APPELLANT'S BRIEF (AMENDED)

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

NO. 27869

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHRISTOPHER DEAN KRYGER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
SECOND JUDICIAL CIRCUIT,
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE MARK SALTER

Circuit Court Judge

MARK KADI & AUSTIN VOS
Public Advocate's Office
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorneys for Appellant.

MARTY JACKLEY
Attorney General
1302 E. Hwy. 14, Ste. 1
Pierre, SD 57501-5070
Attorney for Appellee.

AARON MCGOWAN
Minnehaha Co. State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorney for Appellee.

Notice of Appeal Filed May 20, 2016.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	*	
Plaintiff and Appellee,	*	Case: 27869
v.	*	APPELLANT'S BRIEF
CHRISTOPHER DEAN KRYGER,	*	
Defendant and Appellant.	*	

PRELIMINARY STATEMENT

Trial transcripts will be referred to as "T" followed by the applicable volume number followed by the page number. The settled record will be referred to as "SR" followed by the page number. Any exhibits will be referred to as "E" followed by an exhibit letter or number. The Appellant will be referred to as the "Appellant", "Defendant" or "Kryger".

JURISDICTIONAL STATEMENT

The trial court entered the Appellant's judgment and sentence on April 28, 2016. SR680. A Notice of Appeal was timely filed on May 20, 2016. SR683. Jurisdiction of this Court applies per SDCL 15-26A-3.

LEGAL ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED BY COMPLETELY PRECLUDING QUESTIONING OF THE DECEDENT'S BROTHER CONCERNING HIS BIAS AGAINST THE DEFENDANT AND MOTIVE TO FABRICATE IN VIOLATION OF KRYGER'S DUE PROCESS AND CONFRONTATION CLAUSE RIGHTS.

The trial court limited the Defendant's questioning.

State v. Spaniol, 2017 S.D. 20
Delaware v. Van Arsdall, 475 U.S. 673 (1986)

II.WHETHER THE TRIAL COURT ABUSED ITS DISCRETION ADMITTING EXPERT OPINION TESTIMONY EXPRESSED IN TERMS OF POSSIBILITIES

The trial court admitted the opinion testimony.

Koenig v. Weber, 174 N.W.2d 218 (SD 1970)
Vaux v. Hamilton, 103 N.W.2d 291 (ND 1960)

III.WHETHER THE TRIAL COURT ERRED ADMITTING IRRELEVANT EVIDENCE WITHOUT FOUNDATION OF PHYSICAL EVIDENCE FROM THE STATE'S INVESTIGATION

The trial court admitted the evidence.

SDCL 19-19-401
State v. Muetze, 368 N.W.2d 575 (SD 1985)

IV.WHETHER THE TRIAL COURT ERRED BY ADMITTING THE DEFENDANT'S STATEMENTS THAT HE HAS A CRIMINAL MIND AS AN ADMISSION AGAINST INTEREST, OVER APPELLANT'S OBJECTIONS CONCERNING CHARACTER EVIDENCE AND ITS PROBATIVE VALUE BEING SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE

The trial court admitted the evidence.

Armstrong v. State, 931 So.2d 187 (Fla.App, 2006)
Banks v. State, 725 So.2d 711 (Ms. 1997)

V.WHETHER THE TRIAL COURT ERRED BY DENYING EVERY MOTION FOR MISTRIAL WHEN THE JURY WAS EXPOSED TO MATTERS CONCERNING THE DEFENDANT'S PRIOR RECORD THAT THE TRIAL COURT ORDERED TO BE EXCLUDED

The trial court denied each motion for mistrial.

State v. Cage, 302 N.W.2d 793 (SD 1981)

VI.WHETHER THE TRIAL COURT ERRED BY DENYING PROPOSED JURY INSTRUCTIONS REGARDING USE OF EVIDENCE OF THE DEFENDANT'S

"CRIMINAL MIND" WHEN EVALUATING STATE OF MIND ELEMENTS CHARGED IN HIS INDICTMENT

The trial court declined to offer the instructions.

State v. Webster, 2001 S.D. 41, 637 N.W.2d 392
Miller v. State, 338 N.W.2d 673 (S.D. 1976)

VII.WHETHER THE TRIAL COURT ERRED BY DENYING PROPOSED JURY INSTRUCTIONS CONCERNING SPECULATION AND CONJECTURE WHERE EVIDENCE WAS ADMITTED TOWARDS ESTABLISHING POSSIBILITY AND NOT PROBABILITY

The trial court did not offer the instructions.

State v. Webster, 2001 S.D. 41, 637 N.W.2d 392
Degen v. Beyman, 241 N.W.2d 703 (S.D. 1976)

VIII. WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON EACH COUNT OF THE INDICTMENT

The trial court denied the motion.

State v. LaCroix, 423 N.W.2d 169 (S.D. 1988)

IX.WHETHER THE TRIAL COURT ERRED BY PRECLUDING USE OF AN ALIBI JURY INSTRUCTION WHERE THE STATE DID NOT PRESENT A SPECIFIC TIME IN ITS DEMAND AND THE DEFENDANT STATEMENTS REGARDING THE PERIOD IN QUESTION SHOWED HE WAS PLACES OTHER THAN THE DECEDENT'S RESIDENCE

The trial court denied the alibi instruction.

State v. Hibbird, 273 N.W.2d 172 (S.D. 1978)
State v. Kinney, 1981 WL 6076 (Oh.App 1981)

X.WHETHER THE ACCUMULATION OF THE COMBINED ASSIGNED ERRORS CONSTITUTED REVERSIBLE ERROR

State v. Dokken, 385 N.W.2d 493 (S.D. 1986)
State v. Nelson, 1998 S.D. 129, 587 N.W.2d 439

STATEMENT OF THE CASE

The State indicted the Defendant charging him with Murder 1st (5 counts), Murder 2nd, Rape 2nd, Rape 3rd, and Burglary 1st (2 counts). SR18. A jury convicted him of all counts except Rape in the 3rd degree. SR592. The Defendant appeals his judgment and sentence in its entirety.

STATEMENT OF FACTS

On Friday, March 14, 2014, Kari Kirkegaard, hereinafter "decedent", met members of her family for dinner at the Pizza Ranch in Sioux Falls around 7:00 p.m. The decedent arrived alone. T6:131. They stayed, per tradition, until closing time at approximately 10:00 p.m. when all had departed T6:129.

Often on Sundays, the decedent's son Nick Kirkegaard and his fiancee, Paetyn Haemze, and the decedent would meet for dinner. On Sunday, March 16, 2014, Kirkegaard and Haemze attempted to contact the decedent to ask her to join them. Without receiving an answer, the couple got ready and left to eat by themselves. Later that day, Kirkegaard asked Haemze to try contacting the decedent. After no response, Haemze went to the decedent's home at 709 S. Garfield in Sioux Falls around 5:00 p.m. T6:54-55.

Haemze noticed the decedent's blue SUV parked in the driveway. She had a key for the decedent's front door handle but not the deadbolt. It was not unusual for the

decedent to leave the front door unlocked. T6:56. This time, however, Haemze found the handle unlocked but the deadbolt fastened. Haemze tried the back door. The back door was a glass storm door with a broken handle. The door could be kept shut by holding it from the inside and spinning the lock. Haemze found the back door unlocked and she entered the home. T6:57. No damage to either door was observed. T6:65-66. Haemze heard water running in the bathroom. She opened a cracked door, turned on the light, and found the decedent lying naked on her side in a full bathtub with the water running. T6:59.

Haemze first called Nick to inform him. She then called 911. Officer Pat Mertes responded and entered the bathroom finding the decedent in the bathtub facing towards the door. He did not notice anything unusual in the bathroom. Fire, ambulance, and additional law enforcement personnel arrived soon afterwards. They took photographs of the decedent, drained the bath water, and removed the body from the home. They checked out the rest of the home and found everything in order and without suspicion. There were no signs of tampering or forced entry. The decedent's body showed no apparent signs of foul play or visible trauma. Law enforcement officers and first responders did *not* notice an overwhelming smell of bleach in the bathroom.

T7:41. Matt Hardwick, a paramedic who examined the decedent in the bathroom, did not smell any bleach. T7:67. They then cleared the scene and turned the home back over to the family and departed. The decedent's brother, Brian Johnson, punched a wall in the bathroom.

After their departure, the decedent's family and friends who remained started cleaning up the house. Approximately twenty family members present. T6:71. They noticed a few things were missing including the decedent's bedsheets, purse, SUV keys, along with the towels and rugs from the bathroom. JT6-63. The family and friends testified there was also had a distinct smell of bleach, a smell which nobody, including law enforcement, fire personnel, and paramedics, observed prior to law enforcement's initial departure. T6:155-56; T6:162 The family looked around the house and in the blue SUV, where no bleach odor was observed, for the missing items but did not find them.

They called police who returned about an hour after police initially left. T6:64. Law enforcement arrived a second time and began interviewing the decedent's friends and family present at the home. Law enforcement officers now detected an overpowering odor of bleach the moment they walked into the residence. T7:42; T10:121.

Most family members and friends testified that the decedent was a "homebody" who stuck within her circle of friends, ds and family. Supporters had helped the decedent sign up on a few dating sites, and she had e-mail conversations with unnamed men on one dating site. Some family members described her as a friendly, open book who could carry a conversation with anyone. Others characterized her as lonely and looking for companionship.

Law enforcement additionally discussed Kari's romantic life with those who knew her. Those close to Kari testified she had not been in an intimate relationship for quite some time. However, those same witnesses initially reported to police the decedent did have romantic interests in her life. EA. Dennis Kirkegaard a.k.a "Spook", Nick Kirkegaard's father, was one such person. "Spook" was not in Nick's life, but Kari had relied on him occasionally for financial support, and in return, Spook requested sexual favors. T8:31. Richard Anderson, a person living in an apartment above the Gas Light Lounge in Sioux Falls, was another person Kari had previously engaged in an off and on again relationship. T8:29-31

Other officers canvassed the neighborhood for possible information. Officer Michelle DeSchepper discovered that a mosque at 701 S. Garfield Avenue, two lots north of Kari's

home, possessed surveillance footage covering the time between March 14, 2014 and when law enforcement eventually arrived on scene on March 16, 2014. The surveillance camera faced to the south and east, angled to view the decedent's front lawn and driveway as well as the street and part of Garfield Elementary School. T8:11It showed the decedent's SUV return at 10:00 p.m. on Friday. It also showed an individual walk across the street in front of the mosque at 2:33 a.m. Saturday morning. The person was wearing a plaid flannel coat with the hood up, jeans, dark shoes, and appeared to have something shiny in their ungloved hands. The person's face was not visible. After the individual exited the camera, the decedent's vehicle was seen leaving the driveway and travelling northbound. It eventually returned at 3:33 a.m., fifty-eight minutes after its original departure. The footage did not show who was in the vehicle, nor did it show anyone entering or leaving the residence.

Detective Timothy Bakke also reviewed the mosque footage and observed additional details. T8:11-26. Earlier in the evening, an individual could be seen riding a bike on the street northbound, exit the camera, and return southbound on the sidewalk in front of the decedent's home. At 2:31 a.m., the bicycle returned in the footage, heading

northbound on Garfield once again. The bicyclist eventually moves out of the frame but then appears on the camera covering the back side of the mosque. A person in a plaid coat was then seen walking towards the decedent's home and her vehicle pulls out of her driveway. The vehicle then pulls into the back of the mosque before leaving to go southbound on Williams Avenue. After it returned to the home, as observed by Officer DeSchepper, the vehicle was parked, and an individual was seen behind the mosque and leaving on the bicycle.

Law enforcement eventually released the video from the mosque to the general public.[1] After receiving tips, law enforcement spoke with various people who knew Kryger – Michael Miller, a personal friend from the SDDOC; Lori Nagel, Kryger's fiancée; and Richard Foster, Kryger's uncle and employer. Nagel and Miller were concerned the person in the grainy video was Kryger due to the individual's gait and clothing. Kryger had worn a blue plaid coat.[2] They also confirmed Kryger typically relied on his bicycle to move

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[1] Detective Bakke also observed other individuals passing by Kari's home on bike, foot, or vehicle but, according to his trial testimony, all were disregarded summarily. T8:18.

[2] Foster testified he did not think the person in the video was Kryger due to the individual's physical build. He also stated Kryger was known to wear various shirts, sweaters, and coats. Nagel's live-in uncle also wore a plaid coat.

around Sioux Falls. Nagel additionally told law enforcement she had a dispute with Kryger the night of March 14th at the Gas Light Bar, and Kryger returned to her home around 4:30 a.m. to reconcile. Miller ran into Kryger that morning, and the two of them visited Walmart later in the day for Kryger to purchase an engagement ring for Nagel.

Detective Robert Forster initiated contact with Kryger at his home in Sioux Falls. Kryger, on parole, consented to the conversation. During their conversation in Forester's vehicle, Kryger provided his whereabouts on March 14th through the 16th. He also admitted to having a criminal mind specifically within the context of his personal background and history dealing with police. E45(time 6:30); T1:4

Kryger was then willingly transported to the law enforcement center for an interview with lead Detective Martin Hoffman. Kryger stated to Hoffman information regarding his whereabouts during the time in question. He explained he was upset with Nagel and decided to go for a long bike ride throughout Sioux Falls. While riding around, Kryger was almost struck by an SUV without displayed headlamps just north of the decedent's home. Later, he slid his bike too close to the river and fell in.

He returned home and washed his dirty clothes in the washer and called Nagel to reconcile. He eventually rode his bike to her house and spent the remainder of the morning there. He discussed seeing Miller at HyVee, shopping at Walmart, and attending a barbecue at Miller's home. Kryger also discussed having a "criminal mind". E39 Without being shown a picture of the decedent, Kryger denied having sex with her.

During the course of their investigation, law enforcement collected hundreds of items for testing purposes from various locations and persons in Sioux Falls, most notably the decedent's vehicle, residence, Kryger's storage shed, Foster's shed, Kryger's person and residence, the decedent's person, persons from the decedent's family, a burn pit by Neon Pride Signs, and other various locations that contained items of possible interest. In total, hundreds of items were collected, and only some of the items were tested. Only one piece of evidence not found on Kryger's person or in his home, DNA collected from inside the decedent's person, came back relating to Kryger. Everything else collected in the decedent's home or vehicle, items dusted for fingerprints or items swabbed for DNA, either excluded Kryger, did not include him, or were inconclusive. Other items in the home and her vehicle,

particularly items found in the decedent's bedroom, tested positive for family members' DNA or fingerprints. No items collected outside of the decedent's residence or vehicle tested positive for her DNA. Many items were never tested, including blood stains in the decedent's bathroom and hallway carpet. The footprint collected outside of the decedent's home was never scientifically compared to Kryger's footprint. T8:28. Law enforcement never found any of the items missing from the decedent's home. While in custody, Kryger received a phone call from Nagel wherein he admitted to having sex with the decedent after seeing her face in news reports, although a time was not stated. E47

Dr. Kenneth Snell performed an autopsy on decedent's body on March 17, 2014. Initially, Snell observed multiple areas of trauma on the outer part of the decedent's body. Most notably, there was a ¾ inch wide ligature furrow across the anterior neck consisting of two parallel lines. The face had petechial hemorrhages and numerous small abrasions. Inside the neck, the hyoid bone and thyroid cartilage were fractured with associated hemorrhaging. Snell additionally observed small abrasions on the anterior wall of the vaginal vault but no lacerations or tears. He testified that it was equally possible the marks could be from consensual sex or non-consensual sex. T9:208. He

found the cause of death to be asphyxia due to lack of oxygen reaching the brain and the manner of death to be homicide. He was unable to determine a time of death due to the body's submersion in water as well as the body being kept one night in a cooler prior to examination, nor the amount of time between intercourse and death. T9:206-09. Nor did he find alcohol or a substantive level of drugs in her system. In consideration of law enforcement's request, he collected a rape kit and sent the results to the South Dakota State Lab. Those results returned positive for Kryger's sperm cell DNA. Kryger was then arrested.

