IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 27736

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JOSEPH PATTERSON,
Defendant and Appellant.

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

THE HONORABLE BRADLEY G. ZELL

APPELLANT'S BRIEF

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NOTICE OF APPEAL WAS FILED January 13, 2016

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PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Joseph Patterson, will be referred to as "Defendant" or by his name. Plaintiff and Appellee, State of South Dakota, will be referred to as "State." The alleged minor victim in this matter will be referred to by his initials "T.R." References to the transcripts of the jury trial shall be referred to as "JT" followed by the specific volume and page number(s). All other transcripts will be referred to by name and date, followed by the specific page number(s). All other documents within the settled record as outlined in the Register of Actions shall be referred to as "SR," followed by the page number(s).

JURISDICTIONAL STATEMENT

On October 18, 2013, Mr. Patterson was indicted by a Lincoln County Grand Jury on the charges of murder in the second degree (SDCL 22-16-7), manslaughter in the first degree while engaged in the commission of aggravated battery (SDCL 22-16-15), manslaughter in the first degree while engaged in the commission of abuse or cruelty to a

minor (SDCL 22-16-15 and 26-10-1), aggravated battery of an infant (SDCL 22-18-1.4), and abuse or cruelty to minor (SDCL 26-10-1). T.R., a two-year-old child, was the alleged victim in each count. On September 29, 2015, after a two-week jury trial, the jury returned guilty verdicts on the counts of murder in the second degree, manslaughter in the first degree, and aggravated battery of an infant. *See* Judgment and Sentence at A1-A4, SR 1980.

Thereafter, on November 19, 2015, Mr. Patterson was sentenced by the Honorable Bradley G. Zell to serve life in the South Dakota State Penitentiary on the murder in the second degree conviction and twenty-five (25) years on the aggravated battery of an infant conviction with the sentences to run concurrently. The trial court did not issue a sentence on the manslaughter in the first degree conviction after finding that the murder in the second degree and manslaughter in the first degree convictions arose from the same conduct. A written judgment was entered on December 31, 2015. *See* Judgment and Sentence at Appendix A3-A4 and SR 1980.[1]

Mr. Patterson's Notice of Appeal was timely filed with this Court on January 13, 2016. SR 1984. Appeal from the final judgment is brought as a matter of right pursuant to SDCL 23A-32-2. The State timely filed its State's Notice of Review on January 29, 2016; however, this Court is without jurisdiction to consider the issues raised by the State. *See* SDCL 23A-32-4.

STATEMENT OF THE LEGAL ISSUES

1. Did the trial court permit prejudicial error by allowing the State to present other acts evidence to the jury?

[1] The Judgment also reflects that the State dismissed Count 3 of the Indictment, manslaughter in the first degree and Count 5 of the Indictment, abuse or cruelty to minor.

The trial court permitted the other acts evidence to be presented to the jury over the defense's objections. JT Vol. III pgs. 4-26.

State v. Moeller, 1996 S.D. 60, 548 N.W.2d 465.
People v. Casias, 312 P.3d 208, 2012 COA 117.
State v. Wright, 1999 SD 50, 593 N.W.2d 792.

2. Did the trial court err when it permitted the State to argue a factual theory of guilt and motive not supported in the record by any evidence?

The trial court overruled Mr. Patterson's objection to the State's closing argument related to a factual assertion concerning motive not supported in the record. JT Vol. X, 12, 15.

United States v. Beckman, 222 F.3d 512 (8th Cir.2000).
State v. Janis, 2016 SD 43, 880 N.W.2d 76.

3. Did the trial court err by permitting the State to elicit expert opinions that were impermissibly intrusive?

The trial court denied Mr. Patterson's objection to the expert opinions. SR 214, 373.

State v. Guthrie, 2001 SD 61, 627 N.W.2d 401.
State v. Barber, 1996 SD 96, 552 N.W.2d 817.

4. Did the trial court err by refusing to allow Mr. Patterson to present additional instances of alleged child abuse committed by a potential third party perpetrator?

The trial court denied Mr. Patterson the opportunity to present several instances of alleged child abuse conducted by a potential third party perpetrator.

State v. Iron Necklace, 430 N.W.2d 66, (S.D.1988).
State v. Packed, 2007 SD 75, 736 N.W.2d 851.

5. Did the trial court err by failing to grant Mr. Patterson's motion for judgment of acquittal?

The trial court denied Mr. Patterson's motion for judgment of acquittal. JT V 107-110.

State v. Thomason, 2014 SD 18, 845 N.W.2d 6402.
State v. Edmunds, 308 Wis.2d 374 (2008).

Ex Parte Henderson, 384 S.W.3d 833, (Tex.Crim.App. 2012).

6. Does this Court have jurisdiction to consider the issues presented in the State's Notice of Review?

   The trial court did not review or decide this issue below given the appellate nature of the issue.

   State v. Reath, 2003 SD 144, 673 N.W.2d 294.
   SDCL 23A-32-4.

STATEMENT OF THE CASE AND FACTS

On October 9, 2013, Ashley Doohen (Ashley), the mother of two-year-old T.R. received a frantic phone call from her boyfriend, Joey Patterson (Joey). Joey, who was watching T.R., explained that T.R. was not breathing. Ashley told Joey to hang up and to call 911. When Joey called 911 he requested help and informed the dispatcher that T.R. was choking. Paramedics arrived at approximately 5:52 p.m. Unfortunately, by the time help arrived, it was too late to save T.R.

Earlier that day, at approximately 5:00 pm, Ashley picked up T.R. from his regular daycare, which was operated by Marilyn Kurnk. JT Vol. I pgs. 63-65. Ashley and T.R. arrived at the apartment that they shared with Joey approximately fifteen minutes later. Joey was already home when Ashley and T.R. arrived. Id. 65-66.

At that time, T.R. was in the process of potty training and as a reward for successfully using the bathroom, Joey helped T.R. get a package of gummy fruit snacks from the kitchen. Id. 146-147. While Joey was helping T.R., Ashley was changing clothes and getting ready to go work out at a local gym, Fitness 19, located only a few blocks away. Id. 70. When Ashley left for the gym, everything appeared fine and T.R.

was watching TV and eating fruit snacks. Ashley testified that while she was leaving, T.R. was in a good mood and enjoying himself and not whining. Id. 185.

While Ashley was leaving the apartment complex she saw Joey on the balcony waiving goodbye. Id. 175. At 5:34:40 PM she sent Joey several text messages stating: "Have I told you lately that I love you?", "Cuz I love you.", "UR so romantic." Then at 5:36:48 Ashley texted Joey "If you love me ull put it on me real good tonight." Id. 147. At 5:37:08, Joey responded by text message "Bae I love u too." Id. 147-148.

Ashley checked in to the workout facility at 5:42. *See* JT Vol. III 89 (Ashley's check-in time at the gym). As she was about to place her personal belongings into her locker she noticed that she had missed two phone calls from Joey. Phone records produced at trial established that the first missed call occurred at 5:42:40. JT Vol. I. 191. The second missed call occurred at 5:43:24. Id. *See also,* JT. Vol. IV 7-8 and trial exhibit TT at SR 1639. Ashley called Joey back at 5:43:34 (Id.) and Joey, in a panic, frantically explained that T.R. was not breathing and was non-responsive. JT Vol. I 71, 150. Ashley, who was now scared, told Joey to hang up and call 911. Id. She then drove back to the apartment; a trip that she estimated took five minutes. Id. All told, based upon the phone records produced at trial, Ashley was only gone for fifteen minutes.

After ending his call with Ashley, Joey attempted to call 911 but misdialed. At 5:45:27, Joey was successful and stayed on the phone with the dispatcher for seven minutes 23 seconds. JT Vol. IV 10. This call was recorded and played for the Jury. JT Vol. I 195. On the recording of the 911 call, Joey can be heard telling the dispatcher "I got the fruit out of there [referring to T.R.'s mouth]." Joey can also be heard telling dispatch that T.R. was turning blue. *See* Trial Exhibit 14 and JT Vol. III 71.

When Ashley entered the apartment at 5:49 she saw T.R. on the floor, not breathing or moving. Id. 71. *See* JT Vol. IV 11 (timing of Ashley's return to the apartment). Ashley did not notice any bruises, injuries, or any other type of marks on T.R. JT Vol. I 153. At trial, Ashley testified that she started administering CPR to T.R. and noticed, "there was no air was going in." Id. 72, 151. Ashley assumed that T.R.'s airway was blocked. Id. 152. She then sat T.R. up and he had "just kind of some mucous and phlegm come out of his throat, come out of his mouth." Id. Ashley testified that nothing solid came out of T.R. but that she could tell, "there was oxygen going into his chest." Id.

The first responder to the scene was Sioux Falls Police Officer Cody Schulz. When Officer Schulz arrived at the apartment complex at approximately 5:52, he saw Joey near the entrance of the building waving and screaming. Id. 197. Joey told Officer Schulz that a child was choking, that the mother was doing CPR, and that Officer Schulz "needed to help him." Id. Officer Schulz described Joey as "very upset, agitated, very emotional." Id. 198.

After he entered the apartment, Officer Schulz had Ashley stop doing CPR. Id. 198. He noticed that the apartment was "very clean and orderly." Id. 199. As Officer Schulz examined T.R. he was not able to hear any breathing, only gurgling. Id. 208. The officer did not notice any obstruction to T.R.'s airway; however, he did notice a sweet fruity smell coming from T.R.'s mouth. Id. 198-199. He also noted in his report that T.R. had a sticky substance around his mouth that appeared to possibly be from candy. Id. 209.

Very shortly after Officer Schulz examined T.R., an ambulance crew arrived and took over the scene at 5:53 PM. Id. 199, *See* JT Vol. III 42 (establishing that the paramedics arrived at approximately 5:53 PM). Officer Schulz observed that Joey was still very agitated and pacing back and forth throughout the apartment and screaming for T.R. to wakeup. JT Vol. I 199-200. Ashley was also very emotional "bordering on hysterical." Id. 200. Officer Schulz testified that both Joey and Ashley were acting the way anybody would act when a child is choking in their presence. Id. 210.

As the paramedics were leaving with T.R., Officer Schulz noted that T.R. had no vital signs. In his own "blunt terms", this meant that T.R. would have been "brain dead." Id. 208. Paramedics also noted similar findings. JT Vol. III 39. Paramedics conducted CPR on T.R. all the way to the hospital. At trial it was estimated that T.R. had undergone CPR for as long as 26 minutes. *See* JT Vol. III 47-48 (establishing that the ambulance arrived at the hospital at 6:21 PM and that CPR had been administered for approximately 26 minutes).

After arriving at the emergency room at Sanford Medical Center, T.R. was initially seen by pediatric emergency room physician Dr. Kelly Black. Dr. Black observed that T.R. was in full cardiac arrest, not breathing on his own, and that he was unresponsive. Dr. Black received information that T.R. had choked. This information concerned Dr. Black given that, in her opinion, choking does not commonly cause cardiac arrest. JT Vol. II 37, 39-40. As a result, Dr. Black ordered a CT scan of T.R.'s head. After the CT scan was completed, Dr. Black observed intracranial hemorrhaging, or bleeding, underneath T.R.'s skull and under the dura that surrounds the brain, also known as intracranial bleeding. Id. 42-43, 45. Based upon this information, Dr. Black

believed that T.R. had suffered from "nonaccidental trauma" which again, was in her opinion inconsistent with choking. Id. 44. Dr. Black then noted her opinion in the medical charts so other doctors would be aware of her findings. Id.

T.R. was also seen by additional doctors who came to the conclusion that T.R. had suffered from intracranial bleeding as the result of nonaccidental trauma. *See* generally JT Vol. II. For example, Dr. Janice Dubois, a pediatric radiologist with Sanford, testified that she reviewed T.R.'s CT scan and observed a subdural hematoma and intracranial hemorrhaging most likely caused by some form of trauma. Id. 190, 193, 200. Dr. Nancy Free, a specialist in the field of child abuse pediatrics who is associated with Child's Voice also testified that T.R. suffered from abusive head trauma or nonaccidental head trauma. JT Vol. V 74-75. Additionally, Dr. Greg Osmund, an ophthalmologist with the Sanford School of Medicine, inspected T.R.'s eyes and concluded that T.R. suffered from retinal hemorrhages caused by nonaccidental trauma such as a "shaking type motion." JT Vol. II 174.

The State also called several additional doctors to the stand who testified that T.R.'s injuries were not consistent with choking and that the observed brain bleeds would not normally be caused by undergoing CPR for 26 minutes. For example, *see* testimony of pediatric intensive care physician, Dr. Joseph Segeleon at JT Vol II 210, 212-213, 220. Ultimately, the State called Dr. Donald Habbe, a forensic pathologist, who performed the autopsy of T.R. Although Dr. Habbe found no significant external bruising on T.R., (JT Vol. IV. 142-143, 197)[2] he concluded that T.R. died as a result of four distinct impacts to

[2] Dr. Habbe testified that he observed a red mark on the back of T.R.'s head and an abrasion on the tip of T.R.'s right ear. According to Dr. Habbe, these marks may or may not have been related to T.R.'s death. JT Vol. IV 141-143.

his head. Dr. Habbe opined that these impacts could have been caused by blows from a fist. Id. 149-151. Interestingly, Dr. Habbe's autopsy did not find any contusion or bruising to T.R.'s brain. Id. 159, 197. Additional opinions of the doctors called by the State are presented in the argument section of this brief.

After T.R. was taken away by ambulance, Officer Schulz spoke with Joey. Joey related that after Ashley had left for the gym, T.R. was sitting on the couch watching TV. Joey went to use the restroom to "take a piss" and when he stepped out he noticed T.R. lying slumped over and unresponsive on the couch. JT Vol. I 200. Joey also later explained to the officer that when he was trying to assist T.R., he was able to pull a piece of gummy candy from T.R.'s mouth. Joey also showed a piece of partially dissolved gummy candy to the paramedics. Id. 213. At least to Officer Schultz, Joey appeared to be "pretty straightforward." Id. 212. After speaking with Joey, Officer Schulz spoke with his supervisor, Patrol Sergeant Mclary and other responding officers. The officers concluded, "Everything on scene appeared to be leaning that way that it was a choking." Id. 202.

Sioux Falls Police Department Sergeant Speckmeir also interviewed Joey later that same evening. During this interview Joey explained that he was in the bathroom long enough to check his Facebook account with his cell phone and to play a game on his phone called Home Run. JT. Vol. III 55, 63, 105. A review of Joey's phone was not able to confirm or deny that Joey was playing the game on his phone during the relevant time. JT Vol. III 74, JT Vol. IV 15. During the interview Joey denied ever having hit or shaken T.R. Id. 18. Law enforcement "spoke" with Joey four or five times and law enforcement wrote that Joey was "extremely consistent" during these interviews. Id. 19.

At trial, the prosecution referenced the fact that law enforcement noted that Joey initially explained that he was urinating in the bathroom but on subsequent interviews explained that he was in fact defecating. Id. 21.

Law enforcement secured the apartment the night of October 9, and returned the next day to try and locate the missing fruit snack. JT Vol. III 72-73. A fruit snack wrapper was found near the couch/loveseat where T.R. was sitting watching TV. Id. 76-77. The partially dissolved fruit snack was also found in the carpet near a child's play set near the couch/loveseat. Id. 73, 78-79, 85, 109-110. The location of the fruit snack was consistent with where Joey told law enforcement T.R. had been found non-responsive. Id. 107. The fruit snack was collected and sent to the crime lab at the Sioux Falls Police Department. The partially dissolved fruit snack was then swabbed for DNA that may have been present in any saliva. The swab was then sent to the South Dakota Forensic Laboratory in Pierre where the swab was tested for DNA. DNA was found on the swab and the profile from the fruit snack came back as T.R.'s. Id. 73-74.

On October 11, 2013, T.R.'s treating doctors declared that he was brain dead. JT Vol. II 219. Ashley, along with her family, made the decision to take T.R. off life support and donate his organs. JT Vol. I 74.

At trial, the defense called expert witnesses to establish that T.R. had died as a result of choking. Dr. Khaled Tawansy of Los Angels, CA, an ophthalmologist and founder of Children's Retina Institute, testified that within his practice, he had examined the eyes of over 700 children who had suffered from choking followed by subsequent CPR. JT Vol. VIII 5, 19-20. Based upon Dr. Tawansy's review of T.R.'s medical records, he concluded that T.R.'s retinal hemorrhages were the result of choking. Id. 15-

17, 25. Dr. Tawansy also testified that he would have expected to see more extensive hemorrhages located deeper and underneath the retinas in T.R.'s eyes, had T.R. suffered from a shaking type injury. Id. 23. Dr. Tawansy also concluded that choking "most likely" caused T.R.'s cardiopulmonary arrest and that he would not expect that blunt force trauma would have caused cardiopulmonary arrest in T.R.'s case. Id. 35-36.

Dr. Waney Squire, a pediatric neuropathologist with the National Health Services of England, who has conducted examinations of around 3,000 brains, testified that after reviewing T.R.'s medical records, that if T.R. had suffered from asbuse, she would have expected to see evidence of traumatic blows to the head, such as skull fractures. JT Vol. VI 16, 40-41. She would have also expected to see widespread bleeding throughout the brain itself, as opposed to just within the dura, given that T.R. immediately collapsed. Id. Dr. Squire also testified that she would have expected to see ten times the amount of blood in the base of T.R.'s skull, if T.R. had suffered a massive blow to the head. Id. 57-58. In fact, Dr. Squire found no trauma to T.R.'s brain itself after reviewing the slides of T.R.'s brain that Dr. Habbe collected. Id. 28. Ultimately, Dr. Squire informed the jury that during a choking incident, brain damage can occur within four to five minutes, and that T.R.'s records and death were consistent with choking and the amount of CPR that was administered to T.R. Id. 28-29, 46-48, 60-61.

Dr. Roland Auer of Saskatchewan, Canada, a neuropathologist with the Royal University Hospital and author of numerous articles and coauthor of several books in the field, testified that based upon his review of T.R.'s records, T.R's death was consistent with choking. Id. 117, 123, 128. Dr. Auer found no evidence of the type of trauma that he would have expected to see had T.R. sustained blows to the head that would have

caused his death. Specifically, Dr. Auer would have expected to see skull fractures if T.R. had received fatal blows to the head, and he would have expected to see brain damage in the form of tissue damage within the brain. Id. 106. Dr. Auer was also critical of T.R.'s treating physicians and their diagnosis of abusive head trauma. Dr. Auer testified that T.R.'s treating doctor's erroneously diagnosed him with head trauma based upon the hemorrhage in the CT scan. "[T]hat [diagnosis] was perpetuated through the chart material from one doctor to the next without a critical thinking if that was really true." Id. 96.

Dr. Janice Ophoven, a consulting pediatric forensic pathologist from Roseville, Minnesota, who has performed hundreds of autopsies, mostly on children less than two years of age, also testified that T.R.'s cause of death was choking. Id. 177, 194. Dr. Ophoven testified that if T.R. had suffered from abusive trauma she would have expected to see more blood than was present in T.R.'s case. She also testified that:

> In my experience, training, and my knowledge of the literature, I am not aware of a case where a fatal…rapid-onset cardiac arrest resulted from an impact with no evidence of an impact. I am not aware and have not seen a case where it was deemed to be traumatic death from an impact to the head without evidence of an impact to the head.

Id. 198.

ARGUMENTS

1. Did the trial court permit prejudicial error by allowing the State to present other acts evidence to the jury?

Summary: During the trial, the State was permitted to present evidence that Mr. Patterson had previously slapped, spanked, and bruised two other children. Although the trial court allowed this information for the limited purpose of establishing motive and to establish lack of mistake or accident, in this context, the evidence amounted to mere

propensity evidence. Allowing the jury to hear this other acts evidence only inflamed the jury and was unduly prejudicial. The logical relevance between spanking a child too hard and murder is tenuous at best.

Standard of review: This Court reviews a trial court's decision to admit other acts evidence under the abuse of discretion standard. *State v. Wright*, 1999 SD 50 ¶ 12, 593 N.W.2d 792. "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable.' " *Kaberna v. Brown*, 2015 S.D. 34, ¶ 13, 864 N.W.2d 497, 501 (quoting *Gartner v. Temple*, 2014 S.D. 74, ¶ 7, 855 N.W.2d 846, 850). Yet, "[w]hen a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion." *State v. Packed*, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859 (quoting *State v. Guthrie*, 2001 S.D. 61, ¶ 30, 627 N.W.2d 401, 415).

The other acts evidence presented at trial: During the trial, Jasmin Leach (Ms. Leach), Mr. Patterson's former girlfriend, testified regarding three separate instances of conduct involving Mr. Patterson and her two minor sons, K.K. and M.K. The first incident took place during the summer of 2010 while Mr. Patterson, Ms. Leach, and her two boys were traveling to Rapid City for a softball tournament. JT Vol. III 15. After about 45 minutes in the vehicle, K.K., who was three years old at the time (Id.), began to cry and apparently wanted his mother to sit in the backseat with him. Mr. Patterson instructed K.K. to "shut up and stop crying" and threatened to pull the vehicle over. Id. 16. When K.K. did not settle down, Mr. Patterson pulled the vehicle over at an exit, got out, opened the back door of the vehicle and "ripped" K.K. out of his car seat, and "then took him out and threw him up against the back rear tire." While there, Mr. Patterson

then held K.K. by his shirt and while pointing his finger at K.K., threatened to "call the cops" if K.K. did not stop crying. Id.

The second other acts incident is alleged to have occurred during the summer of 2011. During this time, Mr. Patterson and Ms. Leach were living together in an apartment along with K.K. and M.K. While home one day, Ms. Leach heard M.K., who was three years old at the time, crying from his bedroom. When Ms. Leach went into the bedroom, she saw Mr. Patterson standing by the bunk bed and instructing M.K. how to do sit-ups from the top ledge. Id. 18. When Ms. Leach discovered what was going on she told Mr. Patterson "that was enough" and that that "M.K. didn't want to do that anymore." Mr. Patterson responded by saying that M.K. was being a baby and that he could do the sit-ups. Ms. Leach informed Mr. Patterson that he "didn't need to act like a drill sergeant." Id. 19. As the couple continued to argue, M.K. began to scream louder. Ms. Leach claimed that at some point, Mr. Patterson turned and slapped M.K. across the face. Id.

The third other acts incident occurred on June 10, 2012. That morning, Ms. Leach took her two sons to church and while they were there, M.K. began to "throw a fit" when Ms. Leach did not permit him to choose the Sunday school program that he wanted to attend. Id. 20. M.K. was still three years old at this time. Id. In order to vent her frustrations, Ms. Leach called Mr. Patterson, who was still at home, and informed him that she was going to put M.K. in time-out after church was over. Id. 20-21.

After Ms. Leach and her boys returned home from church and while they were pulling into the garage, Mr. Patterson "came flying out…and flipped open [the] car door and ripped M.K. out of his car seat and took him down the stairs and made him pull his

pants down and [Mr. Patterson] spanked [M.K.] four to five times in a row as hard as he could." Id. 21. Ms. Leach also came down stairs and told Mr. Patterson to "knock it off" and "that was enough." Id. However, Mr. Patterson went into a laundry room, shut the door, and continued to spank M.K. four to five more times. Id. After the spanking, M.K. was left alone, crying in the laundry room to complete a time-out session.

