape allegations against him in violation of the collateral-estoppel doctrine of the Double Jeopardy Clause. JURY TRIAL VOL. 3 at 249-270. By forcing

Defendant to re-litigate the rape allegations that he was acquitted of further violated the Due Process Clause and created a trial that was fundamentally unfair. The Lawrence County Jury already determined the facts in regard to Portia Crane Radtke and determined that Defendant did not sexually assault her.

Furthermore, under the balancing test required for prior acts, this prior rape charge is not relevant to the case at hand. If the Court were to find that it was relevant, the act is too remote and its admission was unduly prejudicial to Defendant. Therefore, Defendant requests that the Court find that the trial court erred in allowing the prior acts related to Portia Crane Radtke into the trial against Defendant as they were inadmissible based on the law and facts stated above.

In regard to Tayla Lynn Brooks, the State offered prior acts evidence that was not admissible. This prior charge was dismissed based on testimony from investigating Officer Jeremy Smith. JURY TRIAL VOL. 2 at 228. One of the key factors was third party DNA found in Ms. Brooks that did not belong to Defendant. JURY TRIAL VOL. 2 at 228. This case was not credible. Yet, this 404(b) evidence was allowed into trial and ultimately helped get Defendant convicted. The 404(b) evidence regarding Ms. Brooks, when properly weighed under the balancing test set forth above shows that it is not relevant to this case and it is too remote and its admission was unduly prejudicial to Defendant. *State v. Most*, 2012 S.D. 46, ¶¶ 16-17, 815 N.W.2d 560, 565.

The trial court recognized that the Defendant was having to try a case within a case and that it was concerned about "us going astray here and having a couple different cases within a case." JURY TRIAL VOL. 2 at 226.

Unfortunately, the trial court then erred and allowed the 404(b) evidence cited above to be admitted against Defendant. Therefore, this matter should be remanded for a new trial with instructions not to admit the 404(b) evidence regarding Ms. Radtke or Ms. Brooks.

II.

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A MISTRIAL.

The Court presumes that evidentiary rulings made by a trial court are correct, and reviews those rulings under an abuse of discretion standard. *State v. Fool Bull*, 2008 S.D. 11, ¶ 10, 745 N.W.2d 380, 385. The test applied is "whether we believe a judicial mind, in view of the law and the circumstances, could have reasonable reached the same conclusion." *Id*. "If error is found, it must be prejudicial in nature before this Court will overturn the trial court's evidentiary ruling." *Id*. Prejudicial error is error that in all probability "produced some effect upon the final result and affected rights of the party assigning it." *State v. Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d 538, 544.

Trial courts have "considerable discretion in granting or denying mistrials and determining the prejudicial effect of witness statements." *State v. Buchhold*, 2007 S.D. 15, ¶ 50, 727 N.W.2d 816, 828. Prejudicial error must be established for a trail court to grant a motion for a mistrial. *State v. Anderson*, 1996 S.D. 46, ¶ 21, 546 N.W.2d 395, 401. "Prejudicial error sufficient to constitute grounds for a mistrial must in all probability have produced some effect upon the jury's verdict that is concomitantly injurious to the substantial rights of the party assigning it." *Fool Bull*, 2008 S.D. 11, ¶ 10, 745 N.W.2d at 385.

The Defendant moved for a mistrial on several grounds. Those grounds included the improper 404(b) evidence that Defendant argued first was not admissible pursuant to the required balancing test and second, exceeded the scope authorized by the trial court. JURY TRIAL VOL. 3 at 378 and 414. Also, Defendant argued that Ms. Fendrick had tampered with Mr. Fichter in the hallway prior to trial and attempted to alter his testimony. JURY TRIAL VOL. 3 at 378 and 414. The trial court erred in denying Defendant's request.

When examining the prejudicial error created by the wrongful admission of the 404(b) evidence it is important to note just how much of the State's case was built on 404(b) evidence. The Defendant accurately argued that he was being forced to try a case within a case and that more time was being spent on 404(b) evidence than the case in chief. JURY TRIAL VOL. 2 at 225. Ms. Radtke and Ms. Brooks spent substantial time on the witness stand regarding the alleged prior acts involving them. Pursuant to the argument above, these acts never should have been admitted. When combined with Ms. Fendrick's attempted manipulation of Mr. Fichter, the result is a prejudicial error sufficient for a mistrial as these factors clearly produces an effect on the jury verdict that was injurious to the substantial rights of the Defendant. *Fool Bull*, 2008 S.D. 11, ¶ 10, 745 N.W.2d at 385.

Therefore, the trial court erred in denying Defendant's motion for a mistrial.

III.

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL.

Defendant moved for a motion for a judgment of acquittal pursuant to SDCL 23A-23-1 after the close of the State's evidence. That motion was denied by the trial court. Defendant contends that the trial court erred in denying his motion.

"In reviewing a circuit court's decision to deny a motion for judgment of acquittal, we inquire whether the State presented sufficient evidence on which the jury could reasonably find the defendant guilty of the crime charged." *State v. Guthrie*, 2001 S.D. 401, ¶ 47, 627 N.W.2d 401, 420-421. "More specifically, we ask if there was sufficient evidence in the record that, if believed, would be adequate to sustain a conviction beyond a reasonable doubt." *State v. Edelman*, 1999 S.D. 52, ¶4, 593 N.W.2d 419, 421. The jury verdict will be set aside on a sufficiency of the evidence challenge "only when the evidence and the reasonable inferences to be drawn therefrom fail to sustain a rational theory of guilty." *State v. Hage*, 532 N.W.2d 406, 410 (S.D. 1995).

The State built their case on 404(b) evidence that Defendant contends above was not admissible. JURY TRIAL VOL. 3 at 378 and 414. Furthermore, the DNA evidence introduced by affidavit pursuant SDCL 23-3-19.3 deprived him of his right to confront and cross examine witnesses. JURY TRIAL VOL. 2 at 222-226. The actual evidence provided was lacking.

Ms. Roy was consuming alcohol heavily on the night in question, so much so that she became ill. JURY TRIAL VOL. 2 at 134. She had a prior sexual encounter with Defendant in April of 2013. JURY TRIAL VOL. 2 at 125-126. On the night in question she kissed Defendant. JURY TRIAL VOL. 3 at 292. When Defendant came back to the room Ms. Roy met him at the door naked. JURY TRIAL VOL. 2 at 135-136. None of the other people in the room saw any signs of a struggle or a rape. JURY TRIAL VOL. 3

at 302-304 and JURY TRIAL VOL. 2 at 187. Ms. Roy claimed that she was assaulted in the morning by Defendant but, all four of the friends were in the same bed together and none of the others corroborated her account. JURY TRIAL Vol. 3 at 187.

The nurse who conducted the rape kit was Kristy Schumaker. JURY TRIAL VOL. 3 at 325. The results of the rape kit examination were submitted at trial. JURY TRIAL VOL. 3 at 336. The examination did not reveal any signs of tearing, bruising, or physical trauma. JURY TRIAL VOL. 3 at 336.

The evidence in this matter is contradictory and does not support a conviction of forcible rape. Therefore, the trial court erred in denying Defendant's motion for a judgment of acquittal.

IV

THE DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES WHEN THE TRIAL COURT ADMITTED LAB REPORTS BY AFFIDAVIT PURSUANT TO SDCL 23-3-19.3 WITHOUT ADEQUATE FOUNDATION

SDCL 23-3-19.3 states as follows:

> A copy of a statement of the methods and findings of any examination or analysis conducted by employees of the State Forensic Laboratory or by a certified chemist employed by a law enforcement agency within the state, authenticated under oath by the employee, is prima facie evidence in all grand jury, court, parole, probation, and contested case proceedings in the State of South Dakota of the facts contained therein reciting the methods and findings.
>
> The statement has the same force and effect as if the person who performed the analysis or examination had testified in person. An accused person or the accused's attorney may request that the person in the State Forensic Laboratory or the certified chemist employed by a law enforcement agency within the state, who conducted the examination testify in person at a criminal trial, parole revocation, or probation revocation, concerning the examination or analysis.

The Sixth Amendment Confrontation Clause provides that the Defendant in a criminal case shall have the right to confront and cross-examine adverse witnesses. *State v. Beck*, 2000 S.D. 141, ¶ 10, 619 N.W.2d 247, 250. The trial court must balance the defendant's right to confront and cross-examine a witness with the government's interest in not requiring confrontation. *State v. Beck*, 2000 S.D. 141, ¶ 11, 619 N.W.2d 247, 250. The balancing test applied requires that the court assess the explanation the government offers for why confrontation is undesirable or impractical. *Id*. The trial court must then apply the second factor of whether the evidence is reliable. *Id*; See also *U.S. v. Grimes*, 54 F.3d 489 (8th Cir. 1995).

The trial court in this case, like in *Beck*, failed to follow the requirements of SDCL 23-3-19.3. There was no on record balancing of the confrontation rights of the Defendant against the grounds asserted by the State for not requiring confrontation nor were there any findings of good cause for dispensing with confrontation. *State v. Beck*, 2000 S.D. 141, ¶ 13, 619 N.W.2d 247, 252. In the case at hand Defendant objected to the admission of the lab reports based on chain of custody and foundational grounds. JURY TRIAL VOL. 2 at 222-226. The State merely argued that the lab reports were authenticated under oath pursuant to SDCL 23-3-19.3 and should be admitted. *Id*. The trial court failed to conduct any balancing test regarding the Defendant's Sixth Amendment right to confront and cross examine witnesses and allowed the lab reports to be admitted over the objection of Defendant. *Id*.

Even more troubling, was the fact that Defendant's DNA was not seized and tested in this case. JURY TRIAL VOL. 3 at 353-355. The lab reports relied on a sample from an old case that had been dismissed. *Id*. Defendant was deprived of his

confrontation rights regarding the DNA sample that was used for the testing and how it was handled and the court admitted the lab results without any balancing test. *State v. Beck*, 2000 S.D. 141, ¶ 13, 619 N.W.2d 247, 252.

Therefore, based on the law and facts set forth above, the Defendant has been deprived of his right to confront and cross-examine witnesses and his conviction should be reversed.

V.

THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL DUE TO CUMMULATIVE ERROR.

Cumulative error by a trial court can result in a defendant being denied the right to a fair trial. *State v. Davi*, 504 N.W.2d 844, 857 (S.D. 1993). This Court has 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." *Id*. The Court must decide after the review of the entire record that Defendant received a fair trial. *Id.* See *McDowell v. Solem*, 447 N.W.2d 843 (S.D. 1989).

Defendant, as set forth above, suffered from error that deprived him of his right to a fair trial. An entire review of the record reveals that trial court admitted 404(b) evidence against him for acquitted and dismissed acts that did not meet the balancing test required pursuant to statute and case law. *State v. Most*, 2012 S.D. 46, ¶¶ 16-17, 815 N.W.2d 560, 565. Furthermore, the acquittal for rape that was admitted as 404(b) violated his rights against double jeopardy and due process. It is well settled that the collateral-estoppel doctrine prohibits the Government from re-litigating an issue of ultimate fact that has been determined by a valid and final Judgment." *Dowling v. United*

States, 110 S. CT 668. 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990).

In addition to the 404(b) error, the trial court also allowed the admission of DNA evidence against Defendant pursuant to SDCL 23-3-19.3 without conducting any balancing test in violation of his Sixth Amendment right to confront and cross examine witnesses. *State v. Beck*, 2000 S.D. 141, ¶ 13, 619 N.W.2d 247, 252. Also, there was misconduct by the State's witness Ms. Fendrick who tried to influence Mr. Fichter's testimony. JURY TRIAL VOL. 3 at 378 and 414. Finally, after reviewing the evidence Defendant contends that there was not sufficient evidence to sustain a conviction as there were no physical signs of forcible rape. TRIAL VOL. 3 at 336.

When all of these factors are taken into account and the entire record is reviewed it is revealed that Defendant was deprived of his constitutional right to a fair trial. The trial court erred in denying his motion for a mistrial. Defendant is therefore entitled to a mistrial based on the cumulative error cited above.

VI.

THE TWENTY-TWO YEAR SENTENCE HANDED DOWN BY THE TRIAL COURT WAS GROSSLY DISPROPORTIONATE IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS.

Defendant received a sentence of fifty years in prison with twenty years suspended. This sentence was grossly disproportionate in violation of Defendant's constitutional rights. Whether a sentence is grossly disproportionate to Defendant's offenses under the Eighth Amendment is reviewed under a de novo standard. *State v. Garreau*, 2015 S.D. 36, ¶ 7, 864 N.W.2d 771, 774.

In reviewing a sentence challenged under the Eighth Amendment the Court first will look to the "gravity of the offense and the harshness of the penalty." *State v. Chipps*, 2016 S.D. 8, ¶ 38, 874 N.W.2d 475, 488-89. "If the penalty imposed appears to be grossly disproportionate to the gravity of the offense, then we will compare the sentence to those imposed on other criminals in the same jurisdiction as well as those imposed for commission of the same crime in other jurisdictions. *Id*. See also *State v. Rice*, 2016 S.D. 18, ¶ 17, 877 N.W.2d 75, 81.

Defendant was found guilty of rape in the second degree and two counts of misdemeanor sexual contact. SR at 265. He received a sentence near the statutory maximum. Defendant's counsel argued that he was a young man, only 27 years old, and he had good family support. SENTENCING 7/11/19 at 36. The psychosexual evaluation indicated that Defendant could be treated in a community setting. *Id*. Defendant maintained his innocence and his desire to appeal his sentence. *Id*.

The trial court indicated that it was concerned with Defendant's lack of remorse, the fact that he was on parole and that he was a high risk to re-offend. SENTENCING 7/11/19 at 38. The trial court did not cite any mitigating factors in passing sentence on the Defendant. *Id*.

Defendant is young and open to rehabilitation with a good work history but, these mitigating factors were not taken into account at sentencing and he received fifty years in the penitentiary with twenty years suspended. *Id*. Therefore, Defendant requests that his sentence be found grossly disproportionate in violation of the Eighth Amendment.

CONCLUSION

Based on the argument and analysis of facts and law set forth above, Defendant requests that this Court overturn the verdict rendered in this matter and grant him a new trial. Defendant also requests that this Court grant all of the relief requested as set forth above with the corresponding instructions provided to the trial court on remand.

BARNAUD LAW FIRM, Prof. LLC
Attorney for Appellant

_____

Timothy J. Barnaud
Attorney for Appellant
704 7th Avenue – Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
(605)723-5007

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12 point type. Appellant's Brief contains 6,252 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 15th day of October, 2019.

