IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30429

STATE OF SOUTH DAKOTA

APPELLEE,

VS.

TROY O'BRIEN,

APPELLANT

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

THE HONORABLE JOHN R. PEKAS
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed on August 11, 2023.

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PRELIMINARY STATEMENT

All references herein to the Settled Record are cited as "SR." The transcript of the Jury Trial held on December 6 and 7, 2022, is cited as JT followed by the volume number ("JT 1" refers to the transcript captioned "JURY TRIAL Day #1 minus jury selection" and "JT 2" refers to the transcript captioned "JURY TRIAL Day #2"). The State offered demonstrative exhibit 3 on the second day of trial (JT 2 at 70:9-17). That exhibit is cited as "Ex. 3." The transcript of the June 7, 2023, Sentence Hearing is cited as "SH." Each reference is followed by a page number or numbers and, when appropriate, line number(s).

JURISDICTIONAL STATEMENT

Appellant Troy O'Brien appeals the Judgment and Sentence entered on July 14, 2023, by the Honorable John R. Pekas, Circuit Court Judge, Second Judicial Circuit, adjudicating O'Brien guilty of one count of Rape in the Second Degree, one count of Rape in the Fourth Degree, four counts of Sexual Contact with a Child Under the Age of Sixteen, and three counts of Sexual Exploitation of a Minor. SR 192. O'Brien timely filed a *pro se* Notice of Appeal of his conviction and sentence, dated August 9, 2023, on August 11, 2023. SR 290. Undersigned counsel was appointed to represent O'Brien[1] and filed and served a Notice of Appearance and Notice of Appeal on August 14, 2023. SR 294; 297. This Court has jurisdiction over the appeal pursuant to SDCL § 23A-32-2.

[1] Undersigned counsel did not represent O'Brien at trial.

STATEMENT OF LEGAL ISSUES

1. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT O'BRIEN'S CONVICTIONS FOR RAPE IN THE SECOND DEGREE AND RAPE IN THE FOURTH DEGREE.

The trial court denied O'Brien's motion for judgment of acquittal, and the jury entered guilty verdicts on the counts of Rape in the Second Degree and Rape in the Fourth Degree.

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

State v. Toohey, 2012 S.D. 51, 816 N.W.2d 120

SDCL 22-22-1(2)
SDCL 22-22-1(5)
SDCL 22-22-2
SDCL 23A-23-1

2. WHETHER O'BRIEN'S DUE PROCESS RIGHT TO JURY UNANIMITY WAS VIOLATED AS TO COUNTS ONE AND TWO BY DUPLICITY IN THE INDICTMENT.

The trial court did not rule on this issue. The defense did not request a unanimity instruction or address the duplicitous counts in the indictment. O'Brien seeks plain error review of this issue.

State v. Olvera, 2021 S.D. 84, 824 N.W.2d 112

State v. Muhm, 2009 S.D. 100, 775 N.W.2d 508

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

STATEMENT OF THE CASE

On January 19, 2022, in Lincoln County, the State charged Appellant Troy O'Brien by indictment with one count of Rape in the Second Degree, one count of Rape in the Fourth Degree, four counts of Sexual Contact with a Child Under the Age of Sixteen, and three counts of Sexual Exploitation of a Minor. SR 1. The indictment alleged that the victim of these acts was R.M., whose date of birth was listed as August

24, 2006. SR 1.[2] The State also filed a Part 2 Habitual Information alleging that O'Brien had one prior felony conviction. SR 5.

A jury trial on the indictment commenced on December 6, 2022, and concluded on December 7. JT 1 and JT 2. The Honorable John R. Pekas presided. *Id.* At the conclusion of the State's case, O'Brien made a motion for judgment of acquittal, which the trial court denied. JT 2 at 162-165. On December 7, 2022, the petit jury found Appellant Troy O'Brien guilty of one count of Rape in the Second Degree, one count of Rape in the Fourth Degree, four counts of Sexual Contact with a Child Under the Age of Sixteen, and three counts of Sexual Exploitation of a Minor. SR 192. On January 23, 2023, O'Brien admitted to the Part 2 Habitual Information. SR 279. On June 7, 2023, the trial court imposed a sentence of fifty years in the penitentiary on count 1; twenty-five years on count 2; twenty-five years on each of counts 3, 4, 5, and 6; and five years on count 7. SR 279; s*ee generally* SH. The trial court ordered that all of the penitentiary sentences were to run concurrently. *Id.* The trial court also ordered that O'Brien pay $116.50 in court costs and register as a sex offender on each count. *Id.* The Judgment and Sentence was filed on July 14, 2023. SR 279.

STATEMENT OF FACTS

L.M., the mother of R.M., and O'Brien were in a romantic relationship for approximately ten years, starting in the early 2010s. JT 1 at 77-79. L.M., R.M., and O'Brien lived together in Sioux Falls, beginning around the time when R.M. was in

[2] At trial, R.M.'s mother, L.M., testified that R.M.'s birthday was August 4, 2006. JT 1 at 76:10-12.

kindergarten. JT 1 at 79:1-10. During that time, when L.M. worked out of the home, R.M. would often be left in the care of O'Brien. JT 1 at 80-82.

L.M., R.M., and O'Brien lived in four or five different homes in or around Sioux Falls. JT 1 at 86. At the time that R.M. accused O'Brien of the conduct alleged in this case, they had lived in a home in Lincoln County for around two years. JT 1 at 86, 88. The period that they lived in the Lincoln County home roughly corresponds to the dates of the offenses alleged in the indictment. SR 1. In the Lincoln County home, L.M. and O'Brien shared a room, while R.M. had her own room in the basement. JT 1 at 88.

According to L.M., R.M.'s report of abuse by O'Brien began when R.M. began crying in the bathroom "for no reason." JT 1 at 83-84. R.M. testified that she told her mother twice, and that the second time occurred in the living room. JT 2 at 56-58. As a result of R.M.'s report, L.M. took R.M. to stay with a friend and former daycare provider, Karen. JT 1 at 85. L.M. called someone involved in law enforcement, and ultimately took R.M. to Child's Voice on November 1, 2021. JT 1 at 92-93; JT 2 at 102:3. At Child's Voice, R.M. was given a physical examination and forensic interview.[3] JT 1 at 92-93; JT 2 at 101-102; 132. R.M.'s physical examination was normal, although R.M. declined an anogenital examination. JT 2 at 105:3-8. A few days after the physical examination and interview, R.M. returned to Child's Voice for lab work. JT 2 at 106:12-20. R.M.'s tests were negative for pregnancy and sexually transmitted disease. JT 2 at 106:18-20. The State did not offer a recording or transcript of R.M.'s forensic interview into evidence at

[3] Child's Voice is a "medical child advocacy center where children are referred when there's concerns for child maltreatment." JT 1 at 23:16-18. At Child's Voice, referred children undergo a medical evaluation and forensic interview. *See generally* JT 1 and JT 2.

the trial, and what R.M. said during that interview is not in the record.[4] *See generally* JT 1 and JT 2.

R.M. was sixteen years old when she testified at trial. JT 1 at 76:12. During trial, R.M. testified that O'Brien "touched" her "inappropriately."[5] JT 2 at 16:21. R.M. testified that the inappropriate touching occurred at each of the houses she had lived at in Sioux Falls with O'Brien. JT 2 at 13:11-13. She testified that the last time it had occurred was at a house on a street or avenue called "John," and that O'Brien touched her in the living room, the two bedrooms, and in the basement family room. JT 2 at 13-14; 37-38.

When asked to describe what constituted inappropriate touching, R.M. testified that O'Brien touched her "chest and the woman's part." JT 2 at 17:7-9. At various times under examination, R.M. clarified that "woman's part" meant "where we go to the restroom" or "where you go pee." JT 2 at 23:24-24:3; 28:23-29:1; 44:6-9; 45:15; 52:16-17; 71-72.

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[4] R.M.'s statements during the interview were not admissible pursuant to SDCL 19-19-806.1. R.M. was over the age of thirteen at the time of her forensic interview at Child's Voice and subsequent trial, and there is no evidence in the record that she is developmentally disabled, although R.M. mentioned "trying to get into Special Olympics basketball and track and field" and the trial judge did comment on the matter. SR 1; JT 2 at 9:16-19; 65:23-66:4. Leslie Crevier, who conducted R.M.'s forensic interview, testified that she did not have any concerns about R.M.'s developmental condition for purposes of the forensic interview. JT 2 at 137.

[5] R.M. also used the terms "molest" and "rape," but gave no indication that she understood "rape" to include penetration. JT 2 at 12. Instead, R.M. testified that "rape" meant "touching inappropriate parts where you shouldn't be touched," that she did not typically use those words, and that she used them to "sound as professional as possible" in court. JT 2 at 12:22-23; 94-95. It is reasonable to conclude that R.M.'s use of the word "rape" was colloquial as opposed to asserting sexual penetration as defined by SDCL 22-22-2.

When asked to specifically describe the last time that O'Brien had touched her inappropriately, R.M. testified that it occurred on the bed in the room that O'Brien shared with L.M. JT 2 at 14-15. R.M. testified that she was napping in her mother's bed, and that O'Brien came from another room, woke her up, and laid on the bed with her. JT 2 at 16. R.M. testified that O'Brien first touched "all over" her chest, which she clarified meant her breast. JT 2 at 18. When asked if O'Brien was "rubbing" her breast, R.M. agreed. JT 2 at 19. R.M. testified that O'Brien "rubbed" her breast both over and under her clothes. JT 2 at 19-20. R.M. testified that she tried to get up and leave but that O'Brien held her and pulled her back. JT 2 at 20-21. R.M. then described feeling O'Brien's hands moving—or "sliding"—to her leg under her clothing and then to her "woman's part." JT 2 at 23-26. When asked to clarify what "woman's part" meant, R.M. said it was "[t]he part where you go pee." JT 2 at 28:21-29:1. When asked what his had did after it arrived at her "woman's part," R.M. testified that she did not remember. JT 2 at 33.

R.M. did not testify that O'Brien touched her in a way that penetrated her "woman's part." The State did attempt to elicit testimony from R.M. about penetration:

> Q: Okay. You said you don't remember necessarily what his hand was doing, but do you remember what, if any, where it went when it was on your woman parts?
>
> A: I don't quite remember.

JT 2 at 33:5-8. Despite R.M.'s answer, the State continued to try to obtain testimony about penetration by asking R.M. a series of questions that the trial court ruled were leading. JT 2 at 33:9-34:10.

R.M. then testified that O'Brien had touched her inappropriately on more than one occasion in her own bedroom. JT 2 at 39:10-12. The State asked R.M. what happened on

these occasions, and R.M. testified that it was "exactly the same" as the occasion she had described from the other bedroom. JT 2 at 39:13-24. The State asked R.M. to describe two different incidents that occurred in her bedroom—once when she was dressed and once when she was undressed. JT 2 at 40. R.M. described an incident that she said occurred while she was dressed and was similar to the one that had occurred in her mother's room. JT 2 at 40-44. During this discussion, R.M. testified again that O'Brien put his hand beneath her clothes, touched her breast, moved it to her leg, and then to an area that she physically pointed out to the jury but did not describe. JT 2 at 42-43. She said that his hand was moving, but when asked "[h]ow was it moving," said that she did not know. JT 2 at 43:17:22. R.M. did not describe a specific event that occurred when she was undressed in her bedroom.

R.M. then testified that, on unspecified occasions, O'Brien undressed her and touched her inappropriately, but that she could not remember the last time it had happened or what had happened. JT 2 at 44-45. R.M. testified that this happened at the house on John, as well as at houses on streets named Campbell, Willow, and Duluth. JT 2 at 45-47.

The State asked R.M. to testify about an incident that occurred in the living room at the "John house." JT 2 at 48-53. It appears that R.M.'s testimony in this regard described or multiple instances, as she said that sometimes the touching occurred while there was daylight and sometimes when it was dark. JT 2 at 49-50. Additionally, the State's questions referred to "times" when R.M. remembered O'Brien touching her. JT 2 at 51:23; 52:4. R.M. said that O'Brien would sit on the couch playing a videogames, and then put down the videogame, "drag" R.M. over to him while she tried to pull away, and

"inappropriately" touch her "chest and the woman's part." JT 2 at 50-51. When asked where R.M. could feel O'Brien's finger on "where a woman would go to the restroom," R.M. replied that she did not "really remember." JT 2 at 13-23.