ARGUMENT

I.THE TRIAL COURT ERRED BY COMPLETELY PRECLUDING QUESTIONING OF THE DECEDENT'S BROTHER CONCERNING HIS BIAS AGAINST THE DEFENDANT AND MOTIVE TO LIE IN VIOLATION OF THE DEFENDANT'S DUE PROCESS AND CONFRONTATION CLAUSE RIGHTS.

The Defendant is entitled to confront the "witnesses against him". U.S.Const.amend VI & XIV. The Appellant sought to cross examine State's witness, Brian Johnson, brother of the decedent, regarding his bias *against the Defendant* and his counsel per his Confrontation Clause rights. T6:38-39. The State opposed such cross examination stating concerns about relevance concerning bias *against defense counsel*. T6:38. The trial court accepted the State's position and limited the Defendant's cross

examination of Johnson *totally*[3] concerning issues of bias and motive to fabricate or exaggerate, precluding jury evaluation of such evidence.[4] In so doing the court below erred, denying Kryger's right to a fair trial.

This Court recently acknowledged "that in all criminal cases, the defendant has the right "to be confronted with the witnesses against him." State v. Spaniol, 2017 S.D. 20, at ¶24, citing Crawford v. Washington, 541 U.S. 36 (2004). Where Confrontation Clause rights are asserted, the issue for this Court becomes "whether [a defendant's] Sixth Amendment right to confrontation was violated is a constitutional question, which we review de novo". Spaniol, 2017 S.D. at ¶23.

In contrast to cases where evidence was erroneously admitted, this matter involves evidence erroneously excluded from the jury's consideration *totally*. In cases where evidence is excluded, appellate review does not focus on the effect of such exclusion regarding an event on the jury's verdict. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). Instead, review focuses on the effect of exclusion on the witness's testimony and the jury's perception of the

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[3] See State v. Bausch, 2017 S.D. 1, ¶22, 889 N.W.2d 404, 411 (distinguishing total versus partial limitations on cross).
[4] The trial court declined confrontation clause analysis and ruled on state evidence law grounds. T6:40-41

witness. Id. In Van Arsdall, the United States Supreme Court explained the reasoning for the distinction: "It would be a contradiction in terms to conclude that a defendant denied *any* opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict." Id.(Emphasis *added*). It becomes problematic to speculate how a jury might have considered evidence it never knew, rather to judge the effect of inadmissable evidence on a jury's verdict.

Information as to Johnson's bias against the Appellant, would sufficiently address whether he might have a motive to lie or exaggerate to obtain these convictions. Was his hatred and anger so significant that he might fabricate or omit details about the sequence of events in March, 2014? [5] In addition to the murder charges, burglary and theft were also alleged against the Appellant. Few relations of the decedent, let alone an unfamiliar murder suspect, might know that money was kept in a freezer, raising questions whether Johnson's account of moneys

[5] It is subjectively difficult to evaluate whether Appellant's Senior Counsel advocates effectively on this point or others, then or now, due to Johnson's alternative solution to place counsel on a "casket list" and informing counsel to "sleep lightly" at his home, in a case alleging burglary and murder. SR455 et seq., SR448; T6:104.

possibly being deposited in a bank account was fully accurate or a mistake or something else.[6] T6:115-17.

Similarly, descriptions regarding the timing of each witness' initial awareness of a bleach smell in the home varied among the decedent family's testimony between the time of trial and when statements were first taken by police. It did not vary among law enforcement officers or rescue personnel, who uniformly indicated they only noticed it after they returned to the residence. Johnson, who punched through the bathroom wall, also experienced an injury. This might leave some blood behind, inspiring clean-up activities, notwithstanding whether any blood samples later found would ever be tested. Johnson's bias against the Appellant, or anger about the situation in general, could suggest that he or his supportive relatives and friends used bleach in the decedent's home, or who had knowledge of its use as well as the identity of who used it, despite denials stated later. Fabrications or omissions which also lead to material issues concerning alterations to a crime scene, may be more readily found to

[6] Johnson testified concerning what was told *to him* and did not present bank records. T6:115-17.

exist from a witness so angered he might experience lapses in judgment.[7]

The trial court's error limiting cross examination in total constituted reversible error. Overwhelming evidence did not exist in this case regarding proof of any charges against the Appellant, see infra. This Court, therefore, should not conclude such error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684. The error deprived the Appellant of his ability to cross examine a central State witness "cutting off all questioning concerning an event" thereby depriving him of due process, right to confront witnesses, and a right to a fair trial. Id. at 679.

II. THE TRIAL COURT ABUSED ITS DISCRETION ADMITTING OPINION TESTIMONY OF THE COUNTY CORONER EXPRESSED IN TERMS OF POSSIBILITIES

The County Coroner, Dr. Kenneth Snell, performed an autopsy of the decedent and rendered opinions at trial regarding causation of her injuries and death. The Defendant filed a motion in limine to prevent Snell from stating an opinion that injuries to her vaginal area were indicative of those received from consensual sex or non-consensual sex. T9:208. The trial court denied this motion

[7](i.e. threats extended to the Appellant and/or his legal counsel). SR455.

stating the coroner "may testify the injuries were caused by rough consensual sex or non-consensual sex". SR678. T9:201-02, 208. The trial court erred admitting such testimony at trial in that the opinion gave rise to equal degrees of possibilities regarding either conclusion, thus encouraging the jury to become confused, speculating as to which conclusion might apply. Such an opinion went to the primary issue regarding rape charges (and related felony murder and burglary charges) regarding proof of force or defense of consent thereby prejudicing the defendant's right to a fair trial.

Decisions regarding the admission of evidence utilize an abuse of discretion standard of review. State v. Packed, 2007 S.D. 75, ¶24, 736 N.W.2d 851, 859. Abuse of discretion review first involves an initial legal determination by an appellate court whether discretion to admit or exclude evidence was ever even present.[8] As illustrated in Packed, although trial courts are accorded wide discretion to admit or exclude evidence, when a "a trial court misapplies a rule of evidence, as opposed to

[8] See State v. Harris, 2010 S.D. 75, ¶16, 789 N.W.2d 303, 310 (appellate legal determination that admitted statements were hearsay preceded the Court below concluding that "the trial court abused its discretion by overruling Harris's hearsay objection to the recordings.")

merely allowing or refusing questionable evidence, it abuses its discretion." Id., citing Koon v. U.S., 518 U.S. 81, 100 (1996).

Snell's opinion was phrased in terms of possibilities, not probabilities to any reasonable degree of certainty. Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more *probable* or less *probable* than it would be without the evidence." SDCL 19-19-401 (emphasis *added*). A jury's verdict must "not be based upon speculation, guess or conjecture." See Degen v. Beyman, 241 N.W.2d 703, 706 (S.D. 1976). An opinion addressing possibilities would cause jurors to speculate and guess.

Expert testimony may be admitted where it will help the trier of fact. SDCL 19-19-702. Rule 702 "requires a valid scientific connection to the pertinent inquiry as a pre-condition to admissibility". Daubert v. Merrell Dow, 509 U.S. 579, 592-93 (1993). Expert testimony should not be received "if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from mere guess or conjecture." Scurlocke v. Hansen, 684 N.W.2d 565, 569 (Ne 2004). Expert testimony "based on 'could', 'may' or 'possibly' lacks the definiteness required to meet the

claimant's burden . . . the trier of fact is not required to guess". Paulsen v. State, 541 N.W.2d 636, 643 (NE 1996).

The South Dakota Supreme Court addressed the issue as to propriety of expert opinions expressing conclusions in terms of possibilities. Koenig v. Weber, 174 N.W.2d 218, 224 (S.D. 1970). In Koenig, the defendant objected to admission of the opinions of the plaintiff's physician regarding the permanency of the plaintiff's injuries. The Supreme Court noted that the doctor testified to a reasonable degree of certainty, and actually, to a degree of absolute certainty. It concluded that the opinion was properly admitted as it was based on certainty and probability, and not possibility. Koenig, 174 N.W.2d at 224.

Koenig drew its holding from Vaux v. Hamilton, 103 N.W.2d 291 (N.D. 1960). Koenig, 174 N.W.2d at 224. Vaux described the differences between opinions based on possibilities versus probabilities in a personal injury case addressing injury causation issues. The Plaintiff's expert was asked:"Doctor, can you state with a reasonable degree of medical certainty that there is a distinct *possibility* that this might happen?" Vaux, 103 N.W.2d at 294 (emphasis *added*). The defendant objected stating the

question was, inter alia, speculative and conjectural. The trial court overruled the objection.

On appeal, the Supreme Court of North Dakota held the trial court erred by admitting the opinion. The court reasoned:

> under certain circumstances, the opinion of an expert is admissible, testimony which consists of no more than a mere guess of the witness is not admissible. Such testimony must be as to a definite probability and must not involve, to an excessive degree, the element of speculation or conjecture. The question directed to the medical expert in this case was calling for a mere guess on the part of the doctor 'that there is a distinct possibility that this might happen. . . Webster defines 'possibility' as 'the character, state, or fact of being possible, or that which may be conceivable.' Thus, even if an event might occur only once in ten thousand times, it still is within the realm of possibility, though very improbable.
> Vaux, 103 N.W.2d at 294.

The appellate court concluded that "A medical expert is qualified to express an opinion to a medical certainty, or based on medical probabilities only, but not an opinion based on mere possibilities," and ordered a remand for a new trial. Vaux 103 N.W.2d at 294. The South Dakota Supreme Court uniformly limits expert opinions to expressing conclusions as probabilities and not possibilities. *See* Truck Ins. Exch. V. CNA, 2001 S.D. 46, ¶19, 624 N.W.2d 705, 709; Brady Memorial Home v. Hantke, 1999 S.D. 77, ¶11, 597

N.W.2d 677, 682.[9] This precedence must be applied to the facts of this case as well.[10]

The State presented an opinion couched in terms of possibilities. As such, the trial court had no discretion to admit such an opinion at all as an opinion leading equally to opposite conclusions could not be relevant. See Packed, 2007 S.D. at ¶24-25,736 N.W.2d at 859-60. It is possible that injuries to the vaginal area were the product of consensual sex, or possibly they might not. It is possible that injuries to the vaginal area were the product of a sexual assault, or possibly they might not. Snell's opinion offered the jury an invitation to guess between potentially equal probabilities which is legally insufficient, effecting his right to a fair rial. *See* Hansen, 558 N.W.2d at 80; Koon, 518 U.S. at 100.

III. THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT EVIDENCE WITHOUT FOUNDATION CONCERNING PHYSICAL EVIDENCE OBTAINED DURING THE STATE'S INVESTIGATION

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[9] See also Hanten v. Palace Builders, Inc., 1997 S.D. 3, ¶9, 558 N.W.2d 76, 78 (SD 1997); Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992); Armstrong v. Minor, 323 N.W.2d 127, 128 (SD 1982); Thomas v. St. Mary's Church, 283 N.W.2d 254, 258 (SD 1979).

[10] The rules of evidence apply to all proceedings in this state, other than those excluded by SDCL 19-19-1101. Criminal jury trials are not excluded. Accordingly, rules of evidence protect *insured* defendants from speculative opinions in civil trials and *criminal* defendants in criminal trials with equal zeal, as the latter risk incarceration as well as potential monetary losses (not indemnified contractually by a third party).

The State presented evidence concerning what it characterized as a burn pit found during their investigation. E35; E93-94. The Defendant objected to its admission on relevance and foundation rounds. The State argued that such evidence was relevant to steps taken by law enforcement as part of the investigation. The trial court erred by admitting such evidence.

Evidence is relevant where it "has any tendency to make a fact more or less probable than it would be without the evidence". SDCL 19-19-401(a). The fact sought to be proved must be "of consequence in determining the action". SDCL 19-19-401(b). The fact must be "relevant to some controverted material issue". State v. Muetze, 368 N.W.2d 575, 586 (SD 1985).[11] The fact that the State found what it characterized as a burn pit was not controverted. In that no evidence from that site was linked to the Defendant, it was not material either. Accordingly, the evidence was not relevant and the trial court misapplied the law of relevance. All evidence not relevant is inadmissible. SDCL 19-19-402. The trial court erred in admitting such evidence on relevance grounds alone, in addition to its

[11] Use of the term "and" suggests the test is conjunctive. See In re: Fischer, 395 N.W.2d 598, 600(S.D. 1986) 'and'").

probative value being substantially outweighed by unfair prejudice.[12]

IV. THE TRIAL COURT ERRED BY ADMITTING THE DEFENDANT'S STATEMENTS THAT HE HAS A CRIMINAL MIND AS AN ADMISSION AGAINST INTEREST OVER APPELLANT'S OBJECTIONS CONCERNING CHARACTER EVIDENCE AND ITS PROBATIVE VALUE BEING SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE

The State offered and admitted evidence concerning statements made by the Defendant to Detective Hoffman and Forester. SR670, 676; E39; E45; T10:140; T10:10. The Defendant indicated he had a "criminal mind". Id. The Defendant objected on grounds that such a statement constituted inadmissible character evidence. SR426,442; T1:1-5. In addition, any probative value of the statement would be substantially outweighed by unfair prejudice by confusing the admission "criminal mind" with certain mens rea elements within the indictment's charges. T1:3. The State argued that it was relevant to the mens rea requirements. T1:3.

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[12] The probative value of evidence not material is low compared to the high risk that evidence not linked to the Defendant would produce speculation as to its relevance, and investigative efforts evidence was cumulative via Rule 403. See State v. Muetze, 368 N.W.2d 575, 586 (SD 1985). Also, foundation and relevance was lacking regarding questions to Nagel as to Kryger's scratch marks (T8:97); the trial court erred on rule 403 grounds admitting autopsy photos (T9:180).

The trial court overruled the objections. SR670, 676. The trial court concluded the statement was not character evidence (merely) because it was an admission against interest. Id.; T1:5. With regards to probative/prejudice balancing, the trial court conceded it had not yet considered the prejudice arising from confusion between the admissions and mens rea elements. T1:5. Nevertheless, the trial court concluded that its probative value was not outweighed by prejudice. It indicated any prejudice could be addressed via presentation of careful jury instructions.[13] T1:5.

The effect of evidence admissible for one purpose, yet inadmissible due to prejudice was illustrated in Armstrong v. State, 931 So.2d 187 (Fla.App, 2006). In a prosecution for robbery the State successfully admitted over objections the defendant's statement to authorities that "I will f--- with people I don't know, I will steal somebody's s---, but I ain't never hurt nobody in my f------ life, man. I have never hurt nobody". Armstrong, 931 So.2d at 190. The appellate court found admission of the statements to be reversible error as it "served only to show his bad character and propensity to commit the crime charged." Id.

[13] None, however, were submitted later, see infra. T12:49.

at 192. The defendant tried to present "a general idea of his character and what he would do and not do." Id. In addition, the "jury was not told about the context in which the statement was made." Id. at 193.

The Defendant did not state he had a criminal mind regarding *this case*. He made these statement in the context of discussing a prior dismissed charge against him and his resulting view of police investigations, as well regarding a matter of "general concern" with his girlfriend/fiancée. T1:3-5. The parties were precluded from discussing the Defendant's record or other alleged acts. T8:113. T10:19. The jury, therefore, was not aware of the context in which the statements were made. The statements constituted character evidence and were inadmissible on those grounds in addition to being highly prejudicial. See Banks v. State, 725 So.2d 711, 718 (Ms. 1997) (reversible error to admit defendant admission that he was a dangerous man to prove state of mind in murder case).[14]

Evidence can fall under the purview of more than one statute, yet still be inadmissible due to a single overriding reason. The trial court, while concluding that

[14] See also State v. Nelson, 501 S.E.2d 716, 724 (S.C. 1997).

the statement was an admission against interest, tacitly assumed it could not also fall under rule 404 as character evidence. SR, T1:3-5. Armstrong shows that evidence admitted by the trial court for one reason will create reversible error when admitted against more compelling reasons, thereby denying Kryger's right to a fair trial. Koon, 518 U.S. at 100.