_____

Timothy J. Barnaud
704 7th Avenue – Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
(605)723-5007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of October, 2019, an original and two true and correct copies of Appellant's Brief in the matter of *State of South Dakota v. Cole Taylor* were served by e-mail and mail, first class, postage prepaid, upon Shirley Jemeson-Fergel, Supreme Court Clerk, South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501; Jason Ravnsborg, Attorney General, 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501; and John H. Fitzgerald, Lawrence County State's Attorney, 90 Sherman Street, Suite 8, Deadwood, SD 57732.

Timothy J. Barnaud
Attorney for Appellant
704 7th Avenue – Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
(605)723-5007

APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

VS.

COLE TAYLOR,
DOB 7-04-1991
Defendant.

CRI 18-646

I N D I C T M E N T

****

THE LAWRENCE COUNTY GRAND JURY CHARGES:

COUNT I: RAPE (Class 1 Felony)

That on or about the 11th day of November, 2017, within Lawrence County, State of South Dakota, Cole Taylor, DOB 7-04-1991, did accomplish an act of sexual penetration accomplished with another person, namely, Melinda Roy, DOB 8-02-1991, through the use of force or coercion. Contrary to SDCL 22-22-1(2).

COUNT II: ATTEMPTED RAPE (1/2 punishment of a class 1 felony)

That on or about the 11th day of November, 2017, within Lawrence County, State of South Dakota, the Defendant did with the specific intent to commit the crime of Rape did a direct act toward the commission of the intended crime and failed or was prevented or was intercepted in the perpetration of the crime. Contrary to SDCL 22-22-1(2) and 22-4-1.

Dated this 25th day of July, 2018, at Deadwood, South Dakota.

A True Bill
"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

Julie Stone
Grand Jury Foreman

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARDS TO THIS MATTER

Justin Lux
Melinda Roy
Alex Hamann
Alissa Fendrick
Austin Fitcher

FILED
JUL 25 2018
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

1

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

COLE TAYLOR,
Defendant.

CRI 18-646

PART II INFORMATION

****

The undersigned, as prosecuting attorney, in the name of and by authority of the State of South Dakota, upon his oath informs this Court, that the Defendant, has on one or two prior occasions been convicted of a felony enhancing principle felony to next more severe class (SDCL 22-7-7), said conviction being as follows:

(1) That on or about the 12th day of October, 2012, the Defendant pled guilty to the crime of Possession of Controlled Substance, A Class 5 Felony, in violation of SDCL 22-42-5, County of Pennington, State of South Dakota, Seventh Judicial Circuit.

(2) That on or about the 25th day of January, 2016, the Defendant pled guilty to the crime of Simple Assault Third or Subsequent Offense, A Class 6 Felony, in violation of SDCL 22-18-1, County of Meade, State of South Dakota, Fourth Judicial Circuit.

Contrary to statute in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 24 day of July, 2018, in Deadwood, South Dakota.

Prosecuting Attorney

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STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

VS.

COLE TAYLOR,
Defendant.

CRI 18-646

INFORMATION

****

The undersigned, as prosecuting attorney, in the name of and by authority of the State of South Dakota, makes and files this Information against the above named Defendant, and charges as to:

COUNT I: SEXUAL CONTACT WITHOUT CONSENT WITH PERSON CAPABLE OF CONSENTING (Alissa Fendrick)

That on or about the 12th day of November, 2017, within Lawrence County, State of South Dakota, the Defendant, did knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, had not consented to such contact. Contrary to SDCL 22-22-7(4).

COUNT II: SEXUAL CONTACT WITHOUT CONSENT WITH PERSON CAPABLE OF CONSENTING (Alissa Fendrick)

That on or about the 12th day of November, 2017, within Lawrence County, State of South Dakota, the Defendant, did knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, had not consented to such contact. Contrary to SDCL 22-22-7(4).

Contrary to statute in such case made and provided against the peace and dignity of the state of South Dakota.

Dated this 26 day of July, 2018, in Deadwood, South Dakota.

Prosecuting Attorney

WITNESSES KNOWN TO THE PROSECUTING ATTORNEY AT THE TIME OF THE FILING OF THIS INFORMATION:

Justin Lux	Alex Hamann
Tony Bradley	Erik Jandt
Ken Mertens	Alissa Fendric
Melinda Roy	Wylie Walno

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff,	)	CRI 18-646
VS.	)	**JUDGMENT OF CONVICTION**
COLE TAYLOR, Defendant.	)	

An Indictment was filed with this Court on the 25th day of July, 2019 charging the Defendant with the crime of Count I: Rape (SDCL 22-22-1(2)) and Count II: Attempted Rape (SDCL 22-22-1(2) and 22-4-1), an Information was filed with this Court on the 26th day of July, 2018 charging the Defendant with Count I and II: Sexual Contact Without Consent With Person Capable Of Consenting (SDCL 22-22-7(4)) and a Part II Information was filed with the Court on the 26th day of July, 2018.

On the 30th day of August, 2018, the Defendant, the Defendant's Attorney, Tim Barnaud, and John H. Fitzgerald as prosecuting attorney appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant entered a plea of not guilty and requested a Jury Trial on the charges contained in the Indictment and Information.

A Jury Trial commenced on the charges on the 8th and 9th days of April, 2019, in Deadwood, South Dakota. On the 9th day of April, 2019, the Jury returned a verdict of guilty to the charges of Count I: Rape (SDCL 22-22-1(2))) as charged in the Indictment,

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Count I and II: Sexual Contact Without Consent With Person Capable Of Consenting (SDCL 22-22-7(4)) as charged in the Information.

IT IS THEREFORE the Judgment of the Court that the Defendant is guilty of Count I: Rape (SDCL 22-22-1(2))) as charged in the Indictment, Count I and II: Sexual Contact Without Consent With Person Capable Of Consenting (SDCL 22-22-7(4)) as charged in the Information.

On the 25th day of April, 2019, the Defendant, the Defendant's Attorney, Timothy Barnaud, and John H. Fitzgerald as prosecuting attorney appeared at the Defendant's arraignment on the Part II Information. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant admitted to the Part II Information.

S E N T E N C E

On the 11th day of July, 2019, 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:

RAPE

IT IS HEREBY ORDERED that the Defendant shall pay costs in the amount of $104.00 LEOTF, $70.00 warrant fee, $392.40 prosecution costs and Defendant shall serve fifty (50) years in the South Dakota State Penitentiary. Defendant shall receive credit for time served of 337 days. This sentence is deemed to have commenced July 11, 2019.

IT IS FURTHER ORDERED that twenty (20) years of the fifty (50) year penitentiary sentence shall be suspended upon the following terms and conditions:

(1) Defendant shall pay all costs
(2) Defendant shall obey all laws.

SEXUAL CONTACT WITHOUT CONSENT WITH PERSON CAPABLE OF CONSENTING

IT IS HEREBY ORDERED that the Defendant shall pay court costs of $84.00 and serve three hundred thirty-seven days in the Lawrence County Jail. The Defendant shall receive credit for time served of 337 days. This jail sentence shall run concurrent with Count I: Rape.

SEXUAL CONTACT WITHOUT CONSENT WITH PERSON CAPABLE OF CONSENTING

IT IS HEREBY ORDERED that the Defendant shall pay court costs of $84.00 and serve three hundred thirty-seven days in the Lawrence County Jail. The Defendant shall receive credit for time served of 337 days. This jail sentence shall run concurrent with Count I: Rape and Count II: Sexual Contact Without Consent With a Person Capable of Consenting.

IT IS FURTHER ORDERED that the Defendant reimburse Lawrence County for court appointed attorney fees in the amount of $9,917.30 to be paid through the Lawrence County Auditor's Office.

IT IS FURTHER ORDERED that all bonds posted herein be exonerated.

BY THE COURT:

Signed: 7/11/2019 3:59:36 PM

Attest: CAROL LATUSECK, CLERK
McCroden, Brianna
Clerk/Deputy

Hon. Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: NOVEMBER 11, 2017

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,	)	
	)	**CRI. No.: 18-646**
Plaintiff,	)	
v.	)	**NOTICE OF APPEAL**
COLE TAYLOR,	)	
	)	
Defendant.	)	

TO: CAROL LATUSECK, LAWRENCE COUNTY CLERK OF COURT; JASON RAVNSBORG, ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA; JOHN FITZGERALD, LAWRENCE COUNTY STATE'S ATTORNEY, AS PROSECUTING ATTORNEY

COMES NOW, Cole Taylor, Defendant, by and through his attorney of record, Timothy J. Barnaud, Barnaud Law Firm, Prof., LLC, Belle Fourche, South Dakota, pursuant to SDCL § 23A-32-15 and SDCL §23A-32-16, hereby appeals to the Supreme Court of the state of South Dakota the Judgment of Conviction and Sentence imposed on July 11th, 2019.

Dated this 24th day of July, 2019.

BARNAUD LAW FIRM, Prof. LLC
Attorney for Petitioner

Timothy J. Barnaud
704 7th Avenue, 2nd Floor, Suite 201
P.O. Box 2124
Belle Fourche, SD 57717-2124
605/723-5007
tbarnaud@barnaudlaw.com

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STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF LAWRENCE)		FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	*	CRI 18-646
vs.	*	NOTICE OF INTENT TO OFFER OTHER ACTS EVIDENCE
COLE PATRICK TAYLOR, Defendant.	*	

Comes now the State of South Dakota by and through its attorney, John H. Fitzgerald, Lawrence County State's Attorney, and gives notice that the State, pursuant to rule 404B, intends to introduce evidence during its case-in-chief that the Defendant has committed other acts of sexual assault against women in the past.

The State seeks to introduce evidence outlined as follows:

1) The sexual assault of Portia Mae Crain in her dormitory room on the BHSU campus in Spearfish, SD. This act occurred on November 20, 2013.

2) The sexual assault of Tayla Lynn Brooks, Date of Birth 12-29-1992. This assault occurred on December 29, 2014 in Rapid City, South Dakota.

Copies of Spearfish Police Department's report concerning the assault identified in paragraph 1 are attached to this notice. Copies of the Rapid City Police Department's report concerning the assault identified in paragraph 2 are attached to this notice.

The State offers these "other acts" evidence testimony as proving preparation, plan, motive and knowledge pursuant to SDCL 19-19-404B(2).

The State requests that the attachments to this motion, specifically the police reports, remain under seal of the court in the public file.

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The State further requests that a hearing be held on this motion and request one and one-half hour of time.

Dated this 28 day of November, 2018.

John H. Fitzgerald
Lawrence County State's Attorney
90 Sherman Street Ste 8
Deadwood SD 57732
(605)-578-1707

TATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Petitioner,	*	CRI 18-646
vs.	*	
	*	CERTIFICATE OF SERVICE
COLE PATRICK TAYLOR, Defendant.	*	

The undersigned, Lawrence County State's Attorney hereby certifies that on the 28 day of November, 2018, he served a copy of the Notice of Intent to Offer Other Acts Evidence upon the person(s) named below by scanning a copy thereof in Deadwood, SD, addressed to:

Mr. Timothy Barnaud
Attorney at Law
211 Main Street, Suite 2
Spearfish, SD 57783
Tbarnaud@barnaudlaw.com

whose address is the last known address of addressee known to the subscriber.

John Fitzgerald
Lawrence County State's Attorney

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,	)	
	)	**CRI. No.: 18-646**
Plaintiff,	)	
	)	**BRIEF IN SUPPORT OF**
v.	)	**DEFENDANT'S MOTION AND**
	)	**NOTICE OF INTENT TO INTRODUCE**
	)	**EVIDENCE OF VICTIM'S**
COLE TAYLOR,	)	**CONSENSUAL SEXUAL**
	)	**ENCOUNTERS WITH DEFENDANT**
Defendant.	)	**PURSUANT TO SDCL 19-19-412(b)**
	)	**AND IN OPPOSITION TO**
	)	**PLAINTIFF'S PROPOSED PRIOR**
	)	**ACTS EVIDENCE PURSUANT TO**
	)	**SDCL 19-19-404(b)**
	)	

COMES NOW, the Defendant, Cole Taylor, by and through his attorney of record, Timothy J. Barnaud, Barnaud Law Firm, Prof. LLC, Spearfish, South Dakota, and hereby provides this Brief in Support of Defendant's Motion and Notice of Intent to Introduce Evidence of Victim's Consensual Sexual Encounters with Defendant PURSUANT TO SDCL 19-19-412(B) and In Opposition to Plaintiff's Proposed 19-19-404(b) Evidence.

DEFENDANT'S PROPOSED SDCL 19-19-412(b) EVIDENCE

Defendant provided notice of his intent to introduce evidence that Defendant and victim Melinda Roy had a prior consensual sexual encounter. The Victim in this matter testified to the Lawrence County Grand Jury that she and the Defendant had a consensual sexual encounter four and one half years ago. This prior sexual act between Defendant and Victim is relevant to show that the sexual activity in this matter was consensual. This evidence is admissible pursuant to

Exhibit 7

SDCL 19-19-412(b).

In order to determine the admissibility of the evidence the Court must hold a hearing pursuant to the procedures set forth in SDCL 19-19-412(c). The Court is required to allow the parties and the victim to attend the hearing and be heard. Defendant attended this hearing on January 14th, 2019, at 10:00 a.m. The alleged Victim did not attend the hearing but, the State appeared as her representative and did not dispute that she testified to the Lawrence County Grand Jury that she and Defendant had engaged in consensual sexual intercourse on one prior occasion four and one half years prior at a party. Grand Jury Transcripts Melinda Roy, Page 3 (Exhibit 4).

This prior sexual encounter is relevant to a material fact in this case, which is to prove consent and is not highly prejudicial to the Victim. See *State v. DeNoyer*, 541 N.W.2d 725, 730 (1995). The act is also similar to the alleged act in this case. Both instances took place when the Defendant and Victim met at a party and consumed alcohol together and engaged in sexual activity. GJ Grand Jury Transcripts Melinda Roy, Page 3-14. Therefore, based on the law and facts stated above, the Defendant's noticed 19-19-412(b) evidence of a prior consensual sexual encounter with the Victim, which was confirmed by her under oath to the Lawrence County Grand Jury, should be admitted.

PLAINTIFF'S PROPOSED SDCL 19-19-404(b) EVIDENCE

The State has offered two instances of prior bad acts related to sexual assault pursuant to SDCL 19-19-404(b). The first involved Portia Mae Crain on November 20th, 2013, and the second involved Tayla Lynn Brooks on December 29th, 2014. Defendant argues first, that these accusations are inadmissible because they are demonstrably false. Second, if the Court finds

that they are not demonstrably false, these prior acts are not relevant to the facts in this case. Finally, if the Court finds the acts to be relevant, the admission of these prior acts would be unduly prejudicial to Defendant and would effectively result in a trial within a trial.

The admission of other acts evidence is governed by SDCL 19-19-404(b) as follows:

> **(b) Crimes, wrongs, or other acts.**
>
> (1) Prohibited uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted uses; notice in a criminal case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
>
> (A) Provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) Do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

SDCL 19-19-404.

