IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29287

State of South Dakota,
Plaintiff and Appellee,
v.
Stephen Robert Falkenberg,
Defendant and Appellant.

Appeal from the Circuit Court, First Judicial Circuit
Yankton County, South Dakota

The Honorable Cheryle Gering
Circuit Court Judge

APPELLANT'S BRIEF

Attorneys for Appellant
Clint Sargent
Raleigh Hansman
Meierhenry Sargent LLP
315 S. Phillips Ave
Sioux Falls, SD 57104
605-336-3075
clint@meierhenrylaw.com
raleigh@meierhenrylaw.com

Attorneys for Appellee
Jason Ravnsborg
Brigid Hoffman
Office of the Attorney General
1302 E. Hwy 1 Ste. 1
Pierre, SD 57501
605-773-3215
atgservice@state.sd.us
Brigid.hoffman@state.sd.us

Notice of Appeal filed on the 20th day of March, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **ii**

JURISDICTIONAL STATEMENT **1**

STATEMENT OF THE ISSUES **1**

STATEMENT OF THE CASE **2**

STATEMENT OF THE FACTS **3**

STANDARD OF REVIEW **5**

ARGUMENT **6**

CONCLUSION **27**

CERTIFICATE OF SERVICE **28**

CERTIFICATE OF COMPLIANCE **28**

APPENDIX **29**

TABLE OF AUTHORITIES

Cases

Gartner v. Temple, 2014 S.D. 74, 855 N.W.2d 846 .....6, 17

Kaberna v. Brown, 2015 S.D. 34, 864 N.W.2d 497 .....2, 6, 17

Kansas v. Cordray, 82 P.3d 503 (Kan. 2004).....12

Kansas v. Jones, 8 P. 3d 1282 (Kan. 2000) 12

Kansas v. Robinson, 934 P.2d 38 (Kan. 1997) 12

Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419 (S.D. 1994).....16

Loen v. Anderson, 2005 SD 9, 692 N.W.2d 194 .....2, 16

South Dakota v. Lyerla, 424 N.W.2d 908, (S.D. 1988).....12

South Dakota v. Miller, 2014 SD 49, 851 N.W.2d 703.....12

State of New Mexico v. Reed, 120 P.3d 447 (N.M. 2005) 1, 11

State of South Dakota v. Harruff, 2020 SD 4, 939 N.W.2d 20 1

State of South Dakota v. Holsing, 2007 SD 72, 736 N.W.2d 883 ..... passim

State of South Dakota v. Martin, 2006 S.D. 104, 724 N.W.2d 872.....2, 19, 20

State of South Dakota v. Orr, 2015 SD 89, 871 N.W.2d 834.....2, 21

State v. Brooks, 962 So.2d 1220 (La.App.2 Cir. 2007).....12

State v. Engelmann, 541 N.W.2d 96 (S.D. 1995).....6

State v. Houghton, 272 N.W.2d 788 (S.D. 1978).....6

State v. Johnson, 316 N.W.2d 652 (S.D. 1981).....6

State v. Olson, 408 N.W.2d 748 (S.D. 1987) 5

State v. Primeaux, 328 N.W.2d 256 (S.D. 1982) 7, 11

State v. Running Bird, 2002 SD 86, 649 N.W.2d 609 5

State v. Ruttman, 1999 SD 112, 598 N.W.2d 910 .....6, 19

State v. Smith, 477 N.W.2d 27 (S.D. 1991) 18

State v. Thayer, 2006 SD 40, 713 N.W.2d 608 ..... 20, 21

State v. Tofani, 2006 SD 63, 719 N.W.2d 391 ..... 1, 5, 13

State v. Tuttle, 460 N.W.2d 157 (S.D. 1990) 20

State v. Verhoef, 2001 SD 58, 627 N.W.2d 437 5

State v. Wingler, 2007 SD 49, 734 N.W.2d 795 6

State v. Wolff, 438 N.W.2d 199 (S.D.1989) 22

Statutes

SDCL § 15-26A-3(1) 1

SDCL § 19-19-401 ..... 1, 14, 16

SDCL § 19-19-402 ..... 1, 16

SDCL § 19-19-403 ..... 2, 17

SDCL § 22-16-7 ..... 1, 7, 13

SDCL § 23A-28-2 ..... 2, 20

SDCL § 23A-28-3 ..... passim

SDCL § 23A-28-9 ..... 2, 20

Other

SDCPJI 3-24-14 13

JURISDICTIONAL STATEMENT

In this appeal, Stephen Robert Falkenberg seeks review of the following orders: (1) November 12, 2019 Order Re: Defendant's Motion to Exclude Dismemberment Evidence; (2) the trial Court's oral order denying Defendant's oral Motion for Judgment of Acquittal on Second Degree Murder on January 15, 2020; (3) and the restitution amount ordered by the Court in its March 4, 2020 Judgment and Conviction of Sentence.

Falkenberg respectfully submits that jurisdiction exists pursuant to SDCL § 15-26A-3(1) (appeal from final judgment as a matter of right).[1]

STATEMENT OF THE ISSUES

I. Whether Sufficient Evidence Exists to Sustain Falkenberg's Second Degree Murder Conviction

SDCL § 22-16-7

State of South Dakota v. Harruff, 2020 SD 4, 939 N.W.2d 20

State v. Tofani, 2006 SD 63, 719 N.W.2d 391

State of New Mexico v. Reed, 120 P.3d 447 (N.M. 2005)

II. Whether the Trial Court Erred in Denying Falkenberg's Motion to Exclude Dismemberment Evidence and Prejudicial Testimony

SDCL § 19-19-401

SDCL § 19-19-402

---

[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "MH" designates the transcript for the Motion Hearing on October 28, 2019; (3) "JT" designates the transcript for the Jury Trial held January 9 – 21, 2020; (4) "SH" designates the transcript for the Sentencing Hearing on March 2, 2020; (5) "App." designates Appellant's Appendix.

SDCL § 19-19-403

Loen v. Anderson, 2005 SD 9, 692 N.W.2d 194

Kaberna v. Brown, 2015 SD 34, 864 N.W.2d 497

III. Whether the Trial Court Violated Falkenberg's Due Process rights and Separation of Powers doctrine when it imposed a non-specific, open-ended restitution amount as part of Falkenberg's sentence

SDCL § 23A-28-2

SDCL § 23A-28-3

SDCL § 23A-28-9

State of South Dakota v. Martin, 2006 S.D. 104, 724 N.W.2d 872

State of South Dakota v. Orr, 2015 SD 89, 871 N.W.2d 834

State of South Dakota v. Holsing, 2007 SD 72, 736 N.W.2d 883

STATEMENT OF THE CASE

On March 18, 2019, Stephen Robert Falkenberg was arrested and charged by Complaint with Second Degree Murder in the death of Tamara LaFramboise. CR. 9. Falkenberg was indicted by a Yankton County Grand Jury on April 1, 2019, for Second Degree Murder and Manslaughter in the First Degree. CR. 25. Falkenberg pleaded not guilty to all charges at his April 4, 2019 Arraignment.

A hearing on Defendant's Motion to Exclude Evidence was held on October 28, 2019. The circuit court made oral rulings at that time. An Order memorializing the circuit court's decision was filed on November 12, 2019. CR. 92; Appx. 4-8.

Falkenberg's Jury Trial commenced on January 9, 2020, in Yankton, Yankton County, South Dakota. At the close of the State's case-in-chief, Falkenberg moved for a

judgment of acquittal on the Second-Degree Murder and the First-Degree Manslaughter (Heat of Passion) charges. *JT.* 447:25 – 448:9. After hearing argument from both sides, the circuit court denied Falkenberg's oral motion. *JT.* 448:19-22.

On January 21, 2020, Falkenberg was found guilty of Second-Degree Murder, as well as guilty on the lesser included offenses of First-Degree Manslaughter (Heat of Passion), First-Degree Manslaughter (Unnecessary Killing), and Second-Degree Manslaughter. CR. 662. Falkenberg was sentenced on March 4, 2020, to life in the South Dakota State Penitentiary for the Second-Degree Murder conviction. CR. 855; App. 1-3. Restitution was also ordered. Appx. 3.

STATEMENT OF THE FACTS

Methamphetamine is lethal. Even the tiniest amount interrupts the cardiovascular system's electrical impulses – risking catastrophic consequence. Aneurysms, strokes, and undetectable cardiac arrhythmias are documented in medical literature as caused by methamphetamine ingestion. There is no safe ingestion level for methamphetamine. It is not a drug that one can build up a tolerance. Each time someone uses methamphetamine, that person risks death.

Methamphetamine can also disrupt the brain. Violent and irrational behavior by persons suffering from methamphetamine intoxication is medically documented. High doses of methamphetamine can elicit restlessness, confusion, hallucinations, circulatory collapse, and convulsion.

Tamara LaFramboise struggled with methamphetamine addiction for more than twenty years. Methamphetamine made LaFramboise aggressive, violent, and combative. During a more than twenty-year span, LaFramboise was convicted of possessing a controlled substance and assaultive offenses in California, New Mexico, and South Dakota.

In 2016, LaFramobise moved from New Mexico to Yankton, SD. Shortly thereafter, she began a romantic relationship with Stephen Robert Falkenberg. Unlike LaFramboise, Falkenberg was not a drug user. Falkenberg didn't approve of or enable LaFramboise's methamphetamine addiction. In an effort to help LaFramboise maintain sobriety, Falkenberg would call the probation-mandated Color Wheel to ascertain for LaFramboise whether she needed to submit to a urine analysis that day. He visited LaFramboise when she was in jail, helped her obtain legal counsel, and reached out to her Court Services Officer.

Falkenberg has no history of violence or aggressive behavior. When LaFramboise went after him physically, often when she was under the influence of methamphetamine, he took it without fighting back.

In 1993, when he was 19 years old, Falkenberg suffered multiple traumatic brain injuries in a motor vehicle accident. Large portions of his brain were removed. After spending months in the hospital, he was discharged to a rehabilitation facility. He left shortly after his arrival against medical advice. He never received any other follow-up treatment or rehabilitation for his traumatic brain injuries.

LaFramboise's mother reported her missing on March 5, 2019. On March 16, 2019, LaFramboise's body was discovered in a creek in Menominee, Michigan. Her body was frozen with her head, hands, and feet not attached. The autopsy blood test revealed that at the time LaFramboise died she was suffering from acute methamphetamine intoxication. The autopsy also revealed that LaFramboise's body had been frozen prior to dismemberment. The dismemberment occurred outside South Dakota, days after LaFramboise died.

STANDARD OF REVIEW

Denial of a motion for judgment of acquittal is a question of law reviewed de novo. *State v. Harruff*, 2020 SD 4, ¶ 15, 939 N.W.2d 20, 25. The standard is whether "evidence was sufficient to sustain the convictions." *State v. Running Bird*, 2002 SD 86, ¶ 19, 649 N.W.2d 609, 613 (quoting *State v. Verhoef*, 2001 SD 58, ¶ 22, 627 N.W.2d 437, 442) (internal citations omitted)). When measuring the sufficiency of the evidence, the Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Tofani*, 2006 SD 63, ¶ 24, 719 N.W.2d 391, 398. "A guilty verdict will not be set aside if the state's evidence and all favorable inferences that can be drawn therefrom support a rational theory of guilt." *Id.*

"Questions of the relevance of proffered testimony are committed to the discretion of the trial court and this court will not reverse its ruling absent an abuse of discretion." *State v. Olson*, 408 N.W.2d 748, 752 (S.D. 1987). Additionally, when reviewing a trial court's exercise of "balancing the probative value against the risk of unfair prejudice and the other Rule 403 considerations," this Court will "determine

whether there has been an abuse of discretion." *State v. Johnson,* 316 N.W.2d 652 (S.D. 1981) (quoting *State v. Houghton,* 272 N.W.2d 788, 791 (S.D. 1978)). "The term 'abuse of discretion' refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Id.* (quoting *State v. Engelmann*, 541 N.W.2d 96, 100 (S.D. 1995)). Abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable.'" *Kaberna v. Brown*, 2015 SD 34, ¶ 13, 864 N.W.2d 497, 501 (quoting *Gartner v. Temple,* 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850).

The standard for reviewing a trial court's questions of law as it pertains to a restitution award is "under a de novo standard with no deference given to the trial court's conclusions." *State v. Wingler*, 2007 SD 49, ¶ 7, 734 N.W.2d 795, 797 (citing *City of Deadwood v. Summit, Inc.*, 2000 SD 29, ¶ 9, 607 N.W.2d 22, 25). A "trial court's findings of fact concerning a restitution award are reviewed under the clearly erroneous standard." *Id.*

> A trial court's finding is clearly erroneous if, "after reviewing the entire evidence, we are left with the definite and firm conviction that a mistake has been made." All conflicts in the evidence must be resolved in favor of the trial court's determinations. The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the trial court and we give due regard to the trial court's opportunity to observe the witnesses and the evidence.

State v. Ruttman, 1999 SD 112, ¶ 14, 598 N.W.2d 910, 913 (quoting *Estate of Unke*, 1998 SD 94, ¶ 11, 48 N.W.2d 145, 148).

ARGUMENT

I. Falkenberg's Motion for Judgment of Acquittal Should Have Been Granted; Insufficient Evidence to Sustain Second Degree Murder Conviction

> Homicide is murder in the second degree if 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.

SDCL § 22-16-7.

"In order to successfully prosecute a suspect for murder under this statute, the prosecution must prove that the Defendant's conduct established that he was acting with a depraved mind." *State v. Harruff*, 2020 SD 4, ¶ 39, 939 N.W.2d 20, 30 (citing *State v. Primeaux*, 328 N.W.2d 256, 258 (S.D. 1982)).

> Whether the conduct is imminently dangerous to others and evincing a depraved mind regardless of human life is to be *determined from the conduct itself and the circumstances of its commission*.

South Dakota Criminal Pattern Jury Instruction 3-24-14 (emphasis supplied).

The State's theory was that Falkenberg killed LaFramboise after he arrived at her apartment, found her dressed up, and accused her of cheating on him. At trial, the State put on its theory of "depraved mind" murder through testimony about Falkenberg's demeanor and behavior from hotel clerks, gas station attendants, and food service workers he encountered between South Dakota and Michigan in early March 2019 and with testimony, pictures, and continuous references to LaFramboise's dismembered body.