V. THE TRIAL COURT ERRED BY DENYING EACH AND EVERY MOTION FOR MISTRIALS WHEN THE JURY WAS EXPOSED TO MATTERS CONCERNING THE DEFENDANT'S PRIOR RECORD WHICH THE TRIAL COURT ORDERED TO BE EXCLUDED

The trial court had ruled regarding motions in limine that references to the Defendant's past and present custody status, prior records and other acts were precluded during the State's case in chief. T8:112; SR378, 672. Such evidence, however, came before the jury. Detective Forster's testimony revealed the defendant's parole status. T10:9. The state resented audio evidence, originally thought to have been edited, of a recorded conversation between the Defendant and Lori Nagel, revealing his incarceration status. E37; T8:103. The trial court subsequently indicated it did not want such issues arising again. T8:113. T10:19.

It was later reported the jury saw Defendant in hand cuffs while being transported back to the jail, shortly

before the trial concluded. T13:9 The Appellant moved for mistrials after these events arguing that exposure to each incident permitted the jury to consider inadmissible information, thus, depriving the Defendant of his constitutional right to a fair trial. U.S.Const.Amend. VI and XIV. (T8:111, T9:18, T13:7). Each motion was denied.

The Court encountered a similar situation where improper evidence was admitted in defiance of prior motion in limine rulings in State v. Cage, 302 N.W.2d 793 (SD 1981). In Cage, the trial court granted a defendant's motion in limine preventing the prosecutor from inquiring about a witness' age. Nevertheless, the prosecutor asked the question in disregard of the court's order. Cage, 302 N.W.2d at 797. The defendant objected but the witness still responded. The defendant requested a mistrial be declared which was denied. On appeal, this Court reversed noting that, in response to the appellee's harmless error argument, "We, however, are of the opinion that the harmless error rule ought never be used to justify unfairness at the trial." Id.

In the present case, the jury was exposed to forbidden content not once but numerous times. Despite benevolent intentions, curative instructions further called attention to such content. Prejudice was inflicted on the

Appellant's right to a fair trial, on these grounds, and in conjunction with other error present in the record below.

VI. THE TRIAL COURT ERRED BY DENYING PROPOSED JURY INSTRUCTIONS REGARDING ITS USE OF EVIDENCE THAT THE DEFENDANT HAD A CRIMINAL MIND WHEN EVALUATING STATE OF MIND ELEMENTS CHARGED IN THE INDICTMENT

The trial court admitted evidence of the Defendant's statements concerning his "criminal mind" over the Defendant's objections. SR670, 676. The Defendant argued that the jury would confuse the term with other states of mind at issue in this case such as depraved mind and premeditation. T1:1-5. The trial court, however, provided some limited solace to the Defendant by expressing he was "confident that with careful instructions on the law . . . I can mitigate against any confusion with my instructions and avoid the possibility that the danger of confusion substantially outweigh the force of that evidence." T1:5.

Accordingly, the Defendant proposed jury instructions suggesting proper use of the "criminal mind" statements for evaluation of whether such elements as depraved mind and premeditation had been proven. SR583. The instructions stated "Evidence that the Defendant described himself as having a criminal mind does not in itself mean the Defendant possessed a [depraved mind/premeditated design]. You must consider any such evidence in conjunction with all

other evidence presented." The trial court declined the proposed instructions, and offered no alternative "careful" instructions of its own making. T12:49.

Reversible error to refuse to give a proposed jury instruction is shown where the tendered instruction is a correct statement of the law, the instruction was warranted by the evidence, and the error from not giving the instruction was prejudicial. State v. Webster, 2001 S.D. 141, ¶7, 637 N.W.2d 392, 394. If the error of refusing the instruction goes to the heart of a Defendant's case, "it can infringe upon the defendant's right to due process and a fair trial". Miller v. State, 338 N.W.2d 673, 676 (S.D. 1976). The Defendant's criminal mind statement was offered into evidence. The proposed instructions were then warranted. It does not conflict with state law, but rather explained the applicable law in relation to this case.

The Defendant argued through his cross examination of Detective Bakke, the State could not prove any state of mind of any individual entering the decedent's residence as shown on the mosque video. The notion that the Defendant had a criminal mind, stated out of context, could be confused with notions that he also possessed a depraved mind or a mind with a premeditated design simply because the phrases may sound alike to some jurors. T1:3-5; T9:18.

Prejudice resulted from removing from the jury's consideration an instruction that distinguished the two or at least pointed out they are not necessarily synonymous without consideration of all evidence.

Failure to separate the two encourages speculation and conjecture on the part of the jury whether the two phrases are synonymous or different. Verdicts cannot be based on conjecture or speculation. Degen, 241 N.W.2d at 706). The Defendant suffered further prejudice by being unable to mitigate the effects of the improper admission of "criminal mind" evidence over the Defendant's objections through his curative instructions.

VII. THE TRIAL COURT ERRED BY DENYING PROPOSED JURY INSTRUCTIONS CONCERNING SPECULATION AND CONJECTURE WHERE EVIDENCE WAS ADMITTED TOWARDS ESTABLISHING POSSIBILITY RATHER THAN PROBABILITY

The Defendant proposed multiple alternative jury instructions defining speculation and conjecture. SR583. The trial court rejected all of them. T12:62. Per Webster, the instructions correctly stated the law. In support of the instruction, the Defendant cited, inter alia, Jaramillo v. U.S., 357 F.Supp. 172, 175 (DCNY 1973); Oklahoma City v. Wilcoxson, 48 P.2d 1039, 1043 (Ok. 1935); Weed v. Scofield, 73 Conn. 670, 49 Atl. 22 (Conn. 1901). In addition, the

evidence, or lack thereof, warranted use of *any* of the proposed instructions.

Per Webster, the Defendant presented a theory that the State presented a lot of evidence, although little was actually presented that which affirmatively linked the Defendant to the crimes alleged, creating reasonable doubt. Evidence was presented that non-consensual sex occurred or consensual sex occurred per Dr. Snell, encouraging speculation whether sex occurred (at some location) or a sex crime occurred (at some location). T9:201-02, 208. Evidence of a burn pit was presented to show what the State looked into during their investigation, but not how it might be relevant to any alleged actions of the Defendant. E93-94. Numerous items were collected from the decedent's residence, the Defendant's residence and place of work, but few were tested to establish any relation to the Defendant's presence or activities. E95-98. In addition, pictures of a number of bicycles were taken at the Defendant's work place, but no testimony was offered that any were used, if at all, by anyone at all, during the period of time in question. E36.

The jury was left to speculate whether such evidence, if any, pertained to the Defendant and his alleged actions, causing prejudice to the Appellant's right to a fair trial.

Instructions as to what constitutes speculation and conjecture would assist the jury to determine whether the State proved its case. The Defendant was further prejudiced by being unable to mitigate the effects of the improper admission of speculative opinion evidence (Snell) or volumes of evidence concerning investigative steps producing evidence (burn pit, blood stains, jacket) obtained but not tested or affirmatively linked to the Defendant over the Defendant's objections.

VIII. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON ALL COUNTS

The Defendant presented a motion for judgment of acquittal on all charges. T12:5 et seq. The trial court denied the motion(s). T12:17. The lack of proof present in the record demonstrates the convictions were arrived at in error based on speculation by the jury. The proof of facts offered by the State demonstrated only the possibility that the elements were established, and not the probability of their existence. Similarly, the underlying offenses giving rise to the felony murder counts in Counts II through V as well as the offense components of Burglary in Counts IX and X, required those charges to fail as well. As such, the trial court erred by denying the motion for a judgment of acquittal on all Counts "where "the evidence [was]

insufficient to sustain a conviction of the offense or offenses". SDCL 23A-23-1; See State v. Wellner, 318 N.W.2d 324 (S.D. 1982).

The State indicted the Defendant with several charges requiring proof of a unique and defined state of mind. SR18. Count I required proof of a "premeditated design" per SDCL 22-16-4(1). See also Kleinsasser v. Weber, 2016 S.D. 16, ¶24, 877 N.W.2d 86, 94, (specific intent crime). Count VI required that the State demonstrate a "depraved mind" per SDCL 22-16-7. Counts IX and X required proof of the "intent to commit any crime" via SDCL §§22-32-1(1) and 22-32-1(3). Proof of the state of mind of the Appellant, let alone the actual perpetrator, is lacking in this case.

In addition, the Appellant was also charged and convicted of Rape 2nd, requiring evidence of force, coercion or threats. Medical testimony from Dr. Snell testified that the decedent's injuries to her vaginal area were consistent with both consensual and non-consensual sex. T9:201-02, 208. He indicated that sex with the decedent occurred prior to her death. However, he could not provide an opinion as to the time sexual intercourse occurred nor was he able to state the time of death. One is left to guess when and where sexual intercourse occurred, and whether it was consensual or part of a rape.

Detective Bakke testified his observations of the "mosque video". E46-47; T8:18-25. He indicated he could not tell who occupied the decedent's vehicle as it approached her residence, and whether it contained more than one person. He indicated the video does not show, and so he does not know, and the jury would not know, whether the individual on the video walking towards the decedents residence entered by permission of the decedent or without her permission. T8:18-25. It is unknown by which entrance entry may have been obtained by this individual if it had been obtained at all. T8:18-25. A lack of evidence of forced entry, or damage inside the residence, inspire speculative notions of physical force being used outside or inside of the house. One is left to guess whether the perpetrator formed any intent to perform any degree of murder before entering the residence, while in the residence, assuming the decedent died in the house, outside the house, or in the garage, or elsewhere. T8:18-25.

This Court evaluated a lack of proof of a defendant's state of mind in State v. LaCroix, 423 N.W.2d 169 (S.D. 1988). In LaCroix, the defendant was charged, inter alia, with burglary. LaCroix, 423 N.W.2d at 169. The State alleged the defendant entered a bar with the intent to commit an assault against the bartender. Id. at 171. The

defendant had been successfully convicted in the same trial concerning the defendant's earlier assault that day against another bartender at a different bar. Id. The defendant thought the second bartender was the same person. Id.

On appeal, the defendant argued the State failed to show sufficient proof that the defendant possessed the intent to commit the assault when he entered the bar. Id. The State argued that it could be inferred that the intent to commit the first assault carried over to the second assault, which was the subject of the appeal. Id. This Court rejected the State's argument noting "Although state is entitled to reasonable inferences fairly drawn from the evidence to support the verdict, the determination of the sufficiency of the evidence may depend upon the difference between mere speculation and legitimate inference from proven facts." Id. The Court noted that there was no evidence of the defendant's demeanor when he entered the (second) bar. Id. The evidence did not affirmatively show that the first bartender could have arrived to the second bar in time prior to the defendant. Id.

The trier of fact could only "speculate" whether the defendant entered the bar with the intent to strike *a* bartender, or only formed the intent after the defendant had entered. Id. This Court reversed the trial court,

holding that "The evidence and all reasonable inferences drawn therefrom might permit *conjecture or speculation* as to defendant's intent when he entered the V.F.W. Club, but it is too tenuous to support the verdict." Id. (emphasis *added*).

The facts presented by the State present a similar situation this Court encountered in LaCroix. The reasonable inferences which could be taken from the State's evidence might permit conjecture or speculation that the Appellant is the actual suspect, who may have formed all or some or none of the particular required intents either before or after (or never) while at the decedent's residence. The perpetrator may have formed an intent to kill outside the residence prior to entry, or perhaps not. The perpetrator may have formed an intent to steal money in the decedent's refrigerator or perhaps not, or it might have been given to him, or the Johnson family may have deposited such money or perhaps not. Such conjecture or speculation was "too tenuous" to support the verdicts in this case.

The State's offering of proof invited too much conjecture or speculation, not otherwise defined by presented jury instructions, to justify the convictions against the Appellant. The trial court erred denying the

defendant's motion for judgment of acquittal. This Court should remand the case to the trial court with instructions to enter judgments of acquittal on all counts.

IX.THE TRIAL COURT ERRED BY OMITTING AN ALIBI JURY INSTRUCTION WHERE THE STATE FAILED TO PRESENT A SPECIFIC TIME IN ITS DEMAND AND THE DEFENDANT STATEMENTS OVER THE TIME PERIOD SHOWED HE WAS PLACES OTHER THAN THE DECEDENT'S RESIDENCE

The Appellant requested the trial court instruct the jury regarding an alibi defense. T12:32. The State deferred to the court. T12:32. State law requires that State's Demand for Alibi must indicate the time, date and place where the event occurred. SDCL 23A-9-1. The trial court first noticed that the State's Demand did not state specific time but a period of time over two days. T12:32-34. The Demand alleged the offense to occur between 10 p.m. on Friday, March 14, 2014 through 5:00 am on Saturday, March 15, 2014. It referred to the place in question as the decedent's address.

In this case, the Defendant did not take the stand per his constitutional right to remain silent. U.S.Const. Amend. V. However, the State admitted his statements to detectives concerning information he could recall regarding his whereabouts as admissions against interest via the detective's recollections and interview videos. E39-40. In those interviews, the Defendant discussed he had rode his

bike throughout the city of Sioux Falls during that period, and had a near collision with a large SUV. T12:31-32. He also provided information concerning his whereabouts during his interview regarding March 14-16, 2014.

The Defendant concedes he did not provide a traditional notice to the State's Demand. However, evidence of alibi may still nevertheless be admitted through a defendant's testimony[15], thus warranting an instruction. See SDCL 23A-9-4; State v. Hibbird, 273 N.W.2d 172, 174 (S.D. 1978) citing S.D.Const.Art. VI, §7. This Court, in Hibbird, noted "the rationale for excluding testimony of witnesses other than defendant does not apply when addressed to defendant." Hibbird, 273 N.W.2d at 175. Alibi evidence coming from sources other than the defendant "is particularly susceptible of fabrication; therefore, the state has a legitimate interest in not being surprised at trial with a parade of witnesses avowing that defendant was not at the scene of the crime." Id.

This Court noted the absence of concerns regarding surprise from evidence produced solely from a defendant. It stated "the state already has the burden of proving

[15] "In common parlance, 'testimony' and 'evidence' are synonymous." Black's Law Dictionary, Fifth Edition, p. 1324; See also State v. Sellers, 818 So.2d 231 (La. 2002)

beyond a reasonable doubt that he was at the crime scene during the time in question. The optimistic defendant who hopes to convince the jury through his own unsupported testimony that he was not in the vicinity of the crime has sufficient credibility problems to offset any disadvantage to the state resulting from surprise." Id. In the present case, no surprise existed at all. The State was aware of the defendant's alibi evidence concerning his journeys throughout Sioux Falls during that time via his statements to investigators made prior to his indictment.

The State tacitly regarded the Defendants admissions against interests as being reliable such that they admitted his statements into evidence. The Appellant's statements about almost being hit by an SUV were reliable and relevant. It demonstrated relevance via the impossibility of the Defendant being at the decedent's address while almost being hit by an SUV in motion. It demonstrates reliability via video surveillance footage showing a bicyclist proceeding north on Garfield while the suspect in the decedent's SUV pulled into view in front of the decedent's address going south on Garfield *simultaneously*. EG; E46-47; T11:40-41; T11:36-50 Detective Hoffman concluded the suspect driving the SUV and bicyclist could not be the same person. T11:44.