As the Court is aware, "to determine the admissibility of other acts evidence, the court must determine: (1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *State v. Most*, 2012 S.D. 46, ¶¶ 16-17, 815 N.W.2d 560, 565. In determining the admission of the prior acts the court must also be weigh the remoteness of the acts, the facts of the case and the nature of the prior acts. *Id.* "Remoteness and similarity must be considered together because the two concepts are so closely related; the remoteness of a prior crime takes on increased significance as the similarity between the prior crime and the charged offense increases." *Id.*

Defendant does not dispute that the State provided notice of the other acts that they intended to offer in a timely matter. Defendant does dispute that the evidence is relevant or admissible for any purpose in the case at hand. In regard to Portia Crain, that matter was tried before a Lawrence County Jury and Defendant was acquitted of the charges. Pursuant to the law set forth in *Dowling v. United States*, 110 S. CT 668, 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990) the prior acts noticed in regard to Portia Crain are not admissible for any purpose. To admit them would be a violation of the Due Process Clause under the fundamental fairness test and also a violation of the collateral estoppel component of the Double Jeopardy Clause. *Id.*; See Also *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469.

In The matter of Portia Crain, Lawrence County Criminal File 14-47, Defendant was charged with Rape, Second Degree, pursuant to the Indictment. (Attached as Exhibit 1). The case went to a jury trial and Defendant was acquitted of all charges pursuant to the Verdict form. (Attached as Exhibit 2). Defendant received a Judgment of Acquittal. (Attached as Exhibit 3). "The collateral-estoppel doctrine prohibits the Government from re-litigating an issue of ultimate fact that has been determined by a valid and final Judgment." *Dowling v. United States*, 110 S. CT 668. 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469.

In the current instance the State is attempting to use the rape allegations made by Portia Crane against Defendant in Lawrence County Criminal File 14-47 as prior acts

evidence against Defendant in the current matter. The State indicated in its motion that the acts are being used to prove preparation, plan, motive and knowledge pursuant to SDCL 19-19-404(b) (2). The State is incorrect in asserting that the 404(b) evidence offered in regard to Portia Crane is admissible. The reason being that the State is prohibited from re-litigating an issue of ultimate fact that has been determined by a valid and final judgment. *Dowling v. United States*, 110 S. CT 668. 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469.

The rape allegations against Defendant regarding Portia Crane were submitted to a jury and those ultimate facts were determined by the jury when they acquitted Defendant. The State continues to contend that Defendant did rape Portia Crain and now attempts to force Defendant to re-litigate the rape allegations against him in violation of the collateral-estoppel doctrine of the Double Jeopardy Clause. This attempt to force Defendant to re-litigate the rape allegations that he was acquitted of further violates the Due Process Clause and is fundamentally unfair. The Lawrence County Jury already determined the facts in regard to Portia Crane and determined that Defendant did not sexually assault Portia Crane. *Dowling*, 110 S. Ct. at 668; Exhibits 1, 2 and 3.

An examination of the record and facts of Lawrence County Criminal file 14-47 reveals that the Verdict acquitting Defendant of the rape charge in that file and the identity theft charge was based on the very issue that Defendant requests to foreclose. *Id.* The sexual assault charges and the facts surrounding them were decided by the jury

in 2014 and therefore they are not admissible in this case. *Id.*

Furthermore, under the balancing test required for prior acts, this prior rape charge is not relevant to the case at hand. If the Court were to find that it was relevant, the act is too remote and its admission would be unduly prejudicial to Defendant. Therefore, Defendant requests that the Court find that the prior acts noticed in regard to Portia Crane are inadmissible based on the law and facts stated above.

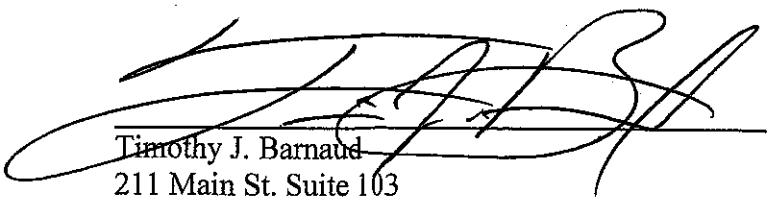
In regard to Tayla Lynn Brooks, the State has offered prior acts evidence that is not admissible. This prior charge was dismissed. The State failed to call Tayla Brooks to testify at the 404(b) hearing and instead relied solely on hearsay testimony and hearsay evidence in its attempt to offer this prior act. This case was not credible. It is the Defendant's contention that under the balancing test set forth above that this evidence is not relevant to the case at hand, it is too remote and its admission would be unduly prejudicial to Defendant. *State v. Most*, 2012 S.D. 46, ¶¶ 16-17, 815 N.W.2d 560, 565.

CONCLUSION

Based on the law and facts set forth above, Defendant requests that he be allowed to admit evidence of the above listed consensual sexual activity that has taken place between himself and the victim Melinda Roy pursuant to SDCL 19-19-412(b). Defendant further moves this Court to find that the prior acts offered by the State under SDCL 19-19-404(b) are inadmissible.

Dated this 22nd day of February 22, 2019.

BARNAUD LAW FIRM, PROF. LLC
Attorney for Defendant



Timothy J. Barnaud
211 Main St. Suite 103
Spearfish, SD 57783
Phone: (605) 639-3019
tbarnaud@barnaudlaw.com

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff,	*	CRI 14-47
	*	SUPERSEDING
	*	**I N D I C T M E N T**
VS.	*	
	*	
COLE TAYLOR	*	
Defendant.	*	

THE LAWRENCE COUNTY GRAND JURY CHARGES:

COUNT I: IDENTITY THEFT (Daniel Lefebre) (Class 6 Felony)

That on or about the 20th day of November, 2013, in the County of Lawrence, State of South Dakota, the Defendant without the authorization or permission of another person and with the intent to deceive or defraud, did obtain, possess, transfer, use, attempt to obtain, or records identifying information not lawfully issued for that person's use. Contrary to SDCL 22-40-8.

COUNT II: RAPE (CLASS 1 FELONY)

That on or about the 20th day of November, 2013, within Lawrence County, State of South Dakota, Cole Taylor, D.O.B. 7-04-1991, did accomplish an act of sexual penetration accomplished with another person, namely, Portia Crain, through the use of force or coercion. Contrary to SDCL 22-22-1(2).

Dated this 22 day of May, 2014, at Deadwood, South Dakota.

A True Bill

"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

Richard D. Sluey

Grand Jury Foreman

FILED

MAY 22 2014

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By_____

Ex 1.

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARDS TO THIS MATTER

Darin Pedneau 1-16-14 & 5-22-14 Portia Crain 1-16-14 & 5-22-14

Daniel Lefebre 1-16-14

STATE OF SOUTH DAKOTA,

Plaintiff,

V.

COLE TAYLOR,

Defendant.

CR. 14-47

VERDICT

We the jury, duly impaneled in the above-entitled action find the Defendant:
(Check the appropriate space)

Count I: IDENTITY THEFT

X NOT GUILTY

_____ GUILTY

Count II: RAPE IN THE SECOND DEGREE

X NOT GUILTY

_____ GUILTY

Dated this 18th day of July, 2014.

Foreperson of the Jury

FILED

JUL 24 2014

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By_____

Ex 2

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
COURT NO. CRI14-47

STATE OF SOUTH DAKOTA)
)
Plaintiff,)
)
vs.)
)
COLE TAYLOR,)
)
Defendant.)

JUDGMENT OF ACQUITTAL

An Indictment was filed in this Court on the 22nd day of May, 2014, charging the Defendant, in part, with the following: COUNT I: Identity Theft (Class 6 Felony), contrary to SDCL §22-40-8 and COUNT II: Rape (Class 1 Felony) contrary to SDCL §22-22-1(2). The Defendant, Defendant's attorney, Kirk Albertson, and State's Attorney, John Fitzterald, appeared at Defendant's arraignment on the 22nd day of May, 2014. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges against the Defendant. The Defendant entered a not guilty plea and subsequently requested a jury trial.

A jury trial commenced on the 16th day of July, 2014, in Deadwood, South Dakota. Defendant and his attorneys, Kirk W. Albertson and Amber L. Richey, appeared and the State was represented by State's Attorney John Fitzgerald and Deputy State's Attorney Brenda Harvey. On the 18th day of July, 2014, the jury returned a verdict of Not Guilty on the Indictment as to COUNT Identity Theft and Count II Rape. It is therefore,

ORDERED that a JUDGMENT OF ACQUITTAL is entered as to the following: COUNT I: Identity Theft (Class 6 Felony), contrary to SDCL §22-40-8 and COUNT II: Rape (Class 1 Felony) contrary to SDCL §22-22-1(2).

Dated this 23rd day of July, 2014.

BY THE COURT:

Honorable Randall Macy
Circuit Court Judge

ATTEST:
Carol Latuseck
Clerk of Courts
BY: Deputy
(SEAL)

FILED
JUL 23 2014
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

Ex 3

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

COLE PATRICK TAYLOR,
Defendant.

CRI 18-646

Findings of Fact
Conclusion of Law
and Order
Allowing Other Acts

****

Findings of Fact

1. The Defendant was indicted by a Lawrence County Grand Jury on the 25th day of July, 2018 for one count of Rape and one count of Attempted Rape. The sexual assault occurred in Deadwood, SD, on November 11, 2017. The victim is identified as Melinda Roy, a young woman from Rapid City, SD.

2. On November 28, 2018, the State filed a Notice of Intent to Offer Other Acts Evidence. The State specified the two other acts:

   a. Sexual assault of Portia Mae Crain in her dormitory room on the BHSU Campus in Spearfish, SD. This act occurred on November 20, 2013.

   b. Sexual assault of Tayla Lynn Brooks. This assault occurred on December 29, 2014 in Rapid City, South Dakota.

3. Attached to the Notice were the Spearfish Police Department reports concerning the November, 2013, sexual assault of Portia Crain and the Rapid City

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Police Department reports of the assault of Tayla Brooks. These reports and some brief testimony of Detective Pedneau and Robert Brooks were offered by the State in accordance with SDCL 19-19-404(b)(2)(A). That statute requires the State to provide reasonable notice of the general nature of the other acts evidence that the State's Attorney Office intends to offer at trial.

4. The State seeks to introduce other acts evidence for the purpose of motive, intent, and plan of the Defendant to engage in non-consensual sexual penetration with young adult women.
5. The disclosures attached to the State's Motion in summary show that without consent Defendant had sex with each of the two named women. Both young women assert that these acts were non-consensual and were the plan and intent of the Defendant.
6. Before the Court is the Indictment alleging sexual acts using force or coercion. Ms. Roy asserts that she was the victim of Defendants non-consensual anal penetration on November 11, 2017. Later that same day, Ms. Roy asserts that the Defendant attempted intercourse, but after failure to complete that act, he ejaculated on her body.
7. Biological evidence exists in all three actions linking the Defendant to these occurrences.

Conclusions of Law

1. The South Dakota Supreme Court has dealt with other acts evidence in a number of cases. In the

1. The South Dakota Supreme Court has dealt with other acts evidence in a number of cases. In the recent case of *State v. Phillips*, 906 N.W.2d 411, SD 2018, the Court set forth

"To determine the admissibility of other acts evidence, the court must determine: (1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially out-weighed by its prejudicial effect." *State v. Huber*, 2010 S.D. 63 Para. 56, 789 N.W.2d 283, 301, SDCL 19-19-404(b) is a rule of inclusion, not exclusion. Id. "If the other act evidence is admissible for any purpose other than simply character, then its use is sustainable. All that is prohibited under SDCL 19-19-404(b) is that similar act evidence not be admitted 'solely to prove character.'" *State v. Wright*, 1999 S.D. 50, Para. 17, 593 N.W.2d 792, 800 (quoting *Huddleston v. United States*, 485 U.S. 681, 687, 108k S.Ct. 1496, 1500, 99 L.Ed.2d 771 (1988)). "It is the proponent of the prior acts evidence who must persuade the trial court that the evidence has some permissible purpose." *State v. Armstrong*, 2010 S.D. 94, Para. 11, 793 N.W.2d 6, 11.

2. The Court concludes that the other acts demonstrate consent, which is a fact of consequence. Consent is a material issue in the case. Thus, the other acts are relevant to a material fact.

3. State has complied with the requirement to provide notice of intent to use other acts evidence. The rule is one of inclusion not exclusion. This allows the Trial Court, in determining admissibility, to balance the probative value of the evidence against the prejudice to the Defendant. *State v. Fool Bull*, 45 N.W.2d 380, 2008 S.D. 11.
4. The other acts do not have to result in arrest or conviction. "In fact, even where the defendant

has been tried for and acquitted of the other crime, its use is not barred under 404(b)". Dowling v. United States, 493 U.S.342 (1990). The other crime evidence becomes a matter of conditional relevancy under FRE 104(b), then the standard is whether a jury could reasonably find by a preponderance of the evidence that the defendant committed the other crime. Huddleston v. United States, 485 U.S. 681 (1988).

5. Once other acts evidence is found to be relevant, the balance tips emphatically in favor of admission unless the danger of unfair prejudice substantially outweighs the probative value of the evidence. *State v. Reyes*, 695 N.W.2d 245, 2005 S.D. 46.

6. The Court concludes the purpose of the evidence is proper. The repeated similar actions of the Defendant show a pattern of motive, plan and intent. All three sexual assaults disclose a degree of planning. In this action, there are three unrelated complaining witnesses who do not know each other. All three young women have made similar complaints against the Defendant. All three young women assert that they were sexually assaulted in a non-consensual manner. In two of the three cases, the young women assert that the Defendant anally penetrated them. The Defendant's actions are not the result of a mistake or misunderstanding. The Defendant's actions are the result of the Defendant's plan,

intent and motive to achieve sexual gratification with non-consenting young female partners.

7. The Court concludes the evidence is highly prejudicial however it concludes that because the Defendant claims the victim consented, the probative value outweighs the prejudicial value.

ORDERED

The State may present other acts evidence as disclosed. The Court will require the actual victims of the prior acts to testify unless otherwise excused by the Court.

Dated this 25th day of February, 2019.

Michelle K. Comer
Fourth Circuit Judge

ATTEST:
Lawrence County Clerk

Deputy Clerk
(SEAL)

FILED
FEB 26 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the FINDINGS OF FACT CONCLUSION OF LAW AND ORDER ALLOWING OTHER ACTS in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

Timothy Barnaud (E-mailed)
PO BOX 2124
Belle Fourche, SD 57717

Mr. John Fitzgerald (Hand Delivered)
90 Sherman Street
Deadwood, SD 57732

which addresses are the last addresses of the addresses known to the subscriber.