> Question by Attorney Brent Kempema: In March – on March 1st of 2019, did you have kind of – kind of a side hustle? A side job?
>
> Answer by Timothy Pillar: Yeah. I was working over at the -- the AmericInn in Tomah.
>
> ...
>
> Q. On the date that the defendant checked in, was there anything notable for you that kind of stood out?
>
> A. Just that left eye. That was the main thing.
>
> Q. Okay. So that even though it was March 1st that kind of stuck out in your mind?

A. Yeah.

Q. Okay. How was that gentleman acting that night?

A. Kind of goofy. Was talking nonsense and all that.

Q. Did he seem panicked at all?

A. No. Not panicked.

JT. 115:23-118:9.

Question by Attorney Brent Kempema: Would you have been working on March 1st, 2019?

Answer by Jolene Rhea: Yes, I was.

...

Q. What is the name of the customer that's identified on Exhibit 18?

A. Stephen Falkenberg.

Q. Does it give a location for the delivery?

A. Yes. At the AmericInn, Room 120.

...

Q. And did you deliver the food to Room 120?

A. I went there and no one answered the door. So I went to the front desk and they said that he was in the pool area but I could not take food in the pool area. So I just opened the door and hollered his name. No one responded. And then someone else that was in the pool went over to the hot tub area and he got out of the hot tub and came to the door and went to Room 120.

...

Q. What was Mr. Falkenberg's demeanor like during this entire process?

A. I didn't notice anything out of the ordinary.

Q. Did you notice any panicking or anything like that?

A. No.

Q. Just somebody who got out of a hot tub?

A. Yes.

JT. 126:2- 129:8.

Question by Attorney Brent Kempema: Did he tell you anything about the dismembering of Tammy?

Answer by Sebastian Falkenberg: No.

Q. Did you have any discussion with your dad about the tools that he used?

A. No.

Q. Do you remember talking to your dad about what would have happened to any tools that were involved in the dismemberment?

A. No.

...

Q. Did your dad ever tell you where he cut Tammy's head, hands, and feet off at?

A. No.

...

Q. Did he ever tell you about using a tarp when he was cutting her up?

A. No.

JT. 228:21 – 230: 18.

Question by Attorney Doug Barnett: Did you ask your dad about Tamara's dismemberment?

Answer by Marissa Luetjen: Yes.

Q. Did you ask your dad about the cutting or why the cutting?

A. Yes. I said, "What's with the cutting situation?" And he said her identity or identity – I'm not completely sure exactly.

Q. He said one of those things?

A. Yes.

Q. Her identity or identity?

A. Correct.

JT. 254:19-255:3.

Question by Attorney Brent Kempema: And the body – did you examine the amputations?

> Answer by Jeff Brunelle: Some of my observations were it was a small female, nude. I got a closer inspection of the tattoos. There were some marbling on the body. The body was frozen. Some things – other observations, I did not detect any odors of cleaning products, bleach, and I did not smell the odor of human decomposition.
>
> Q. As far as the areas where the amputations occurred, did you make any notes?
>
> A. Yeah. The cuts where the head had been decapitated and the hands and feet had been amputated – there were tool markings on the bones themselves and they appeared to be horizontal striations on the bones.

JT. 172:13-25.

At trial, there was no dispute that the dismemberment occurred post-mortem, when the body was frozen, and that it was not related to cause of death.

> Question by Attorney Brent Kempema: Doctor, do you have an opinion as to whether or not Tamara LaFramboise was dismembered before or after she was frozen?
>
> Answer by Dr. Adam Covach: I believe it occurred after she was frozen.
>
> Q. Okay. And what do you base those opinions on?
>
> A. The fact that she had any blood in her whatsoever. When you lose a limb, even after you've died, you will lose a significant amount of blood just from the body moving around. It will seep out of the major cut arteries and veins. When we performed the internal examination of her, all of her major arteries were bulging with liquid blood. Removal of the heart and lungs produced similar amount of blood as what you would see in a freshly deceased person who hadn't suffered any major traumatic injuries. That indicated to me that she hadn't lost a lot of it following dismemberment which would be consistent with the blood being frozen at the time of dismemberment.

JT. 414:23- 415:14.

> Question by Attorney Raleigh Hansman: And you'll confirm that the body was frozen at the time it was dismembered; correct?
>
> Answer by Dr. Adam Covach: Yes.
>
> Q. And as I heard you testify about the amount of blood you found within the body, it sounds like the body was frozen fairly close in time to when death occurred, would that be correct?

A. For sure within two days of her dying. You usually start seeing more pronounced decompositional changes at around the two-day mark.

JT. 421:25-422:9.

Question by Attorney Raleigh Hansman: What were you hired to do in this matter?

Answer by Dr. Leon Kelly: I was to review some scene photos, some autopsy photos, and an autopsy report and then offer my opinions about those materials.

Q. And is that what you are prepared to do here today?

A. Yes.

Q. In your review of those materials, was there any indication to you of any injuries or trauma prior to death?

A. No. All the injuries that you see and that are described in the autopsy report appear to be postmortem, meaning the injuries occurred after death.

Q. Does that also include the dismemberment injuries?

A. It does, yes.

JT. 503:12-24.

The State's burden for Second Degree Murder required proof beyond a reasonable doubt that Falkenberg's "conduct established that he was acting with a depraved mind" at the time LaFramboise died. *Harruff,* ¶ 39, 939 N.W.2d at 30 (citing *State v. Primeaux,* 328 N.W.2d 256, 258 (S.D. 1982). "Depraved mind" is "[a] corrupt, perverted, or immoral state of mind constituting the highest grade of malice [that equates] with malice in the commonly understood sense of ill will, hatred, spite or evil intent." *State of New Mexico v. Reed,* 120 P.3d 447, 455 (N.M. 2005) (internal citations omitted). "Depraved mind murder, therefore, requires outrageously reckless conduct performed with a depraved kind of wantonness or total indifference for the value of human life." *Id.* "Obviously, mere negligence or recklessness will not do." *Id.* at 454.

Conduct evincing a depraved mind includes continued abuse of a child

culminating in its death, *State of South Dakota v. Miller*, 2014 SD 49, 851 N.W.2d 703, firing "shots" to disable a vehicle known to be occupied, *State of South Dakota v. Lyerla*, 424 N.W.2d 908, (S.D. 1988), firing "warning shots" into the darkness in the direction of a vehicle known to be occupied but without intent to hit the vehicle's occupants, *Kansas v. Cordray*, 82 P.3d 503 (Kan. 2004), "blindly" swinging a golf club at a person with great force with the intent to hit but not kill, *Kansas v. Robinson*, 934 P.2d 38 (Kan. 1997), randomly firing a gun over a crowd with one's eyes closed, *Kansas v. Jones*, 8 P. 3d 1282 (Kan. 2000), and opening fire into a crowd, *State of Louisiana v. Brooks*, 962 So.2d 1220 (La.App.2 Cir. 2007). In each instance, "depraved mind" was premised upon the conduct causing or the conduct resulting in the death.

Nothing in the State's "depraved mind" theory is derived from an act that resulted in LaFramboise's death. Instead, the State's Second Degree Murder case hinged on exploiting the dismemberment and encouraging the extrapolation that anyone who could dismember a body - despite such an act indisputably occurring post-mortem, days later, and without any connection to cause of death – must have had a depraved mind when the death occurred.

> What other efforts did the defendant take to conceal his crime? He drove her 600 miles away from the crime scene. He cut off her right hand. He cut off her left hand. He cut off her right foot. Cut off her left foot. And he cut off her head. He dumped her body in the Little River. He got rid of her right hand. Got rid of her left hand. Got rid of her left foot. Got rid of her right foot. Got rid of her head. Got rid of the tools he used to dismember her. Got rid of the tarp that he used. And he threw away Tammy's clothes.

JT. 645:15-24.

> Perhaps most compelling against any sort of claim of self-defense are the defendant's actions after the killing. People who act in self-defense call the cops. They don't hide the weapon they were supposedly assaulted with. They don't flee. They don't lie to the victim's mother. They don't lie to good friends or former fiancée. They do not lie to the police. They do not drive the body of a loved one 600 miles in horrible conditions. They don't strip their loved one naked. They don't chop off their loved one's hands. They don't chop off their feet. They don't chop off their loved one's head. They don't throw her clothes in the trash.

JT. 650: 6-17.

Post-mortem acts occurring days after death should not be allowed to retroactively establish or to be considered as an "act ...evincing a depraved mind, without regard for human life, [.]" SDCL § 22-16-7. The trial court's allowance of the State's dismemberment-centric presentation contradicted the statute's plain language, the South Dakota Criminal Pattern Jury Instructions, and case law from South Dakota and other jurisdictions. SDCL § 22-16-7; SDCPJI 3-24-14. Further, the trial court's allowance of such greenlighted the jury to consider the dismemberment evidence with equal disregard for the law.

Although the evidence is to be reviewed "in a light most favorable to the verdict" with "all favorable inferences that can be drawn therefrom [to] support a rational theory of guilt," such standard does not allow South Dakota law on Second Degree Murder and its elements to be ignored. *State v. Tofani*, 2006 SD 63, ¶ 24, 719 N.W.2d 391, 398. To deem indisputably post-mortem, days later acts as "a favorable inference" to sustain the verdict ignores the record and is in dereliction of South Dakota law and Falkenberg's constitutional right to a fair trial.

Because there is not evidence in the record sufficient to sustain a Second Degree Murder conviction beyond a reasonable doubt, the jury's January 21, 2020 Verdict should be vacated, the Court's Order Denying Defendant's Motion for Judgment of Acquittal should be reversed, and the matter should be remanded for a new trial.

II. Fair Trial Rights Violated by Court's Abuse of Discretion in Allowing Prejudicial Testimony

There is not, and has never been, a dispute that the dismemberment occurred post-mortem and out-of-state.

Evidence is relevant if:

(a) It has any tendency to make a fact more or less probable than it would be without the evidence; *and*

(b) The fact is of consequence in determining the action.

SDCL § 19-19-401 (emphasis supplied).

Prior to trial, Falkenberg moved to exclude the dismemberment evidence based upon the undisputed autopsy findings and the undisputed passage of time between alleged events.

> Attorney Clint Sargent: We're asking the Court to exclude this dismemberment evidence mainly because of the time difference between the alleged acts that would constitute the crimes alleged here in South Dakota and any acts of dismemberment. In the State's response brief, the State lays out its theory that this [dismemberment] would have occurred at least a day later.
>
> I can tell the Court that the additional evidence that has been produced in discovery is that Mr. Falkenberg would have traveled as far as Tacoma, Wisconsin, on March 1st. Would have stayed there before traveling on to Michigan in the area of his brother's farm. So we're looking at least 24-hour and maybe longer period of time before any dismemberment occurred.

> We provided the Court with the autopsy findings which shows any dismemberment was done postmortem. The body was completely frozen, that the blood inside the body was completely frozen. I presume the State – this all occurred at a time when it was very cold outside. I presume the State's theory is the body froze while in the back of Mr. Falkenberg's pickup and that this happened at a time later.
>
> So we're asking, because of the volatile and graphic nature of a human dismemberment case, that this evidence be excluded because it happened so long after the alleged events. And the possibility of the jury confusing the decision that it has to make, especially on the issue of intent and looking at what was Mr. Falkenberg's intent at the time of the altercation with Ms. LaFramboise versus what his intent might have been days later, creates a situation where the probative value of the evidence is outweighed by the danger of confusing or misleading the jury and, of course, the extreme prejudice to Mr. Falkenberg.
>
> In response to our motion, again, the State says that they are offering this to prove state of mind, and that is our major objection. That to be able to argue that what he did two days later is probative of a depraved mind, which would be the intent requirement on Murder 2, or that it happened on a heat of passion under the First Degree Manslaughter charge is unfairly prejudicial and dangerous and – creates the danger of unfair confusion and misleading the jury.

MH. 3:24-5:15.

Despite the undisputed nature of the dismemberment evidence – that it occurred post-mortem, days later, and was not related to cause of death, the Court ruled the dismemberment evidence admissible.

At trial, "dismember," or derivations thereof, was uttered 36 times. *JT.* 33:13, 38:7, 228:21, 229:3, 239:9, 254:19, 372:13, 372:21, 414:24, 415:13, 415:14, 422:1, 488:15, 488:16, 489:5, 489:7, 489:11, 490:7, 503:23, 506:6, 630:17, 643:12, 645:23, 650:23, 658:19, 659:2, 659:6, 659:11, 659:14, 667:23, 668:15, 669:12, 674:3: 674:5, 674:12. Cut (22), chop (7), decapitate (3), sever (2), and amputate (3), and derivations thereof, were also utilized by the State during opening statements, questioning, and closing arguments. *JT.* 32:18, 32:21, 34:5, 172:13, 172:20, 172:22, 172: 23, 230:4, 230:8, 230:16, 230:21, 231:15, 254:21,

254:21, 254:22, 255:7, 405:8, 408:10, 409:8, 409:15, 410:4, 410:5, 645:17, 645:18, 645:19, 650:14, 650:15, 671:21.

More prejudicial than the words alone, however, was the descriptive, detailed testimony the verbiage subsequently elicited. The word choice and testimony were then compounded by the admission of ten photographs showing Ms. LaFramboise's torso with attention focused on areas missing extremities. *Physical Jury Trial Exhibit List* – Exhibits 33-40; 43-44. The State then capitalized upon the prejudice in its closing argument and rebuttal. *JT.* 645:15-24; 650:6-17; *JT.* 671:17-24.

> Attorney Brent Kempema: The defendant's – the defense gets up here and argued we can't prove what killed her. It takes a special kind of arrogance to chop off a woman's head and say, "Ha, you cannot prove what I did to her head so you have to find me not guilty." That is absurd. There's a reason he chopped her head off. You can – and the jury instructions do tell you this: You can use common sense. You can use reason to figure out what happened in there.

JT. 671:17-24.

Nothing in the autopsy report, photographs, or in the expert or lay testimony suggested that dismemberment played a role in LaFramboise's death, much less death by homicide. SDCL § 19-19-401; SDCL §19-19-402. Any potential relevance was outweighed by the danger of the jury confusing the issues – resulting in both overvaluation and improper extrapolation of the dismemberment evidence. The gruesome nature of dismemberment was guaranteed to inflame the jury, encouraging decisions based upon emotion instead of law. Once dismemberment was mentioned or shown in a photograph, "the harm [was] done." *Loen v. Anderson*, 2005 SD 9, ¶ 8, 692 N.W.2d 194, 197 (citing *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 426 (S.D. 1994)).