R.M. also testified that during some of these incidents, she would see O'Brien undress and touch his exposed penis. JT 2 at 36-37; 53-54. When asked whether she had ever touched O'Brien's penis, R.M. testified that she thought she had touched it with her hand, but did not remember. JT 2 at 37:8-15. There was no evidence that O'Brien touched R.M.'s genitalia with his penis or attempted fellatio with R.M. *See generally* JT 1 and JT 2.

Following a recess, the State asked R.M. to draw an illustration of her "lady parts." JT 2 at 68:3-5. R.M. drew a picture of a person, which she referred to as "a human body." JT 2 at 68-69; Ex. 3. The picture included an arrow pointing at what R.M. referred to as "[t]he woman's part." JT 2 at 69:6-9; Ex. 3. In addition to the picture of the human body, the picture included a sketch in the upper corner that R.M. testified was the "woman's part" or, as the State referred to it, "lady parts." JT 2 at 69:11-19. That latter sketch included a small "oblong, not quite oval," which R.M initially testified was for "us[ing] the restroom." JT 2 at 71:18-72:5. Then, when the State asked if that part was what R.M. used to "pee," R.M. said three times that she did not know. JT 2 at 72:23-73:9. R.M. described the rest of the sketch of the "woman's part" in the corner of exhibit 3 as "where the leg and the woman's part are connect [sic]." JT 2 at 73:10-12. The State asked R.M. what part O'Brien had touched, and R.M. apparently pointed to what the State described as "[t]hat oblong part" JT 2 at 13-16. The State asked R.M. to mark that part

with a star, and R.M. apparently drew a star over "that oblong part." JT 2 at 73:13-16; 20-25; Ex. 3. The picture was admitted as demonstrative exhibit 3. JT 2 at 70:12-171 Ex. 3.

On cross-examination, R.M. acknowledged that the drawing she made on exhibit 3 did not look like her body. JT 2 at 75:9-18; 76:10-16. R.M. also acknowledged that the picture might not show where O'Brien had touched her, and that she did not know whether the picture was "completely accurate." JT 2 at 76:17-22.

R.M. testified that, prior to her disclosure to her mother, she did not tell anyone that O'Brien touched her because O'Brien told her that he would hurt her or her mother and that she was afraid of his temper because he would yell. JT 2 at 30.

O'Brien made a motion for judgment of acquittal at the close of the State's case, specifically citing the lack of evidence of penetration. JT 2 at 162. The trial court denied the motion. JT 2 at 162-64

At no point during the trial did the State elect any alleged offense as the basis for any count of the indictment. Nor did O'Brien request that the trial court give the jury a unanimity instruction. The trial court did not give any such instruction. *See generally* JT 1 and JT 2; SR 143 *et. seq.*

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT O'BRIEN'S CONVICTIONS FOR RAPE IN THE SECOND DEGREE AND RAPE IN THE FOURTH DEGREE.

"A motion for judgment of acquittal under SDCL 23A-23-1 (Rule 29(a)) is the proper vehicle for a sufficiency challenge." *State v. Disanto*, 2004 S.D. 112, ¶ 14, 688 N.W.2d 201, 206. The Supreme Court reviews challenges to the sufficiency of evidence *de novo*. *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140 (citing *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764). The Court is not required to "ask itself

whether it believes that the evidence at the trial established guilty beyond a reasonable doubt." *Id.* (quoting *Plenty Horse*, 2007 S.D. 114, ¶ 5). Rather, the Court must decide whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (additional citations omitted). In order to conclude that the evidence was insufficient to convict, the Court must decide that "no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* (additional citations omitted). The Court does not substitute its judgment for the jury's in "resolving conflicts in the evidence, weighing credibility, and sorting out the truth." *Id.* (additional citations omitted).

The jury found O'Brien guilty of one count of Rape in the Second Degree and one count of Rape in the Fourth Degree. SR 192. Both counts of rape required proof beyond a reasonable doubt that sexual penetration occurred. SR 1; SDCL 22-22-1(2) and 22-22-1(5). South Dakota law defines "sexual penetration" as requiring "any intrusion, however slight, of any part of the body or of any object into the genital or anal openings of another person's body." SDCL 22-22-2. This Court has "interpreted this definition as to mean evidence of vulvar or labial penetration, however slight, is sufficient to prove penetration of the female genital opening." *State v. Toohey*, 2012 S.D. 51, ¶ 22, 816 N.W.2d 120, 129. "Penetration can be inferred from circumstantial evidence and need not be proved by medical evidence." *Id.* "In cases involving child victims, a child's limited understanding of her exact anatomical features does not negate the child's ability to provide circumstantial evidence that penetration occurred. Yet a conviction cannot be sustained on mere suspicion or possibility of guilt." *Id.* at ¶ 22, 816 N.W.2d at 130 (internal citations omitted).

The primary source of evidence offered by the State against O'Brien was the testimony of R.M. However, R.M.'s testimony did not provide either direct or circumstantial evidence that O'Brien's "touching" included penetration as defined by SDCL 22-22-2.

R. M. never testified directly that O'Brien engaged in an act of sexual penetration with her. R.M. testified that O'Brien "touched" her on her chest and on her "women's part," which she would then clarify meant where she would "go to the restroom" or "go pee." JT 2 at 23:24-24:3; 28:23-29:1; 44:6-9; 45:15; 52:16-17; 71-72. The State did attempt to elicit testimony from R.M. about penetration:

> Q: Okay. You said you don't remember necessarily what his hand was doing, but do you remember what, if any, where it went when it was on your woman parts?
>
> A: I don't quite remember.

JT 2 at 33:5-8. Despite R.M.'s answer, the State continued to try to obtain testimony about penetration by asking R.M. a series of leading questions. JT 2 at 33:9-34:10. Ultimately, R.M.'s articulated testimony only described O'Brien touching her genitalia or its vicinity, but not necessarily intruding into the labia. It did not describe an act of sexual penetration

Although a child's testimony can also provide circumstantial evidence of penetration, R.M.'s testimony was also insufficient in this respect. According to this Court, such circumstantial evidence can include whether the child testified that a defendant's touching caused pain. *Toohey,* 2012 SD 51, ¶¶ 23-25, 816 N.W.2d at 130 ("Other courts have examined similar facts.... Those courts finding insufficient proof of penetration in these circumstances emphasize the absence of any evidence other than

touching, with no experience of pain.... In contrast, where the victim experienced some pain from the genital touching, several courts have concluded that sufficient evidence of penetration was shown."). In *Toohey*, "the child victim indicated that Toohey's 'touch' was in her pudendal area, and it caused her pain." *Id.* ¶ 25, 816 N.W.2d at 131. As a result, this Court ruled that there was sufficient evidence of penetration in *Toohey*.

In the present case, R.M. never testified that she felt pain from, or was hurt by, O'Brien's touching. *See generally* JT 2 at pp. 12-99. R.M. did testify that O'Brien's touching made her "uncomfortable." JT 2 at 33:1-4; 34:14-20. However, R.M.'s testimony did not equate discomfort with pain caused by penetration. R.M. also described other touching as uncomfortable. For example, R.M. also testified that she felt "uncomfortable" when R.M. touched her chest:

Q: Could you feel the skin of his hand touching your breast?

A: Yes.

Q: How did that feel?

A: Uncomfortable.

JT 2 at 20:9-12; *see also* JT 2 at 23:9-21. Additionally, R.M. testified that she felt "really uncomfortable" when O'Brien touched her leg "[b]efore he got to the woman's part." JT 2 at 26:24-27:3. Finally, when the State asked R.M. what she meant by "uncomfortable," R.M. did not describe pain or physical discomfort:

Q: What did it feel like when his hand was down there?

A: Uncomfortable.

Q: *Okay. What does that mean?*

A: *Um, I don't know just really uncomfortable and I did not like it.*

Q: Okay. Why did not you like it?

A: Because it was very uncomfortable and wasn't right.

JT 2 at 34:13-19 (emphasis added). As a result, the circumstantial evidence of penetration considered dispositive in *Toohey*—a description of physical pain by the child victim—is absent in this case.

Other types of circumstantial evidence of penetration cited by this Court are also absent. R.M. tested negative for sexually transmitted diseases. *See e.g. State v. Carter*, 2023 S.D. 67, ¶ 71, --N.W.3d--; *Spaniol v. Young*, 2022 S.D. 61, ¶ 37, 981 N.W.2d 396, 408; *State v. Fool Bull*, 2008 S.D. 11, 15, 745 N.W.2d 380, 386. There was no evidence that O'Brien viewed or possessed child pornography. *See e.g. Carter*, 2023 S.D. 67, ¶ 71. R.M. did not use language generally considered to describe "stimulation of interior vaginal structures." *Id.* For example, the only time R.M. used the term "rub," it was in connection with O'Brien touching her breast, and not her genitalia. JT 2 at 18-19.

Demonstrative exhibit 3 and R.M.'s testimony about it did not provide direct or circumstantial evidence of penetration. R.M. drew a picture that she said represented where she "used the restroom," but her additional testimony was insufficient to establish whether she was referring to a urethral opening or just to a general area of the human body. JT 2 at 72:5. When asked if that meant she used it to "pee," R.M. repeatedly stated that she did not know. JT 2 at 72-73. R.M. also testified that exhibit 3 may not depict where she was touched after all. JT 2 at 76:17-22. R.M.'s description of the curved lines that she drew around the starred oval—"where the leg and the woman's part are connect [sic]"—indicates that she did not consider those lines to be components of "the woman's

part." JT 2 at 73:10-12. Thus, the State's insinuation during the closing argument that R.M. drew a labia or vagina was not based on R.M.'s testimony. JT 2 at 189.

To the extent that one could infer that R.M.'s testimony described O'Brien's touch intruding into the labia, R.M. recanted that testimony almost immediately by disclaiming that she remembered O'Brien touching her there or that exhibit 3 actually depicted that. As discussed *supra*, R.M. testified multiple times that she did not know if the picture that she starred on exhibit 3 was where she would "pee." Further, R.M. herself stated that her lack of knowledge did not arise from nervousness or fear from testifying. On direct examination by the State, R.M. testified as follows:

> Q: Okay. We were talking about that little circle part, oblong part right there. Is that where you pee?
>
> A: I don't know.
>
> Q: Why did you draw that part?
>
> A: I don't know. Just the human body structure, the human body.
>
> Q: But on a human body, what is that part used for?
>
> A: I don't know.
>
> Q: Hey, earlier remember, when I asked you the question about remember, I don't remember, I don't know. *Is this an I don't know or I don't want to talk about this?*
>
> A: *It's an I don't know.*

JT 2 at 72:23-73:9 (emphasis added). On cross-examination, R.M. testified that the picture she drew may not have shown where O'Brien touched her:

> Q: And would you say this drawing is exactly what your lady parts look like?
>
> A: Not quite.

Q: Okay. It's different?

A: Yes.

Q: Yours might be different?

A: Yes.

Q: And where you say Troy touched you might be different parts of it as well?

A: Yes.

Q: Okay. So you're not exactly sure that all of this is completely accurate?

A: Um, I don't know.

JT 2 at 76:10-22.

In *Brende*, the State offered the child victim's out-of-court statements at Child's Voice as substantive evidence of anal penetration by the defendant. *Brende*, 2013 S.D. 56 at ¶ 26, 835 N.W.2d at 142. However, the child victim then recanted at trial, including stating that he did not remember what he had told Child's Voice, and this Court relied on that recantation in concluding that a reasonable juror could not have found the defendant guilty beyond a reasonable doubt. *Id.* at ¶¶ 26-27, 835 N.W.2d at 142. The rationale behind this Court's conclusion in *Brende* applies to R.M.'s testimony in the present case. Even if R.M.'s testimony that exhibit 3 depicted the "woman's part" where a woman "used the restroom" is interpreted as a specific reference to an area within the labia, her subsequent testimony that she did not know if that was what it was for, or whether that was where O'Brien touched her, constitutes a recantation that would prevent a reasonable juror from finding that penetration occurred beyond a reasonable doubt.