Later that day, Ms. Leach left to go to a grocery store. When she returned home, she found that Mr. Patterson had taken an ice cube from the freezer. When Ms. Leach asked what the ice cube was for, Mr. Patterson "mumbled" that it was for M.K. and walked away. Ms. Leach followed Mr. Patterson into the bedroom and saw M.K. lying on his stomach on the bed with his pants down and Mr. Patterson icing the welts on M.K.'s butt. Id. 22. Ms. Leach described that M.K.'s butt looked "like as if you would take like wet clay and put your hand print into wet clay." Id. When Ms. Leach saw M.K.'s condition, she started "freaking out" and Mr. Patterson responded, "You don't think I feel bad about this? I've been searching online all day about how to get rid of these welts." Id. 22-23. Later, Mr. Patterson applied olive oil to M.K.'s butt in an attempt to reduce the swelling and the bruises. Id. 23. Ms. Leach described the bruises as being very black and blue and very red. Photos of M.K.'s butt were taken two days after the spanking. Over objection, one of the photos was admitted into evidence. Id. 25. Ms. Leach testified that the photo did not capture the visible handprints, welts and bruising. Id. 26.

Ms. Leach was also permitted to testify, over objection from the defense, that Mr. Patterson was "very verbally, emotionally, and physically abusive." Id. 10.

The defense objected to the admission of the other acts evidence before trial and the parties submitted written briefs. SR 148. The defense also objected to the admission of this evidence during trial, both before and after Ms. Leach testified. See JT Vol. III 6, 29.

The trial court overruled these objections and found the other acts evidence admissible under the theory that the evidence could be used for the limited purposes of determining motive and for determining absence of mistake or accident. The trial court provided the jury with a limiting instruction on these two purposes before Ms. Leach testified. Id. 5.

During closing argument, the State utilized the other acts evidence extensively. The trial prosecutor quoted a text message that Mr. Patterson had sent to Ashley, the alleged victim's mother, that read: "Me and my ways of disciplining ain't changing…" The trial prosecutor then argued, "The defendant's motive correlates directly with his philosophy of rearing children, how they should be disciplined. The Defendant believes he needs to physically punish kids to get them to behave. His discipline of physical punishment explains his motive." JT Vol. X 12, 31.

Legal Authority: This Court has addressed the applicable legal standards related to other acts evidence on numerous occasions. "Generally, evidence of crimes or acts other than the ones with which the defendant is charged are inadmissible, unless certain exceptions apply." *State v. Moeller*, 1996 S.D. 60, ¶ 12, 548 N.W.2d 465, 471. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." SDCL 19–19–404(b). However, other acts evidence "may ... be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. The circuit court is required to conduct a two-part balancing test on the record in order to determine if the evidence is admissible. *State v. Scott*, 2013 S.D. 31, ¶ 28, 829 N.W.2d 458, 468; *State v. Andrews*, 2001 S.D. 31, ¶ 9, 623 N.W.2d 78, 81. First, the court must determine whether the other acts evidence is relevant to some material issue in the case other than character, typically referred to as factual relevancy. Second, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, or logical relevancy. *State v. Armstrong*, 2010 S.D. 94, ¶ 12, 793 N.W.2d 6, 11; *State v. Moeller*, 1996 S.D. 60, ¶ 13, 548 N.W.2d at 472; SDCL 19–19–403.

In this case, the trial court permitted the other acts evidence under two separate theories, first, so the jury could determine Mr. Patterson's motive and second, so the jury could weigh the evidence of Mr. Patterson's claim that T.R. had choked to death as opposed to dying as the result of non-accidental blunt force trauma. *See* JT Vol. III 5 for trial court's instruction to the jury.

A. Argument and authority related to the other acts evidence being admissible under a theory of motive. This Court addressed the issue of motive in the context of other acts evidence extensively in *State v. Lassiter*, 2005 SD 8, ¶ 21, 22, 692 N.W.2d 171, 177. In *Lassiter*, this Court found that evidence of a prior bad acts may demonstrate a defendant's motive to commit a crime in one of two ways. First, the prior bad act can supply the motive for the charged act. For example, if someone was attempting to commit a robbery and was shot by police officers and rendered a paraplegic, those facts would become relevant if the would be robber was later accused of murdering the officers

in retaliation for having been shot. *See People v. Daniels*, 52 Cal.3d 815, 277 Cal.Rptr. 122, 802 P.2d 906, 925 (1991).

In the second category, the uncharged act tends to establish the existence of a motive, but the act itself does not supply the motive. This approach is typically followed where the motive is in the nature of hostility, antipathy, hatred, or jealousy. However, this Court warned that "[t]here must be some relationship between all the victims. Otherwise, the evidence would show only the defendant's general violent nature...." *Id.* ¶ 22 *(internal citations omitted). See, e.g., United States v. LeBaron,* 156 F.3d 621, 625–26 (5th Cir.1998) (evidence of prior murders admitted where other victims were former members of the same church); *Kimble v. State,* 659 N.E.2d 182, 184–85 (Ind.Ct.App.1995) (evidence of defendant's membership in racially biased group was relevant to show that defendant was motivated to choose victim based on her race); *Lazcano v. State,* 836 S.W.2d 654, 660 (Tex.Ct.App. 1992). *See also United States v. Bowman,* 720 F.2d 1103, 1105 (9thCir.1983) (prior assault on relative of wife—sufficient factual relationship or nexus between two victims to render the prior conviction relevant to the issue of defendants motive for assault on wife).

Turning to the first category recognized by *Lassiter*, in this case, the State never argued that Mr. Patterson hit T.R. in order to seek revenge or to retaliate against the children who where the alleged victims in the other acts incidents. For example, nobody is arguing that Mr. Patterson hit two-year old T.R. to get revenge against M.K for something that happened years earlier. Clearly the first category of permissible use does not apply here.

The second category is equally inapplicable to Mr. Patterson's case given that no relationship exists between all of the alleged victims. For example, the State did not argue below that Mr. Patterson simply hates all children in the same way a racist hates all people of a certain ethnicity. *Compare Kimble v. State*, 659 N.E.2d 182, 184–85 (Ind.Ct.App.1995) (where evidence of defendant's membership in racially biased group was relevant to show that defendant was motivated to choose victim based on her race).

The holding of *Lassiter* confirms that the second category is inapplicable to Mr. Patterson's case. In *Lassiter*, this Court reversed a defendant's convictions for aggravated assault and burglary after finding that the trial court impermissibly admitted the defendant's previous aggravated assault conviction as other acts evidence for the purpose of establishing motive. The evidence produced at trial was that a man entered the home of the alleged victim, Davis, and assaulted him. During the time of the assault, Davis was in a relationship with a woman named Tobin, who as it turns out, was also the defendant's former girlfriend. At trial the State was permitted to present evidence that the defendant had previously assaulted another girlfriend, unrelated to the assault on Davis. The jury convicted.

On appeal, the State contended that evidence of the prior assault was admissible, given that both assaults had the same motive, specifically, that the defendant would become angry and violently retaliate when he felt "jilted" by a girlfriend. This Court rejected the State's argument and wrote:

> …the prior assault on defendant's former girlfriend was inadmissible because any connection between the two assaults was simply too remote. Allowing evidence about the prior assault… only tended to prove that because defendant had done it before, he must have done it again.

> This is the kind of propensity evidence SDCL 19–12–5 (Rule 404(b)) was designed to preclude: evidence of other crimes cannot be used to prove conduct through an inference about the defendant's character, i.e., a general propensity to commit assaults when rejected by girlfriends. Indeed, this is what legal commentators warn against: "But where the *motive* evidence is offered to prove that the act was committed or that the defendant was the perpetrator, the only justification for admitting the evidence under Rule 404(b) is that it is not evidence of character; in this situation courts must be on guard to prevent the motive label from being used to smuggle forbidden evidence of propensity to the jury." 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5240, at 480 (1978) (emphasis added). *See also State v. Saltarelli*, 98 Wash.2d 358, 655 P.2d 697, 699–700 (1982) (rape of another woman five years earlier had no logical tendency to provide a motive for the charged rape except upon the forbidden inference of a propensity to commit rape).

Id. ¶ 23-24, 178-9.

In this case, the State argued in its closing that Mr. Patterson's having slapped and spanked other children was his motive for having hit T.R. four times in the head. The State specifically argued: "The defendant's motive correlates directly with his philosophy of rearing children, how they should be disciplined. The Defendant believes he needs to physically punish kids to get them to behave. His discipline of physical punishment explains his motive." JT Vol. X 12, 31. In other words, the State's argument is that Mr. Patterson had the same motive during the times he previously spanked M.K. and when he allegedly hit T.R.; i.e., he generally "snaps" and harshly disciplines children when they whine. In other words, just as in *Lassiter*, here the State is arguing that the motive is the same in both crimes.

However, this is precisely the argument this Court rejected in *Lassiter*. Just as there was no connection between the defendant's girlfriends in *Lassiter*, here there is no connection between M.K., K.K. and T.R. Rather than supply motive, as that term is defined by *Lassiter*, the State's argument amounts to a call to the jury to convict Mr.

Patterson simply because he has a history of hitting children. Stated more plainly, the State's argument is that because Mr. Patterson has a history of hitting children who act up, Mr. Patterson must have also hit T.R. (although no evidence was presented that T.R. was acting up at the relevant time). In this case, the other acts evidence only "smuggled in" forbidden propensity evidence. In rejecting the State's argument in *Lassiter*, the Court wrote, "Allowing evidence about the prior assault… only tended to prove that because defendant had done it before, he must have done it again." The Court should reach the same conclusion here and find error.

B. Argument and authority related to the other acts evidence to prove absence of accident or mistake.

The trial court also permitted the other acts evidence to be admitted under the theory that it might tend to establish the absence of accident or mistake. However, the other acts evidence of slapping and spanking do not closely resemble the charged act of hitting a child four times in the head hard enough to cause death. As a result, the evidence that Mr. Patterson spanked and slapped other children is not relevant for purposes of refuting a theory of accidental injury. More importantly, the other acts are not relevant given that the defense is that T.R. choked, not that Joey accidently hit T.R. too hard while disciplining him. *See State v. Steichen*, 1998 SD 126, ¶ 26, 588 N.W.2d 870, 876 (finding error to allow admission of other acts evidence related to sexual assault under lack of mistake or accident exception where defense was that charged act did not occur as opposed to arguing accident or mistake).

In *People v. Casias*, 312 P.3d 208, 2012 COA 117, the Colorado Court of Appeals, Div. I, found error when the prosecution was permitted to admit other acts evidence, similar to other acts presented here. Casias, the defendant, was convicted by a

jury of the crimes of first degree murder (causing the death of a child under the age of twelve by one in a position of trust) and knowing or reckless child abuse resulting in death. At trial the prosecution established that Casias' girlfriend left him at home with their seven-week-old baby, J.C. When she left, J.C. was awake, responsive, and content. Shortly afterwards, however, Casias telephoned his girlfriend and told her that J.C. had choked and stopped breathing. Casias hung up but called back moments later to tell her that he was taking J.C. to the hospital. Upon arrival at the hospital, J.C. was unresponsive and limp and did not open her eyes or move any of her extremities. Casias told the emergency room physician that he had been feeding her when she began choking and that, in an effort to help her, he put cold water on her and shook her "a little bit but not excessively." J.C. died the next morning.

At trial, the prosecution presented expert witnesses who opined that J.C. died as the result of non-accidental traumatic brain injury caused by being violently shaken or "slamm[ed]" against a hard surface. The experts based their opinions on fractures to J.C.'s skull and rib, hemorrhages in both her retinas, severe swelling of her brain, and bruising on her forehead. According to at least some of the prosecution's experts, J.C.'s injuries had been recently inflicted, perhaps within a day or two of her death. Additionally, several of the prosecution's expert witnesses stated that J.C.'s injuries would have immediately affected her heart rate and breathing, making her lethargic and unable to focus.

For his defense, Casias asserted that J.C.'s injuries were the result of a fall off the bed onto a hardwood floor approximately a week before she died. Consistent with this theory, Casias' girlfriend testified that seven to ten days before she died, J.C. had rolled

off the bed, struck her head on the wooden floor, and thereafter was more lethargic, had trouble eating, was congested, and "cried a lot." Also consistent with this theory, Casias' expert witness testified that (1) skull fractures in children J.C.'s age could result from short falls onto a hard surface; (2) she did not see injuries to the upper neck, spinal cord, and brain stem that she would expect if J.C. had been injured as a result of being shaken; and (3) choking is reported in many cases where a child has the type of brain damage J.C. suffered. Defendant's expert also opined, contrary to the prosecution's evidence, that J.C.'s rib injuries could have resulted from either a deformity or CPR performed on her, and that retinal hemorrhages are found in accidental deaths and are not characteristic of significant force to the head.

For the purpose of showing defendant's knowledge or absence of mistake, the prosecution was permitted to introduce evidence of two instances in which defendant allegedly abused his three-year-old daughter, A.C. Approximately four to five months before J.C.'s death, Casias had slapped A.C. hard enough to leave a handprint (and later a bruise) on her face, and, on another occasion, he had taken her by the arm, shaken her "a little bit," thrown her into a car, and "smacked" her on the arm. On both occasions, the acts against A.C. occurred shortly after an argument between Casias and another adult (in the first instance, with his girlfriend's sister, and in the second instance, with the girlfriend).

On appeal the appellate court found error and wrote:

> In our view, evidence that, on other occasions, defendant, in anger, slapped, shook, and roughly handled a three-year-old, with no resulting serious bodily injury, has no tendency to make more or less probable the allegation that, in connection with the first-degree murder charge, he knowingly caused J.C.'s death. This follows for the simple reason that defendant's past acts did not result in serious injury or death to A.C., and,

> thus, did not tend to demonstrate that he was aware his conduct was practically certain to cause A.C.'s (much less, J.C.'s) death.
>
> Similarly, the evidence of defendant's other bad acts with respect to A.C. was not relevant to prove the culpable mental state of child abuse resulting in death.
>
> In one sense, evidence of *any* past "knowing" or "reckless" abuse of a child could be said to tend to prove any "knowing" or "reckless" abuse of a child—even a different child—on a subsequent occasion. But this type of proof differs little, if at all, from impermissible proof of bad character or propensity—that because the person acted abusively in the past with some child, he is likely to have acted abusively on a subsequent occasion with any child. *See Harvey v. State*, 604 P.2d 586, 590 (Alaska 1979) ("Evidence of past abusive conduct is often available in child abuse cases and strictly speaking is never totally irrelevant. However, its relevance often exists only because it reflects on the propensity of a past offender to continue a pattern of child abuse. This is precisely the type of inference Rule 404(b) is intended to prevent."); *see also* 1 Imwinkelried, *Uncharged Misconduct* § 2:19, at 113 ("the prosecutor may not prove that the defendant is either generally a criminal or more particularly a rapist or burglar" to show that, on a particular occasion, the defendant acted in conformity therewith).

People v. Casias, 2012 COA 117.

Similarly to *Casias*, the evidence that the State submitted here related to K.K. and M.K. only established that Mr. Patterson had previously hit children. This evidence did not provide the jury with a reason to believe that Mr. Patterson was aware or on notice that based upon his past conduct with children, that if he hit T.R. his actions could result in death. At best, the other acts evidence only showed that Mr. Patterson had a propensity to "physical[y] punish kids to get them to behave." See JT Vol. X 31 (State's closing). However, this is precisely the forbidden character inference prohibited by Rule 404(b).

By way of contrasting example, this Court affirmed the admission of other acts evidence in *State v. Wright*, 1999 SD 50 ¶ 23, 593 N.W.2d 792, 802. In *Wright*, the

defendant was accused of child abuse after he punched a child in the stomach, whipped the child's back with a cord, and kicked him in the eye. At trial, the defendant claimed that his acts constituted reasonable discipline. This Court found the defendant's previous acts against other children was relevant and admissible. The Court wrote:

> The two prior acts were also admissible to show absence of mistake or accident. As Wright did not testify, the jury could only draw from the circumstances themselves a sense of his state of mind when he "disciplined" his son. Whether E.W.'s injuries were unintended or inflicted cruelly and abusively remained open to inference.

The difference is that in this case, Mr. Patterson is not claiming that he accidently or mistakenly hit T.R. too hard while disciplining him. While the other acts evidence was clearly relevant in *Wright* to answer the question whether the injuries were unintentionally or cruelly inflicted, the other acts evidence in this case could only be used to answer the question whether or not T.R. was in fact struck. However, the only way the other acts evidence can be used to answer this question is by utilizing it as character evidence, which is forbidden.

Prejudice: In a child abuse case like this, where emotions are especially heightened, the reasonable probability that the other acts evidence would sway a jury is unmistakable. *See Montgomery v. State*, 810 S.W.2d 372, 397 (Tex.Crim.App.1990) (recognizing the inherently inflammatory nature of evidence of misconduct involving children). *See also State v. Wright*, 1999 SD 50, ¶ 15, 592 N.W.2d 792, 799 ("Child injury cases are often emotion-charged"). Additionally, "In this country it is a settled and fundamental principle that persons charged with crimes must be tried for what they allegedly did, not for who they are." *State v. Moeller*, 1996 SD 60, ¶ 6, 548 N.W.2d 465, 468 quoting *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir.1985). 'Prejudice

does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.'" *State v. Iron Shell*, 336 N.W.2d 372, 375 (S.D.1983) (quoting 22 C. Wright & K. Graham, Federal Practice and Procedure § 5215 at 274–75 (1978)), *conviction rev'd on other grounds in habeas corpus proceeding*, *Iron Shell v. Leapley*, 503 N.W.2d 868 (S.D.1993).

In this case, the likelihood that the other acts evidence would persuade the jury by illegitimate means was particularly high. The State's case against Mr. Patterson was based upon medical evidence that was vigorously contested by the team of doctors that the defense called. When Ashley left the apartment T.R. was fine, watching TV, and eating fruit snacks. Importantly, T.R. was not whiney when Ashley left. Via text message, the couple flirted and discussed having sex later that day. It was only a few minutes after Ashley left that Mr. Patterson made his frantic phone call seeking help. The first responding officer noted that the apartment was clean and orderly. No apparent reason was discovered for Mr. Patterson to have motive to strike T.R. such as T.R. making a mess in the apartment or breaking something belonging to Mr. Patterson. No eyewitnesses observed the event that caused T.R. to die, (whether choking or being struck). No external injuries were found on T.R. consistent with a blow to the head.

In this context, the jury was called upon to decide if the State had proven beyond a reasonable doubt that Mr. Patterson had struck T.R. four times in the head and thereby recklessly caused his death, or whether a real possibility existed that T.R. had choked to death on a gummy fruit snack. In light of this question, the prejudice of the other acts evidence was particularly high given the nature of how the State argued the other acts

evidence in closing: "Me and my ways of disciplining ain't changing." And later arguing, "The Defendant believes he needs to physically punish kids to get them to behave. His discipline of physical punishment explains his motive." JT Vol. X 31. The State's argument amounts to a call for the jury to believe the State's theory based upon Mr. Patterson's past conduct with children. The State was asking the jury to believe that Mr. Patterson had a temper and had previously spanked a child too hard in the past, so therefore he must have also lost his temper with T.R. and then hit T.R. too hard as well.

Ultimately, the other acts evidence was prejudicial because the State used it as its theme throughout the trial.

This Court reached a similar conclusion in *State v. Moeller* where this Court wrote:

> The other acts testimony was a shocking and emotionally gripping contrast to State's sterile circumstantial case. Because there were no living witnesses to the rape and murder of [the victim], the testimony of [the other acts witnesses] provided the only depiction of Moeller as a man engaged in sexual and physical aggression. Through their testimony, State transformed Moeller from a man who *could* have committed the crime, based on circumstantial evidence, to a man who *would* have committed the crime, based on a propensity for sexual predation and physical violence. Because Moeller had sexually assaulted others, the jury could readily infer that Moeller was the type of man who would rape and murder a child. This is precisely the type of propensity conclusion that is prohibited under SDCL 19–12–5.

State v. Moeller,1996 SD 60, ¶ 39, 548 N.W.2d 465, 478.

The Court should reach the same result here. The State should not have been able to argue that Mr. Patterson's ways of disciplining "ain't changing" thereby transforming Mr. Patterson into a man who could have committed the crime into the type of man who would have committed the crime based upon a propensity to hit children. This is especially true in light of the circumstantial nature of the evidence against Mr. Patterson.

2. Did the trial court err when it permitted the State to argue a factual theory of guilt and motive not supported in the record by any evidence?

Summary: Throughout the trial, the State's theory of the case was that Mr. Patterson would become angry and hit children when they would whine in his presence. However, the State was never able to establish what specifically happened to cause Mr. Patterson to "snap" in the few minutes he was alone with T.R. During the State's closing, the trial prosecutors argued that Mr. Patterson must have "snapped" when T.R. was whining about what was on TV. However, this argument is not supported by any evidence. When the trial court overruled the defense objection to this argument, it permitted the State to fashion a factual theory that was in no way supported by the evidence. Additionally, the State was permitted to argue a factual theory of the case that was not litigated and therefore did not allow the defense to respond. This error amounts to prejudicial prosecutorial misconduct.

Standard or review: The trial court has broad discretion in controlling the scope of closing arguments. *United States v. Bell*, 651 F.2d 1255, 1260 (8th Cir.1981). An appellate court reviews the trial court's decisions regarding the propriety of a prosecutor's remarks under an abuse of discretion standard. *Id.* The question on appeal to consider is whether the argument was " 'so offensive as to deprive the defendant of a fair trial.' " *United States v. Segal*, 649 F.2d 599, 604 (8th Cir.1981) (quoting *U.S. v. Bohr*, 581 F.2d 1294, 1301 (8th Cir.1978)).

Factual background: The State's theory of the case was that Mr. Patterson "snapped" and hit T.R., thereby causing his death. The State submitted other acts evidence to the jury to demonstrate that Mr. Patterson had a temper and history of hitting children when they whined. However, when Ashley left T.R. with Mr. Patterson the day

T.R. died, everything was fine. T.R. was sitting on the couch watching TV and eating fruit snacks. Ashley and Mr. Patterson communicated by text message and discussed having sex later that day. Only a few moments later, Mr. Patterson called Ashley in a panic. When the first responders arrived they noticed that the home was clean and orderly. Nothing was out of the ordinary to indicate that T.R. had broken anything or made a mess to cause Mr. Patterson to have "snapped."

In order to support its theory during closing argument, the trial prosecutor invented a theory extrapolated from the other acts evidence. The State began its closing argument by quoting a text message that Mr. Patterson had sent to Ashley:

MS. SHATTUCK: 'Me and my ways of disciplining ain't changing' Those are the very words the defendant sent to Ashley Doohen, the mother of T.R., on September 9, 2013, one month before T.R. was fatally injured and died. The defendant wasn't willing to change his ways of discipline… when T.R. came to his house…the defendant got fed up with him. When T.R. pointed at the TV and wanted to change the channel, the defendant snapped.

MR. RENSCH: Objection, Your Honor, that assumes facts not in evidence.

THE COURT: Overruled.