Dismemberment's repeated mention, whether by exact word, synonym, description, or photograph, unfairly prejudiced Falkenberg at trial. Because the dismemberment evidence did not have "any tendency to make a fact more or less probable" and was not "of consequence to determining" the charges against Falkenberg, it should have been prohibited at trial. SDCL § 19-19-401.The inappropriate emotional response likely incited by the dismemberment evidence further strengthens the need for exclusion.

It was a "fundamental error of judgment" for the trial court to allow the unlimited reference and reliance upon an act that indisputably occurred post-mortem, outside the Court's South Dakota jurisdiction, and had no bearing on cause of death. *Kaberna*, ¶ 13, 864 N.W.2d at 501 (quoting *Gartner v. Temple*, 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850). The arbitrary and unreasonableness is further illustrated by the trial court's own extrapolation and application of the dismemberment evidence to justify its relevancy decision. *Id.*

> The Court: The Court is denying the defendant's motion, which I am referring to as Motion No. 1, the defendant's dismemberment of Tamara that's set forth. The court finds that it is relevant under Rule 401 and 402 that it does have a tendency to make a fact more or less probable than it would be without the evidence. And that the probative value is not substantially outweighed by danger of any of those listed in Rule 403 in that it goes not only toward the issue of concealment of the alleged crime, but also it goes to the elements of the underlying crime for the reasons stated by the State reflecting Mr. Falkenberg's alleged view of Ms. LaFramboise as a person. And so the Court will deny that motion.

MH. 8:3-15.

Falkenberg's right to a fair trial was violated when the trial court abused its discretion in allowing the State's carte blanche dismemberment presentation. SDCL § 19-19-403. Falkenberg does not seek a perfect trial – he simply seeks that which the

Constitution guarantees – a fair one. *State v. Smith*, 477 N.W.2d 27, 35 (S.D. 1991). Therefore, the Jury's January 20, 2020 Verdict should be vacated, and the matter should be remanded for a new trial.

III. Restitution Order Violates Due Process and Separation of Powers Doctrine

> *... If the sentencing court orders the defendant to the state penitentiary and does not suspend the sentence, the court shall set forth in the judgment the names and specific amount of restitution owed each victim*. The Department of Corrections shall establish the collection schedule for court-ordered restitution while the defendant is in the penitentiary and on parole. The Board of Pardons and Paroles shall require, as a condition of parole, that the defendant pay restitution ordered by the court.

SDCL § 23A-28-3 (emphasis supplied).

At Sentencing, the State sought specific restitution amounts to be reimbursed to the Crime Victims' Compensation Fund and to LaFramboise's daughter, Sydney Sedillo, personally. Falkenberg objected based upon absent documentation and the claimed amounts relationship to the case.

> Attorney Clint Sargent: As it relates to the restitution amounts sought. We would object to the $4,856.14 that – some of the documentation might suggest that it's for a funeral, but there hasn't been any documentation from a funeral home that that was the cost, that it was paid, and by whom it was paid. Similarly, the $720.00, there appears to be a request that that's some type of transportation cost that was requested with – by Ronny I believe. However, from my reading of the document it hasn't been paid because that needed to be substantiated by a mileage submission or some other proof that that expense was actually incurred.
>
> Same objection as it related to the headstone. No documentation that that expense has actually been incurred and paid and by whom. And then the final two items, the $568.00, as well as the $2,191.65, which are purported to be for medical bills. One references a counseling bill but there's no documentation supporting that that was for a counseling bill or the timeframe in which those counseling services were provided and that they were different than the regular counseling that that patient was already receiving.

> Finally, the $2,191.65, I was just handed two documents before court today. It looks like those are for medical services that were received on January – excuse me – December 1st, 2019. And includes x-rays of a hand and perhaps some other emergency department treatment but, again, can't tell whether these are for different services, the same services, and how they possibly relate to this case or should be the responsibility of this defendant.

SH. 6:18-7:21.

Despite the trial court's acknowledgment that documentation was lacking, it imposed a restitution order above and beyond the State's request *sua sponte*.

> The Court: As to the issue of restitution, the Court does believe that it is appropriate for the billing statements themselves to be provided for the amounts that have been paid by the Crime Victim's Compensation Fund or approved by and not yet paid before being ordered. But the Court is going to order up to $15,000 in restitution for any amounts paid by the Crime Victims' Compensation Fund. Again, with receipts to be provided and, if there is a dispute regarding the amounts set forth in those receipts, then Mr. Falkenberg can request a hearing either before this court or more likely before the Department of Corrections because I have entered my order up to $15,000.
>
> As to additional restitution, the Court is ordering the restitution of $2,191.65 as set forth in the billing statements received today related to Sydney. The Court is ordering up to an additional $40,000 in restitution if any claims are made by Ms. Tamara LaFramboise's children or her mother for counseling or other medical expenses attributable to the death of Tamara LaFramboise. And, again, if there is any dispute, Mr. Falkenberg will have the right to a hearing after review of any documentation submitted in support of those requests either before this court or, again, more likely before the Department of Corrections.

SH. 13:20-14:18.

"At a restitution hearing, the defendant is entitled to confront witnesses against him, but the rules of evidence and civil burden of proof do not apply." *State v. Martin*, 2006 SD 104, ¶¶ 5-6, 724 N.W.2d 872, 874 (quoting *State v. Ruttman*, 1999 SD 112, ¶ 3, 598 N.W.2d 910, 911). The trial court applies the "reasonably satisfied" standard of proof when it determines restitution. *Id.* (citing *State v. Tuttle*, 460 N.W.2d 157, 159 (S.D.

1990)). The trial court has broad discretion in imposing restitution. *Id.* (citing *State v. Thayer*, 2006 SD 40, ¶ 16, 713 N.W.2d 608, 613). "Restitution" is defined as the "full or partial payment of pecuniary damages to a victim." SDCL 23A-28-2(4). Significantly, "pecuniary damages" are defined as "all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium." SDCL 23A-28-2(3). "Therefore, the civil measure of damages applies." *Martin*¶ 6, 724 N.W.2d at 874.

In defining "pecuniary damages," SDCL § 23A-28-2(3) uses the word "could," which expresses possibility, not "would," which expresses certainty. Although a victim *could* recover pecuniary damages against a defendant in a civil trial, it does not mean that a victim will or in what amount. Civil measurement of damages requires proof of the damages incurred. Admittedly, in the restitution context, pecuniary damages' evidence does not need to conform to the rules of evidence or to the civil burden of proof. But, evidence is still required. Here, the trial court's open-ended restitution order is speculative and subjective – concepts frowned upon and outlawed in civil damages law.

The trial court's broad authority to impose restitution does not allow it to indiscriminately order an amount to be paid or to be available for payment. If properly ordered restitution is not enough, a victim is able to "sue and recover damages from the defendant in a civil action." SDCL § 23A-28-9. The restitution amount(s) simply become a set-off. SDCL § 23A-28-9. The trial court and its restitution authority are not a victim's only compensatory avenue.

When imposing restitution upon a defendant remanded to the South Dakota State Penitentiary, the trial court "shall set forth in the judgment the names and *specific amounts of restitution owed to each victim*." SDCL § 23A-28-3 (emphasis supplied); *see also State v. Thayer*, 2006 SD 40, ¶ 16, 713 N.W.2d 608. Thereafter, "[t]he Department of Corrections shall establish the collection schedule for court-ordered while the defendant is in the penitentiary…" SDCL § 23A-28-3. This explicit separation of powers tasks the judicial branch with establishing the specific restitution amount for each victim and the executive branch with the restitution order's subsequent enforcement.

The ability and opportunity for Falkenberg to repeatedly object to amounts sought under the trial court's restitution order and receive a restitution hearing violates the separation of powers doctrine. This Court has consistently held that "a defendant should not be subjected to simultaneous supervision of the executive branch and judicial branch." *State v. Orr*, 2015 SD 89, ¶ 4, 871 N.W.2d 834, 835. "Probationers are subject to the supervision of our judicial branch." *Id.* ¶ 5, 871 N.W.2d at 836. "[I]nmates of the state penitentiary are under the control of the executive branch." *Id.* ¶ 6. Falkenberg, presently incarcerated for life in the South Dakota State Penitentiary, is subject to Department of Corrections supervision. Pursuant to SDCL § 23A-28-3, the Department of Corrections is only tasked with enforcement – namely collection and distribution – of the trial court's restitution order. Establishing an amount that a specific victim is to receive is explicitly carved out by statute as a judicial responsibility. SDCL § 23A-28-3.

Anytime an amount is submitted for reimbursement under the trial court's *sua sponte* order, Falkenberg has a right to contest such at a restitution hearing. That hearing must be conducted by the trial court – which, by nature of Falkenberg's prison

incarceration, no longer has jurisdiction. To comply with SDCL § 23A-28-3 under the situation created by the trial court places Falkenberg under both judicial and executive branch supervision. Such simultaneous supervision is forbidden.

Falkenberg's due process rights are also violated by the cyclical scenario produced by the trial court's restitution order. "Imposition of restitution requires similar procedural protections as those employed in criminal sentencing." *State v. Holsing*, 2007 SD 72, ¶ 7, 736 N.W.2d 883, 884.

> South Dakota law and due process, however, require that as part of the sentence, defendants be advised of the names of victims and specific amounts of restitution owing. SDCL 23A–28–3. The State argues [defendant's] due process rights are protected because the State is requesting a hearing to set further restitution. However, due process rights attach at the time of sentencing, when restitution is set, not seven years after sentencing. In setting restitution, "[d]ue process safeguards, however, include the need for finality." *Commonwealth v. Wozniakowski,* 860 A.2d 539, 545 (Pa.Super.2004). The trial court's sentence must comply with due process protection "by informing the defendant of the restitution he faced at the time of sentencing." *State v. Wolff,* 438 N.W.2d 199, 202 (S.D.1989).

Id. ¶ 17, 736 N.W.2d at 886.

When "specific" is used as an adjective, as it is in SDCL § 23A-28-3, Merriam Webster Dictionary online defines "specific" as "free from ambiguity: accurate." https://www.merriam-webster.com/dictionary/specific. Synonyms for "specific" include:

- Certain;
- Fixed;
- Set;
- Determined;
- Distinct;
- Definite;

- Express;
- Precise.

https://www.merriam-webster.com/dictionary/specific#synonyms.

There is nothing "fixed" or "certain" about the trial court's restitution order. Instead of the trial court adhering to SDCL § 23A-28-3, the trial court's oral order and Falkenberg's Judgment and Conviction of Sentence included an open-ended, albeit capped, amount that Falkenberg *may* pay in restitution. It cannot be ascertained from the Judgment and Conviction of Sentence what amount Falkenberg will ultimately pay or to whom. The trial court did not even issue written findings of fact in support of its *sua sponte* order.

In *State v. Holsing*, the defendant "pleaded *nolo contendere* to three counts of sexual contact with a minor." 2007 SD 72, ¶ 2, 736 N.W.2d 883, 884. He was sentenced to three concurrent 7 ½ year terms in the South Dakota State Penitentiary. *Id.* As part of his sentence, Holsing was ordered to pay restitution to the victims for counseling. *Id.* The Board of Pardons and Parole was to determine the restitution payment schedule. *Id.* ¶ 8, 736 N.W.2d at 885.

The trial court judge orally ordered:

> You will pay for the costs of counseling for the victims. And at least one of these victims has had to have counseling, the fact you utterly disregarded.

Id. ¶ 11, 736 N.W.2d at 885.

In its written findings, the trial court wrote:

> That said Defendant shall make restitution in full to the victims for the costs of any counseling that said victims *may have incurred* as a result of said offenses.

Id. ¶ 13, 736 N.W.2d at 886 (emphasis in original).

Pursuant to SDCL 23A-28-6, the Board of Pardons and Parole "gave notice to the victims of the restitution hearing, and following the hearing, set forth the amount of restitution owed to R.S. and determined the schedule of payments." *Id.* ¶ 9. The amount of restitution was set at $5,709.25 and Holsing paid the amount to R.S. while on parole. *Id.* ¶ 3, 736 N.W.2d at 884.

Nearly a year later, the State "filed an application for order to show cause against Holsing seeking to have the trial court order Holsing to pay an additional $190,768.83 in restitution to R.S." *Id.* ¶ 4. The State contended that the trial court's original oral order contemplated past and future counseling costs. *Id.* ¶ 12, 736 N.W.2d at 885. After reviewing the trial court's oral order and written order, the South Dakota Supreme Court disagreed with the State.

> The phrase "may have incurred" implies past tense. The suffix "ed" added to incur is used to form the past tense of regular weak verbs. Webster's Ninth New Collegiate Dictionary, 296 (1986 ed). When using the plain ordinary meaning of the words of the written sentence, which we are required to do, we conclude that counseling costs were limited to those incurred and not future costs. *See* SDCL 2–14–1. The written sentence clarifies the oral sentence. Any other interpretation would require us to insert words into the oral and written sentence that the defendant was not advised of at the time of sentencing.

Id. ¶ 13, 736 N.W.2d at 886

The original restitution order and Holsing's satisfaction thereof remained undisturbed.

> The trial court's jurisdiction over Holsing ended when he complied with the schedule of payments of restitution and he was discharged from parole. This is consistent with the principle of separation of powers enunciated in *State v. Oban,* 372 N.W.2d 125, 129 (S.D.1985); *see also State v. Hurst,* 507 N.W.2d 918, 923 (S.D.1993)("[o]nce an offender is within the jurisdiction of the executive branch of government, the judicial branch—the circuit court—loses jurisdiction and control"). Our holding gives full

> effect to the trial court's sentence and order of restitution. The trial court does not have jurisdiction to increase the amount of Holsing's restitution.

Id. ¶ 17-18, 736 N.W.2d at 887.

The analysis and rationale underpinning the *Holsing* Court's holding that the trial court could not increase restitution after a restitution order was established and collected upon by the Board of Pardons and Parole is applicable here. In short, a defendant is constitutionally entitled to know the specific amount of restitution he owes each victim at the time he is sentenced to prison.