Dated this 26th day of February, 2019.

Brianna McCroden
Deputy Clerk of Courts

FILED
FEB 26 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By_____

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

COLE TAYLOR,

Defendant.

Arraignment

40CRI18-646

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
August 30, 2018, at 9:00 a.m.

APPEARANCES:

For the State: **MR. JOHN H. FITZGERALD**
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant: **MR. TIM BARNAUD**
Barnaud Law Firm, Prof. LLC
P.O. Box 2124
Belle Fourche, SD 57717

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STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

COLE TAYLOR,

Defendant.

Evidentiary Motions Hearing

40CRI18-646

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
January 14, 2019, at 10:00 a.m.

APPEARANCES:

For the State: **MR. JOHN H. FITZGERALD**
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant: **MR. TIM BARNAUD**
Barnaud Law Firm
211 Main Street, Ste. 2
Spearfish, SD 57783

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

COLE TAYLOR,

Defendant.

Jury Trial
(Voir Dire)

40CRI18-646

Volume 1 of 3
(Pgs. 1 - 100)

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
April 8, 2019, at 8:30 a.m.

APPEARANCES:

For the State: **MR. JOHN H. FITZGERALD**
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant: **MR. TIM BARNAUD**
Barnaud Law Firm, Prof. LLC
P.O. Box 2124
Belle Fourche, SD 57717

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

COLE TAYLOR,

Defendant.

Jury Trial

40CRI18-646

Volume 2 of 3
(Pgs. 101 - 245)

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
April 8, 2019, at 11:31 a.m.

APPEARANCES:

For the State: **MR. JOHN H. FITZGERALD**
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant: **MR. TIM BARNAUD**
Barnaud Law Firm, Prof. LLC
P.O. Box 2124
Belle Fourche, SD 57717

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

COLE TAYLOR,

Defendant.

Jury Trial

40CRI18-646

Volume 3 of 3
(Pgs. 246 - 419)

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
April 9, 2019, at 8:00 a.m.

APPEARANCES:

For the State: **MR. JOHN H. FITZGERALD**
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant: **MR. TIM BARNAUD**
Barnaud Law Firm, Prof. LLC
P.O. Box 2124
Belle Fourche, SD 57717

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF LAWRENCE)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

COLE TAYLOR,

Defendant.

Sentencing

40CRI18-646

40CRI19-252

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
July 11, 2019, at 10:30 a.m.

APPEARANCES:

For the State: **MR. JOHN H. FITZGERALD**
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant: **MR. TIM BARNAUD**
Barnaud Law Firm, Prof. LLC
P.O. Box 2124
Belle Fourche, SD 57717

12

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29072

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

COLE TAYLOR,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER
Circuit Court Judge

APPELLEE'S BRIEF

JASON R. RAVNSBORG
ATTORNEY GENERAL

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

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Timothy J. Barnaud
Attorney at Law
704 7th Avenue, Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
Telephone: (605) 639-3019
E-mail: tbarnaud@barnaudlaw.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed July 25, 2019

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TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29072

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

COLE TAYLOR,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Cole Taylor, is referred to as "Defendant." The settled record in the underlying case is denoted as "SR," followed by the e-record pagination. The Jury Trial transcripts are cited as "JT." Documents attached in the Appendix are referred to as "APP."

JURISDICTIONAL STATEMENT

On July 12, 2019, the Honorable Michelle K. Comer, Circuit Court Judge, Fourth Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Cole Taylor*, Lawrence County Criminal File Number 18-646. SR:369-71. Defendant filed his Notice of Appeal on July 25, 2019. SR:389. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT ADMITTED 404(b) EVIDENCE?

The trial court admitted the noticed 404(b) evidence.

Dowling v. U.S., 493 U.S. 342 (1990)

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

State v. White, 538 N.W.2d 237 (S.D. 1995)

State v. Willis, 370 N.W.2d 193 (S.D. 1985)

SDCL 19-19-404(b)

SDCL 19-19-401

II

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTIONS FOR MISTRIAL?

The trial court denied Defendant's motion for a mistrial.

State v. Fischer, 2016 S.D. 1, 873 N.W.2d 681

Kern v. Progressive Northern Ins. Co., 2016 S.D. 52, 883 N.W.2d 511

State v. Danielson, 2012 S.D. 36, 814 N.W.2d 401

State v. Reay, 2009 S.D. 10, 762 N.W.2d 356

SDCL 15-26A-60

III

IS THERE SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTIONS FOR JUDGMENT OF AQUITTAL?

The trial court denied Defendant's motion for judgment of acquittal.

State v. Hemminger, 2017 S.D. 77, 904 N.W.2d 746

State v. Hayes, 2014 S.D. 72, 855 N.W.2d 668

SDCL 22-22-1(2)

IV

WHETHER DEFENDANT WAS DEPRIVED OF HIS RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES WHEN THE TRIAL COURT ADMITTED LAB REPORTS WITHOUT TESTIMONY OR FOUNDATION PURSUANT TO SDCL 23-3-19.3?

The trial court admitted the lab reports pursuant to SDCL 23-3-19.3.

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

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

State v. Medicine Eagle, 2013 S.D. 60, 835 N.W.2d 886

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

SDCL 23-3-19.3

V

WAS DEFENDANT DENIED HIS RIGHT TO A FAIR TRIAL BASED ON CUMULATIVE ERROR?

The trial court did not rule on this issue.

State v. Delehoy, 2019 S.D. 30, 929 N.W.2d 103

State v. Davi, 504 N.W.2d 844 (S.D. 1993)

VI

WAS THE SENTENCE IMPOSED A VIOLATION OF THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT?

The trial court did not rule on this issue.

State v. Yeager, 2019 S.D. 12, 925 N.W.2d 105

State v. Chipps, 2016 S.D. 8, 874 N.W.2d 475

U.S. Const. amend. VIII

SDCL 22-6-1

SDCL 22-7-7

SDCL 22-22-1

STATEMENT OF THE CASE

On July 25, 2018, an Indictment was filed charging Defendant with the crimes of: Count 1: Rape of M.R., in the Second Degree, in violation of SDCL 22-22-1(2), a Class 1 felony; and Count 2: Attempted Rape of M.R., in violation of SDCL 22-22-1(2) and 22-4-1, a Class 1 felony. SR:1. The State filed a Part II Information for Habitual Offender based on Defendant's previous Possession of a Controlled Substance and Simple Assault Third or Subsequent Offense convictions in 2012 and 2016, respectively. SR:2.

On July 26, 2018, the State filed a Complaint and Information charging Defendant with two counts of Sexual Contact Without Consent with Person Capable of Consenting, in violation of SDCL 22-22-7.4, Class 1 misdemeanors. SR:3-4. The Information identified A.F. as the victim. SR:4.

Defendant was arraigned on August 30, 2018. On November 16, 2018, Defendant filed a Motion and Notice of Intention to Use Evidence of Victim's Consensual Sexual Encounters With Defendant, pursuant to

SDCL 19-19-412, "to show that the sexual activity in this matter was consensual" with regard to M.R. SR:25. On November 28, 2018, the State filed a Notice of Intent to Offer Other Acts Evidence, identifying Defendant's sexual assault of P.C. in November of 2013 and his sexual assault of T.B. in December of 2014, to prove preparation, plan, motive, and knowledge pursuant to SDCL 19-19-404(b). SR:28-29. A hearing on the evidentiary motions was held and the trial court took the matters under advisement. Evidentiary Motions Hearing (1/14/19) at 21.

After briefing by the parties, the court filed written Findings of Fact and Conclusions of Law admitting the 404(b) other acts evidence. SR:176-80 (APP 1-5). At the Pretrial Conference on March 25, 2019, the court granted Defendant's motion to introduce the previous sexual encounter between M.R. and Defendant. Pretrial Hearing (3/25/19) at 3-4.

A jury trial was held April 8-9, 2019. The jury found Defendant guilty of Rape and two counts of Sexual Contact. JT:412. Defendant admitted to the Part II Information on April 25, 2019. SR:370.

A sentencing hearing was held on July 11, 2019. SR:370. Defendant was sentenced on the rape count to fifty years in the penitentiary with twenty years suspended. SR:370-71. He received credit for 337 days already served. *Id.* For the sexual contact convictions, Defendant was sentenced to 337 days in jail for each count

and received credit for 337 days already served. SR:371. All three sentences were to run concurrently. *Id.*

STATEMENT OF THE FACTS

On November 10, 2017, 26-year-old M.R. and her friend A.F. travelled to Deadwood, South Dakota, to attend a concert at the Deadwood Mountain Grand ("DMG"). JT:124, 126-27. A.F.'s employer gave her four tickets to the concert and rented a room for her at the Silverado Franklin hotel ("hotel room"). JT:127-28. The hotel room came with one king-sized bed. JT:135. A.F. and M.R. attended a "VIP party," which lasted for an hour before the concert, and then stayed for the concert. JT:128-29. Both M.R. and A.F. consumed a few alcoholic drinks during the VIP party and the concert. JT:129.

On the day of the concert, A.F. and M.R. learned that one of the friends A.F. invited, Austin Fitcher ("Austin"), would be joining them at the concert. JT:129-30. Austin said he was bringing a friend. JT:130. A.F. and M.R. did not learn the identity of Austin's friend until he and Austin showed up towards the end of the concert. JT:130. At that time, M.R. recognized Austin's friend as Cole Taylor ("Defendant"). JT:130. M.R. knew Defendant because they had a consensual sexual encounter in April of 2013. JT:125-26. M.R. saw Defendant one other time after their encounter and was Facebook friends with him for approximately one year after they met. JT:126. A.F. also recognized Defendant, who she previously met through Austin. JT:164.

After Austin and Defendant arrived at the DMG, M.R. and A.F. joined them and went to the DMG bar area. JT:131. After a while, the four eventually all ended up at the hotel room, where they socialized and continued to drink alcohol. JT:131-32. While in the hotel room, Defendant held A.F. in place while she was sitting on the bed and kissed her. JT:170. A.F. tried to get away from Defendant but did not say anything else to him in an attempt to avoid conflict. JT:170.

Also, while at the hotel room, Defendant leaned in and kissed M.R. JT:132. M.R. was surprised by this kiss and stopped Defendant when he tried to kiss her again. JT:133. M.R. and Defendant then went outside to smoke and M.R. told Defendant that she had a boyfriend and made it clear she didn't want to mess anything up with her boyfriend. JT:133. When she returned inside, M.R. felt nauseous and decided to stay at the hotel room to sleep while A.F., Austin, and Defendant went to the bars. JT:133-34. M.R. vomited in the bathroom and then laid down in the bed. JT:135.

While on the dance floor at one of the bars, Defendant came up behind A.F., put one of his hands on the front of her breast, and put his other hand on her "vaginal area." JT:172-73. A.F. walked away from Defendant, went outside, and then told Austin what Defendant did. JT:174. Austin told Defendant to "knock it off." JT:296. Defendant replied, "my bad, my bad," threw a "temper tantrum," and sat by himself at the bar for a while. JT:297-300. A.F. stayed close to

Austin the rest of the night. JT:175. After the bars closed around 2 a.m., A.F., Austin, and Defendant went to a private apartment near the bars. JT:175. On the way back to the hotel room, A.F. realized she lost her debit card. JT:176. She and Austin went to look for it and checked at each bar. JT:176. Defendant took off from the group and did not help search. JT:176.

Sometime after falling asleep, M.R. heard a knock at the hotel room door and heard someone say her name. JT:136. Thinking it was Austin or A.F., M.R. opened the door just far enough to let the person in. JT:136. M.R. then hurried back to the bed to cover up, since, as was her custom, she had been sleeping without any clothing. JT:135-37. M.R. did not see who she let in because she laid on her stomach when she got back into bed. JT:137.

M.R. realized that the person she let in was Defendant when he crawled into bed with her without any clothing on. JT:137. Immediately after getting into bed, Defendant flipped M.R. on to her back, got on top of her, and put himself between her legs. JT:137. Defendant had an erection and penetrated M.R. vaginally. JT:137-38. M.R. was initially in shock and then told Defendant to "stop" and said "I can't." JT:138. M.R. was crying, hyperventilating, and having a panic attack. JT:138. Defendant "shushed" M.R. and tried to calm her down. JT:138. As soon as M.R. calmed down, Defendant continued to vaginally penetrate her. JT:138-39. M.R. tried to hold Defendant's

hips back with her hands, but she felt sick and did not have the strength to physically stop Defendant. JT:139. M.R. told Defendant to stop more than once. JT:139.

In an attempt to get away from Defendant, M.R. pulled at the edge of the bed and tried to crawl off the bed. JT:140. She flipped over on to her stomach and was able to get away from Defendant for a few seconds. JT:140. M.R. was half way off the bed when Defendant grabbed her by the hips and penetrated her anally with his penis. JT:140-41. M.R. continued to cry. JT:141.

After anally penetrating M.R., Defendant pulled her on to the bed and put her on her back. JT:140-41. He then knelt down next to M.R., grabbed the back of her head, pulled her up towards him, and tried to put his penis in her mouth. JT:141. M.R. kept her teeth shut and told Defendant, again, to stop. JT:142. Instead of stopping, Defendant flipped M.R. on to her stomach and continued to penetrate her vaginally and anally, while repeatedly saying "give it to daddy," until he ejaculated. JT:142.

After Defendant ejaculated, M.R. passed out and did not wake until her alarm sounded around 7:00 a.m. JT:144. At that time, M.R. was on the far side of the bed closest to the door, Defendant was lying next to her, and A.F. and Austin were on the other side of the bed. JT:144. When M.R. began to move, Defendant woke up, got on top of her, and put himself between her legs. JT:145. M.R. tried to get out of

bed, but Defendant put his hand across her stomach and shoved her down until she could not move. JT:145. M.R. stuck out her arms, put them on Defendant's hips, locked her elbows, and held him back. JT:145. Defendant continued to touch himself while on top of M.R. until he ejaculated on the "clitoris area of her privates." JT:146.

M.R. felt dirty and violated, so she got up and took a shower to get Defendant's smell off of her. JT:147-48. After her shower, M.R. woke A.F. and told her they needed to leave. JT:148, 178. A.F. and M.R. quickly packed their things and left Deadwood. JT:178. M.R. reported the rape to the Deadwood Police Department approximately thirty-six hours later. JT:150.

After reporting the rape to the police, M.R. went to the hospital and was examined by a sexual assault nurse examiner. JT:150-51, 326, 329-30. The nurse collected physical evidence from M.R.'s vagina, cervix, mouth, and anus. JT:330-34. The physical evidence from the examination was sent to the state forensics laboratory in Pierre. JT:278-79, 335. M.R.'s vaginal and anal swabs tested positive for sperm cells and the DNA contained therein was matched or was consistent with the known DNA profile of Defendant. JT:346-47, 350-51, 355-56.

