IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
vs. FILE NO: 26885

ALFREDO VARGAS,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE JANINE M. KERN, Circuit Court Judge

APPELLANT'S BRIEF

Jamy Patterson
Office of the Public Defender
for Pennington County
Pennington County Courthouse
Rapid City, South Dakota 57701
Attorney for Appellant

Mr. Marty J. Jackley
Attorney General
1302 E. Hwy 14 Suite 1
Pierre, South Dakota 57501

and

Mr. Mark A. Vargo
Pennington County State's Attorney
300 Kansas City Street
Rapid City, SD 57701

Notice of Appeal was filed on November 20, 2013.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES CITED: PAGES:

STATUTES CITED:

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. FILE NO. 26885

ALFREDO VARGAS,
Defendant and Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Alfredo Vargas, will be referred to as "Vargas." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." References to documents in the record herein will be designated as "SR" followed by the appropriate page number. References to the transcript of a motion hearing will be designated as "MH," followed by the date of the motion hearing, and then followed by the appropriate page number. References to the transcript of a motion hearing will be designated as "EV," followed by the date of the motion hearing, and then followed by the appropriate page number. References to the transcript of the Bond hearing of November 9, 2012 will be designated as "BH" followed by the appropriate page number.

References to the seven volumes of the Jury Trial transcripts will be designated as "JT," followed by the volume number, and then followed by the appropriate page number (i.e., volume two of three will be referenced as "JT2," and followed by the appropriate page number). References to Appendix will be designated as "APPX."

JURISDICTIONAL STATEMENT

Vargas appeals from a final judgment of conviction for Attempted Fetal Homicide. The judgment was entered on November 11, 2013 before the Honorable Janine Kern, Seventh Judicial Circuit Court Judge, Rapid City, Pennington County, South Dakota and filed on November 13, 2013. SR 304. Appeal is by right pursuant to SDCL § 23A-32-2. Notice of appeal was filed on November 20, 2013. SR 309.

STATEMENT OF LEGAL ISSUES

II. WHETHER TRIAL COURT VIOLATED THE SPOUSAL PRIVILEGE AND VARGAS'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN IT ALLOWED THE STATE TO PLAY THE SECRETLY RECORDED PHONE CALL BY THE GOVERNMENT BETWEEN VARGAS AND HIS WIFE?

Trial Court violated Vargas's Sixth Amendment Right to Confrontation when it allowed the State to play the secretly recorded phone call by the government between Vargas and his wife.

Crawford v. Washington, 541 U.S. 36 (2004).
State v. Johnson, 2009 S.D. 67, 771 N.W.2d 360.
SDCL § 19-13-13.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE 404(B) EVIDENCE IN THIS CASE?

Trial Court abused its discretion in permitting the 404(b) evidence in this case.
State v. Wright, 1999 S.D. 50, 593 N.W.2d 792.
SDCL § 19-12-5.
SDCL § 19-12-3.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETIONI N ADMISSION OF THE STATE'S EXPERT WITNESSES?

Trial Court abused its discretion when it permitted the State's experts to testify.
State v. Huber, 2010 S.D. 63, 789 N.W.2d 283.
SDCL § 19-15-2.
SDCL § 19-12-3.

IV. WHETHER THERE WAS SUFFICIENT EVIDENCE PRESENTED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF ATTEMPTED FETAL HOMICIDE?

There was insufficient evidence presented to prove beyond a reasonable doubt the elements of Attempted Fetal Homicide.
Jackson v. Virginia, 443 U.S. 307 (1979).
State v. Jucht, 2012 S.D. 39, 66, 821 N.W.2d 629.
SDCL § 22-16-1.1(1).

STATEMENT OF CASE

Vargas was re-charged[1] by indictment with alternative counts of

[1] The case before this Court was a re-filing of criminal file 11-1868 that had been dismissed by the State on August 9, 2012 "for further investigation." APPX—Defendant's December 10 Letter brief, Defendant's Ex. A. The State's dismissal occurred after the trial court in the previous file had ruled against the State on several material issues, including the State's 404(b) evidence, in a final judgment dated July 11, 2012, and filed with the Clerk of Court the following day. APPX—Defendant's December 10 Letter brief, Defendant's Ex. D. No new evidence was presented to the Grand Jury in the file before this Court.

Attempted Fetal Homicide, SDCL 22-16-1.1(1) in Count One, and, Procurement of Abortion SDCL 22-15-5, in Count Two. The State dismissed Count Two on February 4, 2013. The Honorable Janine Kern, Circuit Court Judge, presided.

On March 27 2013, Trial Court held an evidentiary hearing on State's Notices of Proposed Experts, and on State's 404(b) Notice, which Vargas opposed. On June 10, 2013, Trial Court denied Defendant's opposition to State's proposed Experts and State's 404(b) Evidence.

On August 16, 2013, Trial Court held an evidentiary hearing on Defendant's Motion to Suppress based on a chain-of-custody challenge, which Trial Court denied at the conclusion of the hearing.

On September 10, 2013, State filed Notice of Intent to Use Specified Evidence (Recorded Telephone Call) under an exception listed in SDCL § 19-13-15 to the spousal privilege. On September 13, 2013, Trial Court ruled the spousal privilege did not bar admission to the recorded phone call between Wife and Vargas.

A jury trial was held September 18, 2013, through September 20, 2013. Vargas moved for a judgment of acquittal after close of State's case. On September 20, 2013, the jury returned a guilty verdict for Attempted Fetal Homicide.

Rather, the State offered certified copies of an affidavit and the transcripts of the grand jury proceedings from the previous file 11-1868. APPX—Defendant's December 10 Letter brief, Defendant's Ex. B.

Trial Court sentenced Vargas to 10 years in prison, with 5 suspended. Vargas appeals his conviction.

STATEMENT OF FACTS

The State alleges that Vargas attempted to murder the unborn child of Lisa Komes by putting herbal substances in her pop a handful of times over a couple months in the beginning of her pregnancy. None of the herbal substances alleged to have given to Komes—pennyroyal, black cohosh, or blue cohosh—were ever detected in this case. Komes delivered a healthy baby boy on October 5, 2010. JT1 157. Neither she, nor the then fetus, were ever harmed by the few drinks Komes claimed Vargas gave her, beginning at the end of March 2010 through the May 23, 2010. JT1 153, 157. Even after the second suspicious drink that Komes turned over to the police on May 23, 2010, Komes continued to date and sleep with Vargas. JT1 156-157, 171-172. They ended their relationship shortly before the birth of the child. JT1 157.

At trial, the State called Dr. Scott Philips, a medical toxicologist. JT2 352. Defense had challenged Phillips's qualification as an expert with the facts in this case at a pre-trial evidentiary hearing, EV (03/27/13) 24, which challenge was denied by Trial Court. MH (06/10/14) 2-4. Phillips testified over 30 times in court, but never regarding pennyroyal, blue cohosh, or black

cohosh. EV (03/27/13) 31.

Pennyroyal is a minty plant whose essential oil is called "pulegon." EV (03/27/13) 16-17. "Penyroyal plants are part of the mint family. . . and because of that they have a minty or spearmint kind of taste, aroma, or flavor." EV (03/27/13) 17. Peppermint, for instance, also contains pulegon, EV (03/27/13) 17. The presence of "pulegon" means it came from a plant that contains pulegon, such as spearmint, peppermint, or pennyroyal. JT2 375.

In this case, two fountain drink cups with what appeared to be soda in them, were turned over to law enforcement by Komes on May 15, 2010, JT1 156 (State's Ex. 1), and May 23, 2010, JT1 156 (State's Ex 2). The liquid in the cups were stored in two different cans, with the liquid from May 15, 2013 being placed in a larger metal can, JT1 187 (State's Ex. 3), and the May 23, 2013 liquid being placed in a smaller can, JT1 205 (State's Ex. 4); JT2 278. Both cans eventually became "pretty rusty," with the liquid in Exhibit 3 having disappeared entirely. JT1 185, JT2 264, 257.

These cups were analyzed by two different state employees, who arrived at drastically different conclusions. Both used the gas chromatograph-mass spectrometer for analysis. JT2 271, 319. Richard Wold, with the Rapid City Police Department, detected "terpin hydrate" in "the smaller can," (State's Exhibit 4), and nothing in State's Exhibit 3.

JT2 329. Terpin hyrdate is not pulegon, but an "over-the-counter cough suppressant [that] is no longer used." JT2 322-323. Roger Mathison, with the State Health Lab in Pierre, on the other hand, detected pulegon from the "larger can," and nothing from the "smaller can." (State's Ex. 4). JT2 3270-271, 274, 278-279. Thus, Wold detected nothing in the larger can, while Mathison detected pulegon; and Mathison detected nothing in the smaller can, while Wold detected "terpin hydrate."

Defense also challenged the expertise of Mathison at the evidentiary hearing held on March 27, 2013. Mathison testified he has been a forensic chemist for the State Health Lab in Pierre, South Dakota, for nearly 29 years. EV (03/27/13) 50. The Lab is "not accredited at this time in the area of doing drug analysis or toxicology." EV (03/27/13) 65. His duties include analyzing blood and urine samples for the presence of drugs. EV (03/27/13) 50. This was first time Mathison had ever detected "pulegon" in all the samples he had ever tested in 29 years. EV (03/27/13) 60. The equipment Mathison used has a "10 or 15 percent margin of error." EV (03/27/13) 74.

Mathison testified that he never determined what the liquid actually was in which he detected the pulegon. JT2 283. Therefore, he conceded it was possible the pulegon "came from or was infused in" the liquid in which he detected the pulegon. JT2 284. Mathison put in his affidavit that the liquid from the cup was "soda," despite never testing the liquid for its contents, which he could have done. EV (03/27/13) 67-

68. Further, even though Mathison was "aware that pulegon is a constituent of the mint family," he "never ran a test" to determine if the pulegon came from "peppermint or spearmint or pennyroyal." JT2 284. "I couldn't tell you which plant species this material originated in." JT2 284. Lastly, although Mathison put in his affidavit "material found to be marijuana were weighed," no marijuana was ever detected in this case. JT2 291-293.

Philips testified that pennyroyal "can cause an abortion if it's taken in enough quantities and that's usually a quantity sufficient to make the mother sick as well." EV (03/27/13) 19. However, anything taken in high enough doses can be dangerous. JT2 372. Philips agreed, given a hypothetical which put into issue the known variables as provided by the State in this case, that a woman who weighed 150 pounds and ingested 50 milligrams of pulegon would probably not experience any distress because that level is not even close to being toxic. EV (03/27/13) 96. It would take approximately 400 cans to create a lethal dose with the amount of pulegon detected in this case. JT2 398-399. Indeed, there are more reported cases of abortion caused by ingesting parsley than by ingesting pennyroyal. EV (03/27/13) 83. Nutmeg can also cause an abortion if consumed in great enough quantities. JT2 385.

"Blue" cohosh is distinct from "black" cohosh. EV (03/27/13) 24-25. Black cohosh is *not* an abortifacient because it does not stimulate the uterine

walls. EV (03/27/13) 33. Historically, black cohosh has been used as an *anti*-abortifacient. EV (03/27/13) 34. At best, black cohosh can be used to try and *induce labor late* on in a woman's pregnancy, as opposed to early on in attempting to abort a fetus, because it "opens up the cervix…making it easier for labor." EV (03/27/13) 33-34, 102.

However, as to Philips's assertion that black cohosh helps to induce labor, he could not cite to any specific reference for that opinion. EV (03/27/13) 43-44. Philips could also not cite to any specific reference of the over 40 articles he had provided at the evidentiary hearing for his opinion that "the combined use of pennyroyal and black cohosh" have an "abortive affect," admitting that "article does not exist." EV (03/27/13) 23, 34-35, 37, 43. Philips did not know of any known dose of black cohosh that can be toxic to a human. EV (03/27/13) 45.

Maggie Toavs testified that she had contacted Vargas to get "blue" cohosh to help her induce labor very late in her pregnancy. JT1 212-213. At that time, Toavs claims that Vargas told her his girlfriend "Lisa" was also taking it in her drinks; and it was her understanding the girlfriend wanted to terminate her pregnancy. JT1 215-216. Toavs's daughter, Tashinah Walks, testified it was "black" cohosh that Vargas gave her mother. JT2 234. Neither Toavs or Walks saw the label on the bottle Vargas had. JT2 222-223, 231-232.

At trial, Trial Court allowed the State to play a secretly recorded

marital communication despite Vargas's wife being unavailable. The parties had all agreed at the March 27, 2013 hearing that the spousal privilege precluded admission of the conversation at issue. EV (03/27/13) 138. However, one week before trial, State filed notice of its intent to introduce the recorded phone call between Vargas and his wife. SR 109. Trial Court ruled it would permit the recorded call to be played to the jury with a limiting instruction. MH (9/16/2013) 12-13.

I. TRIAL COURT VIOLATED THE SPOUSAL PRIVILEGE AND VARGAS'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN IT ALLOWED THE STATE TO PLAY THE SECRETLY RECORDED PHONE CALL BY THE GOVERNMENT BETWEEN VARGAS AND HIS WIFE.

A. Preservation of Objection/Standard of Appellate Review

A trial court's evidentiary rulings are reviewed under the abuse of discretion standard. State v. Koepsell, 508 N.W.2d 591, 595 (S.D.1993). "However, we apply a *de novo* standard of review to claims of constitutional violations." State v. Tiegen, 2008 S.D. 6, ¶14, 744 N.W.2d 578, 585.

Vargas preserved the spousal privilege and Sixth Amendment Confrontation issues for appeal through his arguments to Trial Court, and through his arguments and objections at jury trial. MH (09/13/13) 8-9, 13-14, 16; MH (09/16/13) 2-13; SR 144-146, 147-217; JT1 112-117; JT2 421.

Trial Court ruled the spousal privilege did not bar admission to

the recorded phone call between Wife Melissa Vargas and Defendant Vargas. MH (09/13/13) 17-22. Trial Court ruled Wife's statements in the recorded phone call were not hearsay, and therefore would allow it to be played to the jury with a limiting instruction. MH (09/16/13) 12-13.

B. Analysis

"All marital communications are presumed confidential." State v. Witchey, 388 N.W2d 893, 895 (1986)(citing Blau v. United States, 340 U.S. 332 (1951) and Wolfie v. United States, 291 U.S. 7 (1934)). "A communication is confidential if it is made privately by any person to his or her spouse during the course of their marriage and is not intended for disclosure to any other person." SDCL § 19-13-12. "An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse." SDCL § 19-13-13.

Admission of the phone call amounted to allowing Wife to testify regarding a confidential marital communication in violation of the spousal privilege and in violation of Vargas's Sixth Amendment right to confrontation. Admission of the spousal phone call constituted prejudicial error, and was not harmless.

1. The phone call was inadmissible because of the spousal privilege.

It is undisputed the phone call communication occurred during

the course of Vargas and his wife's marriage, and was therefore subject to the spousal privilege. SDCL § 19-13-12. Vargas had every reasonable expectation that the phone call from his wife on March 8, 2011 was a confidential marital communication, "not intended for disclosure to any other person," least of all Detective Baker who was actually secretly recording the conversation.[2] SDCL § 19-13-12.

Trial Court determined, however, that the secretly recorded phone call was not a confidential marital communication between Wife and Alfredo Vargas.

> The Court first notes that the spousal privilege is intended to protect confidential communications between spouses and this Court finds that that confidentiality was lost when one spouse brought in a detective to place a controlled call to the other spouse. That this is not a confidential communication intended to be protected by the privilege.

MH (9/13/2013) 19.

This finding is clearly erroneous. South Dakota has determined the spousal privilege is only waived if the spouse communicates to the other spouse in a manner that a reasonable person could expect another

---

[2] During the phone call, Vargas tells his wife: "I told [Detective Baker] that we, if, if he needs to talk to any of us, we were gonna get an attorney. You just tell him, you just tell him no, that you don't have anything to talk to him about." JT2 422 (State's Ex. 16A, pg 1). Likewise, the day prior on March 7, 2011 when Vargas spoke with Detective Baker alone, Vargas informed Baker he would like counsel in any future discussions with the government. JT1 119 (Ex. AA, pg 12) ("And that, really that, that's all I have to say. I mean if, if you want to keep talking and going around and around this I mean I can go get an attorney and then we'll, we'll talk a little bit more.")

person would hear the spousal communication. State v. McKercher, 332 N.W.2d 286 (SD 1983)(defendant could not assert spousal privilege in jailhouse phone call to wife where jailer was present and in the same room with defendant, and only a few feet away, when statements were made to wife). Trial Court cited no authority for its ruling "that confidentiality was lost when one spouse brought in a detective to place a controlled call to the other spouse" other than citing generally to a district court case from Illinois that "talk[ed] about the principle behind the spousal privilege rule."[3] MH (9/13/2013) 19. More relevant persuasive authority is United States v. Neal, 532 F. Supp. 942 (D.Colo. 1982), which held that spousal privilege remained intact when wife allowed the FBI to record a conversation between wife and the defendant without the defendant's knowledge. If Trial Court's logic is followed, then any communication that is privileged can be lost if one of the parties to the privilege consents to the disclosure, i.e., a communication a person has with their attorney or a priest would be lost if the attorney or priest allowed law enforcement to surreptitiously listen to the privileged communication. Clearly that is not what the law intends regarding when a privilege is waived.

a. The Spousal Privilege was not waived under SDCL § 19-13-15(2).

[3] Any reliance on State v. Wood, 361 N.W.2d 620 (1985), is also misplaced because Woods dealt with an oral communication that had no privilege that arguably applied.

The spousal privilege can be waived under exceptions found in SDCL § 19-13-15. Subsection (2) states:

> There is no privilege under section § 19-13-13 in a proceeding in which one spouse is charged with a crime against the person or property of:
>
> 2. A child of either.

Trial Court erred when it found that even if the phone call "should be deemed a confidential communication," the spousal privilege did not apply because it dealt with a proceeding where one spouse was charged with a crime against "a *child* of either." MH (9/13/2013) 20 (emphasis added).

The intent of the exception to the privilege is certainly to preclude use of the privilege where there are children of either party either living with them or otherwise subject to their care, custody, or control. In other words, it stands to reason that the policy of not allowing the privilege to apply to cases where the parents are charged with crimes against their children is grounded in the interest of justice, and in such cases, outweighs the interest in the sanctity of spousal communications. Trial Court's ruling unnecessarily and without legal or policy basis, however, extended the exception to fetuses, particularly a fetus not of the parties to the conversation, but of one of the parties to the conversation and another person entirely.

Statutes in South Dakota take special care to define unborn children and to specify which laws are meant to apply to them. An unborn child is defined in the criminal statutes as "an individual organism of the species homo sapiens from fertilization until live birth." SDCL § 22-1-2(50A). An unborn child requires a separate definition from other humans for the reason that it does not have the same legal status of other humans. This begs the question of why there is a fetal homicide statute.

Each and every version of homicide from first degree murder to manslaughter in the second degree identifies victims as human beings, "including an unborn child." See SDCL §§ 22-16-1 through 22-16-41 (vehicular homicide). Yet, South Dakota also has a fetal homicide statute. SDCL § 22-16-1.1. Why the additional protection? The statute recognizes the privacy rights of pregnant women that are implicated and at issue in abortion rights laws. This is particularly salient in the context of the fetal homicide statute as it must accommodate the pregnant female's right to consent to the killing of the fetus. The killing of another human being, by contrast, is never justified or excused by consent. See generally, State v. Goulding, 799 N.W.2d 412 (SD 2011).

"[W]e adhere to two primary rules of statutory construction. The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the

statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." Goetz v. State, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681. "Where statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them 'harmonious and workable.'" Wiersma v. Maple Leaf Farms, 1996 S.D. 16, ¶ 4, 543 N.W.2d 787, 789. However, "It is fundamental to statutory interpretation that we give the language used its plain meaning." Lamar Adver. of S.D., Inc., 2012 S.D. 76, ¶ 13, 822 N.W.2d at 864.

The fact that the statute allows prosecution of homicide for an "unborn child," and yet creates a separate statute all together for the same act, homicide, but for fetuses, means the law recognizes a distinction between "child" and "fetus." Trial Court's ruling would extend any definition of human beings found in the criminal laws to the law of evidence. Although Wiersma cited to SDCL § 22-1-2(50A) for authority that killing of a "fetus" constituted a killing of an "unborn child" under the wrongful death statute, Wiersma does not stand for authority that a "fetus" is a "child" under SDCL § 19-13-15. One could see the problems that could arise if it did because a person who spoke to their spouse about killing a "fetus" not his child would still be protected by the spousal privilege under SDCL § 19-13-15; and, would arguably be

protected if a person spoke to their spouse about killing a fetus that he thought was his child, but later turned out, was not his child.

No one other than the pregnant female has parental rights or obligations to the fetus. Criminalization of the non-consensual death of a fetus does not make it a human for purposes of evidentiary law. It is the criminalization of the death of the fetus that the definitions of an unborn child and fetus were designed to effect, not the modification of evidentiary law. Such laws do not change the status of the father, nor should they make the fetus a child in the context of an exception to the spousal privilege.

b. The error in finding the spousal privilege did not bar admission of the recorded phone call was prejudicial.

In State v. Harris, this Court said:

> If error is found it must be prejudicial before this Court will overturn the trial court's evidentiary ruling. . . Error is prejudicial when, in all probability it produced some effect upon the final result and affected rights of the party assigning it.

2010 S.D. 75, ¶¶ 8, 17, 789 N.W2d 307, 309 (citations omitted).

Admission of the recorded phone call was prejudicial because the State conceded, they "did not have a solid case," not even "probable cause" to have arrested Vargas for Attempted Fetal Homicide, without its admission. JT2 428.

3. The phone call violated Vargas's Sixth Amendment Right to Confrontation.

Even if this Court finds the spousal privilege does not apply, admission of the phone call violated Vargas's Sixth Amendment right to confrontation.

> The Confrontation Clause of the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 53–54 (2004), the United States Supreme Court held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."

State v. Johnson, 2009 S.D. 67, ¶ 18, 771 N.W.2d 360, 368.

It is undisputed that Vargas's wife, Melissa Vargas, was "unavailable," [4] and that Vargas never had a prior opportunity to cross-examine her. MH (9/13/2013) 15. Detective Baker testified that he was prompting Wife to ask certain questions and make certain statements both before and during the recorded phone call. JT2 430-431. Wife's statements are therefore "testimonial" because "an objective witness acting as a government informant would believe [her] statement...would be available for use at a later trial." Johnson, 2009 at ¶ 23, 771 N.W.2d at 368 (citing Crawford, 541 U.S. at 51–52.).

---

[4] THE STATE: Melissa Vargas has been subpoenaed. She has not honored her subpoena. My understanding is she is still married to Mr. Vargas so we can't secure her. She is out of state. So I highly doubt she will be here. MH (9/13/2013) 15.

Trial Court ruled, however, that the recorded phone call between Vargas and his wife was admissible despite defense arguments that Wife's statements violated the Confrontation Clause and Crawford because they were hearsay being used for the truth of the matter asserted. MH (9/16/2013) 5-12.

> The Court in this case finds that the Running Bird case to be instructive. The Court finds that the statements of Melissa Vargas are not being offered to prove truth of the matter asserted. The Court is going to give the jury an instruction, a limiting instruction, similar to the one utilized in Running Birds that tells them they are to disregard the allegations, the statements, made by Melissa Vargas as they are introduced solely for the purpose of establishing the stage to set the responses of Alfredo Vargas.

MH (9/16/2013) 12-13.

Trial Court erred when it found that Wife's statements were not hearsay and that the limiting instruction as set forth in State v. Running Bird, 2002 S.D. 86, 649 N.W.2d 609 cured any violation. In Running Bird, a recorded interview between a non-testifying police officer and the defendant were played to the jury. 2002 at ¶ 35, 649 N.W.2d at 616. However, the defendant in Running Bird was not arguing that the officer's statements were hearsay in the recorded interview violated the Confrontation Clause. Rather, the defendant argued the officer "in essence gave his opinion as to Running Bird's credibility via the videotape, something that Officer Mueller would not have been allowed to do through direct questioning." Id. The officer's comments in question included:

> "Something pretty big happened last night and I think you've probably got a good idea as to why we're down here questioning you"; "We know it wasn't consensual as what you're saying"; "I think that you know deep down that this gal from Holland probably didn't want to go as far as things went either"; and "Well, we both know that didn't happen."

2002 at ¶ 35, 649 N.W.2d at n 4.