Although the Board of Pardons and Parole conducted a restitution hearing in *Holsing*, it does not make the trial court's assumption that such is the proper protocol post-Sentencing constitutionally permissible. Because "[t]he State does not allege the Board violated SDCL 23A-28-3 when it set Holsing's schedule of payment for restitution," it was not addressed. *Id.* ¶ 10, 736 N.W.2d at 885.

Additionally, it is important to note that although *Holsing* is a 2007 decision, Holsing himself was sentenced in 1988. The version of SDCL § 23A-28-3 in effect at that time is substantially different in terms of explicit separation of powers and delegation of authority.

> If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant, in cooperation with the court services officer assigned to the defendant, promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim and a schedule of restitution payments. If the defendant is presently unable to make any restitution but there is a reasonable possibility that the defendant may be able to do so at some time during his probation or parole period, the plan of restitution shall also state the conditions under which or the event after which the defendant will make restitution. If the defendant believes that no person suffered pecuniary damages as a result of the defendant's criminal activities, he shall so state. If the defendant contests the amount of restitution recommended by the court services officer, he is entitled to a

> hearing at which the court shall determine the amount. *If the sentencing court orders the defendant to the state penitentiary and does not suspend the sentence, the board of pardons and paroles may require as a condition of parole that the defendant, in cooperation with the executive director of the board of pardons and paroles, prepare the plan of restitution as described in this section.*

SDCL § 23A-28-3 (1988 version) (emphasis supplied).

> If the sentencing court orders the defendant to the county jail, suspended imposition of sentence, suspended sentence, or probation, the court may require as a condition that the defendant, in cooperation with the court services officer assigned to the defendant, promptly prepare a plan of restitution, including the name and address of each victim, a specific amount of restitution to each victim, and a schedule of restitution payments. If the defendant is presently unable to make any restitution, but there is a reasonable possibility that the defendant may be able to do so at some time during the defendant's probation period, the plan of restitution shall also state the conditions under which or the event after which the defendant will make restitution. If the defendant believes that no person suffered pecuniary damages as a result of the defendant's criminal activities, the defendant shall so state. If the defendant contests the amount of restitution recommended by the court services officer, the defendant is entitled to a hearing at which the court shall determine the amount. *If the sentencing court orders the defendant to the state penitentiary and does not suspend the sentence, the court shall set forth in the judgment the names and specific amount of restitution owed each victim. The Department of Corrections shall establish the collection schedule for court-ordered restitution while the defendant is in the penitentiary and on parole.* The Board of Pardons and Paroles shall require, as a condition of parole, that the defendant pay restitution ordered by the court.

SDCL § 23A-28-3 (emphasis supplied).

The *Holsing* Court was not confronted with the separation of powers issue created by the trial court's open-ended restitution order under SDCL § 23A-28-3's present version. *Holsing* should therefore not be read, understood, or relied upon for the proposition that the Board of Pardons and Parole can handle the reoccurring need for restitution hearings established by the trial court's restitution order.

The absence of finality generated by the trial court's restitution order violates Falkenberg's constitutional due process protections and the separation of powers

doctrine. *Holsing*, ¶ 17, 736 N.W.2d at 886; SDCL § 23A-28-3. The restitution order must be vacated, and this matter must be remanded for proceedings that comply with SDCL § 23A-28-3 and the U.S. and South Dakota Constitution.

CONCLUSION

Absence of evidence that Falkenberg's conduct at the time LaFramboise died established that he acted with a depraved mind coupled with the abuse of discretion in allowing the State's unbridled dismemberment presentation to the jury demonstrates Falkenberg's constitutionally deficient trial. Falkenberg respectfully requests that this Honorable Court vacate his Second-Degree Murder conviction, reverse the trial court's erroneous Order Denying Judgment of Acquittal, reverse the trial court's decision to allow the dismemberment evidence, and remand for a new trial.

Alternatively, Falkenberg's due process rights and separation of powers doctrine were violated by the trial court's open-ended, non-specific restitution order. Falkenberg respectfully requests this Honorable Court vacate the trial court's restitution order and remand for a new hearing.

Respectfully submitted this 22nd day of July, 2020.

/s/ Raleigh Hansman
Clint Sargent
Raleigh Hansman
Meierhenry Sargent LLP
315 S. Phillips Avenue
Sioux Falls, SD 57104
605-336-3075
clint@meierhenrylaw.com
raleigh@meierhenrylaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Brief and all appendices were filed online and served upon:

Jason Ravnsborg
Brigid Hoffman
Office of the Attorney General
1302 E. Hwy 1 Ste. 1
Pierre, SD 57501
605-773-3215
atgservice@state.sd.us
Brigid.hoffman@state.sd.us

On this 22nd day of July, 2019.

/s/ Raleigh Hansman
Clint Sargent
Raleigh Hansman
Meierhenry Sargent LLP
315 S. Phillips Avenue
Sioux Falls, SD 57104
605-336-3075
clint@meierhenrylaw.com
raleigh@meierhenrylaw.com

CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 7,535 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 22nd day of July, 2020.

/s/ Raleigh Hansman
MEIERHENRY SARGENT LLP

APPENDIX

Tab 1 - November 12, 2019 Order on Pretrial Motions ..... Appx. 1-4

Tab 2 - Judgment of Conviction and Sentence..... Appx. 5-7

FILED

NOV 12 2019

Cindy L Johnson
Yankton County Clerk of Courts
Circuit Court of South

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF YANKTON FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, 66 CR1 19-159

Plaintiff,

vs.

ORDER ON PRETRIAL MOTIONS

STEPHEN ROBERT FALKENBERG,

Defendant.

The State's and Defendant's pending pretrial motions having come before the Court for hearing on October 28, 2019 at the Yankton County Courthouse, the Honorable Cheryle Gering presiding, with the State of South Dakota represented by Assistant Attorney's General Douglas Barnnett and Brent Kempema, and the Defendant Stephen Falkenberg personally present and represented by his attorneys Clint Sargent, Raleigh Hansman, and Erin Willadsen, and with the State and Defendant having filed various pretrial motions on September 30, 2019, October 17, 2019, and October 28, 2019, and the court having considered the written and oral arguments of counsel, and the court having made its oral ruling which is incorporated by reference, it is hereby:

ORDERED that the Defendant's Motion to Exclude evidence regarding the dismemberment of T.L.'s body (Defendant's Motion #1) is denied.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude autopsy photographs (Defendant's Motion #2) is denied, with the Defendant having the right to bring a future motion as to specific photographs. The State shall identify which photographs the State intends to offer at trial by November 21, 2019.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude evidence and argument regarding the Defendant's non-disclosure of T.L.'s missing body parts (Defendant's

Motion #3) is granted in part and denied in part. The State may not present evidence or argue that the Defendant has failed to provide information as to the location of T.L.'s body parts as that implicates the Defendant's Fifth Amendment right against self-incrimination. However, the State is not precluded from arguing that the State believes the Defendant knows the location of T.L.'s missing body parts.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude evidence and arguments regarding cleaning products and receipt from Paul Bramchreiber's house (Defendant's Motion #4) is granted.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude Bluestar presumptive presence of blood locations (Defendant's Motion #5) is taken under advisement by the court and an evidentiary hearing on this motion will be held on December 6, 2019 beginning at 10:00 am.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude any reference to red blood substance at Defendant's residence (Defendant's Motion #6) is taken under advisement as the State is pursuing further testing.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude mention of blood or DNA (Defendant's Motion #7) is granted as to Laboratory Report No. 19-0358.1 – Item 5 (grey shirt – stain on chest) and Laboratory Report No. 19-0358.1 – Item 8.01 (swab of handle, nozzle and cap). The remainder of Defendant's motion is taken under advisement as the State is pursuing further testing.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude reference to tub and towel stains from T.L.'s residence (Defendant's Motion #8) is granted.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude as to use of the term "victim" (Defendant's Motion #9) is denied.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude reference to nude photographs texted by Defendant to others (Defendant's Motion #10) is granted.

IT IS FURTHER ORDERED that the Defendant's Motion to Exclude references to the Defendant as a "womanizer" (Defendant's Motion #11) is granted.

IT IS FURTHER ORDERED the State's Motion in Limine as to the introduction of any evidence or argument regarding a third-party perpetrator is granted. If the Defendant does intend to present such evidence and argument, the Defendant shall give notice to the State in advance of the jury trial.

IT IS FURTHER ORDERED that the State's Reciprocal Discovery Motion is granted in its entirety.

IT IS FURTHER ORDERED that the State's Motion for Defendant to provide notice of Rule 404(a) character evidence of any State's witness will be taken under advisement, with the Defendant's counsel to provide a brief in resistance.

IT IS FURTHER ORDERED that the State's Motion for Defendant to provide notice of 404(a) and (b) character evidence of the victim will be taken under advisement, with the Defendant's counsel to provide a brief in resistance.

IT IS FURTHER ORDERED that the Defendant' Request for Notice for the State to disclose any Rule 404(a) and (b) evidence is granted. The State shall disclose the Rule 404 evidence it intends to offer by November 21, 2019 or another date as agreed to by counsel for the parties.

IT IS FURTHER ORDERED that there will be an evidentiary hearing December 6, 2019

at 10:00 am to address the Bluestar evidence, as well as other pretrial motions that have been taken under advisement and any additional motions that may be filed by the parties pursuant to the Amended Scheduling Order entered on July 19, 2019.

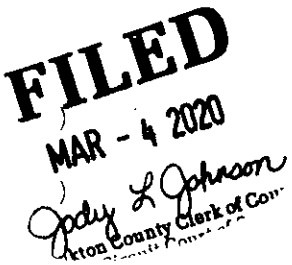
Dated this 12th day of November, 2019.

BY THE COURT:

Cheryle Gering
Circuit Court Judge

ATTEST:
Jody Johnson
Yankton County Clerk of Courts
By _____

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF YANKTON)



IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

STEPHEN ROBERT FALKENBERG,

Defendant.

DOCKET NO.66CRI19-000159

JUDGMENT OF CONVICTION AND SENTENCE

An Indictment was filed with this Court on the 1st day of April, 2019, charging the Defendant with the crimes of Count 1A - Second Degree Murder, and Count 1B - First Degree Manslaughter (Heat of Passion), that occurred on or about the 1st day of March, 2019, in Yankton County.

The Defendant was arraigned on said Indictment on the 4th day of April, 2020. The Defendant, the Defendant's attorneys, Clint Sargent and Raleigh Hansman, and Douglas P. Barnett, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of his constitutional and statutory rights pertaining to the charges filed against the Defendant, including but not limited to the right against self-incrimination, the right to confrontation, and the right to a jury trial. The Defendant plead not guilty to the offense(s) charged in the Indictment.

A jury trial commenced January 9, 2020, at Yankton, South Dakota. At trial, the Defendant was represented by his attorneys, Clint Sargent, Raleigh Hansman, and Erin Willadsen, and the State of South Dakota was represented by Assistant Attorneys General Brent K. Kempema, and Douglas P. Barnett. On the 21st day of January, 2020, the jury returned a verdict of guilty to Counts 1A and 1B of the Indictment and a verdict of guilty to the additional instructed offenses of First Degree Manslaughter (Unnecessary Killing) and Second Degree Manslaughter.

On January 21, 2020, the Court having ordered a Pre-Sentence Investigation and scheduled sentencing in this matter for March 2, 2020.

On the 2nd day of March, 2020, the Defendant Stephen Robert Falkenberg, the Defendant's attorney Clint Sargent and Brent K. Kempema and Douglas P. Barnett, prosecuting attorneys, appeared at the Defendant's sentencing. The Court having determined that the Defendant has been regularly held to answer for said offenses and that the Defendant was represented by competent counsel.

It is therefore,

ORDERED, ADJUDGED AND DECREED that a JUDGMENT of guilty is entered as to Count 1A - **SECOND DEGREE MURDER**, (SDCL § 22-16-7), a Class B Felony.

SENTENCE AS TO COUNT 1A

On the 2nd day of March, 2020, the Defendant Stephen Robert Falkenberg, the Defendant's attorneys Clint Sargent and Brent K. Kempema and Douglas P. Barnett, prosecuting attorneys, appeared at the Defendant's sentencing. The Court asked the Defendant if any legal cause existed to show why Judgment and Sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence as to Count 1A only:

ORDERED, ADJUDGED AND DECREED that the Defendant Stephen Robert Falkenberg shall be imprisoned in the South Dakota State Penitentiary for a term of life imprisonment, for the remainder of his natural life, commencing on March 2, 2020, and without the possibility of parole, there to be kept, fed and clothed according to the rules and regulations governing said institution. It is further

ORDERED, ADJUDGED AND DECREED that the Defendant Stephen Robert Falkenberg be remanded into the immediate custody of the Yankton County Sheriff to begin serving this sentence and to be transported to the South Dakota State Penitentiary. It is further

ORDERED, ADJUDGED AND DECREED that the Defendant Stephen Robert Falkenberg shall pay restitution to the Yankton County Clerk of Court's Office in the total amount of $29,678.86 to be paid to Yankton County for prosecutions costs; total reimbursement to Crime Victim's Compensation Fund of up to $15,000.00 upon proof of expenditure; $2,191.65 to Sydney Sedillo for counseling and total reimbursement for counseling costs related to Defendant's crime up to $40,000.00 for Mary Laframboise, Sydney Sedillo and Ron Sedillo, which restitution is owed by Robert Falkenberg individually. If the Defendant disputes any portion of the $15,000 or $40,000 being paid, he has the right to request a restitution hearing. The

$29,678.86 and $2,191.65 is not subject to further hearings as the court ordered those amounts to be paid.

THE DEFENDANT WAS ADVISED THAT THE DEFENDANT HAS A RIGHT TO APPEAL FROM THIS ORDER/JUDGMENT WITHIN 30 DAYS AFTER IT IS SIGNED, ATTESTED AND FILED, THAT IF THEY WAIT MORE THAN 30 DAYS IT WILL BE TOO LATE TO APPEAL, AND THAT IF THEY ARE INDIGENT, THIS COURT WOULD APPOINT AN ATTORNEY TO HANDLE THAT APPEAL FOR THEM.

Dated the 4th day of March, 2020.