MS. SHATTUCK: …when T.R. pointed at the TV and wanted to… change the channel, the defendant snapped and, he administered one, two three, four blows to little T.R.'s head.

JT Vol. X 12.

Later in her closing, the trial prosecutor expanded the argument further:

MS. SHATTUCK: After the defendant saw Mom drive by, he walked back into the apartment and he said T.R. was watching TV. Well at that point … T.R. started whining. He wanted to watch something other than the sports that were on TV.

MR. RENSCH: Objection, Your Honor. There is no evidence of that at all.

THE COURT: Overruled.

MS. SHATTUCK: He wanted to watch something other than the sports on TV. The defendant snapped when T.R. started whining. He was going to teach him a lesson. He was going to discipline T.R., and he was going to discipline T.R. his way because his ways weren't changing.

And so the defendant did so by delivering one, two, three, four blows to little T.R.'s head. And those were hard blows. They were blows that ended – that made T.R. go unconscious shortly afterwards.

Id. 15.

The trial prosecutor continued this theme in her closing and later argued:

MS. SHATTUCK: Why would anyone hit a child? Well, the defendant's motive correlates directly with this philosophy of rearing children, how they should be disciplined. The defendant believes he needs to physically punish kids to get them to behave. His discipline of physical punishment explains his motive.

Id. 31.

Argument and authority: This Court reviews prosecutorial misconduct using a two-prong analysis. *State v. Smith*, 1999 SD 83, ¶ 44, 599 N.W.2d 344, 354. "First, we must determine that the misconduct occurred." *Id.* (citations omitted). "If misconduct did occur, we will reverse the conviction only if the misconduct has prejudiced the party as to deny him or her a fair trial." *Id.* (citation omitted). During closing argument, an attorney's role is to assist the jury in analyzing, evaluating, and applying the evidence. *Id.* Arguments that transcend such boundaries are improper. *See United States v. Risnes*, 912 F.2d 957, 960 (8th Cir.1990).

In *United States v. Beckman*, the Eighth Circuit reversed a conviction for conspiracy to distribute methamphetamine, based in part on prosecutorial misconduct that occurred during closing arguments where the prosecutor argued facts not in evidence. *United States v. Beckman* 222 F.3d 512 (8th Cir.2000).

During the trial, one of the defendants, Kelly, took the stand in his own defense. During cross-examination, the prosecutor asked Mr. Kelly if he lost his job due to failing a drug test. Mr. Kelly empathically denied this. During closing, the prosecution argued that the defendant had lost his job as a truck driver due to failing a drug test. The defense objected, but the trial court simply instructed the jury "Ladies and gentlemen, you are entitled to resolve the facts based upon not only direct evidence, but any logical inference flowing from that evidence."

On review the Eighth Circuit found this error to be prejudicial and wrote:

> There is no evidence in the record that Kelly lost his job due to a failed drug test. In fact, the only evidence regarding a drug test in relation to Kelly's employment is Kelly's denial that he lost his job due to such test… During closing argument, an attorney's role is to assist the jury in analyzing, evaluating, and applying the evidence. Arguments that transcend such boundaries are improper.
>
> The government's closing argument in this case did more than argue permissible inferences from the evidence, it asserted facts not in evidence and attempted to argue and imply inferences therefrom. This was clearly improper.

Beckman at 527.

In this case, the State invented and argued facts that were not in evidence in order to provide some form of factual scenario where it would have been plausible for Mr. Patterson to have struck or hit T.R. consistent with the State's theory that Mr. Patterson "snapped" due to T.R's whining. This was a new factual theory of the case that was not litigated and left the defense unable to respond with evidence. While trial counsel has "considerable latitude in closing arguments," a prosecutor also shares in the court's obligation to ensure that the defendant receives a fair trial. *State v. Smith*, 1999 S.D. 83, ¶ 42, 599 N.W.2d 344, 353. It is not the prosecutor's duty to "seek a conviction at any price." *Id.* Here, the trial prosecutor went even further than the prosecutor in *Beckman*

supra. In this case the trial prosecutor not only argued facts not in evidence, she also made-up facts to fit with the central theme of the State's theory of the case: Mr. Patterson "snaps" and hits children when they whine. The State's arguing facts not in evidence to provide Mr. Patterson with motive and reason to hit T.R. is clearly prejudicial under the standards set forth by the Court.

Additionally, in the context of multiple errors, this Court has found it appropriate to consider the errors together when determining if prejudice occurred. *See Dillon v. Weber*, 2007 SD 81, 737 N.W.2d 420 (finding a combination of errors established prejudice), *see also United States v. Beckmen*, 222 F.3d 512 (8th Cir.2000) (finding prejudice and granting a new trial based upon a combination of several errors). The combined errors in this case clearly establish prejudice, especially when viewed together. The trial prosecutor used a propensity argument based upon Mr. Patterson's past conduct with children in order to buttress the imagined scenario of T.R. pointing at the TV and whining. In short, the State was able to unfairly utilize the other acts evidence to form the factual basis for the improper propensity argument.

Given that no external bruising or marks were found on T.R., and given that the State's abusive head trauma theory was vigorously contested by the defense experts, the State's case clearly rested heavily upon its theory that Mr. Patterson hit T.R. based upon his history with other children. Given the emotional nature of the charges[3] and the other acts evidence, when viewing the trial and the evidence as a whole, the combined errors present in this case prejudiced Mr. Patterson's right to have a fair trial.

[3] *See Montgomery v. State*, 810 S.W.2d 372, 397 (Tex.Crim.App.1990) (recognizing the inherently inflammatory nature of evidence of misconduct involving children).

3. Did the trial court err by permitting the State to elicit expert opinions that were impermissibly intrusive?

Summary: During the trial, the State called a number of medical expert witnesses to the stand. The State elicited a number of expert opinions on the cause of T.R.'s death including abusive head trauma and non-accidental trauma. These opinions contradicted the defense theory that T.R. choked and passed on the credibility of the theory of the defense. Additionally, these opinions improperly invaded the province of the jury, were conclusory in nature and essentially just told the jury what conclusion to reach.

Standard of review: Trial courts retain broad discretion in ruling on the admissibility of expert opinions. *State v. Edelman*, 1999 SD 52, ¶ 4, 593 N.W.2d 419, 421. A trial court's decision to admit or deny opinion evidence will not be reversed absent a clear showing of abuse of discretion. *State v. Logue*, 372 N.W.2d 151, 156 (S.D.1985) (citations omitted). A trial court's ruling on reliability receives the same deference as its decision on ultimate admissibility. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176, 143 L.Ed.2d 238, 252–53 (1999). However, when a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion. *See Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392, 414 (1996).

Factual background: During the trial the State called a number of expert witnesses to provide opinions regarding the cause of T.R.'s death. Specifically, the State called the following witnesses and elicited the following opinions: Dr. Kelly Black, an emergency room physician, who treated T.R. after he was brought into the emergency room testified that based upon her findings T.R. suffered from "non-accidental trauma." JT Vol. II 44. Dr. Hsu, a pediatric critical care doctor with the intensive care (ICU) unit

at Sanford's Children's hospital also treated T.R. after T.R. was brought to the emergency room. Dr. Hsu also testified that T.R. suffered from "non-accidental trauma." Id. 99. Dr. Casas-Melley, a pediatric surgeon with Sanford's Children's Hospital also treated T.R. Although she found no external physical findings of injury on T.R. at the ICU (Id. 133) she testified that her ultimate diagnosis was "abusive head trauma" and that T.R. was struck or shaken. Id. 140. Dr. Greg Osmund, an ophthalmologist who was with the Sanford School of medicine, examined T.R.'s eyes and observed "wide-spread, diffuse hemorrhaging of both the preretinal area and the retinal area" of T.R.'s eyes. Id. 165. He ultimately concluded that T.R.'s injuries were most consistent with "non-accidental trauma." Id. 174. Dr. Joseph Segelean, a pediatric intensive care physician, testified that after observing T.R. that he had a concern for "non-accidental trauma or abusive head trauma." Id. 220. Dr. Charles Miller, a neurosurgeon who practiced at Sanford Medical Center in Sioux Falls, was asked by Dr. Hsu to consult on T.R.'s case. After reviewing T.R.'s medical records Dr. Miller testified that he had "never consulted for a patient who has had a choking incident which has resulted in…a subdural hematoma." Dr. Miller concluded that T.R. died as a result of non-accidental trauma. Telephonic Deposition of Doctor Charles J. Miller 13-14, 28-29. Dr. Nancy Free, a pediatrician, testified that T.R. suffered from blunt force trauma to the head caused by shaking or a striking object. JT Vol. II. 73-74. Her ultimate conclusion and diagnosis was "non-accidental trauma" and/or "abusive head trauma." JT Vol. V 74-75. Similarly, Dr. Geoffrey Tuffy, a pediatric ophthalmologist with Sanford, who was brought on by the State as a consulting expert, testified that T.R. suffered from "abusive head trauma." JT

Vol. IV 105. Finally, Dr. Habbe, the forensic pathologist, testified that T.R.'s cause of death was four distinct and separate impacts to the head. JT Vol. IV 149-50.

Legal analysis: This Court has frequently addressed the legal standards applicable to the admissibility of expert opinions. In 1993, this Court adopted SDCL 19–15–4 (Rule 704), abrogating the old rule that an expert's opinion was inadmissible merely "because it embraces an ultimate issue to be decided by the trier of fact." SDCL 19–15–4.

However, not "all expert opinion on the ultimate issue is admissible." *State v. Raymond*, 540 N.W.2d 407, 410 (S.D.1995) (citation omitted). "It is the function of the jury to resolve evidentiary conflicts, determine the credibility of witnesses, and weigh the evidence." *State v. Packed*, 2007 S.D. 75, ¶ 34, 736 N.W.2d 851, 862 (quoting *State v. Svihl*, 490 N.W.2d 269, 274 (S.D.1992)). As the Federal Advisory Committee Notes declare, "The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions." Fed.R.Evid. 704 advisory committee's note. This Court has found that, "[o]pinions merely telling a jury what result to reach are impermissible as intrusive, notwithstanding the repeal of the ultimate issue rule." *State v. Guthrie*, 2001 S.D. 61, ¶ 33, 627 N.W.2d 401, 415 (citation omitted). An expert's role is to "assist the trier of fact to understand the evidence or to determine a fact in issue [.]" SDCL 19–15–2 (Rule 702). That role is not to tell the trier of fact what to decide, shifting responsibility from the decision maker to the expert. *State v. Guthrie*, 2001 S.D. 61, ¶ 33, 627 N.W.2d at 415.

In *State v. Guthrie*, *supra*, the defendant was convicted at trial of the first-degree murder of his wife. The defendant's position at trial was that his wife had committed suicide. The State called Dr. Berman who provided an account of the common factors for persons at risk for suicide, a comparison of those factors to the decedent's case, and

finally Dr. Berman gave the opinion that the decedent did not commit suicide. On review this Court carefully considered Dr. Berman's ultimate conclusion and wrote:

> Opinions merely telling a jury what result to reach are impermissible as intrusive, notwithstanding the repeal of the ultimate issue rule. Although Berman was not asked to address Guthrie's guilt or innocence, his opinion approached the impermissible when he told the jury that "Sharon Guthrie did not die by suicide." It left the inference that she was murdered, or perhaps died accidentally, a far less likely deduction in view of the pathologist's conclusions. It is one thing to state that few of the factors typically found in suicide can be seen in this case. It is another thing to declare as scientific fact that based on a psychological profile the death was not suicide. One assists the jury, but allows it to draw its own inferences from the psychological knowledge imparted. The other simply tells the jury what inference to draw.

Guthrie at ¶ 33 (internal citations omitted).

This Court did not ultimately go on to reach the conclusion as to whether or not Dr. Berman's opinion was impermissibly intrusive, given that it found that the opinion was improper under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). However, this Court had serious issue with Dr. Berman's opinion addressing the ultimate question of that case.

The similarities between Mr. Patterson's case and *Guthrie* are clear. Just as in *Guthrie*, the experts in this case went beyond simply telling the jury the characteristics, mechanics or factors of a scientific theory. Rather, the experts told the jury as a matter of scientific fact how T.R. died. By using terms such as "abusive" and "non-accidental" the State's experts were telling the jury as a matter of scientific fact that T.R. was murdered, or at least his death was not accidental. Therefore, the experts were ultimately telling the jury what decision to reach.

The very terms "abusive" and "non-accidental" are themselves conclusory and do not assist the trier of fact in any meaningful way. On the contrary, those terms describe a

perpetrator's mental state, which cannot be know by the injures alone. By way of contrasting example, the State called Dr. Janice Dubois, a pediatric radiologist with Sanford Hospital, who testified that after reviewing T.R.'s CT scans, she was concerned about "some form of trauma" based upon what appeared to be an intracranial hemorrhage. JT Vol. II 199-200. Dr. Dubois was able to provide the jury with information and background facts without inserting conclusory language into her opinions such as "non-accidental" and "abusive." Had the State's experts been prevented from opining about "non-accidental" and "abusive" the State would still have had all of the information and facts it needed to make its arguments to the jury.

Prejudice: Without the State's experts rendering intrusive opinions, the outcome of the trial may well have been different. Error is harmless when "the jury verdict would not have been different if the [challenged testimony] were excluded[.]" *State v. Hart*, 1996 SD 17, ¶ 17, 544 N.W.2d 206, 210. The State bears the burden of proving the error was not prejudicial. *State v. Nelson*, 1998 SD 124, ¶ 7, 587 N.W.2d 439, 443 (citations omitted). In *Guthrie, supra*, this Court found the admission of Dr. Berman's harmless error, in part due to the jury having had the benefit of substantial and independent circumstantial evidence from which to conclude that the victim's death was a homicide. *Guthrie* at ¶ 43, 420. In Mr. Patterson's case, the State's expert opinions not only went to the heart of the issue, they were also numerous. The sheer volume of the expert opinions alone makes prejudice readily apparent.

Additionally, as this Court has recognized, expert testimony holds an "aura of reliability and trustworthiness [that] surround[s] scientific evidence." *State v. Buchholtz*, 2013 SD 96, 841 N.W.2d 449 (finding expert diagnosis of child sexual abuse prejudicial

as an improper assessment of ultimate credibility). Even in the absence of any eyewitnesses or physical evidence of abuse, the expert opinions in this case put to rest, with an air of medical certainty, any question about whether T.R. had choked or had been hit by Mr. Patterson. Clearly, the expert opinions here were just as prejudicial as the opinion in *Buchholtz*.

4. Did the trial court err by refusing to allow Mr. Patterson to present additional instances of alleged child abuse committed by a potential third party perpetrator?

Summary: The trial court prevented Mr. Patterson from fully developing the defense that T.R. may have been injured while he was under the supervision of a daycare provider. During preparation for the trial, the defense uncovered a number of instances where children were injured at the daycare where T.R. was watched. Although the trial court permitted several of these other instances of injury to be submitted to the jury, the trial court ultimately excluded a number of relevant instances. The exclusion of these additional instances of injuries to other children prevented Mr. Patterson from presenting a complete defense.

Standard of review: A trial court's decision to admit or deny evidence is reviewed under the abuse of discretion standard. *Steffen v. Schwan's Sales Enterprises, Inc.*, 2006 SD 41, ¶ 19, 713 N.W.2d 614, 621. *See also, State v. Packed*, 2007 SD 75, ¶ 17, 736 N.W.2d 851. This Court affords broad discretion to a trial court in deciding whether to admit or exclude evidence. *Steffen v. Schwan's Sale Enterprises Inc.*, 2006 SD 41, ¶ 19, 713 N.W.2d 614, 621 (citations omitted). However, "[w]hen a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable

evidence, it abuses its discretion." *State v. Guthrie*, 2001 SD 61, ¶ 30, 627 N.W.2d 401, 415.

Factual and procedural background: In May of 2015, evidence was disclosed that a number of children under the care of T.R.'s daycare provider, Marilyn Knurck (Knurck), were injured while at her daycare. *See* Motions Hearing transcript of September 14, 2015 at 7. More specifically, in March of 2015, Knurck was charged by indictment with one count of felony child abuse and five counts of misdemeanor child abuse. Id. These injuries to the other children were alleged to have occurred in the same daycare where T.R. was staying shortly before he became nonresponsive on October 9, 2013. Id. 8. The defense provided a proffer that Knurck was overwhelmed at the relevant time, and going through a divorce as well as dealing with financial difficulty. Id. 8-9. The defense provided a list of incidents starting in 2012 that included slapping, yelling at children, and swinging them by their arms. *See* Appendix A of Notice of Third-Party Perpetrator Evidence at SR 833 (this document contains the names of children and was therefore sealed by the trial court). Additionally, Knurck lied about having dropped a child on his head and the child suffered a brain bleed and a fracture to the skull. When Knurck was confronted about the child's injury, Knurck denied having any knowledge about the child being dropped. Id. 8-11. Ultimately, the defense proffered numerous separate instances of conduct it wished to utilize to establish Knurck as a potential third party who may have injured T.R. Id. 33.

In reviewing the proffered incidents, the trial court found that most of the incidents were not relevant and ordered their exclusion. The excluded incidents are contained at Appendix A of Notice of Third-Party Notice at SR 833. The excluded

instances include allegations that W.C.W.'s mom informed law enforcement that W.C.W., while being interviewed at Child's Voice, claimed that Knurck hit him on the back and stomach, W.C.W. also claimed that Knurck grabbed him by the arm and swung him around; A.D.P., age four, who received a large unexplained scratch that left a thick scar on her ankle; A.D.P. also told Child's Voice that Knurck was "naughty to me."; L.C., age seven, claimed that Knurck would throw him down and pin him with her arms or foot. Knurck later admitted while undergoing a police polygraph this type of incident occurred twice. L.C. futher claimed that Knurch threw him down and stomped on his "tummy and hand" with her foot and that it hurt and the he couldn't get up and that he cried. Another child, N.W., age five, substantiated this allegation during an interview with Child's Voice. J.T., age nine, while at Child's Voice, explained that Knurck, would grab him and his brothers by their shirts and would swing them into a chair and grab their arms and scream in their faces. J.T.'s, seven-year-old brother substantiated this allegation during an interview at Child's Voice. Id.

At trial, Knurck testified regarding the incident where C.L. was dropped and suffered a brain bleed. She also testified about H.S. being bruised while at her daycare but that she was unsure what caused the injury. JT Vol. IV 35-37. Knurck ultimately entered a guilty plea to a misdemeanor charge related to child abuse. Id. 37. Pursuant to the trial court's ruling, Ms. Knurck was not asked about the excluded instances of conduct.

Legal analysis and argument: The State of South Dakota does not have a special rule dealing solely with third-party perpetrator evidence. Relevant evidence is admissible; irrelevant evidence is inadmissible, subject to the considerations of SDCL 19–12–3 (Rule

403). SDCL 19–12–2 (Rule 402). Labeling an offer "third-party perpetrator" evidence will not automatically exclude it. When third party perpetrator evidence is challenged as unfairly prejudicial, confusing, or misleading, trial courts are required to apply, on the record, the probative versus prejudicial balancing test of SDCL 19–12–3 (Rule 403) in deciding to admit or exclude such evidence. *See State v. Jenner*, 451 N.W.2d 710, 722 (S.D.1990); *State v. Braddock*, 452 N.W.2d 785, 789–90 (S.D.1990). *See also*, *State v. Packed*, 2007 SD 75, P 17, 736 N.W.2d 851.

An accused must "be afforded a meaningful opportunity to present a complete defense." *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D.1988) (citation omitted); *see also State v. Mixon*, 27 Kan.App.2d 49, 998 P.2d 519, 523 (2000) (citing *State v. Bradley*, 223 Kan. 710, 576 P.2d 647 (1978)). Those denied the ability to respond to the prosecution's case against them are effectively deprived of a " 'fundamental constitutional right to a fair opportunity to present a defense.' " *State v. Lamont*, 2001 SD 92, ¶ 16, 631 N.W.2d 603, 608–09 (quoting *Crane v. Kentucky*, 476 U.S. 683, 687, 106 S.Ct. 2142, 2145, 90 L.Ed.2d 636 (1986)). When a defendant's theory "is supported by law and ... has some foundation in the evidence, however, tenuous[,]" the defendant has a right to present it. *United States v. Grimes*, 413 F.2d 1376, 1378 (7thCir.1969) (citing *Tatum v. United States*, 190 F.2d 612, 617 (D.C.Cir.1951); *United States v. Phillips*, 217 F.2d 435, 442–43 (7thCir.1954)); *see also United States v. Chatham*, 568 F.2d 445, 450 (5thCir.1978); *State v. Lujan*, 192 Ariz. 448, 967 P.2d 123, 127 (1998); *Lewis v. State*, 591 So.2d 922, 925–26 (Fla.1991).

When the trial court prevented the defense from presenting the complete picture of the injuries that children had sustained at Knurck's daycare, it prevented Mr. Patterson

from presenting a complete defense. The State contended that T.R. was killed by non-accidental or blunt force trauma to the head. Additionally, the State's experts concluded that T.R. could not have choked to death based upon the intracranial bleeding that T.R. suffered. Importantly, T.R. was being watched at Knurck's daycare shortly before his death. Based upon Ashley's testimony, T.R. was picked up only minutes before she dropped him off with Mr. Patterson at the apartment. This means that T.R. was under Knurck's supervision shortly before he was found unresponsive. *See In re Fero*, 192 Wash.App. 138, 367 P.3d 588 (2016) (new trial granted where new expert testimony contested claims of prosecution experts that children suffering abusive head trauma become unconscious almost immediately).

As it turns out, Knurck had an extensive history of injuring children at her daycare. While the trial court permitted several of these incidents, the trial court also excluded a significant number of the proffered events. Had the defense been able to present all the injuries children sustained at Knurck's daycare, the defense would have been in a better position to establish a course of conduct and pattern, thereby being able to argue more effectively that it was a reasonable possibility that T.R. was injured at the daycare and not during the few minutes that he was alone with Mr. Patterson. The exclusion of the other proffered acts undermines the confidence this Court should have in the verdict.

5. Did the trial court err by failing to grant Mr. Patterson's judgment of acquittal?

Standard or review: The denial of a motion for judgment of acquittal presents a question of law, and thus this Court's review is de novo. In measuring evidentiary sufficiency, 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." *State v. Thomason*, 2014 SD 18, ¶ 14, 845 N.W.2d 6402.

Legal analysis and argument: In a sufficiency challenge, this Court will set aside a jury verdict only when "the evidence and the reasonable inferences to be drawn therefrom fail to sustain a rational theory of guilt." *State v. Hage*, 532 N.W.2d 406, 410 (S.D.1995) (citations omitted); *State v. Lewandowski*, 463 N.W.2d 341, 343–44 (S.D.1990). On review this Court will not resolve conflicts in the testimony, pass on the credibility of witnesses, or weigh the evidence. *Hage*, 532 N.W.2d at 410–411 (citations omitted).

A large portion of the State's theory of the case rested on expert testimony. As the State noted during a pretrial hearing, its medical theory was based upon what is known as the "triad", a medical theory previously known as "shaken baby syndrome" that rests on the assumption that retinal hemorrhages, subdural hematoma, and brain swelling establish that a child was intentionally injured. See Motions Hearing of September 14, 2015 at 80-82, 83, *see* generally the medical testimony provided by the State's experts *supra*, *see also Commonwealth v. Millien*, 474 Mass. 417, 418, 50 N.E.3d 808 (discussing "shaken baby syndrome and abusive head trauma).