Running Bird was correct in finding that the unavailable officer's "statements and questions on the videotape do not constitute direct testimony." 2002 at ¶ 35, 649 N.W.2d at 616. However, the same does not hold true for Wife's statements. They constituted direct testimony of an unavailable declarant that Vargas never had an opportunity to confront. For instance,

> WIFE: Well [Detective Baker] said you put Penny Royal in [Komes'] drinks and that, *didn't you say* that when she got picked up she went to the ER? '*Cause you brought her that drink*?
> VARGAS: That's the thing. He has to prove, because ah,
> WIFE: *That is the only time you took her the drink.*
> VARGAS: They, they can't prove that she drank it.
> WIFE: And nobody saw you, right?
> VARGAS: That's the thing, she ah, he has to prove that I took the drink that, that, that she drank anything. She doesn't ah, she can't prove that she drank anything.
> WIFE: *She was the only one who came out, was in back, right*?
> VARGAS: Of course. So that's the thing, he has to prove that I had, that I had something, because when ah, he, he told, he asked me how much child support I was paying because they're trying to look for, for motive and shit like that. And I said I pay a hundred and eighty dollars a month. He was like wow I thought you were gonna, that you were paying way more. I was like no, I, I'm not worried about paying child support. They don't have anything.

JT2 422 (State's Ex. 16A, pg 4) (emphasis added).

While Vargas's statements are arguably non-hearsay because they may be viewed as admissions of a party-opponent, Wife's statements

were not mere "context" for Vargas's admissions. Johnson, 2009 at ¶¶ 20-21, 771 N.W.2d at 369 ("Statements providing context for other admissible statements are not hearsay because they are not offered for their truth.") Wife did not merely respond to Vargas's statements, as was the case in Johnson. 2009 at ¶ 21, 771 N.W.2d at 369. Her statements are not like a government informant's recorded statements in a controlled drug-buy, which are an "inextricable element of the sale" and "gave meaning to the sale," since they are "made contemporaneously with or immediately preparatory" to the purchase of the drug, thereby not constituting inadmissible hearsay. State v. Harris, 2010 S.D. 75, ¶ 15, 789 N.W2d 303, 309. Rather, the "veracity of . . . [Wife's] recorded statements . . . were completely relevant to the case." Johnson at ¶ 21, 771 N.W.2d at 369.

> WIFE: Spearmint. Is that what [Detective Baker] asked you too, Penny Royal and Spearmint?
> VARGAS: Well Penny Royal is what he has, what he has on paper. Penny Royal is a, is a, a, it's a variety of things. A variety of things have Penny Royal. So that's supposedly what they found. A, a, a version of it. And that's what I told him. I say, how, how do you know she didn't put that shit there and, and brought a drink. That's (inaudible) to have one drink. How does he know that she didn't do that, she didn't put that shit in the drink. . . .
> WIFE: *Yeah but you said when. . .*
> VARGAS: And, just brought it here.
> WIFE: *you were giving it to her at her house, she was just leaving the drinks.* Did you spill 'em out?
> VARGAS: I only, I only gave her two and, and yeah, she, if ah, if she didn't drink it I would, I would spill 'em out. I would rinse it out. She never had anything. She had one drink that she took that she had at work, that's it.

> WIFE: *That when you, er when you came in back?*
> VARGAS: That's it. And I told him, I said how didn't [he] know she'd even put the, the, the stuff in the drink and, and brought her over? And she didn't think anything because he said that the, the pop was almost full. I was like yeah. Well, I mean how do you even know anything? 'Cause that's, that's the, that's all they have. That's all they have. That's all they're going for. What she said.

JT2 422 (State's Ex. 16A, pg 5) (emphasis added).

Wife's statements also consisted of inadmissible compound hearsay, SDCL § 19-16-36, which further impermissibly bolstered, State v. Buchholtz, 2013 S.D.96, ¶ 26, 841 N.W.2d 441, 457, the trial testimony of Wife's sister, Maggie Tovas:

> WIFE: 'Cause what little bit [Maggie] told me was that she was under the assumption that you and Lisa talked about it, that you were, 'cause uhm, you were telling her what drinks she could put it in, 'cause Lisa didn't like the dri, certain drinks or whatever. That's all she remembered, but that she, she said uhm, that she was just under the assumption that, uhm you and Lisa were ok with it.
> VARGAS: What?
> WIFE: That's what Maggie said.

JT2 422 (State's Ex. 16A, pg 2).

Wife's statements were hearsay because they were used to prove the truth of the matter asserted. The ultimate issue of the case, whether Vargas ever possessed pennyroyal and delivered it to Komes by putting it in her drinks, could only be inferred from accepting as fact what Wife asserted. The lead detective paraphrased the recorded call demonstrating this during his trial testimony:

> DETECTIVE BAKER: When [Vargas] was talking with Melissa, he is making statements to Melissa and talking with Melissa and he says "that, ah, all she has is that pop. The one I brought in the

back."
And Melissa is talking about, "well, you gave them to her at the house."
He goes "I only gave her two."
"Well, did you spill them out?"
"Yeah, I spilled them out and I rinsed the cups."
JT2 428-429.

Hence Vargas never said, "the one I brought in the back." Later, Baker qualified his testimony, showing he agreed that Wife's statements needed to be accepted as fact to infer the evidence the State sought to prove:

> DEFENSE COUNSEL: Fair to say, that nowhere in this interview—well, excuse me, it's not an interview really. The conversation between Melissa and Alfredo Vargas that he admits to either of the pops that were taken into evidence?
> DETECTIVE BAKER: It was kind of a rough phrase there where he is talking with Melissa and she mentions the one that she brought into the back. He says, "that's all they got."
> DEFENSE COUNSEL: And that is all you got, right?
> DETECTIVE BAKER: That's all we got. We got two soda pops from her and one came back with pulegon in it.

JT2 436.

Wife's statements, therefore, "went to the heart of the State's case." Johnson, 2009 at ¶ 26, 771 N.W.2d at 371. Wife's "excessive details" and "specific accusations against" Vargas "went beyond setting the scene." United States v. Hearn, 500 F.3d 479, 484 (6th Cir. 2007). "This is not a case in which prosecutors admitted [unavailable] confidential informants' statements only to provide general background" or context. Id. Lead Detective Baker conceded there was no evidence of Vargas possessing pulegon/pennyroyal, let alone putting it in Komes's drinks,

without this recorded phone call. JT2 441.

Yet, Vargas never stated he put pennyroyal in Komes's drinks in the recorded call. This "fact" came from Wife's accusation that Vargas told her he put "it" in Komes's drinks. Whether "it" refers to pennyroyal or spearmint is unclear. Further, because Trial Court had ruled Wife's statements were non-hearsay, Vargas was unable to impeach Wife with her prior inconsistent statement to Baker that the only thing Vargas ever told her he put in Komes's drinks was black cohosh, which can be an *anti*-abortificiant. MH (09/13/2013) 9; SR 147, 175-217; EV (03/27/2013) 34. Thus, the error in admitting the recorded call was not harmless.

> The State bears the burden of proving beyond a reasonable doubt the error was harmless. " 'In determining whether an error is harmless, the reviewing court must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened.' " State v. Zakaria, 2007 SD 27, ¶ 18 n. 5, 730 N.W.2d 140, 145 n. 5 (quoting United States v. Hardy, 228 F.3d 745, 751 (6th Cir.2000)) (alteration in original). "In other words, we must find 'that it was more probable than not that the error materially affected the verdict.' " Id. (quoting United States v. Trujillo, 376 F.3d 593, 611 (6th Cir.2004)).

Johnson, 2009 at ¶ 25, 771 N.W.2d at 370.

"[A]dmission of [the] hearsay statements was not harmless error because 'the evidence [was] not so overwhelming that [the] statements cannot be said to have weighted against [the defendant] in ultimately tipping the scales toward a guilty verdict'." Johnson, 2009 at ¶ 26, 771 N.W.2d at 370-371 (quoting State v. Frazier, 2001 SD 19, ¶ 33, 622

N.W.2d 246, 259). The lead detective in the case admitted he did not even have enough to establish "probable cause" to arrest Vargas for Attempted Fetal Homicide prior to the recorded phone call. JT2 428. This was true despite the other evidence he had already gathered in the case: the statements from Toavs, JT2 412, and that a trace amount of "pulegone" had been found in one of the two cups Komes said Vargas gave her. JT2 411. As Baker testified, "[I]t wasn't until after we got done with the phone call from Melissa I really felt this case was solid." JT2 428.

The import of the recorded phone call is further shown by the repeated substantive references to it by the State in both its opening and closing remarks. JT1 131-132; JT3 485, 486, 487, 512, 515. "The State certainly crossed the line during its closing arguments" by using the recorded call to establish Vargas's guilt. Johnson, 2009 at ¶ 24, 771 N.W.2d at 370; Hearn, 500 F.3d 479, 484 (6th Cir. 2007). Trial Court violated Vargas's Sixth Amendment right to confront his accusers with admission of the recorded phone call, and his conviction should be reversed on this basis.

II. TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE 404(B) EVIDENCE IN THIS CASE.

A. Preservation of Objection/ Standard of Appellate Review

"Our review of a trial court's decision to admit other act evidence

under SDCL 19-12-5 (Rule 404(b)) is for an abuse of discretion." State v. Boe, 2014 S.D. 29, ¶ 20, 847 N.W.2d 315, 320. Vargas preserved this issue for appeal with his pretrial objections, his objections at trial, and the Trial Court issuing a final decision denying Vargas's objections. SR 67; MH (11/19/13) 3; MH (06/10/13) 7-10; JT1 212, 229.

B. Analysis

All relevant evidence is admissible; [e]vidence that is not relevant is not admissible." SDCL 19-12-2. "Relevance under 404(b) is established 'only if the jury can reasonably conclude that the act occurred and the defendant was the actor… by a preponderance of the evidence.' State v. Wright, 1999 S.D. 50, ¶ 20, 593 N.W.2d 792, 798-799. The South Dakota Supreme Court further held in Wright that:

> "404(b) other act evidence may not be admitted if its sole purpose is to establish an inference from bad character to criminal conduct. It is admissible when similar in nature and relevant to a material issue, and not substantially outweighed by its prejudicial impact. The degree of similarity required for other act evidence will depend on the purpose for which it is offered."

Wright, 1999 S.D. at ¶ 16, 593 N.W.2d 792, 799-800.

Trial court abused its discretion when it ruled that the State's 404(b) evidence was relevant as establishing a common plan or scheme. "All that is required to show a common plan is that the charged and uncharged events 'have sufficient points in common.'" Wright, 1999 S.D. at ¶ 19, 593 N.W.2d at 800) (citation omitted.) In this case, the State alleges Vargas attempted to kill the unborn child of the mother because

he did not want the baby and he did this by allegedly putting some substances in her drinks a handful of times during the first few months of her pregnancy. At the evidentiary hearing held on this matter, Toavs testified that Vargas gave her "blue cohosh" to *help* induce labor at the very *end* of her pregnancy, not that he was trying to give her anything to hurt Toavs or abort her unborn child. EV (03/27/13) 118-119. This is consistent with her trial testimony. JT1 221. There is no evidence "pulegon" has anything to do with "blue cohosh." Furthermore, Toavs and her daughter could not actually identify what Vargas gave Toavs. EV (03/27/13) 124, 132; JT2 222-223, 231-232.

The State's whole case rests on Vargas's intent to kill the unborn child against the mother's wishes. Helping a woman late in her pregnancy with a substance that has never been identified and has nothing to do with "pulegon" fails to establish a common plan or scheme with the intent required in this case. *Helping* someone to induce labor *at their request* is opposite the intent necessary to prove the specific intent to abort a fetus without the mother's knowledge or consent. Furthermore, Trial Court's finding is directly contrary to the prior judge's findings of fact and conclusions of law on the same facts. APPX— Defendant's December 10 Letter brief, Defendant's Ex. D.

Even if this Court finds this act is sufficiently similar to the charged act in the indictment, any probative value was substantially

outweighed by the danger of unfair prejudice. State v. Boe, 2014 S.D. 29, ¶ 12, 846 N.W.2d 315. "Blue cohosh" has never been detected in this case, and has nothing to do with "pulegon." Pulegon is an essential oil of "pennyroyal," and only large quantities of "pennyroyal" can induce labor, amounts which themselves would cause significant injury and/or death to the mother. In this case, the amount of pulegon found was too low to cause her or her unborn baby any harm. Therefore, allowing the jury to hear about "blue cohosh" creates "unfair prejudice, confusion of the issues, and is misleading." SDCL § 19-12-3. The fact that Toavs's daughter testified she heard her mother and Vargas talk about "black" cohosh, instead of blue cohosh further confuses the issue, since blue and black cohosh are distinct; and black cohosh is more an anti-abortifacient than anything. EV (03/27/13) 24-25, 34, 127, 130-131.

III. THE TRIAL COURT ABUSED ITS DISCRETION WITH ADMISSION OF THE STATE'S EXPERTS.

A. Preservation of Objection/Standard of Appellate Review

"We review a trial court's decision to admit or deny an expert's testimony under the abuse of discretion standard." State v. Fischer, 2011 S.D. 74, ¶ 42, 805 N.W.2d 571, 580. Vargas preserved this issue for appeal with his pretrial objections to the State's proposed experts, and the Trial Court issuing a final decision denying Vargas's objections. SR 37-39; MH (06/10/13) 2-7.

B. Analysis

The admissibility of expert testimony is controlled by SDCL § 19-15-2 which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data,
> (2) The testimony is the product of reliable principles and methods, and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Trial Court erred when it found Philips's and Mathison's testimony was the product of reliable principles and methods based upon sufficient facts or data that had been applied reliably to the facts of this case. Furthermore, their testimony was more prejudicial than probative under SDCL § 19-12-3.

This case involves allegations that while Komes was pregnant with Vargas's child, Vargas gave her a couple cups with soda over a two-month period in the beginning of her pregnancy. Only one of those cups was even alleged to have had a miniscule amount of pulegon in one of two lab tests, in an amount incapable of even moderately harming the mother, let alone the fetus. No black cohosh, blue cohosh, nor pennyroyal, was ever detected in the two cups; and black cohosh is more an *anti*-abortificient than anything. Further, pulegon can be found in other sources, like peppermint. The liquid in which the pulegon was detected, by only one of the State's experts, was

itself never analyzed, although it could have been. Therefore, without knowing the liquids contents, the State's expert conceded it was possible the pulegon "came from or was infused in" the liquid in which he detected the pulegon. JT2 284. Finally, no rational explanation exists for how *two different chemists for the State could arrive at such different conclusions*.

The error in admitting either of the State's experts constituted prejudicial error. Ruschenberg v. Eliason, 2014 S.D. 42__ N.W.2d___; State v. Huber, 2010 S.D. 63, 789 N.W.2d 283. Both Philips and Wold were necessary witnesses for the State in proving the case of Attempted Fetal Homicide beyond a reasonable doubt.

IV. THERE WAS INSUFFICIENT EVDIENCE PRESENTED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF ATTEMPTED FETAL HOMICIDE.

A. Preservation of Objection/Standard of Appellate Review

A challenge to the sufficiency of the evidence is reviewed *de novo*. State v. Morse, 2008 S.D. 66, ¶ 10, 753 N.W.2d 915, 918. Vargas preserved this issue for appeal when he moved for a Judgment of Acquittal after the close of the State's case, which Trial Court denied. JT2 449-451, 452.

B. Analysis

In State v. Jucht, this Court explained how a challenge of the sufficiency of the evidence is reviewed:

> There must be substantial evidence to support the conviction. The inquiry does not require an appellate court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Rather, [t]he relevant question is 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. Moreover, the jury is … the exclusive judge of the credibility of the witnesses and the weight of the evidence. Accordingly, this Court will not resolve conflicting evidence, assess the credibility of witnesses, or reevaluate the weight of the evidence.

2012 S.D. 66, ¶ 18, 821 N.W.2d 629, 633. (citations omitted)

There was insufficient evidence to prove beyond a reasonable doubt the elements of Attempted Fetal Homicide. Jackson v. Virginia, 443 U.S. 307 (1979). Specifically, elements Two and Four as stated in Instruction 21:

> (2) The Defendant attempted to cause the death of the unborn child;
> (4) Wherein that Defendant intended to cause the death of or do serious bodily injury to Lisa Komes or the unborn child.

The State's lead detective agreed no evidence was presented at trial that Vargas ever possessed the murder weapon in question: pennyroyal. No evidence was presented that Vargas ever possessed black or blue cohosh, which was never even detected in this case, other than the statements of Toavs and Walks.

> DEFENSE COUNSEL: Did you ever at any point find any evidence that [Vargas] possessed pennyroyal?
> DETECTIVE BAKER: No.

DEFENSE COUNSEL: Cohoshes?
DETECTIVE BAKER: The only evidence we had that [he] possessed cohoshes were the statements from Maggie and TaShinah.

JT2 441-442.

The experts for the State testified they could not tell where the pulegon came from, whether it be pennyroyal, spearmint, or any other "plant species this material originated in." JT2 284, 375. No tests were run on the liquid in which the pulegon was detected, and so the State's expert conceded that it was possible the pulegon originated from, or was infused as a favoring agent in, the liquid in which the pulegon was detected. JT2 283-284. No pulegon was ever detected by the first expert analyzing the liquid in two cups, rather, he only found Terpin Hyrdate, a now-discontinued cough syrup. JT2 329. However, when the same cups were analyzed again by a second expert, the cup that had tested for Terpin Hyrdate tested for nothing; and the cup that had tested for nothing, tested for a trace amount of pulegon.

Komes testified that she never felt ill, or suffered any adverse physical affects, from the few drinks she claimed Vargas gave her over a two-month period. JT1 153. However, the State's expert testified that even a small amount of pulegon would produce "lightheadedness and nausea." JT2 377. Therefore, no evidence was ever presented that Komes consumed the murder weapon of pulegon. Further, it would take 400 soda pop cans to produce a lethal dose of pulegon with the amount

detected in this case. JT2 398-399. Hence, it can't possibly be extrapolated that Vargas ever put pennyroyal in Komes's drinks with the intent to cause serious bodily injury to her or her unborn child.

Finally, even with majority of the State's evidence produced at trial, the lead detective for the State testified it only established "probable cause" to have arrested Vargas for Attempted Fetal Homicide. JT2 428. There simply was insufficient evidence produced at trial to prove beyond a reasonable doubt that (a) any murder weapon of "poison" existed in this case; (b) that Vargas possessed such a murder weapon; and (c), that Vargas ever delivered such murder weapon to Komes with the intent to kill her fetus.

CONCLUSION

Vargas asks that this Court reverse his conviction for Attempted Fetal Homicide.

REQUEST FOR ORAL ARGUMENT

Vargas requests to present oral arguments on these issues.

Dated this 24th day of July, 2014.

Respectfully submitted,

/s/Jamy Patterson

Jamy Patterson
Office of the Public Defender
for Pennington County
Pennington County Courthouse
Rapid City, South Dakota 57701

CERTIFICATE OF SERVICE

1. I certify that the Appellant's Brief is within the limitation provided for in SCDL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Brief contains 7713 words.

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

Dated this 24th day of July, 2014.

/s/Jamy Patterson
Jamy Patterson
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of July, 2014, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. Alfredo Vargas* was served by electronic mail on Caroline Srstka at Caroline.Srstka@state.sd.us.

/s/Jamy Patterson
Jamy Patterson
Attorney for Appellant

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26885

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ALFREDO VARGAS,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JANINE M. KERN
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

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

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Jamy Patterson
Pennington County Public Defender
315 St. Joseph, #44
Rapid City, SD 57701
Telephone: (605) 394-2181
E-mail: jamyp@co.pennington.sd.us

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed November 20, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

Other Authorities

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26885

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ALFREDO VARGAS,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Alfredo Vargas, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name.

The various transcripts and reports will be cited as follows:

Jury Trial Transcript ....JT

Arraignment Transcript ..... AT

Sentencing Transcript ..... ST

The settled record in the underlying criminal case, *State of South Dakota v. Alfredo Vargas*, Pennington County Criminal File No. 12-3442, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." Any references to motion hearing transcripts will be designated as "MH," followed by the date of the

motion hearing, and by the appropriate page number. References to the Court's Decision transcript will be designated as "Court's Decision" followed by the date of the hearing and by the appropriate page number. All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Conviction and Sentence entered by the Honorable Janine M. Kern, Seventh Judicial Circuit Court Judge, on November 11, 2013, effective November 4, 2013. SR 307. The Judgment of Conviction was filed November 12, 2013. SR 307. Defendant filed a Notice of Appeal on November 20, 2013. SR 309. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE TRIAL COURT PROPERLY FOUND THE SPOUSAL PRIVILEGE DOES NOT APPLY AND ADMITTED THE PHONE CONVERSATION BETWEEN DEFENDANT AND MS. VARGAS?

The trial court found the spousal privilege was waived and admitted the recorded conversation between Defendant and his spouse.

SDCL 19-13-15(2)

United States v. Nash, 910 F.Supp.2d 1133 (S.D. Ill. 2012)

State v. Running Bird, 2002 S.D. 86, 649 N.W.2d 609

II.

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

The trial court admitted other acts evidence under SDCL 19-12-5.

SDCL 19-12-5

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

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

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

III.

WHETHER THE TRIAL COURT PROPERLY ADMITTED STATE'S EXPERT WITNESS TESTIMONY?

The trial court admitted the State's expert witness testimony.

SDCL 19-15-2

State v. Koepsell, 508 N.W.2d 591 (S.D. 1993)

State v. Lemler, 2009 S.D. 86, 774 N.W.2d 272

IV.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF ATTEMPTED FETAL HOMICIDE?

The trial court denied Defendant's motion for judgment of acquittal and the jury found Defendant guilty of attempted fetal homicide.

SDCL 22-16-1.1(1)

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

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

State v. Reed, 2010 S.D. 66, 78 N.W.2d 1

STATEMENT OF THE CASE

On September 12, 2012, Defendant was indicted on one count of Attempted Fetal Homicide in violation of SDCL 22-16-1.1(1), or in the alternative, Procurement of Abortion in violation of SDCL 22-17-5.1. SR 1.[1] The State later dismissed Count 2. SR 49. Defendant pleaded not guilty at his arraignment on November 5, 2012. AT 7.

The State filed three notices of intent to use expert testimony and a notice of intent to use other acts evidence, to which Defendant objected. SR 9-11; MH (1/7/2013) 2. The trial court held a Daubert hearing and motion hearing. Court's Decision (6/10/13) 2-5. The trial court denied Defendant's objections, finding the other acts evidence and the experts' testimony relevant. Court's Decision (6/10/13) 9.

The State filed a notice of intent to introduce testimony under the exception to spousal privilege on September 10, 2013. SR 141. Defendant objected. MH (9/13/13) 6. On September 13, 2013, the trial court denied Defendant's objection and granted State's motion. MH (9/13/13) 21.

[1] On August 9, 2012, the State dismissed an Indictment against Defendant dated May 26, 2011, charging the offense of Attempted Fetal Homicide. SR 52.

Defendant's jury trial commenced September 18, 2013. JT, *generally*. On September 20, 2013, the jury found Defendant guilty of attempted fetal homicide. JT 522.

Defendant was sentenced on November 4, 2013, to serve ten years in the South Dakota State Penitentiary, with five years suspended. ST 21. The Judgment was entered on November 11, 2013, effective November 4, 2013. SR 307. Defendant filed a Notice of Appeal on November 20, 2013. SR 309.

STATEMENT OF FACTS

In late 2009, Lisa Komes (Ms. Komes) entered into a romantic relationship with Defendant. JT 142. Defendant moved into Ms. Komes' home shortly thereafter. JT 142. At that time, Defendant had six children, one of whom lived with Ms. Komes and Defendant, and one for whom he paid child support. (State's Ex. 15A, pg 6); JT 143. In January 2010, Ms. Komes became pregnant with Defendant's seventh child. JT 144; State's Ex. 15A, pg. 8. When Ms. Komes informed Defendant of the pregnancy, Defendant told her to get an abortion. JT 144. Ms. Komes, surprised at Defendant's reaction, refused. JT 145.

Defendant's demand for an abortion and his inability to contribute toward the monthly rent put a strain on their relationship, causing Ms. Komes to ask Defendant to move out. JT 145-46.

Although the parties separated, Ms. Komes attempted to work on their relationship for the sake of the baby. JT 147.

Defendant subsequently started bringing Ms. Komes fountain drinks, which she described as tasting minty, "bitter and gritty." JT 147, 150. Ms. Komes testified that she did not finish the first such fountain drink, and threw it away. JT 148. The second time Defendant brought Ms. Komes a fountain drink, she found that it tasted "bitter and gritty," and she observed a white powdery substance on the bottom of the cup. JT 149. After Ms. Komes was finished with the drink, she noticed that Defendant rinsed out the cup and threw the cup away. JT 149.

On May 15, 2010, Defendant brought a third fountain drink to Ms. Komes at her workplace, claiming that it was a Coca-Cola. JT 150. Ms. Komes described the fountain drink as smelling minty and tasting terrible. JT 150. Ms. Komes stated that Defendant generally attempted to shame Ms. Komes into drinking the fountain drinks by appearing insulted when she did not want to drink them. JT 177. After Defendant left her workplace, Ms. Komes asked her supervisor what to do about the suspicious-tasting beverage. JT 150. Ms. Komes followed her supervisor's advice and called the police to report that she feared her boyfriend was poisoning her. JT 150-51. Sergeant Becker responded to the call, came to Ms. Komes' workplace, collected the fountain drink, and submitted it for testing at the evidence building of

the Rapid City Police Department. JT 185. Sergeant Becker observed an oily substance in the drink, and noted that the soda smelled minty and like gasoline. JT 184.