Based upon the lack of direct or circumstantial testimony that O'Brien's "inappropriate touching" resulted in penetration, the jury's verdict on counts one and two could only "be sustained on mere suspicion or possibility of guilt," and should be reversed. *Toohey*, 2012 S.D. 51, ¶ 22, 816 N.W.2d at 13

II. O'BRIEN'S DUE PROCESS RIGHT TO JURY UNANIMITY WAS VIOLATED AS TO COUNTS ONE AND TWO BY DUPLICITY IN THE INDICTMENT.

O'Brien did not raise this issue before the trial court, or request a unanimity instruction, and therefore asks this Court to review the State's failure to elect a single offense for the counts in the indictment or the trial court's failure to give a unanimity instruction for plain error:

> We invoke our discretion under the plain error rule cautiously and only in exceptional circumstances. To demonstrate plain error, the appellant must establish that there was: (1) error, (2) that is plain, (3) affecting substantial rights; and only then may we exercise our discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

State v. Olvera, 2012 S.D. 84, ¶ 9, 824 N.W.2d 112, 115. This case is distinguishable from *Brende*, in which this Court declined to review a similar issue under the plain error doctrine on the grounds that, in *Brende*, "the jury was ultimately informed of the unanimity requirement" and "the State discussed the unanimity requirement with the jury after expressly identifying the four acts that corresponded with the four charges." *Brende*, 2013 S.D. 56, ¶19, 835 N.W.2d at 140. There was no such effort in the present case. As a result, it was error for the jury to be allowed to deliberate without the necessary election or instruction; this error is obvious; the error affected O'Brien's substantial right to a unanimous verdict; and the error affected the fairness and integrity of the proceedings.

This Court reviews *de novo* whether an indictment is duplicitous. *State v. Muhm*, 2009 SD 100, ¶ 18, 775 N.W.2d 508, 514. O'Brien respectfully asserts that the

indictment in the present case was duplicitous, thereby denying him his right to a unanimous jury verdict. "'Duplicity is the joining in a single count of two or more distinct and separate offenses.... [A] duplicitous indictment or information includes a single count that captures multiple offenses[.]" *Id.* at ¶ 19 (citations omitted).

The South Dakota Constitution guarantees a unanimous jury verdict to each defendant in a criminal case. S.D. Const. art. 6, § 6; SDCL 23A-26-1; *State v. Keeble,* 207 N.W. 456 (S.D. 1926). However, duplicity in an indictment violates this guarantee:

> Another vice of duplicity is that because the jury has multiple offenses to consider under a single count, the jury may convict without reaching a unanimous agreement on the same act, thereby implicating the defendant's right to jury unanimity. In some situations, a general verdict may not reveal whether the jury unanimously found the defendant guilty of one offense or more offenses, or guilty of one offense and not guilty of others.
>
> This concern is of even more significance in cases [in which the defendant] was charged with "single act' offenses. In such cases, the due process right to jury unanimity requires that the jury be unanimous as to the single act or acts that are the basis for the verdict. In other words, even though due process may not require time specificity in charging such cases, the jury must have been in agreement as to a single occurrence or the multiple occurrences underlying each count. And, for single act offenses, jury unanimity is not achieved if some of the jurors believed the crime occurred on one occasion during the timeframe and others believed that the crime occurred on a different occasion.

Id. at ¶¶ 29-30, 775 N.W.2d at 517-18 (citations omitted). The charges on which O'Brien was found guilty are single act offenses, and the concern of a duplicitous indictment in this case is therefore "of even more significance." *Id.* at ¶ 30 n.5, 775 N.W.2d at 517 n.5.

In order to prevent the harm of a duplicitous indictment, this Court has adopted the "either or" rule:

> The rule does not require dismissal of a duplicitous indictment. Rather, the government must elect a single offense on which it plans to rely, and as long as the evidence at trial is limited to only one of the offenses in the duplicitous count, the defendant's challenge will fail. Alternatively, if there is no election the trial

> court should instruct the jury it must find unanimously that the defendant was guilty with respect to at least one of the charges in the duplicitous count.

Id. at ¶ 32, 775 N.W.2d at 518-19. "Therefore, '[w]here the prosecution declines to make an election on a duplicitous count and the evidence indicates the jurors might disagree as to the particular act defendant committed, *a standard unanimity instruction should be given.*" *Brende*, 2013 S.D. 56, ¶14, 835 N.W.2d at 138 (emphasis added).

If the "either or" rule is violated, this Court then determines whether the error was harmless: "harmless error applies in cases when the trial court fails 'either to select specific offenses or give a unanimity instruction' if 'the record indicate[s] the jury resolved the basic credibility dispute against defendant and would have convicted the defendant of any of the various offenses shown by the evidence to have been committed." *Muhm*, 2009 S.D. 100, ¶ 34, 775 N.W.2d at 520 (quoting *People v. Jones*, 51 Cal.3d 294, 307 (1990). In the present case, the State did not elect a single incident as described by R.M. for any count in the indictment, nor did the trial court give a unanimity instruction. *See generally* JT 1 and JT 2. South Dakota does have a standard unanimity instruction:

> The State has presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the State has proved that the defendant committed at least one of these acts and you all agree on which act [he][she] committed.

S.D. Pattern Jury Instructions – Criminal 1-19-7 (2019).

According to this Court's previous directives, a unanimity instruction should have been given in the present case because R.M. described multiple discrete instances of "inappropriate touching" on which the jury may have been divided:

> In determining when to give the unanimity instruction, trial courts "must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of

> a single discrete crime. In the first situation, but not the second, [the court] should give the unanimity instruction.".

State v. White Face, 2014 SD 85 ¶ 23; 857 NW2d 387 (*quoting People v. Russo*, 25 Cal. 4th 1124, 1135 (2001)). This case falls squarely into the first category described in *White Face*. The State, through R.M. presented testimony about a number of incidents that could support each count, without specifying which count to which each incident corresponded.[6] First, R.M. described an incident in O'Brien's and L.M.'s bedroom, in which she alleged that O'Brien touched her breast and "woman's part." JT 2 at 14-33. Then, R.M. testified about multiple incidents in her bedroom but did not specify how frequently they occurred. JT 2 at 39:10-12; 44-45. R.M. also testified about an unclear number of occasions when O'Brien touched her inappropriately in the living room at the house on John. JT 2 at 48-53. Finally, at various times, R.M. alluded to inappropriate touching at homes she had lived at before the house on John, which would have been outside the timeframe alleged in the indictment. JT 2 at 45-47.

With respect to counts one and two of the indictment, it is unclear which incident the jury could have unanimously relied upon to return a verdict of guilty. As discussed, *supra*, there was no clear evidence that any of the inappropriate touching during any of the incidents described by R.M. included sexual penetration. R.M.'s testimony after the recess during her direct examination, in which the State attempted to use demonstrative exhibit 3 to elicit clearer evidence of penetration, did not relate to any specific incident; and R.M. did not testify that the behavior briefly described during that particular colloquy (JT 2 at 73:13-22) was universal across all of the incidents she'd previously described. JT

[6] O'Brien does not concede that the evidence presented was sufficient to convict him of any specific count.

2 at 67-74. There is a risk that the jurors could have divided between concluding that the penetration necessary to convict O'Brien on counts one and two occurred in L.M. and O'Brien's bedroom, R.M.'s bedroom, the living room, or in one of the homes they lived in before the one on John. The broad language of the indictment and the jury instructions "allowed each individual juror to determine which incident he or she would consider in finding [O'Brien] guilty." *State v. Celis-Garcia,* 344 S.W.3d 150, 156 (Mo. 2011) (en banc).

This error was not harmless, because, as discussed *supra.*, even if one reads R.M.'s testimony as providing evidence of multiple specific instances of inappropriate touching, none of those incidents includes persuasive direct or circumstantial evidence of penetration. Therefore, it is not clearly indicated from the record that, if a unanimity instruction had been given or the State had made the proper election, the jury would have unanimously convicted O'Brien of any of the "various offenses" alleged by R.M. in her testimony. *Muhm*, 2009 S.D. 100, ¶ 34, 775 N.W.2d at 520.

CONCLUSION

Even viewing the evidence in the light most favorable to the State, the evidence submitted to the jury was insufficient for a rational trier of fact to have found beyond a reasonable doubt that penetration, as defined by SDCL 22-22-2, occurred on any occasion. Additionally, there was plain error depriving O'Brien of his right to a unanimous verdict and therefore affecting the fairness of the proceedings, in that the State did not make the proper election of what offense it relied upon for counts one and two of the indictment; and because the Court failed to give a required unanimity instruction to the jury. For the reasons discussed *supra*, and based upon the authorities cited and the settled record, O'Brien

respectfully urges this Court to enter an Order remanding this case to the trial court and directing the trial court to reverse the Judgment and Sentence on counts one and two.

REQUEST FOR ORAL ARGUMENT

Undersigned counsel for Appellant Troy A. O'Brien respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 12th day of February, 2024.

BY _____

John R. Hinrichs
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CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). The undersigned certifies that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief is 25 pages long, including the cover sheet, Table of Contents, and Table of Authorities, and contains 5823 words and 28,114 characters, no spaces, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word word processing software used to prepare this brief at font size 12, Times New Roman, and left justified.

Dated this 12th day of February, 2024.

John R. Hinrichs
John R. Hinrichs

CERTIFICATE OF SERVICE AND MAILING

The undersigned hereby certifies that a true and correct copy of this document and the attached appendix was served via the Unified Judicial System's Odyssey e-filing system and first-class mail upon:

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The undersigned further certifies that this document and the attached appendix was filed with the South Dakota Supreme Court via the Unified Judicial System's Odyssey e-filing system, emailed to SCClerkBriefs@ujs.state.sd.us, and by mailing the original via first class mail to:

Ms. Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol Ave.
Pierre, SD 57501-5070

Dated this 12th day of February, 2024

John R. Hinrichs
John R. Hinrichs

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30429

STATE OF SOUTH DAKOTA

APPELLEE,

VS.

TROY O'BRIEN,

APPELLANT

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

THE HONORABLE JOHN R. PEKAS
CIRCUIT COURT JUDGE

APPENDIX TO APPELLANT'S BRIEF

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Attorneys for Appellee

Notice of Appeal filed on August 11, 2023.

CONTENTS

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

:ss

COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

State of South Dakota,

Plaintiff,

vs.

Troy A. Obrien,

Defendant.

CRI. 22- 59

Indictment for

Ct. 1: Rape, Second Degree, SDCL 22-22-1(2)
Ct. 2: Rape, Fourth Degree, SDCL 22-22-1(5)
Ct. 3: Sexual Contact with a Child Under the Age of Sixteen, SDCL 22-22-7
Ct. 4: Sexual Contact with a Child Under the Age of Sixteen, SDCL 22-22-7
Ct. 5: Sexual Contact with a Child Under the Age of Sixteen, SDCL 22-22-7
Ct. 6: Sexual Contact with a Child Under the Age of Sixteen, SDCL 22-22-7
Ct. 7: Sexual Exploitation of a Minor, SDCL 22-22-24.3(1)
Ct. 8: Sexual Exploitation of a Minor, SDCL 22-22-24.3(2)
Ct. 9: Sexual Exploitation of a Minor, SDCL 22-22-24.3(3)

THE LINCOLN COUNTY GRAND JURY CHARGES:

That on or between the 24th day of August, 2019, and the 29th day of October, 2021, in the County of Lincoln, State of South Dakota, Troy A. Obrien, did commit the public offense of:

Count 1.

RAPE, SECOND DEGREE (SDCL 22-22-1(2)) in that he did accomplish an act of sexual penetration with any person through the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution, to-wit: Troy A. Obrien did accomplish an act of sexual penetration with R. M. (DOB: 08-24-06) through the use of force, coercion, or threats of immediate and great bodily harm to R. M. (DOB: 08-24-06), accompanied by apparent power of execution, in violation of SDCL 22-22-1(2), (Cl. 1 felony);

Count 2.

RAPE, FOURTH DEGREE (SDCL 22-22-1(5)) in that he did accomplish an act of sexual penetration with any person who is at least thirteen years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim, to-wit: Troy A. Obrien (DOB: 08-10-69), did accomplish an act of sexual penetration with R. M. (DOB: 08-24-06) who is at least thirteen years of age, but less than sixteen years of age, in violation of SDCL 22-22-1(5), (Cl. 3 felony);

Count 3.

SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (SDCL 22-22-7) in that he did, being sixteen years of age or older, knowingly engage in sexual contact with another person, other than his spouse, when such other person was under the age of sixteen years, to-wit: Troy A. Obrien (DOB: 08-10-69), did knowingly engage in sexual contact with R. M. (DOB: 08-24-06), who was under the age of sixteen and not his spouse, in violation of SDCL 22-22-7, (Cl. 3 felony);

Count 4.

SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (SDCL 22-22-7) in that he did, being sixteen years of age or older, knowingly engage in sexual contact with another person, other than his spouse, when such other person was under the age of sixteen years, to-wit: Troy A. Obrien (DOB: 08-10-69), did knowingly engage in sexual contact with R. M. (DOB: 08-24-06), who was under the age of sixteen and not his spouse, in violation of SDCL 22-22-7, (Cl. 3 felony);

Count 5.

SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (SDCL 22-22-7) in that he did, being sixteen years of age or older, knowingly engage in sexual contact with another person, other than his spouse, when such other person was under the age of sixteen years, to-wit: Troy A. Obrien (DOB: 08-10-69), did knowingly engage in sexual contact with R. M. (DOB: 08-24-06), who was under the age of sixteen and not his spouse, in violation of SDCL 22-22-7, (Cl. 3 felony);

Count 6.

SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN (SDCL 22-22-7) in that he did, being sixteen years of age or older, knowingly engage in sexual contact

with another person, other than his spouse, when such other person was under the age of sixteen years, to-wit: Troy A. Obrien (DOB: 08-10-69), did knowingly engage in sexual contact with R. M. (DOB: 08-24-06), who was under the age of sixteen and not his spouse, in violation of SDCL 22-22-7, (Cl. 3 felony);

Count 7.

SEXUAL EXPLOITATION OF A MINOR (SDCL 22-22-24.3(1)) in that he did cause or knowingly permit a minor to engage in an activity or the simulation of an activity that is harmful to minors, to-wit: Troy A. Obrien did cause or knowingly permit minor R. M. (DOB: 08-24-06) to engage in an activity or in the simulation of an activity that is harmful to minors, in violation of SDCL 22-22-24.3(1), (Cl. 6 felony);

Or, in the alternative,

Count 8.

SEXUAL EXPLOITATION OF A MINOR (SDCL 22-22-24.3(2)) in that he did cause or knowingly permit a minor to engage in an activity or the simulation of an activity that involves nudity, to-wit: Troy A. Obrien did cause or knowingly permit minor R. M. (DOB: 08-24-06) to engage in an activity or in the simulation of an activity that involves nudity, in violation of SDCL 22-22-24.3(2), (Cl. 6 felony);

Or, in the alternative,

Count 9.

SEXUAL EXPLOITATION OF A MINOR (SDCL 22-22-24.3(3)) in that he did cause or knowingly permit a minor to engage in an activity or the simulation of an activity that is obscene, to-wit: Troy A. Obrien did cause or knowingly permit minor R. M. (DOB: 08-24-06) to engage in an activity or in the simulation of an activity that is obscene, in violation of SDCL 22-22-24.3(3), (Cl. 6 felony);

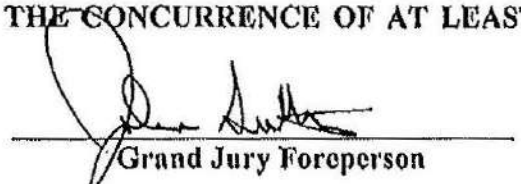
contrary to the statute in such case, made and provided against the peace and dignity of the State of South Dakota.

Dated this 19 day of January, 2022.

A True Bill

"A True Bill"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX (6) GRAND JURORS.



Grand Jury Foreperson

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARD TO THIS INDICTMENT: R. M. (DOB: 08-24-06); Lori J. Marvel

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

State of South Dakota, CRI. 22- 59

Plaintiff,

vs.

Part II Information For
Habitual Criminal
SDCL 22-7-7

Troy A. Obrien
DOB: 08/10/1969,

Defendant.

Amanda D. Eden, as prosecuting attorney, in the name of and by the authority of the State of South Dakota, upon her oath, informs this Court:

That TROY A. OBRIEN, is a Habitual Offender, as defined by SDCL 22-7-7, in that he has been convicted of a felony on one or more prior occasions as follows:

Child Abuse, in the County of Lincoln, State of South Dakota, disposed of on the 19th day of September, 2003;

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

Dated this 19th day of January, 2022.

Prosecuting Attorney

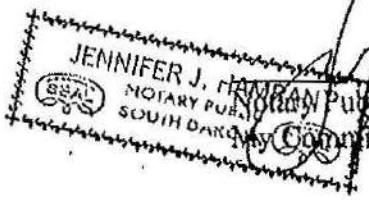
FILED
JAN 19 2022
Lincoln County, S.D.
Clerk Circuit Court

State of South Dakota)
:ss
County of Lincoln)

Amanda D. Eden, being first duly sworn, states that she is the prosecuting attorney for the above matter, that she has read the foregoing Information and the same is true to her own best knowledge, information and belief.

Prosecuting Attorney

Subscribed and sworn to before me this 19th day of January, 2022.

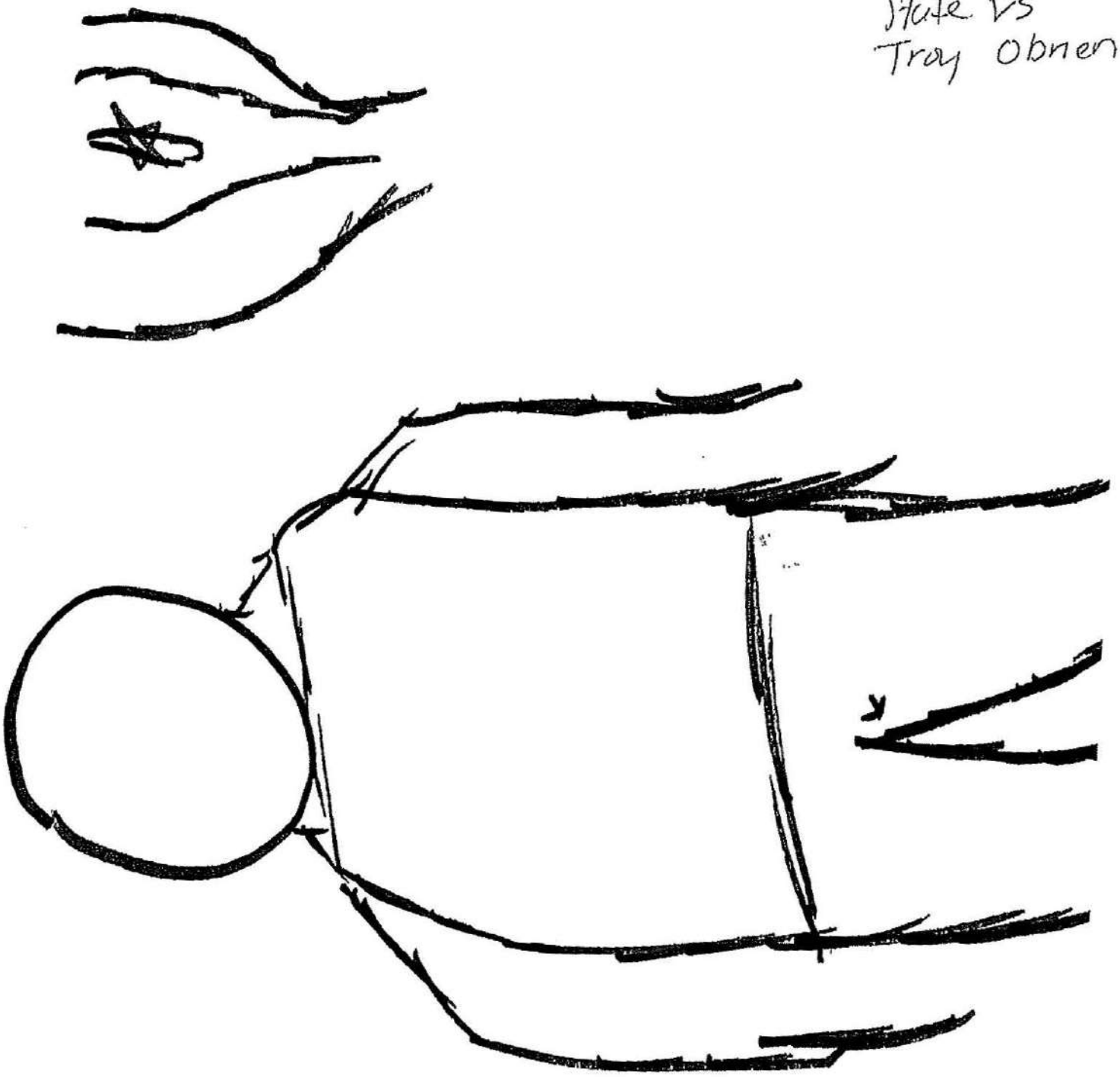


Notary Public - South Dakota
My Commission Expires: 2-13-2028

WITNESSES KNOWN TO THE PROSECUTING ATTORNEY AT THE TIME OF THE FILING OF THIS INFORMATION: Lincoln County (SD) Clerk of Courts; Fingerprint Examiner

WITNESSES WHO BECAME KNOWN TO THE PROSECUTING ATTORNEY AFTER THE FILING OF THE INFORMATION AND ENDORSED WITH THE PERMISSION OF THE COURT:

CR 1 CC 07
State vs
Tray Obrien



FILED
DEC 07 2022
Lincoln County, S.D.
Clerk Circuit Court

EXHIBIT
3
PENDING 000-631-6989

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

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

TROY A. OBRIEN,

Defendant.

CR. 22-59

JURY VERDICT

As to Count 1 of the Indictment, Rape in the Second Degree, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

As to Count 2 of the Indictment, Rape in the Fourth Degree, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

As to Count 3 of the Indictment, Sexual Contact with a Child Under the Age of Sixteen, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

As to Count 4 of the Indictment, Sexual Contact with a Child Under the Age of Sixteen, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

FILED
DEC 07 2022
Lincoln County, S.D.
Clerk Circuit Court

As to Count 5 of the Indictment, Sexual Contact with a Child Under the Age of Sixteen, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

As to Count 6 of the Indictment, Sexual Contact with a Child Under the Age of Sixteen, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

As to Count 7 of the Indictment, Sexual Exploitation of a Minor, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

As to Count 8 of the Indictment, Sexual Exploitation of a Minor, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

As to Count 9 of the Indictment, Sexual Exploitation of a Minor, we, the Jury, duly impaneled in the above entitled case, find the Defendant Troy A. Obrien:

NOT GUILTY

GUILTY

PLEASE CIRCLE ONE

Signed this 7th day of December, 2022.

Foreperson

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

:ss

COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

State of South Dakota, CRI. 22-59

Plaintiff,

vs. Judgment and Sentence

Troy A. Obrien,

Defendant.

An Indictment was filed with the Court on the 19th day of January, 2022, charging the Defendant with Count 1: Rape, Second Degree, a class 1 Felony, SDCL 22-22-1(2); Count 2: Rape, Fourth Degree, a class 3 Felony, SDCL 22-22-1(5); Count 3: Sexual Contact With A Child Under The Age Of Sixteen, a class 3 Felony, SDCL 22-22-7; Count 4: Sexual Contact With A Child Under The Age Of Sixteen, a class 3 Felony, SDCL 22-22-7; Count 5: Sexual Contact With A Child Under The Age Of Sixteen, a class 3 Felony, SDCL 22-22-7; Count 6: Sexual Contact With A Child Under The Age Of Sixteen, a class 3 Felony, SDCL 22-22-7; Count 7: Sexual Exploitation Of A Minor, a class 6 Felony, SDCL 22-22-24.3(1); Or, in the alternative, Count 8: Sexual Exploitation Of A Minor, a class 6 Felony, SDCL 22-22-24.3(2); Or, in the alternative, Count 9: Sexual Exploitation Of A Minor, a class 6 Felony. SDCL 22-22-24.3(3). A Part II Information for Habitual Criminal was also filed pursuant to SDCL 22-7-7.

The Defendant appeared for arraignment on the 7th day of February, 2022, Pro Se, and the State was represented by prosecuting attorney Thomas R. Wollman. A plea of not guilty was entered and the matter was scheduled for further hearing.

On the 6th and 7th days of December, 2022, the Defendant returned before the Court with Koln Fink, and the State was represented by Amanda D. Eden. A jury trial was held.

On the 7th day of December, 2023, the Defendant was found GUILTY to the charge that on or between the 24th day of August, 2019 and the 29th day of October, 2021, in the County of Lincoln, State of South Dakota, Troy A. Obrien did commit the public offense of:

Ct. 1: Rape, Second Degree, SDCL 22-22-1(2).

Ct. 2: Rape, Fourth Degree, SDCL 22-22-1(5).

Ct. 3: Sexual Contact With A Child Under The Age Of Sixteen, SDCL 22-22-7.

Ct. 4: Sexual Contact With A Child Under The Age Of Sixteen, SDCL 22-22-7.

Ct. 5: Sexual Contact With A Child Under The Age Of Sixteen, SDCL 22-22-7.

Ct. 6: Sexual Contact With A Child Under The Age Of Sixteen, SDCL 22-22-7.

Ct. 7: Sexual Exploitation Of A Minor, SDCL 22-22-24.3(1).

Ct. 8: Sexual Exploitation Of A Minor, SDCL 22-22-24.3(2).