The "triad" associated with shaken baby syndrome or what is now called abusive head trauma has been called into question by several appellate courts. See *State v. Edmunds*, 308 Wis.2d 374, 746 N.W.2d 590 (2008) (conviction reversed on habeas review based upon shift in mainstream medical opinion regarding "shaken baby syndrome"), *Commenwealth v. Millien*, 474 Mass. 417, 418, 50 N.E.3d 808 (recognizing

the medical controversy as to how often the triad of symptoms of abusive head trauma are caused by accidental short falls or other medical causes), *Ex Parte Henderson*, 384 S.W.3d 833, (Tex.Crim.App. 2012) (conviction reversed on habeas review based upon shift in new developments in the science of biomechanics and the causes of injury in children), *People v. Bailey*, 999 N.Y.S.2d 7132014 N.Y. Slip Op. 24418 (conviction reversed based upon medical advances where conviction was based on injuries consistent with shaken baby syndrome), and *In re Fero*, 192 Wash.App. 138, 367 P.3d 588 (2016) (similar).

Although the cases cited above primarily address convictions that were obtained where little or no expert evidence was presented by the defense, these cases still establish that the theories of shaken baby syndrome and abusive head trauma are not as widely accepted as they were even a decade ago by the medical community. In Mr. Patterson's case, the State's theory was grounded in the medical opinion that T.R. died as a result of abusive head trauma. The State used this analysis to refute the defense claim that T.R. died of choking, and to establish that Mr. Patterson was the actual perpetrator who recklessly struck T.R.

Given the lack of any eye-witnesses to the alleged crime, the testimony of the defense expert witnesses countering the theory of abusive head trauma, and the growing debate about the medical soundness of the theory of abusive head trauma itself, the trial court should have granted the motion for judgment of acquittal. Based upon the entire record, no reasonable jury could have found beyond a reasonable doubt that T.R's death was not the result of choking and that his death could only have been caused by Mr. Patterson striking him in the head.

6. This Court does not have jurisdiction to consider the issues presented in the State's cross-appeal.

After Mr. Patterson filed his Notice of Appeal, the State filed its State's Notice of Review. See Supreme Court of South Dakota Court Doc. Num. 27738. Specifically, the State requests that this Court review "whether the trial court erred when it prohibited the pathologist who conducted the autopsy of the coroner from testifying as to the manner of death" and "whether the trial court erred when it allowed an instruction on consciousness of innocence." Id.

This Court is without jurisdiction to review these issues on this appeal. This Court has written that the law in the area of appellate jurisdiction is well settled and that "the right of appeal is purely statutory. It is not conferred by the Constitution, and can be exercised only by the party to whom it is given." *State v. Stunkard*, 28 SD 311, 133 N.W. 253, 254 (S.D.1911). This Court has also written that the Court "has only 'such appellate jurisdiction as may be provided by the legislature. The right to appeal is statutory and does not exist in the absence of a statute permitting it.' " *Dale v. City of Sioux Falls*, 2003 SD 124, ¶ 6, 670 N.W.2d 892, 894 (citations omitted). The statue that governs the State's right to appeal is SDCL 23A-32-4. *See State v. Reath*, 2003 SD 144, 673 N.W.2d 294. SDCL 23A-32-4 reads:

> Appeal by prosecution from judgment setting aside verdict, dismissal, arrest of judgment, new trial, or deviation from mandatory sentence. An appeal by a prosecuting attorney in a criminal case may be taken to the Supreme Court, as a matter of right, from a judgment, or order of a circuit court setting aside a verdict and entering judgment of acquittal, sustaining a motion to dismiss an indictment or information on statutory grounds or otherwise, or granting a motion for arrest of judgment or a motion for a new trial, or an order finding mitigating circumstances to exist in deviating from the mandatory sentencing provisions of § 22-42-2. However, any appeal does not bar or preclude another prosecution of the defendant for the same offense, unless the dismissal is affirmed by the Supreme

Court.

Given that the issues that the State seeks to have this Court review are not specifically enumerated within the statute that provides this Court with jurisdiction to permit the State to appeal, this Court should decline to hear the issues contained within the State's notice.

CONCLUSION

For the reasons stated above, Mr. Patterson respectfully requests that this Court enter an order reversing and remanding his convictions and further enter an order granting a new trial.

REQUEST FOR ORAL ARGUMENT

Mr. Patterson respectfully requests oral argument on all issues.

Dated this 7th day of December 2016.

GREY &
EISENBRAUN LAW

_____

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APPENDIX

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:ss
COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

State of South Dakota, 41CRI13-000598

Plaintiff,

vs. Judgment and Sentence

JOSEPH R. PATTERSON,

Defendant.

An Indictment was filed with the Court on the 18th day of October, 2013, charging the Defendant with the crimes of Second Degree Murder, SDCL 22-16-1(1), 22-16-7, 22-16-12; First Degree Manslaughter, SDCL 22-16-1(2), 22-16-15(1), 22-18-1.4; OR, in the alternative: First Degree Manslaughter, 22-16-1(2), 22-16-15(1), 26-10-1; Aggravated Battery Of An Infant, SDCL 22-18-1.4; OR, in the alternative: Abuse Or Cruelty To Minor, SDCL 26-10-1.

The Defendant was arraigned on said Indictment on the 28th day of October, 2013. The Defendant was present with attorney Timothy J. Rensch, and Thomas R. Wollman, State's Attorney in and for Lincoln County, 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 him. The Defendant pled not guilty to the Indictment and requested a jury trial.

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On the 14th day of September, 2015, a trial commenced to a Lincoln County jury, duly empaneled to try the issues herein, specifically Counts One (1), Two (2) and Four (4) of the Indictment. Counts Three (3) and Five (5) were dismissed on the record by the prosecution. Throughout the jury trial the Defendant was represented by counsel, Timothy J. Rensch and Robert W. Van Norman, and the State was represented by Lincoln County State's Attorney Thomas R. Wollman, along with Assistant Attorneys General Robert Mayer and Laura Shattuck. On the 29th day of September, 2015, the jury returned verdicts of Guilty to Second Degree Murder, in violation of SDCL 22-16-1(1), 22-16-7, 22-16-12, as charged in Count One (1) of the Indictment; First Degree Manslaughter, in violation of SDCL 22-16-1(2), 22-16-15(1), 22-18-1.4, as charged in Count Two (2) of the Indictment; and Aggravated Battery Of An Infant, in violation of SDCL 22-18-1.4, as charged in Count Four (4) of the Indictment.

It is therefore, ORDERED, ADJUDGED and DECREED, that a Judgment of Guilty shall be entered, in that on or about the 9th day of October, 2013, in the County of Lincoln, State of South Dakota, JOSEPH R. PATTERSON did commit the public offenses of Second Degree Murder, in violation of SDCL 22-16-1(1), 22-16-7, 22-16-12; First Degree Manslaughter, in violation of SDCL 22-16-1(2), 22-16-15(1), 22-18-1.4; and Aggravated Battery Of An Infant, in violation of SDCL 22-18-1.4.

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SENTENCE

On the 19th day of November, 2015, the Court asked the Defendant if any cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS ORDERED AND ADJUDGED by this Court that as to the charge of Second Degree Murder, the Defendant, JOSEPH R. PATTERSON, is hereby sentenced to life imprisonment in the South Dakota State Penitentiary, there to be kept, fed and clothed according to the rules of said institution. It is further,

ORDERED, that the Defendant shall pay $104.00 in court costs, reimburse Lincoln County $190.50 in attorney fees, and repay Lincoln County $2,646.42 for prosecution costs. It is further,

ORDERED, that the Defendant shall provide DNA samples to the Lincoln County Sheriff's Department, pursuant to SDCL 23-5A.

IT IS FURTHER ORDERED AND ADJUDGED by this Court that as to the charge of Aggravated Battery Of An Infant, the Defendant, JOSEPH R. PATTERSON, is hereby sentenced to serve a period of twenty five (25) years in the South Dakota State Penitentiary, there to be kept, fed and clothed according to the rules of said institution. It is further,

ORDERED, that this term of imprisonment shall be deemed to run concurrent with the sentence imposed for Second Degree Murder. It is further,

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ORDERED, that the Defendant shall pay $104.00 in court costs. It is further,

ORDERED, that the Defendant shall be given credit for three hundred seventy (370) days previously served.

IT IS FURTHER ORDERED AND ADJUDGED, that as to the charge of First Degree Manslaughter, no sentence is hereby imposed.

IT IS FURTHER ORDERED, that all charges to which the jury rendered a guilty verdict shall be considered to have arisen from the same conduct.

IT IS FURTHER ORDERED, that all charges contained in the Amended Complaint are dismissed.

IT IS FURTHER ORDERED, that the Defendant, JOSEPH R. PATTERSON, stands committed to the custody of the Sheriff of Lincoln County pending the execution of this Judgment and Sentence.

Dated this 31st day of December, 2015.

BY THE COURT:

Bradley G. Zell

Bradley G. Zell, Circuit Court Judge

ATTEST:
Kristie Torgerson, Clerk of Courts
BY:

_____(SEAL)
Deputy Clerk

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27736

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH PATTERSON,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE BRADLEY G. ZELL
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed January 13, 2016

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JURISDICTIONAL STATEMENT

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

STATEMENT OF LEGAL ISSUES

DID THE TRIAL COURT IMPROPERLY ADMIT EVIDENCE OF DEFENDANT'S PRIOR PHYSICAL ABUSE OF CHILDREN TO ESTABLISH MOTIVE AND ABSENCE OF ACCIDENT?

State v. Holland, 346 N.W.2d 302 (S.D. 1984)

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

Dant v. Kentucky, 258 S.W.3d 12 (Ky. 2008)

People v. Weeks, 369 P.3d 699 (Colo.App.Div.III 2015)

The trial court admitted evidence that the defendant had previously physically abused two other children for the purpose of proving motive and lack of mistake or accident.

DID THE TRIAL COURT IMPERMISSABLY ALLOW THE STATE TO ARGUE A MOTIVE THEORY ALLEGEDLY NOT SUPPORTED BY THE EVIDENCE?

State v. Smith, 1999 SD 83, 599 N.W.2d 344

The trial court overruled defendant's objections to the state's argument in closing regarding why defendant struck the decedent.

DID THE TRIAL COURT ERRONEOUSLY PERMIT MEDICAL EXPERTS TO TESTIFY IN GENERALLY-ACCEPTED DIAGNOSTIC TERMS OF ABUSIVE OR NON-ACCIDENTAL HEAD TRAUMA TO DESCRIBE ETIOLOGY OF FATAL INJURIES TO CHILD?

State v. Holland, 346 N.W.2d 302 (S.D. 1984)

People v. Weeks, 369 P.3d 699 (Colo.App.Div.III 2015)

State v. Gray, 347 S.W.3d 490 (Ct.App.Mo. 2011)

Sanchez v. State, 142 P.3d 1134 (Wyo. 2006)

The trial court overruled defendant's objections to the expert's use of medical diagnostic terminology.

DID THE TRIAL COURT IMPROPERLY EXCLUDE EVIDENCE OF ALLEGED ABUSE OF THE DECEDENT BY A THIRD-PARTY PERPETRATOR?

State v. Faulks, 2001 SD 115, 633 N.W.2d 613

State v. Garza, 1997 SD 54, 563 N.W.2d 406

Davis v. Missouri, 907 S.W.2d 280 (Ct.App.Mo. 1995)

People v. Swart, 860 N.E.2d 1142 (Ct.App.Ill.2nd)

The trial court admitted some, but not all, evidence that the victim's daycare provider had been convicted of an abuse and neglect charge in connection with other children in her care.

DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL?

State v. Beck, 2010 SD 52, 785 N.W.2d 288

State v. Morgan, 2012 SD 87, 824 N.W.2d 98

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

State v. Brende, 2013 SD 56, 835 N.W.2d 131

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

PRELIMINARY STATEMENT

The trial transcripts and exhibits will be cited as TRANSCRIPT or TRIAL EXHIBIT followed by a reference to the corresponding volume/page/line or number. The general record and presentence investigation report will be cited as RECORD followed by a reference to the cited page in the settled record.

STATEMENT OF THE CASE AND FACTS

On October 9, 2013, at 5:45 p.m., Joseph Patterson called 911 to summon help for 26-month-old T.R., his girlfriend's son whom he said was unconscious from choking on a piece of candy. Patterson told police

and paramedics that T.R. had been acting lethargic and cranky. TRANSCRIPT 3 at 67/24, 96/8, 97/16. He said that after T.R.'s mother left the house, he went to the bathroom to urinate "real quick" while T.R. sat on the couch watching *Turtle Tales* on TV and eating strawberry gummy candy. TRANSCRIPT 1 at 201/8; TRANSCRIPT 3 at 67/20; TRANSCRIPT 4 at 15/13, 21/5. Later, Patterson said he had been watching ESPN and went to the bathroom for approximately five minutes to defecate. TRANSCRIPT 3 at 67/13. Either way, Patterson was alone with T.R. for approximately 5 minutes and 32 seconds. TRIAL EXHIBIT TT, Appendix at 00001. Patterson claimed he found T.R. slumped over on the couch, unconscious and not breathing, when he exited the bathroom.

Patterson moved T.R. to the living room floor. He claims he removed a piece of gummy candy from the child's mouth, but T.R. did not revive. TRANSCRIPT 1 at 213/16; TRANSCRIPT 3 at 110/10. This story was suspect because "[u]sually anything that is . . . covering the opening of the trachea . . . is much further back [in the throat] and not something that would be seen and be removed" by a finger sweep of the mouth. TRANSCRIPT 9 at 68/14; TRIAL EXHIBIT 15 at 17:42:58, 17:43:10, 17:43:55 (showing Patterson curling his finger as he describes "scooping" candy from T.R.'s mouth).

Rather than call 911 right away, Patterson called T.R.'s mother, Ashley Doohan, to come back to the apartment. TRANSCRIPT 3 at 72/13-24. She told him to call 911.

When Doohan arrived back at the apartment, she found nothing obstructing T.R.'s airway, nor did the police or paramedics who arrived minutes later. TRANSCRIPT 1 at 72/21, 198/21; TRANSCRIPT 3 at 36/10. The paramedic found this odd. "Typically a choking, if it would be significant enough to cause unconsciousness, would have that object still intact. If they were able to clear it, they wouldn't typically go into unconsciousness or cardiac arrest." TRANSCRIPT 3 at 37/14; TRANSCRIPT 5 at 25/22. Nevertheless, initial emergency care was administered on the report that T.R. was in cardiac arrest secondary to choking. A piece of masticated gummy candy with T.R.'s DNA was later recovered from the living room carpet. TRANSCRIPT 1 at 213/20; TRANSCRIPT 3 at 112/23.

Medical personnel quickly became "suspicious" of Patterson's choking story. TRANSCRIPT 1 at 203/13; TRANSCRIPT 2 at 44/17. Full cardiac arrest in a child is so uncommon that it raises "a lot of questions" with emergency room personnel. TRANSCRIPT 2 at 40/20. A CT scan of T.R.'s head revealed intracranial or subdural hemorrhaging, which is bleeding in the space between the brain and the membrane that surrounds it known as the dura. TRANSCRIPT 2 at 43/24, 190/4, 193/19. Examination of T.R.'s eyes revealed widespread retinal

hemorrhaging. TRANSCRIPT 2 at 174/12, 178/12, 180/23. These findings are diagnostic of blunt force trauma to the head

Though T.R. did not present with conspicuous abrasions or bruising, autopsy revealed four distinct subcutaneous hemorrhages on his scalp consistent with blunt force trauma delivered by a fist. TRIAL EXHIBIT 71, Appendix at 00019; TRANSCRIPT 4 at 145/13, 147/1-25, 149/8-23, 150/14, 151/19, 152/4, 164/17, 202/10-24, 209/24, 151/19. When a detective asked how he believed T.R. developed brain bleeding, Patterson pointed toward the back of his head and said "he obviously . . . something would hit," but switched to "I don't know" before completing the sentence. TRIAL EXHIBIT 15 at 17:49:02. T.R. was likely brain dead before he ever reached the hospital. TRANSCRIPT 1 at 208/16; TRANSCRIPT 2 at 68/1; TRANSCRIPT 4 at 25/1. He survived on intensive life support for two more days.

Patterson was charged with second-degree murder, first-degree manslaughter and aggravated battery of a child. After a 10–day trial, a jury convicted Patterson of second degree murder. He now appeals.

ARGUMENT

Patterson raises six challenges to his conviction. None warrant reversal.

1. Admitting Evidence That Patterson Was An Abusive "Disciplinarian" Was Proper

This court is no stranger to seeing "discipline" and "accidents" camouflaging abuse, even deaths, of children. Here, as in so many

infanticides, Patterson claims that T.R. died of an "accident" – not of abuse masquerading as "discipline." Like so many abusers, Patterson claims that his history of abusing T.R. and other children should *never* have come into evidence at his trial. And, as in other cases of infanticides attributed to "accidents" like choking or falling, Patterson is wrong.

Both Patterson's warped concept of "discipline" and T.R.'s history of "accidents" while in his sole custody are well-documented. In a series of text messages between Patterson and T.R.'s mother during the approximately 1½-month period of time she lived with him, Patterson made no secret of his penchant for physical "discipline" when coping with ordinary toddler behavior – whining, crying, toilet training – that annoyed him. TRANSCRIPT 1 at 95/17-22, 114/21, 116/13; TRANSCRIPT 5 at 79/18; TRIAL EXHIBIT 2. The texts offer a nauseating glimpse into a mindset that rationalizes and disguises abuse as "discipline:"

> **September 9, 2013 –** While Patterson made arrangements for childcare for T.R. and P.P., his son by another woman, he said that "neither the boys can b throwin fits like [T.R.] was last time. I flick the shit outta [P.P.] he scream like that." TRANSCRIPT 1 at 89/19.
>
> **September 10, 2013 –** Patterson complained that he is "embarrassed" by T.R.'s "bad" behavior. He told T.R.'s mother "u

can let me handle it if u don't wanna do it. Lil man needs to know, and you know it." TRANSCRIPT 1 at 90/25. "That shit is not acceptable. I can't stand it." TRANSCRIPT 1 at 91/1. "Fuckin makes you/us look like theres no authority and he thinks hes the boss . . . that shit don't fly with me at all." TRANSCRIPT 1 at 91/4. "He needs a SPANKING." TRANSCRIPT 1 at 91/5. "For real, if u don't handle it now, he only gonna get worse." "By spanking him, he will remember that acting up isn't acceptable and then when u ask him if he wants Joey [Patterson] to spank, he'll straighten his ass up for real. Nuff of playin nice." TRANSCRIPT 1 at 91/23-92/1. "[T.R.] need to get it from me . . . 'cuz he for real don't look at u as authority." TRANSCRIPT 1 at 92/14. "He for real needs to go in the bathroom w me, over the knee and spanked." TRANSCRIPT 1 at 92/19. "So I step in and do the spanking and he'll relate that with the way he just acted. And then the next time u ask him if he wants to have Joey spank, he'll say 'hell' no and u won't have to spank." TRANSCRIPT 1 at 94/1. "What u want me to do then? For real . . . cuz that shit ain't acceptable momma." TRANSCRIPT 1 at 94/13 "[M]e and my ways of discipline . . . ain't changin." TRANSCRIPT 1 at 95/5.

September 17, 2013 – Patterson derided T.R.'s mom for putting him and P.P. in "time out" for fighting over a toy. "Authority walked out" he texted, meaning "the boys didn't see [her] as

authority" unless she used physical discipline. TRANSCRIPT 1 at 98/9.

September 26, 2013 – Patterson and T.R.'s mother argued because Patterson said "something wrong with [T.R.] because he was whining so much." TRANSCRIPT 1 at 111/11. Patterson later texted "I'm glad ur going to work out cuz I aint got shit to say to u. U will never try and twist my words like that again. I simply asked what's wrong w u? Like why u always poutin? Always whining? Not once did I ever fuckin make reference towards a special needs child. U need to learn to watch what the fuck y say to me. I'm tired of ur shit and twisting my words and making me feel like shit. U will not do that agai[n]." TRANSCRIPT 1 at 110/21-111/3. T.R.'s mother responded that she knew his "whining is frustrating and annoying and I'm handling it as best as I can." TRANSCRIPT 1 at 111/23. Patterson replied "Ya, but I don't tolerate it w [P.P.] nor will I w [T.R.]. He wanna whine, he sittin his ass in timeout till he done. If he gonna continue and get worse n louder, then he gonna get spanked." TRANSCRIPT 1 at 112/5.

September 27, 2013 – Methods of discipline became a more frequent topic of discussion between Patterson and T.R.'s mother. TRANSCRIPT 1 at 112/24. Patterson texted her to complain that

T.R. was "throwin' a not so cool fit cuz he can't have a toy . . . Ugh." TRANSCRIPT 1 at 113/10.

September 28, 2013 – Patterson complained that T.R. was "cryin cuz [P.P.] hit him. Not having that. When [P.P.'s] tryin to play." TRANSCRIPT 1 at 114/8. Patterson asked "U want to hear crying? Not me." TRANSCRIPT 1 at 114/16.

October 1, 2013 – Patterson texted that T.R. "just has to stop whining the minute he comes home. Simple as that." TRANSCRIPT 1 at 115/16.

October 2, 2013 – Patterson texted "plz hande [T.R's] whining before he comes in. I really aint in the mood to deal w it . . . tired of him whining the minute he comes home." TRANSCRIPT 1 at 117/2.

October 6, 2013 – T.R.'s mother texted Patterson that she spanked him after he acted "fussy" and hit his grandmother in the face. Patterson responded "Knew itd be coming sooner or later! Better than gettin it here. I hate it when he misbehaves." TRANSCRIPT 1 at 122/10. "Way to stay tuff n lay down the law. Good thing I didn't come, u know how that flys with me." TRANSCRIPT 1 at 122/16.

October 7, 2013 – Patterson texted that T.R. "is a whiner today for sure." His mother asked if she and T.R. should leave the apartment for a while. Patterson said "No? That does nothing

but give into him. U leave cuz [T.R.s] throwin a fit? Uh, no. Hes the one that shld listen to us!" TRANSCRIPT 1 at 123/17. Patterson said T.R. "don't like me and that makes him not think he has to listen to me." TRANSCRIPT 1 at 123/20. T.R.'s mother tried to lighten the mood by sending Patterson a video of T.R. and P.P. in the tub. Patterson remarked that in the video T.R. "just sits w his head down" because he's "afraid of Joey." TRANSCRIPT 1 at 124/8.

October 8, 2013 – Patterson texted that T.R. had defecated in the bathtub during his bath. With it was a picture of T.R. screaming. TRIAL EXHIBIT 11. T.R.'s mother responded that T.R. looked "terrified." TRANSCRIPT 1 at 126/3. Patterson texted that T.R. was "screaming. Disgusting. Over n done w." TRANSCRIPT 1 at 126/10. T.R. had never acted terrified from defecating in the tub when his mother bathed him. TRANSCRIPT 1 at 138/13.