Similarly, the trial court possesses the discretion to waive the notice requirement for good cause shown. SDCL 23A-9-5. The trial court had noticed the lack of specificity as to the date(s) and time of day in the State's Demand. Presumably, the trial court possessed concerns about whether any defendant would being able to comply with a specific notice of alibi after encountering a demand broad in scope regarding time.

Inequities present in balancing burdens and specificities of proof in alibi cases were noted by the Ohio Court of Appeals in State v. Kinney, 1981 WL 6076 (Oh.App 1981). In Kinney, the appellate court noted, "A defendant is presumed innocent, yet only the guilty man knows the exact time of the crime. A guilty man can fabricate his alibi. An innocent man must guess the time of the offense at his peril." Kinney, at 3. The court later posed the following hypothetical:

> Suppose yesterday a crime was committed. We shall presume any reader of this opinion did not commit it, and would, if necessary, have a good alibi. He was at home, then at work, then shopping, then at home again. Yet if the reader were charged with the crime, and not told the time when it occurred he would be hard put to make the alibi except by accounting for his time throughout the entire day. And then having filed his notice of alibi, the reader is told he must state the time of the crime, or else he cannot prove his alibi. Id.

Having noted the broad scope of time the State alleged the event to have occurred, good cause existed to permit presentation of an alibi instruction where the Defendant would have to account for his whereabouts, not only at a particular second or minute of a day, but the multitude of minutes and seconds contained within a 7 hour period over two days. Once concerns were noted regarding the Demand's scope of time, the trial court erred denying the Defendant's request for an instruction which would assist his defense that the Defendant was present elsewhere during that time. An alibi jury instruction would allow the Defendant to place his statements concerning his whereabouts over time in a proper context, *especially in light of the video evidence demonstrating the bicycle rider and the decedent's SUV on the move simultaneously.* EG; E46-47; T11:36-50(video time(s) stated, p40-44). Failing to provide the instruction constituted prejudice. See State v. Engessor, 2003 S.D. 47, ¶43, 661 N.W.2d 739, 753. The effect of failing to give that instruction denied the Appellant his constitutional right to due process and a fair trial. S.D.Const.Art. VI, §7; U.S.Const.Amend. V, VI, and XIV.

X.THE ACCUMULATION OF THE COMBINED ASSIGNED ERRORS CONSTITUTED REVERSIBLE ERROR

The Defendant maintained the State presented insufficient evidence regarding all counts when he made his motions for judgment of acquittal. If this Court determined that the State's evidence was insufficient, the proper remedy would be to reverse this matter with instructions to enter judgments of acquittal on all counts per SDCL 23A-23-1. In the alternative, if the trial court's errors, jointly and severally, cumulated to the extent the Defendant experienced prejudice and was deprived of right to a fair trial, reversal for a new trial is warranted. See State v. Dokken, 385 N.W.2d 493, 504 (S.D. 1986). This matter does not present a case involving overwhelming evidence supporting an appellate determination of harmless error. Compare State v. Big Head, 363 N.W.2d 556, 563 (S.D. 1985); cf. State v. Nelson, 1998 S.D. 129, ¶20, 587 N.W.2d 439, 446.

Appellate courts will find reversible error arising from erroneous trial court evidentiary rulings when overwhelming evidence is not present leading to the conviction. Redinberg v. State, 727 S.E.2d 201, 204-06 (Ga.App. 2012); People v Gaskin, 565 N.Y.S.2d 547, 548 (N.Y. 1991). Overwhelming evidence is simply not present here. While the Defendant admitted a sexual encounter via his recorded statements to Nagel, his admissions did not

contain admissions regarding use of force or violence occurring during the encounter, or the location of any encounter. E37. Dr. Snell indicated he could not conclude to a reasonable degree of medical certainty the decedent's injuries indicated non-consensual intercourse occurred. T9:208. He could not indicate when intercourse occurred or when the decedent passed, leaving the trier of fact to speculate whether rape or consensual sex occurred followed some undetermined time later by some other intervening force.

The State failed to present overwhelming evidence of the suspect's intent at any point between March, 14-16, 2014. Per Detective Bakke, neither video or DNA evidence shows who was in the decedent's vehicle at any time, or in the decedent's house at any time, whether they were allowed in or forced themselves into the residence, whether the/a suspect driving the SUV at any time is the same suspect who may have entered the residence, whether the suspect(s) had a particular intent either outside or inside the residence or when any intent manifested itself. T8:18-25. DNA tests were done, on the few samples which were actually tested,

within the structure and the SUV. Finger print analysis was performed producing negative results.[16]

Numerous anomalies presented themselves regarding the collection of physical evidence from the decedent's residence. Evidence of blood stains or viscous liquids found near the bathroom or behind the defendant's ear were not tested at all. Law enforcement officer and first responders specifically did not detect strong odors of bleach or cleaning solutions when the first arrived on the scene. Relatives and friends of the decedent arrived later, and stayed after officers and responders initially departed from the residence. The decedent's friends and relatives testified they smelled a bleach type odor upon entering the residence. Prior to trial during the investigation, many had previously indicated to officers that they did not smell any such odors. All family members and relatives denied cleaning up the residence. Cleaning materials and bedding were not found in the house. No cleaning chemical odors were detected in the SUV when it was viewed by family members and law enforcement. Yet, the mosque video does not reveal the individual depicted departing on the bike carrying any bedding or cleaning materials. In addition,

[16] The suspect depicted in the "mosque video" did not appear to be wearing gloves. E46-47.

the SUV returns to the residence as the bike rider proceeds north on Garfield simultaneously. T11:44. While the unanswered questions and lack of proof may be overwhelming, such does not constitute overwhelming evidence of guilt.

As each error manifested itself, the Appellant first attempted to prevent the errors from occurring and later sought corrective measures after they occurred. The Appellant moved in limine to preclude evidence concerning his admission' concerning his "criminal mind". Having failed on that issue, the Appellant sought to limit its prejudicial effect, acknowledged by the trial court to exist, by proposing jury instructions in light of the court's stated solution to carefully crafted jury instructions. Despite the need for careful instructions the court rejected all proposed instructions on this issue. The jury was left to speculate whether a "criminal mind" was indicative of a depraved mind or one capable of coming up with a premeditated design.

The trial court ordered that references to the Defendant's criminal record and alleged other acts were not admissible. However, references to the Appellant's past record via references to his parole status, or being in the jail, or being seen in hand cuffs nevertheless entered the proceedings. Each time the Appellant moved for a mistrial

Each time the request was denied. References to the criminal mind stated both prohibited by the court and unexplained in its original context, and not receiving any further instructions on such topics by the court as to how to consider the phrase, but while also in the presence of indications of a prior record, combined to present prejudice cumulatively. See Nelson, 1998 S.D. at ¶20, 587 N.W.2d at 446.

Numerous items collected, but not tested, in this case were admitted into evidence. For instance, evidence of a trash burn pit were admitted over the Appellant's objections that the State failed to show how it was related to this case. E35, 93-94. No testing had been done to link such evidence to the Appellant. The concern was that such evidence, and other untested evidence at the Appellant's home and workplace would lead the jury to speculate as to their probative value.

To remedy the effects of admission of such evidence which might go to other conclusions, the Appellant proposed multiple instructions concerning speculation and conjecture. All were rejected by the trial court, leaving the jury to speculate on such issues as, inter alias, is the bleach pictured at the Appellant's work place the same bleach used by the Appellant in between the time police and

first responders initially left the scene and returned, which went unnoticed by all the decedent's relatives present in the residence while such cleaning commenced? Or, was the bleach pictured in the Defendant's workplace, used to clean the residence before all state witnesses entered the residence on March 16, which possesses unique chemical characteristics to leave no odors until law enforcement officers came back to the residence a second time?

Each error outlined in this brief standing alone is sufficient to warrant reversal. There were, however, more than one present here. The trial court rejected proposed corrective measures. See State v. McDowell, 391 N.W.2d 661, 666 (S.D. 1986)(effect of corrective measures taken). In the alternative the combined sum of the errors in all its parts deprived the Defendant of a fair trial.

CONCLUSION

The trial court committed reversible error by denying the Defendant's motions for judgment of acquittal for convictions based on speculation and possibilities. The cumulative effect of the trial court's errors justify reversal and remand for a new trial.

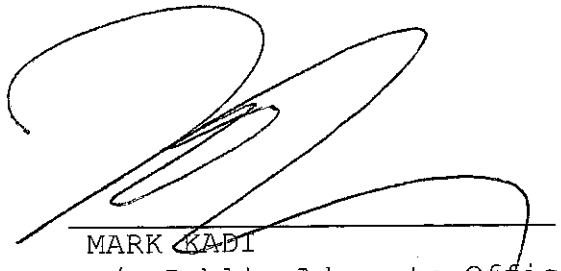
CERTIFICATE OF COMPLIANCE

This brief meets this Court's expanded page limitations per prior Order of this Court.

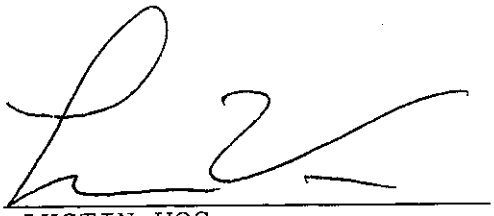
REQUEST FOR ORAL ARGUMENT

The Appellant requests 20 minutes for oral argument or any additional time in the Court's discretion.

Dated this 5th day of September, 2017.



MARK KADI
c/o Public Advocate Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.org
Attorney for Appellant



AUSTIN VOS
c/o Public Advocate Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.org
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of September, 2017, a true and correct copy of the foregoing Amended Appellant's Brief was served electronically on:

Marty Jackley
Attorney General
1302 E. Hwy, Suite 1
Pierre, SD 57501
ATGservice@state.sd.us

Aaron McGowan
c/o LeAnne Harries
Minnehaha County States Attorney
415 N. Dakota Ave
Sioux Falls, SD 57104
ujsservice@minnehahacounty.org

Attorney for Appellant c/o
Minnehaha County Public Advocate

Appendix A

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA * SFPD201416409
Plaintiff

vs. * INDICTMENT

CRI14-1956

CHRISTOPHER DEAN KRYGER
Defendant *

****

COUNT 1: MURDER IN FIRST DEGREE – PREMEDITATED MURDER – CLASS A FELONY
COUNT 2: MURDER IN THE FIRST DEGREE – CLASS A FELONY
COUNT 3: MURDER IN THE FIRST DEGREE – CLASS A FELONY
COUNT 4: MURDER IN FIRST DEGREE – PREMEDITATED MURDER – CLASS A FELONY
COUNT 5: MURDER IN FIRST DEGREE – PREMEDITATED MURDER – CLASS A FELONY
COUNT 6: MURDER IN 2ND DEGREE-DEPRAVED MIND – CLASS B FELONY
COUNT 7: RAPE 2ND DEGREE – FORCE, THREAT – CLASS 1 FELONY
COUNT 8: RAPE 3RD – INCAPABLE – PHYSICAL OR MENTAL (AFTER 7-91) – CLASS 2 FELONY
COUNT 9: BURGLARY IN 1ST DEGREE-INFLICT INJURY ON ANOTHER – CLASS 2 FELONY
COUNT 10: BURGLARY IN 1ST DEGREE-COMM. IN NIGHT TIME – CLASS 2 FELONY

THE MINNEHAHA COUNTY GRAND JURY CHARGES:

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there, without authority of law and with a premeditated design to effect the death of KARI ANNE KIRKEGAARD, did kill a human being, KARI ANNE KIRKEGAARD, and thereby did commit the offense of Murder in the 1st Degree, which conduct was in violation of 22-16-4(1), contrary to the form of statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 2

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there did kill another human being, KARI ANNE KIRKEGAARD, while engaged in the perpetration or attempted perpetration of the crime of RAPE, and thereby did commit the offense of Murder in the 1st Degree, which conduct was in violation of SDCL 22-16-4(2), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 3

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there did, without authority of law, kill another

human being, KARI ANNE KIRKEGAARD, said Defendant while engaged in the perpetration or attempted perpetration of the crime of BURGLARY, and thereby did commit the offense of Murder in the 1st Degree, which conduct was in violation of 22-16-4, contrary to the form of statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 4

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there did perpetrate or attempt to perpetrate the crime of RAPE, and subsequently effected the death of KARI ANNE KIRKEGAARD to prevent detection or prosecution of the crime and thereby did commit the offense of Murder in the 1st Degree, which conduct was in violation of 22-16-4, contrary to the form of statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 5

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there did perpetrate or attempt to perpetrate the crime of BURGLARY, and subsequently effected the death of KARI ANNE KIRKEGAARD to prevent detection or prosecution of the crime and thereby did commit the offense of Murder in the 1st Degree, which conduct was in violation of 22-16-4, contrary to the form of statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 6

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there did perpetrate an act imminently dangerous to others and evincing a depraved mind, regardless of human life, and thereby did kill a human being, namely KARI ANNE KIRKEGAARD, without any premeditated design to effect the death of any particular person, thereby committing the offense of Murder in the 2nd Degree, which conduct was in violation of 22-16-7, contrary to the form of statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 7

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, did commit the crime of Rape in the Second Degree by accomplishing an act of sexual penetration with KARI ANNE KIRKEGAARD, by 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, which conduct on the part of the Defendant was in violation of SDCL 22-22-1(2), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 8

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, did commit the crime of Rape in the Third Degree by accomplishing an act of sexual penetration with KARI ANNE KIRKEGAARD, who was incapable because of physical or mental incapacity, of giving consent to such act,, which conduct on the part of the Defendant was in violation of SDCL 22-22-1(3), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 9

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there did enter or remain in an occupied structure, namely, 709 S. GARFIELD AVE., SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA, with the intent to commit any crime, HOMICIDE, RAPE AND/OR THEFT, and the Defendant inflicted or attempted or threatened to inflict physical harm on another person, KARI ANNE KIRKEGAARD. That additionally, the premises above described were not, at the time, open to the public, or, the Defendant was not licensed or privileged to enter or remain therein. That the Defendant thereby committed the offense of Burglary in the 1st Degree in violation of SDCL 22-32-1(1), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

COUNT 10

That the Defendant, CHRISTOPHER DEAN KRYGER, in Minnehaha County, State of South Dakota, on or about the 14th day of March, 2014, then and there did enter or remain in an occupied structure, namely 709 S. GARFIELD AVE., SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA, in the nighttime, with the intent to commit any crime, HOMICIDE, RAPE AND/OR THEFT. That additionally, the premises above described were not, at the time, open to the public, or, the Defendant was not licensed or privileged to enter or remain therein. That the Defendant thereby committed the offense of Burglary in the 1st Degree in violation of SDLC 22-32-1(3), contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of South Dakota.

Dated this 9TH day of APRIL, 2014.

A TRUE BILL
"A True Bill"

This Indictment has the concurrence of 6 members of the Minnehaha County Grand Jury.

Foreperson
Minnehaha County Grand Jury

WITNESSES WHO TESTIFIED FOR THE GRAND JURY IN THIS MATTER:
PAETYN HEMZE
OFF. MERTES
DET. HOFFMAN
DR. SNELL

CHRISTOPHER DEAN KRYGER, 3-25-1974, 1519 W. BURNSIDE ST., SIOUX FALLS, SD

DEMAND FOR NOTICE OF ALIBI

The undersigned (deputy) State's Attorney states that the charged offense is alleged to have occurred on the _____ day of _____, 20___, at or about _____ o'clock ___.M., at _____
_____.

Pursuant to SDCL 23A-9-1 demand is hereby made upon defendant and defendant's counsel to give notice of intent to offer a defense of alibi.