Ct. 9: Sexual Exploitation Of A Minor, SDCL 22-22-24.3(3).

On the 13th day of January, 2023, the Defendant returned before the Court with attorney Koln Fink and the State was represented by prosecuting attorney Ryan D. Wiese. The Defendant entered an admission to the Part II Information for Habitual Criminal filed pursuant to SDCL 22-7-7.

SENTENCE

On the 7th day of June, 2023, the Defendant returned to court with attorney Koln Fink, and the State was represented by prosecuting attorney Amanda D. Eden and the Defendant was sentenced. The Court asked the Defendant if any cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court pronounced the following sentence.

CT. 1: RAPE, SECOND DEGREE, SDCL 22-22-1(2)

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Troy A. Obrien, shall be imprisoned in the South Dakota State Penitentiary for a period of 50 years, and the following:

(1) The Defendant shall pay $116.50 in court costs, transcript fees in the amount of $112.20, $2,342.38 in trial witness fees and reimburse Lincoln County $8,806.10 in attorney fees. Said monies shall be repaid on a payment schedule established by parole services.

(2) The Defendant shall receive credit for 489 days previously served.

(3) The Defendant is remanded immediately to the Lincoln County Sheriff to begin his sentence.

(4) The Defendant shall complete recommendations 1-9 of the psychosexual evaluation completed by Dr. Kauffman on April 27, 2023.

(5) The Defendant shall register as a sex offender pursuant to SDCL 22-24B-1, 22-24B-2.

(6) The Defendant shall have no contact with R.M. (DOB: 8/24/2006).

CT. 2: RAPE, FOURTH DEGREE, SDCL 22-22-1(5)

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Troy A. Obrien, shall be imprisoned in the South Dakota State Penitentiary for a period of 25 years, upon the following conditions:

(1) The Defendant shall pay $116.50 in court costs.

(2) The Defendant shall register as a sex offender pursuant to SDCL 22-24B-1, 22-24B-2.

IT IS FURTHER ORDERED, that the terms and conditions of this matter shall run concurrent to counts 1, 3, 4, 5, 6 and 7.

CT. 3: SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN, SDCL 22-22-7

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Troy A. Obrien, shall be imprisoned in the South Dakota State Penitentiary for a period of 25 years, upon the following conditions:

(1) The Defendant shall pay $116.50 in court costs.

(2) The Defendant shall register as a sex offender pursuant to SDCL 22-24B-1, 22-24B-2.

IT IS FURTHER ORDERED, that the terms and conditions of this matter shall run concurrent to counts 1, 2, 4, 5, 6 and 7.

CT. 4: SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN, SDCL 22-22-7

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Troy A. Obrien, shall be imprisoned in the South Dakota State Penitentiary for a period of 25 years, upon the following conditions:

(1) The Defendant shall pay $116.50 in court costs.

(2) The Defendant shall register as a sex offender pursuant to SDCL 22-24B-1, 22-24B-2.

IT IS FURTHER ORDERED, that the terms and conditions of this matter shall run concurrent to counts 1, 2, 3, 5, 6 and 7.

CT. 5: SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN, SDCL 22-22-7

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Troy A. Obrien, shall be imprisoned in the South Dakota State Penitentiary for a period of 25 years, upon the following conditions:

(1) The Defendant shall pay $116.50 in court costs.

(2) The Defendant shall register as a sex offender pursuant to SDCL 22-24B-1, 22-24B-2.

IT IS FURTHER ORDERED, that the terms and conditions of this matter shall run concurrent to counts 1, 2, 3, 4, 6 and 7.

CT. 6: SEXUAL CONTACT WITH A CHILD UNDER THE AGE OF SIXTEEN, SDCL 22-22-7

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Troy A. Obrien, shall be imprisoned in the South Dakota State Penitentiary for a period of 25 years, upon the following conditions:

(1) The Defendant shall pay $116.50 in court costs.

(2) The Defendant shall register as a sex offender pursuant to SDCL 22-24B-1, 22-24B-2.

IT IS FURTHER ORDERED, that the terms and conditions of this matter shall run concurrent to counts 1, 2, 3, 4, 5, and 7.

CT. 7: SEXUAL EXPLOITATION OF A MINOR, SDCL 22-22-24.3(1)

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Troy A. Obrien, shall be imprisoned in the South Dakota State Penitentiary for a period of 5 years, upon the following conditions:

(1) The Defendant shall pay $116.50 in court costs.

(2) The Defendant shall register as a sex offender pursuant to SDCL 22-24B-1, 22-24B-2.

IT IS FURTHER ORDERED, that the terms and conditions of this matter shall run concurrent to counts 1, 2, 3, 4, 5, and 6.

BY THE COURT:

Attest:
Wiberg, Paula
Clerk/Deputy

John Pekas - Circuit Court Judge

7/14/2023 3:06:31 PM

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30429

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TROY ALLEN OBRIEN,

Defendant and Appellant.

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

THE HONORABLE JOHN PEKAS
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed August 11, 2023

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30429

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

TROY ALLEN OBRIEN,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Troy Allen Obrien, is referred to as "Defendant." The victim is referred to by her initials, "R.M." R.M.'s mother is referred to by her initials, "L.M." The settled record in the underlying case is denoted as "SR." Trial exhibits are referenced as "Ex" followed by the exhibit number. Defendant's Brief is denoted as "DB." All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On July 14, 2023, the Honorable John Pekas, Circuit Court Judge, Second Judicial Circuit, entered a Judgment of Conviction in *State of South Dakota v. Troy Allen Obrien*, Lincoln County Criminal File Number 41CRI22-000059. SR:279-82. Defendant filed his Notice of Appeal on

August 11, 2023. SR:290. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER SUFFICIENT EVIDENCE ESTABLISHED THE SEXUAL PENETRATION ELEMENTS OF COUNTS 1 AND 2 TO SUSTAIN DEFENDANT'S CONVICTIONS?

The circuit court denied Defendant's motion for judgment of acquittal, finding the State presented sufficient evidence for the jury to convict Defendant.

State v. Carter, 2023 S.D. 67, 1 N.W.3d 674

State v. Hernandez, 2016 S.D. 5, 874 N.W.2d 493

SDCL 22-22-1(2)

SDCL 22-22-1(5)

SDCL 22-22-2

II.

WHETHER THE CIRCUIT COURT COMMITTED PLAIN ERROR BY FAILING TO GIVE A UNANIMITY INSTRUCTION AS TO COUNTS 1 AND 2?

The circuit court did not rule on this issue.

State v. Babcock, 2020 S.D. 71, 952 N.W.2d 750

State v. Carter, 2023 S.D. 67, 1 N.W.3d 674

State v. Manning, 2023 S.D. 7, 985 N.W.2d 743

State v. Muhm, 2009 S.D. 100, 775 N.W.2d 508

STATEMENT OF THE CASE

On January 19, 2022, in *State of South Dakota v. Troy Allen Obrien*, Lincoln County Criminal File Number 41CRI22-000059, a grand jury issued an Indictment charging Defendant with nine counts. SR:1-3. Count 1 charged Second Degree Rape in violation of SDCL 22-22-1(2), a Class 1 felony. SR:1. Count 2 charged Fourth Degree Rape in violation of SDCL 22-22-1(5), a Class 3 felony. SR:2. Counts 3 through 6 charged Sexual Contact with a Child Under the Age of Sixteen in violation of SDCL 22-22-7, a Class 3 felony. SR:2-3. Counts 7 through 9 charged alternative counts of Sexual Exploitation of a Minor in violation of SDCL 22-22-24.3(1), (2), or (3), a Class 6 felony. SR:3. The victim in each of the counts was R.M., (DOB 08-24-06), making her thirteen, fourteen, and fifteen years old during the dates charged in the indictment. *See* SR:1-3. The State filed a Part II Information pursuant to SDCL 22-7-7 alleging one prior felony—a Child Abuse conviction disposed of on February 19, 2003, arising out of South Dakota. SR:5.

The case proceeded to a two-day jury trial beginning on December 6, 2022, before the Honorable John Pekas, Circuit Court Judge, Second Judicial Circuit. SR:358. At the end of the State's case, Defendant unsuccessfully moved for judgment of acquittal. SR:779-82. Before closing arguments, the parties settled jury instructions. SR:782-801; *see* SR:142-78 (Final Jury Instructions). After closing arguments, the case

was given to the jury. SR:832. Later that day, the jury found Defendant guilty of all counts. SR:832-35.

On January 13, 2023, Defendant admitted to the Part II Information. SR:328. On June 7, 2023, the circuit court sentenced Defendant to fifty years in the South Dakota Penitentiary for Count 1, twenty-five years for Counts 2 through 6, and five years for Count 7, with all sentences to run concurrently. SR:279-82. The circuit court did not impose a sentence for Counts 8 and 9. SR:279-82, 353. Defendant appealed. SR:290.

STATEMENT OF FACTS

Between August 24, 2019, and October 29, 2021, in Lincoln County, South Dakota, Defendant raped, engaged in sexual contact, and sexually exploited R.M.—a girl who viewed Defendant as a father figure. SR:192-93, 561. R.M. was between the ages of thirteen and fifteen during this timeframe. *See* SR:621. While the location where the crimes occurred varied, how Defendant touched R.M. did not. SR:770-71.

Five witnesses testified at trial. SR:482, 619. Brianna Staton, a forensic interviewer at Child's Voice, testified about her training and experience with children who disclose sexual abuse. SR:502-08. Staton testified that she has conducted approximately 2,400 forensic interviews where she gathered medical history from children for medical providers to provide diagnosis and treatment. SR:506. She testified how delayed disclosure of sexual abuse is not uncommon. SR:511. She explained

how children may not disclose abuse or only partially disclose if they do not feel safe, believed, or supported in that disclosure. SR:511. Under these circumstances, a disclosure may stop and may never continue. SR:511. Staton testified that she would not expect a fifteen-year-old child to fully disclose an entire account of an event at one time. SR:512.

Staton testified about how children may struggle testifying in court. SR:516-20. She explained that children may be scared to talk in front of groups of people or they may be embarrassed or ashamed about the topic. SR:516. Children may also struggle testifying when they see the abuser. SR:516. Further, in response to questions, children may frequently state, "I don't remember" either because they do not remember, or the topic is hard to talk about. SR:520.

L.M., the mother of R.M., testified at trial regarding her relationship with Defendant and Defendant's relationship with R.M. SR:556-73. L.M. testified that she dated Defendant for ten years when she lived in the Sioux Falls, South Dakota, area. SR:558. The couple started dating when R.M. was about five or six years old. SR:558. Defendant, L.M., and R.M. lived together throughout most of the couple's ten-year relationship. SR:558. They lived in multiple houses, but when R.M. disclosed the abuse, they had lived in the current house in Lincoln County for over two years. SR:566-68. During the ten-year relationship, Defendant was often alone with R.M. SR:561. R.M. looked up to Defendant as a father and loved him. SR:561.

L.M. testified that in October 2021, she heard R.M. crying. SR:563, 590. When L.M. asked R.M. why she was crying, R.M. stated that Defendant inappropriately touched her.[1] SR:564. L.M. immediately moved out of the house with R.M. SR:565, 577. On November 1, 2021, L.M. brought R.M. to Child's Voice for a forensic interview. SR:573, 590.

R.M. testified at trial. SR:621. R.M. explained that testifying was difficult for her, and she did not like it. SR:628, 694. She testified that she has had anxiety for years,[2] being in big groups makes her nervous, and speaking in front of people makes her nervous. SR:628. She stated that she was nervous testifying. SR:628.

R.M. testified that Defendant abused her not only at the house she most recently lived in with him at, but at every house she lived in with him. SR:630, 655, 662-64, 671-72. R.M. identified the different houses in the Sioux Falls area by the street the house was located on—Cambell, John, Willow, and Duluth. SR:662. R.M. referred to the most recent house as the John house. SR:623.

In the John house, R.M. testified that Defendant touched her in four rooms—the living room, R.M.'s bedroom, L.M. and Defendant's bedroom, and the basement family room. SR:631. R.M. testified about

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[1] R.M. testified that she delayed reporting the abuse because she was scared that Defendant would hurt her or her mom. SR:647-49. She testified that Defendant had a temper and liked to yell, which made her want to hide under her bed. SR:647-48. She also testified that Defendant told her not to tell anyone he was touching her. SR:649.
[2] L.M. also testified that R.M. experienced anxiety. SR:570-71.

the most recent incident that occurred in L.M. and Defendant's bedroom. SR:632. R.M. testified that she was sleeping on the bed when Defendant came into the bedroom from the living room and laid on the bed. SR:631-33. R.M. testified that Defendant touched her "chest and the woman's part" with his hand. SR:634-35. R.M. stated that she used the word chest to mean her breast because using the word "breast" made her uncomfortable.[3] SR:635. She described how Defendant would rub her chest "all over" both over her clothing and underneath her bra. SR:636-37. R.M. testified that she tried to get away from Defendant, but he pulled her back towards him. SR:638, 644.