October 9, 2013 – The morning of T.R. last day of consciousness. Patterson texted that he was "turnin bitter at the world. And WTF . . . [T.R.] really start whining again at 7 a.m.? Really? First thing . . . whining, crying, actin like a baby." TRANSCRIPT 1 at 128/5.

Though T.R. *was* just a baby, Patterson was not about to put up with him behaving like one. Better to condition T.R.'s mother to the idea that

his brand of "discipline" was not abuse than to change his mode of discipline. TRIAL EXHIBIT 2 EXCERPT, Appendix at 00022/16:29:39. "Just letting u know what I believe," he tells her so she will start accepting it. TRIAL EXHIBIT 2 EXCERPT, Appendix at 00022/16:29:39.

Another string of text messages between Patterson and T.R.'s mother document that this little baby, who grated so on Patterson's nerves, was "accident" prone while in Patterson's care. TRANSCRIPT 1 at 76/22, 103/22.

September 17, 2013 – "[T.R.] fell on the slide. Pretty good . . . hit his tailbone. Hes OK now." TRANSCRIPT 1 at 96/5. Later that same day Patterson reported that "[T.R.] just fell out of the tub while I was putting a diaper on [P.P.]." TRANSCRIPT 1 at 97/2. The texts were accompanied by a picture of an "owie" on T.R.'s lip unlike any his mother had seen before. TRANSCRIPT 1 at 135/14; TRIAL EXHIBIT 5, Appendix at 00002.

September 18, 2013 – "Damn the boys just wrecked their bikes hard. Ran into each other. [P.P.'s] lip is busted. Damn." "They just crashed harder than fuck." TRANSCRIPT 1 at 19/23. T.R. "hit the handle bars pretty good." TRANSCRIPT 1 at 99/6-12. Patterson was concerned that P.P.'s mother was "gonna think I slapped his mouth im sure . . . start a fight im sure." TRANSCRIPT 1 at 99/19. The texts were accompanied by a picture of a "really bad" bruise on T.R.'s chest. TRANSCRIPT 1 at

100/22, 101/7; TRIAL EXHIBIT 6, Appendix at 00003. Patterson then texted "To be honest, idk [I don't know] if its even from their bike wreck, but I noticed it when I was giving them baths . . . and it looked bad so I sent u a pic." TRANSCRIPT 1 at 101/16. T.R.'s mother correctly observed that the bruise looked more like a "hand print" than a handle bar. TRANSCRIPT 1 at 104/24, 136/3; TRIAL EXHIBIT 6, Appendix at 00003.

September 19, 2013 – Patterson reports that P.P.'s lip is better "but the side of his tonge was bit pretty good." TRANSCRIPT 1 at 108/21.

September 22, 2013 – Patterson texted a picture of what he said was a "red spot rash on [T.R.'s] left eye." TRANSCRIPT 1 at 109/14, 136/10; TRIAL EXHIBIT 7, Appendix 00004. T.R. did not have a "rash" on his left eye when his mother left for work that morning – and what T.R.'s mother saw didn't look like a rash. What she saw "look[ed] like broken blood vessels or something." TRANSCRIPT 1 at 109/24, 110/9.

October 3, 2013 – Patterson texted that T.R. "just slipped" in the shower. TRANSCRIPT 1 at 117/17. When his mother asked if he was hurt, Patterson told her that T.R. had "cut the inside of his lip" and had "a little blood comin from his lip." TRANSCRIPT 1 at 118/10; TRIAL EXHIBIT 8, Appendix 00005. Again, it was not the type of lip injury T.R.'s mother had ever seen the child sustain

when he was in her care. TRANSCRIPT 1 at 137/10. Patterson became defensive. He texted T.R.'s mother "I feel like u thinkin in ur head like, Jesus fuck Joey . . . WTF? [T.R.] always gets hurt w u!" TRANSCRIPT 1 at 119/23-120/1.

If all these injuries were accidental, one wonders why T.R. was growing "afraid" of Patterson and did not "want to spend time alone" with him. TRANSCRIPT 1 at 88/19, 124/24, 125/11. Patterson himself remarked on it. About a month before T.R.'s death, Patterson expressed concern about T.R.'s aunt coming to visit because he didn't "want her seein' [T.R.] all afraid of me." TRANSCRIPT 1 at 88/16. T.R. was more "agitated," "irritated, aggravated, whining when he was around" Patterson, and Patterson's "level of frustration" with T.R. "dramatically increased" in the days before T.R.'s death. TRANSCRIPT 1 at 88/22, 124/24, 125/3.

Patterson's irritation with T.R.'s infant behavior was nothing new. He was similarly "short tempered" in his relationships to M.K. and K.K., the sons of a prior girlfriend, Jasmin Leach. TRANSCRIPT 3 at 11/7. According to Leach, Patterson was "annoyed by crying children." He "would get upset very quickly" when M.K. or K.K. "would cry, whine or be cranky" and physically punish them. TRANSCRIPT 3 at 13/18.

- In the first incident, three-year-old K.K was crying during a car trip to Rapid City. Patterson "told him to shut up and stop crying" or "he was going to pull the truck over." TRANSCRIPT 3 at 16/13.

When K.K. continued crying, Patterson "pulled off at the next exit and he got out of the truck and he opened the back door and he ripped [K.K.] out of his car seat, and he took him out and threw him up against the back rear tire." TRANSCRIPT 3 at 16/17. Patterson held K.K. "by the front of his shirt and he pointed in his face and told him if he didn't stop crying he was going to call the cops on him." TRANSCRIPT 3 at 16/24.

- In the second incident, Patterson forced three-year-old M.K. to do sit ups "like a drill sergeant" because he had been crying. TRANSCRIPT 3 at 19/7. Leach told Patterson to stop. Patterson "started screaming" and arguing with Leach. She told him to stop arguing in front of the children. The louder Patterson screamed, the louder M.K. screamed until Patterson "just turned and slapped him right across the face." TRANSCRIPT 3 at 19/13.
- In the third incident, M.K. had "thrown a fit" at Sunday school. When Leach and M.K. arrived home, Patterson "came flying out of the garage door into the garage and flipped open [Leach's] car door and ripped M.K. out of his car seat and took him down the stairs and made him pull his pants down, and he spanked him four to five times in a row as hard as he could." TRANSCRIPT 3 at 21/7. Leach told him to "knock it off" but Patterson took M.K. "into the laundry room and shut the door, and he continued to spank him four to five more times." TRANSCRIPT 3 at 21/13. Later, Leach

saw Patterson retrieving an ice cube from the freezer to treat the swelling welts on M.K.'s bottom. When Leach saw the welts she "freaked out." TRANSCRIPT 3 at 22/19. M.K.'s bottom "looked like as if you would take like wet clay and put your hand print into wet clay." TRANSCRIPT 3 at 22/23. The next day, M.K.'s bottom was "very bruised, very black and blue, very red." TRANSCRIPT 3 at 24/1; TRIAL EXHIBIT 41, Appendix at 00006.

Patterson complains that the trial court erred in admitting Leach's testimony. Courts, however, have widely agreed that prior incidents of abuse or excess "discipline" are highly probative of motive, intent and absence of accident or mistake in infant "choking" fatalities when the victim presents with contraindicative symptoms of inflicted trauma.

Under facts nearly identical to this case, in *State v. Holland,* 346 N.W.2d 302 (S.D. 1984), a defendant challenged the admission of prior acts of abuse in his trial for murder of a 23-month-old child. As here, defendant claimed that the child had choked and that he had removed a piece of foam rubber from the child's mouth but the child did not resuscitate. He also stated that he bumped the child's head on the door carrying him into the bathroom to render care. *Holland,* 346 N.W.2d 302 at 304. Death was attributed to suffocation, but the child had bruises on his face, back and chest.

The trial court suppressed testimony regarding three incidents of defendant abusing other children by grabbing them by the throat and

hitting them with his fists. The state appealed the suppression rulings. The *Holland* court found the prior incidents probative of "absence of mistake or accident, opportunity, and identity of defendant as [the] perpetrator" and reversed. *Holland,* 346 N.W.2d at 308. The court stated that "the evidence of prior abuse [wa]s not some collateral matter offered solely for prejudicial purposes. The evidence [wa]s directed at the vital issues of whether the injuries to [the child] could have happened by accident, as defendant maintains, and whether defendant can be identified as one who may have harmed the child. As such the evidence may have an adverse impact on defendant's case, as does most evidence offered by [the] state, but it does not persuade by illegitimate means." *Holland,* 346 N.W.2d at 309.

Holland is consistent with the decisions of other courts in "choking" cases. In *Dant v. Kentucky,* 258 S.W.3d 12 (Ky. 2008), a seven-month-old child died after her stepfather reported that she had been crying and "gasping for breath," so "he shook her a little to help her breath." *Dant,* 258 S.W.3d at 15. After shaking her, the child stopped crying. "[S]he also had a dazed look on her face and had stopped breathing." *Dant,* 258 S.W.3d at 17. Externally, the child's body showed "no significant signs of physical trauma," but autopsy revealed "a hemorrhage on the top of her skull," "five different hemorrhages or instances of internal bleeding in and around [her] brain," and the classic

triad of injuries associated with blunt force trauma – subdural and retinal hemorrhaging and edema. *Dant,* 258 S.W.3d at 22.

At trial, the prosecution introduced evidence of Dant's prior abuse. Witnesses testified that Dant "was the one who 'puts [the victim] in the corner and smacks her on the head when she does not mind him.'" *Dant,* 258 S.W.3d at 16. When his own daughter was six months old he would push her face into the wall when she cried and shake her to make her stop crying. *Dant,* 258 S.W.3d at 16. Dant also hit a previous girlfriend's 16-month-old son on the face when he was crying "so many times he left fingerprints and bruising."

The appellate court affirmed admission of Dant's prior acts of abuse as "relevant to proving Dant's pattern of conduct or his *modus operandi*" and "absence of mistake or accident." *Dant,* 258 S.W.3d at 19-20. The court found the fact that Dant "had previously shaken [his daughter] in order to stop her from crying [wa]s certainly relevant to show his motive and intent in shaking [the victim] on the night of her death." *Dant,* 258 S.W.3d at 20. Also, "this prior act was highly probative of Dant's pattern of shaking children to keep them from crying." *Dant,* 258 S.W.3d at 20. And though hitting his girlfriend's son was "not precisely identical to the physical act of shaking a baby, the fact remains that each time an infant's crying would disturb Dant, he would respond with a violent, physical act of abuse." *Dant,* 258 S.W.3d at 20-21. Thus, "the evidence strongly reveal[ed] a common element that

precede[d] each act of physical abuse – a crying baby." *Dant,* 258 S.W.3d at 21, see also *Bell v. Texas,* 2012 WL 5351134 (Tex.App.)(two-year-old boy who died mysteriously after "choking" on food found to have "four separate impacts to [his] head from a hard object" consistent with "being hit by someone's hand").

In *People v. Hine,* 650 N.W.2d 659 (Mich. 2002), a 30-month-old girl died from "choking" while in the defendant's care. She presented with circular bruises on her abdomen and a bruise across the bridge of her nose. An autopsy found subdural hematoma and an array of internal abdominal injuries. Three former girlfriends testified at Hine's trial about prior abuse he inflicted on them and the victim.[1] One girlfriend testified that Hine had previously grabbed the victim, put his hands in her mouth and stretched her lips, causing bruising to her gums. She also testified to being abused by Hine herself. *Hine,* 650 N.W.2d at 662. Another former girlfriend described being "head-butted" and thrown to the ground by Hine. *Hine,* 650 N.W.2d at 662. A third girlfriend, the victim's mother, testified that Hine poked her in the forehead and chest and head-butted her. She also described a maneuver in which Hine "put his fingers or hand inside her mouth and forcefully pulled" as a "fish hook" *Hine,* 650 N.W.2d at 662.

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[1] It is worth noting that, though prior abuse of a girlfriend is relevant in a child "choking" case, the trial court here excluded evidence of Patterson's abuse of Jasmine Leach and Ashley Doohan. STATE 404(b) NOTICE, Appendix at 00007-10. Here the court circumscribed the 404(b) evidence to Patterson's prior acts of child abuse.

The appellate court affirmed the admission of the prior acts testimony as relevant to "defendant's scheme, intent, system, or plan in committing the acts and to show the lack of accident." *Hine,* 650 N.W.2d at 663. Specifically, the head-butting and "'fish hook' assaults on the defendant's former girlfriends were similar to the method or system that could have caused the fingernail marks on [the victim's] right cheek" and bruising on the bridge of her nose. *Hine,* 650 N.W.2d at 665. Also, "the forceful and hurtful 'poking' inflicted" on one of the girlfriends was consistent with the "twenty circular bruises on [the victim's] abdomen." *Hine,* 650 N.W.2d at 665. Thus, the "evidence of uncharged acts . . . support[ed] the inference that the defendant employed the common plan [of head-butting, poking and fish-hooking] in committing the charged offense." *Hine,* 650 N.W.2d at 665.

In *Durham v. State,* 2005 WL 2787550 (Tex.App.), a 29-day-old infant died reportedly of choking on formula. Durham did not immediately call 911. *Durham,* 2005 WL 2787550 at *5. Hospital personnel grew suspicious because of bruises to the child's head and face and a presentation that "did not fit with the history of choking." *Durham,* 2005 WL 2787550 at *1. Examination of the child revealed "subscalpular hemorrhage, subdural and subarachnoid hemorrhaging" and swelling in the brain. *Durham,* 2005 WL 2787550 at *8. The treating physicians opined that the child "had probably already started nursing from her bottle when she sustained the blow [to her head], and

that the blow or blows to her head made her choke." *Durham,* 2005 WL 2787550 at *9.

At trial, the prosecution introduced evidence that Durham had been "tweaking" on methamphetamine the day of the child's death, making him "unusually irritable and sleep deprived . . . triggering the possible frustration that cause Durham to inflict her fatal and non-fatal injuries that morning." *Durham,* 2005 WL 2787550 at *15. The appellate court affirmed the admission of Durham's drug use "to explain the context of the offense and Durham's motive and intent that morning." *Durham,* 2005 WL 2787550 at *15.

In *State v. Thompson,* 1997 WL 599178 (Ct.App.Ohio), where a child actually did die of choking, her mother forcibly planted the obstructing object in her airway in order to accomplish what her battering had not. X-rays revealed that the child's skull and bones around her eyes had been fractured. *Thompson,* 1997 WL 599178 at *3. An autopsy found subdural hemorrhaging. *Thompson,* 1997 WL 599178 at *8.

At trial, the state introduced evidence of the "defendant's poor mothering skills, her suicidal tendencies, the lack of interaction between defendant and [the victim]" and the defendant being "stressed out" by child rearing. One witness testified that the defendant had referred to the child "as a 'bitch' or 'ugly' . . . and that she had shaken" the child. *Thompson,* 1997 WL 599178 at *4. Though defendant objected, claiming

that the evidence was "offered solely to convince the jury that, because defendant was a bad mother, she must have murdered her child," the appellate court affirmed the admission of the other acts as "substantial, probative evidence of the defendant's guilt" in that it tended to prove that:

> [D]efendant, a young, single, uneducated, poor mother was so ill-equipped intellectually, emotionally and financially to cope with the pressures and stresses of providing and caring for two children under the age of two that she was driven to commit a desperate act. The challenged testimony [wa]s so closely and logically related to the [murder] . . . as to demonstrate that defendant had both a motive and the intent to purposely cause her daughter's death.

Thompson, 1997 WL 599178 at *9

In *State v. Tumlin,* 2014 WL 7073752, *12 (Ct.Crim.App.Ky.), a defendant claimed that his 3-year-old son "made noises he had never made before, that he choked on water," had "uneaten food" removed from his mouth and "was breathing 'funny'" before he died. Treating doctors found "bruising under the victim's scalp, subdural bleeding underneath the thick covering of the brain and a subarachnoid hemorrhage." *Tumlin,* 2014 WL 7073752 at *3. The trial court admitted evidence that the defendant had caused bruising, bite marks and abrasions to the victim in the past while "playing" rough. The appellate court affirmed, citing the evidence as probative of the allegation that "the victim's death was not accidental or a result of routine child's play" and, thus, "relevant on the material issues of intent . . . and absence of mistake." *Tumlin,* 2014 WL 7073752 at *19, *20.

In *Futrell v. Kentucky,* 471 S.W.3d 258 (Ky. 2015), a 17-month-old child died allegedly by choking on chewing gum while in his mother's boyfriend's care. Though some chewing gum was found in the child's throat, the child also presented with a skull fracture and subdural bleeding that was so severe it would immediately have rendered the child symptomatic and probably unconscious. *Futrell,* 471 S.W.3d 258 at 267.

At trial, friends of the defendant testified that bruises started appearing on the child once the defendant came into his life, that defendant physically disciplined the child, and had expressed exasperation with and contempt for the child. *Futrell,* 471 S.W.3d 258 at 287. The appellate court affirmed the admission of the defendant's prior conduct as "relevant to rebut [his] claim that the child's fatal injuries were the result of a series of accidents, *i.e.* swallowed chewing gum and then improper CPR." *Futrell,* 471 S.W.3d 258 at 471 S.W.3d at 287.

In view of these authorities, there is scant support for Patterson's contention that his prior instances of physically "disciplining" his girlfriends' children had no probative value beyond proof of propensity.

Patterson's argument rests on the erroneous premise that propensity evidence is inadmissible *per se.* In reality it is inadmissible only "if its probative value is *entirely* dependent upon its tendency to demonstrate the defendant's propensity to engage in [abusive] behavior." *State v. Ortega,* 339 P.3d 1186, 1191 (Ct.App.Idaho 2015)(emphasis added). Though propensity evidence may implicate a person's character, it may

yet be admitted if "offered for a logically relevant purpose other than character." *State v. Wright,* 1999 SD 50, ¶ 23, 593 N.W.2d 792, 803; *Ortega,* 339 P.3d at 1191. "[S]uch evidence is *only* inadmissible if offered to prove character." *Wright,* 1999 SD 50 at ¶ 13, 593 N.W.2d at 798 (emphasis in original). But if propensity evidence is offered for some relevant purpose, "the balance tips emphatically in favor of admission" unless its prejudicial effect "substantially" outweighs its probative value. *Wright,* 1999 SD 50 at ¶ 14, 593 N.W.2d at 798. "All that is prohibited under 404(b) is that similar act evidence may not be admitted 'solely to prove character.'" *Wright,* 1999 SD 50 at ¶ 17, 593 N.W.2d at 800.

The probative value of evidence of other crimes, wrongs or acts to establish intent and an absence of mistake or accident is "well established, particularly in child abuse cases." *Wright,* 1999 SD 50 at ¶ 23, 593 N.W.2d at 802. "Where a parent uses severe corporal punishment, often the only way to determine whether the punishment is a non-criminal act of discipline . . . is to look at the parent's history of disciplining the child." *Wright,* 1999 SD 50 at ¶ 23, 593 N.W.2d at 802.

Thus, this court must determine whether the evidence of Patterson's prior abusive acts toward children was admitted on a proper or improper basis. Naturally, "[t]he rule barring propensity evidence prohibits [its] admission . . . when the only logical inference to be drawn consists of nothing more than reasoning that the defendant is a bad person, or a particular kind of bad person, and he is likely to commit

criminal offenses generally, or this type of criminal offense specifically, because of his bad nature." *Ortega,* 339 P.3d at 1192. If Patterson's prior abusive acts were admitted *just* to portray him as a "bad" person, Patterson might rightly complain. But, as in other "choking" cases, the evidence was relevant here to the permissible, independent inference that T.R. died of non-accidental head trauma resulting from abusive discipline.

- As in *Ortega,* Patterson claimed accident.
- As in *Holland, Dant, Hine, Durham, Bell, Tumlin* and *Futrell,* Patterson claimed a specific type of accident – choking.
- As in *Holland, Dant, Bell, Durham, Hine, Thompson, Futrell* and *Tumlin,* Patterson is the sole source of the "choking" history.
- As in *Holland, Durham* and *Bell,* Patterson's choking "story" did "not explain" the array of symptoms T.R. exhibited on his arrival at the hospital. As in *Dant, Hine, Tumlin* and *Futrell,* T.R.'s subdural bleeding, edema and retinal hemorrhaging contraindicated the reported etiology of "choking."
- As in *Holland* and *Bell,* nothing was found blocking T.R.'s airway. TRANSCRIPT 1 at 72/21, 153/10, 198/20; TRANSCRIPT 3 at 36/10, 37/21.
- As in *Bell, Durham, Tumlin* and *Futrell,* the presence of uneaten candy in T.R's mouth, but not blocking his trachea, could evidence

immediate onset of symptoms after he was struck while chewing. TRANSCRIPT 4 at 172/19.

- As in *Dant,* Patterson reported that T.R. was being "lethargic" and "cranky" and Patterson, like Dant, was known to "get upset very quickly" when a child was "cranky." TRANSCRIPT 3 at 13/18, 67/24, 96/8, 97/16. As in *Dant* and *Futrell,* Patterson's low tolerance for whining and crying was probative of absence of accident.
- As in *Durham, Thompson, Ortega* and *Futrell,* Patterson's irritability and exasperation in dealing with child behavior were probative of motive. As in *Dant*, Patterson's frustration with T.R.'s "whining" was escalating in the days prior to T.R.'s head injury.
- As in *Holland, Dant* and *Hine,* Patterson's prior acts against children other than T.R. were probative of *modus operandi* and absence of accident. See also *State v. Jolley,* 2003 SD 5, 656 N.W.2d 305 (defendant's abuse of his daughter properly admitted in trial for murder of his son to show absence of mistake or accident).
- As in *Bell,* T.R. was "acting normally" before being entrusted to Patterson's care. TRANSCRIPT 1 at 69/21, 185/21.
- As in *Dant* and *Futrell,* the severity of T.R.'s injuries should have manifested in outward symptoms immediately, ruling out infliction

of injury by someone prior to T.R. being entrusted to Patterson's sole care and custody.

- As in *Durham* and *Bell,* Patterson was reluctant to dial 911. See also *People v. Swart,* 860 N.E.2d 1142 (Ct.App.Ill.2nd)(daycare provider convicted of inflicting fatal head trauma called child's mother before calling 911).
- As in *Dant, Bell, Durham* and *Tumlin,* T.R. did not exhibit external signs of trauma, but autopsy revealed subscalpular hemorrhaging indicative of blows to the head.

Thus, the precedent in "choking" cases consistently supports admission of prior abusive acts as probative of motive, *modus operandi* and absence of accident.

Patterson's principle authority, *People v. Casias,* 312 P.3d 208 (Colo.App.I 2012), does not actually depart from this precedent as he argues. Under facts similar to this case, the court ruled that the defendant's prior abusive acts toward his 3-year-old daughter should *not* have been admitted in his trial on charges of first-degree murder for killing his 7-month-old daughter. The court found that the prior abusive acts were not probative of the premeditation element because they had not resulted in serious bodily injury, and so "did not tend to demonstrate that [defendant] was aware his conduct was practically certain to cause . . . death." *Casias,* 312 P.3d at 217.