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE 404(B) EVIDENCE.

A. *Standard of review and background.*

This Court reviews evidentiary rulings for abuse of discretion. *State v. Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d 488, 497. "Under this standard, not only must error be demonstrated, but it must also be shown to be prejudicial. An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Id.*

Prior to trial, the State filed notice of its intent to offer evidence of previous sexual assaults between Defendant and two other victims, P.C. and T.B., under SDCL 19-19-404(b). The State attached police reports from the prior two assaults to its motion to provide notice of the nature of the other acts evidence. SR:30-59, 65-69. A hearing was held, the parties briefed the issue, and the trial court entered findings of fact and conclusions of law admitting both instances of previous sexual assault. SR:176-180 (APP 1-5).

On appeal, Defendant argues that the other acts evidence was not relevant, too remote, and unduly prejudicial. Additionally, Defendant argues that, because he was acquitted of rape with regard to P.C., the admission of evidence of that sexual assault was a violation of

his due process rights and a violation of the collateral estoppel component of the Double Jeopardy Clause. Defendant's Brief at 12.

B. *The trial court properly admitted the other acts evidence.*

The trial court must conduct a two-part balancing test before 404(b) evidence can be admitted. *Stone*, 2019 S.D. 18, ¶25, 925 N.W.2d at 497. First, the court must decide whether the evidence of other acts is relevant to a material issue in the case other than character. *Id.* Under SDCL 19-19-401, evidence is relevant if it tends to make a fact, which is of consequence in determining the action, more or less probable than it would be without the evidence. "Relevant other acts evidence is admissible for any purpose other than proving the character of the defendant or his propensity to act in conformity therewith." *Id.*

Second, the trial court "must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *Id.* Once the trial court determines that the evidence is relevant, "the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 substantially outweigh the probative value." *Id.*

1. The other acts evidence was relevant.

The evidence at issue involved Defendant's sexual assault of two women, P.C. and T.B., who testified at trial. The first sexual assault occurred between Defendant and P.C. in November of 2013, when she

was 19 years old. JT:251, 255; SR:30. P.C. knew Defendant, who was a friend of P.C.'s boyfriend, Daniel. JT:254. In the early morning hours of November 20, 2013, P.C. was texting Daniel's phone. JT:251-52. P.C. then received text messages from a different number asking to come have sex with her and claiming to be Daniel. JT:252. P.C. thought it was Daniel at first, but soon figured out the person texting her was Defendant. JT:253-54. Defendant then asked to come up to P.C.'s dorm room so he could apologize for an "event" that happened August of 2013. JT:254; *see also* JT:258, 269 (P.C. testifying that the event in August 2013 was when Defendant sexually assaulted her in his car). Admittedly naïve, P.C. allowed Defendant in her room to apologize because she did not want to interrupt Daniel and Defendant's friendship. JT:254-55, 269. P.C. also thought letting Defendant into her dorm room would be safe because people would be able to hear her if she screamed. JT:261.

After P.C. let Defendant in, the two talked for a short time and then Defendant kissed her. JT:255. P.C. told Defendant to stop, but Defendant took off her pants and held a pillow over her face when she screamed. JT:255. Defendant told her he would take the pillow off her face if she stopped screaming. JT:255. Defendant vaginally penetrated P.C. with his penis and then tried to penetrate her anally. JT:256. P.C. begged him not to penetrate her anally. JT:256. After Defendant gave her the option of "oral or anal," P.C. submitted to oral sex. JT:256.

Defendant told P.C. he was going to record her performing oral sex to prove that she was willing. JT:256. P.C. told him that she would scream on the recording to prove that she was not willing. JT:256. Defendant then penetrated P.C. vaginally and ejaculated inside of her. JT:256-57. P.C. reported the rape to police, went to the hospital, and, ultimately, Defendant was charged with rape. JT:239-40, 257. At trial, Defendant was found not guilty of the rape charge. JT:241.

The second sexual assault occurred between Defendant and his 21-year-old second-cousin, T.B., in December of 2014. JT:198-99, 207. T.B.'s father testified that she suffers from a traumatic brain injury ("TBI") as a result of a car accident. JT:195. Due to her injury, T.B. has memory issues, needs extra time to process words, gets frustrated when asked questions too quickly, and has some difficulty with walking and balance.[1] JT:195-197, 209. She is also easily influenced and sometimes has the "mentality of a 6-year-old." JT:195.

T.B. testified that she first met Defendant in December of 2014. JT:210-11. After meeting T.B., Defendant would call and text her. JT:211. On December 30, 2014, Defendant asked T.B. to take him to a store. JT:211. T.B. drove Defendant to the store and then drove him to her house. JT:211. T.B. and Defendant were alone at her house and went into her bedroom. JT:211-13. Defendant then vaginally and anally penetrated T.B. and called her a slut and a slutty bitch. JT:213-

[1] T.B.'s trial testimony demonstrates that she has difficulty communicating what happened to her. *See* JT:206-17.

14. T.B. told Defendant he was hurting her and told him to stop. JT:215-16. T.B. could not physically stop Defendant because she was laying on her stomach. JT:215. After anally penetrating her, Defendant told T.B. to kneel and made her perform oral sex. JT:215-16. Defendant then ejaculated on T.B.'s face. JT:216. T.B. was scared, especially after Defendant slapped her on the head, because she could go into a coma or die if she is hit in the head. JT:209, 213.

Because of her TBI, T.B. and her father communicate through the phone 25-30 times per day. JT:199. On December 30, 2014, T.B. was not responding to her father's phone calls and texts, so he went to check on her after completing his out-of-town trucking route. JT:199-200. When her father arrived, T.B. was hysterical and told her father that Defendant needed to go home now. JT:200-01. T.B.'s father took Defendant home. JT:202. When he returned, T.B. told him Defendant raped her and would not let her answer her phone. JT:202, 214. T.B.'s father called the police and an investigation took place, but the matter was ultimately dismissed.[2] JT:203-04, 219.

In admitting the testimony, the trial court found that the other acts were relevant to the material issue of consent in the current case

[2] Defendant argues that evidence of the act involving T.B. was not credible because the case was dismissed. However, the reliability of evidence is an inherent part of the balancing test the court performs. *State v. Barber*, 1996 S.D. 96, ¶29, 552 N.W.2d 817, 822. Also, uncharged acts are admissible under Rule 404(b). *State v. Medicine Eagle*, 2013 S.D. 60, ¶18, 835 N.W.2d 886, 893.

and that the purpose of the evidence was proper. SR:178-79 (APP 3-4). Specifically, the trial court found that:

> The repeated similar actions of the Defendant show a pattern of motive, plan, and intent. All three sexual assaults disclose a degree of planning. In this action, there are three unrelated complaining witnesses who do not know each other. All three young women have made similar complaints against the Defendant . . . [and] assert that they were sexually assaulted in a non-consensual manner. In two of the three cases, the young women assert that Defendant anally penetrated them. The Defendant's actions are not the result of a mistake or misunderstanding. The Defendant's actions are a result of the Defendant's plan, intent, and motive, to achieve sexual gratification with non-consenting young female partners . . . because the Defendant claims the victim consented, the probative value outweighs the prejudicial [effect].

SR:179-80.

The trial court's ruling was correct. Here, Defendant introduced evidence of his previous consensual sexual encounter with M.R. to argue that the sexual activity on the night in question was consensual, making consent a material issue in the trial. SR:25. Additionally, Defendant's use of the mistake of fact instruction made his state of mind a material issue. SR:241. Thus, the other acts evidence was relevant to establish Defendant's plan and intent to have sex with M.R., regardless of whether she consented, and his lack of mistake in doing so. *State v. Waugh*, 2011 S.D. 71, ¶¶17-21, 805 N.W.2d 480, 484-85 (similar acts evidence is admissible to negate the defense of consent in a rape trial); *see also State v. Willis*, 370 N.W.2d 193, 198 (S.D. 1985)

(other act evidence is relevant to show intent in rape trial when defendant claims innocence by a mitigating factor).

Here, the other acts evidence shows how Defendant intentionally targets young women he is acquainted with and capitalizes on their personal vulnerabilities to: (1) get them alone; (2) fulfill his *specific* sexual desires; and (3) orchestrate conditions that allow him to later argue consent. *See State v. White*, 538 N.W.2d 237, 244 (S.D. 1995) (citing *Oliphant v. Koehler* and stating that other act evidence may be admitted to negate a defense of consent if rapist's method of operation is calculated to create the appearance of consent by the victim)[3]; *see also Willis*, 370 N.W.2d at 198 (other act evidence reflected common features of defendant's plan to isolate and engage in compelled sexual intercourse with vulnerable females). The pattern of conduct that establishes Defendant's plan and intent is patently evident in the other acts evidence offered at the trial below.

In P.C.'s case, Defendant used his relationship with P.C.'s boyfriend and a claimed apology as a ruse to gain access to her dorm room. After he was alone with P.C., Defendant sexually assaulted her and held a pillow over her face until she agreed to stop screaming. Defendant vaginally penetrated P.C., tried to penetrate her anally, and

[3] *See generally Oliphant v. Koehler*, 594 F.2d 547 (6th Cir. 1979) (applying Michigan state law and explaining that, because consent was at issue, testimony regarding two acquitted rape charges was properly admitted under Rule 404(b) to show defendant's plan to rape women in a manner and under circumstances which gave the appearance of consent if he was met with resistance).

then forced her to submit to oral sex. Defendant threatened to record the encounter with P.C. to prove that it was consensual. P.C. said she would scream to show she did not consent, so he elected to penetrate her vaginally until he ejaculated inside of her.

In T.B's case, Defendant established a friendship with T.B., who suffers from noticeable verbal, cognitive, and physical limitations. Defendant used this friendship to get T.B. alone and away from her phone, which, due to her limitations, rendered her unable to defend herself. Once alone, Defendant first vaginally penetrated T.B. without her consent and then anally penetrated her after she said "no" and told him to stop. Finally, Defendant forced T.B. to kneel and perform oral sex so he could ejaculate on her face.

Defendant's pattern emerged in this case as well. Here, Defendant was allowed to join a group of friends who were attending a concert. At the end of the night, Defendant split off from A.F. and Austin and headed to the hotel room where he knew M.R. was alone and feeling sick after drinking alcohol. Once M.R. let him in to the hotel room, Defendant forced her to have sex despite her telling him to stop and attempts to push him away. As with P.C. and T.B., Defendant penetrated M.R. vaginally first, then anally, and then tried to make her submit to oral sex. M.R. kept her teeth closed when Defendant tried to put his penis in her mouth, so Defendant continued to penetrate her vaginally and anally until he ejaculated inside of her. With M.R.,

Defendant recognized an opportunity to be alone with a woman who was vulnerable and, like other times before, used that opportunity to have sex regardless of her consent. The other acts evidence offered at trial was relevant because it tended to make it less probable that M.R. consented or that Defendant mistook M.R.'s actions with those of someone who was consenting.

Finally, Defendant argues that the acts are too remote. Defendant's Brief at 11-12 (citing *State v. Most*, 2012 S.D. 46, ¶17, 815 N.W.2d 560, 565). But *Most* is not helpful to Defendant's position. In that case, this Court approved the use of prior other acts involving two other victims, even though the acts occurred more than two decades prior to the charged offense. *Most*, 2012 S.D. 46, ¶¶5-8, 18, 815 N.W.2d at 563, 565.

Here, the acts involving P.C. took place in November of 2013 and the acts involving T.B. occurred in December of 2014, between three and four years before Defendant raped M.R. in November of 2017. SR:30, 46. This length of time is short compared to the *decades* between the acts in *Most*. *See also State v. Boe*, 2014 S.D. 29, ¶24, 847 N.W.2d 315, 322 (admitting other acts evidence occurring ten years prior). The trial court properly found that the other acts evidence was relevant and offered for a proper purpose.

2. Any prejudicial effect stemming from the other acts evidence did not outweigh its probative value.

"The most striking aspect of Rule 404(b) is its inclusive rather than exclusionary nature: should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403." *State v. Wright*, 1999 S.D. 50, ¶16, 593 N.W.2d 792, 799 (citations and emphasis omitted). Defendant bears the burden of proving that the trial court abused its discretion in admitting the evidence and that the admission was *unfairly prejudicial*. *Boe*, 2014 S.D. 29, ¶23, 847 N.W.2d at 321. Here, the court noted that the evidence was "highly prejudicial," but concluded that "because the Defendant claims the victim consented, the probative value outweighs the prejudicial effect."[4] SR:180 (APP 5).

Defendant argues that the other act evidence "helped get Defendant convicted." Defendant's Brief at 14. But that does not render it inadmissible. "[M]ere damage to a defendant's case is not a basis for exclusion." *Medicine Eagle*, 2013 S.D. 60, ¶17, 835 N.W.2d at 893. Furthermore, at trial, Defendant was able to cross-examine both P.C. and T.B. in front of the jury. JT:217, 258-68. With regard to P.C., the jury was informed multiple times that Defendant was acquitted of the rape charge in her case. JT:241-43, 259-60, 401. Defendant fails

[4] As the Court noted in *Boe*, the trial court had the standard backwards and recited an older, incorrect phrasing that imposed a higher burden than required. 2014 S.D. 29, ¶25, 847 N.W.2d at 322. Because the trial court's ruling was based on the higher standard, the use of that standard is not an issue on appeal.

to show he was unfairly prejudiced, and that any prejudice substantially outweighed the probative value of the other acts evidence.

Defendant disagrees with the trial court's ruling, but "[w]ith regard to the rules of evidence, abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d at 497. The trial court properly conducted the two-prong analysis before admitting the other acts evidence and instructed the jury on the limited purposes for which the evidence was admitted. SR:178-80 (APP 3-5); SR:242. The trial court's ruling was not an abuse of discretion.

C. *The other act evidence did not violate the Double Jeopardy or Due Process Clauses.*

This Court reviews alleged violations of constitutional rights under the de novo standard of review. *State v. King*, 2014 S.D. 19, ¶4, 845 N.W.2d 908, 910. Defendant argues that the admission of P.C.'s testimony was a violation of his constitutional rights because he was previously acquitted of raping P.C. Defendant's Brief at 12 (citing *Dowling v. U.S.*, 493 U.S. 342 (1990); *Ashe v. Swenson*, 397 U.S. 436 (1970)). However, the Supreme Court's holding in *Dowling* supports the admission of P.C.'s testimony.

1. <u>The collateral estoppel component of the Double Jeopardy clause is not applicable</u>.