BY THE COURT:

Hon. Cheryle Gering
Circuit Court Judge

ATTEST: Jody Johnson
Jody Johnson
Yankton County Clerk of Court
BY Sanderson

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29287

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEPHEN ROBERT FALKENBERG,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

THE HONORABLE CHERYLE GERING
Circuit Court Judge

APPELLEE'S BRIEF

JASON R. RAVNSBORG
ATTORNEY GENERAL

Brigid C. Hoffman
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

Clint Sargent
Raleigh Hansman
Meierhenry Sargent LLP
315 S. Phillips Ave
Sioux Falls, SD 57104
Telephone: (605) 336-3075
E-mail: clint@meierhenrylaw.com
raleigh@meierhenrylaw.com

ATTORNEYS FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed March 20, 2020

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF LEGAL ISSUES AND AUTHORITIES 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

ARGUMENTS

I. SUFFICIENT EVIDENCE SUSTAINS DEFENDANT'S SECOND-DEGREE MURDER CONVICTION 13

II. THE TRIAL COURT PROPERLY ADMITTED DISMEMBERMENT EVIDENCE 20

III. THE TRIAL COURT'S RESTITUTION ORDER DOES NOT VIOLATE DUE PROCESS OR THE SEPARATION OF POWERS 28

CONCLUSION 35

CERTIFICATE OF COMPLIANCE 36

CERTIFICATE OF SERVICE 36

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

SDCL 19-19-401 ..... 2, 21

SDCL 19-19-402 ..... 2, 21

SDCL 19-19-403 ..... 2, 21

SDCL 22-16-3 15

SDCL 22-16-7 ..... 2, 3, 14

SDCL 22-16-15(2) 3

SDCL 23A-24-2(2) 26

SDCL 23A-28-1 30

SDCL 23A-28-3 ..... passim

SDCL 23A-32-2 2

CASES CITED:

Bradley v. State, 960 S.W.2d 791 (Tex. App. 1997) 19, 23

Fields v. Leapley, 30 F.3d 986 (8th Cir. 1994) 26

Rivers v. United States, 270 F.2d 435 (9th Cir. 1959) 18, 22

State v. Aesoph, 2002 S.D. 71, 647 N.W.2d 743 ..... 18, 22

State v. Bradford, 484 S.E.2d 221 (W. Va. 1997) 19, 22

State v. Bryant, 2020 S.D. 49, ___ N.W.2d ___ 28

State v. Fisher, 2013 S.D. 23, 828 N.W.2d 795 25

State v. Fischer, 2016 S.D. 1, 873 N.W.2d 681 28

State v. Frazier, 2001 S.D. 19, 622 N.W.2d 246 ..... 18, 22

State v. Harruff, 2020 S.D. 4, 939 N.W.2d 20 ..... passim

State v. Hart, 1998 S.D. 93, 584 N.W.2d 863..... 14, 15

State v. Hauge, 2019 S.D. 45, 932 N.W.2d 165 28

State v. Hemminger, 2017 S.D. 77, 904 N.W.2d 746..... 2, 24, 25

State v. Henjum, 1996 S.D. 7, 542 N.W.2d 760 28

State v. Holsing, 2007 S.D. 72, 736 N.W.2d 883..... 3, 31, 32

State v. Kihega, 2017 S.D. 58, 902 N.W.2d 517..... 21

State v. Laible, 1999 S.D. 58, 594 N.W.2d 328 15

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808 28

State v. Orr, 2015 S.D. 89, 871 N.W.2d 834 ..... 3, 33, 34

State v. Quist, 2018 S.D. 30, 910 N.W.2d 900 ..... 2, 23, 25

State v. Reddington, 80 S.D. 390, 125 N.W.2d 58 (1963) 26

State v. Reed, 120 P.3d 447 (N.M. 2005) 14

State v. Smith, 1999 S.D. 83, 599 N.W.2d 344..... 20, 26

State v. Stone, 2019 S.D. 18, 925 N.W.2d 488.....13, 18, 22

State v. Thayer, 2006 S.D. 40, 713 N.W.2d 608..... 30

State v. Towney, 881 N.W.2d 470 (Iowa Ct. App. 2016) 26

State v. Traversie, 2016 S.D. 19, 877 N.W.2d 327 ..... 13, 20

State v. Tuttle, 460 N.W.2d 157 (S.D. 1990)..... 28, 33

State v. Willis, 370 N.W.2d 193 (S.D. 1985)..... 21

State v. Wingler, 2007 S.D. 59, 734 N.W.2d 795..... 28 , 29

State v. Wright, 1999 S.D. 50, 593 N.W.2d 792 26

United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007) 18, 22, 23

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29287

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

STEPHEN ROBERT FALKENBERG,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Stephen Robert Falkenberg, is referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, is referred to as "State." References to documents are designated as follows:

Yankton County Criminal File No. 19-159.....SR

Motions Hearing Transcript 10/28/19.....MH

Jury Trial Transcript 1/13/20-1/21/20 (volumes 1-4) .....JT

Sentencing Hearing Transcript 3/2/20.....SENT

Appellant's Brief.....AB

Exhibits.....EX

All document designations are followed by the appropriate volume, page, and/or exhibit number(s).

JURISDICTIONAL STATEMENT

This is an appeal of a Judgment and Sentence filed on March 4, 2020, by the Honorable Cheryle Gering, Circuit Court Judge, First Judicial Circuit, Yankton County. SR 855. On March 20, 2020, Defendant filed a Notice of Appeal. SR 860. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER SUFFICIENT EVIDENCE SUSTAINS DEFENDANT'S SECOND-DEGREE MURDER CONVICTION?

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

State v. Harruff, 2020 S.D. 4, 939 N.W.2d 20

SDCL 22-16-7

II

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXCLUDE DISMEMBERMENT EVIDENCE?

The trial court found that such evidence was relevant and the probative value was not substantially outweighed by unfair prejudice.

State v. Quist, 2018 S.D. 30, 910 N.W.2d 900

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

SDCL 19-19-401

SDCL 19-19-402

SDCL 19-19-403

III

WHETHER THE TRIAL COURT'S RESTITUTION ORDER VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS AND THE SEPARATION OF POWERS DOCTRINE?

The trial court ordered up to $15,000 in restitution for any amounts paid by the Crime Victims Compensation fund, $2,191.65 to Sydney Sedillo, and up to $40,000 for counseling costs expended by Mary LaFramboise, Ron Sedillo, or Sydney Sedillo.

State v. Holsing, 2007 S.D. 72, 736 N.W.2d 883

State v. Orr, 2015 S.D. 89, 871 N.W.2d 834

SDCL 23A-28-3

STATEMENT OF THE CASE

On March 19, 2019, the State filed a Complaint alleging that Defendant committed Second Degree Murder, a Class B felony in violation of SDCL 22-16-7. SR 9. On April 1, 2019, a Yankton County Grand Jury indicted Defendant for Count 1A: Second-Degree Murder, a Class B felony in violation of SDCL 22-16-7 and Count 1B: First Degree Manslaughter, a Class C felony in violation of SDCL 22-16-15(2). SR 25. Defendant was arraigned on April 4, 2019. *See* SR 855.

On September 20, 2019, Defendant moved to exclude certain evidence, including evidence of dismemberment. SR 41. Following briefing and a hearing, the court filed its Order on Pretrial Motions on November 12, 2019, incorporating its oral ruling that denied Defendant's motion regarding dismemberment. SR 92.

Testimony in a jury trial commenced on January 13, 2020. JT1 1. After the State rested, Defendant moved for a judgment of acquittal, which the court denied. JT3 447-48. On January 21, the jury returned a guilty verdict to Count 1A, as well as all lesser-included offenses. JT4 683-84; SR 662.

A sentencing hearing was held on March 2, 2020. *See generally* SENT. On March 4, 2020, the court filed its Judgment of Conviction and Sentence, sentencing Defendant as to Count 1A: life imprisonment without the possibility of parole in the South Dakota State Penitentiary. SR 856. The court also ordered Defendant to pay costs of prosecution and restitution. SR 856-57. Defendant filed a Notice of Appeal on March 20, 2020. SR 860.

STATEMENT OF THE FACTS

Tamara LaFramboise, in the words of her mother, Mary LaFramboise, was "intelligent, compassionate, loving, athletic, understanding, nonjudgmental" despite her struggles with drug addiction. JT1 42-43. She was Mary's only child, the mother of two children, and a college graduate with honors. JT1 40, 42-43.

Tamara was in a romantic relationship with Defendant[1]. JT1 47. Their relationship was not always loving. Defendant demonstrated his

[1] Defendant suffered a severe head injury in 1993. JT3 529. Despite this, he was highly functional—he built a successful business, made important decisions, and participated in raising his children from a previous marriage. JT2 245; JT3 533.

frustration with Tamara when he was visiting her in jail on August 11, 2018. EX 101. During the visit, the two had a heated argument about her legal situation. *Id.* He told her to "fucking listen" to him and that he was "fucking sick" of her. *Id.* He lowered his voice, scowled, clenched, and pointed at her saying "shut the fuck up." *Id.* Defendant was similarly hostile during an argument with his ex-wife, Jennifer Becker, in January 2017 in which he told her to "get the eff out of my house" and an officer had to separate the two. JT3 534-36.

Defendant's co-worker, Travis Peterson, once witnessed Tamara push and hit Defendant, while Defendant stood still and waited for Tamara to wear herself out, even laughing at her. JT3 477. After all, Defendant worked in construction, was six feet tall, and was physically powerful from the heavy lifting he did for work. JT2 250. Tamara was small. JT2 172.

Tamara worked at Wilson Trailer in Yankton as a machine operator. JT1 86. She worked her shift during the late evening of February 28, 2019, into the early morning of March 1. JT1 82. At about midnight when her co-worker, Javier Gonzalez, was getting ready to go home, Tamara gave him her debit card and asked Gonzalez to purchase some beer at Wal-Mart for her before liquor sales ended for the night; in exchange, Tamara said he could purchase beer for himself. JT1 83-84. Gonzalez did so. JT1 83; EXS 8, 10. He returned to Wilson

Trailer and placed Tamara's beer, debit card, and receipt in Rick Russel's truck, who was a fellow employee. JT1 83-84.

Around 1:00 a.m. or 1:30 a.m. on March 1, Tamara used a friend's phone to speak with Mary because her phone was broken. JT1 45. Tamara spoke almost every day with Mary, who lived in New Mexico. JT1 40, 45. This was the last time Mary heard from Tamara. JT1 45.

Tamara's shift ended at 2:00 a.m. JT1 89-90. She retrieved her items from Russel's vehicle, and Defendant picked her up in his pickup. JT1 89-91; EX 7. After leaving Wilson Trailer, Defendant and Tamara went to Wal-Mart. JT1 99; EX 9. Tamara went inside and purchased snacks and an alarm clock. JT1 99; EXS 9, 11. Surveillance footage shows Defendant's pickup passing by the doors at the time Tamara entered and exited Wal-Mart. JT1 99-101; EX 9. At that time, the pickup had an open bed with a gas can visible. JT1 101; EX 9.

Later in the morning on March 1, two calls were made from Defendant's cell phone to the HOPE court number at 6:15 a.m. and 7:14 a.m. JT3 442; EX 132. Probationers call the HOPE court number to see if their assigned color has been called in to provide a urine sample for drug testing. JT3 435-36. Tamara was on probation and enrolled in this program. JT3 436.

Defendant later admitted to his children what happened next. JT2 223-24; 253. Defendant returned to Tamara's apartment to tell her

that she did not have to drug test for probation. JT2 222-23. Defendant, seeing that Tamara was dressed up, confronted her about whether she was cheating on him and where she got alcohol the night before. JT2 223-24, 253. During the fight, he pushed her against the wall and knew immediately that she was dead. JT2 224; 253.

That afternoon, Defendant stopped at TJ's, a convenience store in Yankton, shortly before 2 p.m. JT1 107, 110-11; EXS 12, 13. The store clerk commented on Defendant's swollen and red hand, and Defendant claimed that he punched an icicle. JT1 107. The clerk also noted that the pickup bed was concealed by a Tonneau cover, which she did not remember from Defendant's previous visits. JT1 110; EX 12. During later investigation, a cadaver dog indicated that human remains had been present in Defendant's pickup. JT2 350.

Defendant then drove to Michigan, stopping overnight on the evening of March 1 to stay at the AmericInn in Tomah, Wisconsin. JT1 115-16; EXS 14-18. The desk clerk who checked Defendant in noted his right hand was significantly swollen, which forced him to sign paperwork with his left hand. JT1 121; EX 14. After checking in and ordering supper, Defendant soaked in the hot tub until his food arrived. JT1 128. He checked out the next morning. JT1 123; EX 16.

Meanwhile, Mary attempted to reach Tamara on March 2 through Defendant. JT1 46-47. She talked via text with him periodically from March 2 to March 5. JT1 46-61. Defendant denied knowing where

Tamara was, stating that she kicked him out of her apartment after he told her she did not have to test for probation, and he suggested that she had been hanging around with "somebody last week." JT1 49, 61. He also told Mary that he had two broken fingers from a fall. JT1 53.[2] Mary reported Tamara missing on March 5. JT1 62.

Defendant saw Dr. Thomas Mack at a clinic in Marinette, Wisconsin, for the injury to his right hand on March 2. JT2 183; EX 28. Dr. Mack's notes indicate that Defendant reported that he had punched a "big" icicle the previous afternoon. JT2 183; EX 28 at 2. In a subsequent visit with Dr. Andrew Kirkpatrick at the same clinic on March 4, Defendant stated that he injured his hand while bracing for a fall on the ice with a closed fist. JT2 184; EX 28 at 4.

Dr. Richard Curd, an orthopedic hand and microvascular surgeon practicing in Sioux Falls testified at trial about Defendant's hand injury after reviewing these medical records. JT3 380, 384. Defendant had been diagnosed with fractures to the middle and ring finger metacarpal. JT3 384. Metacarpals are the bones that give palms structure, the tops of which are knuckles. JT3 384-85.

Dr. Curd opined that Defendant's injury to his right middle and ring finger metacarpal would be caused by a hand clenched in a fist impacting a non-moving object. JT3 389. This type of hand injury is

---

[2] In the text message to Mary, Defendant stated, "Feel [sic] the other day and my finger hurt." JT1 53; EX 3. Mary took "feel" to mean "fell." JT1 53.

common in sports and is sometimes referred to as a "boxer's fracture" or "fighter's fracture." *Id.* While the injury could be consistent with a fall braced by a clenched fist, Dr. Curd stated that to be caused by an icicle, the icicle would have to be very narrow in diameter (and thus easier to break) to only impact the middle and ring finger metacarpal. JT3 390, 392. This injury was consistent with punching someone in the face, particularly in the chin or forehead. JT3 392-93.