Here, Patterson was charged and convicted of second-degree, not first-degree, murder. While, first-degree murder requires proof that Patterson *knew* that hitting T.R. would kill him, second-degree murder simply requires conduct "imminently dangerous to others and evincing a depraved mind, without regard for human life." SDCL 22-16-7. *Casias* is, thus, readily distinguishable because it does not follow from the position that a defendant who is not aware that his escalating abuse is *certain* to produce death is also unaware that his escalating abuse *could* produce death. *Dant,* 258 S.W.3d at 16-17 (fact that defendant's "smack[ing]" of victim in the head was non-fatal in the past did not preclude admission of prior acts evidence in trial for wanton murder).

Everyone knows that a fisted blow to a two-year-old's head entails a risk of mortal injury, whether or not it had caused serious bodily injury in the past. TRANSCRIPT 4 at 151/19, 231/1. Patterson acknowledged as much himself when he pointed at his own head and said T.R.'s brain bleed "obviously" may have happened because "something . . . hit" his head. TRIAL EXHIBIT 15 at 17:49:02.

One also finds that Colorado has explicitly rejected Patterson's attempt to expand *Casias'* exclusionary reach from disallowing prior acts evidence as affirmative proof of premeditation to disallowing it to rebut a defendant's defense of accident. In *People v. Weeks,* 369 P.3d 699 (Colo.App.Div.III 2015), the court ruled that evidence of the defendant's prior abuse of another child and the family pets – though not probative of

the premeditation element per *Casias* – remained probative of absence of accident. "[U]se of other act evidence to show intent, knowledge, and absence of mistake or accident qualifies as a 'proper' purpose independent of the inference that a defendant acted in conformity with a character trait." *Weeks,* 369 P.3d at 704. Thus, "[w]hen a defendant asserts that a victim was injured accidentally (as [Patterson] did here, in his statements to the police), prior similar acts may be relevant to rebut this argument and show that the defendant caused the injury." *Weeks,* 369 P.3d at 705. In view of the cardinal distinctions between the *mens rea* of first- and second-degree murder, and *Weeks'* rejection of Patterson's expansive interpretation of *Casias,* comparing this case to *Casias* is comparing apples to oranges.

A better comparison is to *Holland,* where defendant's prior abuse of other children was relevant to rebut the defense of choking in a second-degree murder trial. Or *State v. Miller,* 2014 SD 49, ¶¶31, 36, 851 N.W.2d 703, 710-11, where evidence of the defendant's "prior abuse of [his child], frustration with [the child's] behavior" and admission that he hit the child because "he wouldn't shut up" was properly admitted to rebut a defense of accidental suffocation in the defendant's trial for second-degree murder. *Weeks'* delineation of *Casias* places Colorado law squarely in line with *Holland, Miller* and *Wright* in holding that character evidence not admissible as proof of an element of an offense may nonetheless be introduced "for a logically relevant purpose other than

character," such as *modus operandi* or rebutting a defense of accident. *Wright,* 1999 SD 50 at ¶25, 593 N.W.2d at 803.

Patterson's 404(b) argument thus frames the question improperly. Certainly, "[i]t is not unreasonable to conclude that the average juror holds those who abuse toddlers in low esteem." *Ortega,* 339 P.3d at 1192. But, the question is not, as Patterson frames it, whether his prior toddler abuse has some tendency to evidence propensity or low character. The proper question is whether the evidence was offered *only* to prove propensity or low character. If the prior acts evidence served an independent, permissible purpose under the rule, its incidental tendency to evidence propensity or low character is not grounds for exclusion (absent undue prejudice). *Holland,* 346 N.W.2d 302.

As in *Weeks* and *Holland,* Patterson's prior acts were "not some collateral matter offered solely for prejudicial purposes" – as might be the case if Patterson were charged with, say, armed robbery. *Holland,* 346 N.W.2d at 309. Since he was on trial for the death of a child under suspicious circumstances, Patterson's prior abusive acts were independently probative of "the vital issue of whether the injuries to [T.R.] could have happened by accident as [Patterson] maintains and whether [Patterson] can be identified as one who may have harmed [T.R.]" *Weeks,* 369 P.3d at 704; *Holland,* 346 N.W.2d at 309. Such evidence "need[] only . . . support the inference that [Patterson] employed the common plan [of abuse] in committing the charged offense" to be

admissible. *Hine,* 650 N.W.2d at 665. Patterson's prior acts – slapping M.K. hard across the face, slamming K.K. up against the car, spanking M.K.'s bare bottom raw – sufficiently "support[ed] the inference" of abusive discipline as a plausible explanation for T.R.'s death to be admissible. *Hine,* 650 N.W.2d at 665.

Here, as in *Holland,* despite the "adverse impact" of Leach's testimony on Patterson's case, it did "not persuade by illegitimate means." *Holland,* 346 N.W.2d 302. The court instructed the jury against misusing Leach's testimony as evidence of "whether [Patterson] committed the offenses involved in the crimes charged," and instructed that its only proper use was "to determine motive, absence of mistake or accident." TRANSCRIPT 3 at 5/12; *Wright,* 1999 SD 50 at ¶26, 593 N.W.2d at 803 (limiting instruction "shielded the defendant against possible misuse" of 404(b) evidence). The state's closing argument that Patterson's "discipline of physical punishment explains his motive" tracked the court's instruction (and the law) to a T – as evidenced by the fact that the argument was made without objection from the defense. TRANSCRIPT 10 at 31/13.

When there is specific symptomatology and physical evidence that T.R. was hit on the head, and Patterson denies hitting him and blames choking instead, he opens the door to evidence refuting his claim of accident and demonstrating his *modus operandi* of "disciplining" children through physical violence. *Holland,* 346 N.W.2d 302; *Weeks,* 369 P.3d at

705. As stated in *State v. Kuehn,* 728 N.W.2d 589, 602 (Neb. 2007), "[w]hen a defendant asserts that a child's injuries were accidental, the defendant has placed in issue whether the injuries were indeed the result of an accident." With the assertion of an "accident" defense, "[p]revious abuse of a child is admissible . . . because it is 'probative of a material issue other than character; that is, it was evidence of malice and absence of accidental death.'" *Kuehn,* 728 N.W.2d at 602.

Because T.R.'s symptomatology was better explained by blunt force trauma than choking, the probative value of such evidence was very high; each instance of Patterson's *modus operandi* of physical abuse lowered the probability of accident. Accordingly, the trial court did not err in admitting Patterson's prior acts of abuse as evidence of motive and absence of accidental death.

2. The State's Motive Argument Was Supported By The Evidence

In Patterson's gauzy, official version of events, T.R. was nestled contentedly into a corner of the couch eating gummy candy while watching his favorite show, *Turtle Tales*. TRIAL EXHIBIT 15 at 17:20:20, 17:32:31, 17:29:28, 17:58:41, 18:51:42. Everything was to T.R.'s satisfaction. Harmony enveloped the little apartment. Any alternate version is an "invented . . . theory extrapolated from the other acts evidence." APPELLANT'S BRIEF at 29.

Except the alternate version is not "extrapolated from the other acts evidence." It is extrapolated from Patterson's own conflicting

accounts of the circumstances of T.R. final conscious moments . . . and a key corroborating observation of the scene by law enforcement.

The official *Turtle Tales* version is one story Patterson told to law enforcement. Another is that he had been watching ESPN on TV. TRANSCRIPT 3 at 67/19. This alternate version is corroborated by one officer at the scene who noticed that the TV was tuned to "college football highlights" not "a children's cartoon." TRANSCRIPT 4 at 82/19, 89/6. Patterson told one of the detectives that T.R. was being "lethargic" and "cranky" and pointing at the TV. TRANSCRIPT 3 at 67/24, 96/8, 97/16; TRIAL EXHIBIT 15 at 17:56:36, 17:57:48. Curiously, Patterson also told the detective that his only mode of discipline was "time out." TRANSCRIPT 3 at 69/13; TRIAL EXHIBIT 15 at 17:05:41, 17:05:59. When the detective asked point blank "Do you use anything else for discipline?" Patterson grunted "unh uh" while emphatically shaking his head no. TRIAL EXHIBIT 15 at 17:06:05. Patterson told the detective that he would "never, ever dream . . . of hurting [T.R.] or any other child." TRIAL EXHIBIT 15 at 18:05:23. There is much in Patterson's statements to impeach his official version.

The fact that Patterson gave two different accounts of what was on TV when T.R. lost consciousness suggests that what was on TV *did* play a role in things . . . and that the role it played required concealing. Why say that T.R. was watching *Turtle Tales* if the fact that he was *not* played no role in things? If ESPN, not *Turtle Tales,* was on, the texts reveal

Patterson as someone who would take T.R.'s pointing at the TV, wanting something other than "college football highlights," as a challenge to his "authority" – and Patterson does not "walk out" when toddlers disrespect his authority. TRANSCRIPT 1 at 98/9. Patterson's brand of authority imposes "discipline." And since Patterson is such a devotee of physical "discipline," one naturally wonders why he would hide that fact from the detective if it played absolutely no role in things.

A prosecutor has "considerable latitude in closing argument" to "discuss the evidence and inferences and deductions generated from the evidence presented." *State v. Smith,* 1999 SD 83, ¶42, 599 N.W.2d 344, 353. The record shows that the inference that "T.R. started whining" because "[h]e wanted to watch something other than the sports that were on TV" is not extrapolated from the other acts evidence; it is extrapolated from Patterson's own words. More fundamentally, it is extrapolated from the simple logic that there would be no need for Patterson to change the facts if the truth was no danger. Consequently, Patterson cannot demonstrate that the prosecution's argument injected "unfounded or prejudicial innuendo into the proceedings" as needed to warrant relief. *Smith,* 1999 SD 83 at ¶46, 599 N.W.2d at 354.

3. Medical Opinions Stated In Diagnostic Terminology Of Abusive Or Non-Accidental Head Trauma Were Proper

Nor can Patterson demonstrate impropriety in medical testimony diagnosing T.R. as suffering from "abusive" or "non-accidental" head trauma. Patterson's argument is constructed around conclusory

statements, not citations to on-point authority. A review of on-point authority reveals that testimony to the medical diagnosis of "abusive" or "non-accidental" head trauma does not usurp the jury's function of assigning guilt or impermissibly opine on the ultimate issue.

In *Weeks,* the defendant assigned error to expert testimony that the child's "injuries were caused by non-accidental trauma." *Weeks,* 369 P.3d at 714. The court ruled there was no error in this testimony because the expert "gave [no] opinion regarding whether the defendant inflicted [the child's] injuries or whether those injuries fit the legal definition of child abuse." *Weeks,* 369 P.3d at 714. The *Weeks* standard has been applied in numerous cases raising this issue . . . and with the same result.

In *Revilla v. Gibson,* 283 F.3d 1203, 1213 (10th Cir. 2002), the court ruled that testimony to a diagnosis of "non-accidental trauma" did not prejudice the defendant or opine on the validity of the defendant's version of events leading to the child's death. Again in *State v. Smallwood,* 955 P.2d 1209, 1221 (Kan. 1998), the court ruled that testimony that the child "died as a result of child abuse, either shaking or a blow to the skull," did not invade the province of the jury or impermissibly opine on the ultimate issue when the doctor did not further opine on the defendant's guilt or innocence. In *Sanders v. State,* 715 S.E.2d 124, 130 (Ga. 2011), the court ruled that testimony from doctors "giving scientific conclusions within their fields of expertise

regarding the etiology of the baby's condition based upon . . . inferences drawn from the medical evidence . . . did not interfere with the jury's duty to decide who" committed the crime.

In *State v. Gray,* 347 S.W.3d 490, 504 (Ct.App.Mo. 2011), the court ruled that a doctor's testimony that he would "absolutely consider [the child's injuries to be] consistent with abusive behavior" did not invade the province of the jury because the doctor "did not testify . . . that it was [the defendant] who caused [the child's] injuries." Finally, in *Sanchez v. State,* 142 P.3d 1134, 1145-46 (Wyo. 2006), a doctor's testimony that the child's death "occurred . . . as a result of trauma to his head and very clearly in a non-accidental manner" did not interfere with the jury's rightful role because, "while the phrase 'child abuse' has a legal meaning, it also has meaning in the medical context."

In *Holland,* this court ruled that the trial court erred in excluding the state's expert's testimony attributing the child's death to "battered child syndrome." *Holland,* 346 N.W.2d at 307. The court observed that "'[b]attered child syndrome' is a conclusion, based on extensive study by medical science, that a child found with certain types of injuries has not suffered those injuries by accidental means." *Holland,* 346 N.W.2d at 307. The court ruled that "'battered child syndrome' testimony is admissible when there is a finding that a child 'exhibits evidence of subdural hematoma" or other symptoms consistent with the diagnosis. *Holland,* 346 N.W.2d at 308. Thus, "[t]estimony concerning 'battered

child syndrome' should be admitted by a trial court when there is evidence of injuries inflicted upon the child over a span of time, when the nature of the injuries is such as to preclude accidental injury, and when the story given does not explain the injury." *Holland,* 346 N.W.2d at 308.

"Abusive head trauma," like "battered child syndrome," is a recognized diagnosis in child abuse cases in South Dakota. *Miller,* 2014 SD 49 at ¶20, 851 N.W.2d at 707 (child's death attributed to "abusive head trauma"); *State v. Fisher,* 2011 SD 74, ¶¶13, 39, 805 N.W.2d 571, 580 (child's death result of "abusive head trauma").

In view of these authorities, the trial court did not abuse its discretion in permitting the experts to testify to a diagnosis of "abusive" or "non-accidental" head trauma in this case. Abusive or non-accidental head trauma is a formal, recognized diagnosis in the medical community, no different than lung cancer or bone fracture. TRANSCRIPT 5 at 75/6, 78/3; The Center for Disease Control's International Classification of Diseases, 9th Edition, has "assign[ed] codes, diagnosis and procedural codes" for pediatric head injuries generally and "abusive head injury" in particular. TRANSCRIPT 5 at 75/12-76/18; TRIAL EXHIBIT 65, Appendix at 00014-15. Presumptive abusive head trauma and probable abusive head trauma are assigned their own codes. TRANSCRIPT 5 at 77/19.

Even Patterson's experts acknowledge that "abusive head trauma" is the established diagnosis of the triad of symptoms T.R. exhibited –

subdural bleeding, swelling and diffuse retinal hemorrhages. TRANSCRIPT 6 at 153/24, 154/12 (Auer). One of Patterson's experts even observed that *any* mechanism of injury – whether shaking or striking a child on the head – that produces the "pattern of findings in the retina including the hemorrhages" found in T.R.'s eyes is "by definition" child abuse. TRANSCRIPT 8 at 58/12 (Tawansy). Likewise, any blow to the head sufficient to produce subdural hemorrhaging is, by definition, abuse. Thus, as in *Sanchez,* the diagnoses of abusive and non-accidental head trauma were used by the doctors in this case according to their "meaning in the medical context." *Sanchez,* 142 P.3d at 1145-46.

One also finds in reviewing the record that the doctors confined their use of the diagnosis to this medical meaning. None of the doctors described Patterson as a child abuser in the legal sense or opined that he was responsible for inflicting the injuries. *Weeks,* 369 P.3d at 714; *Smallwood,* 955 P.2d at 1221; *Gray,* 347 S.W.3d at 504; TRANSCRIPT 2 at 44/18, 45/21, 46/2, 46/22 (Black), 99/18, 99/22 (Hsu), 139/21, 140/11, 141/15 (Casas-Melley), 173/24, 174/16 (Osmundson), 220/3 (Segeleon); TRANSCRIPT 4 at 106/1 (Tufty); TRANSCRIPT 5 at 74/25, 75/4 (Free)

Defense counsel had the opportunity to vigorously cross-examine the state's pediatric surgeon, Dr. Adele Casas-Melley, about the supposedly unfounded medical assumptions behind the diagnostic term

"abusive head trauma." TRANSCRIPT 2 at 155. He attacked the term as, essentially, presuming an abusive etiology simply because "the person that was with the child doesn't say something that, to you, accounts for" the injury. TRANSCRIPT 2 at 155/18. Dr. Casas-Melley explained that doctors "don't presume abuse unless there's significant clinical findings that lead [them] to believe there has been an abusive trauma." TRANSCRIPT 2 at 155/22. Arriving at a diagnosis of abusive or non-accidental head trauma entails examination of diagnostic imagery first for evidence of traumatic injury and second for a mechanism of injury that is explained or unexplained. Depending on the symptomatology, physical examination and whether the etiological explanation fits the medical evidence, an injury is diagnosed as either accidental or non-accidental. TRANSCRIPT 2 at 157/5.

Defendant adamantly denied that T.R. sustained trauma to his head by any accidental means, such as falling down a stairwell, tripping on a toy, hitting his head against a wall, running into the patio door, *etc.* TRIAL EXHIBIT 15 at 18:52:07-19:07:36, 19:13:20-19:17:15. By definition, then, any head trauma he experienced would be non-accidental. Medically, Patterson's "choking" story did not explain T.R.'s symptoms. "[W]hen the nature of the injuries is such as to preclude accidental injury, and when the story given does not explain the injury," *Holland* permits doctors to assign T.R.'s symptoms and presentation its

proper medical diagnosis – abusive or non-accidental head trauma. TRANSCRIPT 2 at 155/22, 156/1; *Holland,* 346 N.W.2d at 308.

4. Alleged Third-Party Perpetrator Evidence Was Not Improperly Curtailed

Patterson complains that he was denied the opportunity to present a "complete defense" by the partial exclusion of evidence that T.R.'s daycare provider, Marilyn Knurck, was abusive toward some of the children in her care. The trial court admitted two incidents that occurred at Knurck's day care: (1) in one, about a year after T.R. died, a child, C.L., developed a brain bleed that evening and required surgery after he squirmed out of Knurck's arms and dropped to the floor on his head; (2) about 18 months after T.R. died, a child, H.S., sustained unexplained bruising while Knurck was out of the room, which led to a conviction for the misdemeanor offense of contributing to abuse or neglect of a child. TRANSCRIPT 4 at 34/21, 35/17, 37/4-15, 45/2, 67/21.

Patterson argues that *every* allegation of abuse involving Knurck should have been admitted because the probative value of T.R. having been in her care only 40 minutes prior to going unconscious was allegedly high. Despite this "short" time frame, the unique nature of T.R.'s injury does not satisfy the physical and temporal proximity requirements of highly probative third-party perpetrator evidence.

Viable third-party perpetrator defenses depend on the existence of evidence "that demonstrat[es that] a third person was in the proximity of

the crime, and had the motive and opportunity to commit the crime." *State v. Faulks,* 2001 SD 115, ¶ 22, 633 N.W.2d 613; *State v. Garza,* 1997 SD 54, 563 N.W.2d 406; *State v. Larson,* 512 N.W.2d 732 (S.D. 1994). Evidence that "raises a reasonable doubt" that the defendant committed an offense must not be "remote and lack[ing in physical and temporal] connection with the crime." *Holmes v. South Carolina,* 126 S.Ct. 1727, 1733 (2006). Alternate perpetrator evidence "may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote." *Holmes,* 126 S.Ct. at 1733.

While a "defendant's general right to present evidence is undeniably strong," the "state's legitimate interest in reliable and efficient trials is often compelling." *State v. Luna,* 378 N.W.2d 229, 233 (S.D. 1985). Admission of third-party perpetrator evidence requires "balanc[ing] the importance of the evidence for the defendant against the state's interest in preserving orderly trials and excluding unreliable or prejudicial evidence." *Garza,* 1997 SD 54 at ¶25, 563 N.W.2d at 411. "A trial court's evidentiary ruling that limits cross-examination will be reversed only when there is a clear abuse of discretion as well as a showing of prejudice to the defendant." *State v. Bruce,* 2011 SD 14, ¶17, 796 N.W.2d 397, 403. "Prejudice results when a reasonable jury probably would have had a significantly different impression if otherwise appropriate cross-examination had been permitted." *Bruce,* 2011 SD 14

at ¶ 17, 796 N.W.2d at 403. Despite its surface plausibility, Patterson's theory that Knurck fatally injured T.R. does not meet these standards.

Consider this. If T.R. had been shot in the head at Patterson's apartment at 5:42 p.m., would Knurck receive any serious consideration as a possible third-party perpetrator? TRIAL EXHIBIT TT, Appendix at 00001. Clearly not. Medically speaking, the blows that killed T.R. were equivalent to a bullet to the brain. The instantaneous onset of debilitating symptoms in cases like T.R.'s is widely recognized and accepted.[2] For example, in *State v. Wright*, 2012 WL 1418078 (Ct.App.Ohio 5th), the court noted that a child who sustains fatal head injuries "would have had immediate onset of symptoms . . . [and] would not have wanted to eat or play, nor would he have been giggling, happy and smiling after the injury." But T.R. did not exhibit *any* symptoms in the presence of Knurck or his mother, during or after day care.

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[2] *Dant,* 258 S.W.3d at 17 (child "had a dazed look on her face and had stopped breathing" right after being shaken); *Futrell,* 471 S.W.3d 258 at 267 (child's symptoms "so severe they would immediately have rendered the child symptomatic and probably unconscious"); *People v. Ceasor,* 2007 WL 2011747 (Ct.App.Mich.)("with subdural hemorrhage and bleeding within both eyes . . . the child becomes symptomatic right away, the child does not run around asymptomatic . . . for several hours"); *In re D.L.,* 2010 WL 3025241 (Ct.App.Ca.3rd)(with skull fracture, subdural bleeding, swelling of the brain and retinal hemorrhages "the child immediately will become lethargic or unconscious"); *People v. Swart,* 860 N.E.2d 1142 (Ct.App.Ill.2nd 2006)(in "severe shaken baby cases, the child will become unconscious immediately and breathing difficulties will set in"); *State v. Johnson,* 400 N.W.2d 502, 506 (Ct.App.Wis. 1986)(shaking injury "would lead to an immediate onset of pain, followed by shock and then severe bleeding").

Indeed, T.R. enjoyed day care. He "loved" Knurck and "was always eager to give her a hug and run in and go to day care." TRANSCRIPT 1 at 60/11-23, 61/1. There was zero evidence of Knurck ever physically abusing T.R. On T.R.'s last day of consciousness, when his mother dropped him off at day care, he was, as "usual, happy to be there, [he] got out of the car and ran inside" – T.R. was not "afraid" of Knurck like he was "afraid of Joey." TRANSCRIPT 1 at 63/2, 124/8.

When T.R.'s mother came to pick him up at the end of the day, T.R. was "running around the backyard playing," acting "perfectly normal." TRANSCRIPT 1 at 63/19, 65/4; TRANSCRIPT 4 at 27/1, 39/22. As usual, T.R. "didn't want to leave." TRANSCRIPT 1 at 64/14, 65/7. He playfully tried to "fake" his mother out and "run back into the yard so [she] couldn't get him" to take him home. TRANSCRIPT 1 at 64/5-22. He tried to hide behind Knurck, and clung to her, so he could stay. TRANSCRIPT 1 at 64/5-22; TRANSCRIPT 4 at 40/1, 55/20, 70/3, 71/12. T.R.'s mother had to pry him loose from hugging Knurck to get him into the car. TRANSCRIPT 1 at 65/6; TRANSCRIPT 4 at 70/3.