R.M. testified that Defendant's hands then went to "the woman's part." SR:640. R.M. testified that "the woman's part" meant "where we go to the restroom," specifically "where you go pee." SR:641. R.M. described how Defendant placed his hand under her clothing and she could feel his fingers on her "woman's part," SR:643, the "part where you go pee." SR:646. She testified that it was "[r]eally uncomfortable" and "very uncomfortable" when Defendant touched her "woman part." SR:650-51. R.M. testified that Defendant took off his clothing and she saw his penis. SR:653-64.

R.M. also testified about Defendant touching her in her basement bedroom. SR:655. The abuse in her bedroom happened more than one

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[3] The State asked R.M. multiple times to stand for the jury and point to different areas of her body. *See* SR:635, 641-42, 660-61, 668, 674.

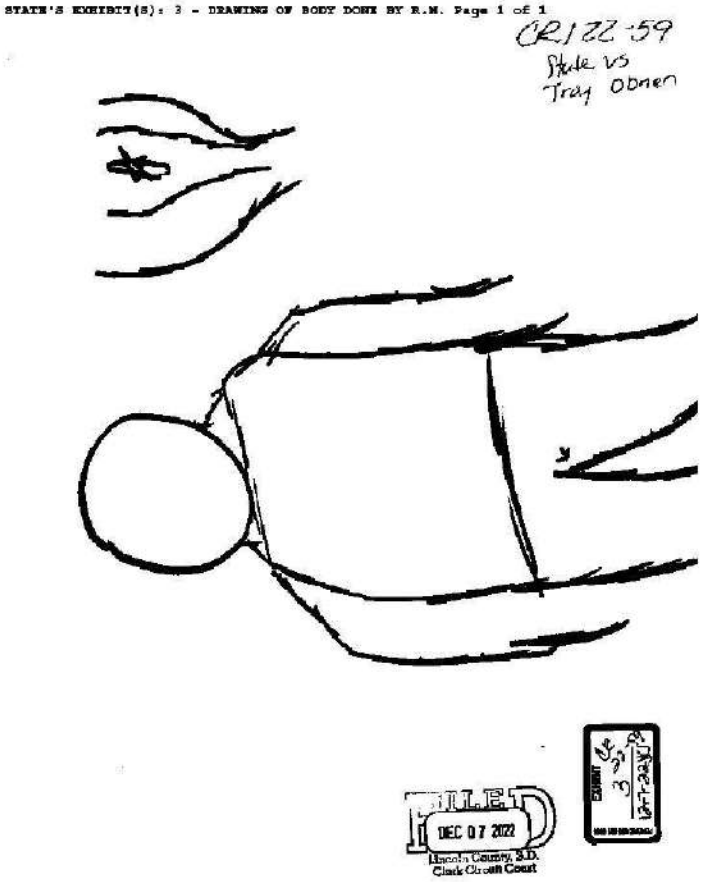
time, where Defendant would touch her chest and "woman's part." SR:655. R.M. described two incidents in her bedroom—one where she did not have any clothes on and one where her clothes were on. SR:657. R.M. described how the abuse would begin with her laying down on her twin-sized bed. SR:655. As to the abuse with R.M.'s clothes on, R.M. described the abuse like the others that occurred in L.M. and Defendant's bedroom. SR:657-60. Defendant would put his hand under her bra, touch her breast, put his hand under her underwear, and touch the "woman's part" where the "woman goes to the restroom." SR:657-60. R.M. could feel Defendant's fingers going to the "woman's part" where she goes pee. SR:661. R.M. tried to get away, but Defendant held her against him. SR:658-59. R.M. also testified to a second abuse in the bedroom where Defendant took her clothing off. SR:661.

R.M. described abuse in the living room. SR:664-65. The abuse occurred on an L-shaped couch more than one time. SR:664-65. R.M. described how Defendant would play video games in the living room and R.M. would watch him play. SR:666. Defendant would then turn off his game and touch her like in the bedrooms. SR:666-69. R.M. saw Defendant's penis during the abuse and Defendant would touch his penis with his hand. SR:670-71.

During trial, the State asked R.M. to draw her "woman's parts." SR:685. R.M. complied, described her drawing, and stated that the arrow she drew pointed to the "woman's part." SR:685-86; *see* SR:191

(Ex:3). The drawing was entered into evidence and shown to the jury. SR:687, 691.

R.M. described the oblong part of the drawing as the area she uses to pee.[4] SR:688-89. She testified that the oblong part of the picture is also where Defendant touched her with his fingers. SR:690. R.M. drew a star on the picture to indicate where Defendant touched her:



SR:191, 690.

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[4] At this point, the State asked R.M., "Are you okay? . . . Are you sure?" SR:689. The record is unclear why the State asked R.M. these questions. As the State continued to ask questions after this exchange, R.M. started to repeatedly answer "I don't know." *See* SR:689-90.

On November 1, 2021, R.M. was interviewed and examined at Child's Voice. SR:719. Leslie Crevier, a forensic interviewer at Child's Voice, testified about her interview of R.M. SR:747-49. During the forensic interview, R.M. describe one incident in detail. SR:770. Crevier testified that R.M. describe that the abuse occurred in multiple rooms of her house and in different houses but said that the type of touching was the same during the different incidents. SR:770-71. R.M. shared that the touching happened more than once spanning across years. SR:775-76. Crevier testified that she did not ask R.M. to describe every time that Defendant touched her because she would not expect a child to know exactly how many times the touching happened with details. SR:775-76.

After R.M.'s forensic interview with Crevier, R.M. received a physical examination. SR:720-21. Shelly Hruby, a certified nurse practitioner at Child's Voice, testified that she performed a physical examination on R.M. SR:717-20. Hruby testified that R.M. tested negative for sexually transmitted diseases. SR:723. When asked by the State if a negative test meant R.M. was not sexually abused, Hruby responded that it did not. SR:723. Hruby explained that a negative test merely meant that R.M. was not exposed to any sexually transmitted infections through sexual contact. SR:723. Based on the examination, Hruby recommended that R.M. have no contact with Defendant, R.M. receive counseling, and R.M. follow up with a primary care provider for anxiety symptoms. SR:725-26. The above evidence, along with other

evidence presented over the course of a two-day trial, resulted in Defendant's conviction on all nine counts.

ARGUMENTS

I.

SUFFICIENT EVIDENCE ESTABLISHED SEXUAL PENETRATION TO SUSTAIN DEFENDANT'S RAPE CONVICTIONS.

A. *Background.*

On appeal, Defendant narrowly challenges the sufficiency of the evidence regarding one element of Second and Fourth Degree Rape—the sexual penetration element. DB:10. Defendant does not challenge the sufficiency of the evidence for the other elements of these two counts or any element of his other convictions. *See* DB:10. Defendant asserts that R.M.'s testimony that Defendant would touch her on her "women's part" where she would "go pee" and her drawing depicting where she was touched by Defendant was insufficient evidence to establish sexual penetration. DB:11. When viewing all the evidence in the light most favorable to the State, sufficient evidence established that Defendant sexually penetrated R.M. to support the jury's verdict. Defendant is therefore entitled to no relief.

B. *Standard of Review.*

This Court reviews de novo the denial of a motion for judgment of acquittal and questions about the sufficiency of the evidence. *State v. Peltier*, 2023 S.D. 62, ¶ 24, 998 N.W.2d 333, 340. This Court's "task is

to determine whether the evidence was sufficient to sustain the conviction." *State v. Solis*, 2019 S.D. 36, ¶ 17, 931 N.W.2d 253, 258 (quotation omitted).

> To do so, [this Court] ask[s] 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. If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside.

Id. (cleaned up). Likewise, "this Court will not resolve conflicts in the evidence, assess the credibility of witnesses, or reweigh the evidence." *State v. Fasthorse*, 2009 S.D. 106, ¶ 6, 776 N.W.2d 233, 236 (citations omitted).

C. *Sufficient Evidence of Sexual Penetration Supports Defendant's Convictions under Count 1 and 2.*

In determining the sufficiency of the evidence, this Court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Peltier*, 2023 S.D. 62, ¶ 25, 998 N.W.2d at 341. Defendant disputes the sexual penetration element of Second Degree Rape in violation of SDCL 22-22-1(2) and Fourth Degree Rape in violation of SDCL 22-22-1(5). Under SDCL 22-22-1,

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

> persons within the victim's presence, accompanied by apparent power of execution;
>
> (5) If the victim is thirteen years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim;
>
> . . .

SDCL 22-22-1(2), (5). Sexual penetration is defined as "any intrusion, however slight, of any part of the body or of any object into the genital or anal openings of another person's body." SDCL 22-22-2.

Entry into the female genitalia beyond the labia majora is not required to prove penetration. *See State v. Carter*, 2023 S.D. 67, ¶ 70, 1 N.W.3d 674, 696 (reasoning that evidence of "vulvar or labial penetration, however slight, is sufficient to prove penetration"); *State v. Packed*, 2007 S.D. 75, ¶ 32, 736 N.W.2d 851, 861 (reasoning that this Court has "never held that SDCL 22-22-2 requires hymenal penetration . . . ."). "Penetration can be inferred from circumstantial evidence and need not be proved by medical evidence." *Carter*, 2023 S.D. 67, ¶ 70, 1 N.W.3d at 696 (quoting *State v. Toohey*, 2012 S.D. 51, ¶ 22, 816 N.W.2d 120, 129).

As to the challenged element, the circuit court instructed,

> "Sexual penetration" means an act, however slight, of sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the body or of any object into the genital or anal openings of another person's body. Genital penetration does not require proof of vaginal penetration. It includes penetration of the exterior of the labia majora.

> "Cunnilingus" is defined as oral stimulation of the female genitalia vulva or the clitoris.
>
> "Fellatio" is defined as oral stimulation of the penis.
>
> "Vulva" is defined as the external parts of the female genital organs.
>
> "Labia majora" is defined as the outer fatty folds of the vulva.

SR:154 (Instruction No. 10); *see* South Dakota Criminal Pattern Jury Instruction 3-3-15 (same first paragraph as Instruction No. 10); *State v. Spaniol*, 2017 S.D. 20, ¶¶ 48-50, 895 N.W.2d 329, 345-46 (holding South Dakota Criminal Pattern Jury Instruction 3-3-15 is a correct statement of the law); *State v. Floody*, 481 N.W.2d 242, 249-50 (S.D. 1992) (approving of a trial court's use of the dictionary definitions of fellatio, cunnilingus, and genitals/genitalia). Defendant did not object to Instruction No. 10, nor does he challenge it on appeal. *See* SR:793; DB.

The circuit court also gave several other instructions. Preliminary Instruction No. 2 stated, in part, "You are entitled to consider the evidence in the light of your own observations and experiences in the affairs of life. You may use reason and common sense to draw deductions or conclusions from the facts which have been established by the evidence . . . ." SR:134. Further, Instruction No. 25 stated, "You are the sole and exclusive judges of all questions of fact and the credibility of the witnesses . . . [Y]ou may take into account . . . [a witness's] manner while testifying . . . and the reasonableness of the testimony considered in the light of all the evidence in the case." SR:170.

Accordingly, applying the de novo standard of review, applying the jury instructions, and considering the evidence in the light most favorable to the State, Defendant's motion for judgment of acquittal was properly denied. It is rational to conclude that the jury looked to Instruction No. 10 and determined that it could find Defendant guilty based off R.M.'s testimony and drawing.[5] The jury heard testimony from R.M. that the touching during each abuse was the same where Defendant would use his finger to touch her "woman's part," the "part where you go pee." *See, e.g.*, SR:643, 646. Contrary to Defendant's inference that R.M. was required to use words such as "labia," DB:11, the law does not require R.M. to use specific words. "[A] child's limited understanding of [his or] her exact anatomical features does not negate the child's ability to provide circumstantial evidence that penetration occurred." *State v. Brende*, 2013 S.D. 56, ¶ 22, 835 N.W.2d 131, 140-41; *see Carter*, 2023 S.D. 67, ¶ 71, 1 N.W.3d at 696 (holding the victim's "statements to multiple individuals that [the defendant] 'licked my lady parts' is an age-appropriate way to describe the act of cunnilingus, which involves oral stimulation of interior vaginal structures").