On March 4, the same day as his second doctor's visit, Defendant stopped at Lindner and Sorenson's, an auto sales and repair business in Menominee, Michigan, to conduct some business. JT2 155-57. Defendant, who was driving his mother's car at the time, asked the service manager, Michael Leverich, if he could dispose of some trash in his dumpster. JT2 156-57. Leverich allowed him to do so. JT2 157.

Soon after, Defendant returned to Yankton. JT2 195. Following Mary's report of Tamara's disappearance, law enforcement began its investigation, and Deputy Darren Moser spoke with Defendant on March 6. JT1 132. Defendant claimed the last time he saw Tamara was when he went to her apartment and told her she did not have to test for probation on March 1. JT1 133-34. When shown pictures of Javier Gonzalez using Tamara's debit card at Wal-Mart, he suggested that Tamara was seeing another man. JT1 136-37. He also denied knowing about the circumstances of Tamara's disappearance to his

friend, Terri Thurman, when she called his attention to a newspaper article about her disappearance. JT2 196.

On March 16, Gregory Thornson-Westby, a resident of Number 5 Road in Menominee, Michigan, made a discovery. JT2 159-61. That day, his children went out to walk their dog, and one of them ran back to the house, telling Thornson-Westby they found a body. JT2 160. Thornson-Westby went outside and saw, resting on top of the ice covering a river, a body with no hands, feet, or head. JT2 161. The dismembered body was found in a wooded and sparsely populated area, on a creek near a bridge, approximately 1.4 miles from property owned by Defendant's family. JT2 168-69; EXS 19, 21.

Thornson-Westby contacted 911. JT2 163. Jeff Brunelle, a detective for the Menominee County Sheriff's Office, was one of the responding officers. JT2 165. When he got a good look at the body, Brunelle determined it was a small, nude female with tattoos. JT2 172. The body was frozen, and there were tool markings on the bones where parts of the body had been amputated. *Id.* Using the tattoos, authorities identified the body as Tamara. JT2 173.

During the evening of March 16, Defendant met with his children, Sebastian Falkenberg and Merissa Luetjen. JT2 217-18, 252. He told them the circumstances of their fight and Tamara's resulting death. JT2 223-24, 253. Defendant claimed that Tamara obtained a baseball bat and he pushed her against a wall and knew right away that she was

dead. JT2 224, 253. Notably, however, Defendant did not mention Tamara using a bat until Luetjen first mentioned self-defense. JT2 253-54. Defendant further stated to his children on March 16 that the tools he used to dismember Tamara were no longer around and that the dismemberment was undertaken because of "identity." JT2 254-55.

An autopsy conducted on Tamara's remains by Dr. Adam Covach, a forensic pathologist and chief medical examiner for Fond du Lac County, Wisconsin, concluded that her body had been dismembered while frozen. JT3 399, 414-15. While amphetamine and methamphetamine were present in Tamara's system, it was not at levels usually associated with fatality without another condition present. JT3 416-17 (*see also* JT3 519-20 (defense expert Dr. Leon Kelly's testimony regarding his review of Tamara's autopsy results)). Furthermore, Tamara had a healthy heart. JT3 417 (*see also* JT3 523). Dr. Covach determined that Tamara's death was a "homicide by unspecified means" because no specific cause of death could be determined, but the findings and circumstances surrounding her death pointed to homicide. JT3 415-16 (*see also* JT3 515-16). Dr. Covach was unable to evaluate other possible sources of trauma or causes of death because of Tamara's missing body parts. JT3 430-31 (*see also* JT3 520-21).

During the investigation, a bat was never found in Tamara's apartment, and while there were five bats in Defendant's shop, they

were all dusty and appeared not to have been used for quite some time. JT1 135; JT2 305-06, 308. Tamara was never known by her family to have a baseball bat in her apartment. JT1 64; JT2 289-90, 299. Dr. Curd testified at trial that Defendant's hand injury was inconsistent with a blow by a baseball bat, since the injury would have been more widely distributed if caused by a bat, and if it was a defensive injury it would have likely affected fingertips or forearms. JT3 393-94. Furthermore, a swab of the wall in the entryway of Tamara's apartment revealed the presence of blood matching her DNA. JT2 308, 323-24.

Officers in Michigan conducted an excavation at the Menominee Township Landfill to find what Defendant had disposed of in Leverich's dumpster. JT2 175-76. Several items were found in the landfill, including a black sequined hat, white jeans, a yellow and grey Columbia coat, and a Harley Davidson shirt. JT2 176-81. Jennifer Parmelee, a Yankton resident, sold the coat and Harley Davidson shirt to Tamara. JT2 187-88. Tamara purchased the sequined hat with her daughter, Sydney Sedillo. JT2 288. Sedillo also testified at trial that the white pants were like ones worn by Tamara. JT2 288.

After Defendant was arrested and incarcerated at the Yankton County Jail, he alluded to what had happened in Michigan in visits with friends. He told Thurman "weird stuff happened in Michigan the other day" which was not good for him. EX 51. In another jail visit with friends, Defendant similarly referenced the "weird stuff in Michigan"

that was not good for him, was going to be "ugly," and would "be a big fiasco deal there, guaranteed." EX 52.

ARGUMENTS

I

SUFFICIENT EVIDENCE SUSTAINS DEFENDANT'S SECOND-DEGREE MURDER CONVICTION.

A. Introduction and Standard of Review

Defendant argues that the State produced insufficient evidence that he acted with a "depraved mind" for purposes of second-degree murder. AB 12. Defendant contends that the State's case hinged on using the dismemberment evidence to establish that he had a depraved mind at the time of Tamara's murder when the dismemberment occurred post-mortem. *Id.*

Review of whether there is evidence to support a conviction is conducted de novo. *State v. Stone*, 2019 S.D. 18, ¶ 38, 925 N.W.2d 488, 500. The Court must view the evidence in a light most favorable to the prosecution. *Id.* From that vantage point, the question is whether, based on the evidence—including reasonable inferences drawn from circumstantial evidence—"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* If evidence supports a rational theory of guilt, a guilty verdict will not be disturbed. *Id.* "The jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence, and [the]

Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence." *State v. Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d 327, 330 (internal quotation marks omitted).

Defendant was convicted under SDCL 22-16-7, which provides:

> Homicide is murder in the second degree if 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 court instructed the jury that in order to find Defendant guilty, it had to find: "1. The defendant caused the death of Tamara LaFramboise; 2. The defendant did so by an act imminently dangerous to others evincing a depraved mind, without regard for human life; and 3. The killing was not excusable or justifiable." SR 607.

The Defendant cites a New Mexico case, *State v. Reed*, 120 P.3d 447 (N.M. 2005), for a definition of depraved mind as "[a] corrupt, perverted, or immoral state of mind constituting the highest grade of malice [that equates] with malice in the commonly understood sense of ill will, hatred, spite or evil intent." *Id.* at 454; AB 11. That is not the standard for depraved mind recognized by this Court for purposes of second-degree murder.

In *State v. Hart*, the defendant requested an instruction defining depraved mind much like *Reed's* definition. 1998 S.D. 93, ¶ 11, 584 N.W.2d 863, 865. The trial court rejected the defendant's proposed

definition and instead defined conduct evincing a depraved mind as "conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but a lack of regard for the life of another." *Id.* ¶ 10. This Court affirmed. *Id.* ¶ 18. Thus, "if a person is able to act with a lack of regard for the life of another, then that person can be convicted of second degree murder." *State v. Laible*, 1999 S.D. 58, ¶ 13, 594 N.W.2d 328, 332 (internal quotation marks omitted). "This mens rea requirement involves less culpability than the element of premeditation required for first-degree murder." *State v. Harruff*, 2020 S.D. 4, ¶ 39, 939 N.W.2d 20, 30.

The court provided the same instruction defining depraved mind as in *Hart*. SR 608. The jury was also instructed that in evaluating whether Defendant acted with a depraved mind, it could consider "the conduct itself," "the circumstances of its commission," and the "domestic or confidential relationship that existed between the accused and the person killed." SR 609-10; *see also Laible*, 1999 S.D. 58, ¶ 14, 594 N.W.2d at 333; SDCL 22-16-3.

B. The Evidence Supports the Verdict.

Contrary to Defendant's assertions, the State's case did not rely solely upon evidence of dismemberment to prove the element of depraved mind, although such evidence was used for relevant and probative reasons.

Defendant admitted to his children, Sebastian and Luetjen, that he went to Tamara's apartment the morning of March 1. Seeing her dressed up, he argued with her about where she got alcohol from the night before and whether she was cheating on him. He admitted that during the argument, he shoved Tamara into a wall and knew immediately that she was dead.

These admissions were supported by additional evidence. Defendant's hand was significantly swollen because he had two broken metacarpals the day after Tamara was last seen. The type of injury Defendant sustained was consistent with hitting a chin or eye socket. Moreover, Defendant could not keep his story straight about how he suffered the injury. He sometimes stated to others that he fell on a clenched fist, while other times he stated that he punched an icicle. According to Dr. Curd, the icicle would have had to be narrow, and thereby more breakable, to impact only his middle two metacarpals.

This evidence demonstrates Defendant became enraged, based upon his suspicion that Tamara was cheating on him, and hit her—a woman he supposedly loved—hard enough that he broke two bones. This was an act without regard for her life. The jury knew it was well within Defendant's ability to become aggressively hostile towards Tamara when she frustrated him, and that Defendant was a tall, physically fit man, while Tamara was small. In *Harruff*, which also involved a second-degree murder conviction resulting from an

argument about cheating between domestic partners, this Court determined that such use of physical force evinces a lack of regard for human life. 2020 S.D. 4, ¶ 42, 939 N.W.2d at 31 (holding that "Harruff's admission that he struck Kristi in the chest with the force of a mule kick evinces a lack of regard for her life in this case.").

Furthermore, there was no other justification for Tamara's death. While Defendant claimed that Tamara grabbed a baseball bat, there was no evidence that Tamara ever possessed a bat. The bats in Defendant's garage were dusty and unused. Nor was his hand injury consistent with a blow from a bat. Moreover, Defendant did not claim self-defense until Luetjen first mentioned it during their March 16 conversation.

While Defendant further claimed at trial that Tamara was a violent person, especially when under the influence of methamphetamine, Travis Peterson testified that Defendant easily ignored Tamara when she became physical and was unaffected by her blows. Tamara stood no chance against Defendant.

Finally, Defendant's actions in the days following the killing supported a guilty verdict. *See Harruff*, 2020 S.D. 4, ¶¶ 44-45, 939 N.W.2d at 31 (examining defendant's subsequent acts and inconsistent statements). He gave conflicting accounts about the source of his hand injury. He initially claimed to be unaware of the circumstances of Tamara's disappearance, then later admitted to being in a fight which

resulted in her death to his children. During jail visits, he also told friends that what had happened in Michigan was not good for him.

His most egregious acts following the crime were driving Tamara's body six-hundred miles to his family's farm in Michigan after the murder, dismembering her, and dumping her body. He discarded her clothes and the tools he used to dismember her. The steps Defendant took to conceal his crime support the conclusion that he was conscious of the unjustifiable nature of his actions that caused Tamara's death. *See Stone*, 2019 S.D. 18, ¶ 26, 925 N.W.2d at 498 (stating "evidence of flight or concealment immediately after the events charged in the indictment, may be relevant to show consciousness of guilt" and noting how such evidence explained how defendant discarded a gun that was never recovered); *State v. Aesoph*, 2002 S.D. 71, ¶ 51, 647 N.W.2d 743, 760 (stating that defendant's act in moving his wife's body to make it appear that a crime had not been committed "tend[ed] to demonstrate that Aesoph was guilty, and because of that guilt, he attempted to conceal the crime" in support of jury instruction on concealment); *State v. Frazier*, 2001 S.D. 19, ¶ 40, 622 N.W.2d 246, 260 (describing steps defendant took to conceal her involvement in a crime in support of jury instruction on concealment as evidence of consciousness of guilt); *see also Rivers v. United States*, 270 F.2d 435, 438 (9th Cir. 1959) (holding that "[i]t is plain that the jury could well infer from the evidence in this case that the dismemberment of the body and the throwing of the

portions into the sea were done to conceal a murder or to avoid its detection."); *United States v. Mitchell*, 502 F.3d 931, 968 (9th Cir. 2007) (dismemberment evidence admissible for, among other reasons, consciousness of guilt, concealing victim's identity, and to rebut defense theory); *State v. Bradford*, 484 S.E.2d 221, 231 (W. Va. 1997) (dismemberment is evidence of consciousness of guilt); *Bradley v. State*, 960 S.W.2d 791, 803 (Tex. App. 1997) (same).

While Defendant contends that the State used dismemberment as its sole evidence of his depraved mind, the State, in its closing argument before the jury, argued that the elements of second-degree murder had been met by physical blows to Tamara so forceful Defendant broke his hand, when the two should have been in a loving relationship. JT4 646-47. Its arguments regarding dismemberment concerned Defendant's concealment of evidence and knowledge that his actions were unjustified. JT4 645-46, 650, 671-72, 674-76.

The jury's consideration of dismemberment was also guided by Instruction No. 43:

> Concealment by the defendant does not create a presumption of guilt. If you find that the defendant dismembered the body of Tamara LaFramboise, or disposed of tools and Tamara LaFramboise's clothing, this evidence may be considered by you as a circumstance tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider this evidence in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive.

SR 639. The jury was informed of the role that dismemberment could, but was not required to, play in its deliberation in connection with all the evidence. It was also instructed on how to evaluate Defendant's claims of self-defense. SR 624-34; *see also State v. Smith*, 1999 S.D. 83, ¶ 22, 599 N.W.2d 344, 350 ("It must be presumed the jury followed the court's instruction."). Thus, the jury was instructed on how to decide if Defendant dismembered Tamara because he was conscious of his guilt, or if he had acted in self-defense.