On the way home, T.R. acted "normal," not sleepy or crying, sitting in his car seat in the back "talking to himself like he normally" did. TRANSCRIPT 1 at 65/15. When they arrived at Patterson's apartment, T.R. "ran around, grabbed some toys, started playing like normal." TRANSCRIPT 1 at 67/3. When T.R.'s mother left him in Patterson's care, he was "completely asymptomatic." TRANSCRIPT 4 at 27/4.

Given the extent of T.R.'s injuries, this "happy," talkative, active, playful, normal behavior would not have been possible if he had sustained his fatal injuries at daycare. With the level of trauma to T.R.'s head, the onset of symptoms would have been "essentially simultaneous." TRANSCRIPT 4 at 26/16. "[T]here would not be any lucid period in between the incident itself and the onset of symptoms, which in this case was [T.R.] going unconscious." TRANSCRIPT 4 at 26/18. This fact exonerates Knurck of any suspicion as assuredly as if T.R. had been shot in the head 40 minutes after leaving her care.

The immediacy of fatal head trauma symptomatology has been used to rule out alleged alternate perpetrators in other cases. For example, in *People v. Swart,* 860 N.E.2d 1142, 1151 (Ct.App.Ill.2nd 2006) a daycare provider tried to implicate a child's parents in her death by insinuating that the child had been "abused and neglected" before she was entrusted to her care. Swart's blame shifting proved futile, however, given that it would have been impossible for the child to act normally most of the time she was in the defendant's care (as defendant admitted) if she had sustained fatal head trauma four or more hours earlier while in her mother's care. *Swart,* 860 N.E.2d at 1151.

Likewise, in *Davis v. Missouri,* 907 S.W.2d 280, 281-83 (Ct.App.Mo. 1995), when a child had acted normally prior to being dropped off at daycare, and during most of her time in daycare, the rapid onset of symptoms that would have followed from the child's head injury

refuted any "inference that the child was injured at her own home" approximately seven hours before being entrusted to the defendant's care. And, in *Worden v. State,* 603 S.2d 581, 582 (Fla.Ct.App.Dist.2 1992), the fact that child would have exhibited "observable effects soon after the fatal blow" ruled out his mother as a suspect when child died two hours after being in the sole custody of his father.

Given the reality of the instantaneous symptomatology of fatal head trauma in infants, and T.R.'s perky, energetic behavior during and after daycare, the probative value of Patterson's proffered third party evidence was much lower than circumstances might suggest. Short as the time window may seem, it was too long under the circumstances to place Knurck in physical or temporal proximity to T.R. at the time of his injury. Nor does any evidence suggest that Knurck had motive injure T.R.

As the trial court found, the excluded allegations were factually dissimilar. MOTIONS HEARING at 34-39; RECORD at 833, Appendix A. Patterson, thus cannot demonstrate that the jury would have had a "significantly different impression" of him, Knurck or this case if further cross-examination on the allegations involving Knurck had been permitted. *Bruce,* 2011 SD 14 at ¶ 17, 796 N.W.2d at 403. Accordingly, the court did not clearly abuse its discretion in excluding further third-party perpetrator evidence. *Bruce,* 2011 SD 14 at ¶ 17, 796 N.W.2d at 403.

5. The Evidence Of Abusive Head Trauma Was Sufficient To Sustain Patterson's Conviction

When this court reviews an appeal for the sufficiency of the evidence, the "question is whether 'there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *State v. Beck,* 2010 SD 52, ¶ 7, 785 N.W.2d 288, 292. "Claims of insufficient evidence are 'viewed in the light most favorable to the verdict.'" *State v. Morgan,* 2012 SD 87, ¶ 10, 824 N.W.2d 98, 100. This court "will not resolve conflicts in the evidence, assess the credibility of witnesses, or reevaluate the weight of the evidence." *State v. Hayes,* 2014 SD 72, ¶ 39, 855 N.W.2d 668, 680. The court does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. *State v. Brende,* 2013 SD 56, ¶ 21, 835 N.W.2d 131, 140. A "guilty verdict will not be set aside if the state's evidence and all favorable inferences that can be drawn therefrom support a rational theory of guilt." *State v. Johnson,* 2009 S.D. 67, ¶ 10, 771 N.W.2d 360, 365. "Consequently, the evidence is insufficient only when no rational trier of fact could find guilt beyond a reasonable doubt." *Brende,* 2013 SD 56 at ¶ 21, 835 N.W.2d at 140.

As in *Weeks,* "this was not a close case as to whether [T.R.'s] injuries were caused by an accident or by defendant." *Weeks,* 369 P.3d at 707. All of the treating physicians attributed T.R.'s death to inflicted head trauma. The treating physicians unanimously agreed that choking would not cause T.R.'s array of symptoms. TRANSCRIPT 2 at 135/17,

212/7-21, 213/16; TRANSCRIPT 9 at 15/16, 72/22, 115/18. Even Patterson's own experts agreed that T.R. could have died from blunt force trauma to his head.

The pediatric emergency physician who first rendered treatment to T.R., Dr. Kelly Black, felt that the history of choking proffered by Patterson "did not match the findings that [she] was seeing on [T.R.'s] CT scan." TRANSCRIPT 2 at 44/4. The CT showed a thick, dense line of blood between the brain and the dural membrane covering it, possible minor swelling but no skull fractures. TRANSCRIPT 2 at 190/4-19, 193/19, 198/9, 199/13. This diagnostic imaging raised "a high suspicion for a child undergoing . . . trauma or non-accidental trauma." TRANSCRIPT 2 at 44/17. Cardiac arrest secondary to choking is not a recognized etiology for subdural hemorrhages whereas respiratory and cardiac arrest secondary to subdural hemorrhaging due to blunt force trauma is. TRANSCRIPT 2 at 72/15-20. Nor was the absence of external bruising or lesions on T.R.'s scalp unusual for a blunt force head trauma case. TRANSCRIPT 2 at 78/23, 79/11, 206/2. All of T.R.'s symptoms and injuries were "consistent with non-accidental trauma." TRANSCRIPT 2 at 45/21

Dr. Benson Hsu, another pediatric critical care physician who treated T.R., was also "concern[ed]" by what he was seeing. TRANSCRIPT 2 at 91/22, 92/25. "[A]s [he was] resuscitating this really ill child, [he was] thinking 'OK, so now I have a story of choking, and I have imaging

that's suggesting trauma. That doesn't jibe.'" TRANSCRIPT 2 at 94/9. Dr. Hsu does not "expect" brain blood in choking, but he does "expect blood in trauma." TRANSCRIPT 2 at 112/25. The "classic teaching" in Dr. Hsu's field of pediatric critical care told him that subdural hemorrhaging like T.R.'s results from "significant" blunt force trauma to the brain, not hypoxia secondary to choking, or resuscitation efforts as argued by Patterson. TRANSCRIPT 2 at 94/13, 95/1, 96/8-21, 98/13. T.R.'s severe level of non-responsiveness led Dr. Hsu to worry that choking, if any, was caused by the brain injury, not *vice versa* as Patterson had reported. TRANSCRIPT 2 at 91/22. For Dr. Hsu, it would have taken "a lot of mental gymnastics" to accept Patterson's hypothesis that T.R.'s extensive subdural hemorrhaging was secondary to coagulopathy secondary to hypoxia secondary to cardiac arrest secondary to choking. TRANSCRIPT 2 at 112/13, 113/23, 121/8.

By the time Dr. Adela Casas-Melley, a pediatric surgeon, first saw T.R., he was already on a ventilator. TRANSCRIPT 2 at 133/3. "He was completely unresponsive, had fixed and dilated pupils, and to [her] appeared to already have a significant brain injury." TRANSCRIPT 2 at 133/5. Her initial impression was that T.R. was brain dead. TRANSCRIPT 2 at 138/6. Like the other treating physicians, Dr. Casas-Melley found "blood within the outside layers of the brain that was consistent with a traumatic injury." TRANSCRIPT 2 at 134/3. Like Dr. Hsu, Dr. Casas-Melley was adamant that "[h]ypoxia does not cause

subdural bleeding." TRANSCRIPT 2 at 135/17. Rather, such bleeding is the result of a "significant injury" to that brain caused by "multiple blows" to the head or "a final blow on top of previous injuries." TRANSCRIPT 2 at 141/7. Like Dr. Black, Dr. Casas-Melley testified that in her experience in hundreds of cases in 14 years as a pediatric surgeon it is "very common" to see children "come in with absolutely no external evidence of injury whatsoever that have devastating internal injuries." TRANSCRIPT 2 at 145/2, 152/12.

But the eyes offer windows to injuries within. Dr. Greg Osmundson's examination of T.R.'s eyes revealed significant ocular damage diagnostic of head trauma. TRANSCRIPT 2 at 175/7. Dr. Osmundson found "[w]ide-spread diffuse hemorrhaging of both the pre-retinal area and the retinal area." TRIAL EXHIBITS 55/56, Appendix at 00016-17. Basically, "the retina itself ha[d] blood within it and on top of it." TRANSCRIPT 2 at 165/14. T.R.'s retinal hemorrhages extended all the way out to the ora serrata, a "very thick jelly that is attached to [retinal] blood vessels and the jelly during acceleration/deceleration type mechanism can pull on these retinal vessels causing these hemorrhages." TRANSCRIPT 2 at 173/9-21. In Dr. Osmundson's experience, the blood patterns in T.R.'s eyes are "most consistent with trauma," not intracranial pressure secondary to choking as Patterson alleged. TRANSCRIPT 2 at 174/12, 178/12, 180/23. Intracranial pressure is known to cause localized hemorrhaging around the optic

nerve in the back of the eye, not broadly diffuse retinal hemorrhaging extending out to the ora serrata. TRANSCRIPT 2 at 181/1-19.

Dr. Osmundson consulted with a colleague, Dr. Geoffrey Tufty, for a review of his examination. TRANSCRIPT 4 at 95/24. Like Dr. Osmundson, Dr. Tufty found "intraretina and preretina hemorrhages" and "hemorrhaging out to the peripheral aspect of the retina." TRANSCRIPT 4 at 96/14. Dr. Tufty also reviewed the autopsy report's findings of "hemorrhages with the optic nerve sheath itself and also four distinct subcutaneous hemorrhages on the head." TRANSCRIPT 4 at 99/20. Dr. Tufty explained that, in children, the blood vessels of the retina and optic nerves are more adherent to the structures of the eye socket than adults, and, hence, more vulnerable to tearing when impacted. TRANSCRIPT 4 at 100/8-101/7, 125/11.

According to Dr. Tufty, extensive retinal hemorrhaging like T.R.'s only results from extreme forces, like a high-speed rollover car accident. "Household accident[s]" do not generate the levels of force sufficient to pull on and tear the peripheral areas of the retina. TRANSCRIPT 4 at 102/10. Nor does choking, or coughing or gagging secondary to choking, or intracranial pressure, or CPR. TRANSCRIPT 4 at 102/16, 103/6, 103/19, 104/2, 124/8; TRANSCRIPT 9 at 67/8. Non-accidental or abusive head trauma, however, is capable of exerting "sudden, aggressive" forces sufficient to tear the blood vessels in the optic nerve

and peripheral retina. TRANSCRIPT 4 at 105/21, 116/2, 122/5, 123/15.

Dr. Joseph Segeleon, a pediatric intensive care physician, rendered care to T.R. after he was stabilized by emergency personnel. T.R. "had had a prolonged cardiac arrest and was very severely, profoundly neurologically affected." TRANSCRIPT 2 at 212/15. In addition to "disseminated intravascular coagulopathy" and respiratory failure, T.R. also presented with "diabetes insipidus," a condition associated with "catastrophic brain injury." TRANSCRIPT 2 at 220/6, 221/4. Dr. Segeleon suspected brain death. He wanted "the appropriate personnel . . . contacted and consulted that deal with the forensic investigation" because the finding of "intracranial bleeding [wa]s not consistent with a history of a choking and asphyxia or arrest." TRANSCRIPT 2 at 212/7-21, 213/16.

One person Dr. Segeleon contacted was Dr. Bonnie Bunch who chairs the pediatric neurology division at Sanford Health. Dr. Bunch performed a brain death examination. The EEG of T.R.'s brain reported "electrocerebral silence," a medical term denoting "severe absence of any brain activity." TRANSCRIPT 5 at 13/18, 15/21. According to Dr. Bunch, while choking can lead to brain death, if a person is "quickly revived" or receives CPR, "the odds are that they would not be brain dead after that." TRANSCRIPT 5 at 25/22, 37/9, 70/1, 78/21. She could not recall any case where a child had "a sizeable brain hemorrhage related to

their CPR" or a "reperfusion" injury as claimed by Patterson. TRANSCRIPT 5 at 56/6, 59/6. "Damage that is significant enough to lead to [T.R.'s] sort of outcome within a couple of days, in [Dr. Bunch's] personal experience, has mostly been traumatic." TRANSCRIPT 5 at 37/17.

Dr. Nancy Free, a pediatrician with specialization in treating child abuse cases, likewise testified that T.R.'s injuries had been "generated by blunt force trauma to the head." TRANSCRIPT 5 at 73/15. Dr. Free based this diagnosis on the pattern of subdural hematoma, extensive bilateral retinal hemorrhaging and massive cerebral edema associated with head trauma, exclusion of congenital or metabolic explanations, exclusion for infectious causes, and absence of an appropriate accidental history. TRANSCRIPT 5 at 74/12-25, 89/11, 92/9, 93/6-94/19. Dr. Free testified that she had seen many "children who choke . . . with other injuries with lack of oxygen, and they don't have subdurals" or "who ha[d] survived CPR after having no pulse and no respirations and [she didn't] see subdurals in those kids." TRANSCRIPT 5 at 96/18-97/8; TRANSCRIPT 9 at 15/16.

Dr. Donald Habbe performed the autopsy on T.R. Like the treating physicians, Dr. Habbe found subdural bleeding over each hemisphere of the T.R.'s brain. TRANSCRIPT 4 at 154/9, 156/23. In his extensive experience "[a]lmost always subdural blood is the result of trauma." TRANSCRIPT 4 at 154/14. Bio-mechanically, "blunt force to the scalp,

head, causes the brain, causes these vessels [connecting the brain to the dura] to rupture." TRANSCRIPT 4 at 163/15, 215/18. Dr. Habbe also found bleeding grossly around optic nerves and involving all layers of both retinas. TRANSCRIPT 4 at 168/12, 169/23, 170/16; TRIAL EXHIBIT 78, Appendix at 00018. The nature and extent of the bleeding in T.R.' case were diagnostic of a significant "impact" to his brain. TRANSCRIPT 4 at 152/4, 164/25, 167/3, 168/24, 202/24, 209/24, 212/4.

Dr. Habbe found "evidence of impact" in four distinct sites of hemorrhaging between the top of T.R.'s skull and the underside of his scalp. TRIAL EXHIBIT 71, Appendix at 00019. TRANSCRIPT 4 at 145/13, 147/1-25, 149/8-23, 150/14, 152/4, 164/17, 202/10-24, 209/24. Testing on the four subscalpular sites also revealed that they were "acute, recent" and each of an age consistent with being inflicted at the same time. TRANSCRIPT 4 at 148/4-23, 165/4. Any "one or all four of the hemorrhages in the subscalp w[ere] responsible for" T.R.'s "underlying severe brain injury." TRANSCRIPT 4 at 228/22, 231/18. All were consistent with blunt force trauma delivered by a fist. TRANSCRIPT 4 at 151/19, 231/1.

Dr. Habbe testified that subscalp hemorrhaging would not be caused by any physiology secondary to choking. TRANSCRIPT 4 at 152/16, 165/6-14. He ruled out shaking as an etiology for the subdural hemorrhaging because of the distinct "evidence of impact" to T.R.'s scalp.

TRANSCRIPT 4 at 164/17; TRIAL EXHIBIT 71, Appendix at 00019. Nor, in his experience, is it "uncommon" for there to be no external bruising or contusion over sites of subscalp hemorrhaging. TRANSCRIPT 4 at 160/14. Indeed, because youthful skin is so elastic and skulls so pliable, it is practically "the norm" with "children that die of . . . a homicidal type death [to] demonstrate no evidence of injury externally, nothing. But then when you do the internal examination you will see . . . hemorrhage in the subscalp tissues . . . . [T]he idea that you have to see external injury for it to be homicide or something out of the normal, that's not true." TRANSCRIPT 4 at 160/14-161/4, 215/8, 227/19, 228/6; TRANSCRIPT 9 at 88/19, 95/23, 96/5.

Due to the nature and extent of T.R.'s injuries, Dr. Habbe stated that "symptoms" – lethargy, vomiting, respiratory arrest – "would be immediate." TRANSCRIPT 4 at 172/19. Dr. Habbe's autopsy report listed the cause of death as "blunt force trauma to the head." TRANSCRIPT 4 at 173/18. Though not the case coroner, Dr. Habbe described the manner of death as "homicide." TRANSCRIPT 4 at 234/11.

Patterson's medical experts admitted that T.R.'s injuries were consistent with blunt force trauma to the head. TRANSCRIPT 6 at 31/14, 70/8, 75/5 (Squier), 129/18, 140/25, 141/3 (Auer); TRANSCRIPT 8 at 45/3, 52/13. (Tawansy). Patterson's experts essentially argued only (1) that they believed fatal blunt force trauma to the head should manifest in external bruising or skull fracture and (2) as

bleeding within the brain itself, and (3) that the classic triad of abusive head trauma – subdural hemorrhage, brain swelling, diffuse retinal hemorrhage – is not *necessarily* diagnostic of blunt force trauma. TRANSCRIPT 6 at 41/5, 60/13, 106/14. These are "poorly" supported "minority position[s]" that have not "gained any traction in the medical community." TRANSCRIPT 9 at 62/24, 63/20.

Despite their fealty to these "minority position[s]," Patterson's experts admitted on cross-examination that blunt force trauma can cause cardiac arrest, that fatal abusive head trauma would not necessarily manifest in external bruising or as observable injury to the skull or brain, that bruising from blows to the head might not develop right away, that the diffuse retinal hemorrhaging found in T.R. is medically recognized as specific to abusive head trauma, and that they could not exclude blunt force trauma as the cause of T.R.'s death. TRANSCRIPT 6 at 68/13-23, 70/8-18, 75/5, 82/20 (Squier), 132/9, 144/16 (Auer), 222/7 (Ophoven); TRANSCRIPT 8 at 44/16, 45/3, 52/13, 53/14, 60/8, 66-72, 77/4, 78/4 (Tawansy). Patterson's experts effectively dispensed with any need for the jury to decide between dueling experts by agreeing that T.R. could have died of blunt force trauma to his head.

In addition to unanimous medical testimony that T.R. died or could have died of blunt force head trauma, Patterson's guarded,

inconsistent reporting cast suspicion on the circumstances of T.R.'s death and his reported etiology of choking:

- Patterson first reported that he went to the bathroom to urinate "real quick" but later said he went to the bathroom for approximately five minutes to defecate. TRANSCRIPT 1 at 201/8; TRANSCRIPT 3 at 67/13-20; TRANSCRIPT 4 at 15/13, 21/5. This was a significant discrepancy because it takes two minutes to develop unconsciousness from choking and an additional two minutes of oxygen deprivation before the onset of irreversible brain injury. TRANSCRIPT 6 at 48/11, 184/15, 195/22; TRANSCRIPT 9 at 77/13. Thus, the urination scenario would not explain T.R.'s death because, if T.R. had been choking and Patterson had removed the obstruction "real quick" as he said, T.R. either should never have lost consciousness or, if he did, should have regained consciousness once his airway was cleared. TRANSCRIPT 3 at 37/14; TRANSCRIPT 5 at 25/22. Patterson therefore had to invent the defecation scenario to explain how choking, as opposed to head trauma, caused unconsciousness for a sufficient amount of time to produce brain death before he "scooped" the candy from T.R.'s mouth.
- Patterson's report that T.R. had been acting "lethargic" before he lost consciousness was inconsistent with his mother's description of him as "energetic" and playful when she left him. TRANSCRIPT

1 at 67/2; TRANSCRIPT 3 at 67/24, 68/20, 95/23, 96/8, 97/16. Choking does not explain why T.R. became lethargic after his mother left, but the abrupt onset of symptoms of blunt force trauma certainly does.

- As discussed above, Patterson's reporting of what was on TV was inconsistent. Patterson first reported that T.R. was watching a cartoon he liked rather than a sports broadcast that Patterson liked. This suggests that Patterson was trying to conceal that T.R. became "cranky" over what was on TV after his mother left and, to Patterson, in need of "discipline." TRANSCRIPT 1 at 185/21.
- Patterson told the investigating detective that his only method of discipline was "time out." TRANSCRIPT 3 at 69/13, 96/8. Why would Patterson tell this whopper of a lie if not to deflect suspicion that he had hit T.R. on the head and distance himself from any telltale bruising that might be found?

In view of the medical evidence and Patterson's conflicting accounts of T.R.'s last moments, the record here is sufficient to sustain a finding of Patterson's guilt beyond a reasonable doubt. *Beck,* 2010 SD 52 at ¶ 7, 785 N.W.2d at 292. The medical evidence shows that T.R. was hit in the head four times. T.R.'s injuries – subdural hemorrhaging, diffuse retinal bleeding and swelling of the brain – are diagnostic of blunt force trauma, not choking. The severity of his head injuries were such that unconsciousness and symptoms would have been instantaneous.

Patterson was alone with T.R. when he lost consciousness. Patterson said T.R. was acting "lethargic" and "cranky." TRANSCRIPT 3 at 67/24, 96/8, 97/16. Patterson's *modus operandi* was to "flick the shit outta" babies for being "cranky," "throwin fits," crying, whining, "acting up" or – God forbid – "actin like a baby." The inference that Patterson hit T.R. to "discipline" him for becoming "cranky" after being left alone with him was fair to draw from the facts presented. *Johnson,* 2009 S.D. 67 at ¶ 10, 771 N.W.2d at 365.

Having drawn this inference, a rational jury could decide that hitting a baby in the head is an imminently dangerous act which exhibits depravity and disregard for tender life . . . and that any resulting death was second-degree murder. *Johnson,* 2009 S.D. 67 at ¶ 10, 771 N.W.2d at 365. Patterson is thus far from the mark of meeting his burden of showing that "no rational trier of fact could find [him] guilt[y] beyond a reasonable doubt." *Brende,* 2013 SD 56 at ¶ 21, 835 N.W.2d at 140.

CONCLUSION

"[M]e and my ways of discipline . . . ain't changin." TRANSCRIPT 1 at 95/5; TRIAL EXHIBIT 2 EXCERPT, Appendix at 00022/16:24:42. On the morning T.R. lost consciousness, Patterson woke up at 7:00 a.m. "bitter" with the world. So bitter that at 11:49 a.m., nearly five hours later, he was still angry that T.R. had "start[ed] whining again at 7 a.m.? Really? First thing . . . whining, crying, actin like a baby." TRANSCRIPT 1 at 128/5; TRIAL EXHIBIT 2 EXCERPT, Appendix at 00021/11:46:16,

21/11:49:42. Twice that week Patterson had said he was "tired" of T.R. "whining the minute he comes home." TRANSCRIPT 1 at 115/16, 117/2. It was no stretch for the jury to infer from these and other facts that Patterson "disciplined" T.R. after his mother left for the gym for his "whining" and "crying" that morning, for being "whin[y] and agitated" after being left alone with Patterson, or being "cranky" over having to watch "college football highlights" instead of *Turtle Tales*.