Under the collateral-estoppel doctrine, once an issue of ultimate fact has been determined by a valid and final judgment, that issue

cannot be relitigated by the same parties in any future lawsuit. *Dowling*, 493 U.S. at 347 (citing *Ashe*, 397 U.S. at 443); *see also State v. Danielson*, 2010 S.D. 58, ¶7, 786 N.W.2d 354, 35. In *Ashe*, the Supreme Court recognized that the Double Jeopardy Clause implicitly incorporated the collateral estoppel doctrine after Ashe was acquitted of robbing a poker player and then was subsequently charged and convicted of robbing a different poker player *during the same robbery*. 397 U.S. at 439-40, 445. The Supreme Court reversed Ashe's conviction and concluded that the acquittal in the first trial barred the State from *prosecuting* him again in a second trial based on the same event. *Id.* at 445.

Here, Defendant cites *Ashe* and argues that collateral estoppel precluded the use of P.C.'s testimony based on his acquittal in the trial involving P.C. But this identical argument was rejected by the United States Supreme Court in *Dowling*. 493 U.S. at 347-48. There, the Court declined "to extend *Ashe* and the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.* at 348.

P.C.'s testimony was not barred by collateral estoppel because the admission of other act evidence based on acquitted conduct is not the same as charging and prosecuting a defendant again for the same

offense. *Id.*; *see also U.S. v. Felix*, 503 U.S. 378, 386-87 (1992) (discussing *Dowling's* endorsement of the basic principle that "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.") Because the standard for admission of 404(b) evidence is lower than the beyond-a-reasonable-doubt standard required to prove a defendant's guilt, Double Jeopardy does not apply. *Dowling*, 493 U.S. at 348-50 (comparing civil forfeiture cases); *Felix*, 503 U.S. at 386-87 (observing that the primary ruling in *Dowling* was based on the lower standard of proof for 404(b) evidence). Indeed, the *Dowling* Court recognized that a defendant's acquittal does not prove that he is innocent; it merely proves the existence of reasonable doubt as to his guilt of the offense charged. 493 U.S. at 349; *see also U.S. v. Watts*, 519 U.S. 148, 155-56 (1997) (explaining that "a jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty.") As this Court has recognized, just because a jury acquits does not mean a defendant did not participate in the acts. *See State v. Graham*, 2012 S.D. 42, ¶44, 815 N.W.2d 293, 308.

Under South Dakota law, jurors may consider 404(b) evidence if they find, by a preponderance of the evidence, that the other acts occurred, and the defendant was the actor. *State v. Thomas*, 2019 S.D. 1, ¶22, 922 N.W.2d 9, 16. Here, the jury was instructed as to the proper use of 404(b) evidence. SR:242. Because the jury's

consideration of the other acts evidence regarding P.C. was determined by a lower standard of proof in this trial, compared to the standard of proof required to convict Defendant of raping P.C. during his first trial, the collateral estoppel component of the Double Jeopardy Clause does not apply.

Under *Dowling* and its progeny, when evidence of a defendant's conduct from an acquitted charge is introduced at a subsequent criminal trial, the admission of that evidence is not barred by the Double Jeopardy Clause.

2. Use of the prior acquitted acts is not barred by the Due Process Clause.

Defendant argues that the admission of the other act evidence regarding P.C. violated his due process rights and was fundamentally unfair. The Court in *Dowling* recognized the potential issues that can arise when 404(b) evidence is admitted after a prior acquittal, including possible prejudice to the jury and the cost of re-litigating matters considered at the first trial. 493 U.S. at 352. However, the Court also determined that those issues did not fall under the narrow category of infractions that violate "fundamental fairness" and, instead, could be handled through the rules of evidence. *Id.* at 352-53 (discussing the trial court's limiting instructions and the circumstantial value of the other act testimony).

The Court in *Dowling* recognized the tradition that government cannot force a person acquitted in one trial to defend against the same

accusation in a subsequent trial but found it to be amply protected by the Double Jeopardy Clause. *Id.* at 354. The Court then declined "to use the Due Process Clause as a device for extending double jeopardy protection to cases where it would otherwise not extend." *Id.* at 354. This Court should similarly refuse to automatically extend the Due Process Clause to bar acquitted other act evidence.

3. This Court should decline to apply a bright-line rule prohibiting the use of acquitted acts.

Defendant's argument suggests he is asking this Court to apply a blanket prohibition against the use of prior acquitted acts. But, as *Dowling* demonstrates, an acquittal does not serve as a per se bar to the use of acquitted other acts in a subsequent trial. 493 U.S. at 348. Instead, the rules of evidence can adequately address any issues that may rise. *Id.* at 348, 352. Many courts have declined to apply a bright line rule barring acquitted other act evidence as well. *See, e.g., People v. Oliphant*, 250 N.W.2d 443, 453 (Mich. 1976); *State v. Yonkman*, 312 P.3d 1135, 1140 (Ariz. Ct. App. 2013) (noting that a majority of state jurisdictions allow courts to admit acquitted conduct under the state's rules of evidence); *State v. J.M., Jr.*, 137 A.3d 490, 498-99 (N.J. 2016). Similarly, South Dakota trial courts should continue to use the well-recognized 404(b) balancing test to determine whether acquitted conduct is admissible for a particular purpose.

In this case, the trial court concluded that P.C.'s testimony, although based on a situation where Defendant was acquitted, was not barred under *Dowling*. SR:179 (APP 4). The trial court then balanced the conditional relevancy of the acquitted act with the danger of unfair prejudice and found that the act was more probative than prejudicial. Importantly, the trial court pointed out that (1) Defendant was claiming that M.R. consented and; (2) the other acts evidence showed a *pattern* of motive, plan, and intent . . . [and were] not the result of a *mistake or misunderstanding*. Here, the facts and procedure of this case are a perfect example of an acquitted act that was properly found relevant under the first prong of the 404(b) test.

Furthermore, to guard against unfair prejudice, courts offer instructions explaining the use of the other acts evidence and may inform the jury of the defendant's acquittal. Here, the trial court allowed Defendant to inform the jury multiple times that he was acquitted of raping P.C. and instructed the jury on the proper consideration and use of the other act evidence involving P.C. Defendant also had an opportunity to cross-examine P.C. in front of the jury. Trial courts are amply equipped to determine if evidence of acquitted acts should be admitted and to guard against unfair prejudice.

In South Dakota, "[t]he most striking aspect of Rule 404(b) is its inclusive rather than exclusionary nature: should the evidence prove

relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403." *Wright*, 1999 S.D. 50, ¶16, 593 N.W.2d at 799 (citations and emphasis omitted). "Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized, the application of Rule 403 must be cautious and sparing." *Id*.

In this case, Defendant used evidence of his previous sexual encounter with M.R. to suggest she consented (JT:154), and he proposed a jury instruction allowing for a mistake of fact defense, which the court granted. SR:382. Defense counsel argued these points in his closing. When a defendant uses consent or mistake of fact as a defense in a rape trial, the jury should not be led to believe that Defendant's *recent* history is free of *palpably similar* sexual encounters with women who did not consent. The jury is entitled to know about prior instances of relevant conduct when determining the validity of the defense. *See Wright*, 1999 S.D. 50, ¶21, 593 N.W.2d at 801 (previous instances of harsh parental discipline were relevant to determine whether excessive discipline in question was reasonable or part of an overall plan of abuse when, in isolation, the discipline could seem reasonable); *State v Huber*, 2010 S.D. 63, ¶57, 789 N.W.2d 283, 301-02 (in husband's trial for murdering his wife, the jury was entitled to a picture of the nature of the marriage when determining husband's intent and lack of mistake). This is true regardless of whether the prior conduct was charged and, if so, whether it led to a conviction or an

acquittal. Because Rule 404(b) concerns a defendant's relevant *conduct* and not his convictions, an acquittal does not outright bar evidence of conduct associated with that acquittal.

D. *Defendant cannot rely on the purported "unnoticed" prior act as a basis for appeal.*

Defendant argues that P.C.'s "unnoticed" mention of a prior rape by Defendant in August of 2013 was inadmissible under 404(b). Defendant's brief at 10-13. But the State did not include the August 2013 incident in its notice filed November 28, 2018, nor did the State elicit testimony from P.C. in her direct examination at trial. SR:28. Rule 404(b) only requires notice of other acts that *the prosecutor intends to offer at trial*. In this case, the unnoticed act Defendant is objecting to was introduced in response to a question from Defendant's counsel.

During P.C.'s direct examination, the prosecutor asked P.C. about the November 2013 incident with Defendant:

> Q: Okay. Explain why you allowed [Defendant] to come into your dorm room.
>
> A: Because he was going to apologize for an event that happened in—in August of 2013.

JT:254. Then, after P.C. testified about Defendant's sexual assault in her dorm room, the following exchange occurred between Defendant's counsel and P.C. on cross-examination:

> Q: Okay. And you and Mr. Taylor had engaged in prior sexual encounters prior to that incident; correct?

A: No sir, he raped me before that.

JT:258. Defendant's counsel did not object, move to strike, or offer a curative instruction. "Failure to object at trial constitutes a waiver of that issue on appeal." *State v. Roach*, 2012 S.D. 91, ¶27, 825 N.W.2d 258, 266.

Further, Defendant's counsel knew about the August 2013 sexual assault[5] and knew it was not one of the noticed acts the State intended to use at trial, yet he asked a question that would elicit the testimony he now claims was inadmissible. "A party to a criminal proceeding will not be permitted to allege an error in proceedings in the trial court in which he himself acquiesced, or which was invited or induced by him." *State v. Buller*, 484 N.W.2d 883, 888-89 (S.D. 1992). Defendant induced this alleged error, so he cannot seek to benefit from it on appeal.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTIONS FOR MISTRIAL.

A. *Standard of review and background.*

This Court will not overturn a trial court's denial of a motion for mistrial unless there is an abuse of discretion. *State v. Delehoy*, 2019

[5] The prior sexual assault from August 2013 was disclosed in P.C.'s testimony in Defendant's trial for the November 2013 rape allegations. *See generally* Lawrence County Crim No. 14-47 (judicial notice requested). Defendant's counsel specifically requested the transcript of the prior testimony and used it to attempt to discredit P.C. Pre-trial Hearing (3/25/19) at 4; JT:258-65.

S.D. 30, ¶20, 929 N.W.2d 103, 108. "Motions for mistrial are within the discretion of the trial judge and will not be granted unless there is a showing of actual prejudice to the defendant." *Thomas*, 2019 S.D. 1, ¶27, 922 N.W.2d at 17. A prejudicial error is one "which, in all probability, produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.*

At the close of the State's case-in-chief, Defendant made a motion for mistrial based on Defendant's assertion that A.F. attempted to influence Austin's testimony. JT:378-79. The trial court denied the motion, holding that there was insufficient evidence to find an inference of witness tampering. JT:380. The court also noted that Austin testified that A.F. did not tell him what to say. JT:380.

After closing arguments, Defendant renewed his motion for mistrial and "add[ed] the 404(b) evidence," arguing that "it went beyond the scope that the Court had authorized." JT:414. The trial court, again, denied the motion for mistrial. JT:414-15.

B. *The trial court properly denied Defendant's motions for mistrial.*

1. Alleged witness misconduct

A.F. testified on the first day of trial and Austin testified on the second day. JT:162, 283. Austin was not present in the courtroom when A.F. testified. JT:122 (trial court's oral sequestration order); JT:313. A.F. testified that she did not tell Austin that Defendant kissed her in the hotel room. JT:183. On the second day of trial, during the

State's direct examination, Austin testified that he saw Defendant kiss A.F. JT:291-92. On cross-examination by defense counsel, the following exchange took place:

> Q: And you never saw Cole Taylor and [A.F.] kiss, did you?
>
> A: No.
> . . .
>
> Q: Okay. Well, you just testified when you came in that you saw Cole and [A.F.] kiss.
>
> A: No.
>
> Q: You didn't see Cole and [A.F.] kiss?
>
> A: No.
>
> Q: Did [A.F.] tell you that her and Cole kissed?
>
> A: She's told me, yes.
> . . .
>
> Q: . . . She told you today that Cole kissed her, didn't she?
>
> A: I don't know what she said today.
>
> Q: She was out there in the hall going through your testimony with you, wasn't she?
>
> A: I was reviewing for it, yeah.
> . . .
>
> Q: Was she telling you what to say?
>
> A: No.

JT:313-314. On re-direct, Austin testified that when the State asked him about Defendant kissing A.F. he misunderstood and thought the State said M.R. JT:321-22. At the close of the State's case-in-chief, Defendant moved for a mistrial, claiming that A.F. attempted to

influence Austin's testimony. JT:378. Defendant argued that the "witness tampering" occurred between day one of the trial when A.F. testified and day two when Austin testified, because A.F. and Austin were sitting near each other before court. JT:378-79.

The court denied the motion, recalling Austin's testimony that A.F. did not tell him what to say and finding that there was insufficient evidence to find any inferences of witness tampering. JT:380. The trial court's ruling was not an abuse of discretion. Since the trial court heard Austin's testimony and explanation, it was in the best position to determine whether any impropriety occurred and what effect, if any, the testimony may have had on the jury. *See State v. Reay*, 2009 S.D. 10, ¶31, 762 N.W.2d 356, 366. Defendant has not shown how this purported improper influence caused him any actual prejudice.

2. Scope of the 404(b) evidence

After the verdict was announced, Defendant renewed his motion for mistrial, which previously only included the allegation of witness tampering, and "added the 404(b) evidence" because "it went beyond the scope that the Court had authorized." JT:378, 414. On appeal, Defendant contends that the 404(b) evidence, offered at trial, should not have been admitted and went beyond the scope authorized by the trial court. Defendant's Brief at 16. He concludes that the trial court erred in denying his request for a mistrial. *Id.*

First, the 404(b) other acts evidence was properly admitted. *See, supra*, Section I. Second, in his brief, Defendant does not identify what evidence went beyond the scope of the trial court's 404(b) Order. Defendant's Brief at 15-16. His failure to adequately present arguments and authority in his brief constitutes waiver on appeal. SDCL 15-26A-60; *Kern v. Progressive Northern Ins. Co.*, 2016 S.D. 52, ¶35, 883 N.W.2d 511, 518. This issue is also not preserved because Defendant's passing reference to the 404(b) evidence at trial did not adequately preserve any issue regarding the improper scope that he claims in his brief. *State v. Danielson*, 2012 S.D. 36, ¶¶28-29, 814 N.W.2d 401, 410. His failure to present both the legal and factual basis for his claim to the trial court constitutes waiver on appeal. *Id.*; *State v. Fischer*, 2016 S.D. 1, ¶12, 873 N.W.2d 681, 686-87; *In re M.D.D.*, 2009 S.D. 94, ¶¶10-11, 774 N.W.2d 793, 796-97.