C. Conclusion

There is sufficient evidence to support Defendant's second-degree murder conviction beyond a reasonable doubt. This Court's role is to draw the most favorable inferences in favor of the verdict, rather than re-weigh the evidence, resolve conflicts in the evidence, or assess the credibility of witnesses. *Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d at 330. While Defendant offered an alternate version of events, it was the jury's role to judge the credibility of the evidence.

II

THE TRIAL COURT PROPERLY ADMITTED DISMEMBERMENT EVIDENCE.

A. Introduction and Standard of Review

Defendant argues that dismemberment evidence was not relevant because it was unrelated to her cause of death and occurred in Michigan a day or two after her murder. AB 14-15. He contends that

references to the dismemberment in the form of testimony, photographs, and in the State's arguments were prejudicial. AB 16.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Harruff*, 2020 S.D. 4, ¶ 14, 939 N.W.2d at 25. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable." *Id.* (internal quotation marks omitted). Not only must the court have committed error, the error must be prejudicial. *Id.* A trial court's evidentiary ruling is not reversible error if any valid reason exists therefor. *State v. Willis*, 370 N.W.2d 193, 201 (S.D. 1985).

Under SDCL 19-19-401, "[e]vidence is relevant if: (a) [i]t has any tendency to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action." All relevant evidence is generally admissible. SDCL 19-19-402. SDCL 19-19-403 provides that relevant evidence is not admissible "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Despite the grounds for exclusion of relevant evidence, "[t]he law favors admitting relevant evidence no matter how slight its probative value" and the decision to exclude it

should be used sparingly. *State v. Kihega*, 2017 S.D. 58, ¶ 22, 902 N.W.2d 517, 524.

Before trial, Defendant moved to exclude evidence of dismemberment, arguing that because Tamara's autopsy results concluded dismemberment occurred post-mortem while she was frozen, any relevance was outweighed by unfair prejudice. SR 46. The State argued dismemberment illustrated Defendant's attempts at concealing evidence. SR 70. Furthermore, the State argued that dismemberment was relevant to Defendant's self-defense claim. SR 71. At the motions hearing, in response to the court's question about how this evidence could also go to intent, the State responded that such evidence showed that Defendant did not view Tamara as a person. MH 8. The court ruled:

> The Court finds that it is relevant under Rule 401 and 402 that it does have a tendency to make a fact more or less probable than it would be without the evidence. And that the probative value is not substantially outweighed by danger of any of those listed in Rule 403 in that it goes not only toward the issue of concealment of the alleged crime, but also it goes to the elements of the underlying crime for the reasons stated by the State reflecting Mr. Falkenberg's alleged view of Ms. Laframboise as a person.

Id.

B. The Dismemberment Evidence was Relevant

At trial the State used evidence of dismemberment to argue that Defendant undertook extensive efforts to conceal evidence. Concealing evidence, such as driving a body 600 miles to another state and

dismembering it, is relevant to show consciousness of guilt. *See Stone*, 2019 S.D. 18, ¶ 26, 925 N.W.2d at 498; *Aesoph*, 2002 S.D. 71, ¶ 51, 647 N.W.2d at 760; *Frazier*, 2001 S.D. 19, ¶ 40, 622 N.W.2d at 260; *Rivers*, 270 F.2d at 438; *Mitchell*, 502 F.3d at 968; *Bradford*, 484 S.E.2d at 231; *Bradley*, 960 S.W.2d at 803. Evidence of the condition of a victim's body is also relevant to respond to a defense theory. *See State v. Quist*, 2018 S.D. 30, ¶ 18, 910 N.W.2d 900, 905–06; *Mitchell*, 502 F.3d at 968. By taking steps to conceal his crime in such an extensive manner, such actions were relevant to any claim that Tamara's death was justifiable.

For instance, certain testimony on where Tamara was found and the condition of her remains was relevant to demonstrate how Defendant concealed his crime. Sebastian and Luetjen's testimony partly concerned admissions Defendant made about dismembering Tamara in order to conceal her identity. Furthermore, Thornson-Westby's testimony about finding Tamara near his home in Michigan, 1.4 miles from Defendant's family's property, several states removed from where she was last seen, was materially relevant. Likewise, Brunelle's testimony about his investigation and observations of Tamara's body, including his observations about possible cut marks on her limbs and the need to identify her through her tattoos because of her missing body parts, was relevant to this issue.

Evidence of dismemberment was also vital to understanding her autopsy. The results of Tamara's autopsy, which indicated "homicide by unspecified means," could only be fully understood if it was known that Tamara was missing important parts of her body: her head, hands, and feet. These parts of her body could not be evaluated.

The photographic evidence of Tamara's condition was likewise admissible. The standard regarding photographs is well-settled:

> [P]hotographs are generally admissible where they accurately portray anything that a witness may describe in words. They are also admissible when they are helpful in clarifying a verbal description of objects and conditions. They must, however, be relevant to some material issue. If relevant, photographs are not rendered inadmissible merely because they incidentally tend to arouse passion or prejudice. Autopsy photographs fall within these rules. Although disturbing and cumulative, autopsy photographs may be admitted when they are necessary to aid in an expert's presentation of evidence.

State v. Hemminger, 2017 S.D. 77, ¶ 33, 904 N.W.2d 746, 757 (internal citations omitted).

Photographs of where Tamara's body was found were necessary to clarify and corroborate Thornson-Westby's and Brunelle's testimony about the location where Tamara was found and her condition. EXS 22-23; JT2 170-71; *Hemminger*, 2017 S.D. 77, ¶ 33, 904 N.W.2d at 757. Furthermore, photographs conducted at her autopsy showing evidence of dismemberment were each relevant for different purposes, were neutrally presented, and were necessary to aid expert testimony. *Hemminger*, 2017 S.D. 77, ¶ 34, 904 N.W.2d at 757. Several

photographs showing dismemberment also showed individual tattoos used to identify Tamara. EXS 38-40, 43-44; JT2 173; JT3 410. Photos of the front of her body, bottom portion of her body, and back of her body showed the general condition of her remains. EXS 33-35; JT3 406-408. Cross-sections showed marks caused by cutting tools. EXS 36-37; JT2 172; JT3 408-410.

Defendant's admissions, the condition of Tamara's body 600 miles from home near his family's farm, her autopsy results, evidence of tool marks used on her limbs, and the fact that Tamara was identified by her tattoos, all show relevant evidence of Defendant's attempt at concealing evidence of his crime because he was conscious of unjustifiably killing Tamara.

C. The Probative Value of the Dismemberment Evidence was Not Substantially Outweighed by Unfair Prejudice

While it was undisputed that Tamara's dismemberment was unrelated to her cause of death and occurred in the days following her homicide, the State has a right to present its case within evidentiary rules. *See Quist*, 2018 S.D. 30, ¶ 18, 910 N.W.2d at 905–06. Relevant evidence is "not rendered inadmissible merely because [it] incidentally tend[s] to arouse passion or prejudice." *Hemminger*, 2017 S.D. 77, ¶ 33, 904 N.W.2d at 757. "Evidence does not cause danger of unfair prejudice merely because its legitimate probative force damages the defendant's case." *State v. Fisher*, 2013 S.D. 23, ¶ 15, 828 N.W.2d 795,

800. Relevant evidence should only be excluded if it persuades the jury in an unfair and illegitimate way. *Id.*

The State, in proving second-degree murder, had to prove beyond a reasonable doubt that Defendant had not acted in self-defense. *See Fields v. Leapley*, 30 F.3d 986, 991 (8th Cir. 1994) (citing *State v. Reddington*, 80 S.D. 390, 125 N.W.2d 58, 61 (1963)). As discussed, Defendant's concealment of evidence speaks to his consciousness of unjustifiably killing Tamara. Because dismemberment was relevant for this purpose, it did not persuade the jury in an unfair way. Trials cannot be conducted based on sanitized facts. *State v. Wright*, 1999 S.D. 50, 593 N.W.2d 792, 799.

Defendant is also mistaken in asserting this evidence should have been excluded due to the passage of time between the murder and the dismemberment. Defendant's attempts at concealment began directly after her murder when he loaded her into his pickup and began the drive from South Dakota to Michigan. Shortly after arriving in Michigan, Defendant dismembered her and threw away his tools and Tamara's clothes. Defendant's actions demonstrate a continuous course of conduct showing an attempt to conceal evidence because he knew what he did was wrong.

Simply put, Tamara's dismemberment played its proper role within the extensive evidence presented at trial. Because the dismemberment evidence was relevant to Defendant's concealment of

evidence and consciousness of guilt, the State was entitled to argue how it supported the Indictment. *See* SDCL 23A-24-2(2); *Smith*, 1999 S.D. 83, ¶ 46, 599 N.W.2d at 354. Nor can it be said that the word choice used during trial caused unfair prejudice. *See State v. Towney*, 881 N.W.2d 470 (Iowa Ct. App. 2016) ("Ultimately, in this case, it is the nature of the conduct at issue and not the prosecutor's language that was inflammatory.").

As noted, the jury's consideration of such evidence was guided by Instruction No. 43. SR 639. The jury was instructed on how to consider dismemberment as not presumptive of guilt, and that it could, but was not required to, consider it as evidence of consciousness of guilt. Furthermore, this instruction provided that dismemberment had to be given its proper weight in the context of all the evidence.

D. Conclusion

It was not a "fundamental error of judgment" or "a choice outside the range of permissible choices" for the court to admit dismemberment evidence. *See Harruff*, 2020 S.D. 4, ¶ 14, 939 N.W.2d at 25. The evidence tended to make the fact that an unjustifiable killing had taken place more probable when considered with his other attempts at concealing his guilt such as lying to friends, Tamara's mother, and law enforcement. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Not allowing this evidence would have prevented the State from explaining what

Defendant did to her body in order to conceal his crime and would have forced the jury to speculate about the condition of Tamara's remains.

III

THE TRIAL COURT'S RESTITUTION ORDER DOES NOT VIOLATE DUE PROCESS OR THE SEPARATION OF POWERS.

A. Introduction and Standard of Review

Defendant argues that the trial court's manner of setting restitution is in error. AB 20, 23.[3] Furthermore, Defendant contends that under the terms of the order, his ability to "repeatedly object to amounts sought under the trial court's restitution order and receive a restitution hearing violates the separation of powers." AB 21. Thereby, he argues, his right to due process has been violated. AB 22-23.

---

[3] The Court may wish to consider that the core of Defendant's argument is that the way the court set the amount of restitution by using maximum caps is in error. AB 20, 23. Although Defendant initially objected to the court ordering any restitution based on the lack of receipts prior to the court pronouncing its order, Defendant never objected to how the court set its order using maximum amounts. Nor did Defendant request a restitution hearing. *State v. Tuttle*, 460 N.W.2d 157, 160 (S.D. 1990); *State v. Hauge*, 2019 S.D. 45, ¶¶ 28-29, 932 N.W.2d 165, 173; *State v. Henjum*, 1996 S.D. 7, ¶ 13, 542 N.W.2d 760, 763 ("Even fundamental rights may be waived."). Only now does Defendant argue on appeal that these maximum amounts of restitution are "open-ended" and "non-specific" in violation of SDCL 23A-28-3. AB 20, 23, 27. In order to "preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, *giving their reasons*." *State v. Fischer*, 2016 S.D. 1, ¶ 12, 873 N.W.2d 681, 687. If the issue is unpreserved, the Court does not need to invoke its discretion to review it because it did not impact a substantial right and did not "so infect[] the entire trial that the resulting *conviction* violates due process." *State v. Mulligan*, 2007 S.D. 67, ¶ 27, 736 N.W.2d 808, 818; *see also State v. Bryant*, 2020 S.D. 49, ¶¶ 33-34, __ N.W.2d __.

Questions of law regarding a court's restitution order are reviewed de novo. *State v. Wingler*, 2007 S.D. 59, ¶ 7, 734 N.W.2d 795, 797. A trial court's findings of fact are reviewed under the clearly erroneous standard. *Id.*

At the sentencing hearing, Defendant initially objected to any restitution requested by the State and argued that documentation supporting the expenditures should be provided. SENT 6-7. At the time of the sentencing hearing, not all the invoices submitted to the Crime Victims Compensation fund were available. SENT 10. The court agreed that Defendant was entitled to documentation of these expenses, thus, the court ordered:

> As to the issue of restitution, the Court does believe that it is appropriate for the billing statements themselves to be provided for the amounts that have been paid by the Crime Victims' Compensation Fund or approved by and not yet paid before being ordered. But the Court is going to order up to $15,000 in restitution for any amounts paid by the Crime Victims' Compensation Fund. Again, with receipts to be provided and, if there is a dispute regarding the amounts set forth in those receipts, then Mr. Falkenberg can request a hearing either before this court or more likely before the Department of Corrections because I have entered my order up to $15,000.
>
> As to additional restitution, the Court is ordering the restitution of $2,191.65 as set forth in the billing statements received today related to Sydney. The Court is ordering up to an additional $40,000 in restitution if any claims are made by Ms. Tamara Laframboise's children or her mother for counseling or other medical expenses attributable to the death of Tamara Laframboise. And, again, if there is any dispute, Mr. Falkenberg will have the right to a hearing after review of any documentation submitted in support of those requests either before this

court or, again, more likely before the Department of Corrections.

SENT 13-14.

B. The Trial Court's Restitution Order Does Not Violate the Separation of Powers or Defendant's Right to Due Process.

The circuit court's order is not in error, nor is there a separation of powers problem precluding Defendant from obtaining a restitution hearing if he requests one. "It is the policy of this state that restitution shall be made by each violator of the criminal laws to the victims of the violator's criminal activities to the extent that the violator is reasonably able to do so." SDCL 23A-28-1. Trial courts have broad discretion in ordering restitution. *State v. Thayer*, 2006 S.D. 40, ¶ 16, 713 N.W.2d 608, 613.

At sentencing, the court considered the damages of Defendant's crime in the form of mental anguish suffered by each member of Tamara's family and need for counseling, medical costs incurred by Sydney arising out of her mental distress, funeral costs, and other expenses. *See, e.g.*, SR 702-03, 708, 710, 712, 837-53. Mary LaFramboise also explained at sentencing that she had submitted bills for certain expenses to the fund. SENT 10. Thus, the court had a basis for awarding restitution, with the directive that receipts be provided to Defendant.