_____
(Deputy) State's Attorney

Appendix B

STATE OF SOUTH DAKOTA)	MAY 0 5 2016	IN CIRCUIT COURT
: SS		
COUNTY OF MINNEHAHA)		SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff,	+	SFPD 201416409
		49CRI14001956
vs.	+	JUDGMENT & SENTENCE
CHRISTOPHER DEAN KRYGER, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on April 9, 2014, charging the defendant with the crimes of Count 1 Murder in 1st Degree-Premeditated Murder on or about March 14, 2014; Count 2 Murder in 1st Degree on or about March 14, 2014; Count 3 Murder in 1st Degree on or about March 14, 2014; Count 4 Murder in 1st Degree-Premeditated Murder on or about March 14, 2014; Count 5 Murder in 1st Degree-Premeditated Murder on or about March 14, 2014; Count 6 Murder in 2nd Degree-Depraved Mind on or about March 14, 2014; Count 7 Rape 2nd Degree-Force, Threat on or about March 14, 2014; Count 8 Rape 3rd Degree-Incapable-Physical or Mental on or about March 14, 2014; Count 9 Burglary in 1st Degree-Inflict Injury on Another on or about March 14, 2014; Count 10 Burglary in 1st Degree-Comm. in Night Time on or about March 14, 2014 and a Part II Habitual Criminal Information was filed. The defendant was arraigned upon the Indictment and Information on April 14, 2014, Mark Kadi and Austin Vos appeared as co-counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Eric Johnson, Mandi Mowery and Abby Roesler, Deputy State's Attorneys appeared for the prosecution and, Mark Kadi and Austin Vos, appeared as co-counsel for the defendant. A Jury was impaneled and sworn on November 9, 2015 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on November 20, 2015 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, CHRISTOPHER DEAN KRYGER, guilty as charged as to Count 1 Murder in 1st Degree-Premeditated Murder (SDCL 22-16-4(1)); guilty as to Count 2 Murder in 1st Degree (SDCL 22-16-4(2)); guilty as charged as to Count 3 Murder in 1st Degree (SDCL 22-16-4(2)); Count 4 Murder in 1st Degree-Premeditated Murder (SDCL 22-16-4); guilty as charged as to Count 5 Murder in 1st Degree-Premeditated Murder (SDCL 22-16-4); guilty as charged as to Count 6 Murder in 2nd Degree-Depraved Mind (SDCL 22-16-7); guilty as charged as to Count 7 Rape 2nd Degree-Force, Threat (SDCL 22-22-1(2)); not guilty as to Count 8 Rape 3rd Degree-Incapable-Physical or Mental (SDCL 22-22-1(3)); guilty as charged as to Count 9 Burglary in 1st Degree-Inflict Injury on Another (SDCL 22-32-1(1)) and guilty as charged as to Count 10 Burglary in 1st Degree-Comm. in Night Time (SDCL 22-32-1(3))." The Sentence was continued to February 25, 2016.

Thereupon on February 25, 2016, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 1 MURDER IN 1ST DEGREE : CHRISTOPHER DEAN KRYGER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for life without the possibility of parole.

AS TO COUNT 7 RAPE 2ND DEGREE-FORCE, THREAT: CHRISTOPHER DEAN KRYGER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifty (50) years, concurrent to Murder in 1st Degree.

AS TO COUNT 10 BURGLARY IN 1ST DEGREE : CHRISTOPHER DEAN KRYGER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty-five (25) years, concurrent to Murder in 1st Degree but consecutive to Rape 2nd Degree-Force, Threat.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary or the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

It is ordered that the Part II Habitual Criminal Information in this matter be and hereby is dismissed.

The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 27 day of ~~March~~ April, 2016.

BY THE COURT:

JUDGE MARK E. SALTER
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____ Deputy

UNIFIED JUDICIAL SYSTEM Justice STATE OF SOUTH DAKOTA

FILED
APR 28 2016
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA } ss.
MINNEHAHA COUNTY
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

MAY 03 2016

Clerk of Courts, Minnehaha County
By _____ Deputy

Appendix C

STATE OF SOUTH DAKOTA) : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

CHRISTOPHER KRYGER,

Defendant.

CR. 14-1956

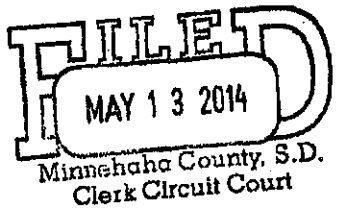
DEMAND FOR NOTICE OF ALIBI

****

The undersigned (Deputy) State's Attorney states that the charged offense is alleged to have occurred on or about March 14, 2014 through March 15, 2014 at or about 10:00 P.M. until 5:00 o'clock A.M., at 709 South Garfield Avenue, Sioux Falls, Minnehaha County South Dakota.

Pursuant to SDCL 23A-9-1 demand is hereby made upon defendant and defendant's counsel to give notice of intent to offer a defense of alibi.

Dated at Sioux Falls, South Dakota this 13 day of May, 2014.



Mandi Mowery
Deputy State's Attorney for Minnehaha County
415 N. Dakota Ave., Sioux Falls, SD 57104
Telephone: (605)367-4226

Appendix D

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA., Plaintiff, vs. **CHRISTOPHER DEAN KRYGER,** Defendant.	Cri. 14-1956 **ORDER re: Opinion Evidence**

The Court, having reviewed Mr. Kryger's motion, grants the motion in part. First, Detective Hoffman does not appear to have the requisite knowledge, skill, experience, training, or education to provide expert medical testimony regarding the injuries suffered by the decedent. Absent a showing that Detective Hoffman does have the requisite credentials, Detective Hoffman shall not testify that decedent's vaginal areas were consistent with sexual assault.

Doctor Kenneth Snell may testify as to the injuries caused by rough consensual sex or non-consensual sex. This court has heard Snell testify. Dr. Snell indicated he held these opinions to a reasonable degree of medical certainty. Thus, these opinions are permissible under SDCL § 19-19-702.

IT IS HEREBY ORDERED that Mr. Kryger's motion regarding opinion evidence be GRANTED in part and DENIED in part.

Dated this 18th day of December, 2015.

Honorable Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

By:

FILED
DEC 21 2015
Minnehaha County, S.D.
Clerk Circuit Court

Appendix E

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA., Plaintiff, vs. **CHRISTOPHER DEAN KRYGER,** Defendant.	Cri. 14-1956 **ORDER re: MOTION IN LIMINE-DEFENDANT'S STATEMENT TO OFFICER HOFFMAN RE: CRIMINAL MIND**

The Court, having reviewed Defendant's motion and previously ruled from the bench at an October26, 2015, motions hearing found that Mr. Kryger's statement to Officer Hoffman indicating he had a criminal mind is admissible. The court reviewed the video and audio recording of the statement in camera and the particular context of the statement, which is unprompted and volunteered by Mr. Kryger. Under SDCL § 19-19-801, the statement is not hearsay as it is offered by the State against the Defendant and the statement was made by the Defendant. The Court also finds that the statement is not precluded as character evidence per SDCL § 19-12-404(a). After conducting a balancing test under SDCL § 19-19-403, the probative value of the statement is not substantially outweighed by any *unfair* prejudice. Further, any possible jury confusion caused by admission of the statement and the element of second-degree murder requiring evidence of a depraved mind can be neutralized with carefully crafted jury instructions.

IT IS HEREBY ORDERED that Defendant's motion to preclude admission of Defendant's statement to Officer Hoffman regarding a criminal mind is DENIED.

Dated this 16 day of December, 2015.

Honorable Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

By: _____

FILED
DEC 21 2015
Minnehaha County, S.D.
Clerk Circuit Court

Appendix F

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA., Plaintiff, vs. **CHRISTOPHER DEAN KRYGER,** Defendant.	Cri. 14-1956 **ORDER re: MOTION IN LIMINE-DEFENDANT'S STATEMENT TO OFFICER FORSTER RE: CRIMINAL MIND**

The Court, having reviewed Defendant's motion and previously ruling from the bench at the Motions Hearing dated November 3, 2015, finds that Defendant's statement to Officer Forster indicating he had a criminal mind is admissible. The court reviewed the video and audio recording of the statements in camera and considered the particular context of the statement, which is unprompted and volunteered by Mr. Kryger. Under SDCL § 19-19-801, the statement is not hearsay as it is offered by the State against the Defendant and the statement was made by the Defendant. The Court also finds that the statement is not precluded as character evidence per SDCL § 19-12-404(a). After conducting a balancing test under SDCL § 19-19-403, the probative value of the statement is not substantially outweighed by any *unfair* prejudice. Further, any possible jury confusion caused by admission of the statement and the element of second-degree murder requiring evidence of a depraved mind can be neutralized with carefully crafted jury instructions.

IT IS HEREBY ORDERED that Defendant's motion to preclude admission of Defendant's statement to Officer Forster regarding a criminal mind is DENIED.

Dated this 18th day of December, 2015.

Honorable Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

By: _____

FILED
DEC 21 2015
Minnehaha County, S.D.
Clerk Circuit Court

Appendix G

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA., Plaintiff, vs. **CHRISTOPHER DEAN KRYGER,** Defendant.	Cri. 14-1956 **ORDER re: AMENDED MOTION IN LIMINE-AUTOPSY PHOTOS**

The state seeks admission of photos E3H12174, 75, 76, 78 and 95, not all photos in E3H 12173 through E3H 122000, as referenced in the Defendant's motion. The Court, having reviewed the photos at issue and considered the arguments of counsels and previously ruled from the bench at the Motions Hearing dated October 26, 2015, finds that autopsy photos E3H 12174, 75, 76, 78 and 95 are helpful and necessary to aid the testimony and presentation of the evidence by Kenneth Snell, M.D. This court heard and considered the testimony of Dr. Snell and pursuant to SDCL § 19-19-403, this Court conducted a balancing test and found that the probative value of autopsy photos is not substantially outweighed by any unfair prejudice. Autopsy photos are not inadmissible merely because they incidentally tend to arouse passion or prejudice. *See State v. Holland*, 346 N.W.2d 302, 307 (S.D. 1984)(*citing State v. Huth*, 334 N.W.2d 485 (S.D.1983); *State v. Rash*, 294 N.W.2d 416 (S.D.1980); *State v. Disbrow*, 266 N.W.2d 246 (S.D.1978).

IT IS HEREBY ORDERED that Defendant's motion to preclude the admission of autopsy photos E3H 12173 through E3H 1220 is DENIED.

Dated this 16th day of December, 2015.

Honorable Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

By: _____

UNIFIED JUDICIAL SYSTEM
JUSTICE
STATE OF SOUTH DAKOTA

FILED
DEC 21 2015
Minnehaha County, S.D.
Clerk Circuit Court

Appendix H

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. **CHRISTOPHER DEAN KRYGER,** Defendant.	CRI 14-1956 **ORDER EXCLUDING RONALD JOHNSON AND BRIAN JOHNSON FROM THE JURY TRIAL**

This matter is before the court upon its own motion to consider excluding two members of the family of Kari Ann Kirkegaard from the jury trial in this case. The court previously excluded two members of Ms. Kirkegaard's family, Ronald Johnson and Brian Johnson, for the jury selection process, reserving further ruling.

The court has carefully considered the provisions of SDCL Chapter 23A-28C and the public policy that allows those defined as victims under our state law to, among other things, be present at the trial. The court has also considered its solemn responsibility to ensure a fair and orderly trial for all parties, free of the prospect of disruptions or threats of violence. There is tension between these two considerations as it relates to Messrs. Johnson.

Brian Johnson has been disruptive in some previous pretrial hearings and also engaged in behavior that threatens violence against the defendant and the defense attorneys. At an October 26, 2015, hearing, the court marked several exhibits that illustrated its concerns. Among them was a Facebook post indicating that the defense attorneys in this case had made

Mr. Johnson's "casket list." Mr. Johnson had previously advised one of the defense attorneys that he hoped "he was a light sleeper."

Acting on the court's invitation to submit an objection or written statement about the possibility of exclusion from the trial, Brian Johnson submitted a hand-written letter which began with a statement expressing an apology for his disruptive behavior. He wrote of other difficulties experienced by his family in the recent past and indicated his desire to attend the trial.

The letter was well-written, and the court can appreciate the difficulties experienced by Mr. Johnson's family. However, the possibility that there will be further disruptions or that Mr. Johnson's previous behavior will cast a pall of intimidation over those in the courtroom is real. The mere specter of vigilante justice or the idea taking the law into one's own hands is antithetical to the deepest and most well-established concepts in our system of laws. Simply put, it has no place in this or any other case.

Ronald Johnson was disruptive at the October 26, 2015 hearing, and the court excluded him from the trial "until further order of the court." Ronald Johnson appears to have difficulty hearing and was using headphones provided by the court to assist him. The headphones apparently did not address the issue well enough in Mr. Johnson's view, and he ripped them from his head, threw them and stormed out of the courtroom. Everything stopped, and every person in the courtroom was keenly aware of what had happened. For this period, courtroom decorum was significantly and negatively impacted. Mr. Johnson has used headphones before at other hearings without this sort of reaction. The court can sympathize with hearing difficulties, but the disruption which occurred at the October 26th hearing is unacceptable on general principles and, specifically, it reflects an unacceptable means of seeking a more effective accommodation.

As the court considered the possibility of allowing Brian and Ronald Johnson to attend the jury trial, it noted that the disruptions and behavior to date have occurred at pre-trial stages and featured court sessions of

relatively short duration and without much development of the evidentiary record relating to the current charges. The trial will be different. It will last a significant period of time, and the court anticipates the State will seek to develop its theory of the case with specific and detailed evidence and the defense will work equally hard to advance its cause.

Under the circumstances, the risk that that further disruption or other behavior will occur is too great to permit the attendance of Brian Johnson or Ronald Johnson. If the court were to allow either or both of these men to attend the trial and an incident occurred, it could jeopardize the fairness of the trial for all parties.

The court is very much aware of the fact this this ruling prevents two members of Ms. Kirkegaard's family from attending the trial against their wishes. The decision is truly a last resort for the court and not its first impulse, and the court has considered providing other alternative means for viewing the trial. In this regard, the court has arranged for a video link from the courtroom to a remote site in the Lincoln County Courthouse.

It is, therefore, ordered:

1. That Brian Johnson and Ronald Johnson are excluded from the jury trial in this matter, to include exclusion from the Minnehaha County Courthouse and the Minnehaha County Administration Building during the trial;
2. That notwithstanding the foregoing, Brian Johnson has been identified as a witness for the State and may, for the purposes of testifying or preparing to testify, be in Courtroom 5B of the Minnehaha County Courthouse or the State's Attorney's Office or points in between if part of his direct route in connection with his testimony and if accompanied by a member of the State's Attorney's Office;
3. That Brian Johnson and Ronald Johnson may view the jury trial, if not a subject to witness sequestration order, at the Lincoln County Courthouse in a room to be designated by the Circuit Administrator;

4. That this remote access is available only to Brian Johnson and Ronald Johnson;
5. That no part of the video or audio transmission of the trial to the remote site may be recorded by any means; and
6. The Circuit Administrator is designated as the point of contact for all logistical and technical arrangements and will work with the victim/witness specialist from the State's Attorney's Office to implement the provisions of this order.

Dated this 9th day of November, 2015.

Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk
By:

UNIFIED JUDICIAL SYSTEM JUSTICE STATE OF SOUTH DAKOTA

FILED
NOV 10 2015
Minnehaha County, S.D.
Clerk Circuit Court

Appendix I

STATE V KRYGER 14-1956 PROPOSED INSTRUCTION: Criminal Mind and Depraved Mind

Evidence that the Defendant described himself as having a criminal mind does not in itself mean the Defendant possessed a depraved mind. You must consider any such evidence in conjunction with all other evidence presented.

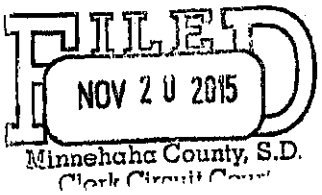
19 Nov 15

Refused

STATE V KRYGER 14-1956 Criminal Mind and Premeditated Design

Evidence that the Defendant described himself as having a criminal mind does not in itself mean the Defendant possessed a premeditated design. You must consider any such evidence in conjunction with all other evidence presented.