On May 23, 2010, Defendant brought Ms. Komes a fourth fountain drink while she was at work. JT 154. Ms. Komes did not drink it, and turned it over to the police. JT 154. Officer Bloomenrader responded to the call and took the soda to the evidence building at the Rapid City Police Department. JT 201-02.

Because Ms. Komes was unsure about whether Defendant was actually poisoning her, she remained in a relationship with him for the sake of the baby. JT 151; 155. Before the baby's birth, however, Ms. Komes and Defendant ended their relationship. JT 156. Ms. Komes delivered a healthy baby on October 5, 2010. JT 157.

Approximately three months after Ms. Komes gave birth, Rapid City Law Enforcement informed Ms. Komes that terpin hydrate, an over-the-counter cough suppressant, was found in one of the fountain drinks. State's Ex 4; JT 329. The substance, pulegone, was detected in the other fountain drink. State's Ex 3; JT 274. Dr. Scott Phillips, the State's expert witness, testified that pulegone is an oil extracted from the pennyroyal plant. JT 362. Pennyroyal can be purchased at local spice stores in Rapid City, or on the Internet. JT 409-410. Dr. Phillips explained that pennyroyal has a bitter mint taste. JT 363. He further testified that, depending on the amount ingested,

pennyroyal can cause an irritated stomach and nausea, kidney failure, liver failure, bleeding, seizures, coma, and death. JT 364-365. Dr. Phillips explained that a couple teaspoons of the pure form of pennyroyal oil could lead to seizures, coma, and death. JT 366. Pennyroyal is also described as an abortifacient. JT 371. The evidence further showed that the label on the pennyroyal bottle warns against its use if pregnant or lactating, and that it may be harmful or fatal if swallowed. JT 433.

At about the same time that Defendant gave Ms. Komes several altered fountain drinks, Defendant provided his current sister-in-law, Maggie Toavs (Ms. Toavs) with cohosh. JT 213.[2] Ms. Toavs was expecting a child shortly, and she expressed to Defendant her desire to take some cohosh to help her go into labor. JT 213. Defendant informed Ms. Toavs that he had some cohosh and gave her some cohosh in oil form. JT 214. Ms. Toavs and her daughter, Tashinah Walks (Ms. Walks), went to Defendant's trailer to retrieve the cohosh. JT 214. Ms. Toavs inquired why Defendant had cohosh, and he

[2] Throughout the jury trial, blue cohosh and black cohosh have been used interchangeably. MH (3/27/13) 100. Ms. Toavs testified that Defendant provided her with blue cohosh, and Ms. Walks testified that Defendant provided Ms. Toavs with black cohosh. JT 213; 234. Both may produce harmful results to a pregnant woman; blue cohosh may produce seizures and uterine contractions, and black cohosh may induce early labor. MH (3/27/13) 23, 101. At trial the State argued that Defendant provided Ms. Toavs with black cohosh, and also poisoned Ms. Komes' soft drinks with black cohosh. MH (9/16/13) 4.

claimed that he had it in order to put it in the drinks of his pregnant girlfriend, Ms. Komes, because they did not want to have the baby. JT 215. Defendant explained to Ms. Toavs that the cohosh tasted poorly in certain types of beverages. JT 216. Ms. Toavs tried the cohosh in a drink and testified that the cohosh tasted bitter like root water, and had no smell. JT 214, 218.

Black cohosh is an herb used to treat perimenopausal symptoms, such as hot flashes and headaches. It also is used to bring on a menstrual period and to induce labor. JT 368. Dr. Phillips testified that if used enough, a mother could go into premature labor, and her baby could be born with seizures and stroke-like symptoms. JT 369. Dr. Phillips further testified that "[i]t is likely that the combination of pennyroyal and black cohosh, if it's of sufficient amounts, could certainly be used to cause an abortion in someone . . ." JT 371.

At trial, A.J. and Sabrina Green (Mr. and Mrs. Green) testified that their friend, Defendant, told Mrs. Green that his girlfriend was pregnant. JT 239. Defendant told Mrs. Green that he was not sure he wanted to be a dad again, and explained there was a supplement he could purchase to miscarry a child. JT 240. Mr. Green testified that he overheard Defendant telling Mrs. Green that he was thinking about buying an herb to induce labor. JT 250.

Detective Duane Baker was assigned to investigate Defendant's case. JT 405. Upon receiving the results of the contaminated fountain drinks, he made several attempts to contact Defendant for an interview. JT 405-13. Detective Baker finally interviewed Defendant in a noncustodial setting at the Rapid City Public Safety Building. JT 413. When questioned about the poisoned fountain drinks, Defendant confirmed he brought Ms. Komes drinks, but he denied adding pulegone or cohosh to the drinks. State's Ex. 15A, pg 8-10. Defendant claimed he was not familiar with cohosh, and that he never gave cohosh to anyone. State's Ex. 15A, pg 11, 13.

The day following the interview, Detective Baker set up a recorded phone call with Defendant and his wife, Melissa Vargas (Ms. Vargas). JT 419. During the recorded phone call, Defendant made incriminating statements about providing Ms. Toavs with a "liquid that she needed to put ah, I think, ah, I don't know, fifteen or twenty drops, and drink it a few times a day." State's Ex. 16A, pg 2. Defendant also stated in the recorded phone call that if Ms. Toavs "tries throwing [him] under the bus [he's] gonna do the same to her." State's Ex. 16A, pg 3. In addition, Defendant told Ms. Vargas in the conversation that he only gave Ms. Komes "two, and, and yeah she, if ah, if she didn't drink it I would, I would spill 'em out. I would rinse it out. She never had anything. She had one drink that she took that she had at work, that's it." State's Ex. 16A, pg 5. After the recorded

phone call, Detective Baker made unsuccessful attempts to contact Defendant, and ultimately requested and was granted a warrant for Defendant's arrest. JT 423. Defendant was extradited from Puerto Rico to Rapid City in September 2011. JT 425.

ARGUMENTS

I.

THE TRIAL COURT PROPERLY FOUND THE SPOUSAL PRIVILEGE WAS WAIVED AND ADMITTED THE PHONE CONVERSATION BETWEEN DEFENDANT AND MELISSA VARGAS.

A. Standard of Review

"The trial court's evidentiary rulings are presumed to be correct." *State v. Crawford*, 2007 S.D. 20, ¶ 13, 729 N.W.2d 346, 349 (quoting *State v. Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d 100, 105). "We review evidentiary rulings for abuse and discretion." *Id.* (citing *State v. Goodroad*, 1997 S.D. 46, ¶ 9, 563 N.W.2d 126, 129)(citations omitted)). Defendant has the burden to prove both error and that the error was prejudicial. *Id.* (citing *State ex rel. Dep't of Transp. v. Spiry*, 1996 S.D. 14, ¶ 11, 543 N.W.2d 260, 263 (citations omitted)). "The test for abuse of discretion is 'whether we believe a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion.'" *Id.* (quoting *Huber v. Dep't of Pub. Safety*, 2006 S.D. 96, ¶ 22, 724 N.W.2d 175, 180)(citations omitted)). "Alleged violations of constitutional rights are reviewed by this Court under the de novo

standard of review." *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 27, 835 N.W.2d 886, 896 (citing *State v. Johnson*, 2009 S.D. 67, ¶ 10, 771 N.W.2d 360, 365 (citations omitted)).

B. The Recorded Conversation of Defendant and Ms. Vargas Was Properly Admitted.

On March 8, 2011, Defendant and his wife, Ms. Vargas, engaged in a phone conversation that was recorded by Detective Baker. State's Ex. 16A. Ms. Vargas consented to the recorded conversation without Defendant's knowledge. State's Ex. 16A. Defendant argues that the trial court erred by allowing into evidence the recorded phone call between Defendant and his wife. DB 11. Defendant argues that this conversation was a confidential marital communication protected by the spousal privilege, that his Sixth Amendment right to confrontation was violated because Ms. Vargas was not present in court to be cross-examined, and that Defendant was prejudiced by the phone call. DB 11. Because the spousal privilege was waived when Ms. Vargas consented to the recording, and because the crime was against the child of Defendant, as provided in SDCL 19-13-15, the trial court properly admitted the recorded conversation.

1. <u>Ms. Vargas Permitted Detective Baker to Record Their Phone Conversation With Defendant.</u>

SDCL 19-13-13 provides that "[a]n accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse."

An exception to this rule exists when such statements are not made in absolute confidence, such as when one spouse permits third parties to witness their communication. *United States v. Nash*, 910 F.Supp.2d 1133, 1137 (S.D. Ill. 2012) (quoting *United States v. Short*, 4 F.3d 475, 478 (7th Cir. 1993)). The trial court correctly held that confidentiality was lost and the spousal privilege waived when Ms. Vargas placed a recorded call to the Defendant because the communication was not intended to be protected by the spousal privilege. MH (9/13/13) 19.

Defendant argues that spousal privilege is waived only if the conversation could reasonably be overheard by a third party. DB 13. This issue has not been decided in South Dakota. Other jurisdictions that have addressed this issue have rejected Defendant's argument. In *Nash*, the court held that a defendant could not invoke the marital communications privilege where his wife had recorded their conversation in order to turn it in to the police. *Nash*, 910 F.Supp.2d at 1136 (S.D. Ill. 2012). The court held that there was no privilege in the communications because the defendant was trying to solicit a crime and force his wife into criminal activity. *Id.*

Although Defendant in the case at bar was not forcing his wife into criminal activity during the recorded conversation, he did tell her not to talk to the detective, and to tell Ms. Toavs not to talk to the detective. State's Ex. 16A, pg 3. He told Ms. Vargas that "if [Ms. Toavs] tries throwing me under the bus I'm gonna do the same to

her" and "[i]f [Ms. Toavs] did then I, I'll, I'm gonna fuckin' call Social Services on her every, every other week. She wants to be a bitch, we, we know more stuff about her than she knows about us." State's Ex. 16A, pg 3. This conversation reveals that Defendant was attempting to intimidate Ms. Toavs into silence because he did not want his admission about providing Ms. Komes with cohosh to terminate her pregnancy disclosed to law enforcement. The trial court, noting that "its statutory privileges are strictly construed to avoid suppressing otherwise competent evidence," properly ruled that the spousal privilege had been waived and allowed the recorded conversation to be heard in court. MH (9/13/13) 19, 21.

2. The Trial Court Properly Held That the Spousal Privilege Was Waived Under SDCL 19-13-15(2).

SDCL 19-13-15(2) states that there is no privilege under § 19-13-13 in a proceeding in which one spouse is charged with a crime against the person or property of a child of either.

Defendant argues that the trial court erroneously applied SDCL 19-13-15(2) because the child was not yet born at the time of the conversation. DB 15. Defendant relies on the definition of "unborn child" in SDCL 22-1-2(50A), "an individual organism of the species homo sapiens from fertilization until live birth," to support his claim. DB 15. Defendant argues that because an unborn child has a "separate definition from other humans, he does not have the same

legal status of other humans," and SDCL 19-13-15(2) should not apply. DB 15. Defendant's argument is without merit.

The definition of unborn child in SDCL 22-1-2(50A) applies and includes a child under SDCL 19-13-15(2). Ms. Komes' unborn child was fathered by Defendant, and was subsequently born despite Defendant's criminal attempts to terminate his life. South Dakota has made attempted fetal homicide a crime. The term "child" contained in SDCL 19-13-15(2) provides an exception to the spousal privilege that allows statements of intent to commit a crime against an unborn child of either parent admissible. The trial court was correct in concluding that "communications with their spouse are not privileged in a proceeding in which one spouse is charged with a crime against the other or a child of either." MH (9/27/13) 20. The trial court further explained that the exception is to protect domestic life, noting that:

> The rule does not tolerate defendants to hide behind the cloaks of spousal privilege when they commit crimes against the peace and dignity of the family. And that's the public policy behind these exceptions. . .[a]lthough the child was unborn at the time of the crime, the State of South Dakota recognizes the humanity and the dignity of the unborn child whenever constitutionally possible.

MH (9/27/13) 20-21. Defendant argues the fetus does not carry the same rights as a human being, since a woman's legal right to abort her unborn child is distinguished from the killing of a human being, which is never justified. DB 15. This argument ignores the language of SDCL 22-16-1.1, which specifically states that the crime of fetal

homicide does not apply to an abortion to which the pregnant woman consents. Here, Ms. Komes refused to have an abortion. Consequently, the fetal homicide exception contained in SDCL 22-16-1.1 does not apply, particularly to Defendant. Defendant's attempt to cause an abortion without Ms. Komes' consent constitutes a crime under SDCL 22-16-1.1, which strictly prohibits the unlawful death of a fetus.

The trial court properly held the spousal privilege does not apply because Defendant was charged with a crime against his own child. The conversation between Ms. Vargas and Defendant was properly admitted into court.

3. Defendant's Sixth Amendment Right to Confrontation Was Not Violated.

Defendant also asserts that admission of the telephone recording with his wife violated Defendant's Sixth Amendment right to confront Ms. Vargas, since she was not present to testify at trial. DB 18. This argument is without merit. The recording was offered and admitted into evidence solely to consider Defendant's own statements. JT 422-423. The trial court instructed the jury to consider only Defendant's statements and not to consider Ms. Vargas' statements as fact, admonishing the jury as follows:

> In a moment you will hear a tape recorded phone call between [Ms. Vargas] and [Defendant]. Please bear in mind that nothing that [Ms. Vargas] says in the course of the interview may be considered by you as a fact. The only thing you may consider in the course of the interview

> are what the Defendant, himself, may have said. The statements of [Ms. Vargas] are not relevant to the facts of the case and are admitted only to set the stage for the response of the Defendant.
>
> So, in essence, you may consider the statements of the Defendant but not the statements of [Ms. Vargas] for their content.

JT 422-423. Defendant claims that Ms. Vargas' statements were testimonial and Defendant should have been allowed to cross-examine her. DB 18. *Crawford v. Washington* defined a testimonial statement as a statement "made during police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at a former trial." *Crawford*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (U.S. 2004). A testimonial statement also is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51, 124 S.Ct. at 1364, 158 L.Ed.2d 177. Evidence is also "testimonial" in nature when given in formal pleadings, such as affidavits, declarations, confessions, or "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) (citing *Crawford*, 541 U.S. at 52, 124 S.Ct. at 1364-65, 158 L.Ed.2d at 193). In his brief, Defendant sets forth the statements he claims are Ms. Vargas' testimonial statements.

> Ms. Vargas: Well [Detective Baker] said you put Penny Royal in [Ms. Komes'] drinks and that, didn't you say that

> when she got picked up she went to the ER? 'Cause you brought her that drink?
>
> Defendant: That's the thing. He has to prove, because ah,
>
> Ms. Vargas: That is the only time you took her the drink.
>
> Defendant: They, they can't prove that she drank it.
>
> Ms. Vargas: and nobody saw you, right?
>
> Defendant: That's the thing, she ah, he has to prove that I took the drink that, that, that she drank anything. She doesn't ah, she can't prove that she drank anything.
>
> Ms. Vargas: She was the only one who came out, was in back, right?
>
> Defendant: Of course. So that's the thing, he has to prove that I had, that I had something, because when ah, he, he told, he asked me how much child support I was paying because they're trying to look for, for motive and shit like that. And I said I pay a hundred and eighty dollars a month. He was like wow I thought you were gonna, that you were paying way more. I was like no, I, I'm not worried about paying child support. They don't have anything.

DB 20; State's Ex. 16A, pg 4. None of the statements by Ms. Vargas are testimonial. Ms. Vargas' questions and statements were not being offered for the truth of the matter asserted. Indeed, "[s]tatements providing context for other admissible statements are not hearsay because they are not offered for their truth." *Johnson*, 2009 S.D. 67, ¶ 21, 771 N.W.2d at 369 (quoting *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006) (citations omitted)). Because the court admonished the jury with limiting instructions, anything that Ms. Vargas said in the phone conversation was not used in trial as a

fact or declaration. The only relevant parts of the conversation were Defendant's admissions.

This Court upheld the admission of a videotaped police interview of a defendant when the officer could not be cross-examined at trial. *State v. Running Bird*, 2002 S.D. 86, ¶ 35, 649 N.W.2d 609, 616. In that case, the trial court admitted the recorded interview with a limiting instruction to the jury that they were not to consider anything the officer said as a fact, and they could consider only the defendant's statements. *Id.*, 2002 S.D. 86 at ¶ 33. This Court held that the officer's statements did not constitute direct testimony, and that the trial court properly admitted the recorded interview with limiting instructions to the jury. *Id.*, 2002 S.D. 86 at ¶ 35.

In this case, the trial court made a similar limiting instruction, and properly admitted the recording into evidence, instructing the jury that Ms. Vargas' statements were not offered for the truth of the matter asserted and should not be considered. JT 422-423. Defendant's argument that Ms. Vargas should have been available for cross-examination because of her "compound hearsay statements" or for impeachment for prior inconsistent statements she made to Detective Baker in an interview that was not admitted into evidence is groundless for the same reason. DB 22, 24.

In *Boykin v. Leapey,* the defendant argued that the disclosure of a co-defendant's conviction to the jury prejudiced the defendant.

Boykin, 471 N.W.2d 165, 168 (S.D. 1991). However, the Court held that the defendant was not prejudiced because of the trial court's limiting instructions admonishing the jury not to consider the co-defendant's conviction "as evidence in determining the guilt of the defendant." *Id.* 471 N.W.2d at 169. The Court held that because jurors are presumed to follow the limiting instructions, the trial court's limiting instructions were upheld. *Id.* (citing *State v. Reddington*, 125 N.W.2d 58 (S.D. 1963) (citations omitted)).

In this case, the court gave clear, cautionary instructions to the jury that Ms. Vargas' statements were not testimony, and should not be considered as fact. The jury is presumed to have followed the trial court's limiting instruction. The trial court did not err in admitting Defendant's recorded admissions to his wife.

II.

THE TRIAL COURT PROPERLY ADMITTED OTHER ACTS EVIDENCE

A. Standard of Review

It is well established that the trial court's rulings on evidentiary matters are presumed to be correct. *State v. Dubois*, 2008 S.D. 15, ¶ 19, 746 N.W.2d 197, 204. This Court reviews the decision to admit other acts evidence under an abuse of discretion standard. *Id.* (citing *State v. Janklow*, 2005 S.D. 25, ¶ 39, 693 N.W.2d 685, 698). "An abuse of discretion refers to a discretion exercised to an end or

purpose not justified by, and clearly against reason and evidence." *State v. Bowker*, 2008 S.D. 61, ¶ 38, 754 N.W.2d 56, 68; *State v. Cottier*, 2008 S.D. 79, ¶ 25, 755 N.W.2d 120, 131. The Defendant bears the burden of establishing error and then showing that it was prejudicial. *Dubois*, 2008 S.D. 15, ¶ 19, 746 N.W.2d at 204. The test on review is not whether this Court would make a similar ruling, but rather whether a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion. *State v. Chamley*, 1997 S.D. 107, ¶ 7, 568 N.W.2d 607, 611.

B. The Other Acts Evidence Was Properly Admitted.

Around Easter of 2010, Ms. Toavs was pregnant and near her delivery date. JT 212. While speaking with Defendant, she expressed her desire to acquire some blue cohosh to help induce labor. JT 212. Ms. Toavs testified that Defendant informed her that he had a bottle of cohosh. JT 213. Ms. Toavs and her daughter, Ms. Walks, drove to Defendant's trailer and Defendant provided Ms. Toavs with a small amount of cohosh. JT 213. Ms. Toavs asked Defendant why he had cohosh. JT 215. Defendant initially told Ms. Toavs that the cohosh was for his friend and she was taking cohosh to terminate a pregnancy. JT 215. Later in the conversation, Defendant admitted to Ms. Toavs that it was Ms. Komes, his girlfriend, that was taking the cohosh because she was pregnant. JT 215. Ms. Toavs assumed Ms. Komes wanted to terminate the pregnancy. JT 216. Defendant told

Ms. Toavs the cohosh did not taste good in certain drinks. JT 216. When Ms. Toavs went home she tried the cohosh. JT 218. She testified that it tasted similar to root water, and threw it away because it tasted bitter. JT 218.

Ms. Walks also testified that around Easter of 2010, she and her mother drove to Defendant's trailer to get black cohosh. JT 230. Ms. Walks testified that Ms. Toavs wanted the cohosh to induce labor and that Defendant provided Ms. Toavs with cohosh from a bottle. JT 230-31. Ms. Toavs tried the cohosh, did not like the taste, and threw it away. JT 232.

C. Other Acts Evidence Was Properly Admitted Under SDCL 19-12-5 to Prove Defendant's Common Scheme or Plan.

The State sought to introduce evidence of Defendant's interaction with Ms. Toavs under SDCL 19-12-5. SR 11-14. The State asserted that Defendant's conduct with Ms. Toavs was admissible to prove the Defendant's knowledge, common plan or scheme, intent, opportunity, and/or lack of mistake or accident. SR 12. The trial court found the other act evidence was relevant to show Defendant's common scheme or plan, and that "the danger of unfair prejudice of this evidence does not substantially outweigh the probative value of the evidence." Court's Decision (6/10/13) 9.

SDCL 19-12-5 (Rule 404(b)) was adopted verbatim from the Federal Rules of Evidence. "Because the possible uses for other act evidence are limitless, Rule 404(b) only suggests a nonexclusive list of

purposes, other than character, for which they may be admissible." *State v. Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d 792, 798. SDCL 19-12-5 provides that evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In *Wright*, this Court reexamined the principles applicable to "other acts evidence" under SDCL 19-12-5. 1999 S.D. 50, ¶ 13, 593 N.W.2d at 797. "Rule 404(b)] is not a rule of exclusion. It is a rule of *inclusion* [and] no 'preliminary showing is necessary before such evidence may be introduced for a proper purpose.'" *Id.* at 798 (emphasis added) (quoting *Huddleston v. United States,* 485 U.S. 681, 687-88 (1988)). *See also* John W. Larson, *South Dakota Evidence,* § 404.2(1) (1991) ("It must be remembered that FRE 404(b) is an inclusionary rule . . . not an exclusionary rule"). "It is anticipated that with respect to permissible uses of such evidence, the trial judge may exclude [similar acts] *only* on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time." Fed. R. Evid. 404(b) Advisory Committee's Note (emphasis added). This Court adopted the view that evidence offered under SDCL 19-12-5 is generally admissible. *Wright,* 1999 S.D. 50, ¶ 13, 593 N.W.2d at 798.

Prior to the admission of other acts evidence, the trial court is required to conduct a two-step balancing procedure on the record. *State v. Owen*, 2007 S.D. 27, ¶ 14, 729 N.W.2d 356, 362-63. The

offered evidence must be: (1) relevant to a material issue in the case; and (2) the probative value of this evidence must substantially outweigh its prejudicial effect. *Dubois*, 2008 S.D. 15, ¶ 20, 746 N.W.2d at 205.

D. The Other Acts Evidence is Relevant.

The State has the burden of showing the relevance of other crimes, wrongs, or acts. *See* SDCL 19-12-1 (Rule 401), SDCL 19-12-2 (Rule 402), and SDCL 19-12-5 (Rule 404(b)). "Relevance under § 404(b) is established 'only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Wright,* 1999 S.D. 50, ¶ 14, 593 N.W.2d at 798 (quoting *Huddleston,* 485 U.S. at 689). Here, Ms. Toavs and Ms. Walks testified to Defendant providing Ms. Toavs with cohosh. JT 213, 230. Ms. Toavs also testified that Defendant admitted to putting blue cohosh in his pregnant girlfriend's drinks. JT 216.

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

that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence." *Id.*; *Bowker*, 2008 S.D. 61, ¶ 39, 754 N.W.2d at 68.

When considering whether an act is relevant to show a common scheme or plan, the Court has held that "[a]ll that is required to show a common plan is that the charged and uncharged events 'have sufficient points in common.'" *Wright*, 1999 S.D. 50, ¶ 19, 593 N.W.2d at 800 (quoting *United States v. Flizondo*, 920 F.2d 1309, 1320 (7th Cir. 1990) (citations omitted)). In the present case, Defendant put cohosh and pulegone in Ms. Komes' drinks without her consent or knowledge in order to induce early labor and abort his child. Ms. Komes described some of the drinks given to her by Defendant as smelly and minty tasting. JT 149. Other drinks tasted bitter, leaving a white residue. JT 149. The expert witness testimony establishes that while cohosh has a bitter taste, pulegone has a minty smell and taste. JT 363, 368.

The fact that Defendant told Ms. Toavs that he was putting cohosh in Ms. Komes' drinks to end her pregnancy is highly relevant. The facts establish that Defendant put two substances, pulegone and cohosh, known to induce labor early, in Ms. Komes' drink to terminate her pregnancy. MH (9/16/13) 4. The testimony of Ms. Toavs and Ms. Walks is highly relevant to establish that Defendant was giving Ms. Komes multiple substances over the course of several months in

order to terminate Ms. Komes' pregnancy without her knowledge or consent. Court's Decision (6/10/13) 9.