T.R.'s brain and subcutaneous scalp tissue did not just spontaneously start bleeding. Nor did he choke to death on candy that was in his mouth, not lodged over his trachea. On the basis of these facts and the medical evidence, this court can comfortably affirm Patterson's conviction for the murder of young T.R.

Dated this 7h day of March 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) and the court's February 14, 2017, order using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 13,984 words.

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

Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of March 2017 a true and correct copy of the foregoing response brief was served on Ellery Grey via lawyerellerygrey@gmail.com.

Paul S. Swedlund
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 27736

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JOSEPH PATTERSON,
Defendant and Appellant.

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

THE HONORABLE BRADLEY G. ZELL

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NOTICE OF APPEAL WAS FILED January 13, 2016

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IN THE SUPREME COURT
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APPEAL # 27736

STATE OF SOUTH DAKOTA,

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JOSEPH PATTERSON,

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PRELIMINARY STATEMENT

Mr. Patterson adopts the preliminary statement from his Appellant's Brief. Additionally, the State's Appellee's Brief shall be referred to as "SB" followed by the specific page number(s).

JURISDICTIONAL STATEMENT

Mr. Patterson reasserts the Jurisdictional Statement contained in his original Appellant's Brief and further, Mr. Patterson does not contest the Jurisdictional Statement contained within the State's Appellee's Brief.

STATEMENT OF THE LEGAL ISSUES

1. Did the trial court permit prejudicial error by allowing the State to present other acts evidence to the jury?

   The trial court permitted the other acts evidence to be presented to the jury over the defense's objections. JT Vol. III pgs. 4-26.

   State v. Moeller, 1996 S.D. 60, 548 N.W.2d 465.
   People v. Casias, 312 P.3d 208, 2012 COA 117.
   State v. Wright, 1999 SD 50, 593 N.W.2d 792.

2. Did the trial court err when it permitted the State to argue a factual theory of guilt and motive not supported in the record by any evidence?

The trial court overruled Mr. Patterson's objection to the State's closing argument related to a factual assertion concerning motive not supported in the record. JT Vol. X, 12, 15.

United States v. Beckman, 222 F.3d 512 (8th Cir.2000).
State v. Janis, 2016 SD 43, 880 N.W.2d 76.

3. Did the trial court err by permitting the State to elicit expert opinions that were impermissibly intrusive?

The trial court denied Mr. Patterson's objection to the expert opinions. SR 214, 373.

State v. Guthrie, 2001 SD 61, 627 N.W.2d 401.
State v. Barber, 1996 SD 96, 552 N.W.2d 817.

4. Did the trial court err by refusing to allow Mr. Patterson to present additional instances of alleged child abuse committed by a potential third party perpetrator?

The trial court denied Mr. Patterson the opportunity to present several instances of alleged child abuse conducted by a potential third party perpetrator.

State v. Iron Necklace, 430 N.W.2d 66, (S.D.1988).
State v. Packed, 2007 SD 75, 736 N.W.2d 851.

5. Did the trial court err by failing to grant Mr. Patterson's motion for judgment of acquittal?

The trial court denied Mr. Patterson's motion for judgment of acquittal. JT V 107-110.

State v. Thomason, 2014 SD 18, 845 N.W.2d 6402.
State v. Edmunds, 308 Wis.2d 374 (2008).
Ex Parte Henderson, 384 S.W.3d 833, (Tex.Crim.App. 2012).

6. Does this Court have jurisdiction to consider the issues presented in the State's Notice of Review?

The trial court did not review or decide this issue below given the appellate nature of the issue.

State v. Reath, 2003 SD 144, 673 N.W.2d 294.

ARGUMENTS

1. Did the trial court permit prejudicial error by allowing the State to present other acts evidence to the jury?

At trial, the State's theory of the case was that Mr. Patterson "snapped" and hit T.R. on the head because he was whining. JT Vol. X 12, 15. The State argued that Mr. Patterson's philosophy of how children should be disciplined explained his "motive" to commit murder. Id. 31. The State specifically referenced and used the other acts evidence, where Mr. Patterson spanked and slapped other children, to try and provide Mr. Patterson with a "motive" to have murdered T.R. Id. 32. During closing the State argued, "Me and my ways of disciplining ain't changing." Later the State argued, "The Defendant believes he needs to physically punish kids to get them to behave. His discipline of physical punishment explains his motive. Consider how [Mr. Patterson] treated his [ex-girlfriend's] kids…" Id. 31.

The State's claims about past discipline simply amounted to a propensity argument asking the jury to infer that because Mr. Patterson had slapped and spanked children in the past he must have also hit and killed T.R. This Court has instructed on when other acts evidence may be properly admitted to establish motive so as to avoid other acts evidence becoming improper character evidence. In *State v. Lassiter*, 2005 SD 8, 692 N.W.2d 177, this Court wrote: "[t]here must be some relationship between all the victims. Otherwise, the evidence would show only the defendant's general violent nature...." *Id.* ¶ 22 *(internal citations omitted).* In *Lassiter*, this Court found error when a criminal defendant's prior assault conviction against a former girlfriend was admitted at his trial for assault on an unrelated man. Even though the other acts evidence involved an

assault, this Court still found prejudicial error given the remoteness and lack of connection between the other acts evidence and the charged crime. This Court wrote, "Allowing evidence about the prior assault on [the former girlfriend] only tended to prove that because defendant had done it before, he must have done it again." *Id.* ¶ 23, 178-9.

Mr. Patterson respectfully maintains the same result should be found here. No connection exists between the children who were spanked and slapped and the alleged victim in this case. The other acts evidence was not only remote, it was completely unrelated to the events that caused T.R.'s death. The other acts evidence only tended to prove that because Mr. Patterson had spanked children in the past, he must be the kind of person who would hit a child four times on the head and kill him.

In response to this argument, the State submits "Courts…have widely agreed that prior incidents of abuse or excess 'discipline' are highly probative of motive, intent and absence of accident or mistake in infant 'choking' fatalities when the victim presents with contraindicative symptoms of inflicted trauma." SB at 15. The State cites *State v. Holland*, 346 N.W.2d 302 (S.D. 1984) as well as other cases in support of its argument. Id. 15.

However, *State v. Holland*, as well as the other cases cited by the State are distinguishable on legal grounds. *State v. Holland* never addressed the admissibility of other acts evidence to establish motive. *State v. Holland* dealt with the admissibly of other acts evidence for the purposes of establishing intent and absence of mistake or accident. Given that *State v. Holland* did not address motive, this case has little precedential value in this context. Additionally, *Holland* was decided 1984, well before

this Court decided *Lassiter* and provided detailed analysis on the admissibility of other acts evidence for the purpose of establishing motive.

Given that the manner in which the State utilized the other acts evidence in this case was virtually identical to the way the State argued the other acts evidence in *Lassiter*, this Court should reach the same result as it did in *Lassiter* and find prejudicial error. The State should not be permitted to argue that because Mr. Patterson has as "warped concept of 'discipline'"[1] he has a motive to hit T.R. for whiny behavior.

Although the State did not argue in its summation that Mr. Patterson's past conduct with other children established that T.R. could not have accidently choked on a fruit snack, the State takes this position on appeal and cites *State v. Holland* in support. However, *State v. Holland* is factually distinguishable. In *Holland*, the defendant was charged with second-degree murder of a twenty-three month old child. The defendant, who was watching the child, claimed that the child choked on a piece of rubber, which apparently was never found. In order to explain away bruises that were found on the child's face, back, and chest, the defendant claimed that he must have bumped the child's head on the bathroom door while attempting to render assistance.

Based on these facts, this Court found that the State was permitted to submit other acts evidence, including: 1) the defendant having previously grabbed a two-month- old baby by the throat, 2) the defendant having intentionally choked a child and then hitting the child on the back, causing a bruise, and 3) the defendant having hit a one-week-old baby with his fists. This Court allowed these other acts to prove absence of mistake or accident, opportunity, and identity of the defendant as perpetrator of the charged criminal

[1] SB at 6.

act. The other acts evidence in *Holland* logically tended to refute the defendant's claim that he accidently injured and bruised the child on the bathroom door while providing assistance. Importantly, the other acts of choking and striking children were similar to the charged conduct and directly challenged the defendant's claim that he had accidently bruised the child on the bathroom door.

By contrast, Mr. Patterson has never claimed that he accidently did anything to T.R. Unlike the child in *Holland*, T.R. did not have any external bruising. Mr. Patterson does not have a history of choking children and unlike in *Holland*, the cause of the choking, the fruit snake, was found. Mr. Patterson's having ripped K.K. out of the car and threating to call the police and having spanked M.K. after misbehaving in church does not having anything to do with disproving chocking. The only way the other acts evidence could be used by the jury in this case was to assume that because Mr. Patterson has a "warped concept of 'discipline'" he was a person of bad character who would hit a child on the head and cause death.

On appeal, the State argues that when Mr. Patterson claimed that T.R. choked, and denied that he hit T.R., he opened the door to "evidence refuting his claim of accident and demonstrating his *modus operandi* of 'disciplining' children. The Court should reject this argument for the simple reason that the trial court never permitted the other acts evidence to be admitted for the purposes of establishing *modus operandi*. Additionally, the jury was instructed that the other acts evidence was admitted to establish motive and not *modus operandi*. Therefore, even if the Court were to accept that modus operandi was an appropriate reason to admit the other acts evidence, the jury would have been improperly instructed. *See State v. Jones*, 2011 S.D. 60, ¶ 5 n. 1, 804

N.W.2d 409, 411 n. 1("[A] court has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error").

The State's *modus operandi* line of reasoning continues in the remaining cases it cites in its brief. These cases are also factually and legally distinguishable. For example, in *Dant v. Kentuky*, 258 S.W.3d 12 (KY 2008) a murder trial involving a child victim, the court permitted the submission of the other acts evidence where the defendant had hit a child in the face multiple times leaving fingerprints and bruising. The *Dant* court, found the other acts admissible as "proving [the defendant's] pattern of conduct or his *modus operandi*." In Mr. Patterson's case, the trial court never permitted the other acts evidence under a theory of establishing *modus operandi*.

The *Dant* court also found the other acts evidence relevant to refute "absence of mistake or accident." However, just as in *Holland supra*, the facts are distinguishable from Mr. Patterson's case. In *Dant*, the defendant claimed he shook the child to provide assistance. Apparently while at the hospital the defendant was confronted by the mother of the child who said "that she would still have her baby if it were not for him and that this was all his fault…" Id. 15. Again, in Mr. Patterson's case, he never claimed that he accidentally did anything to T.R.

During closing the State argued, "Me and my ways of disciplining ain't changing." Later the State argued, "His discipline of physical punishment explains his motive. Consider how [Mr. Patterson] treated his [ex-girlfriend's] kids…" JT Vol. X 31. The State's argument is a call for the jury to believe that Mr. Patterson hit T.R. in the head based upon his past conduct of spanking and slapping other children. The State should not have been able to transform Mr. Patterson from a man who could have

committed the crime into the type of man who would have committed the crime based upon a propensity to hit children.

2. Did the trial court err when it permitted the State to argue a factual theory of guilt and motive not supported in the record by any evidence?

The State's theory of the case was that Mr. Patterson "snapped" and hit T.R., thereby causing his death. The State submitted other acts evidence to the jury to demonstrate that Mr. Patterson had a temper and history of hitting children when they whined. However, when T.R.'s mom left him with Mr. Patterson, everything was fine. JT Vol. I 185. T.R. was sitting on the couch watching TV and eating fruit snacks. Id. T.R.'s mom and Mr. Patterson communicated by text message and discussed having sex later that day. Id. 147-148. Moments later, Mr. Patterson called T.R's mom in a panic. When the first responders arrived they noticed that the home was clean and orderly. Id. 199 Nothing was out of the ordinary to indicate that T.R. had broken anything or made a mess to cause Mr. Patterson to have "snapped."

The State claimed that right after T.R.'s mom left the apartment, T.R. must have started whining about what was on television. The State's theory then goes on to claim that based upon Mr. Patterson's past conduct with children, that he has a short temper and does not like it when children whine. Therefore, when T.R. started whining, Mr. Patterson must have "snapped" and hit T.R. on the head.

The fatal flaw with the State's reasoning is that there is no evidence to support any of it. According to T.R.'s mother, T.R. was eating fruit snacks and "not whining" when she left for the gym. Id. 185. Only Mr. Patterson knows what T.R. was or was not doing shortly before T.R. died, and starting with his frantic 911 call, Mr. Patterson has consistently and adamantly claimed that T.R. choked on a fruit snack. The only way to

arrive at the State's scenario, that T.R. was whining, is to engage in conjecture based on Mr. Patterson's past discipline of other children. This use of the other acts evidence is improper.

On appeal, the State now claims that its theory that T.R. was whining is based upon inconsistencies in Mr. Patterson's statements to law enforcement, and not on the other acts evidence. SB 31-32. Mr. Patterson's response is two-fold. First, this is not how the State presented its argument during trial. At trial, the State clearly referenced the other acts to arrive at its factual scenario.

> MS. SHATTUCK: 'Me and my ways of disciplining ain't changing' Those are the very words the defendant sent to Ashley Doohen, the mother of T.R., on September 9, 2013, one month before T.R. was fatally injured and died. The defendant wasn't willing to change his ways of discipline… when T.R. came to his house…the defendant got fed up with him. When T.R. pointed at the TV and wanted to change the channel, the defendant snapped…

JT Vol. X 12.

> MS. SHATTUCK: Why would anyone hit a child? Well, the defendant's motive correlates directly with this philosophy of rearing children, how they should be disciplined. The defendant believes he needs to physically punish kids to get them to behave. His discipline of physical punishment explains his motive.
>
> Consider how the defendant treated his ex-girlfriend Jasmin's kids who were three at the time the [other acts] incidents occurred.

Id. 31.

Secondly, as to the purported inconsistencies in Mr. Patterson's statements to law enforcement, the State is missing the point. The State cites to Mr. Patterson's statement where he told law enforcement that he was "watching ESPN on television" and then "also discussed [with law enforcement] the *Turtle Tales* video he put in for T.R. SB at 31-32. Whatever was playing on the television aside, no evidence is in the record to support

either the State's claim that "T.R. pointed at the TV and wanted to change the channel, [and] the defendant snapped," or the claim that "The defendant snapped when T.R. started whining." JT Vol. X 12, 15.

The law requires that the State prove its case beyond a reasonable doubt through evidence, not speculation or guesswork. *In re Winship*, 397 U.S. 358, 362 (1970). If this Court finds that the State's arguments are not supported by evidence, it should reverse for retrial. *See United States v. Beckman* 222 F.3d 512 (8th Cir.2000).

3. Did the trial court err by permitting the State to elicit expert opinions that were impermissibly intrusive?

During the trial, the State called a number of medical expert witnesses to the stand who testified that the cause of T.R.'s death was due to "abusive head trauma" and "non-accidental trauma." These opinions contradicted the defense theory that T.R. choked and passed on the credibility of the theory of the defense. Mr. Patterson respectfully submits that these opinions improperly invaded the province of the jury, were conclusory in nature, and essentially just told the jury what conclusion to reach. In support of his argument, Mr. Patterson previously cited *State v. Buchholtz*, 2013 SD 96, 841 N.W.2d 449 where this Court found that the expert diagnosis of child sexual abuse was inadmissible and prejudicial given that it was an improper assessment of the ultimate credibility of the State's complaining witness.

In response to this argument, the State cites *State v. Holland* for the proposition that "battered child syndrome" is properly admissible. The State also notes in its

Appellant's Brief that "abusive head trauma" is a recognized diagnosis in child abuse cases in South Dakota[2].

Since this Court issued its decision in *Holland* in 1984, this Court has reviewed the principles involved in the area of expert opinions that render an ultimate conclusion on the case. In *State v. Buchholtz*, 2013 SD 96, 841 N.W.2d 449, this Court recognized that expert testimony holds an "aura of reliability and trustworthiness [that] surround[s] scientific evidence." This Court went on to find that the expert diagnosis of child sexual abuse was prejudicial given that it was an improper assessment of ultimate credibility by the expert witness.

Similar to *Buchholtz*, in Mr. Patterson's case, the State's expert witnesses were able to tell the jury how to decide the case simply by the diagnosis. The very terms "abusive" and "non-accidental" are themselves conclusory and do not assist the trier of fact in any meaningful way. On the contrary, those terms describe a perpetrator's mental state, which cannot be known by the injuries alone. By way of contrasting example, the State called Dr. Janice Dubois, a pediatric radiologist with Sanford Hospital, who testified that after reviewing T.R.'s CT scans, she was concerned about "some form of trauma" based upon what appeared to be an intracranial hemorrhage. JT Vol. II 199-200. Dr. Dubois was able to provide the jury with information and background facts without inserting conclusory language into her opinions such as "non-accidental" and "abusive." Had the State's experts been prevented from opining about "non-accidental" and

[2] The State also notes that "abusive head trauma" is an established medical diagnosis. SB at 36. However, simply because a term has been established in the medical community does not necessarily mean that the term then becomes automatically admissible in a court of law. *See Buchholtz*.

"abusive" the State would still have had all of the information and facts it needed to make its arguments to the jury.

In Mr. Patterson's case, even in the absence of any eyewitnesses, without obvious external physical evidence, despite the evidence presented by the medical experts called by the defense, and in spite of the defendant's adamant and consistent denial, through the use of the diagnosis of "non-accidental head trauma" or "abusive head trauma" the State's expert opinions put to rest, with an air of medical certainty, any question about whether T.R. had choked or had been hit by Mr. Patterson. Clearly, the expert opinions here were just as prejudicial as the opinion in *Buchholtz*.

4. Did the trial court err by refusing to allow Mr. Patterson to present additional instances of alleged child abuse committed by a potential third party perpetrator?

The trial court prevented Mr. Patterson from presenting several instances where T.R.'s daycare provider, Knurck, injured children while in her care. The excluded incidents are contained at Appendix A at SR 833. For example, the defense was not able to present evidence that, W.C.W. claimed during an interview at Child's Voice, that Knurck hit him on the back and stomach and also grabbed him by the arm and swung him around. The defense was also not able to present evidence that A.L.C. claimed that Knurck would throw him down and pin him with her arms or foot and that Knurck later admitted that this type of incident occurred twice. Additionally, the defense was not able to present evidence that L.C. claimed that Knurck threw him down and stomped on his "tummy and hand" with her foot and that it hurt and he couldn't get up and that he cried.

The exclusion of this evidence prevented the defense from presenting the complete picture of the injuries that children sustained at Knurck's daycare. Importantly,

T.R. was being watched at Knurck's daycare shortly before his death. Based upon the testimony of T.R.'s mother, he was picked up only minutes before she dropped him off with Mr. Patterson at the apartment. This means that T.R. was under Knurck's supervision shortly before he was found unresponsive. The jury should have been informed of the other instances of conduct by Knurck when deciding not only if T.R. died as a result of head trauma, but also if a reasonable doubt existed about who caused the head trauma. When a defendant's theory "is supported by law and ... has some foundation in the evidence, however, tenuous[,]" the defendant has a right to present it. *United States v. Grimes*, 413 F.2d 1376, 1378 (7thCir.1969) (internal citations omitted).

In response, the State argues that the excluded instances were not relevant given that T.R.'s mother testified that he was happy, talkative, and otherwise appeared normal while being picked up from daycare. SB at 43. The State goes on to argue that Knurck can be excluded "of any suspicion as assuredly as if T.R. had been shot in the head 40 minutes after leaving her care." The State bases this assertion on the testimony of the State's own expert witness who opined "[T]here would not be any lucid period in between the incident itself and the onset of symptoms, which in this case was [T.R.] going unconscious." Id.

The flaw with the State's line of reasoning is that it assumes all of the facts that its witnesses testified to are binding upon the jury. A defendant cannot be deprived of his right to present a complete defense simply because the State submits a version of the facts where the defendant is guilty. For example, a defense alibi witness cannot be excluded from testifying simply because the State's witnesses place the defendant at the scene of the crime. The jury determines these types of facts. The jury determines

whether or not T.R. was in fact happy and talkative as his mother picked him up from daycare or whether or not the expert testimony provided by the State was reasonable. At least one court has cast doubt on the proposition that children always become symptomatic after being struck in the head. *See In re Fero*, 192 Wash.App. 138, 367 P.3d 588 (2016) (new trial granted where new expert testimony contested claims of prosecution experts that children suffering from abusive head trauma become unconscious almost immediately).

Knurck had an extensive history of injuring children at her daycare. While the trial court permitted several of these incidents, the trial court also excluded a significant number of the proffered events. Had the jury heard about the excluded instances, they would have been in a better position to accurately determine if reasonable doubt existed or not. Knurck's violent history with children logically increases the probability that she caused the traumatic head injury if, in fact, one existed. The exclusion of the other proffered acts undermines the confidence this Court should have in the verdict.

5. Did the trial court err by failing to grant Mr. Patterson's judgment of acquittal?

Mr. Patterson stands on the legal authority provided in his Appellant's brief in support of this argument. The State's theory of the case rested on the opinions of the State's experts that T.R. died as a result of abusive head trauma. However, the validity of the "triad" associated with shaken baby syndrome, or what is now called abusive head trauma, has been called into question by several appellate courts. *See State v. Edmunds,* 308 Wis.2d 374, 746 N.W.2d 590 (2008) (conviction reversed on habeas review based upon shift in mainstream medical opinion regarding "shaken baby syndrome"), *Commenwealth v. Millien*, 474 Mass. 417, 418, 50 N.E.3d 808 (recognizing the medical

controversy as to how often the triad of symptoms of abusive head trauma are caused by accidental short falls or other medical causes), *Ex Parte Henderson*, 384 S.W.3d 833, (Tex.Crim.App. 2012) (conviction reversed on habeas review based upon shift in new developments in the science of biomechanics and the causes of injury in children), *People v. Bailey*, 999 N.Y.S.2d 7132014 N.Y. Slip Op. 24418 (conviction reversed based upon medical advances where conviction was based on injuries consistent with shaken baby syndrome), and *In re Fero*, 192 Wash.App. 138, 367 P.3d 588 (2016) (similar).

The State used the diagnosis of abusive head trauma to establish that Mr. Patterson was the actual perpetrator who recklessly struck T.R. Given the lack of any eyewitnesses to the alleged crime, the testimony of the defense expert witnesses countering the theory of abusive head trauma, and the growing debate about the medical soundness of the theory of abusive head trauma itself, the trial court should have granted the motion for judgment of acquittal. Based upon the entire record, no reasonable jury could have found beyond a reasonable doubt that T.R.'s death was not the result of choking and that his death could have only been caused by Mr. Patterson striking him in the head.

6. This Court does not have jurisdiction to consider the issues presented in the State's cross-appeal.

The State did not present argument or authority in support of its cross-appeal within its Appellee's Brief. Therefore, Mr. Patterson assumes that the State intends to waive this issue.

CONCLUSION

For the reasons stated above, Mr. Patterson respectfully requests that this Court enter an order reversing and remanding his convictions and further enter an order granting a new trial.

REQUEST FOR ORAL ARGUMENT

Mr. Patterson respectfully requests oral argument on all issues.

Dated this 27th day of March, 2017.

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