Refused 19 Nov 15



STATE V KRYGER 14-1956 PROPOSED INSTRUCTION: Criminal Mind and Specific Intent

Evidence that the Defendant described a criminal mind does not in itself mean the Defendant possessed a specific intent. You must consider any such evidence in conjunction with all other evidence presented.

Refused ISW No. 15

2-1-1

ALIBI

Instruction No. _____

Evidence has been introduced that the defendant was not present at the time when the offense was allegedly committed. The claim of alibi is legal and proper.

If after a full and fair consideration of all the facts and circumstances in evidence, you find that the state has failed to prove beyond a reasonable doubt that the defendant was present at the time and the place the offense charged was allegedly committed you must find the defendant not guilty.

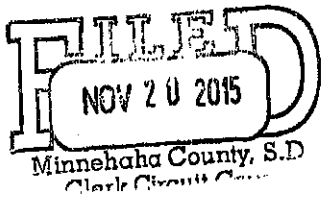
Refused 19 Nov 15

STATE V. KRYGER 14-1956 – Alternative: Speculation and Conjecture

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions, which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case. But do not speculate about possibilities that were not fairly proved.

Pattern Instruction -- *A. GENERAL JURY INSTRUCTION TEMPLATE, VERMONT CIVIL JURY INSTRUCTION COMMITTEE – PLAIN ENGLISH JURY INSTRUCTIONS – GENERAL JURY INSTRUCTIONS.*

Refused - ANow 15



STATE V KRYGER 14-1956: Defendant's Proposed Jury Instruction: Speculation

Speculation is the act of making an assumption or guess based on small amount of data or none at all.

Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.; concerning SDCJI 5-2-2: "not be based on mere speculation, guess or conjecture".

Refused 19 Now 15

STATE V. KRYGER 14-1956 – Alternative: Speculation and Conjecture

Any finding of fact you make must be based on probabilities, not possibilities. A finding of fact must not be based on speculation or conjecture.

Pattern Instruction -- *IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION -- DISTRICT JUDGE DAVID NUFFER.*

Refused 19 Nov 15

STATE V KRYGER 14-1956: Defendant's Proposed Jury Instruction: Speculation (Alternative)

Speculation is the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge.

Black's Law Dictionary 5th Ed.; *Citing* Jaramillo v. U.S., 357 F.Supp. 172, 175 (DCNY 1973) concerning SDCJI 5-2-2: "not be based on mere speculation, guess or conjecture".

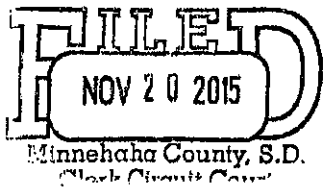
Refused 19 Nov 15

Defendant's Proposed Jury Instruction: Conjecture

A slight degree of credence, arising from evidence too weak or too remote to cause belief. This term applies to any evidence that is based on an estimate or a guess and is insufficient to form the basis of a conclusion.

Black's Law Dictionary 5th Ed. *Citing* Oklahoma City v. Wilcoxson, 48 P.2d 1039, 1043; Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. *citing* Weed v. Scofield, 73 Conn. 670, 49 Atl. 22 (Conn. 1901); concerning SDCJI 5-2-2: "not be based on mere speculation, guess or conjecture".

Refused Angus



Appendix J

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

****

State of South Dakota

Plaintiff,

Jury Trial
Volume 8
CR 14-1956

vs.

Christopher Dean Kryger

Defendant.

****

BEFORE: The Honorable Mark Salter,
Circuit Court Judge
in and for the
Second Judicial Circuit,
State of South Dakota,
Sioux Falls, South Dakota.

APPEARANCES: Eric Johnson
Mandi Mowery
Abby Roesler
Deputy State's Attorney
415 North Dakota Avenue
Sioux Falls, South Dakota 57104

For the Plaintiff;

Mark Kadi
Austin Vos
Assistant Public Advocate
415 North Dakota Avenue
Sioux Falls, South Dakota 57104

For the Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 8:30 A.M.
On the 13th day of November, 2015,
in courtroom 5B at the
Minnehaha County Courthouse,
Sioux Falls, South Dakota.

possibility that that was the same person?
A. I didn't know. I wanted to bring it to someone's attention to see if -- someone smarter than me, to see if they could figure it out.
Q. After bringing it to someone smarter than you, sir, did you, um, think you did that because there's a possibility that the person you saw on the bicycle at 9:48 a.m. might have been the person you observed to be on the bike at 2:30 and 3:30?
A. I didn't know. I thought it could be a possibility.
Q. The video that we saw yesterday, does the video show the Kirkegaard vehicle arriving at 10 o'clock in the evening on the 14th; correct?
A. Yes.
Q. Does it show who is driving the vehicle?
A. No.
Q. Does it show whether or not anyone else is in the vehicle, a passenger?
A. I can't see.
Q. Okay. And does it show Ms. Kirkegaard is actually in that vehicle?
A. No.
Q. Now, a bicycle drives north on Garfield around 11:30 and then south. Is that fair to say?
A. North on the street, south on the sidewalk, yes.

Q. All right. And does the video show to you the individual's face --
A. No.
Q. -- on the bike?
A. No.
Q. Is it fair to say it is difficult to make out what the individual is wearing on the bike?
A. That's fair.
Q. Now, the video shows a suspect park their bike near the mosque around 2:30?
A. After it goes by the front camera by the back, yes, sir.
Q. And you see the individual actually get off the bike at 2:30 or thereabouts?
A. You don't see them get off the bike.
Q. Does the vehicle looking back now around 11:30, does that vehicle show the bike rider stop his bike at any point?
A. On the 11:30 video --
Q. Yes. Going up and down.
A. No.
Q. And so it doesn't show the bike rider around 11:30 parking that bike anywhere?
A. Shows him slow, but I can't see after the driveway.
Q. Okay. Because you just -- all you see is the bike rider going south on the sidewalk. Is that fair to say?
A. Correct.

Q. So do you know how far south the bicycle rider went after it left the perspective of the video?
A. No.
Q. Do you know from personal knowledge or from the video where that bike rider was at, at say, 12 midnight?
A. From the video?
Q. Yeah.
A. No.
Q. How about 12:30?
A. No.
Q. 1?
A. From video, no.
Q. 1:30?
A. No.
Q. 2?
A. From video, no.
Q. Now, the mosque video shows an individual crossing the mosque lawn shortly after 2:30 or thereabouts; correct?
A. Yes, sir.
Q. Does it show anyone crossing the mosque lawn between 11:30 when you first see the bike rider and 2:30?
A. No.
Q. From the perspective of the camera in front of the mosque, does the video show the individual crossing the lawn at around 2:30, ever enter the residence at 709 South

Garfield?
A. No.
Q. Is it fair to say the most immediate action following the individual crossing the lawn is the SUV going out of the driveway?
A. Yes.
Q. When Ms. Kirkegaard's vehicle returns at 3:38 a.m. or thereabouts, does the video show anyone getting out at her residence?
A. No.
Q. So you don't know whether one person would have gotten out or two or more?
A. From the video, no.
Q. You had traveled to the scene on the day of -- that her body was found; correct?
A. On the 16th, yes.
Q. Yes. And did you see any sign of forced entry?
A. No.
Q. Okay. No signs of doors kicked in; correct?
A. Correct.
Q. Nothing about windows pried open?
A. Correct.
Q. Glass being broken?
A. Yes, sir -- or no, sir.
Q. Only sign of physical damage within the house -- to the

house was the bathroom wall that got hit; correct?
A. I didn't supplement that. I do believe I recall that, and I believe that would have been the only damage that I saw there.
Q. You talked about certain reports that led to Mr. Kryger being targeted as a -- being selected as a suspect. Were there any reports of screaming coming from the house of 709 South Garfield?
A. Not that I recall.
Q. Now, you've seen that neighborhood; correct?
A. I've been in that neighborhood.
Q. Seen pictures here -- is it fair to say the neighborhood houses are fairly close together?
A. Yes, sir.
Q. I'll try not to damage this, but -- you have -- it's a matter of feet, not necessarily yards, between houses and property lines. Is that fair to say?
A. That's fair, yes.
Q. Yep. So as far as you know there were no 911 calls coming in saying, I hear someone screaming or anything of that nature?
A. Not that I know of, no.
Q. Now, does the vehicle -- excuse me -- does the video have any sound component to it?
A. No.

Q. So if this person, the suspect that we see walking about and whatnot, if he was talking we wouldn't hear it; correct?
A. Correct.
Q. So if he -- assuming he did go to the door of 709 South Garfield, we don't know whether or not he was greeted at the door; correct?
A. Correct.
Q. All right. Or we don't know whether or not he might not have been greeted at the door; correct?
A. Correct.
Q. Assuming he went there.

We don't know whether or not he was welcomed at the door; correct?
A. Not from the video, no.
Q. He might have been welcomed?
A. I wouldn't know.
Q. Don't know. All right. We don't know whether the suspect, if he went in, was allowed in; correct?
A. Correct.
Q. Or whether he just walked in; correct?
A. Correct.
Q. We don't know from looking at the video whether or not he was expected to arrive by anyone inside. Is that fair to say?
A. Not from the video, no.

Q. We don't know whether that person knew the person inside or did not know the person inside. Is that fair to say?
A. Not from the video, no.
Q. From the video, do we know whether or not the suspect had keys to the home?
A. From the video, no.
Q. So might have had keys to the home or might not have. Is that fair to say?
A. I can't answer that.
Q. You had a chance -- you had arrived after the body was removed. Is that fair to say?
A. Yes, sir.
Q. All right. Have you had a chance to confer with others, law enforcement officers, detectives that were there; correct?
A. I did.
Q. Some first responders?
A. I didn't refer with first responders, no.
Q. Okay. All right.
So do you know, or is it fair we don't know whether Ms. Kirkegaard was strangled in the bathroom or elsewhere. Is that fair to say?
A. I don't have that information, no.
Q. Mm hmm.
So you wouldn't know whether or not she was strangled,

maybe, perhaps in the living room?
A. I don't know.
Q. Or the bedroom?
A. I don't know.
Q. Or the kitchen?
A. I don't know.
Q. Or the laundry room?
A. Don't know.
Q. Or in the garage for that matter?
A. I don't know.
Q. Or outside of the house or inside of the house?
A. I don't know.
Q. Now, the SUV that -- when I refer to the SUV, I'm always talking about Ms. Kirkegaard's vehicle.
A. Yes, sir.
Q. The SUV eventually heads south on Williams. Is that fair to say from your recollection of the video?
A. North -- sorry -- southbound on Williams, yes.
Q. That's after it leaves the residence at 2:30; correct?
A. Leaves the residence, goes to the mosque lot, backs out of the mosque, west on 15th, south on Williams.
Q. And is it fair say you lose sight of the SUV then?
A. Yes.
Q. Do you know where it went before it returned?
A. I wish I did.

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

****

STATE OF SOUTH DAKOTA,

Plaintiff,

-vs-

CHRISTOPHER DEAN KRYGER,

Defendant.

CR. 14-1956
JURY TRIAL
(VOLUME 11)

****

BEFORE: THE HONORABLE JUDGE MARK SALTER,
Circuit Judge, Second Judicial Circuit
Sioux Falls, South Dakota,
on November 18, 2015.

APPEARANCES: ERIC JOHNSON
MANDI MOWERY
ABBI ROESLER
Minnehaha Deputy State's Attorneys
415 N. Dakota Avenue
Sioux Falls, South Dakota 57104

For the Plaintiff;

MARK KADI
AUSTIN VOS
Minnehaha County Public Advocates
415 N. Dakota Avenue
Sioux Falls, South Dakota 57104

For the Defendant.

* * * * * * * * * *

LISA CARLSON, RPR
Court Reporter
Sioux Falls, South Dakota

MR. KADI: Okay. I would offer Exhibit G.
MR. JOHNSON: No objection.
THE COURT: Exhibit G is received.
Q. Before I actually publish this, I would like to ask you a couple more questions. We know that 709 S. Garfield is on this portion of the large overhead -- or the large photograph of -- of the Sioux Falls area with Garfield Avenue that comes into play in this case; correct? This is -- this is the victim's address?
A. Appears to have been marked as that, yes.
Q. And the mosque is two doors up --
A. Yes.
Q. -- north; correct?
A. Yes.
Q. And we know that the SUV without lights on comes to the area between Garfield -- between the 709 S. Garfield residence and the mosque at 3 -- excuse me -- 3:35:59 a.m.; correct?
A. 3:59 a.m.
Q. 335 --
A. 335.
Q. -- 3 hours, 35 minutes, and 59 seconds?
A. Yes.
Q. Okay. Is it fair to say when we look at the video,

we see a bicycle northbound on South Garfield Avenue at 2:35 and 35 seconds, according to the report; correct?

A. According to the report, he says it -- listed as "Camera 10 on 3/15/14 at 2:35:35 bicycle northbound on Garfield Avenue."

Q. Well, we know to add an hour; correct?

A. That's correct.

Q. So it's really 3:35 and 35 seconds the bicycle is seen on South Garfield Avenue going north; correct?

A. Yes, if that's what the video reflects.

MR. KADI: With permission, I would like to publish Exhibit G going to the portions of time that we are referring to.

THE COURT: You may do so.

(Exhibit G, DVD, was played for the jury.)

Q. I am showing Exhibit G. Do you recognize the image in -- on this video?

A. It appears to be the front of the -- that family center that you referenced in the map.

Q. The Family Market?

A. Family Market just south of Lori Nagel's house.

Q. And this would be then 12th Street at this intersection over here where I am pointing?

A. I believe so.

Q. Okay. And this would be South Garfield; correct?
A. Yes.
Q. And there appears to be a street lamp that is casting some illumination on the roadway; is it fair to say?
A. Yes.
MR. KADI: I would ask Mr. Vos, if you could --
Q. We are starting off at 2:35:09. It actually goes for a little bit and I would just ask you to view the area over here and over here (Indicating.) over the next minute or so.
A. (The witness complies.)
MR. KADI: Stop, please.
Q. So is it fair to say at 3:36 at 21 seconds -- and 21 seconds on the morning of March 15th, a bicycle is coming across 12th Street going past the first street lamp in a northerly direction on Garfield; correct?
A. Yes.
Q. And the image is far away, but you are not able to tell the person's face; is it fair to say?
A. No. You can't see it from there. It's a long ways away.
Q. All right. And as it's going next to the lamp, do we see any type of reflectors shining on the video?

A. If you could bring it back.
Q. Sure.
MR. KADI: Can we roll it back a little bit, please.
(The video was replayed at that portion.)
Q. Stop. After rolling it back, were you able to see any kind of reflectors or anything of that nature?
A. I couldn't tell.
Q. But it's going underneath a street lamp; correct? That looks like a lit street lamp?
A. It does.
MR. KADI: If we could go to camera 8.
Q. While we are waiting, there's a number of residential houses on the eastern side of South Garfield?
A. Yes.
Q. And from your recollection and your investigation, Lori Nagel's house would be the house next to this large -- larger residential building with the light on; is it fair to say?
A. I believe so.
Q. Okay. And this is viewing South Garfield from a northerly -- looking towards the north; correct?
A. Facing northeast, it looks like.
Q. Yeah.
MR. KADI: Stop, please.