Defendant argues that providing Ms. Toavs with cohosh at her request to help her induce labor at the end of her pregnancy is irrelevant and devoid of a common plan or scheme. DB 27. Defendant argues that evidence is dissimilar to secretly providing to Ms. Komes with cohosh and pulegone to kill his unborn child. DB 27. The evidence proves Defendant's knowledge, intent, plan, motive, and opportunity to abort Ms. Komes' child by surreptitiously altering beverages with pulegone and cohosh to induce early labor. SR 22-23. Based on the evidence provided, the trial court correctly held that the testimony of Ms. Toavs and Ms. Walks was relevant and properly admitted at trial. Court's Decision (6/10/13) 9.

E. Any Prejudicial Effect of the Interaction is Outweighed by its Probative Value.

After determining the relevancy of the "other acts" evidence, the court must balance the probative value of the evidence against the potential for unfair prejudice. *Dubois*, 2008 S.D. 15, ¶ 20, 746 N.W.2d at 205. Once evidence is found relevant, "the balance tips emphatically in favor of admission unless the dangers set out in Rule

403[3] 'substantially' outweigh probative value." *Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d at 799. This Court has stated:

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

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

Prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means, resulting in one party having an unfair advantage. *State v. Smith*, 1999 S.D. 83, ¶ 19, 599 N.W.2d 344,

---

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

349-50. Evidence is not prejudicial merely because its legitimate probative force damages the defendant's case. *Id.* "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). Ms. Toavs and Ms. Walks testimonies are relevant to prove that Defendant poisoned Ms. Komes' drinks with cohosh, in addition to the pulegone. This testimony, along with that of Ms. Komes and the expert witnesses, establishes that Defendant is well familiar with the effects of pulegone and cohosh on a pregnant woman. Ms. Toavs and Ms. Walks testimony is relevant and more probative than prejudicial.

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

Defendant claims the testimony of Ms. Toavs and Ms. Walks was unfairly prejudicial because cohosh was not detected in Ms. Komes' drinks when tested by State's expert witnesses, Professor Wold and Mr. Mathison. DB 28. However, the evidence established that Defendant used both pennyroyal (pulegone) and cohosh to attempt to abort Ms. Komes' child. MH (9/16/13) 4. Ms. Komes reported receiving four suspicious tasting fountain drinks from Defendant. JT 147, 149, 150, 154. Two of those drinks were tested. JT 150, 154. The first two drinks Ms. Komes received were described as bitter tasting, similar to Ms. Toavs' description of cohosh's flavor. JT 147, 149. Neither drink was given to authorities for testing. JT 147, 149. The third fountain drink Defendant brought to Ms. Komes tasted minty, consistent with the taste of pulegone. JT 150, 273-74, 368. The fourth fountain drink Defendant brought to Ms. Komes was immediately given to the authorities. JT 154. Terpin hydrate was detected in that drink. JT 329. Moreover, Defendant's admission to Ms. Toavs of putting cohosh in Ms. Komes' drink to terminate her pregnancy is highly probative. His own admission proves Defendant used multiple substances through the course of several months with a plan to terminate Ms. Komes' pregnancy. The trial court properly held that the probative value of the testimony of Ms. Toavs and Ms. Walks is not substantially outweighed by the danger of unfair prejudice.

III.

THE TRIAL COURT PROPERLY ADMITTED STATE'S EXPERT WITNESS TESTIMONY

A. *Standard of Review.*

Trial courts in South Dakota have broad discretion concerning the qualifications of expert witnesses and the admission of expert testimony. *State v. Koepsell*, 508 N.W.2d 591, 593 (S.D. 1993). The admission of expert testimony will not be reversed on appeal without a clear showing that the trial court abused its discretion. *Id.*

B. *Expert Witness Testimony Was Properly Admitted.*

Expert testimony is admissible under SDCL 19-15-2 if the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." SDCL 19-15-2. "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has a superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *State v. Lemler*, 2009 S.D. 86, ¶ 18, 774 N.W.2d 272, 278 (citing *Maroney v. Amon*, 1997 S.D. 73, ¶ 39, 565 N.W.2d 70, 79). Defendant argues that the trial court erred when it admitted the State's three expert witnesses, Dr. Phillips, State chemist, Mr. Roger Mathison, and Professor Wold. DB 29-30. Specifically, Defendant argues that Dr. Phillips and Mr. Mathison's testimony did not meet the requirements in SDCL 19-15-2. He also

claims their expert testimony was more prejudicial than probative, in violation of 19-12-3. DB 29.

Dr. Phillips is a medical toxicologist licensed to practice in Colorado. MH (3/27/13) 6. Dr. Phillips, who has been a doctor since 1984, testified that there are only three hundred to three hundred-fifty medical toxicologists in the United States, and none in South Dakota. MH (3/27/13) 6-8. Dr. Phillips testified that, although he practices some internal medicine, his clinical practice is all medical toxicology. MH (3/27/13) 9. He is a member of the American Medical Association of Toxicology, the American College of Medical Toxicology, and several panels and committees. MH (3/27/13) 9-10. He has published nine books, numerous articles, over two hundred book chapters focused on medical toxicology, and teaches doctors who are training to become specialists in toxicology at the University of Colorado. MH (3/27/13) 10-11. He also consults for various organizations and has testified in court regarding medical toxicology in over thirty cases. MH (3/27/13) 12. Dr. Phillips staffs poison centers and treats patients regarding occupational exposures, poison, drug overdoses, chemical exposures, snake bites, and plant-related issues. MH (3/27/13) 9.

In this case, Dr. Phillips testified at both a Daubert hearing and at the jury trial about the consistency, tastes, and uses of black cohosh and pennyroyal, the plant from which pulegone is extracted. MH (3/27/13) 16; JT 360-71. He testified to his familiarity with

pennyroyal, its minty aroma and flavor, its oily consistency, and its use as an abortifacient. MH (3/27/13) 17-18; JT 362-367.
Dr. Phillips testified that black cohosh also has an oily consistency, tastes bitter, and has been used to induce labor, and that it could cause an abortion when used with pulegone. MH (3/27/13) 21-23; JT 367-371.

The trial court properly held that Dr. Phillips had the necessary training, education, and expertise to testify to cohosh and pennyroyal and that his testimony was relevant and reliable. Court's Decision (6/10/13) 3. The trial court properly allowed Dr. Phillips' testimony to educate the jury on the use and dangers of cohosh and pulegone to pregnant women and their fetus.

Defendant further argues that the trial court improperly admitted the expert testimony of Mr. Mathison. DB 29. The court held that because Mr. Mathison "has testified in several hundred cases, has worked as a chemist at the South Dakota State Forensic laboratory for twenty-nine years, and has been deemed an expert on numerous occasions on the use of head space gas chromatography," the test used to determine the presence of pulegone in Ms. Komes' soda, Mr. Mathison's testimony was based on sufficient facts and data, and was the product of reliable principles and methods. Court's Decision (6/10/13) 4. Further, Mr. Mathison applied those principles and methods reliably to the facts of the case. Court's Decision

(6/10/13) 4. Mr. Mathison's testimony was important to provide the jury with the knowledge that the South Dakota State Forensic Laboratory has more resources than the Rapid City Police Department to determine the substances in the drinks submitted for testing. MH (3/27/13) 73. When discussing the discrepancy between Professor Wold detecting terpin hydrate and Mr. Mathison finding pulegone the soda drinks tested, Mr. Mathison explained that the two substances can be similar chemically. MH (3/27/13) 73. Mr. Mathison explained that because he has better resources at the South Dakota State Forensic Laboratory, he had more detailed information to determine that the substance was pulegone. MH (3/27/13) 73. The trial court correctly admitted Mr. Mathison's expert testimony.

Defendant argues the trial court erred when it admitted Professor Wold's testimony. DB 29. Professor Wold has been a chemistry professor at South Dakota School of Mines for ten years, has worked with the Rapid City Police Department for the past twelve years as a forensic examiner, and has worked in various chemical industries for the past thirty years. State's Ex. 5; JT 312-13. Professor Wold also tested Ms. Komes' fountain drinks with the gas chromatograph-mass spectrometer. JT 314. Over the past eleven years, Professor Wold has testified to testing twenty thousand items

using that approach. JT 314. Professor Wold has testified in court more than sixty times and as an expert many times. JT 316.

Professor Wold found terpin hydrate, a cough suppressant that is no longer available to purchase, in the fourth fountain drink Defendant brought to Ms. Komes. JT 322. The detection of terpin hydrate in a beverage would cause it to be adulterated. JT 323. Professor Wold could not identify any toxic substance in the third fountain drink Defendant brought to Ms. Komes. JT 324. Professor Wold testified that because additional analysis was requested, he sent the samples to the South Dakota Forensic Laboratory because it has more resources. JT 317. Testing by Mr. Mathison revealed pulegone in the third fountain drink. MH (3/27/13) 73. Professor Wold's experience and testing methods conclusively establish that the trial court correctly admitted his expert testimony.

IV.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF ATTEMPTED FETAL HOMICIDE.

A. Standard of Review

A challenge to the sufficiency of evidence is reviewed *de novo*. *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140 (citing *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764). This, however, does not mean that the appellate court must "ask itself

whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d at 765 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Rather, "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 S.D. 52, ¶ 7, 785 N.W.2d 288, 292 (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342).

This Court, while engaged in the sufficiency of evidence analysis, "will not usurp the jury's function in resolving conflicts in the evidence, weighing credibility, and sorting out the truth." *State v. Swan*, 2008 S.D. 58, ¶ 9, 753 N.W.2d 418, 420 (quoting *State v. Pugh*, 2002 S.D. 16, ¶ 9, 640 N.W.2d 79, 82). Thus, "[i]f the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustain[s] a reasonable theory of guilt, a guilty verdict will not be set aside." *Beck*, 2010 S.D. 52, ¶ 17, 785 N.W.2d at 292 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 19, 705 N.W.2d 620, 626).

B. *The Evidence is Sufficient to Uphold Defendant's Conviction for Attempted Fetal Homicide.*

Defendant was convicted of attempted fetal homicide, in violation of SDCL 22-16-1.1(1), which provides

> Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant and caused the death of the unborn child without lawful justification and if the person

> intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child.

The State must prove each of the four elements of attempted fetal homicide beyond a reasonable doubt. SDCL 22-16-1.1; SR 224. Defendant asserts there was insufficient evidence to prove beyond a reasonable doubt that Defendant attempted to cause the death of his unborn child and that Defendant intended to cause the death of his unborn child. SR 234; DB 31.

The State met its burden of proof to sustain Defendant's conviction. Viewing the evidence in the light most favorable to the verdict, it is apparent that "any rational trier of fact could have found the essential elements of [attempted fetal homicide] beyond a reasonable doubt." See *Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d at 140. Testimony overwhelmingly proved that Defendant attempted to poison Ms. Komes, intending to cause the death of their unborn child, and intending to cause the death or serious bodily injury to their unborn child.

1. <u>Defendant Attempted to Cause the Death of Ms. Komes' Unborn Child.</u>

Defendant asserts there was a lack of evidence to support finding beyond a reasonable doubt that he attempted to abort Ms. Komes' unborn child. DB 31. "[A]n attempt to commit a crime occurs when one 'does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration of that

crime[.]'" SDCL 22-4-1; *State v. Waugh*, 2011 S.D. 71, ¶23, 805 N.W.2d 480, 486. "[T]o prove an attempt, the prosecution must show that Defendant (1) had the specific intent to commit the crime, (2) committed a direct act toward the commission of the intended crime, and (3) failed or was prevented or intercepted in the perpetration of the crime." *State v. Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d 1, 3.

Defendant argues that the State did not establish that Defendant intended to cause the death of Ms. Komes' unborn child. DB 31. To prove Defendant attempted to commit fetal homicide, the first element to establish is whether Defendant had the specific intent to commit the crime. *Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d at 3. "Specific intent has been defined as 'meaning some intent in addition to the intent to do the physical act which the crime requires[.]'" *State v. Huber*, 356 N.W.2d 468, 472 (S.D. 1984). In this case, Defendant purposefully put the substances pulegone and cohosh in Ms. Komes' drinks to cause her to miscarry their unborn child. Defendant argues, however, that there was no evidence presented at trial that Defendant ever possessed pennyroyal or cohosh. DB 31. This argument ignores the testimony in the record. Mr. Mathison testified that Ms. Komes' fountain drink tested positive for the substance pulegone. JT 277. Additionally, Ms. Toavs and Ms. Walks' testimony established that Defendant both possessed and admitted to adding cohosh in Ms. Komes' drinks in order to terminate her pregnancy. JT 215.

Ms. Komes' description of the bitter tasting fountain drink, laced with cohosh, corroborated Ms. Toavs' testimony of the bitter tasting cohosh. JT 147, 149, 218. Defendant himself admitted to Ms. Toavs that he laced Ms. Komes' drinks with cohosh. JT 215. Dr. Phillips also testified to cohosh tasting bitter. JT 368. Mr. and Mrs. Green testified that Defendant mentioned looking to purchase an herb online to terminate Ms. Komes' pregnancy. JT 250. The totality of the circumstances establishes Defendant had the specific intent to cause the miscarriage of Ms. Komes' unborn child by lacing her drinks with pulegone and cohosh.

The second element to establish Defendant attempted to commit fetal homicide is whether Defendant committed a direct act toward the commission of the intended crime. *Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d at 3. Defendant placed two different substances in Ms. Komes' fountain drinks multiple times without Ms. Komes' knowledge. JT 147, 149, 150, 154. Those two substances, pulegone and cohosh, have abortifacient properties and when used together are harmful or lethal to an unborn child. MH (3/27/13) 23. Defendant put the substances in Ms. Komes' drinks, brought her the drinks, and attempted to manipulate her into ingesting all of the foul-tasting and odiferous drinks. JT 177. The fact that Defendant committed this act multiple times demonstrates his specific intent to abort his child without her knowledge.

The third element of attempted fetal homicide is whether the crime failed or Defendant was prevented or intercepted in the perpetration of the crime. *Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d at 3. Defendant's attempt to abort Ms. Komes' unborn child failed only because, after tasting the minty and bitter drinks, Ms. Komes became suspicious and contacted law enforcement, correctly believing Defendant was trying to poison her. JT 151. Fortunately, Ms. Komes did not consume any more of the contaminated beverages when she realized they tasted minty and bitter, thereby preventing and intercepting the fetal homicide planned by Defendant. JT 154.

Defendant argues that Ms. Komes never felt ill or suffered any adverse physical affects from the poisoned drinks. DB 32. Effects of the poison on either mother or child is not an element of attempted fetal homicide. Defendant had the requisite intent and took deliberate steps toward the commission of the crime. The fact that Ms. Komes prevented the crime does not negate his attempt to commit fetal homicide.

Defendant further argues that there is no evidence that Ms. Komes consumed pulegone. Ms. Komes' consumption of the poisoned drink was not necessary for the jury to find defendant guilty of attempted fetal homicide. Ms. Komes did, however, partially consume the drinks Defendant provided to her. JT 147, 149, 150. As noted in her testimony, she testified to the flavor of the substances. JT 147,

149, 150. The fact that Defendant took intentional steps toward the commission of the crime is enough to find Defendant guilty of attempted fetal homicide.

Defendant also argues that with the amount of pulegone detected in Ms. Komes' drinks, it would take four hundred cans of soda to produce a lethal dose of pulegone. DB 32-33. This argument has no merit. Defendant's ignorance about the amount of pulegone necessary to poison Ms. Komes does not lessen the fact that he attempted to kill his unborn child. The fact that Defendant surreptitiously added the substance to Ms. Komes' drinks with the specific intent of terminating their baby is sufficient evidence to support Defendant's guilt of the crime of attempted fetal homicide.

When the facts are reviewed in the light most favorable to the jury's verdict, there was ample evidence to sustain Defendant's conviction of attempted fetal homicide.

2. Defendant Intended to Cause the Death Of or Do Serious Bodily Injury to Ms. Komes or the Unborn Child.

Defendant asserts that there was lack of evidence proving beyond a reasonable doubt that Defendant intended to cause the death of or do serious bodily injury to Ms. Komes or her unborn child. DB 31. The jury was instructed that "[i]n the crime of Attempted Fetal Homicide, there must exist in the mind of the perpetrator the specific intent to cause the death of or do serious bodily injury to the pregnant woman or the unborn child." Jury Instruction 24, SR 238. Not only

did evidence show Defendant furtively tainted Ms. Komes' fountain drinks with pulegone and cohosh, but testimony by Mr. Green, Mrs. Green, and Ms. Toavs established that Defendant told them of his plan to give Ms. Komes a substance to induce labor. JT 215, 250. This case is replete with evidence that, if believed by the fact finder, was sufficient to sustain a finding of guilt beyond a reasonable doubt. *Beck*, 2010 S.D. 52 at ¶ 7, 785 N.W.2d at 292 (quoting *Carter*, 2009 S.D. 65 at ¶ 44, 771 N.W.2d at 342).

CONCLUSION

The State respectfully requests that the trial court's judgment and sentence be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 9,174 words.

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

Dated this 9th day of September, 2014.

/s/Caroline Srstka
Caroline Srstka
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of September, 2014, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Alfredo Vargas* was served via electronic mail upon Jamy Patterson, jamyp@co.pennington.sd.us.

/s/Caroline Srstka
Caroline Srstka
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
vs. FILE NO: 26885

ALFREDO VARGAS,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE JANINE M. KERN, Circuit Court Judge

APPELLANT'S AMENDED BRIEF

Jamy Patterson
Office of the Public Defender
for Pennington County
Pennington County Courthouse
Rapid City, South Dakota 57701
Attorney for Appellant

Mr. Marty J. Jackley
Attorney General
1302 E. Hwy 14 Suite 1
Pierre, South Dakota 57501

and

Mr. Mark A. Vargo
Pennington County State's Attorney
300 Kansas City Street
Rapid City, SD 57701

Notice of Appeal was filed on November 20, 2013.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED: PAGES:

STATUTES CITED:

OTHER SOURCES: PAGES:

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. FILE NO. 26885

ALFREDO VARGAS,
Defendant and Appellant.

APPELLANT'S AMENDED BRIEF

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Alfredo Vargas, will be referred to as "Vargas." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." References to documents in the record herein will be designated as "SR" followed by the appropriate page number. References to the transcript of a motion hearing will be designated as "MH," followed by the date of the motion hearing, and then followed by the appropriate page number. References to the transcript of a motion hearing will be designated as "EV," followed by the date of the motion hearing, and then followed by the appropriate page number. References to the transcript of the Bond hearing of November 9, 2012 will be designated as "BH" followed by the appropriate page number. References to the seven volumes of the Jury Trial transcripts will be

designated as "JT," followed by the volume number, and then followed by the appropriate page number (i.e., volume two of three will be referenced as "JT2," and followed by the appropriate page number). References to Appendix will be designated as "APPX."

JURISDICTIONAL STATEMENT

Vargas appeals from a final judgment of conviction for Attempted Fetal Homicide. The judgment was entered on November 11, 2013 before the Honorable Janine Kern, Seventh Judicial Circuit Court Judge, Rapid City, Pennington County, South Dakota and filed on November 13, 2013. SR 304. Appeal is by right pursuant to SDCL § 23A-32-2. Notice of appeal was filed on November 20, 2013. SR 309. This Court granted Appellant's Motion to Amend Appellant's Brief Regarding Lack of Subject Matter Jurisdiction on October 31, 2014.

STATEMENT OF LEGAL ISSUES

I. WHETHER ATTEMPTED FETAL HOMICIDE IS A LEGAL IMPOSSIBILITY?

Attempted Fetal Homicide is a legal impossibility and therefore, the Trial Court lacked subject matter jurisdiction.

State v. Whistler, 2014 S.D. 58, 851 N.W.2d 905.

State v. Lyerla, 424 N.W.2d 908 (S.D. 1988).

SDCL § 22-16-1.1(1).

II. WHETHER TRIAL COURT VIOLATED THE SPOUSAL PRIVILEGE AND VARGAS'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN IT ALLOWED THE STATE TO PLAY

THE SECRETLY RECORDED PHONE CALL BY THE GOVERNMENT BETWEEN VARGAS AND HIS WIFE?

Trial Court violated Vargas's Sixth Amendment Right to Confrontation when it allowed the State to play the secretly recorded phone call by the government between Vargas and his wife.

Crawford v. Washington, 541 U.S. 36 (2004).
State v. Johnson, 2009 S.D. 67, 771 N.W.2d 360.
SDCL § 19-13-13.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE 404(B) EVIDENCE IN THIS CASE?

Trial Court abused its discretion in permitting the 404(b) evidence in this case.
State v. Wright, 1999 S.D. 50, 593 N.W.2d 792.
SDCL § 19-12-5.
SDCL § 19-12-3.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMISSION OF THE STATE'S EXPERT WITNESSES?

Trial Court abused its discretion when it permitted the State's experts to testify.
State v. Huber, 2010 S.D. 63, 789 N.W.2d 283.
SDCL § 19-15-2.
SDCL § 19-12-3.

IV. WHETHER THERE WAS SUFFICIENT EVIDENCE PRESENTED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF ATTEMPTED FETAL HOMICIDE?

There was insufficient evidence presented to prove beyond a reasonable doubt the elements of Attempted Fetal Homicide.
Jackson v. Virginia, 443 U.S. 307 (1979).
State v. Jucht, 2012 S.D. 66, 821 N.W.2d 629.
SDCL § 22-16-1.1(1).

STATEMENT OF CASE

Vargas was re-charged[1] by indictment with alternative counts of Attempted Fetal Homicide, SDCL § 22-16-1.1(1) in Count One, and, Procurement of Abortion SDCL § 22-15-5, in Count Two. The State dismissed Count Two on February 4, 2013. The Honorable Janine Kern, Circuit Court Judge, presided.

On March 27 2013, Trial Court held an evidentiary hearing on State's Notices of Proposed Experts, and on State's 404(b) Notice, which Vargas opposed. On June 10, 2013, Trial Court denied Defendant's opposition to State's proposed Experts and State's 404(b) Evidence.

On August 16, 2013, Trial Court held an evidentiary hearing on Defendant's Motion to Suppress based on a chain-of-custody challenge, which Trial Court denied at the conclusion of the hearing.

On September 10, 2013, State filed Notice of Intent to Use Specified Evidence (Recorded Telephone Call) under an exception listed

---

[1] The case before this Court was a re-filing of criminal file 11-1868 that had been dismissed by the State on August 9, 2012 "for further investigation." APPX—Defendant's December 10 Letter brief, Defendant's Ex. A. The State's dismissal occurred after the trial court in the previous file had ruled against the State on several material issues, including the State's 404(b) evidence, in a final judgment dated July 11, 2012, and filed with the Clerk of Court the following day. APPX—Defendant's December 10 Letter brief, Defendant's Ex. D. No new evidence was presented to the Grand Jury in the file before this Court. Rather, the State offered certified copies of an affidavit and the transcripts of the grand jury proceedings from the previous file 11-1868. APPX—Defendant's December 10 Letter brief, Defendant's Ex. B.

in SDCL § 19-13-15 to the spousal privilege. On September 13, 2013, Trial Court ruled the spousal privilege did not bar admission to the recorded phone call between Wife and Vargas.

A jury trial was held September 18, 2013, through September 20, 2013. Vargas moved for a judgment of acquittal after close of State's case. On September 20, 2013, the jury returned a guilty verdict for Attempted Fetal Homicide.

Trial Court sentenced Vargas to 10 years in prison, with 5 suspended. Vargas appeals his conviction.

STATEMENT OF FACTS

The State alleges that Vargas attempted to murder the unborn child of Lisa Komes by putting herbal substances in her pop a handful of times over a couple months in the beginning of her pregnancy. None of the herbal substances alleged to have given to Komes—pennyroyal, black cohosh, or blue cohosh—were ever detected in this case. Komes delivered a healthy baby boy on October 5, 2010. JT1 157. Neither she, nor the then fetus, were ever harmed by the few drinks Komes claimed Vargas gave her, beginning at the end of March 2010 through the May 23, 2010. JT1 153, 157. Even after the second suspicious drink that Komes turned over to the police on May 23, 2010, Komes continued to date and sleep with Vargas. JT1 156-157, 171-172. They ended their

relationship shortly before the birth of the child. JT1 157.

At trial, the State called Dr. Scott Philips, a medical toxicologist. JT2 352. Defense had challenged Phillips's qualification as an expert with the facts in this case at a pre-trial evidentiary hearing, EV (03/27/13) 24, which challenge was denied by Trial Court. MH (06/10/14) 2-4. Phillips testified over 30 times in court, but never regarding pennyroyal, blue cohosh, or black cohosh. EV (03/27/13) 31.