III

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

A. *Standard of review and background.*

A trial court's denial of a motion for acquittal is reviewed de novo. *Stone*, 2019 S.D. 18, ¶38, 925 N.W.2d at 500. On review, this Court determines "whether the evidence was sufficient to sustain a conviction." *Id.* To do so, this Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* "If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside." *Id.*

Defendant moved for a judgment of acquittal at the close of the State's case-in-chief and renewed his motion after the verdict was announced. JT:378, 414. The trial court denied both motions. JT:379, 414-15.

B. *There was sufficient evidence in the record to support the verdict.*

Defendant was found guilty of second-degree rape under SDCL 22-22-1(2), which provides:

> Rape is an act of sexual penetration accomplished with any person under any of the following circumstances:
> . . .
> (2) Through the use of force, coercion, or threats of immediate and great bodily harm against the victim . . . accompanied by the apparent power of execution.

"The State had the burden to prove (1) [Defendant] sexually penetrated [M.R.] through (2) the use of force, coercion, or threats of immediate and great bodily harm to [M.R.], accompanied by the apparent power of execution." *State v. Hayes*, 2014 S.D. 72, ¶41, 855 N.W.2d 668, 680.

M.R. provided undisputed testimony explaining how Defendant used his penis to penetrate her vaginally and anally. *See generally* JT:137-42. The DNA from M.R.'s vaginal and anal swabs, which

matched or was consistent with the known DNA profile of Defendant, corroborated her testimony. JT:350-51, 355-56.

The State also presented evidence of force or coercion. M.R. testified that Defendant got into bed with her without clothing on, flipped her over, got on top of her, put his body between her legs, and then penetrated her vaginally with his erect penis even though she repeatedly told him to stop. JT:137-38. M.R. described how she was having a panic attack—hyperventilating and crying—which caused Defendant to stop moving but did not cause him to get off of her. JT:138. The jury heard how M.R. tried to push on Defendant's hips to hold him back but was physically unable to because she felt nauseous and disorientated. JT:139.

M.R. also described how she was trying to pull herself off the bed and crawl away from Defendant. JT:140-41. M.R. explained that she was able to get away from Defendant for a few seconds, but that he grabbed her hips, proceeded to anally penetrate her, and then physically pulled her back on to the bed. JT:140-41. After Defendant pulled M.R. back on the bed, the jury heard how Defendant grabbed the back of M.R.'s head, pulled her head towards him, and tried to force his penis into her mouth. JT:141-42. Finally, M.R. testified how, after Defendant could not get his penis into her mouth because she kept her teeth shut, Defendant flipped her back on to her stomach and continued to penetrate her anally and vaginally. JT:142. M.R.'s

testimony alone provided sufficient evidence to support the verdict. *See Hayes*, 2014 S.D. 72, ¶42 n.12, 855 N.W.2d at 680.

Defendant's theory of the case was that his activity with M.R. was consensual or based on a mistake of fact. SR:25, 241; JT:382. While M.R.'s testimony alone could support the jury's verdict, the jury also heard testimony from P.C. and T.B. that described similar sexual assaults perpetrated by Defendant. *See generally* JT:206-17, 249-70. This testimony helped show that Defendant's actions were intentional and not due to a mistake of fact. *See*, *supra*, Section I.

Finally, through cross-examination of the witnesses and his closing statements, Defendant tried to point out to the jury instances where, under his theory, M.R.'s actions were not consistent with the actions of a victim who has just been raped. JT:156, 320, 376, 398-99. But the jury also heard testimony from the State's expert, Tiffanie Petro, who explained the different reactions sexual assault victims can have during and after a sexual assault and why victims have those reactions. *See generally* JT:367-77.

Defendant's arguments on appeal present the evidence in a light most unfavorable to the jury's verdict and describe facts and inferences that would support his theory of consensual sexual intercourse or ignorance or mistake of fact. These arguments call attention to the conflicts in and the weight of the evidence and speak to the credibility of M.R. On review, this Court does not pass on the credibility of

witnesses, resolve conflicts in the evidence, or weigh the evidence. *State v. Hemminger*, 2017 S.D. 77, ¶40, 904 N.W.2d 746, 759. Those are matters for a jury and the jury in this case resolved them against Defendant.

Defendant's brief did not explain how the evidence in the record, if believed by the jury, failed to sustain the finding of guilt beyond a reasonable doubt. Because the State offered sufficient evidence to prove the elements of rape in the second degree, in support of the jury verdict, the trial court properly denied Defendant's motions for judgment of acquittal.

IV

THE TRIAL COURT'S ADMISSION OF THE LAB REPORTS BY AFFIDAVIT UNDER SDCL 23-3-19.3 DID NOT RESULT IN PREJUDICIAL ERROR.

A. *Standard of review and background.*

This Court reviews alleged violations of constitutional rights under the de novo standard of review. *Medicine Eagle*, 2013 S.D. 60, ¶27, 835 N.W.2d at 896. As this Court recognized:

> The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides that in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him. . . . [U]nder the Sixth Amendment's Confrontation Clause, [t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Id. (internal citations omitted).

At trial, the State introduced, through Sergeant Smith, the DNA report from T.B.'s 2014 case. SR:267-70 (State's Ex. 3); JT:222-26. The report identified Defendant as the source of DNA in the samples taken from T.B.'s vaginal swabs. SR:269. The State also introduced the DNA report from P.C.'s 2013 case, through Sergeant Pedneau. SR:271-73 (State's Ex. 4); JT:240-41. The report identified Defendant as the source of DNA in the samples taken from P.C.'s cervical swabs. SR:272. Both reports were accompanied by an affidavit, completed by the forensic scientist/author of the report, for the purpose of authenticating the report. JT:223; SR:267-73. Defendant objected on the basis that the reports lacked adequate foundation and violated his right to confront and cross examine witnesses under the Sixth Amendment. JT:222-26, 241. The trial court admitted the lab reports pursuant to SDCL 23-3-19.3. JT:226, 241.

B. *Any alleged error in admitting the reports was harmless.*

On appeal, Defendant argues that the trial court erred in admitting the DNA reports from P.C. and T.B.'s cases by way of affidavit only, pursuant to SDCL 23-3-19.3.[6] Defendant's Brief at 18. Defendant relies solely on *State v. Beck* to support his Sixth Amendment argument. *Id.* at 18-20 (citing *Beck*, 2000 S.D. 141, 619

[6] To the extent that Defendant is challenging the lab results in M.R.'s case, those results were not admitted through SDCL 23-3-19.3. Instead, the results were admitted at trial through the testimony of Molly Raber, the forensic scientist who analyzed the DNA evidence from M.R. sexual assault examination and was subject to cross examination. *See Medicine Eagle*, 2013 S.D. 60, 835 N.W.2d 886.

N.W.2d 247). He claims the court failed to balance Defendant's right to confrontation with the government's interest in not producing the witness, as set forth in *Beck*. This Court need not analyze whether the trial court erred under a *Beck* analysis, since any error in admission of the reports was harmless. *See State v. Kihega*, 2017 S.D. 58, ¶33, 902 N.W.2d 517, 527.

"The harmless error doctrine preserves the essential purpose of criminal trials: to decide a defendant's guilt or innocence. The rule 'promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" *State v. Zakaria*, 2007 S.D. 27, ¶19, 730 N.W.2d 140, 146. This Court deems an error harmless if it "may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt" and did not contribute to the verdict obtained. *Id.*; *State v. Podzimek*, 2019 S.D. 43, ¶15, 932 N.W.2d 141, 146.

Here, introduction of the DNA reports from the earlier cases was harmless. First, the reports were only admitted to show that Defendant was the source of the DNA in the previous cases, which is cumulative or corroborative of the testimony of P.C. and T.B., who both identified Defendant as the person who assaulted them. *Podzimek*, 2019 S.D. 43, ¶16, 932 N.W.2d at 147; JT:210-13, 251-55.

Second, during the trial below, Defendant had an opportunity to cross-examine both T.B. and P.C. regarding their testimony about the previous sexual assaults. On cross-examination of P.C., Defendant tried to establish that P.C. willing let Defendant into her dorm room, after learning it was Defendant who she was exchanging sexually explicit text messages with, to show that their sexual intercourse was consensual or a mistake of fact. JT:262-65. Defendant's counsel also attempted to discredit P.C. with her previous trial testimony from the prior rape trial and Defendant's subsequent acquittal. JT:261-64. Defendant did not, however, dispute his involvement in the sexual activity.

The DNA reports in question were introduced as part of the State's 404(b) evidence, offered for a limited purpose, and represented a minute portion of the evidence offered at trial. *See Graham*, 2012 S.D. 42, ¶26, 815 N.W.2d at 304 (statement in context of entire trial did not materially affect the verdict). M.R. and A.F. testified at length about the events of the night. Austin testified about the "temper tantrum" Defendant threw after he was told not to sexually assault A.F. The jury heard M.R.'s graphic description of what Defendant did to her in the hotel room. Furthermore, Defendant's identity was not an issue in this case. Thus, any error in the admission of the DNA reports regarding the 404(b) evidence was harmless beyond a reasonable doubt and did not affect the jury's verdict in this case.

V

DEFENDANT'S RIGHT TO A FAIR TRIAL WAS NOT VIOLATED DUE TO CUMULATIVE ERROR.

This Court has previously 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). This Court must decide "whether, on a review of the entire record, [Defendant] was provided a fair trial." *Id.*; *see also Delehoy*, 2019 S.D. 30, ¶20, 929 N.W.2d at 108. As this Court has said many times before, Defendant "is not entitled to a perfect trial but rather a fair one." *Davi*, 504 N.W.2d at 857. Because Defendant failed to establish any prejudicial error, as discussed above, this Court should conclude that there is no cumulative error and Defendant received a fair trial.

VI

THE SENTENCE IMPOSED DID NOT VIOLATE THE EIGHTH AMENDMENT.

Defendant asserts that the trial court's imposition of a fifty-year sentence, with twenty years suspended, was cruel and unusual punishment in violation of the United States Constitution. *See* U.S. Const. amend. VIII. Defendant claims that his sentences are grossly disproportionate to the circumstances of his crimes. Defendant's Brief at 21-22.

When a defendant challenges his noncapital sentences on Eighth Amendment grounds, the Court conducts a de novo review to determine whether the sentence imposed is grossly disproportionate to the offense. *State v. Chipps,* 2016 S.D. 8, ¶31, 874 N.W.2d 475. In *Chipps,* the Court examined the standard for gross disproportionality and described it as "relatively straightforward":

> First, we look to the gravity of the offense and the harshness of the penalty. This comparison rarely leads to an inference of gross disproportionality and typically marks the end of our review. If the penalty imposed appears to be grossly disproportionate to the gravity of the offense, then we will compare the sentence to those imposed on other criminals in the same jurisdiction as well as those imposed for commission of the same crime in other jurisdictions.

2016 S.D. 8, ¶38, 874 N.W.2d at 488-89 (internal citations omitted).

As the Court explained in *Chipps*, the first component of the threshold comparison—gravity of the offense—"refers to the offense's relative position on the spectrum of all criminality." 2016 S.D. 8, ¶35, 874 N.W.2d at 487. When judging the gravity of the offense, the Court may consider the harmfulness of the offense and the culpability of the offender. *State v. Diaz*, 2016 S.D. 78, ¶52, 887 N.W.2d 751, 766. Other considerations include Defendant's other conduct relevant to the crime as well as his recidivism. *State v. Traversie*, 2016 S.D. 19, ¶16, 877 N.W.2d 327, 332. As this Court explained, "if the sentence is enhanced because of the offender's recidivism, then the gravity of his past offenses also contributes to the gravity of the present offense." *Chipps*, 2016

S.D. 8, ¶36, 874 N.W.2d at 488. This is because the State has an interest, not only in punishing the primary or "triggering" offense, but also in "dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.*

Here, Defendant was convicted of second-degree rape under SDCL 22-22-1. SR:370-71. Rape inflicts mental and psychological damage to the victim and undermines the community's sense of safety and security. *State v. Yeager*, 2019 S.D. 12, ¶6, 925 N.W.2d 105, 109. Rape is a heinous crime and is, without a doubt, deserving of serious punishment. *Id.* Based on the vast harm to the victim and to the community, the gravity of Defendant's criminal act is comparatively high when weighed against other crimes. *Id.*

Additionally, the gravity of this crime was magnified by Defendant's recidivism. Defendant's sentence was enhanced with the habitual offender statute (SDCL 22-7-7) alleging two prior felony convictions. SR:2. Because of his prior felonies, Defendant's rape conviction was enhanced from a Class 1 felony to a Class C felony level for sentencing purposes.

With regard to the second component, harshness of the penalty, the *Chipps* court explained that this "refers to the penalty's relative position on the spectrum of all permitted punishments." 2016 S.D. 8, ¶37, 874 N.W.2d at 488. The harshness of a defendant's sentence must

be determined by examining the entire range of punishments "that the State could have imposed on any criminal for any crime." *Id.* When assessing the harshness of a sentence, this Court takes into consideration whether a sentence is for a term of years, thus making Defendant eligible for parole. *State v. Uhing*, 2016 S.D. 93, ¶18, 888 N.W.2d 550, 556.

For his conviction of second-degree rape (a Class 1 felony as enhanced by the Part II Information to a Class C felony level for sentencing purposes), Defendant faced up to life in prison and a $50,000 fine. SDCL 22-6-1; 22-7-7. Defendant was not sentenced to the statutory maximum. Instead, Defendant's penalty is for a term of years and he will be eligible for parole, which further diminishes the harshness of his sentence. *Uhing*, 2016 S.D. 93, ¶18, 888 N.W.2d at 556.

Furthermore, it is appropriate to consider the fact that Defendant's sentence is less than the maximum punishments the Legislature has authorized for certain crimes in this state, including the death penalty (Class A felonies), as well as mandatory life imprisonment (Class A and B felonies). SDCL 22-6-1; *Chipps,* 2016 S.D. 8, ¶41, 874 N.W.2d at 490.

In light of the above comparison, Defendant's sentence does not appear to be grossly disproportionate to the gravity of the offense. Because this threshold requirement of the gross disproportionality

standard is not satisfied, it is not necessary—nor appropriate—to move to the next step and consider what sentences other defendants may have received in other cases. *Chipps*, 2016 S.D. 8, ¶42, 874 N.W.2d at 490.

CONCLUSION

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

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

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

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief 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 9,994 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 17th day of December 2019.

/s/
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 17, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Cole Taylor* was served via electronic mail upon Timothy J. Barnaud at tbarnaud@barnaudlaw.com.