Q. Now, Sergeant Hoffman, at 2:36:49, we have seen an individual on a bicycle going north on South Garfield; correct?
A. Yeah, it appears to be a bike, a person on a bike.
Q. And he passes -- the bike rider passes a street lamp at the end of where the mall, little mall ends; correct, and there's another street lamp farther north; is it fair to say?
A. Yes. There are several street lamps there.
Q. And we can see, you know, certain reflectors shining on vehicles that are parked in the area; correct?
A. Yes.
Q. But we didn't see anything shining on the bike; correct?
A. I didn't observe any.
Q. Now, meanwhile up the street at 3:00 a.m. 37 minutes and some seconds, we are seeing the SUV park in the Kirkegaard driveway and we are seeing an individual walking in back of the mosque; correct?
A. Yes.
Q. It can't be the person on the bike; correct?
A. It doesn't appear to be.
THE COURT: Can you approach briefly.
(A bench conference was held outside the hearing of the jury.)

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27869

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHRISTOPHER DEAN KRYGER,

Defendant and Appellant.

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

THE HONORABLE MARK E. SALTER
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Ann C. Meyer
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Mark Kadi
Austin Vos
Public Advocate's Office
415 North Dakota Avenue
Sioux Falls, SD 57104
Telephone: (605) 367-7392
E-mail: mkadi@minnehahacounty.org
avos@minnehahacounty.org

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed May 20, 2016

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27869

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHRISTOPHER DEAN KRYGER,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, State of South Dakota, Plaintif and Appellee, will be referred to as "State." Christopher Dean Kryger, Defendant and Appellant, will be identified as "Defendant" or "Kryger." References to the transcripts of the June 8, 2015 motions hearing; the November 3 through 20, 2015 jury trial; and the February 25, 2016 sentencing hearing will be designated as "MH," "JT" and "ST," respectively. Citations to the settled record, Defendant's brief, jury instructions and exhibits will be identified as "SR," "DB," "JI" and "EX," respectively. State has combined Kryger's sixth, seventh and ninth issues, which deal with jury instructions, into one argument for the sake of brevity.

JURISDICTIONAL STATEMENT

This case arises from a Judgment and Sentence which was filed on April 28, 2016, by the Honorable Mark E. Salter, Circuit Court

Judge, Second Judicial Circuit, Minnehaha County. SR 680-81. On May 20, 2016, Defendant filed a Notice of Appeal. SR 683. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PRECLUDED DEFENDANT'S QUESTIONING OF BRIAN JOHNSON ABOUT HIS THREATS, BIAS AND ANGER TOWARD KRYGER AND HIS DEFENSE COUNSEL?

Judge Salter's analysis was proper.

State v. Spaniol, 2017 S.D. 20, 895 N.W.2d 329

II

WHETHER JUDGE SALTER ERRED WHEN HE ADMITTED DR. SNELL'S TESTIMONY ABOUT THE FACT THAT THIS EXPERT WAS UNABLE TO DETERMINE, BASED UPON A REASONABLE DEGREE OF MEDICAL CERTAINTY, IF THE VICTIM'S VAGINAL INJURIES HAD BEEN CAUSED BY CONSENSUAL OR NONCONSENSUAL SEX?

The trial court's decision was appropriate.

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

III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED CERTAIN EVIDENCE AT TRIAL, WHICH INCLUDED: (A) INPUT ABOUT A BURN PIT; (B) TESTIMONY ABOUT TWO FRESH SCRATCH MARKS ON DEFENDANT'S CHEST; AND (C) THE VICTIM'S AUTOPSY PHOTOGRAPHS?

Judge Salter's evidentiary rulings were correct.

State v. Goodshot, 2017 S.D. 33, 897 N.W.2d 346

IV

WHETHER JUDGE SALTER ERRED WHEN HE ADMITTED DEFENDANT'S SPONTANEOUS REMARKS ABOUT HIS CRIMINAL MIND, DURING KRYGER'S INTERVIEWS WITH DETECTIVES FORSTER AND HOFFMAN, AS STATEMENTS AGAINST INTEREST?

The trial court's rational was sound.

State v. Corean, 2010 S.D. 85, 791 N.W.2d 44

V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THREE OF DEFENDANT'S MOTIONS FOR MISTRIAL, WHICH PERTAINED TO HIS JAIL, PAROLE AND CUSTODIAL STATUS?

Judge Salter's decisions were proper.

State v. Kvasnicka, 2013 S.D. 25, 829 N.W.2d 123

VI

WHETHER JUDGE SALTER ERRED WHEN HE REJECTED DEFENDANT'S PROPOSED JURY INSTRUCTIONS, WHICH RELATED TO: (A) KRYGER'S ADMISSIONS ABOUT HIS CRIMINAL MIND; (B) THE DEFINITIONS OF SPECULATION AND CONJECTURE; AND (C) A SO-CALLED ALIBI DEFENSE?

The trial court reached the right results.

State v. Jensen, 2007 S.D. 76, 737 N.W.2d 285

VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL?

Judge Salter's evaluation was correct.

State v. Owens, 2002 S.D. 42, 643 N.W.2d 735

VIII

WHETHER THE CUMULATIVE EFFECTS OF JUDGE SALTER'S SO-CALLED ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL?

This issue was not raised below.

State v. Birdshead, 2016 S.D. 87, 888 N.W.2d 209

STATEMENT OF THE CASE

This matter stems from Defendant's brutal rape and murder of the victim by ligature strangulation, and the burglary of her home. SR 18-21, 592-95, 680-81; JT 907-1586, 1642-3095; EX 1-127, A-G. The Minnehaha County State's Attorney filed an Indictment on April 9, 2014, which charged Kryger with five counts of First Degree Murder (Counts 1-5), Class A felonies, in violation of SDCL §§ 22-16-4, 22-16-4(1) and 22-16-4(2); one count of Second Degree Murder (Depraved Mind, Count 6), Class B felony, in violation of SDCL 22-16-7; one count of Second Degree Rape (by Force, Coercion or Threats, Count 7), Class 1 felony, in violation of SDCL 22-22-1(2); one count of Third Degree Rape (Incapable of Giving Consent Due to Physical or Mental Incapacity, Count 8), Class 2 felony, in violation of SDCL 22-22-1(3); and two counts of First Degree Burglary (Counts 9 and 10), Class 2 felonies, in violation of SDCL 22-32-1(1) and 22-32-1(3). SR 18-21. Also on the same date, this prosecutor filed a Part II Information for Habitual Criminal (SDCL 22-7-7), which was later dismissed. SR 22-23, 681; ST 788.

On November 3 through 20, 2015, Judge Salter conducted a jury trial. JT 907-1586, 1642-3095; EX 1-27, A-G. The jury convicted Defendant on all of the crimes charged in the Indictment, except for Third Degree Rape (Incapable of Giving Consent Due to Physical or Mental Incapacity, Count 8), in violation of SDCL 22-22-1(3). SR 18-21, 592-95, 680-81; JT 1581-84. This judge held a sentencing hearing on February 25, 2016, and required that Kryger serve a life sentence in prison for First Degree Murder (Count 1); 50 years for Second Degree Rape (Count 7, concurrent to First Degree Murder); and 25 years for First Degree Burglary (Count 10, concurrent to First Degree Murder but consecutive to Second Degree Rape). SR 18-21, 592-95, 680-81; ST 785-807. The court filed a Judgment and Sentence on April 28, 2016 and this appeal ensued. JT 680-83.

STATEMENT OF FACTS

In a tragic chain of events Defendant murdered and raped the victim, Kari Kirkegaard, because he was angry about breaking up with his girlfriend. JT 907-1586, 1642-3095; EX 1-127, A-G. On March 14, 2014, Kari (who had just survived breast cancer) attended a family gathering at Pizza Ranch in Sioux Falls, as was her usual Friday night custom, and returned to her residence (709 South Garfield), at about 10 p.m. that evening. JT 2770-74, 2796-2800, 2812-18, 2859-61, 2856-60, 2865-66, 2946-49; EX 33. The victim's naked body was discovered two days later (March 16, 2014) in her bathtub, which was filled with

running water and a cleaning product, by her son's (Nick) girlfriend. JT 2059-61, 2775-2806, 2811-12, 2950-52, 2990-92, 2946-52; EX 63-66. A number of Kari's family members and friends smelled bleach, or some type of chemical, after entering the victim's residence, although no one had cleaned up anything; these folks and the investigators, who had arrived to provide help, believed that Kari's death had been accidental because no obvious signs of foul play were evident; but Kari's relatives discovered (after the police left and the removal of the victim's body) that her bedding, clothing, towels, rugs, purse and car keys were missing, so detectives were called to the crime scene for a second time. JT 2780-85, 2806-12, 2831-36, 2842, 2854-55, 2881-82, 2889-90, 2950-63, 2984-85. A paramedic and several other investigators, however, did not notice any bleach smell until after Kari's remains had been taken out of her bathtub and the water was drained, which left a residue. JT 1251-52, 1340, 2959-75, 2984-85, 2997.

At trial, Brian Johnson (Kari's brother) testified that he had been so upset by the victim's death, that he had punched a hole in the bathroom wall, broken his finger and cut his hand. JT 1376-77, 2833-34. In addition, this witness indicated that Kari had been "lax [about] locking" her front door; that the victim's bathroom had smelled "really clean," after the water had been drained from the tub; that many items from Kari's bathroom and bedroom were missing; but that the victim had put the money (which she kept hidden in the freezer) in the bank, so it

had not been stolen from her home. JT 1307-09, 2834-38, 2840-42. Johnson also stated that he had viewed Kari's body, in her casket, and that the victim's fingernails had been cut farther back than usual, although she had a habit of biting them. JT 1090, 2838-39; EX 105-06.

Detective Bakke explained that he had obtained a surveillance video of a mosque, which was located just to the north of Kari's residence, and that it had captured the victim's SUV pulling into her driveway on March 14, 2014 (Friday), at approximately 10 p.m. JT 1268-69, 1302-07, 2348-54, 3002-06, 3075-86; EX 38, 46-47, 118. This investigator testified that the recording showed that a bicyclist had ridden past Kari's residence at about 11:30 p.m., while heading north; and immediately doubled back on the sidewalk of the victim's home and visibly slowed down, as this person passed by. JT 1302-07, 2348-50, 2365, 3081-82; EX 46-47, 99. In addition, Bakke indicated that this video had captured a male subject (in a plaid coat) walking to the south of the mosque on March 15, 2014 (Saturday) at about 2:30 a.m., and returning to Kari's SUV; and that the driver of the victim's vehicle had taken off without turning on its headlights.[1] JT 1305-07, 1309-12, 2350-51, 2365-66,3002-06, 3083-84; EX 46-47, 118. This detective also related that the recording showed Kari's SUV returning to her residence about an hour later, or at approximately 3:30 a.m.; that the driver had

[1] Perry Echkoff, a utility billing supervisor, testified that the water began running continuously at Kari's home "sometime after 1 a.m." on March 15, 2014 (Saturday). JT 2896-98.

missed the victim's driveway and turned around in the Garfield Elementary School parking lot; and that Kari's SUV had ultimately been parked back in her driveway. JT 1309-12, 2350-56, 3005-06, 3084-85; EX 46-47. Bakke further noted that the "glint of a bicycle reflector" could be seen heading to the west and on the "very right side," of this video, and that a portion of it (EX 38) and a still photograph (EX 118) had been released to the media to find this suspect. JT 1286, 1310-12, 3085-90; EX 99.

Moreover, Defendant's girlfriend, Lori Nagel, took the stand for the prosecution at trial, and testified that she was living at 224 South Garfield, or near the victim's home on March 14, 2014; that Defendant and Nagel had gotten into a disagreement and broken up on that date at around 6:45 p.m.; and that Kryger had gotten so angry that he had smashed his cell phone on the ground, and taken off on his bike. JT 2416-22, 2433-37; EX 37. Nagel indicated that Defendant's usual mode of transportation was a bicycle, even though he could drive a car; that Kryger had called her by telephone and begged her for forgiveness on Saturday morning at around 4:36 a.m. (March 15, 2014); and that Defendant had returned to her place at about 4:52 a.m. and slept over, although he was not wearing his plaid flannel jacket supposedly due to a fall in the river. JT 2422-24, 2437-39, 2480-81; EX G. In addition, Nagel detailed that Defendant had "a significant amount of money" on the morning of March 15, 2014 (Saturday), when he offered to buy

donuts for breakfast; that Kryger had given her an engagement ring later that day; and that Defendant had two fresh scratches on his upper chest, which he said were work injuries. JT 2417, 2423-27. Nagel also related that "[m]y heart just fell" when she saw the mosque video and still photograph, which had been released to the media, because she recognized Kryger's demeanor, his distinctive walk and the fact that he was always "dressed the same from head to toe." JT 2427-30; EX 38, 118. Nagel further verified she had two photographs on her cell phone (EX 58, 59), which showed Defendant's typical attire; and that Kryger had changed his story, during a May 12, 2014 telephone call, and insisted that he had had consensual sex with Kari (EX 37), after DNA-testing linked him to the victim. JT 1295-96, 2431-34.

In the same vein, Defendant's ex-girlfriend, Jeannette Gaul, was able to identify him, in the mosque video, by "his walk" and the jacket which he usually wore. JT 2400-02; EX 38, 118. Defendant's friend, Mike Miller, indicated that he had run into Kryger at Hy-Vee grocery store, on March 15, 2014 (Saturday morning); and that he had given Defendant a ride to Wal-Mart, where Kryger purchased an engagement ring for Nagel. JT 2403-09, 2412-14; EX 48. Miller also related that Defendant had admitted that he burnt his jacket to get rid of it, after Mike saw the mosque video, and called Kryger to say "hey, look, you're on T.V.," as a joke. JT 2408-09, 2413-14; EX 38. Defendant's uncle, Richard Foster, further identified Kryger, in the mosque video but

recanted at trial, although he confirmed that Kryger owned a (blue) plaid flannel jacket. JT 2451-58; EX 38.

Dr. Kenneth Snell, a forensic pathologist, stressed that he had performed an autopsy upon Kari on March 17, 2014, and discovered a "3/4th inch wide . . . ligature furrow," which consisted of two parallel red lines, and went across the midline of the victim's anterior neck. SR 490-501; JT 1067-78, 1088-91; EX 60-61, 100-01, 103-04, 107-09. This expert emphasized that he had found petechial hemorrhages, or little red dots throughout Kari's "entire face," which included both the white area of her eyes and soft tissue surrounding them; and inside of the victim's mouth, as well as her upper and lower lips. JT 1077-78, 1093-95; EX 113-16. In addition, Dr. Snell indicated that both the right side of Kari's hyoid bone and thyroid cartilage, which consisted of a "little projection" in the victim's larynx, had been fractured; and that Kari had a number of other wounds, which included a hemorrhage on the back of her head, a purple contusion on her right breast, and abrasions on her shoulders, left cheek, knee, and fingers. JT 1078-82, 1087-95; EX 100, 102, 110-12, 117. This expert also noted that Kari had two red marks, in the vestibule of her vagina, and another red mark inside the anterior wall of her vaginal vault. JT 1082-83, 1109-11.

Providing more details, Dr. Snell determined that the cause of Kari's death had been "asphyxia due to ligature strangulation"; that the manner of the victim's death had been a homicide; and that he could not

pinpoint the exact time of Kari's death, because her remains had been discovered "in a body of water" and kept in a morgue cooler. SR 490-504; JT 1099-1100, 1113-14; EX 60-61, 100-04, 107-09. In addition, this expert related that it generally takes "10 to 15 seconds" to render an average person unconscious by ligature strangulation, and "three to five minutes to reach irreversible brain damage"; and that he had performed a rape kit examination in this case. JT 1100-07, 1290-91; EX 29. Dr. Snell also was unable to say (to a reasonable degree of medical certainty) whether Kari's vaginal injuries had been caused by consensual or nonconsensual intercourse; but he opined that either "rough consensual sex or [a sexual] assault" had occurred because of the trauma to the victim's vaginal area. JT 1107-08, 1113-14, 1116-18.