Pennyroyal is a minty plant whose essential oil is called "pulegon." EV (03/27/13) 16-17. "Penyroyal plants are part of the mint family. . . and because of that they have a minty or spearmint kind of taste, aroma, or flavor." EV (03/27/13) 17. Peppermint, for instance, also contains pulegon, EV (03/27/13) 17. The presence of "pulegon" means it came from a plant that contains pulegon, such as spearmint, peppermint, or pennyroyal. JT2 375.

In this case, two fountain drink cups with what appeared to be soda in them, were turned over to law enforcement by Komes on May 15, 2010, JT1 156 (State's Ex. 1), and May 23, 2010, JT1 156 (State's Ex 2). The liquid in the cups were stored in two different cans, with the liquid from May 15, 2013 being placed in a larger metal can, JT1 187 (State's Ex. 3), and the May 23, 2013 liquid being placed in a smaller can, JT1 205 (State's Ex. 4); JT2 278. Both cans eventually became "pretty rusty," with the liquid in Exhibit 3 having disappeared entirely. JT1 185, JT2

264, 257.

These cups were analyzed by two different state employees, who arrived at drastically different conclusions. Both used the gas chromatograph-mass spectrometer for analysis. JT2 271, 319. Richard Wold, with the Rapid City Police Department, detected "terpin hydrate" in "the smaller can," (State's Exhibit 4), and nothing in State's Exhibit 3. JT2 329. Terpin hyrdate is not pulegon, but an "over-the-counter cough suppressant [that] is no longer used." JT2 322-323. Roger Mathison, with the State Health Lab in Pierre, on the other hand, detected pulegon from the "larger can," and nothing from the "smaller can." (State's Ex. 4). JT2 3270-271, 274, 278-279. Thus, Wold detected nothing in the larger can, while Mathison detected pulegon; and Mathison detected nothing in the smaller can, while Wold detected "terpin hydrate."

Defense also challenged the expertise of Mathison at the evidentiary hearing held on March 27, 2013. Mathison testified he has been a forensic chemist for the State Health Lab in Pierre, South Dakota, for nearly 29 years. EV (03/27/13) 50. The Lab is "not accredited at this time in the area of doing drug analysis or toxicology." EV (03/27/13) 65. His duties include analyzing blood and urine samples for the presence of drugs. EV (03/27/13) 50. This was first time Mathison had ever detected "pulegon" in all the samples he had ever tested in 29 years. EV (03/27/13) 60. The equipment Mathison used has a "10 or 15 percent margin of error." EV (03/27/13) 74.

Mathison testified that he never determined what the liquid actually was in which he detected the pulegon. JT2 283. Therefore, he conceded it was possible the pulegon "came from or was infused in" the liquid in which he detected the pulegon. JT2 284. Mathison put in his affidavit that the liquid from the cup was "soda," despite never testing the liquid for its contents, which he could have done. EV (03/27/13) 67-68. Further, even though Mathison was "aware that pulegon is a constituent of the mint family," he "never ran a test" to determine if the pulegon came from "peppermint or spearmint or pennyroyal." JT2 284. "I couldn't tell you which plant species this material originated in." JT2 284. Lastly, although Mathison put in his affidavit "material found to be marijuana were weighed," no marijuana was ever detected in this case. JT2 291-293.

Philips testified that pennyroyal "can cause an abortion if it's taken in enough quantities and that's usually a quantity sufficient to make the mother sick as well." EV (03/27/13) 19. However, anything taken in high enough doses can be dangerous. JT2 372. Philips agreed, given a hypothetical which put into issue the known variables as provided by the State in this case, that a woman who weighed 150 pounds and ingested 50 milligrams of pulegon would probably not experience any distress because that level is not even close to being toxic. EV (03/27/13) 96. It would take approximately 400 cans to create a lethal dose with the

amount of pulegon detected in this case. JT2 398-399. Indeed, there are more reported cases of abortion caused by ingesting parsley than by ingesting pennyroyal. EV (03/27/13) 83. Nutmeg can also cause an abortion if consumed in great enough quantities. JT2 385.

"Blue" cohosh is distinct from "black" cohosh. EV (03/27/13) 24-25. Black cohosh is *not* an abortifacient because it does not stimulate the uterine walls. EV (03/27/13) 33. Historically, black cohosh has been used as an *anti*-abortifacient. EV (03/27/13) 34. At best, black cohosh can be used to try and *induce labor late* on in a woman's pregnancy, as opposed to early on in attempting to abort a fetus, because it "opens up the cervix…making it easier for labor." EV (03/27/13) 33-34, 102.

However, as to Philips's assertion that black cohosh helps to induce labor, he could not cite to any specific reference for that opinion. EV (03/27/13) 43-44. Philips could also not cite to any specific reference of the over 40 articles he had provided at the evidentiary hearing for his opinion that "the combined use of pennyroyal and black cohosh" have an "abortive affect," admitting that "article does not exist." EV (03/27/13) 23, 34-35, 37, 43. Philips did not know of any known dose of black cohosh that can be toxic to a human. EV (03/27/13) 45.

Maggie Toavs testified that she had contacted Vargas to get "blue" cohosh to help her induce labor very late in her pregnancy. JT1 212-213. At that time, Toavs claims that Vargas told her his girlfriend "Lisa" was also

taking it in her drinks; and it was her understanding the girlfriend wanted to terminate her pregnancy. JT1 215-216. Toavs's daughter, Tashinah Walks, testified it was "black" cohosh that Vargas gave her mother. JT2 234. Neither Toavs or Walks saw the label on the bottle Vargas had. JT2 222-223, 231-232.

At trial, Trial Court allowed the State to play a secretly recorded marital communication despite Vargas's wife being unavailable. The parties had all agreed at the March 27, 2013 hearing that the spousal privilege precluded admission of the conversation at issue. EV (03/27/13) 138. However, one week before trial, State filed notice of its intent to introduce the recorded phone call between Vargas and his wife. SR 109. Trial Court ruled it would permit the recorded call to be played to the jury with a limiting instruction. MH (9/16/2013) 12-13.

I. ATTEMPTED FETAL HOMICIDE IS A LEGAL IMPOSSIBILITY.

A. Preservation of Objection/Standard of Appellate Review

Appellant alleges that Attempted Fetal Homicide is a legal impossibility; and is an offense that cannot exist. State v. Lyerla, 424 N.W.2d 908, 912-913 (S.D. 1988). The remaining arguments in Appellant's brief, therefore, are rendered moot if this Court agrees.

Lyerla holds broadly for the proposition that a person cannot be convicted of an offense that does not exist; and as such, the issue can be

raised at any time.

> If attempted [fetal homicide] is not a crime in South Dakota, then a defendant's failure to object cannot establish that crime. Jurisdictional defects are not waived by failure to object. (citation omitted) . . .
> *A reviewing court is required to consider the issue of subject matter jurisdiction even where it is not raised below* in order to avoid an unwarranted exercise of judicial authority.

Id. at 912. (emphasis added).

B. ATTEMPTED MURDER REQUIRES THE SPECIFIC INTENT TO KILL, WHEREAS FETAL HOMICIDE PERMITS A CONVICTION WITH MERELY AN INTENT TO CAUSE SERIOUS BODILY INJURY.

Lyerla cites with approval to the rule that to attempt murder, the statute must require an intent to kill.

> To commit murder, one need not intend to take life; *but to be guilty of an attempt to murder, he must so intend.* It is not sufficient that his act, had it proved fatal, would have been murder.

Id. at 913 (quoting Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395 (1935))(emphasis added).

In Lyerla, this Court reversed the conviction for Attempted Second Degree Murder because the statute for second degree murder did not require an intent to kill. Id. "[O]bviously the jury decided Lyerla did not intend the death of the deceased," nor "did he intend to kill the other two girls" because the statute for second degree murder only required a "criminally reckless state of mind, i.e, perpetrating an imminently dangerous act while evincing a depraved mind, regardless of human life,

but without a design to kill any particular person." Id. at 912-913.

In reversing the conviction for Attempted Second Degree Murder, this Court endorsed the holding "interpreting a similar [homicide] statute" from the Minnesota Supreme Court. Id. (quoting State v. Dahlstrom, 276 Minn. 301, 150 N.W.2d (53)(1967))("[w]e cannot conceive of a factual situation which would make such conduct attempted murder . . . where the actor did not intend the death of anyone and where no death occurred.").

It therefore does not matter if subsection one of Fetal Homicide requires specific intent. Fetal Homicide, under either subsection one or two, allows a person to be convicted *for only intending bodily harm*. An "attempt" of this homicide statute thus creates a factual and legal impossibility. One cannot specifically intend to kill when the offense allows a person to be convicted upon merely an intent to injure. Attempted Fetal Homicide cannot, and does not, exist.

The jury was instructed that they could convict Vargas if they found he either "intended to cause the death" *or* "intended to cause serious bodily injury." SR 224; APPX—Jury Instructions 12, 24. Therefore, the jury was able to convict Vargas of attempted homicide by only finding that he intended to cause serious bodily injury. Thus, under Lyerla, Mr. Vargas' conviction is illegal because the required intent was not just the intent to kill.

C. A NECESSARY ELEMENT IN THE STATUTE FOR FETAL HOMICIDE IS A REQUIREMENT THAT THE UNBORN CHILD BE KILLED.

"[T]he language expressed in the statute is the paramount consideration;" and statutory language should be given its plain meaning. Goetz v. State, 2001 S.D. 138, ¶ 15, 636 N.W.2d, 675, 681. A necessary element of Fetal Homicide is the "death of the unborn child."

> Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant *and caused the death of the unborn child* without lawful justification and if the person:
> (1) Intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child.

SDCL § 22-16-1.1 (emphasis added).

It is undisputed that the baby in this case was born alive and healthy. JT 157. There can be no Attempted Fetal Homicide where the statute for Fetal Homicide plainly requires the death of the unborn child. This necessary element was omitted from the jury instructions in this case. SR 224; APPX—Jury Instructions 12, 24. If the death of the unborn child was not required, SDCL § 22-16-1.1 would read:

> Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant . . . and if the person:
> (1) Intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child.

All of the other homicide statutes protect the "unborn child," but, with the exception of Vehicular Homicide, do not require a finding of

actual death of the victim as one of its elements. See SDCL § 22-16-4 (First Degree Murder); SDCL § 22-16-7 (Second Degree Murder); SDCL § 22-16-15 (First Degree Manslaughter); SDCL § 22-16-20 (Second Degree Manslaughter).

Homicide, by statute, is defined as "the killing of one human being, including an unborn child, by another." SDCL § 22-16-1. The fact that the legislature added the language "caused the death of the unborn child" to the Fetal Homicide statute, when the definition of homicide already requires a finding of a killing, means the death of the unborn child is a necessary fact that must be established to constitute this offense. Clearly, if establishing the death of the unborn child is a necessary predicate to proving this offense, an Attempt of this crime creates a legal impossibility.

"It is within the province of the Legislature to define what conduct constitutes a crime in this State." State v. Whistler, 2014 S.D. 58, ¶ 8, 851 N.W.2d 905, 909. "This Court does not, however, review legislative history when the language of the statute is clear." 2014 S.D. 58, ¶ 9, 851 N.W.2d at 909. The language of "and caused the death" is clear: there must be a death in order for the fetal homicide statute to apply.

However, even if this Court finds the language of the Fetal Homicide statute is not clear, the legislative history does not undermine the proposition that a death of the unborn child has to occur in order for

the Fetal Homicide statute to apply. See Appendix—Legislative History. Otherwise, the crime is one of a fetal assault. See SDCL § 22-18-1.2 (Criminal battery of an unborn child—Misdemeanor); SDCL § 22-18-1.3 (Aggravated criminal battery of an unborn child—Felony). This Court has recognized that the 1995 Legislature distinguished between the crimes of "fetal assault" and "fetal homicide," when discussing what the definition of "unborn child" contemplates. Wiersma v. Maple Leaf Farms, 1996 S.D. 16, ¶6, fn 3, 543 N.W.2d 787, 790.

II. TRIAL COURT VIOLATED THE SPOUSAL PRIVILEGE AND VARGAS'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN IT ALLOWED THE STATE TO PLAY THE SECRETLY RECORDED PHONE CALL BY THE GOVERNMENT BETWEEN VARGAS AND HIS WIFE.

A. Preservation of Objection/Standard of Appellate Review

A trial court's evidentiary rulings are reviewed under the abuse of discretion standard. State v. Koepsell, 508 N.W.2d 591, 595 (S.D.1993). "However, we apply a *de novo* standard of review to claims of constitutional violations." State v. Tiegen, 2008 S.D. 6, ¶14, 744 N.W.2d 578, 585.

Vargas preserved the spousal privilege and Sixth Amendment Confrontation issues for appeal through his arguments to Trial Court, and through his arguments and objections at jury trial. MH (09/13/13) 8-9, 13-14, 16; MH (09/16/13) 2-13; SR 144-146, 147-217; JT1 112-

117; JT2 421.

Trial Court ruled the spousal privilege did not bar admission to the recorded phone call between wife Melissa Vargas and Defendant Vargas. MH (09/13/13) 17-22. Trial Court ruled Wife's statements in the recorded phone call were not hearsay, and therefore would allow it to be played to the jury with a limiting instruction. MH (09/16/13) 12-13.

B. Analysis

"All marital communications are presumed confidential." State v. Witchey, 388 N.W2d 893, 895 (1986)(citing Blau v. United States, 340 U.S. 332 (1951) and Wolfie v. United States, 291 U.S. 7 (1934)). "A communication is confidential if it is made privately by any person to his or her spouse during the course of their marriage and is not intended for disclosure to any other person." SDCL § 19-13-12. "An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse." SDCL § 19-13-13.

Admission of the phone call amounted to allowing Wife to testify regarding a confidential marital communication in violation of the spousal privilege and in violation of Vargas's Sixth Amendment right to confrontation. Admission of the spousal phone call constituted prejudicial error, and was not harmless.

1. The phone call was inadmissible because of the spousal privilege.

It is undisputed the phone call communication occurred during the course of Vargas and his wife's marriage, and was therefore subject to the spousal privilege. SDCL § 19-13-12. Vargas had every reasonable expectation that the phone call from his wife on March 8, 2011 was a confidential marital communication, "not intended for disclosure to any other person," least of all Detective Baker who was actually secretly recording the conversation.[2] SDCL § 19-13-12.

Trial Court determined, however, that the secretly recorded phone call was not a confidential marital communication between Wife and Alfredo Vargas.

> The Court first notes that the spousal privilege is intended to protect confidential communications between spouses and this Court finds that that confidentiality was lost when one spouse brought in a detective to place a controlled call to the other spouse. That this is not a confidential communication intended to be protected by the privilege.

MH (9/13/2013) 19.

This finding is clearly erroneous. South Dakota has determined

---

[2] During the phone call, Vargas tells his wife: "I told [Detective Baker] that we, if, if he needs to talk to any of us, we were gonna get an attorney. You just tell him, you just tell him no, that you don't have anything to talk to him about." JT2 422 (State's Ex. 16A, pg 1). Likewise, the day prior on March 7, 2011 when Vargas spoke with Detective Baker alone, Vargas informed Baker he would like counsel in any future discussions with the government. JT1 119 (Ex. AA, pg 12) ("And that, really that, that's all I have to say. I mean if, if you want to keep talking and going around and around this I mean I can go get an attorney and then we'll, we'll talk a little bit more.")

the spousal privilege is only waived if the spouse communicates to the other spouse in a manner that a reasonable person could expect another person would hear the spousal communication. State v. McKercher, 332 N.W.2d 286 (SD 1983)(defendant could not assert spousal privilege in jailhouse phone call to wife where jailer was present and in the same room with defendant, and only a few feet away, when statements were made to wife). Trial Court cited no authority for its ruling "that confidentiality was lost when one spouse brought in a detective to place a controlled call to the other spouse" other than citing generally to a district court case from Illinois that "talk[ed] about the principle behind the spousal privilege rule."[3] MH (9/13/2013) 19. More relevant persuasive authority is United States v. Neal, 532 F. Supp. 942 (D.Colo. 1982), which held that spousal privilege remained intact when wife allowed the FBI to record a conversation between wife and the defendant without the defendant's knowledge. If Trial Court's logic is followed, then any communication that is privileged can be lost if one of the parties to the privilege consents to the disclosure, i.e., a communication a person has with their attorney or a priest would be lost if the attorney or priest allowed law enforcement to surreptitiously listen to the privileged communication. Clearly that is not what the law intends regarding when

---

[3] Any reliance on State v. Wood, 361 N.W.2d 620 (1985), is also misplaced because Woods dealt with an oral communication that had no

a privilege is waived.

a. The Spousal Privilege was not waived under SDCL § 19-13-15(2).

The spousal privilege can be waived under exceptions found in SDCL § 19-13-15. Subsection (2) states:

> There is no privilege under section § 19-13-13 in a proceeding in which one spouse is charged with a crime against the person or property of:
>
> (2). A child of either.

Trial Court erred when it found that even if the phone call "should be deemed a confidential communication," the spousal privilege did not apply because it dealt with a proceeding where one spouse was charged with a crime against "a *child* of either." MH (9/13/2013) 20 (emphasis added).

The intent of the exception to the privilege is certainly to preclude use of the privilege where there are children of either party either living with them or otherwise subject to their care, custody, or control. In other words, it stands to reason that the policy of not allowing the privilege to apply to cases where the parents are charged with crimes against their children is grounded in the interest of justice, and in such cases, outweighs the interest in the sanctity of spousal communications. Trial Court's ruling unnecessarily and without legal or policy basis, however, extended the exception to fetuses, particularly a fetus not of

---

privilege that arguably applied.

both of the parties to the conversation, but of only one of the parties to the conversation and another person entirely.

Statutes in South Dakota take special care to define unborn children and to specify which laws are meant to apply to them. An unborn child is defined in the criminal statutes as "an individual organism of the species homo sapiens from fertilization until live birth." SDCL § 22-1-2(50A). An unborn child requires a separate definition from other humans for the reason that it does not have the same legal status of other humans. This begs the question of why there is a fetal homicide statute.

Each and every version of homicide from first degree murder to manslaughter in the second degree identifies victims as human beings, "including an unborn child." See SDCL §§ 22-16-1 through 22-16-41 (vehicular homicide). Yet, South Dakota also has a fetal homicide statute. SDCL § 22-16-1.1. Why the additional protection? The statute recognizes the privacy rights of pregnant women that are implicated and at issue in abortion rights laws. This is particularly salient in the context of the fetal homicide statute as it must accommodate the pregnant female's right to consent to the killing of the fetus. The killing of another human being, by contrast, is never justified or excused by consent. See generally, State v. Goulding, 2011 S.D. 55, 799 N.W.2d 412.

"[W]e adhere to two primary rules of statutory construction. The

first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." Goetz v. State, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681. "Where statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them 'harmonious and workable.'" Wiersma v. Maple Leaf Farms, 1996 S.D. 16, ¶ 4, 543 N.W.2d 787, 789. However, "It is fundamental to statutory interpretation that we give the language used its plain meaning." Lamar Adver. of S.D., Inc., 2012 S.D. 76, ¶ 13, 822 N.W.2d 861, 864.

The fact that the statute allows prosecution of homicide for an "unborn child," and yet creates a separate statute all together for the same act, homicide, but for fetuses, means the law recognizes a distinction between "child" and "fetus." Trial Court's ruling would extend any definition of human beings found in the criminal laws to the law of evidence. Although Wiersma cited to SDCL § 22-1-2(50A) for authority that killing of a "fetus" constituted a killing of an "unborn child" under the wrongful death statute, Wiersma does not stand for authority that a "fetus" is a "child" under SDCL § 19-13-15. One could see the problems that could arise if it did because a person who spoke to their spouse

about killing a "fetus" not his child would still be protected by the spousal privilege under SDCL § 19-13-15; and, would arguably be protected if a person spoke to their spouse about killing a fetus that he thought was his child, but later turned out, was not his child.

No one other than the pregnant female has parental rights or obligations to the fetus. Criminalization of the non-consensual death of a fetus does not make it a human for purposes of evidentiary law. It is the criminalization of the death of the fetus that the definitions of an unborn child and fetus were designed to effect, not the modification of evidentiary law. Such laws do not change the status of the father, nor should they make the fetus a child in the context of an exception to the spousal privilege.

b. The error in finding the spousal privilege did not bar admission of the recorded phone call was prejudicial.

In State v. Harris, this Court said:

> If error is found it must be prejudicial before this Court will overturn the trial court's evidentiary ruling. . . Error is prejudicial when, in all probability it produced some effect upon the final result and affected rights of the party assigning it.

2010 S.D. 75, ¶¶ 8, 17, 789 N.W.2d 307, 309 (citations omitted).

Admission of the recorded phone call was prejudicial because the State conceded, they "did not have a solid case," not even "probable cause" to have arrested Vargas for Attempted Fetal Homicide, without its

admission. JT2 428.

2. The phone call violated Vargas's Sixth Amendment Right to Confrontation.

Even if this Court finds the spousal privilege does not apply, admission of the phone call violated Vargas's Sixth Amendment right to confrontation.

> The Confrontation Clause of the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 53–54 (2004), the United States Supreme Court held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."

State v. Johnson, 2009 S.D. 67, ¶ 18, 771 N.W.2d 360, 368.

It is undisputed that Vargas's wife, Melissa Vargas, was "unavailable," [4] and that Vargas never had a prior opportunity to cross-examine her. MH (9/13/2013) 15. Detective Baker testified that he was prompting Wife to ask certain questions and make certain statements both before and during the recorded phone call. JT2 430-431. Wife's statements are therefore "testimonial" because "an objective witness acting as a government informant would believe [her] statement...would be available for use at a later trial." Johnson, 2009 S.D. 67, ¶ 23, 771

[4] THE STATE: Melissa Vargas has been subpoenaed. She has not honored her subpoena. My understanding is she is still married to Mr. Vargas so we can't secure her. She is out of state. So I highly doubt she will be here. MH (9/13/2013) 15.

N.W.2d at 368 (citing Crawford, 541 U.S. at 51–52.).

Trial Court ruled, however, that the recorded phone call between Vargas and his wife was admissible despite defense arguments that Wife's statements violated the Confrontation Clause and Crawford because they were hearsay being used for the truth of the matter asserted. MH (9/16/2013) 5-12.

> The Court in this case finds that the Running Bird case to be instructive. The Court finds that the statements of Melissa Vargas are not being offered to prove truth of the matter asserted. The Court is going to give the jury an instruction, a limiting instruction, similar to the one utilized in Running Birds that tells them they are to disregard the allegations, the statements, made by Melissa Vargas as they are introduced solely for the purpose of establishing the stage to set the responses of Alfredo Vargas.

MH (9/16/2013) 12-13.

Trial Court erred when it found that Wife's statements were not hearsay and that the limiting instruction as set forth in State v. Running Bird, 2002 S.D. 86, 649 N.W.2d 609 cured any violation. In Running Bird, a recorded interview between a non-testifying police officer and the defendant were played to the jury. 2002 S.D. 86, ¶ 35, 649 N.W.2d at 616. However, the defendant in Running Bird was not arguing that the officer's statements were hearsay in the recorded interview, and therefore, violated the Confrontation Clause. Rather, the defendant argued the officer "in essence gave his opinion as to Running Bird's credibility via the videotape, something that Officer Mueller would not have been allowed to do through direct questioning." Id. The officer's

comments in question included:

> "Something pretty big happened last night and I think you've probably got a good idea as to why we're down here questioning you"; "We know it wasn't consensual as what you're saying"; "I think that you know deep down that this gal from Holland probably didn't want to go as far as things went either"; and "Well, we both know that didn't happen."

2002 S.D. 86, ¶ 35, 649 N.W.2d at fn 4.

Running Bird was correct in finding that the unavailable officer's "statements and questions on the videotape do not constitute direct testimony." 2002 S.D. 86, ¶ 35, 649 N.W.2d at 616. However, the same does not hold true for Wife's statements. They constituted direct testimony of an unavailable declarant that Vargas never had an opportunity to confront. For instance,

> WIFE: Well [Detective Baker] said you put Penny Royal in [Komes'] drinks and that, *didn't you say* that when she got picked up she went to the ER? *'Cause you brought her that drink*?
> VARGAS: That's the thing. He has to prove, because ah,
> WIFE: *That is the only time you took her the drink.*
> VARGAS: They, they can't prove that she drank it.
> WIFE: And nobody saw you, right?
> VARGAS: That's the thing, she ah, he has to prove that I took the drink that, that, that she drank anything. She doesn't ah, she can't prove that she drank anything.
> WIFE: *She was the only one who came out, was in back, right*?
> VARGAS: Of course. So that's the thing, he has to prove that I had, that I had something, because when ah, he, he told, he asked me how much child support I was paying because they're trying to look for, for motive and shit like that. And I said I pay a hundred and eighty dollars a month. He was like wow I thought you were gonna, that you were paying way more. I was like no, I, I'm not worried about paying child support. They don't have anything.

JT2 422 (State's Ex. 16A, pg 4) (emphasis added).