/s/
Chelsea Wenzel
Assistant Attorney General

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF LAWRENCE) FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA, * CRI 18-646
Plaintiff, *
* Findings of Fact
* Conclusion of Law
* and Order
vs. * Allowing Other Acts

FILED
FEB 26 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

COLE PATRICK TAYLOR, *
Defendant. *

****

Findings of Fact

1. The Defendant was indicted by a Lawrence County Grand Jury on the 25th day of July, 2018 for one count of Rape and one count of Attempted Rape. The sexual assault occurred in Deadwood, SD, on November 11, 2017. The victim is identified as Melinda Roy, a young woman from Rapid City, SD.

2. On November 28, 2018, the State filed a Notice of Intent to Offer Other Acts Evidence. The State specified the two other acts:
   a. Sexual assault of Portia Mae Crain in her dormitory room on the BHSU Campus in Spearfish, SD. This act occurred on November 20, 2013.
   b. Sexual assault of Tayla Lynn Brooks. This assault occurred on December 29, 2014 in Rapid City, South Dakota.

3. Attached to the Notice were the Spearfish Police Department reports concerning the November, 2013, sexual assault of Portia Crain and the Rapid City

Police Department reports of the assault of Tayla Brooks. These reports and some brief testimony of Detective Pedneau and Robert Brooks were offered by the State in accordance with SDCL 19-19-404(b)(2)(A). That statute requires the State to provide reasonable notice of the general nature of the other acts evidence that the State's Attorney Office intends to offer at trial.

4. The State seeks to introduce other acts evidence for the purpose of motive, intent, and plan of the Defendant to engage in non-consensual sexual penetration with young adult women.
5. The disclosures attached to the State's Motion in summary show that without consent Defendant had sex with each of the two named women. Both young women assert that these acts were non-consensual and were the plan and intent of the Defendant.
6. Before the Court is the Indictment alleging sexual acts using force or coercion. Ms. Roy asserts that she was the victim of Defendants non-consensual anal penetration on November 11, 2017. Later that same day, Ms. Roy asserts that the Defendant attempted intercourse, but after failure to complete that act, he ejaculated on her body.
7. Biological evidence exists in all three actions linking the Defendant to these occurrences.

Conclusions of Law

1. The South Dakota Supreme Court has dealt with other acts evidence in a number of cases. In the

1. The South Dakota Supreme Court has dealt with other acts evidence in a number of cases. In the recent case of *State v. Phillips*, 906 N.W.2d 411, SD 2018, the Court set forth

"To determine the admissibility of other acts evidence, the court must determine: (1) whether the intended purpose is relevant to some material issue in the case, and (2) whether the probative value of the evidence is substantially out-weighed by its prejudicial effect." *State v. Huber*, 2010 S.D. 63 Para. 56, 789 N.W.2d 283, 301, SDCL 19-19-404(b) is a rule of inclusion, not exclusion. Id. "If the other act evidence is admissible for any purpose other than simply character, then its use is sustainable. All that is prohibited under SDCL 19-19-404(b) is that similar act evidence not be admitted 'solely to prove character.'" *State v. Wright*, 1999 S.D. 50, Para. 17, 593 N.W.2d 792, 800 (quoting *Huddleston v. United States*, 485 U.S. 681, 687, 108k S.Ct. 1496, 1500, 99 L.Ed.2d 771 (1988)). "It is the proponent of the prior acts evidence who must persuade the trial court that the evidence has some permissible purpose." *State v. Armstrong*, 2010 S.D. 94, Para. 11, 793 N.W.2d 6, 11.

2. The Court concludes that the other acts demonstrate consent, which is a fact of consequence. Consent is a material issue in the case. Thus, the other acts are relevant to a material fact.

3. State has complied with the requirement to provide notice of intent to use other acts evidence. The rule is one of inclusion not exclusion. This allows the Trial Court, in determining admissibility, to balance the probative value of the evidence against the prejudice to the Defendant. *State v. Fool Bull*, 45 N.W.2d 380, 2008 S.D. 11.
4. The other acts do not have to result in arrest or conviction. "In fact, even where the defendant

has been tried for and acquitted of the other crime, its use is not barred under 404(b)". Dowling v. United States, 493 U.S.342 (1990). The other crime evidence becomes a matter of conditional relevancy under FRE 104(b), then the standard is whether a jury could reasonably find by a preponderance of the evidence that the defendant committed the other crime. Huddleston v. United States, 485 U.S. 681 (1988).

5. Once other acts evidence is found to be relevant, the balance tips emphatically in favor of admission unless the danger of unfair prejudice substantially outweighs the probative value of the evidence. *State v. Reyes*, 695 N.W.2d 245, 2005 S.D. 46.

6. The Court concludes the purpose of the evidence is proper. The repeated similar actions of the Defendant show a pattern of motive, plan and intent. All three sexual assaults disclose a degree of planning. In this action, there are three unrelated complaining witnesses who do not know each other. All three young women have made similar complaints against the Defendant. All three young women assert that they were sexually assaulted in a non-consensual manner. In two of the three cases, the young women assert that the Defendant anally penetrated them. The Defendant's actions are not the result of a mistake or misunderstanding. The Defendant's actions are the result of the Defendant's plan,

intent and motive to achieve sexual gratification with non-consenting young female partners.

7. The Court concludes the evidence is highly prejudicial however it concludes that because the Defendant claims the victim consented, the probative value outweighs the prejudicial value.

ORDERED

The State may present other acts evidence as disclosed. The Court will require the actual victims of the prior acts to testify unless otherwise excused by the Court.

Dated this 25th day of February, 2019.

Michelle K. Comer
Fourth Circuit Judge

ATTEST:
Lawrence County Clerk
Deputy Clerk
(SEAL)

FILED
FEB 26 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By_____

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29072

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

COLE TAYLOR,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER
Circuit Court Judge

APPELLANT'S REPLY BRIEF

TIMOTHY J. BARNAUD
Attorney at Law
704 7th Avenue, Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
ATTORNEY FOR APPELLANT

JASON RAVNSBORG
ATTORNEY GENERAL
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

JOHN H. FITZGERALD
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

Attorneys for Plaintiff and Appellee

Notice of Appeal filed July 25th, 2019

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TABLE OF AUTHORITIES

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29072

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

COLE TAYLOR,

Defendant and Appellant.

PRELIMINARY STATEMENT

The Defendant incorporates by reference the Preliminary Statement in his previous brief, page 1.

JURISDICTIONAL STATEMENT

The Defendant incorporates by reference the Jurisdictional Statement in his previous brief, pages 1-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED 404(B) EVIDENCE OF A PRIOR ACQUITTED ACT TO BE SUBMITTED TO THE JURY?

The trial court allowed 404(b) evidence of a prior acquitted act to be submitted to the jury.

Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970)

Dowling v. United States, 110 S. Ct. 668, 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990)

II.

WHETHER DEFENDANT WAS DEPRIVED OF HIS RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES WHEN THE TRIAL COURT ADMITTED LAB REPORTS WITHOUT TESTIMONY OR FOUNDATION PURSUANT TO SDCL 23-3-19.3?

The trial court allowed lab reports regarding DNA evidence against Defendant to be introduced pursuant to SDCL 23-3-19.3 by affidavit without the witnesses who collected the samples or did the testing being called.

State v. Beck, 2000 S.D. 141, 619 N.W.2d 247

U.S. v. Grimes, 54 F.3d 489 (8th Cir. 1995)

STATEMENT OF THE CASE AND FACTS

The Defendant incorporates by reference the Jurisdictional Statement in his previous brief, pages 5-10.

ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT ALLOWED 404(B) EVIDENCE OF A PRIOR ACQUITTED ACT TO BE SUBMITTED TO THE JURY.

This case was determined in part by 404(b) evidence from a matter that Defendant was already acquitted of by a Lawrence County Jury. SR at 25. In *Dowling v. United States*, 110 S. Ct. 668, 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990), the Supreme Court found that these type of prior acquitted acts noticed in regard to Portia Radtke were not admissible in a subsequent trial. To admit them was a violation of the Due Process Clause under

the fundamental fairness test and also a violation of the collateral estoppel component of the Double Jeopardy Clause. *Id.*; See Also *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970). In its brief the State attempts to distinguish and justify the admission of this evidence but, it cannot succeed in its arguments.

In Lawrence County Criminal File 14-47, Defendant was charged with Rape, Second Degree, pursuant to the Indictment and acquitted at a jury trial of those charges. SR at 25. Defendant received a Judgment of Acquittal. SR at 25. "The collateral-estoppel doctrine prohibits the Government from re-litigating an issue of ultimate fact that has been determined by a valid and final Judgment." *Dowling v. United States,* 110 S. Ct. 668. 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970). The State cannot argue that by admitting this prior acquitted act that it did not force Defendant to re-litigate that matter.

In the current case the State used the rape allegations made by Portia Crane Radtke against Defendant in Lawrence County Criminal File 14-47. JURY TRIAL VOL. 3 at 249-270. This is a classic example of the State forcing the Defendant into re-litigating an issue of ultimate fact that has been determined by a valid and final judgment. *Dowling v. United States*, 110 S. Ct. 668. 107 L. Ed. 2d. 708, 58 USLW 4124, 29 Fed. R. Evid. Serv 1. (1990); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970). To argue differently is simply semantics and an attempt to run around the Defendant's right to a fair trial.

The State contended that Defendant did rape Ms. Radtke in spite of his acquittal, had her testify as such and convinced the trial court to force Defendant to re-litigate the rape allegations against him in violation of the law set forth above. JURY TRIAL VOL. 3 at 249-270. As previously argued, the State, by forcing Defendant to re-litigate the rape allegations that he was acquitted of, further violated the Due Process Clause and created a trial that was fundamentally unfair. A Lawrence County Jury already determined the facts in regard to Portia Crane Radtke and determined that Defendant did not rape her. Yet, the State put her on the stand and had her testify that she was raped in spite of the acquittal. JURY TRIAL VOL. 3 at 249-270.

The State attempts to split this deprivation of Defendant's right to a fair trial into multiple arguments and justifications that fly in the face of the Constitution. The 404(b) evidence of a prior acquitted act was used in this case in violation of Defendant's due process rights and this Court should reverse and remand this case for a new trial.

II.

THE DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES WHEN THE TRIAL COURT ADMITTED LAB REPORTS BY AFFIDAVIT PURSUANT TO SDCL 23-3-19.3 WITHOUT ADEQUATE FOUNDATION

SDCL 23-3-19.3 clearly states as follows:

> A copy of a statement of the methods and findings of any examination or analysis conducted by employees of the State Forensic Laboratory or by a certified chemist employed by a law enforcement agency within the state, authenticated under oath by the employee, is prima facie evidence in all grand jury, court, parole, probation, and contested case proceedings in the State of South Dakota of the facts contained therein reciting the methods and findings.

> The statement has the same force and effect as if the person who performed the analysis or examination had testified in person. An accused person or the accused's attorney may request that the person in the State Forensic Laboratory or the certified chemist employed by a law enforcement agency within the state, who conducted the examination testify in person at a criminal trial, parole revocation, or probation revocation, concerning the examination or analysis.

The State does not argue that Defendant has the right under the Sixth Amendment Confrontation Clause to confront and cross-examine adverse witnesses. *State v. Beck*, 2000 S.D. 141, ¶ 10, 619 N.W.2d 247, 250. As previously state, the trial court must balance the defendant's right to confront and cross-examine a witness with the government's interest in not requiring confrontation. *State v. Beck*, 2000 S.D. 141, ¶ 11, 619 N.W.2d 247, 250. The balancing test applied requires that the court assess the explanation the government offers for why confrontation is undesirable or impractical. *Id*. The trial court must then apply the second factor of whether the evidence is reliable. *Id*; See also *U.S. v. Grimes*, 54 F.3d 489 (8th Cir. 1995).

As previously stated, the trial court in this case, like in *Beck*, failed to follow the requirements of SDCL 23-3-19.3. The record contains no balancing of the confrontation rights of the Defendant against the grounds asserted by the State for not requiring confrontation. There was no finding of good cause for dispensing with confrontation. *State v. Beck*, 2000 S.D. 141, ¶ 13, 619 N.W.2d 247, 252.

The Defendant sought to protect his right to confrontation when he objected to the admission of the lab reports based on chain of custody and foundational grounds. JURY TRIAL VOL. 2 at 222-226. The State flippantly argued that the lab reports were authenticated under oath pursuant to SDCL 23-3-19.3 and should be admitted. *Id*. The State and the trial court failed to conduct any balancing test regarding the Defendant's

Sixth Amendment right to confront and cross examine witnesses and allowed the lab reports to be admitted over the objection of Defendant. *Id*. Defendant was deprived of his rights under the Sixth Amendment and SDCL 23-3-19.3 by this error and such error cannot be said to be harmless.

Even more troubling, was the fact that Defendant's DNA was not seized and tested in this case. JURY TRIAL VOL. 3 at 353-355. The lab reports relied on a sample from an old case that had been dismissed. *Id*. The DNA results were used to compare DNA seized in the case at hand. JURY TRIAL VOL. 3 at 353-355 and JURY TRIAL VOL. 2 at 222-226. Defendant was deprived of his confrontation rights regarding the testing and how the DNA sample was handled. *State v. Beck*, 2000 S.D. 141, ¶ 13, 619 N.W.2d 247, 252.

The State does not contest that Defendant's Sixth Amendment right to confront and cross examine witnesses was violated. Instead, the State attempts to argue that the deprivation of the Defendant's constitutionally guaranteed right is harmless. The State does so by a result oriented application of the law rather than the pure application that this Court should apply. Defendant's conviction must be overturned pursuant to the requirements of the Constitution and SDCL 23-3-19.3. For the State to assert anything else is a startling proposal and an affront to the protections that are provided by the Sixth Amendment. Based on this violation alone Defendant should have his conviction reversed and this matter should be remanded for a new trial.

CONCLUSION

Based on the argument and analysis of facts and law set forth above, as well as those set forth in the Defendant's prior brief, Defendant requests that this Court overturn the verdict rendered in this matter and grant him a new trial.

BARNAUD LAW FIRM, Prof. LLC
Attorney for Appellant

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Timothy J. Barnaud
Attorney for Appellant
704 7th Avenue – Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
(605)723-5007

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12 point type. Appellant's Reply Brief contains 1542 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 15th day of January, 2020.

Timothy J. Barnaud
704 7th Avenue – Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
(605)723-5007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of January, 2020, an original and two true and correct copies of Appellant's Reply Brief in the matter of *State of South Dakota v. Cole Taylor* were served by e-mail and mail, first class, postage prepaid, upon Shirley Jemeson-Fergel, Supreme Court Clerk, South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501; Jason Ravnsborg, Attorney General, 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501; and John H. Fitzgerald, Lawrence County State's Attorney, 90 Sherman Street, Suite 8, Deadwood, SD 57732.

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Timothy J. Barnaud
Attorney for Appellant
704 7th Avenue – Suite 201
P.O. Box 2124
Belle Fourche, SD 57717
(605)723-5007