From there, this issue involves an examination of whether the trial court complied with SDCL 23A-28-3. This statute provides that

the amount of restitution owed and the victims to whom it should be paid is within the purview of the trial court. If the defendant is sentenced to the penitentiary, the Department of Corrections (DOC) is tasked with enforcement. It provides, in part:

> If the defendant contests the amount of restitution recommended by the court services officer, the defendant is entitled to a hearing at which the court shall determine the amount. If the sentencing court orders the defendant to the state penitentiary and does not suspend the sentence, the court shall set forth in the judgment the names and specific amount of restitution owed each victim. The Department of Corrections shall establish the collection schedule for court-ordered restitution while the defendant is in the penitentiary and on parole.

SDCL 23A-28-3.

Defendant contends that the trial court's order lacks specificity. AB 25. While Defendant relies upon *State v. Holsing*, 2007 S.D. 72, 736 N.W.2d 883, the facts here are distinguishable. In *Holsing*, this Court examined a trial court's written restitution order. *Id.* ¶ 12. It referred to the written judgment after determining the oral order was ambiguous. *Id.* The written judgment provided " . . . Defendant shall make restitution in full to the victims for the costs of any counseling that said victims may have incurred as a result of said offenses." *Id.* ¶ 13 (emphasis in original removed). This Court determined that, under the plain meaning of the order, the counseling costs were those that were incurred in the past. *Id.* Thus, because the victim's initials appeared in the sentence and the amount was ascertainable, the

restitution order complied with SDCL 23A-28-3's requirement of specificity. *Id.* ¶ 14. Similarly, here, the court did not err. It identified what costs would be subject to restitution, set specific amounts, and identified the victims entitled to restitution.

Furthermore, in *Holsing,* this Court was confronted with the question of whether the trial court retained jurisdiction to order the defendant to pay additional restitution. *Id.* ¶ 10. Holsing made his restitution payments in full on parole, but subsequently the State sought more restitution to pay for additional counseling costs. *Id.* ¶ 4. Because the trial court ordered restitution based on what had occurred in the past, this Court held that "[a]llowing the State to bring Holsing back into court for the purpose of increasing restitution seven years after he was sentenced would unlawfully increase his punishment and violate due process protections." *Id.* ¶ 17. Here, there is no risk of a violation of *Holsing* under the trial court's restitution order. The court set the amount of restitution in its sentence and there has been no effort to expand that amount of restitution beyond what Defendant was told at sentencing.

Defendant contends that under the court's order Defendant can "repeatedly object to amounts sought under the trial court's restitution order." AB 21. However, the language of the oral order does not contemplate that endless restitution hearings may take place. In pronouncing the $15,000 amount of restitution for costs paid by the

Crime Victim's Compensation Fund, the court stated that when receipts sent to the fund were provided "if there is a dispute regarding the amounts set forth in those receipts, then Mr. Falkenberg can request *a hearing*." SENT 14 (emphasis added). Similarly, when pronouncing $40,000 ordered for counseling or medical costs for Tamara's mother and children, the court repeated Defendant's right to a restitution hearing stating, "*And, again,* if there is any dispute, Mr. Falkenberg will have the right to *a hearing* after review of any documentation submitted in support of those requests." *Id.* (emphasis added).

The court's restitution order as to these amounts was crafted in response to Defendant's request for documentation. Knowing that not all documentation was available at time of the sentencing hearing as to these portions of the order, the court contemplated that *a restitution hearing* could be held. The court's advisement is supported by the principle that Defendant is entitled to a due process hearing if he objects to the amount of restitution set by the court. SDCL 23A-28-3; *Tuttle*, 460 N.W.2d at 160.

Defendant further contends that, because he is now in DOC custody, a restitution hearing in front of the trial court now would be a violation of the principle that a defendant cannot be supervised by the executive and judicial branch simultaneously. AB 21. Thus, he argues, he cannot obtain a due process review of amounts claimed under the restitution order. AB 22. In *State v. Orr*, this Court held that

a prisoner cannot be on probation and parole at the same time because that would mean being subject to the control of two branches of government simultaneously in violation of the separation of powers. 2015 S.D. 89, ¶ 10, 871 N.W.2d 834, 838. However, the Court limited its holding, stating, "[o]ur decision today does not change the court's ability to suspend a sentence without imposing probation, nor does it affect the court's limited, two-year window to reduce a sentence." *Id.* ¶ 11. *Orr* should not be read beyond the principle that a defendant cannot be on probation and parole at the same time.

Orr does not foreclose the circuit court's restitution order here. This is not a case of simultaneous supervision or two branches of government having power over a defendant in overlapping ways. Rather, the trial court has the authority to impose amounts of restitution and resolve any objection to those amounts, while the DOC is tasked with enforcement and carrying out the circuit court's restitution order. Each has a distinct role that does not result in a separation of powers problem. The fact that the trial court alluded to the possibility of a restitution hearing in front of the DOC is harmless error, if any, as the trial court affirmed the right that Defendant has to a restitution hearing before it.

C. Conclusion

The order complies with SDCL 23A-28-3 and a future restitution hearing is not a violation of the separation of powers. Thus, the court's restitution order should be affirmed.

CONCLUSION

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

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

Brigid C. Hoffman
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 8,158 words.

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

Dated this 2nd day of September 2020.

Brigid C. Hoffman
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of September, 2020, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Stephen Robert Falkenberg* was served via electronic mail upon Clint Sargent at clint@meierhenrylaw.com and Raleigh Hansman at raleigh@meierhenrylaw.com.

Brigid C. Hoffman
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29287

State of South Dakota,
Plaintiff and Appellee,
v.
Stephen Robert Falkenberg,
Defendant and Appellant.

Appeal from the Circuit Court, First Judicial Circuit
Yankton County, South Dakota

The Honorable Cheryle Gering
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Attorneys for Appellant
Clint Sargent
Raleigh Hansman
Meierhenry Sargent LLP
315 S. Phillips Ave
Sioux Falls, SD 57104
605-336-3075
clint@meierhenrylaw.com
raleigh@meierhenrylaw.com

Attorneys for Appellee
Jason Ravnsborg
Brigid Hoffman
Office of the Attorney General
1302 E. Hwy 1 Ste. 1
Pierre, SD 57501
605-773-3215
atgservice@state.sd.us
Brigid.hoffman@state.sd.us

Notice of Appeal filed on the 20th day of March, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **ii**

ARGUMENT **1**

CONCLUSION **5**

CERTIFICATE OF SERVICE **6**

CERTIFICATE OF COMPLIANCE **6**

TABLE OF AUTHORITIES

Cases

Kaberna v. Brown, 2015 SD 74, 864 N.W.2d 497 1

State v. Holsing, 2007 SD 72, 736 N.W.2d 883 4

State v. Tofani, 2006 SD 63, 719 N.W.2d 391 2

State v. Wolff, 438 N.W.2d 199, (S.D. 1989) 4

Statutes

SDCL § 19-19-403 1

ARGUMENT

I. Improper Admission of and Continued Reference to Dismemberment Tainted All Evidence; Conviction Should Be Reversed

Five out of the State's 22 witnesses testified about dismemberment. 15 of the State's 63 exhibits depicted dismemberment. Despite the undisputed facts that dismemberment occurred post-mortem and days after death, the State dedicated nearly 25% of its case-in-chief to discussing dismemberment.

Because "[t]he jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence," the trial court must be vigilant in its gatekeeping function and its application of the rules of evidence. Even if the dismemberment evidence was probative, the cumulative presentation thereof demanded exclusion. SDCL § 19-19-403. The continuous and repeated dismemberment discussion contaminated the entire case – stripping Falkenberg of his constitutional right to a fair trial.

It was an abuse of discretion for the trial court to allow detailed dismemberment testimony from multiple witnesses accompanied by double-digit pictures depicting T.L.'s dismembered body as concealment evidence. It is arbitrary and unreasonable to allow a quarter of a case to be devoted to a factor outside the elements for the indicted offense. The "fundamental error in judgment" was not the trial court's initial allowance of dismemberment, but in the trial court's allowance of its exploitation. *Kaberna v. Brown*, 2015 SD 74, ¶ 7, 864 N.W.2d 497, 501.

Here, even the light most favorable to the evidence casts a shadow. *State v. Tofani*, 2006 SD 63, ¶ 24, 719 N.W.2d 391, 398. Therefore, the Jury's January 20, 2020 verdict should be vacated, and the matter should be remanded for a new trial.

II. Due Process and Separation of Powers Violated by Trial Court's Open-Ended, Non-Specific, and Indefinite Restitution Order

The State's assertion that no error, especially not a prejudicial error, exists following the trial court's restitution order because a right to hearing is contained therein ignores the order's language, the implications of the language used, and well-established separation of powers doctrine.

> ORDERED, ADJUDGED AND DECREED that the Defendant Stephen Robert Falkenberg shall pay restitution to the Yankton County Clerk of Court's Office in the total amount of $29,678.86 to be paid to the Yankton County for prosecution costs; total reimbursement to Crime Victim's Compensation Fund of up to $15,000.00 upon proof of expenditure; $2,191.65 to Sydney Sedillo for counseling and total reimbursement for counseling costs related to Defendant's crime up to $40,000 for Mary LaFramboise, Sydney Sedillo, and Ron Sedillo, which restitution is owed by Stephen Robert Falkenberg individually. *If the Defendant disputes any portion of the $15,000 or $40,000 being paid, he has the right to request a restitution hearing. The $29,678.86 and $2,191.65 is not subject to further hearings as the court ordered those amounts to be paid.*

CR. 855 (emphasis supplied).

Nowhere within the Judgment of Conviction and Sentence or the Court's oral pronouncement is there:

- a deadline for claims to be submitted to the Crime Victim's Compensation Fund for reimbursement;
- direction provided to where counseling costs reimbursement requests should be sent; or

- a deadline for counseling costs to submitted for reimbursement.

It is undisputed that the restitution order imposed on March 4, 2020, acknowledges that future restitution hearings are available. This explicit recognition coupled with the order's shortcomings above illustrate the hearing in perpetuity problem. Falkenberg's right to a restitution hearing is triggered anytime a claim is submitted for reimbursement. Non-existent deadlines mean that requests for compensation under the current order can be made anytime, forever.

Each contested restitution submission will require an evidentiary hearing to comply with requisite due process provisions. Every hearing will necessitate Falkenberg's transport from the South Dakota State Penitentiary in Sioux Falls to Yankton, preparation and attendance of counsel for both Falkenberg and the Attorney General's Office, and the attendance of witnesses – many of which are out-of-state. The opportunity and right to appeal will then attach to each restitution order thereafter ordered. If either side exercises that right, both parties will be required to obtain the requisite record, draft and file briefs, and potentially prepare and present at oral arguments. If one or more of the trial court's future restitution orders is reversed, the process may start over.

The unending cycle of restitution hearings before the trial court while Falkenberg is currently under lifetime DOC supervision also violates the separation of powers. In 1989 the South Dakota Supreme Court specifically addressed SDCL § 23A-28-3 and the separation of powers that occurs for restitution purposes when a defendant enters the South Dakota State Penitentiary.

> SDCL ch. 23A-28, as currently formulated, places the responsibility for preparing and distributing plans of restitution within the board of pardons and paroles. This is consistent with the principle of separation of powers enunciated in *State v. Oban*, 372 N.W.2d 125 129 (S.D. 1985): "Once an offender is within the jurisdiction of the executive branch of government, the judicial branch – the circuit court – loses jurisdiction and control" subject to certain exceptions irrelevant to this case. *See also State v. Huftile*, 367 N.W.2d 193, 196 (S.D. 1985). Here, Wolff was sentenced at a hearing on January 4, 1988, and was received at the penitentiary on January 7, 1988. Once Wolff entered the penitentiary, any plan of restitution, under SDCL 23A-28-6, had to be created under the authority of the board of pardons and paroles, not the trial court and its court services officer. Prior to Wolff's delivery to the penitentiary, the circuit court had jurisdiction to formulate a plan of restitution. ... In conclusion, trial courts may prepare plans of restitution when defendants are under its jurisdiction. However, once the defendant enters the penitentiary, the Board of Pardons and Paroles may prepare its own plan of restitution."

State v. Wolff, 438 N.W.2d 199, 203 (S.D. 1989).

Wolff read in conjunction with *Holsing* supports Falkenberg's position that the trial court is without jurisdiction to preside over subsequent restitution hearings now that he is within DOC custody. *State v. Holsing*, 2007 SD 72, ¶¶ 17-18, 736 N.W.2d 883, 887.

Additionally, *State v. Orr*'s overarching principle – that dual supervision is prohibited – is consistent with *Wolff*, *Holsing*, and therefore applicable in the restitution context. 2015 SD 89, 871 N.W.2d 834.

The trial court's open-ended, non-specific restitution order from March 4, 2020 violates due process requirements for finality and the separation of powers doctrine. The order must be vacated and remanded for proceedings that comply with South Dakota statutory and case law, as well as the U.S. and State Constitution.

CONCLUSION

Falkenberg respectfully requests that this Honorable Court vacate his Second-Degree Murder conviction, reverse the trial court's erroneous Order Denying Judgment of Acquittal, reverse the trial court's decision to allow the dismemberment evidence, and remand for a new trial.

Alternatively, Falkenberg respectfully requests this Honorable Court vacate the trial court's restitution order rendered in violation of his due process rights and separation of powers doctrine, and remand for a hearing that adheres to well-established state and federal law.

Respectfully submitted this 23rd day of September, 2020.

/s/ Raleigh Hansman
Clint Sargent
Raleigh Hansman
Meierhenry Sargent LLP
315 S. Phillips Avenue
Sioux Falls, SD 57104
605-336-3075
clint@meierhenrylaw.com
raleigh@meierhenrylaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Reply Brief and all appendices were filed online and served upon:

Jason Ravnsborg
Brigid Hoffman
Office of the Attorney General
1302 E. Hwy 1 Ste. 1
Pierre, SD 57501
605-773-3215
atgservice@state.sd.us
Brigid.hoffman@state.sd.us

On this 23rd day of September, 2020.

/s/ Raleigh Hansman
Clint Sargent
Raleigh Hansman
Meierhenry Sargent LLP
315 S. Phillips Avenue
Sioux Falls, SD 57104
605-336-3075
clint@meierhenrylaw.com
raleigh@meierhenrylaw.com

CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1,144 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 23rd day of September, 2020.

/s/ Raleigh Hansman
MEIERHENRY SARGENT LLP