While Vargas's statements are arguably non-hearsay because

they may be viewed as admissions of a party-opponent, Wife's statements were not mere "context" for Vargas's admissions. Johnson, 2009 S.D. 67, at ¶¶ 20-21, 771 N.W.2d at 369 ("Statements providing context for other admissible statements are not hearsay because they are not offered for their truth.") Wife did not merely respond to Vargas's statements, as was the case in Johnson. 2009 S.D. 67, ¶ 21, 771 N.W.2d at 369. Her statements are not like a government informant's recorded statements in a controlled drug-buy, which are an "inextricable element of the sale" and "gave meaning to the sale," since they are "made contemporaneously with or immediately preparatory" to the purchase of the drug, thereby not constituting inadmissible hearsay. State v. Harris, 2010 S.D. 75, ¶ 15, 789 N.W2d 303, 309. Rather, the "veracity of . . . [Wife's] recorded statements . . . were completely relevant to the case." Johnson at ¶ 21, 771 N.W.2d at 369.

> WIFE: Spearmint. Is that what [Detective Baker] asked you too, Penny Royal and Spearmint?
> VARGAS: Well Penny Royal is what he has, what he has on paper. Penny Royal is a, is a, a, it's a variety of things. A variety of things have Penny Royal. So that's supposedly what they found. A, a, a version of it. And that's what I told him. I say, how, how do you know she didn't put that shit there and, and brought a drink. That's (inaudible) to have one drink. How does he know that she didn't do that, she didn't put that shit in the drink. . . .
> WIFE: *Yeah but you said when. . .*
> VARGAS: And, just brought it here.
> WIFE: *you were giving it to her at her house, she was just leaving the drinks.* Did you spill 'em out?
> VARGAS: I only, I only gave her two and, and yeah, she, if ah, if she didn't drink it I would, I would spill 'em out. I would rinse it

> out. She never had anything. She had one drink that she took that she had at work, that's it.
> WIFE: *That when you, er when you came in back?*
> VARGAS: That's it. And I told him, I said how didn't [he] know she'd even put the, the, the stuff in the drink and, and brought her over? And she didn't think anything because he said that the, the pop was almost full. I was like yeah. Well, I mean how do you even know anything? 'Cause that's, that's the, that's all they have. That's all they have. That's all they're going for. What she said.

JT2 422 (State's Ex. 16A, pg 5) (emphasis added).

Wife's statements also consisted of inadmissible compound hearsay, SDCL § 19-16-36, which further impermissibly bolstered, State v. Buchholtz, 2013 S.D.96, ¶ 26, 841 N.W.2d 449, 457, the trial testimony of Wife's sister, Maggie Tovas:

> WIFE: 'Cause what little bit [Maggie] told me was that she was under the assumption that you and Lisa talked about it, that you were, 'cause uhm, you were telling her what drinks she could put it in, 'cause Lisa didn't like the dri, certain drinks or whatever. That's all she remembered, but that she, she said uhm, that she was just under the assumption that, uhm you and Lisa were ok with it.
> VARGAS: What?
> WIFE: That's what Maggie said.

JT2 422 (State's Ex. 16A, pg 2).

Wife's statements were hearsay because they were used to prove the truth of the matter asserted. The ultimate issue of the case, whether Vargas ever possessed pennyroyal and delivered it to Komes by putting it in her drinks, could only be inferred from accepting as fact what Wife asserted. The lead detective paraphrased the recorded call demonstrating this during his trial testimony:

> DETECTIVE BAKER: When [Vargas] was talking with Melissa, he

is making statements to Melissa and talking with Melissa and he says "that, ah, all she has is that pop. The one I brought in the back."

And Melissa is talking about, "well, you gave them to her at the house."

He goes "I only gave her two."

"Well, did you spill them out?"

"Yeah, I spilled them out and I rinsed the cups."

JT2 428-429.

Hence Vargas never said, "the one I brought in the back." Later, Baker qualified his testimony, showing he agreed that Wife's statements needed to be accepted as fact to infer the evidence the State sought to prove:

> DEFENSE COUNSEL: Fair to say, that nowhere in this interview—well, excuse me, it's not an interview really. The conversation between Melissa and Alfredo Vargas that he admits to either of the pops that were taken into evidence?
> DETECTIVE BAKER: It was kind of a rough phrase there where he is talking with Melissa and she mentions the one that she brought into the back. He says, "that's all they got."
> DEFENSE COUNSEL: And that is all you got, right?
> DETECTIVE BAKER: That's all we got. We got two soda pops from her and one came back with pulegon in it.

JT2 436.

Wife's statements, therefore, "went to the heart of the State's case." Johnson, 2009 S.D. 67, ¶ 26, 771 N.W.2d at 371. Wife's "excessive details" and "specific accusations against" Vargas "went beyond setting the scene." United States v. Hearn, 500 F.3d 479, 484 (6th Cir. 2007). "This is not a case in which prosecutors admitted [unavailable] confidential informants' statements only to provide general background" or context. Id. Lead Detective Baker conceded there was no evidence of

Vargas possessing pulegon/pennyroyal, let alone putting it in Komes's drinks, without this recorded phone call. JT2 441.

Yet, Vargas never stated he put pennyroyal in Komes's drinks in the recorded call. This "fact" came from Wife's accusation that Vargas told her he put "it" in Komes's drinks. Whether "it" refers to pennyroyal or spearmint is unclear. Further, because Trial Court had ruled Wife's statements were non-hearsay, Vargas was unable to impeach Wife with her prior inconsistent statement to Baker that the only thing Vargas ever told her he put in Komes's drinks was black cohosh, which can be an *anti*-abortificiant. MH (09/13/2013) 9; SR 147, 175-217; EV (03/27/2013) 34. Thus, the error in admitting the recorded call was not harmless.

> The State bears the burden of proving beyond a reasonable doubt the error was harmless. " 'In determining whether an error is harmless, the reviewing court must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened.' " State v. Zakaria, 2007 SD 27, ¶ 18 n. 5, 730 N.W.2d 140, 145 n. 5 (quoting United States v. Hardy, 228 F.3d 745, 751 (6th Cir.2000)) (alteration in original). "In other words, we must find 'that it was more probable than not that the error materially affected the verdict.' " Id. (quoting United States v. Trujillo, 376 F.3d 593, 611 (6th Cir.2004)).

2009 S.D. 67, ¶ 25, 771 N.W.2d at 370.

"[A]dmission of [the] hearsay statements was not harmless error because 'the evidence [was] not so overwhelming that [the] statements cannot be said to have weighted against [the defendant] in ultimately tipping the scales toward a guilty verdict'." Johnson, 2009 S.D. 67, ¶ 26,

771 N.W.2d at 370-371 (quoting State v. Frazier, 2001 SD 19, ¶ 33, 622 N.W.2d 246, 259). The lead detective in the case admitted he did not even have enough to establish "probable cause" to arrest Vargas for Attempted Fetal Homicide prior to the recorded phone call. JT2 428. This was true despite the other evidence he had already gathered in the case: the statements from Toavs, JT2 412, and that a trace amount of "pulegone" had been found in one of the two cups Komes said Vargas gave her. JT2 411. As Baker testified, "[I]t wasn't until after we got done with the phone call from Melissa I really felt this case was solid." JT2 428.

The import of the recorded phone call is further shown by the repeated substantive references to it by the State in both its opening and closing remarks. JT1 131-132; JT3 485, 486, 487, 512, 515. "The State certainly crossed the line during its closing arguments" by using the recorded call to establish Vargas's guilt. Johnson, 2009 S.D. 67, at ¶ 24, 771 N.W.2d at 370; Hearn, 500 F.3d 479, 484 (6th Cir. 2007). Trial Court violated Vargas's Sixth Amendment right to confront his accusers with admission of the recorded phone call, and his conviction should be reversed on this basis.

III. TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE 404(B) EVIDENCE IN THIS CASE.

A. Preservation of Objection/ Standard of Appellate Review

"Our review of a trial court's decision to admit other act evidence under SDCL § 19-12-5 (Rule 404(b)) is for an abuse of discretion." State v. Boe, 2014 S.D. 29, ¶ 20, 847 N.W.2d 315, 320. Vargas preserved this issue for appeal with his pretrial objections, his objections at trial, and the Trial Court issuing a final decision denying Vargas's objections. SR 67; MH (11/19/13) 3; MH (06/10/13) 7-10; JT1 212, 229.

B. Analysis

All relevant evidence is admissible; [e]vidence that is not relevant is not admissible." SDCL § 19-12-2. "Relevance under 404(b) is established 'only if the jury can reasonably conclude that the act occurred and the defendant was the actor… by a preponderance of the evidence.' State v. Wright, 1999 S.D. 50, ¶ 20, 593 N.W.2d 792, 798-799. The South Dakota Supreme Court further held in Wright that:

> "404(b) other act evidence may not be admitted if its sole purpose is to establish an inference from bad character to criminal conduct. It is admissible when similar in nature and relevant to a material issue, and not substantially outweighed by its prejudicial impact. The degree of similarity required for other act evidence will depend on the purpose for which it is offered."

Wright, 1999 S.D. 50, ¶ 16, 593 N.W.2d 792, 799-800.

Trial court abused its discretion when it ruled that the State's 404(b) evidence was relevant as establishing a common plan or scheme. "All that is required to show a common plan is that the charged and uncharged events 'have sufficient points in common.'" Wright, 1999 S.D. 50, ¶ 19, 593 N.W.2d at 800) (citation omitted.) In this case, the State

alleges Vargas attempted to kill the unborn child of the mother because he did not want the baby and he did this by allegedly putting some substances in her drinks a handful of times during the first few months of her pregnancy. At the evidentiary hearing held on this matter, Toavs testified that Vargas gave her "blue cohosh" to *help* induce labor at the very *end* of her pregnancy, not that he was trying to give her anything to hurt Toavs or abort her unborn child. EV (03/27/13) 118-119. This is consistent with her trial testimony. JT1 221. There is no evidence "pulegon" has anything to do with "blue cohosh." Furthermore, Toavs and her daughter could not actually identify what Vargas gave Toavs. EV (03/27/13) 124, 132; JT2 222-223, 231-232.

Providing a woman late in her pregnancy with a substance that has never been identified, has nothing to do with "pulegon," and done to help that woman at her request, fails to establish a common plan or scheme with the intent required in this case. *Helping* someone to induce labor *at their request* is opposite the intent necessary to prove the specific intent to injure a fetus without the mother's knowledge or consent. Furthermore, Trial Court's finding is directly contrary to the prior judge's findings of fact and conclusions of law on the same facts. APPX— Defendant's December 10 Letter brief, Defendant's Ex. D.

Even if this Court finds this act is sufficiently similar to the charged act in the indictment, any probative value was substantially

outweighed by the danger of unfair prejudice. State v. Boe, 2014 S.D. 29, ¶ 12, 846 N.W.2d 315. "Blue cohosh" has never been detected in this case, and has nothing to do with "pulegon." Pulegon is an essential oil of "pennyroyal," and only large quantities of "pennyroyal" can induce labor, amounts which themselves would cause significant injury and/or death to the mother. In this case, the amount of pulegon found was too low to cause her or her unborn baby any harm. Therefore, allowing the jury to hear about "blue cohosh" creates "unfair prejudice, confusion of the issues, and is misleading." SDCL § 19-12-3. The fact that Toavs's daughter testified she heard her mother and Vargas talk about "black" cohosh, instead of blue cohosh further confuses the issue, since blue and black cohosh are distinct; and black cohosh is more an anti-abortifacient than anything. EV (03/27/13) 24-25, 34, 127, 130-131.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WITH ADMISSION OF THE STATE'S EXPERTS.

A. Preservation of Objection/Standard of Appellate Review

"We review a trial court's decision to admit or deny an expert's testimony under the abuse of discretion standard." State v. Fischer, 2011 S.D. 74, ¶ 42, 805 N.W.2d 571, 580. Vargas preserved this issue for appeal with his pretrial objections to the State's proposed experts, and the Trial Court issuing a final decision denying Vargas's objections.

SR 37-39; MH (06/10/13) 2-7.

B. Analysis

The admissibility of expert testimony is controlled by SDCL § 19-15-2 which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data,
> (2) The testimony is the product of reliable principles and methods, and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Trial Court erred when it found Philips's and Mathison's testimony was the product of reliable principles and methods based upon sufficient facts or data that had been applied reliably to the facts of this case. Furthermore, their testimony was more prejudicial than probative under SDCL § 19-12-3.

This case involves allegations that while Komes was pregnant with Vargas's child, Vargas gave her a couple cups with soda over a two-month period in the beginning of her pregnancy. Only one of those cups was even alleged to have had a miniscule amount of pulegon in one of two lab tests, in an amount incapable of even moderately harming the mother, let alone the fetus. No black cohosh, blue cohosh, nor pennyroyal, was ever detected in the two cups; and black cohosh is more an *anti*-abortificient than anything. Further, pulegon can be found in other sources, like peppermint. The liquid

in which the pulegon was detected, by only one of the State's experts, was itself never analyzed, although it could have been. Therefore, without knowing the liquids contents, the State's expert conceded it was possible the pulegon "came from or was infused in" the liquid in which he detected the pulegon. JT2 284. Finally, no rational explanation exists for how *two different chemists for the State could arrive at such different conclusions*.

The error in admitting either of the State's experts constituted prejudicial error. Ruschenberg v. Eliason, 2014 S.D. 42, 850 N.W.2d 810; State v. Huber, 2010 S.D. 63, 789 N.W.2d 283. Both Philips and Wold were necessary witnesses for the State in proving the case of Attempted Fetal Homicide beyond a reasonable doubt.

V. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF ATTEMPTED FETAL HOMICIDE.

A. Preservation of Objection/Standard of Appellate Review

A challenge to the sufficiency of the evidence is reviewed *de novo*. State v. Morse, 2008 S.D. 66, ¶ 10, 753 N.W.2d 915, 918. Vargas preserved this issue for appeal when he moved for a Judgment of Acquittal after the close of the State's case, which Trial Court denied. JT2 449-451, 452.

B. Analysis

In State v. Jucht, this Court explained how a challenge of the

sufficiency of the evidence is reviewed:

> There must be substantial evidence to support the conviction. The inquiry does not require an appellate court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Rather, [t]he relevant question is 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. Moreover, the jury is … the exclusive judge of the credibility of the witnesses and the weight of the evidence. Accordingly, this Court will not resolve conflicting evidence, assess the credibility of witnesses, or reevaluate the weight of the evidence.

2012 S.D. 66, ¶ 18, 821 N.W.2d 629, 633. (citations omitted)

There was insufficient evidence to prove beyond a reasonable doubt the elements of Attempted Fetal Homicide. Jackson v. Virginia, 443 U.S. 307 (1979). Specifically, elements Two and Four as stated in Instruction 21:

> (2) The Defendant attempted to cause the death of the unborn child;
> (4) Wherein that Defendant intended to cause the death of or do serious bodily injury to Lisa Komes or the unborn child.

The State's lead detective agreed no evidence was presented at trial that Vargas ever possessed the murder weapon in question: pennyroyal. No evidence was presented that Vargas ever possessed black or blue cohosh, which was never even detected in this case, other than the statements of Toavs and Walks.

> DEFENSE COUNSEL: Did you ever at any point find any evidence that [Vargas] possessed pennyroyal?
> DETECTIVE BAKER: No.
> DEFENSE COUNSEL: Cohoshes?
> DETECTIVE BAKER: The only evidence we had that [he] possessed

cohoshes were the statements from Maggie and TaShinah. JT2 441-442.

The experts for the State testified they could not tell where the pulegon came from, whether it be pennyroyal, spearmint, or any other "plant species this material originated in." JT2 284, 375. No tests were run on the liquid in which the pulegon was detected, and so the State's expert conceded that it was possible the pulegon originated from, or was infused as a favoring agent in, the liquid in which the pulegon was detected. JT2 283-284. No pulegon was ever detected by the first expert analyzing the liquid in two cups, rather, he only found Terpin Hyrdate, a now-discontinued cough syrup. JT2 329. However, when the same cups were analyzed again by a second expert, the cup that had tested for Terpin Hyrdate tested for nothing; and the cup that had tested for nothing, tested for a trace amount of pulegon.

Komes testified that she never felt ill, or suffered any adverse physical affects, from the few drinks she claimed Vargas gave her over a two-month period. JT1 153. However, the State's expert testified that even a small amount of pulegon would produce "lightheadedness and nausea." JT2 377. Therefore, no evidence was ever presented that Komes consumed the murder weapon of pulegon. Further, it would take 400 soda pop cans to produce a lethal dose of pulegon with the amount detected in this case. JT2 398-399. Hence, it can't possibly be

extrapolated that Vargas ever put pennyroyal in Komes's drinks with the intent to cause serious bodily injury to her or her unborn child.

Finally, even with majority of the State's evidence produced at trial, the lead detective for the State testified it only established "probable cause" to have arrested Vargas for Attempted Fetal Homicide. JT2 428. There simply was insufficient evidence produced at trial to prove beyond a reasonable doubt that (a) any murder weapon of "poison" existed in this case; (b) that Vargas possessed such a murder weapon; and (c), that Vargas ever delivered such murder weapon to Komes with the intent to kill her fetus.

CONCLUSION

Vargas asks that this Court reverse his conviction for Attempted Fetal Homicide.

REQUEST FOR ORAL ARGUMENT

Vargas requests to present oral arguments on these issues.

Dated this 1st day of December, 2014.

Respectfully submitted,

/s/ Jamy Patterson

Jamy Patterson
Office of the Public Defender
for Pennington County
Pennington County Administration
Rapid City, South Dakota 57701

CERTIFICATE OF SERVICE

1. I certify that the Appellant's Amended Brief is within the limitation provided for in SCDL 15-26A-66(b) using Bookman Old Style

typeface in 12 point type. Appellant's Amended Brief contains 9454 words.

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

Dated this 1st day of December, 2014.

/s/ Jamy Patterson
Jamy Patterson
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of December, 2014, a true and correct copy of Appellant's Amended Brief in the matter of *State of South Dakota v. Alfredo Vargas* was served by electronic mail on Caroline Srstka at Caroline.Srstka@state.sd.us.

/s/ Jamy Patterson
Jamy Patterson
Attorney for Appellant

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26885

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ALFREDO VARGAS,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JANINE M. KERN
Circuit Court Judge

APPELLEE'S AMENDED BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

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

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Jamy Patterson
Pennington County Public Defender
315 St. Joseph, #44
Rapid City, SD 57701
Telephone: (605) 394-2181
E-mail: jamyp@co.pennington.sd.us

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed November 20, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

Other Authorities

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26885

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

ALFREDO VARGAS,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Alfredo Vargas, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name.

The various transcripts and reports will be cited as follows:

Jury Trial Transcript ....JT

Arraignment Transcript ..... AT

Sentencing Transcript ..... ST

The settled record in the underlying criminal case, *State of South Dakota v. Alfredo Vargas*, Pennington County Criminal File No. 12-3442, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." Any references to motion hearing transcripts will be designated as "MH," followed by the date of the

motion hearing. References to the transcript of the Court's Decision will be designated as "Court's Decision" followed by the date of the hearing. All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Conviction and Sentence entered by the Honorable Janine M. Kern, Seventh Judicial Circuit Court Judge, on November 11, 2013, effective November 4, 2013. SR 307. The Judgment of Conviction was filed November 12, 2013. SR 307. Defendant filed a Notice of Appeal on November 20, 2013. SR 309. This Court granted Appellant's motion to amend his brief on October 31, 2014, and allowed Appellee to file an amended response brief. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER A WAIVER OF THE SPOUSAL PRIVILEGE RENDERED THE PHONE CONVERSATION BETWEEN DEFENDANT AND MS. VARGAS ADMISSIBLE?

The trial court found the spousal privilege was waived and admitted the recorded conversation between Defendant and his spouse.

SDCL 19-13-15(2)

United States v. Nash, 910 F.Supp.2d 1133 (S.D. Ill. 2012)

State v. Running Bird, 2002 S.D. 86, 649 N.W.2d 609

II.

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

The trial court admitted other acts evidence under SDCL 19-12-5.

SDCL 19-12-5

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

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

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

III.

WHETHER THE TRIAL COURT PROPERLY ADMITTED STATE'S EXPERT WITNESS TESTIMONY?

The trial court admitted the State's expert witness testimony.

SDCL 19-15-2

State v. Koepsell, 508 N.W.2d 591 (S.D. 1993)

State v. Lemler, 2009 S.D. 86, 774 N.W.2d 272

IV.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF ATTEMPTED FETAL HOMICIDE?

The trial court denied Defendant's motion for judgment of acquittal and the jury found Defendant guilty of attempted fetal homicide.

SDCL 22-16-1.1(1)

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

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

State v. Reed, 2010 S.D. 66, 78 N.W.2d 1

V.

WHETHER DEFENDANT WAS PROPERLY CONVICTED OF ATTEMPTED FETAL HOMICIDE?

This issue was not raised before the trial court.

SDCL 22-16-1.1

SDCL 22-4-1

STATEMENT OF THE CASE

On September 12, 2012, Defendant was indicted on one count of Attempted Fetal Homicide in violation of SDCL 22-16-1.1(1), or in the alternative, Procurement of Abortion in violation of SDCL 22-17-5.1. SR 1.[1] The State later dismissed Count 2. SR 49. Defendant pleaded not guilty at his arraignment on November 5, 2012. AT 7.

The State filed three notices of intent to use expert testimony and a notice of intent to use other acts evidence, to which Defendant objected. SR 9-11; MH (1/7/2013) 2. The trial court held a Daubert hearing and motion hearing. Court's Decision (6/10/13) 2-5. The trial court denied Defendant's objections, finding the other acts evidence and the experts' testimony relevant. Court's Decision (6/10/13) 9.

[1] On August 9, 2012, the State dismissed an Indictment against Defendant dated May 26, 2011, charging the offense of Attempted Fetal Homicide. SR 52.

The State filed a notice of intent to introduce testimony under the exception to spousal privilege on September 10, 2013. SR 141. Defendant objected. MH (9/13/13) 6. On September 13, 2013, the trial court denied Defendant's objection and granted State's motion. MH (9/13/13) 21.

Defendant's jury trial commenced September 18, 2013. JT, *generally*. On September 20, 2013, the jury found Defendant guilty of attempted fetal homicide. JT 522. Defendant was sentenced on November 4, 2013, to serve ten years in the South Dakota State Penitentiary, with five years suspended. ST 21.

STATEMENT OF FACTS

In late 2009, Lisa Komes (Komes) entered into a romantic relationship with Defendant. JT 142. Defendant moved into Komes' home shortly thereafter. JT 142. At that time, Defendant had six children, one of whom lived with Komes and Defendant, and one for whom he paid child support. State's Trial Ex. 15A, 6; JT 143. In January 2010, Komes became pregnant with Defendant's seventh child. JT 144; State's Trial Ex. 15A, 8. When Komes informed Defendant of the pregnancy, Defendant demanded an abortion. JT 144. Komes, surprised at Defendant's reaction, refused. JT 145.

Defendant's demand for an abortion and his inability to contribute toward the monthly rent strained their relationship, causing Komes to ask Defendant to move out. JT 145-46. Although

the parties separated, Komes attempted to work on their relationship for the sake of the baby. JT 147.

Defendant subsequently started bringing Komes fountain drinks, which she described as tasting minty, "bitter and gritty." JT 147, 150. Komes testified that she did not finish the first such fountain drink, and threw it away. JT 148. The second time Defendant brought Komes a fountain drink, she found that it tasted "bitter and gritty," and observed a white powdery substance on the bottom of the cup. JT 149. After Komes finished the drink, she noticed that Defendant rinsed out the cup and threw it away. JT 149.

On May 15, 2010, Defendant brought a third fountain drink to Komes at her workplace, claiming it was a Coca-Cola. JT 150. Komes described the fountain drink as smelling minty and tasting terrible. JT 150. Komes stated Defendant generally attempted to shame her into drinking the fountain drinks by appearing insulted when she did not want to drink them. JT 177. After Defendant left her workplace, Komes followed her supervisor's advice and called the police to report that she feared her boyfriend was poisoning her. JT 150-51. Sergeant Becker responded to the call, came to Komes' workplace, collected the fountain drink, and submitted it for testing at the evidence building of the Rapid City Police Department. JT 185. Sergeant Becker observed an oily substance in the drink, and noted that the soda smelled minty and like gasoline. JT 184.

On May 23, 2010, Defendant brought Komes a fourth fountain drink while she was at work. JT 154. Komes turned it over to the police without drinking it. JT 154. Officer Bloomenrader responded to the call and took the soda to the evidence building at the Rapid City Police Department. JT 201-02.

Because Komes was unsure whether Defendant was actually poisoning her, she maintained a relationship with him for the sake of their baby. JT 151; 155. Before their baby's birth, however, Komes and Defendant ended their relationship. JT 156. Komes delivered a healthy baby on October 5, 2010. JT 157.