Not only did the jury hear R.M.'s testimony, but it also considered R.M.'s drawing depicting where Defendant touched her. *See* SR:685-86;

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[5] The jury also saw R.M.'s nonverbal communications and demonstrations.

see SR:191 (Ex:3). A commonsense conclusion and reasonable inference based on R.M.'s testimony and drawing is that Defendant used his finger to penetrate R.M.'s labia majora as defined in Instruction No. 10. *See State v. Hernandez*, 2016 S.D. 5, ¶ 27, 874 N.W.2d 493, 500 ("even slight oral stimulation of the vulva or clitoris is sufficient" to support a finding of sexual penetration). Sufficient evidence established sexual penetration.

Defendant argues, in part, that because circumstantial evidence in other cases is not present here, the evidence is insufficient. DB:11-16. Defendant argues that because R.M. did not specifically testify that the touching was painful and she did not have a sexually transmitted disease, there was insufficient evidence. DB:11-16. But Defendant misconstrues case law as this Court has never held that the absence of pain or lack of sexually transmitted disease means insufficient evidence of sexual penetration.

Defendant also overlooks trial testimony. The jury heard testimony from Hruby stating that the lack of sexually transmitted diseases merely meant that R.M. was not exposed to any sexually transmitted infections through sexual contact. SR:723. Further, while R.M. did not specifically testify that Defendant's acts caused her "pain," she testified that it was "[r]eally uncomfortable" and "very uncomfortable" when Defendant touched her "woman part." SR:650-51. *See Hernandez*, 2016 S.D. 5, ¶ 25, 874 N.W.2d at 500 (holding the victim's testimony, including, in

part, that the touching "did not feel good," was sufficient to establish sexual penetration).

Lastly, Defendant argues that even if R.M.'s testimony and drawing were sufficient evidence to establish sexual penetration, R.M. recanted these statements by the way she answered questions, including her "I don't know" responses. DB:15. Defendant argues that R.M.'s testimony stating, "I don't know" was not because she was nervous or in fear from testifying. DB:14. Defendant relies on *State v. Brende* in support of his argument.

Brende is materially distinguishable from the facts of this case. In *Brende*, this Court held that recanted statements, standing alone, are insufficient to support a conviction. *Brende*, 2013 S.D. 56, ¶ 28, 835 N.W.2d at 143. In *Brende*, a victim stated in a forensic interview that the defendant "made him put his penis in [the defendant's] butt," but "completely recanted" the allegation at trial. *Id.* The victim even denied making the statement in the forensic interview. *Id.* The jury was not presented with evidence that the recantation was due to intimidation or coercion, nor was any other evidence presented that would have explained the recantation. *Id.* This Court held that "no rational trier of fact could have found [the defendant] guilty of first-degree rape beyond a reasonable doubt," reasoning, in part, that no other evidence was presented to corroborate the recanted allegation. *Id.* ¶¶ 27-28, 835 N.W.2d at 142-43.

R.M.'s testimony at trial is unlike *Brende* where the victim completely denied making an allegation of sexual abuse. R.M. stated in her forensic interview that the way Defendant abused her was the same during each incident, testified consistently at trial, and never recanted her statement that Defendant touched her woman's part where she goes pee. R.M. stating, "I don't know" in response to questions is substantially different than completely denying a previous allegation of sexual abuse.

Unlike *Brende*, even if R.M.'s testimony was construed as a recantation, the jury was presented with evidence that explained why R.M. answered questions the way she did. Staton testified that a child's disclosure may stop if she does not feel safe, believed, or supported. SR:511. Staton explained that a child may experience difficulties testifying because the child is scared to talk in front of a lot of people or the child may be embarrassed or ashamed about the topic. SR:516. She specifically testified that a child may frequently say, "I don't remember" either because they do not remember, or the topic is hard to talk about. SR:520.

R.M. experienced difficulties testifying. Both R.M. and L.M. testified that R.M. suffered from anxiety. SR:570-71, 628. Hruby even recommended that R.M. seek medical care for her anxiety symptoms. SR:725-26. R.M. testified that she was nervous to testify, speaking in front of people makes her nervous, and being in big groups of people

makes her nervous. SR:628. Throughout trial, R.M. testified that she did not want to use certain words because the words made her uncomfortable. *See* SR:635. R.M. even resorted to non-verbal communication rather than using uncomfortable language. *See* SR:635, 641-42, 660-61, 668, 674.

When R.M. was asked to use words to describe the picture she drew, she struggled. After the picture was entered into evidence, the State asked R.M. specific questions about the picture. SR:688-89. On appeal, the record is cold. Unlike the jury, this Court does not have the benefit of observing R.M.'s demeanor while testifying. That said, the record does show that the State asked R.M., "Are you okay? . . . Are you sure?" SR:689. As the State continued to ask questions, R.M. then started to answer, "I don't know." SR:689-90. While R.M. did testify "I don't know" often, unlike *Brende*, the jury was presented with ample evidence to explain R.M.'s testimony. The jury could reasonably infer from Staton's testimony, R.M.'s testimony, evidence of R.M.'s anxiety, and for reasons not evident in a cold record that the way R.M. testified was because she did not feel safe, believed, or supported, was embarrassed, was experiencing difficulties in testifying, and the topics were difficult.

In viewing the evidence at trial in a light most favorable to the verdict, along with the instructions the jury was given, there is sufficient evidence of sexual penetration to support Defendant's convictions.

Contrary to Defendant's assertion that sexual penetration was not proven, the evidence supports a finding that Defendant used his fingers to penetrate R.M.'s labia majora. Therefore, Defendant's motion for judgment of acquittal was properly denied, and the jury's verdict should be affirmed.

II.

THE CIRCUIT COURT'S FAILURE TO GIVE A UNANIMITY INSTRUCTION FOR COUNTS 1 AND 2 DOES NOT CONSTITUTE REVERSIBLE ERROR.

A. *Background.*

On appeal, Defendant claims for the first time that his due process rights were violated because of duplicity in the indictment for Counts 1 and 2. Defendant argues that "it is unclear which incident the jury could have unanimously relied upon to return a verdict of guilty." DB:19. Defendant argues that the circuit court was required to give a unanimity instruction to the jury because the jury may have divided on Defendant's guilt for the different touching incidents.

No risk of division exists here. The evidence—through R.M.'s testimony and Crevier's testimony—showed that the type of abuse was the same. The jury either believed R.M.'s testimony that the consistent, repetitive touching occurred, or disbelieved it. The jury's verdict shows it believed R.M. and would have convicted Defendant of any of the various offenses shown by the evidence. Thus, Defendant has failed to show he suffered prejudice.

B. *Standard of Review.*

Defendant asks this Court to apply plain-error review because the claim was not preserved. DB:15; *see State v. Manning*, 2023 S.D. 7, ¶ 40, 985 N.W.2d 743, 756 ("When an issue has not been preserved by objection at trial, this Court may conduct a limited review to consider whether the circuit court committed plain error."). Discretionary review under the plain-error doctrine should be applied "cautiously and only in exceptional circumstances." *State v. Krueger*, 2020 S.D. 57, ¶ 38, 950 N.W.2d 664, 674 (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d 725, 729).

To establish a plain error, a defendant "must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if, (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Manning*, 2023 S.D. 7, ¶ 40, 985 N.W.2d at 756 (quoting *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729-30). "Additionally, 'with plain error analysis, the defendant bears the burden of showing the error was prejudicial.'" *McMillen*, 2019 S.D. 40, ¶ 13, 931 N.W.2d at 729 (quotation omitted).

C. *No Reasonable Probability Exists That the Jury Could Have Convicted Defendant of Counts 1 And 2 Without Reaching a Unanimous Agreement That All the Acts R.M. Testified to Occurred.*

Defendant claims that he suffered a due process violation because several pieces of evidence could have supported Counts 1 and 2. DB:16,

20. "[A] duplicitous indictment or information includes a single count that captures multiple offenses[.]" *State v. Babcock*, 2020 S.D. 71, ¶ 31, 952 N.W.2d 750, 760 (quoting *State v. Muhm*, 2009 S.D. 100, ¶ 19, 775 N.W.2d 508, 514). "One 'vice of duplicity is that because the jury has multiple offenses to consider under a single count, the jury may convict without reaching a unanimous agreement on the same act, thereby implicating the defendant's right to jury unanimity.'" *State v. White Face*, 2014 S.D. 85, ¶ 15, 857 N.W.2d 387, 392-93 (quoting *Muhm*, 2009 S.D. 100, ¶ 29, 775 N.W.2d at 517).

To resolve any unanimity concerns, this Court has adopted the "either/or" rule. *Babcock*, 2020 S.D. 71, ¶ 40, 952 N.W.2d at 762.

> This "rule does not require dismissal of a duplicitous indictment. Rather, the [State] must elect a single offense on which it plans to rely, and as long as the evidence at trial is limited to only one of the offenses in the duplicitous count, the defendant's challenge will fail. Alternatively, if there is no election the trial court should instruct the jury it must find unanimously that the defendant was guilty with respect to at least one of the charges in the duplicitous count."

Id. (quoting *Muhm*, 2009 S.D. 100, ¶ 32, 775 N.W.2d at 518-19).

The jury instruction described under the "either/or" rule is modified in cases that "involve the so-called 'resident child molester' who . . . has continuous access to [a child]. In such cases, the victim typically testifies to repeated acts of molestation occurring over a substantial period of time but . . . is unable to furnish many specific details . . . ." *Muhm*, 2009 S.D. 100, ¶ 28, 775 N.W.2d at 517 (quoting

California v. Jones, 792 P.2d 643, 645 (Cal. 1990)). Under these circumstances of repetitive, undifferentiated allegations of sexual abuse,

> [W]hen there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.

Id. ¶ 33, 775 N.W.2d at 519 (quoting *Jones*, 792 P.2d at 659).

At trial, specific acts were not elected to support each charge, nor was a modified unanimity instruction given to alleviate any confusion regarding duplicity. *See Babcock*, 2020 S.D. 71, ¶ 42, 952 N.W.2d at 763. Even so, Defendant is not entitled to relief.[6] *See id.* ¶ 46, 952 N.W.2d at 763-64 (holding that a defendant still must show prejudice absent a unanimity instruction).

Defendant cannot establish "a reasonable probability [exists] that, but for [compliance with the modified 'either/or' rule], the result of the proceeding would have been different." *Carter*, 2023 S.D. 67, ¶ 26, 1 N.W.3d at 686 (quoting *Owens v. Russell*, 2007 S.D. 3, ¶ 9, 726 N.W.2d 610, 615). In other words, Defendant cannot establish "a probability

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[6] This Court addressed this issue in a similar case and summarily affirmed. *See generally Neels v. Fluke*, No. 4:22-CV-04053-KES, 2023 WL 2529236, at *2-3 (D.S.D. Mar. 15, 2023).

sufficient to undermine confidence in the outcome." *Id.* (quoting *Owens*, 2007 S.D. 3, ¶ 9, 726 N.W.2d at 615).

First, Defendant claims that prejudice exists because there was no clear evidence of penetration. DB:19. For the reasons set forth under Issue I, there was sufficient evidence of penetration.

Second, Defendant claims that prejudice exists because the jury could have been divided regarding which incidents involved penetration. DB:20. But the risk of division among the jurors was not present here. The evidence showed that the touching, albeit in different locations, was the same. During each incident, Defendant touched R.M.'s bare chest with his fingers. Then, Defendant would use his fingers to penetrate R.M. Defendant fails to demonstrate that the jury could have been divided when R.M. described the touching as the same and R.M. consistently stated in her forensic interview that the touching was the same.

While a modified unanimity instruction was not given to the jury, the circuit court instructed the jury on how it must return a verdict, its duty as fact finder, and its duty to judge the credibility of witnesses. Instruction No. 26 stated, in part, "You are the sole and exclusive judges of all questions of fact and the credibility of the witnesses and the weight to be given the testimony of each of them." SR:170. Instruction No. 33 stated, in part, "In order to return a verdict, all jurors must agree." SR:177. Further, Instruction No. 34 stated, in part, "All twelve of you

must agree upon any verdict" and it shall not reveal how the jury stands "until after you have reached a unanimous verdict." SR:178. This Court generally presumes that juries follow the circuit court's instructions and have no reason to believe they failed to do so in this case. *State v. Nelson*, 2022 S.D. 12, ¶ 41, 970 N.W.2d 814, 828.

In *Muhm*, this Court determined that where a modified unanimity instruction should be given, "credibility is usually the 'true issue'—'the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it.'" *Muhm*, 2009 S.D. 100, ¶ 33, 775 N.W.2d at 520 (quoting *Jones*, 792 P.2d at 659). In such a situation "a defendant will have his unanimous jury verdict and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act." *Id.* (quoting *Jones*, 792 P.2d at 659).