Approximately three months after Komes gave birth, Rapid City Law Enforcement informed Komes that terpin hydrate, an over-the-counter cough suppressant, was found in one of the fountain drinks, State's Trial Ex 4; JT 329, and that pulegone, was detected in the other fountain drink. State's Trial Ex 3; JT 274. Dr. Scott Phillips, the State's expert witness, testified that pulegone, which is an oil extracted from the pennyroyal plant, JT 362, can be purchased at local spice stores or on the Internet. JT 409-10. Dr. Phillips explained that pennyroyal oil has a bitter mint taste. JT 363. He further testified that, depending on the amount ingested, pennyroyal can cause an irritated stomach and nausea, kidney failure, liver failure, bleeding, seizures, coma, and death. JT 364-65. Dr. Phillips testified that a couple teaspoons of the pure form of pennyroyal oil could lead

to seizures, coma, and death. JT 366. Pennyroyal is also described as an abortifacient. JT 371. Additionally, the label on the pennyroyal bottle warns against its use if pregnant or lactating, and that it may be harmful or fatal if swallowed. JT 433.

At about the same time that Defendant gave Komes several altered fountain drinks, Defendant provided his then sister-in-law, Maggie Toavs (Toavs), with cohosh.[2] JT 213. Toavs, who was pregnant and near her delivery date, told Defendant she wanted to take cohosh to induce labor. JT 213. Defendant informed Toavs he had cohosh and gave her some cohosh in oil form. JT 214. Toavs and her daughter, Tashinah Walks (Walks), drove to Defendant's trailer to retrieve the cohosh. JT 214. Toavs inquired why Defendant had cohosh, and he claimed he had it in order to put it in the drinks of his pregnant girlfriend, Komes, because they did not want the baby. JT 215. Defendant explained to Toavs that the cohosh tasted poorly in certain beverages. JT 216. Toavs tried the cohosh in a drink and

---

[2] Throughout the jury trial, blue cohosh and black cohosh have been used interchangeably. MH (3/27/13) 100. Toavs testified Defendant provided her with blue cohosh, and Walks testified Defendant provided Toavs with black cohosh. JT 213, 234. Both may produce harmful results to a pregnant woman; blue cohosh may produce seizures and uterine contractions, and black cohosh may induce early labor. MH (3/27/13) 23, 101. At trial the State argued Defendant provided Toavs with black cohosh, and also poisoned Komes' soft drinks with black cohosh. MH (9/16/13) 4.

testified that the cohosh tasted bitter like root water, and had no smell. JT 214, 218.

Walks also testified that she and her mother drove to Defendant's trailer to get cohosh for Toavs to induce labor. JT 230. Walks testified that Defendant gave Toavs cohosh in oil form, and after Toavs tried the cohosh, she threw it away because she did not like the taste. JT 230-32.

Black cohosh is an herb used to treat perimenopausal symptoms, such as hot flashes and headaches. JT 367. It also is used to bring on a menstrual period and to induce labor. JT 368. Dr. Phillips testified that, if used enough, a mother could go into premature labor, and her baby could be born with seizures and stroke-like symptoms. JT 369. Dr. Phillips further testified "[i]t is likely that the combination of pennyroyal and black cohosh, if it's of sufficient amounts, could certainly be used to cause an abortion in someone . . ." JT 371.

At trial, A.J. and Sabrina Green (A.J. and Sabrina) testified that Defendant told Sabrina his girlfriend was pregnant. JT 239. Defendant told Sabrina he was not sure he wanted to be a dad again, and explained there was a supplement he could purchase to miscarry a child. JT 240. A.J. testified he overheard Defendant telling Sabrina he was thinking about buying an herb to induce labor. JT 250.

Detective Duane Baker was assigned to investigate Defendant's case. JT 405. Upon receiving the results of the contaminated drinks, he made several attempts to contact Defendant for an interview. JT 405-13. On March 7, 2011, Detective Baker finally interviewed Defendant in a noncustodial setting at the Rapid City Public Safety Building. JT 413. When questioned about the poisoned drinks, Defendant confirmed he brought Komes drinks, but he denied adding pulegone or cohosh to the drinks. State's Trial Ex. 15A, 8-10. Defendant claimed not being familiar with cohosh, and that he never gave cohosh to anyone. State's Trial Ex. 15A, 11, 13.

The day following the interview, Detective Baker set up a recorded phone call with Defendant and his wife, Melissa Vargas (Ms. Vargas). JT 419. Ms. Vargas consented to the recorded conversation without Defendant's knowledge. State's Trial Ex. 16A. During the recorded phone call, Defendant made incriminating statements about providing Toavs with a "liquid that she needed to put. . . I don't know, fifteen or twenty drops, and drink it a few times a day." State's Trial Ex. 16A, 2. Defendant also told Ms. Vargas that if Toavs "tries throwing [him] under the bus [he's] gonna do the same to her." State's Trial Ex. 16A, 3. Additionally, Defendant told Ms. Vargas that he only gave Komes "two, and . . . if she didn't drink it I would . . . spill 'em out. I would rinse it out. She never had anything. She had one drink that she took that she had at work, that's it."

State's Trial Ex. 16A, 5. After the recorded phone call, Detective Baker made unsuccessful attempts to contact Defendant, and ultimately requested, and was granted, a warrant for Defendant's arrest. JT 423. Defendant was extradited from Puerto Rico to Rapid City in September 2011. JT 425.

ARGUMENTS

I.

THE TRIAL COURT PROPERLY FOUND THAT THE SPOUSAL PRIVILEGE DID NOT OPERATE TO EXCLUDE THE PHONE CONVERSATION BETWEEN DEFENDANT AND MS. VARGAS.

A. Standard of Review

"The trial court's evidentiary rulings are presumed to be correct." *State v. Crawford*, 2007 S.D. 20, ¶ 13, 729 N.W.2d 346, 349 (quoting *State v. Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d 100, 105). "We review evidentiary rulings for abuse of discretion." *Id.* (citing *State v. Goodroad*, 1997 S.D. 46, ¶ 9, 563 N.W.2d 126, 129 (citations omitted)). Defendant has the burden to prove both error and that the error was prejudicial. *Id.* (citing *State ex rel. Dep't of Transp. v. Spiry*, 1996 S.D. 14, ¶ 11, 543 N.W.2d 260, 263 (citations omitted)). "The test for abuse of discretion is 'whether we believe a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion.'" *Id.* (quoting *Huber v. Dep't of Pub. Safety*, 2006 S.D. 96, ¶ 22, 724 N.W.2d 175, 180 (citations omitted)). "Alleged violations of

constitutional rights are reviewed by this Court under the de novo standard of review." *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 27, 835 N.W.2d 886, 896 (citing *State v. Johnson*, 2009 S.D. 67, ¶ 10, 771 N.W.2d 360, 365 (citations omitted)).

B. The Recorded Conversation of Defendant and Ms. Vargas Was Properly Admitted.

Defendant argues the trial court erred by allowing into evidence the recorded phone call between Defendant and Ms. Vargas. DB 17. Defendant argues this conversation was a confidential marital communication protected by the spousal privilege, that his Sixth Amendment right to confrontation was violated because Ms. Vargas was not present in court to be cross-examined, and that he was prejudiced by the phone call. DB 17. Because the spousal privilege was waived when Ms. Vargas consented to the recording, and because the crime was against Defendant's child, as provided in SDCL 19-13-15, the trial court properly admitted the recorded conversation.

1. <u>Ms. Vargas Permitted Her Conversation with Defendant to be Recorded.</u>

SDCL 19-13-13 provides "[a]n accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse." An exception to this rule exists when statements are not made in absolute confidence, as when one spouse permits third parties to witness their communication. *United States v. Nash*, 910 F.Supp.2d

1133, 1137 (S.D. Ill. 2012) (quoting *United States v. Short*, 4 F.3d 475, 478 (7th Cir. 1993)). The trial court held confidentiality was lost and spousal privilege waived when Ms. Vargas placed a recorded call to Defendant because the communication was not intended to be protected by the spousal privilege. MH (9/13/13) 19.

Defendant argues spousal privilege is waived only if the conversation could reasonably be overheard by a third party. DB 18. While this issue has not been addressed in South Dakota, other jurisdictions have rejected this argument. An Illinois federal district court held that a defendant could not invoke the marital communications privilege where his wife recorded their conversation intending to turn it in to the police. *Nash*, 910 F.Supp.2d at 1136. The court held there was no privilege in the communications because the defendant was trying to solicit a crime and force his wife into criminal activity. *Id.*

Although Defendant was not attempting to force his wife into criminal activity during the recorded conversation, he directed her not to talk to the detective, and to tell Toavs not to talk to the detective. State's Trial Ex. 16A, 3. He told Ms. Vargas that "if [Toavs] tries throwing me under the bus I'm gonna do the same to her" and "[i]f [Toavs] did then . . . I'm gonna fuckin' call Social Services on her every, every other week. She wants to be a bitch, we, we know more stuff about her than she knows about us." State's Trial Ex. 16A, 3. This

conversation reveals Defendant's attempt to intimidate Toavs into silence because he did not want his admission about providing Komes with cohosh to terminate her pregnancy disclosed to law enforcement. The trial court, noting that "its statutory privileges are strictly construed to avoid suppressing otherwise competent evidence," properly ruled that the spousal privilege had been waived and allowed the recorded conversation to be heard in court. MH (9/13/13) 19, 21.

2. The Spousal Privilege Was Waived Under SDCL 19-13-15(2).

SDCL 19-13-15(2) states there is no privilege under § 19-13-13 in a proceeding in which one spouse is charged with a crime against the person or property of a child of either.

Defendant argues the trial court erroneously applied SDCL 19-13-15(2) because the child was not born at the time of the conversation. DB 20. Defendant relies on the definition of "unborn child" in SDCL 22-1-2(50A), as "an individual organism of the species homo sapiens from fertilization until live birth," to support his claim. DB 20. Defendant argues that because an unborn child has a "separate definition from other humans, he does not have the same legal status of other humans," and SDCL 19-13-15(2) should not apply. DB 20. Defendant's argument is meritless.

The definition of unborn child in SDCL 22-1-2(50A) applies and includes a child under SDCL 19-13-15(2). Komes' unborn child was fathered by Defendant and was subsequently born despite Defendant's

criminal attempts to terminate his life. South Dakota has made attempted fetal homicide a crime. The term "child" contained in SDCL 19-13-15(2) provides an exception to the spousal privilege that allows statements of intent to commit a crime against an unborn child of either parent admissible. The trial court properly concluded that "communications with their spouse are not privileged in a proceeding in which one spouse is charged with a crime against the other or a child of either." MH (9/27/13) 20. The trial court further explained the exception is to protect domestic life, noting:

> The rule does not tolerate defendants to hide behind the cloaks of spousal privilege when they commit crimes against the peace and dignity of the family. And that's the public policy behind these exceptions. . .[a]lthough the child was unborn at the time of the crime, the State of South Dakota recognizes the humanity and the dignity of the unborn child whenever constitutionally possible.

MH (9/27/13) 20-21. Defendant argues the fetus does not carry the same rights as a human being. DB 21. He claims a woman's legal right to abort her unborn child is distinguished from the killing of a human being, which is never justified. DB 21. This argument ignores the language of SDCL 22-16-1.1, which specifically states the crime of fetal homicide does not apply to an abortion to which the pregnant woman consents. Here, Komes refused to have an abortion. JT 145. Consequently, the fetal homicide exception contained in SDCL 22-16-1.1 does not apply, particularly to Defendant. Defendant's attempt to cause an abortion without Komes' consent constitutes a

crime under SDCL 22-16-1.1, which strictly prohibits the unlawful death of a fetus.

Defendant argues the admission of the conversation was prejudicial and without it, the State did not have a solid case or probable cause to arrest Defendant. DB 23. "[A] defendant must prove not only that the trial court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice." *State v. Harris*, 2010 S.D. 75, ¶ 17, 789 N.W.2d 313, 308 (quoting *State v. Lassiter*, 2005 S.D. 8, ¶ 13, 692 N.W.2d 171, 175 (citations omitted)). "Error is prejudicial when, 'in all probability it produced some effect upon the final result and affected rights of the party assigning it.'" *Id.* (quoting *Novak v. McEldowney*, 2002 S.D. 162, ¶ 7, 655 N.W.2d 909, 912 (citations omitted). In addition to the recorded conversation, the State had lab results of the contaminated drinks, and testimony from Komes, Toavs, Walks, A.J., and Sabrina, which provided the State with sufficient evidence to convict Defendant. Therefore, Defendant cannot establish that the trial court abused its discretion by admitting the conversation, and that the conversation was prejudicial.

The trial court properly held the spousal privilege does not apply because Defendant was charged with a crime against his own child. The conversation between Ms. Vargas and Defendant was properly admitted into evidence.

3. Defendant's Sixth Amendment Right to Confrontation Was Not Violated.

Defendant also asserts that admission of the telephone recording with Ms. Vargas violated Defendant's Sixth Amendment right to confrontation, since she was not present to testify at trial. DB 23. However, the recording was offered and admitted into evidence solely to consider Defendant's own statements. JT 422-23. The trial court instructed the jury to consider only Defendant's statements and not to consider Ms. Vargas' statements as fact, stating:

> In a moment you will hear a tape recorded phone call between [Ms. Vargas] and [Defendant]. Please bear in mind that nothing that [Ms. Vargas] says in the course of the interview may be considered by you as a fact. The only thing you may consider in the course of the interview are what the Defendant, himself, may have said. The statements of [Ms. Vargas] are not relevant to the facts of the case and are admitted only to set the stage for the response of the Defendant.
>
> So, in essence, you may consider the statements of the Defendant but not the statements of [Ms. Vargas] for their content.

JT 422-23. Defendant claims Ms. Vargas' statements were testimonial and Defendant should have been allowed to cross-examine her. DB 23. The United States Supreme Court has defined a testimonial statement as "made during police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at a former trial." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). A testimonial statement is also a "solemn declaration or affirmation made for the purpose of establishing or

proving some fact." *Id.* at 51, 124 S.Ct. at 1364, 158 L.Ed.2d 177. Evidence is "testimonial" in nature when given in formal pleadings, such as affidavits, declarations, confessions, or "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) (citing *Crawford*, 541 U.S. at 52, 124 S.Ct. at 1364-65, 158 L.Ed.2d at 193). In his brief, Defendant sets forth the statements he claims are Ms. Vargas' testimonial statements.

> Ms. Vargas: Well [Detective Baker] said you put Penny Royal in [Komes'] drinks and that, didn't you say that when she got picked up she went to the ER? 'Cause you brought her that drink?
>
> Defendant: That's the thing. He has to prove, because ah,
>
> Ms. Vargas: That is the only time you took her the drink.
>
> Defendant: They, they can't prove that she drank it.
>
> Ms. Vargas: and nobody saw you, right?
>
> Defendant: That's the thing, she ah, he has to prove that I took the drink that, that, that she drank anything. She doesn't ah, she can't prove that she drank anything.
>
> Ms. Vargas: She was the only one who came out, was in back, right?
>
> Defendant: Of course. So that's the thing, he has to prove that I had, that I had something, because when ah, he, he told, he asked me how much child support I was paying because they're trying to look for, for motive and shit like that. And I said I pay a hundred and eighty dollars a month. He was like wow I thought you were gonna, that you were paying way more. I was like no, I, I'm not

> worried about paying child support. They don't have anything.

DB 25-26; State's Trial Ex. 16A, 4. None of the statements by Ms. Vargas are testimonial. Ms. Vargas' questions and statements were not offered for the truth of the matter asserted. Indeed, "[s]tatements providing context for other admissible statements are not hearsay because they are not offered for their truth." *Johnson*, 2009 S.D. 67, ¶ 21, 771 N.W.2d at 369 (quoting *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006) (citations omitted)). Because the court gave the jury limiting instructions, anything Ms. Vargas said in the phone conversation was not used in trial as a fact or declaration. The only relevant parts of the conversation were Defendant's admissions.

This Court upheld the admission of a videotaped police interview of a defendant when the officer could not be cross-examined at trial. *State v. Running Bird*, 2002 S.D. 86, ¶ 35, 649 N.W.2d 609, 616. In that case, the trial court admitted the recorded interview with a limiting instruction to the jury that they were not to consider anything the officer said as a fact, and they could consider only the defendant's statements. *Id.*, 2002 S.D. 86 at ¶ 33. This Court held the officer's statements did not constitute direct testimony, as the trial court had properly admitted the recorded interview with limiting instructions to the jury. *Id.*, 2002 S.D. 86 at ¶ 35.

In this case, the trial court made a similar limiting instruction and properly admitted the recording into evidence, instructing the jury Ms. Vargas' statements were not offered for the truth of the matter asserted and should not be considered. JT 422-23. Defendant's argument that Ms. Vargas should have been available for cross-examination because of her "compound hearsay statements" or for impeachment for prior inconsistent statements she made to Detective Baker in an interview that was not admitted into evidence is groundless for the same reason. DB 27, 29.

In *Boykin v. Leapey,* the defendant argued that the disclosure of a co-defendant's conviction to the jury prejudiced the defendant. *Boykin*, 471 N.W.2d 165, 168 (S.D. 1991). However, this Court held the defendant was not prejudiced because of the trial court's limiting instructions ordering the jury not to consider the co-defendant's conviction "as evidence in determining the guilt of the defendant." *Id.* at 471 N.W.2d at 169. This Court held that because jurors are presumed to follow the limiting instructions, the trial court's limiting instructions were upheld. *Id.* (citing *State v. Reddington*, 125 N.W.2d 58 (S.D. 1963) (citations omitted)).

In this case, the court gave clear, cautionary instructions to the jury that Ms. Vargas' statements were not testimony, and should not be considered as fact. The jury is presumed to have followed the trial

court's limiting instruction. The trial court did not err in admitting Defendant's recorded admissions to Ms. Vargas.

II.

THE TRIAL COURT PROPERLY ADMITTED OTHER ACTS EVIDENCE

A. Standard of Review

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

B. Other Acts Evidence Was Properly Admitted Under SDCL 19-12-5 to Prove Defendant's Common Scheme or Plan.

The State sought to introduce evidence of Defendant providing cohosh to Toavs and his conversations with Toavs and Walks under SDCL 19-12-5. SR 11-14. The State asserted Defendant's interaction with Toavs was admissible to prove Defendant's knowledge, common plan or scheme, intent, opportunity, and/or lack of mistake or accident. SR 12. The trial court found the other acts evidence relevant to show Defendant's common scheme or plan, and that "the danger of unfair prejudice of this evidence does not substantially outweigh the probative value of the evidence." Court's Decision (6/10/13) 9.

SDCL 19-12-5 (Rule 404(b)) was adopted verbatim from the Federal Rules of Evidence. "Because the possible uses for other act evidence are limitless, Rule 404(b) only suggests a nonexclusive list of purposes, other than character, for which they may be admissible." *State v. Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d 792, 798. SDCL 19-12-5 provides evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In *Wright*, this Court reexamined the principles applicable to other acts evidence under SDCL 19-12-5. 1999 S.D. 50, ¶ 13, 593 N.W.2d at 797. "Rule 404(b)] is not a rule of exclusion. It is a rule of *inclusion* [and] no 'preliminary showing is necessary before such evidence may be introduced for a proper purpose.'" *Id.* at 798

(emphasis added) (quoting *Huddleston v. United States,* 485 U.S. 681, 687-88 (1988)). *See also* John W. Larson, *South Dakota Evidence,* § 404.2(1) (1991) ("It must be remembered that FRE 404(b) is an inclusionary rule . . . not an exclusionary rule"). "It is anticipated that with respect to permissible uses of such evidence, the trial judge may exclude [similar acts] *only* on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time." Fed. R. Evid. 404(b) Advisory Committee's Note (emphasis added). This Court has held that evidence offered under SDCL 19-12-5 is generally admissible. *Wright,* 1999 S.D. 50, ¶ 13, 593 N.W.2d at 798.

Prior to the admission of other acts evidence, the trial court is required to conduct a two-step balancing procedure on the record. *State v. Owen*, 2007 S.D. 27, ¶ 14, 729 N.W.2d 356, 362-63. The offered evidence must be "relevant to a material issue in the case;" and the probative value of this evidence must substantially outweigh its prejudicial effect." *Id.* (quoting *State v. Jones*, 2002 S.D. 153, ¶ 10, 654 N.W.2d 817, 819).

1. <u>The Other Acts Evidence is Relevant.</u>

The State has the burden of showing the relevance of other crimes, wrongs, or acts. *See* SDCL 19-12-1 (Rule 401), SDCL 19-12-2 (Rule 402), and SDCL 19-12-5 (Rule 404(b)). "Relevance under § 404(b) is established 'only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Wright,* 1999 S.D.

50, ¶ 14, 593 N.W.2d at 798 (quoting *Huddleston,* 485 U.S. at 689). Here, Toavs and Walks testified to Defendant providing Toavs with cohosh. JT 213, 230. Toavs also testified Defendant admitted to putting cohosh in his pregnant girlfriend's drinks. JT 216.

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

When considering whether an act is relevant to show a common scheme or plan, this Court has held that "[a]ll that is required to show a common plan is that the charged and uncharged events 'have sufficient points in common.'" *Wright*, 1999 S.D. 50, ¶ 19, 593 N.W.2d at 800 (quoting *United States v. Flizondo*, 920 F.2d 1309, 1320 (7th Cir. 1990) (citations omitted)). In the present case, Defendant put cohosh and pulegone in Komes' drinks without her consent or knowledge in order to induce early labor and abort his child. Komes

described some of the drinks given to her by Defendant as smelly and minty tasting. JT 149. Other drinks tasted bitter, leaving a white residue. JT 149. The expert witness testimony establishes that while cohosh has a bitter taste, pulegone has a minty smell and taste. JT 363, 368.

Defendant argues that providing Toavs with cohosh at her request to help her induce labor at the end of her pregnancy is irrelevant and devoid of a common plan or scheme. DB 27. Defendant argues that evidence is dissimilar to secretly providing Komes with cohosh and pulegone to kill his unborn child. DB 27. This evidence, however, proves Defendant's knowledge, intent, plan, motive, and opportunity to abort Komes' child by surreptitiously altering beverages with pulegone and cohosh to induce early labor. SR 22-23.

Defendant's admission to Toavs that he was putting cohosh in Komes' drinks to end her pregnancy is highly relevant to establish Defendant gave Komes multiple substances over the course of several months in order to terminate her pregnancy without her knowledge or consent. Court's Decision (6/10/13) 9. This proves Defendant poisoned Komes' drinks with cohosh, in addition to pulegone. This testimony, along with that of Komes and the expert witnesses, establishes that Defendant is well familiar with the effects of pulegone and cohosh on a pregnant woman. The testimony of Toavs and Walks

is relevant and more probative than prejudicial. Based on the evidence provided, the trial court properly held the testimony of Toavs and Walks was relevant and was properly admitted at trial. Court's Decision (6/10/13) 9.

2. Any Prejudicial Effect of the Interaction is Outweighed by its Probative Value.

After determining the relevancy of the "other acts" evidence, the court must balance the probative value of the evidence against the potential for unfair prejudice. *Dubois*, 2008 S.D. 15, ¶ 20, 746 N.W.2d at 205. Once evidence is found relevant, "the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 'substantially' outweigh probative value."[3] *Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d at 799. This Court has stated:

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

Id. at ¶ 15, 593 N.W.2d at 799 (emphasis added). *See also*, *State v. Holland,* 346 N.W.2d 302, 309 (S.D. 1984) ("Damage to the

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

defendant's position is no basis for exclusion; the harm must come not from prejudice, but from 'unfair' prejudice"); *United States v. Rivera,* 83 F.3d 542, 547 (1st Cir. 1996) ("[u]nless trials are to be conducted on scenarios, on unreal facts tailored and sanitized . . . , the application of Rule 403 must be cautious and sparing"); *State v. Goodroad,* 442 N.W.2d 246, 250 (S.D. 1989) ("evidence is not prejudicial merely because its legitimate probative force damages the defendant's case"). "Prejudice does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Iron Shell*, 336 N.W.2d 372, 375 (S.D. 1983).

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

returned a different verdict." *State v. Guthmiller*, 2003 S.D. 83, ¶ 28, 667 N.W.2d 295, 305.

Defendant claims Toavs' testimony was unfairly prejudicial because cohosh was not detected in Komes' drinks when tested by State's expert witnesses, Professor Wold and Mr. Mathison. DB 33. However, the evidence established Defendant used both pennyroyal (pulegone) and cohosh to attempt to abort Komes' child. MH (9/16/13) 4. Komes reported receiving four suspicious tasting fountain drinks from Defendant. JT 147, 149, 150, 154. Two of those drinks were tested. JT 150, 154. The first two drinks Komes received were described as bitter tasting, similar to Toavs' description of cohosh's flavor. JT 147, 149. Neither drink was given to authorities for testing, because Komes dismissed the foul tasting soft drinks as bad fountain drinks from a gas station. JT 147-49. The third fountain drink Defendant brought to Komes tasted minty, consistent with the taste of pulegone. JT 150, 273-74, 368. The fourth fountain drink Defendant brought to Komes was immediately given to the authorities. JT 154. Terpin hydrate, a discontinued cough suppressant with similar properties as pulegone, was detected in that drink. JT 329; MH (3/27/13) 73. Moreover, Defendant's admission to Toavs of putting cohosh in Komes' drink to terminate her pregnancy is highly probative. Defendant's admission proves he used multiple substances through the course of several months with a plan to terminate Komes'

pregnancy. The trial court properly held the probative value of the testimony of Toavs and Walks was not substantially outweighed by the danger of unfair prejudice.

III.

THE TRIAL COURT PROPERLY ADMITTED STATE'S EXPERT WITNESS TESTIMONY

A. *Standard of Review.*

Trial courts in South Dakota have broad discretion concerning the qualifications of expert witnesses and the admission of expert testimony. *State v. Koepsell*, 508 N.W.2d 591, 593 (S.D. 1993). The admission of expert testimony will not be reversed on appeal without a clear showing the trial court abused its discretion. *Id.*

B. *Expert Witness Testimony Was Properly Admitted.*

Expert testimony is admissible under SDCL 19-15-2 if the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has a superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *State v. Lemler*, 2009 S.D. 86, ¶ 18, 774 N.W.2d 272, 278 (citing *Maroney v. Amon*, 1997 S.D. 73, ¶ 39, 565 N.W.2d 70, 79). Defendant argues the trial court erred when it admitted testimony of the State's three expert witnesses, Dr. Phillips,

State chemist Mr. Roger Mathison, and Professor Wold. DB 34-35. Specifically, Defendant argues that Dr. Phillips and Mr. Mathison's testimony did not meet the requirements in SDCL 19-15-2. He also claims their expert testimony was more prejudicial than probative, in violation of 19-12-3. DB 34.

Dr. Phillips is a medical toxicologist licensed to practice in Colorado since 1984. MH (3/27/13) 6. Dr. Phillips testified there are a limited number of medical toxicologists in the United States, none residing in South Dakota. MH (3/27/13) 6-8. Dr. Phillips testified his clinical practice is mostly medical toxicology. MH (3/27/13) 9. He is a member of the American Medical Association of Toxicology, the American College of Medical Toxicology, and several panels and committees. MH (3/27/13) 9-10. He has published nine books, numerous articles, over two hundred book chapters focused on medical toxicology, and teaches physicians training to become specialists in toxicology at the University of Colorado. MH (3/27/13) 10-11. He also consults for various organizations and has testified in court regarding medical toxicology in over thirty cases. MH (3/27/13) 12. Dr. Phillips staffs poison centers and treats patients regarding occupational exposures, poison, drug overdoses, chemical exposures, snake bites, and plant-related issues. MH (3/27/13) 9.

In this case, Dr. Phillips testified at both a Daubert hearing and at the jury trial about the consistencies, tastes, and uses of black

cohosh and pennyroyal (pulegone). MH (3/27/13) 16; JT 360-71. He testified to his familiarity with pennyroyal, its minty aroma and flavor, its oily consistency, and its use as an abortifacient. MH (3/27/13) 17-18; JT 362-67. Dr. Phillips testified that black cohosh also has an oily consistency, tastes bitter, has been used to induce labor, and that it could cause an abortion when used with pulegone. MH (3/27/13) 21-23; JT 367-71.

The trial court properly held Dr. Phillips had the necessary training, education, and expertise to testify to cohosh and pennyroyal and his testimony was relevant and reliable. Court's Decision (6/10/13) 3. The trial court properly allowed Dr. Phillips' testimony to educate the jury on the use and dangers of cohosh and pulegone to pregnant women and their fetuses.

Defendant further argues the trial court improperly admitted the expert testimony of Mr. Mathison. DB 34. The court held that because Mr. Mathison "has testified in several hundred cases, has worked as a chemist at the South Dakota State Forensic laboratory for twenty-nine years, and has been deemed an expert on numerous occasions on the use of head space gas chromatography," the test used to determine the presence of pulegone in Komes' soda, Mr. Mathison's testimony was based on sufficient facts and data, and was the product of reliable principles and methods. Court's Decision (6/10/13) 4. Further, the court found that Mr. Mathison applied

those principles and methods reliably to the facts of this case. Court's Decision (6/10/13) 4. In addition, the court found that Mr. Mathison's testimony was important to inform the jury that the South Dakota State Forensic Laboratory has additional resources beyond those of the Rapid City Police Department and was able to determine the substances in the drinks submitted for testing. MH (3/27/13) 73. Mr. Mathison explained the discrepancy between Professor Wold detecting terpin hydrate and Mr. Mathison finding pulegone in the soda drinks tested and that the two substances can be similar chemically. MH (3/27/13) 73. He explained that better resources at the South Dakota State Forensic Laboratory furnished more detailed information to determine the substance was pulegone. MH (3/27/13) 73. The trial court properly admitted Mr. Mathison's expert testimony.

Defendant argues the trial court erred when it admitted Professor Wold's testimony. DB 35. Professor Wold has been a chemistry professor at South Dakota School of Mines for ten years, has worked with the Rapid City Police Department for the past twelve years as a forensic examiner, and has worked in various chemical industries for the past thirty years. State's Trial Ex. 5; JT 312-13. Professor Wold also tested Komes' fountain drinks with the gas chromatograph-mass spectrometer. JT 314. Over the past eleven years, Professor Wold has testified to testing twenty thousand items

using that approach. JT 314. Professor Wold has testified in court more than sixty times and as an expert many times. JT 316.

Professor Wold found terpin hydrate, a cough suppressant no longer available to purchase, in the fourth drink Defendant brought to Komes. JT 322. The detection of terpin hydrate in a beverage would cause it to be adulterated. JT 323. Professor Wold could not identify any toxic substance in the third drink Defendant brought to Komes. JT 324. Professor Wold testified that when additional analysis was requested, he sent the samples to the South Dakota Forensic Laboratory because it had more resources. JT 317. Testing by Mr. Mathison revealed pulegone in the third drink. MH (3/27/13) 73. Professor Wold's experience and testing methods conclusively establish that the trial court correctly admitted his expert testimony.

IV.

THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT OF ATTEMPTED FETAL HOMICIDE.

A. Standard of Review

A challenge to the sufficiency of evidence is reviewed *de novo*. *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140 (citing *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764). This, however, does not mean the appellate court must "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d at

765 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Rather, "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 S.D. 52, ¶ 7, 785 N.W.2d 288, 292 (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342).

This Court, while engaged in the sufficiency of evidence analysis, "will not usurp the jury's function in resolving conflicts in the evidence, weighing credibility, and sorting out the truth." *State v. Swan*, 2008 S.D. 58, ¶ 9, 753 N.W.2d 418, 420 (quoting *State v. Pugh*, 2002 S.D. 16, ¶ 9, 640 N.W.2d 79, 82). Thus, "[i]f the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustain[s] a reasonable theory of guilt, a guilty verdict will not be set aside." *Beck*, 2010 S.D. 52, ¶ 17, 785 N.W.2d at 292 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 19, 705 N.W.2d 620, 626).

B. *The Evidence is Sufficient to Uphold Defendant's Conviction for Attempted Fetal Homicide.*

Defendant was convicted of attempted fetal homicide, in violation of SDCL 22-16-1.1(1), which provides

> Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant and caused the death of the unborn child without lawful justification and if the person intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child.

The State must prove each of the four elements of attempted fetal homicide beyond a reasonable doubt. SDCL 22-16-1.1; SR 224. Defendant asserts there was insufficient evidence to prove beyond a reasonable doubt he both attempted and intended to cause the death of his unborn child. SR 234; DB 36.

The State met its burden of proof to sustain Defendant's conviction. Viewing the evidence in the light most favorable to the verdict, it is apparent "any rational trier of fact could have found the essential elements of [attempted fetal homicide] beyond a reasonable doubt." See *Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d at 140. Testimony overwhelmingly proved Defendant attempted to poison Komes, intending to cause the death of their unborn child.

1. Defendant Attempted to Cause the Death of Komes' Unborn Child.

Defendant asserts there was a lack of evidence to support finding beyond a reasonable doubt he attempted to kill Komes' unborn child. DB 36. "[A]n attempt to commit a crime occurs when one 'does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration of that crime[.]'" SDCL 22-4-1; *State v. Waugh*, 2011 S.D. 71, ¶ 23, 805 N.W.2d 480, 486. "[T]o prove an attempt, the prosecution must show Defendant (1) had the specific intent to commit the crime, (2) committed a direct act toward the commission of the intended crime, and (3) failed or was prevented or

intercepted in the perpetration of the crime." *State v. Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d 1, 3.

To prove Defendant attempted to commit fetal homicide, the State must first establish Defendant had the specific intent to commit the crime. *Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d at 3. "Specific intent has been defined as 'meaning some intent in addition to the intent to do the physical act which the crime requires[.]'" *State v. Huber*, 356 N.W.2d 468, 472 (S.D. 1984). In this case, Defendant purposefully put pulegone and cohosh in Komes' drinks to cause her to miscarry their unborn child. Defendant argues, however, there was no evidence presented at trial Defendant ever possessed pulegone or cohosh. DB 36. This argument ignores the testimony in the record. Mr. Mathison testified that Komes' drink tested positive for the substance pulegone. JT 277. Additionally, Toavs and Walks' testimonies established Defendant both possessed and admitted to adding cohosh to Komes' drinks in order to terminate her pregnancy. JT 215. Komes' description of the bitter tasting drink laced with cohosh corroborated Toavs' testimony of the bitter tasting cohosh. JT 147, 149, 218. Defendant himself admitted to Toavs that he laced Komes' drinks with cohosh. JT 215. Dr. Phillips also testified to cohosh tasting bitter. JT 368. A.J. and Sabrina testified that Defendant mentioned looking to purchase an herb online to terminate Komes' pregnancy. JT 250. The totality of the circumstances

establishes Defendant had the specific intent to cause the miscarriage of Komes' unborn child by lacing her drinks with pulegone and cohosh.

The second element whether Defendant committed a direct act toward the commission of the intended crime. *Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d at 3. Defendant added pulegone and cohosh to Komes' drinks multiple times without her knowledge. JT 147, 149, 150, 154. Those substances have abortifacient properties and when used together are harmful or lethal to an unborn child. MH (3/27/13) 23. Defendant brought her the laced drinks and attempted to manipulate her into ingesting all of the foul-tasting and odiferous drinks. JT 177. The fact Defendant brought Komes multiple drinks demonstrates his specific intent to abort his child without Komes' knowledge.

The third element is whether the crime failed or Defendant was prevented or intercepted in the perpetration of the crime. *Reed*, 2010 S.D. 66, ¶ 7, 78 N.W.2d at 3. Defendant's attempt to abort Komes' unborn child failed only because, after tasting the minty and bitter drinks, Komes became suspicious and contacted law enforcement, correctly believing Defendant was trying to poison her. JT 151. Fortunately, Komes did not consume any more of the contaminated beverages when she realized they tasted minty and bitter, thereby preventing and intercepting the fetal homicide planned by Defendant. JT 154.

Defendant argues Komes never felt ill or suffered any adverse physical effects from the poisoned drinks. DB 37. Effects of the poison on either mother or child is not an element of attempted fetal homicide. Defendant had the requisite intent and took deliberate steps toward the commission of the crime. The fact that Komes prevented the crime does not negate his attempt to commit fetal homicide.

Defendant further argues there is no evidence Komes consumed pulegone. Komes' consumption of the poisoned drink was not necessary for the jury to find Defendant guilty of attempted fetal homicide. Komes did, however, partially consume the drinks Defendant provided to her. JT 147, 149, 150. As noted in her testimony, she testified to the flavor of the substances. JT 147, 149, 150. Defendant's intentional steps toward the commission of the crime is sufficient to support his conviction of attempted fetal homicide.

Defendant also argues that, with the amount of pulegone detected in Komes' drinks, it would take four hundred cans of soda to produce a lethal dose of pulegone. DB 38. Defendant's ignorance about the amount of pulegone necessary to poison Komes does not negate his attempt to kill his unborn child. That Defendant surreptitiously added the substance to Komes' drinks with the specific

intent of terminating their baby is sufficient evidence to support Defendant's guilt of the crime of attempted fetal homicide.

When the facts are reviewed in the light most favorable to the jury's verdict, there was ample evidence to sustain Defendant's conviction of attempted fetal homicide.

2. Defendant Intended to Cause the Death of His Unborn Child.

Defendant asserts there was a lack of evidence proving beyond a reasonable doubt Defendant's intent to cause the death of or do serious bodily injury to Komes or their unborn child. DB 36. The jury was instructed that "[i]n the crime of Attempted Fetal Homicide, there must exist in the mind of the perpetrator the specific intent to cause the death of or do serious bodily injury to the pregnant woman or the unborn child." Jury Instruction 24; SR 238. Not only did evidence show Defendant furtively tainted Komes' drinks with pulegone and cohosh, but testimony by A.J., Sabrina, and Toavs established that Defendant told them of his plan to give Komes a substance to induce labor. JT 215, 250. This case is replete with evidence that, if believed by the fact finder, was sufficient to sustain a finding of guilt beyond a reasonable doubt. *Beck*, 2010 S.D. 52 at ¶ 7, 785 N.W.2d at 292 (quoting *Carter*, 2009 S.D. 65 at ¶ 44, 771 N.W.2d at 342).

V.

ATTEMPTED FETAL HOMICIDE IS NOT A LEGAL IMPOSSIBILITY.

A. Standard of Review

"A reviewing court is required to consider the issue of subject matter jurisdiction even where it is not raised below in order to avoid an unwarranted exercise of judicial authority." *State v. Lyerla*, 424 N.W.2d 908, 912 (S.D. 1988) (quoting *Honomichl v. State*, 333 N.W.2d 797 (S.D. 1983).

B. Defendant was Properly Convicted of Attempted Fetal Homicide.

Defendant argues attempted fetal homicide cannot exist because SDCL 22-16-1.1 does not require the intent to kill. DB 11. Defendant cites *Lyerla*, wherein this Court reversed the defendant's convictions for attempted second degree murder. 424 N.W.2d at 912-13; DB 11. This Court in *Lyerla* noted "[i]n order to attempt to commit a crime, there must exist in the mind of the perpetrator the specific intent to commit the acts constituting the offense." *Id.* at 912 (citing *State v. Primeaux*, 328 N.W.2d 256 (S.D. 1982) (citations omitted)). This Court reversed Lyerla's attempted second degree murder convictions because Lyerla did not intend to cause the death of his victims. This Court found Lyerla committed criminally reckless acts with a depraved mind. *Id.* at 912. Because second degree murder is defined as "perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although *without any*

premeditated design to effect the death of any particular person, including an unborn child," the statute was devoid of specific intent, and Lyerla's conviction was reversed. SDCL 22-16-7 (emphasis added). This Court held Lyerla could not be guilty of attempted second degree murder because he lacked the requisite intent, and that attempted second degree murder does not exist under South Dakota law. *Lyerla*, 424 N.W.2d at 913.

Lyerla is not applicable in the present case. Fetal homicide requires the following:

> Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant and caused the death of the unborn child without lawful justification and if the person:
>
> (1) Intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child.

SDCL 22-16-1.1(1). Fetal homicide specifically requires the person *intended to cause the death* of . . . the unborn child. Defendant relies on *Lyerla* to argue attempted fetal homicide does not exist. Defendant is selectively arguing the second portion of SDCL 22-16-1.1(1), "intended to do serious bodily injury," but ignores the first part of the clause, "[i]ntended to cause the death of." The statute defines fetal homicide and provides that it occurs when one intends to cause the death of an unborn child. Because Defendant intended to cause the death of his unborn child, the first portion of the statute applies.

Defendant further argues the "jury was instructed that they could convict [Defendant] if they found he either 'intended to cause the death' or 'intended to cause serious bodily injury,'" and cites to SR 224 and Jury Instructions 12 and 24. DB 12-13. Defendant takes issue with the jury instructions, claiming they failed to require the intent to kill. DB 13. However, Defendant is selectively arguing a portion of the Jury Instructions. Instruction 12 informed the jury about the elements of attempted fetal homicide and reads in pertinent part that

> . . . Defendant should have known that . . . Komes, bearing an unborn child was pregnant, and without lawful justification, attempted to cause the death of the unborn child, wherein the Defendant intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child, in violation of 22-16-1.1(1).

SR 225. "Jury instructions are sufficient when, considered as a whole, they correctly state the applicable law and inform the jury." *State v. Eagle Star*, 1996 S.D. 143, ¶ 13, 558 N.W.2d 70, 73 (citing *State v. Fast Horse*, 490 N.W.2d 496, 499 (S.D. 1992) (citations omitted). Defendant intended to cause the death of his unborn child, and the jury was properly instructed of the applicable law, therefore, Defendant's argument is without merit.

C. Defendant Took Steps to Cause the Death of his Unborn Child.

Defendant argues fetal homicide mandates the actual death of the victim, and because Defendant did not effect the death of his unborn child, he cannot be convicted under SDCL 22-16-1.1. DB 13. Defendant argues the requirement of the death of the unborn child

was absent from the jury instructions, and cites to SR 224 and Jury Instructions 12 and 24. DB 13-14. However, the requirement that Defendant "attempted to cause the death of the unborn child" is included in Instruction 12. SR 225.

Defendant further notes the definition of homicide is "the killing of one human being . . ." DB 14; SDCL 22-16-1. Defendant argues that because the legislature added the language in the fetal homicide statute "caused the death of the unborn child," the legislature intended to mandate a death did occur. In support of his argument, Defendant cites to other homicide statutes that allegedly do not require an actual death. DB 14. Defendant's argument is without merit.

First Degree Murder is defined as:

Homicide is murder in the first degree:

(1) If perpetrated without authority of law and with a premeditated design *to effect the death of the person killed* or of any other human being, including an unborn child.

SDCL 22-16-4. The elements for first degree murder include the language "to effect the death of the person killed." SDCL 22-16-4. That statutory language does not preclude a conviction for attempted first degree murder. *See State v. Berhanu*, 2006 S.D. 94, 724 N.W.2d 181.

SDCL 22-4-1 states "any person who attempts to commit a crime, and in the attempt, does any act toward the commission of the crime, but fails or is prevented or intercepted in the perpetration of that crime, is punishable for such attempt. . ." In *Berhanu*, the defendant attempted to murder his coworker. Because he took steps toward the commission of the murder by hitting the victim with his car, this Court upheld the defendant's conviction of attempted first-degree murder. *Berhanu*, 2006 S.D. 94, ¶¶ 2-16, 724 N.W.2d at 181-86. It did not matter Berhanu was unsuccessful in his attempt to murder the victim.

Defendant further argues that Legislative history "does not undermine the proposition that a death of the unborn child has to occur in order for the fetal homicide statute to apply." DB 15. Defendant's argument disregards the legislative intent to "provide penalties for certain crimes against an unborn child." 1995 South Dakota Laws Ch. 122 (H.B. 1210). In addition to the enactment of the fetal homicide statute, the Legislature amended several statutes to include an unborn child. *See* SDCL 22-1-2 (Definition of "Person"); 22-16-1 (Homicide); 22-16-15 (First Degree Manslaughter); 22-16-20 (Second Degree Manslaughter); 22-16-41 (Vehicular Homicide); 22-16-42 (Vehicular battery-transferred to 22-18-36); 22-18-1.2 (Criminal Battery of an Unborn Child-Misdemeanor); 22-18-1.3 (Aggravated Criminal Battery of an Unborn Child-Felony).

Defendant also argues that because death to his unborn child did not occur, fetal assault is the appropriate crime. DB 15. However, Defendant attempted to kill his unborn child because he did not want the baby. He did not intend to simply commit the crime of assault. Defendant himself explains the "1995 Legislature distinguished between the crimes of 'fetal assault' and fetal homicide' when discussing what the definition of 'unborn child' contemplates." DB 15. Thus, even Defendant acknowledges the Legislature intended to make fetal homicide a felony. Through the application of SDCL 22-4-1, Defendant was properly charged and convicted of attempted fetal homicide.

Defendant argues that *Wiersma v. Maple Leaf*, 1996 S.D. 16, 543 N.W.2d 787, draws a distinction between fetal assault and fetal homicide "when discussing what the definition of 'unborn child' contemplates." DB 15. Defendant's argument is misplaced. *Wiersma* does not analyze the distinction between the crimes fetal assault and fetal homicide, but rather the Legislature's definition of "unborn child," and whether that definition includes a both a viable and nonviable fetus. *Id.* at ¶¶ 3-8, 543 N.W.2d at 789-791. Therefore, Defendant's reliance on *Wiersma* does not apply to the case at bar.

Defendant argues because there was not a death of an unborn child, he cannot be convicted of attempted fetal homicide. Because Defendant intended to cause the death of his unborn child, committed

direct acts towards causing the death of his unborn child, but failed in his attempt, he was properly convicted of attempted fetal homicide.

CONCLUSION

The State respectfully requests that the trial court's judgment and sentence be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 10,000 words.

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

Dated this 31st day of December, 2014.

/s/Caroline Srstka
Caroline Srstka
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of December, 2014, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Alfredo Vargas* was served via electronic mail upon Jamy Patterson, jamyp@co.pennington.sd.us.

/s/Caroline Srstka
Caroline Srstka
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
vs. FILE NO: 26885

ALFREDO VARGAS,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE JANINE M. KERN, Circuit Court Judge

APPELLANT'S REPLY BRIEF

Jamy Patterson
Office of the Public Defender
for Pennington County
Rapid City, South Dakota 57701
Attorney for Appellant

Mr. Marty J. Jackley
Attorney General
1302 E. Hwy 14 Suite 1
Pierre, South Dakota 57501

and

Mr. Mark A. Vargo
Pennington County State's Attorney
130 Kansas City Street, Suite 300
Rapid City, SD 57701

Notice of Appeal was filed on November 20, 2013.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED: PAGES:

STATUTES CITED:

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 26885

ALFREDO VARGAS,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Appellee's Brief is cited in this Reply as "AB" followed by appropriate page number. Appellant intends that all arguments contained in his earlier brief be incorporated herein. Appellant will only address the issue of lack of subject matter jurisdiction for the offense of Attempted Fetal Homicide.

I. ATTEMPTED FETAL HOMICIDE IS A LEGAL IMPOSSIBILITY.

The State argues that State v. Lyerla, 424 N.W.2d 908 (S.D. 1988)

"is not applicable to the present case" because "[f]etal homicide specifically requires the person intended to cause the death of…the unborn child." AB 41. However, the fetal homicide statute under SDCL § 22-16-1.1(1) specifically allows a conviction for fetal homicide with either an intent to cause the death *or* do serious bodily injury. Furthermore, this is how the jury was instructed. Jury Instructions 12, 24. Therefore, because the jury could convict upon merely a finding of an intent to cause serious bodily injury, a mens rea legally impossible for Attempted Homicide, the conviction for Attempted Fetal Homicide lacks subject matter jurisdiction. State v. Lyerla, 424 N.W.2d 908 (S.D. 1988).

Furthermore, the language in the fetal homicide statute under SDCL § 22-16-1.1 clearly requires the death of the unborn child with the addition of the words "and caused the death of the unborn child."

> Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant *and caused the death of the unborn child* without lawful justification and if the person:
>
> (1) Intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child.

If the death of the unborn child was not required, SDCL § 22-16-1.1 would read:

> Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant . . . and if the person:

(1) Intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child.

The addition of the words "and caused the death" is not a necessary element to prosecute for the offense of Fetal Homicide unless the words are to be given their plain and ordinary meaning that a death is a necessary finding in order for the statute of fetal homicide to apply. Goetz v. State, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681 (statutory language should be given its plain meaning). The words "and caused the death" would become unnecessary surplusage unless they are to be given their plain meaning. There can be no conviction for Attempted Fetal Homicide when the fetal homicide statute plainly requires a death occur in order for the statute to apply.

The State cites to the First Degree Murder statute under SDCL § 22-16-4, and argues that the language in that statute of "to effect the death of the person killed" is synonymous with the plain language of "and caused the death" in the fetal homicide statute, and therefore, an actual death is not a necessary element of either offense. AB 43. However, the language "with a premeditated design to effect the death of the person killed" in the First Degree Murder statute under SDCL § 22-16-4(1) pertains to the mens rea of the specific intent to kill. It is not language requiring an additional finding of death beyond what the statutory definition for "homicide" already entails. SDCL § 22-16-1 ("Homicide" is defined as "the killing of one human being, including an

unborn child, by another."). As such, Attempted Murder under subsection one of First Degree Murder is legally permissible, whereas Attempted Fetal Homicide is not.

CONCLUSION

For all the reasons discussed herein and in Appellant's earlier brief, Vargas renews his prayer that this Court reverse his conviction for Attempted Fetal Homicide.

Dated this 27th day of January, 2015.

Respectfully submitted,

/s/Jamy D. Patterson
Jamy D. Patterson
Office of the Public Defender
for Pennington County
Rapid City, South Dakota 57701

(605) 394-2181

Attorney for Appellant