Like *Muhm*, a main issue at trial involved a question of credibility—the jury either believed R.M.'s testimony that the consistent, repetitive touching occurred, or disbelieved it. Defense counsel attempted to cast doubt on R.M.'s credibility by drawing the jury's attention to alleged discrepancies in R.M.'s forensic interview and her testimony at trial. *See generally* SR:701-11. This defense is similar to the defense utilized in *Muhm*, where "[t]he only defense was to undermine the [victims'] credibility through various means, including pointing out inconsistencies

in their statements, their smoking and alcohol use, and a number of other subjects." *Muhm*, 2009 S.D. 100, ¶ 35, 775 N.W.2d at 521. The jury rejected Muhm's defense just as the jury here rejected Defendant's. "[The jury's] verdict necessarily implied that it believed [R.M.]." *Id.*

It cannot be said that the jury would have returned a different verdict had a unanimity instruction been given. Assessing the evidence in a commonsense manner, no reasonable probability exists that the jury could have convicted Defendant of Counts 1 and 2 without reaching a unanimous agreement that all the acts R.M. testified to occurred. *See Babcock*, 2020 S.D. 71, ¶ 48, 952 N.W.2d at 764. Because "the jury resolved the basic credibility dispute against [D]efendant and would have convicted [him] of any of the various offenses shown by the evidence . . . ." the circuit court's failure to require an election of acts or to give a unanimity instruction did not prejudice Defendant. *Muhm*, 2009 S.D. 100, ¶ 35, 775 N.W.2d at 521. Therefore, Defendant cannot demonstrate that he is entitled to relief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 5,723 words.

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

Dated this 21st day of March, 2024.

/s/ Jennifer M. Jorgenson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 21, 2024, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Troy Allen Obrien*, was served via Odyssey File and Serve upon John R. Hinrichs at john@hpslawfirm.com.

/s/ Jennifer M. Jorgenson
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30429

STATE OF SOUTH DAKOTA,

APPELLEE,

VS.

TROY O'BRIEN,

APPELLANT

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

THE HONORABLE JOHN R. PEKAS
CIRCUIT COURT JUDGE

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Notice of Appeal filed on August 11, 2023.

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PRELIMINARY STATEMENT

All references herein to the Settled Record are cited as "SR." The transcript of the Jury Trial held on December 6 and 7, 2022, is cited as JT followed by the volume number ("JT 1" refers to the transcript captioned "JURY TRIAL Day #1 minus jury selection" and "JT 2" refers to the transcript captioned "JURY TRIAL Day #2"). The State offered demonstrative exhibit 3 on the second day of trial (JT 2 at 70:9-17). That exhibit is cited as "Ex. 3." Each reference is followed by a page number or numbers and, when appropriate, line number(s).

References to the Appellant's Brief filed on February 12, 2024, are cited as "Appellant's Br." followed by the page number. References to the Appellee's Brief filed on March 21, 2024, are cited as "Appellee's Br." followed by the page number.

The Jurisdictional Statement, Statement of Legal Issues, Statement of the Case, and Statement of Facts set forth in Appellant's Brief are unchanged and incorporated by reference herein.

Appellant relies upon and does not waive any assertion or argument previously made in his Appellant's Brief, and those arguments are incorporated herein.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT O'BRIEN'S CONVICTIONS FOR RAPE IN THE SECOND DEGREE AND RAPE IN THE FOURTH DEGREE.

The State acknowledges that R.M.'s description of O'Brien's conduct was limited to statements that O'Brien "would use his finger to touch her 'woman's part,' the 'part where you go pee,'" and that this formulation was consistent amongst all of the acts

charged.[1] *Appellee's Br.* at p. 15 ('The jury heard testimony from R.M. that the touching during each abuse was the same where Defendant would use his finger to touch her 'woman's part,' the 'part where you go pee.'"). Therefore, the insufficiency of R.M.'s testimony to establish penetration beyond a reasonable doubt affects each count of rape.

The State accuses O'Brien of relying on the fact that R.M. did not use "words such as 'labia'" as grounds for reversal. *Id.* The State's assertion is a strawman fallacy.[2] O'Brien never argues that the R.M. was required to use such words. Rather, O'Brien argues that none of R.M.'s testimony and its context is sufficient to support a conviction for rape. *State v. Morse*, 2008 S.D. 66, ¶ 10, 753 N.W.2d 915, 918 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789) ("*[A]ll* of the evidence is to be considered in the light most favorable to the prosecution." (emphasis in the original)); *State v. Johnson*, 2009 S.D. 67, ¶ 19, 771 N.W.2d 360, 371 (quoting *State v. Frazier*, 2001 S.D. 19, 45, 622 N.W.2d 246, 261) ("[This Court] must 'consider all the evidence the [jury] had before it . . . "). Whether or not R.M. used the word labia is immaterial to the fact that she never described an act of penetration. O'Brien's argument is that R.M.'s testimony, the context in which it is given, and the other circumstantial evidence—or lack thereof—do not amount to "substantial evidence to support the conviction," and so "no rational trier of fact could find guilty beyond a reasonable doubt." *Morse*, 2008 S.D. 66, ¶ 10 (citations omitted). R.M. testified that O'Brien "touched" her, but even under vigorous

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[1] O'Brien agrees with the State that R.M.'s description of the specific contact in each incident was limited to "touching," but, as discussed in § II *infra*, disagrees that her description of each incident and its res gestae was identical to the others, generic, or vague.

[2] The Appellant's Brief explicitly acknowledges that the law does not require R.M to use anatomical terms. *Appellant's Br.* at p. 10.

questioning by the State, did not describe anything that implied penetration. *Appellant's Br.* at p. 11 (citing JT 2 at p. 33). Further, there was no other evidence—direct or circumstantial—supporting a conclusion that "touching" meant penetration. See generally *Appellant's Br.* at pp. 11-16.

In pointing to demonstrative exhibit 3 as evidence of penetration, the State ignores R.M.'s own testimony that the curved lines around the starred oval represented "where the leg and the woman's part are connect [sic]," and so not a part of the "woman's part." JT 2 at 73:10-12. In order for the jury to form a "commonsense conclusion and reasonable inference" that exhibit 3 depicted labia majora, the jury would have had to disregard R.M.'s own testimony. *Appellee's Br.* at p. 16; JT 2 at 72:10-12. This testimony included R.M. admitting that exhibit 3 may not have depicted where she was touched (JT 2 at 76:17-22) and that she "did not know" if it meant the body part used to "pee" (JT 2 at 72.5).

The State's argument that the Court should ignore the deficiencies in the State's evidence because R.M. "experienced difficulties testifying" is without merit. *Appellee's Br.* at p. 18-19. R.M. admitted that she was nervous, which is not an uncommon occurrence for any witness testifying in court. JT 2 at 11:16-17. However, the record provides no evidence that R.M. was unusually limited in her ability to testify, and the State did not make any attempt to have her declared unavailable. See *Appellant's Br.* at p. 5, fn. 4. The State points out that their expert, Brie Staton, testified that some children may find testifying difficult due to fear, nervousness, or shame. *Appellee's Br.* at p. 18. However, Staton never provided an opinion that these conditions applied specifically to

R.M. or affected her ability to testify. JT 1 at pp. 36, 40-41.[3] Finally, the State completely ignores the fact that during a critical part of the State's examination of R.M. about exhibit 3, R.M. was given the opportunity to clarify whether "I don't know" meant "I don't know or I don't want to talk about this" and explicitly stated that it meant "I don't know." JT 2 at 72:23-73:9.

Even assuming *arguendo* that R.M.'s nervousness or fear caused her to withhold testimony or not use the words that the State would have preferred, the Court cannot simply assume what the testimony would have been. A verdict cannot be based upon speculation, guess, or conjecture. SR 134. It is axiomatic that the State still has the burden of proving the element of sexual penetration beyond a reasonable doubt, and that burden is not alleviated by the fact that a critical witness is nervous, anxious, or scared when testifying. SDCL § 23A-22-3; *State v. Wilcox*, 204 N.W. 369, 372-73 (S.D. 1925). Nor does Ms. Staton's testimony permit the finder of fact to "fill in the blanks" in the absence of other evidence. R.M.'s debatable state of mind while testifying may explain the State's failure to meet its burden, but it does not relieve it of the burden.

The evidence presented at trial, even when evaluated in the light most favorable to the prosecution, was insufficient for a rational trier of fact to conclude beyond a reasonable doubt that O'Brien "used his fingers to penetrate R.M.'s labia majora." *Appellee's Br.* at p. 20. At best, the State, via R.M.'s testimony, proved that O'Brien

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[3] While trial counsel did not object to it, O'Brien does not concede that Staton's testimony regarding the ability of a child victim to testify should have been admitted, or would have been proper if Staton had testified about R.M. specifically. See *e.g. State v. Raymond*, 540 N.W.2d 407, 409-10 (S.D. 1995); *State v. Bucholtz*, 2013 S.D. 96, ¶¶ 21-31, 841 N.W.2d 449, 456-60

touched R.M. in the vicinity of or on the outside of her genitalia, which may be sufficient to support a conviction for sexual contact, but not for rape. SDCL § 22-22-7.1.

II. O'BRIEN'S DUE PROCESS RIGHT TO JURY UNANIMITY WAS VIOLATED AS TO COUNTS ONE AND TWO BY DUPLICITY IN THE INDICTMENT.

In its Appellee's Brief, the State acknowledges that it did not elect specific acts to support each charge, and it is undisputed that no unanimity instruction was given to the jury to eliminate the danger of duplicity. *Appellee's Br.* at p. 23. R.M. testified about several different instances of touching, in various rooms, but no evidence in the record established which instance corresponded to which count. *Appellant's Br.* at p. 19.

The State's reliance on *State v. Muhm*, 2009 S.D. 100, 775 N.W.2d 508 is misplaced, because *Muhm* is distinguishable from the present case. In *Muhm*, "the counts were duplicitous and the children's evidence was vague and generic in that it described numerous undifferentiated acts occurring every weekend." *Muhm*, 2009 S.D. 100 at ¶ 34. In the present case, R.M.'s multiple descriptions of O'Brien's conduct were not vague and generic. She differentiated between the events in various ways. The touching was alleged to have occurred in three different rooms in similar but not identical ways. R.M. gave at least four different detailed descriptions of O'Brien touching her: the last time in her mother's bedroom when she was dressed and O'Brien put his hand under her clothes (JT 2 at 14-29; 33-35); the time it happened in R.M.'s bedroom when she was dressed and O'Brien put his hand under her clothes (JT 2 at 40-44); the times it happened in various rooms when O'Brien undressed her (JT 2 at 44-48); and one time in the living room when O'Brien was playing video games (JT 2 at 48 *et. seq.*). R.M. also described the sequence of events on each occasion; the type of touching that occurred; and whether R.M. was dressed or not. R.M. was even able to describe what she and O'Brien were

wearing when she says O'Brien touched her in her mother's room. JT 2 at 17:23-18:6. R.M.'s various descriptions were not so vague or generic that the jury would conclude that each event was identical—even if the type of touching was—and therefore not disagree about any particular one.

O'Brien placed R.M.'s credibility into question regarding one particular event—her description of "the last time" "in Mom and Troy's bedroom." JT 2 at 151-52. The defense alleged that R.M.'s story during her forensic interview conflicted with her testimony at trial. JT 2 at 85-87; 91-92; 152:1-8. The defense also alleged that during trial, R.M. made disclosures that she did not make during the forensic interview. JT 2 at 91092; 153-54. Therefore, at a minimum, in the absence of an election by the State, the trial court should have given a modified unanimity instruction, requiring the jury to resolve R.M.'s credibility with respect to a specific act, in order to assure confidence that they had unanimously concluded that it occurred beyond a reasonable doubt. *Muhm*, 2009 S.D. 100 at ¶ 28.

CONCLUSION

For the foregoing reasons, and for the reasons asserted in his Appellant's Brief, O'Brien respectfully urges the Court to enter an Order remanding this case and directing the trial court to reverse the Judgment and Sentence on counts one and two.

Respectfully submitted this 22nd day of April, 2024.

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CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). The undersigned certifies that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief is 10 pages long, including the cover sheet, Table of Contents, and Table of Authorities, and contains 1752 words exclusive of the Table of Contents, Table of Authorities, Statement of Legal Issues, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word word processing software used to prepare this brief at font size 12, Times New Roman, and left justified.

Dated this 22nd day of April, 2024.

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