Contributing to this picture, Kristina Dreckman, a serologist, explained that it was not practical to test every piece of evidence, which had been collected by the police, after the discovery of Kari's death; that the prioritization of testing protocols had been necessary to determine the fastest way to identify a possible suspect; and that a risk to the public had existed because the victim's killer was still at large. JT 1204-10, 1238-46. In addition, this expert testified that "the sperm cell fraction," which had been found on Kari's vaginal swabs, matched Defendant's DNA profile; and that Kryger's genetic characteristics would not occur "more than once among . . . unrelated individuals in the world population." JT 1222-23, 1237-38, 1290-91; EX 50-53. Dreckman also

confirmed that there were no unknown male or female DNA profiles in this case; that any other samples were partial, unsuitable for comparison, or degraded; that bleach, fire, or other environmental factors can degrade and destroy DNA evidence; and that there is no test, which can detect if bleach has been added to a sample. JT 1211-12, 1233-38, 1244, 1290, 1378; EX 51-53, 98.

Furthermore, two detectives, Forster and Hoffman, testified about their involvement in Kari's case. Forster indicated that he had talked to Defendant, in his patrol car on March 20, 2014, and recorded Kryger's remarks about his criminal mind (EX 45); and that this detective had obtained copies of Wal-Mart receipts (EX 54), which revealed that Defendant had purchased a ring, cell phone and calling plan on the afternoon of March 15, 2014 (Saturday). SR 479-80; JT 1140-44, 1455-56. In addition, Hoffman (lead detective) related that he had investigated Kari's romantic background, which showed that none of her male friends, her ex-husband, or any other acquaintances were connected to the crimes in question; and that he had conducted several interviews (EX 39-40) with Defendant on March 20 and 28, 2014, which again detailed Kryger's references to his criminal mind (EX 39). JT 1269-72, 1282-88, 1291-92, 1297, 1322-29, 1348-69, 1373-81, 1389-91, 1455-56. Hoffman also stated that Kari had sheer blinds on her living room windows, so anyone could see inside; that it would have been futile to test the burn pit site because fire destroys, or deteriorates DNA

evidence; that there were no unknown fingerprints or DNA profiles in this case; that it was not feasible to test all of the approximately 297 items, which the police had collected, and that many of them were not related to the victim's death; and that none of Kari's personal effects were ever located.[2] JT 1250-51, 1256-57, 1288-90, 1332-343 1341-42, 1374-78, 1385-86.

Finally, Defendant's bicycle and a closet full of cleaning supplies were found by the police, in a shed at Kryger's workplace. JT 1036-39, 1041-42; EX 98-99.

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PRECLUDED DEFENDANT'S QUESTIONING OF BRIAN JOHNSON ABOUT HIS THREATS, BIAS AND ANGER TOWARD KRYGER AND HIS DEFENSE COUNSEL.

A. Background and Standard of Review.

Defendant contends, in his first issue, that Judge Salter made a mistake when he prevented the defense from questioning Brian Johnson (the victim's brother) about his threats toward Kryger and his defense counsel. DB 13-17. Defendant also maintains that his federal constitutional rights, under the Sixth and Fourteenth Amendments, were

[2] Hoffman detailed that there was "some dirt" at the south window of the victim's home, which looked "almost like a footprint"; but Marc Toft, a police officer, confirmed that laboratories in South Dakota did not have the capacity to perform shoe casting comparisons. JT 965-67, 1015, 1254; EX 67-68.

violated because Johnson's hatred and anger might have been so great that he fabricated, or omitted details about the money, which Kari kept in her freezer; "the timing" of the bleach smell in the victim's home; and whether any of Kari's relatives had cleaned up the crime scene. DB 15-17.

The Sixth Amendment to the United States Constitution and Article VI, § 7 of the South Dakota Constitution guarantee a defendant the right to confront witnesses. *State v. McCahren,* 2016 S.D. 34, ¶ 25, 878 N.W.2d 586, 597. This right, however, is not absolute and the defendant bears the burden of establishing that "a reasonable jury would have had a significantly different impression," if this limitation did not exist. *State v. Walton,* 1999 S.D. 80, ¶¶ 25-27, 600 N.W.2d 524, 530-31.

B. Legal Analysis.

Judge Salter carefully reviewed the State's oral motion in limine and precluded Defendant from referencing Johnson's threats against Kryger and his defense team during cross-examination at trial. SR 436, 448-50, 455-58; JT 2758-64, 2821-43. *State v. Bausch,* 2017 S.D. 1, ¶ 12, 889 N.W.2d 404, 408; *Walton,* 1999 S.D. 80, ¶ 27, 600 N.W.2d at 530-31 (only the opportunity for effective cross-examination must exist and not to whatever extent the defense may wish). This judge took into consideration that the prosecution's request implicated Defendant's federal and state constitutional confrontation rights; but struck a balance under SDCL 19-19-403 and determined that Johnson's remarks

only had a "marginal degree" of relevance. JT 2758-64. *State v. Spaniol,* 2017 S.D. 20, ¶ 29, 895 N.W.2d 329, 340. In addition, Judge Salter pointed out that Johnson was going to testify about the "investigatory timeline" after Kari's demise; that this witness already had "strong feelings" about Defendant and his defense team because he was the victim's surviving brother; and that the exposure of Johnson's threats, so-called motive to lie, and anger against Kryger and his attorneys was a collateral matter that could confuse the jury, when it evaluated his testimony. JT 2762-64. *McCahren,* 2016 S.D. 34, ¶ 25, 878 N.W.2d at 597. This judge also noted that he was imposing "a reasonable restriction," as far as the exclusion of Johnson's testimony; and that this approach avoided the risk of unfair prejudice and unnecessary delay. JT 2763-64. *Bausch,* 2017 S.D. 1, ¶ 14, 889 N.W.2d at 409. The court further talked to Johnson before he testified (in-chambers) and warned him about not engaging in any emotional outbursts; and Brian apologized and said that he never meant to threaten anyone. JT 2821-28.

Lastly, any error here is harmless (if error at all), because other members of Kari's family (Nick, his girlfriend, a cousin and other relatives) testified that they had smelled bleach, or a cleaning product, when they first entered the victim's residence; a number of these folks stated that no one had cleaned up any blood from Johnson's hand injury, or anything else; and that they had discovered that Kari's purse

was missing. JT 2780, 2783, 2789, 2806, 2808-12, 2854-55, 2881-83, 2969-70, 2972-73, 2995-97. *State v. Rogers,* 2016 S.D. 83, ¶¶ 18-19, 887 N.W.2d 720, 725. In addition, Nagel related that Defendant had had "a significant amount of money" on the morning after Kari's death, which was unusual, and that he had bought her an engagement ring. JT 2424-25. *State v. Uhring,* 2016 S.D. 93, ¶ 12, 888 N.W.2d 550, 554 (jury sorts out the truth). Detective Forster also confirmed that Kryger had spent $171.79 at Walmart, during this same time frame. SR 479-80; JT 927-28, 1144; EX 54. Thus, no constitutional infirmities exist on this basis.

II

JUDGE SALTER DID NOT ERR WHEN HE ADMITTED DR. SNELL'S TESTIMONY ABOUT THE FACT THAT THIS EXPERT WAS UNABLE TO DETERMINE, BASED UPON A REASONABLE DEGREE OF MEDICAL CERTAINTY, IF THE VICTIM'S VAGINAL INJURIES HAD BEEN CAUSED BY CONSENSUAL OR NONCONSENSUAL SEX.

A. Overview and Standard of Review.

Defendant professes, in his second issue, that the trial court denied him the right to fair trial, when it admitted Dr. Snell's testimony that Kari's vaginal injuries could have been caused by either consensual or nonconsensual sex. DB 17-22. Kryger also alleges that this expert's opinion "gave rise to equal degrees of possibilities" and was couched in terms of probabilities, which gave the jury "an invitation to speculate and guess," about whether the victim's vaginal wounds were the product of consent, or a sexual assault. DB 18-22.

The admissibility of expert testimony is governed by SDCL 19-19-702 and reviewed under an abuse of discretion standard. *State v. Fisher,* 2011 S.D. 74, ¶¶ 40-42, 805 N.W.2d 571, 580. A medical expert's testimony that does not give an opinion as to defendant's guilt and only states that the victim's injuries did not indicate consent is proper. *State v. Ralios,* 2010 S.D. 43, ¶ 49, 783 N.W.2d 647, 660-61; *State Running Bird,* 2002 S.D. 86, ¶¶ 38-40, 649 N.W.2d 609, 616-17.

B. Legal Synopsis.

Judge Salter listened to Dr. Snell's proposed testimony, during the June 8, 2015 motion hearing, and ruled that this expert's opinion that Kari's vaginal injuries could had been caused by either consensual or nonconsensual sex was predicated upon "enough [medical] certainty," and that it was permissible under SDCL 19-19-702. DB 17-22; SR 294-97, 678; MH 757-58. *Fisher,* 2011 S.D. 74, ¶¶ 40-42, 805 N.W.2d at 580; *State v. Boyer,* 2007 S.D. 112, ¶¶ 20-29, 741 N.W.2d 749, 756-58; *State v. Moran,* 2003 S.D. 14, ¶ 42, 657 N.W.2d 319, 329-30. In addition, Dr. Snell opined at trial that Kari's vaginal injuries had been caused by "rough intercourse or [a sexual] assault," because of the trauma to this area of the victim's body. DB 19, 22; JT 1107-08, 1116-17. *Ralios,* 2010 S.D. 43, ¶ 49, 783 N.W.2d at 660-61. This expert also acknowledged, during cross-examination, that he could not determine, based upon a reasonable degree of medical certainty (because he was present during the commission of any crimes), whether or not the sexual

intercourse here was consensual or nonconsensual. JT 1113-14. *Mousseau v. Schwartz,* 2008 S.D. 86, ¶ 28, 756 N.W.2d 345, 358 (there are no "magic words" needed to express an expert's degree of medical certainty, as long as he is expressing a medical opinion); *Running Bird,* 2002 S.D. 86, ¶¶ 38-40, 649 N.W.2d at 616-17 (medical experts may testify that a victim's injuries did not indicate consent without invading the province of the jury). Dr. Snell, however, confirmed during redirect examination, that Kari's vaginal wounds were more likely the result of force, although either rough consensual sex or a sexual assault could have taken place. JT 1107-08, 1116-18. *Moran,* 2003 S.D. 14, ¶ 44, 657 N.W.2d at 329-30.

Furthermore, Defendant was not deprived of a fair trial, or hampered in any way, from arguing his position that he supposedly had engaged in consensual sex with Kari before her demise. JT 1113-14, 1117-19. *State v. Aesoph,* 2002 S.D. 71, ¶¶ 54-56, 647 N.W.2d 743, 760. In fact, Kryger used this angle to raise doubt about his guilt, during opening and closing statements; and to suggest that Dr. Snell could not pinpoint whether the victim's vaginal tears were the product of "consensual [or nonconsensual] play," before her death. JT 1503-05, 1508, 1524-27, 1538, 2750, 2756-57. Consequently, Kryger's second issue should be given short shrift.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED CERTAIN EVIDENCE AT TRIAL, WHICH INCLUDED: (A) INPUT ABOUT A BURN PIT; (B) NAGEL'S TESTIMONY ABOUT THE FRESH SCRATCH MARKS ON DEFENDANT'S CHEST; AND (C) THE VICTIM'S AUTOPSY PHOTOGRAPHS.

A. Background and Stand of Review.

The crux of Defendant's third issue is that Judge Salter admitted certain irrelevant evidence at trial, and that its probative value was outweighed by unfair prejudice. DB 22-24 n.12. These materials included testimony and photographs, which pertained to a burn pit; Nagel's testimony about the two fresh scratch marks on Defendant's chest; and the victim's autopsy photographs. DB 22-24 n.12.

A trial court's evidentiary rulings are presumed to be correct and are reviewed under an abuse of discussion standard. *State v. Goodshot,* 2017 S.D. 33, ¶ 14, 897 N.W.2d 346, 350. Such errors are prejudicial when, in all probability, they produce some effect upon the jury's final conclusion. *Bausch,* 2017 S.D. 1, ¶ 12, 889 N.W.2d at 408-09.

B. Legal Analysis.

1. Burn Pit Evidence.

Judge Salter did not abuse his discretion when he admitted testimony and photographs (EX 92-94), which related to a burn pit, because this evidence explained the steps that investigators had taken to find the plaid flannel jacket, which Defendant had been wearing on March 14, 2014, and Kari's missing personal property. DB 22-24;

JT 2484-2500. *Goodshot,* 2017 S.D. 33, ¶¶ 14-15, 897 N.W.2d at 350-51. In addition, this judge denied Defendant's foundation and relevancy objections (outside the presence of the jury) because the photographs (EX 92-94) reflected what the police had seen, when they responded to a tip about this fire pit from a concerned member of the public. JT 2492-96. *State v. Fisher,* 2013 S.D. 23, ¶¶ 9, 15, 828 N.W.2d 795, 799-801. The court also was aware that there was no way to perform any testing on these remains, but noted that it was going to rely upon the adversarial process to probe and reveal any deficiencies in this context. JT 2492-96.

Furthermore, this analysis dovetails with Mike Miller's input that Defendant had said that he burned his jacket, after the release of the mosque video to the public. JT 2408-09; EX 38. *State v. Stanley,* 2017 S.D. 32, ¶¶ 12, 25, 896 N.W.2d 669, 674-75, 678. In addition, Robert Menke, an employee of Pride Neon Signs, indicated that the burn pit had been located in a remote area by the Sioux River, and that the "fabric in the fire" had caught his attention, so he contacted the police. JT 2487-89. Chad Winkel, a police officer, also related that this charred area appeared to be fresh, although it could not be attributed to any particular source. JT 2489-91, 2496-2500; EX 92-93. The defense further exposed, during cross-examination of Winkel, that there were no identifying items (a melted toothbrush, a dollar bill and 12 cigarettes), in

these debris. JT 1341-42, 2498-2500. *Goodshot,* 2017 S.D. 33, ¶ 15, 897 N.W.2d at 350-51 (no prejudice existed).

2. Nagel's Testimony About the Fresh Scratches on Kryger's Chest.

As for Defendant's injuries, Judge Salter meticulously evaluated Nagel's testimony about the two fresh abrasions on Kryger's upper chest, which she had noticed on the morning after the victim's death, and looked like fingernail scratches. DB 24 n.12; JT 2426-27, 2447-49; EX 120-22. *State v. Janis,* 2016 S.D. 43, ¶¶ 14-15, 880 N.W.2d 76, 80-81 (lay witness testimony encompasses a witness's experiences). In addition, this judge discerned that Nagel's perceptions fell "within the realm of observations," which constituted proper lay witness testimony, and that she was not providing any so-called expert opinion. JT 2426-27, 2447-49. *Goodshot,* 2017 S.D. 33, ¶ 15, 897 N.W.2d at 350-51. The court also stated that Nagel's input was helpful for the jury and rationally based upon what an average person, who has "lived more than a few years," would know and understand. JT 2426-27, 2447-49. *State v. Condon,* 2007 S.D. 124, ¶¶ 30-31, 742 N.W.2d 861, 870 (personal knowledge counts).

3. The Victim's Autopsy Photographs.

Finally, Judge Salter reached the right result when he admitted Kari's autopsy photographs (EX 100-17), during Dr. Snell's testimony at trial. DB 24 n.12; SR 424-25, 674-75; MH 758-60; JT 1084-95. *State v.*

Scott, 2013 S.D. 31, ¶¶ 25-29, 829 N.W.2d 458, 467-68 (abuse of discretion controls). Dr. Snell explained that these photographs reflected the different injuries, which he had observed during Kari's autopsy; that this expert had needed to refer to these items, during his discussion about the cause of the victim's death due to ligature strangulation; and that he had relied upon them in his autopsy report. SR 490-501; JT 1084-95; EX 60-61, 124. *State v. Owens,* 2002 S.D. 42, ¶¶ 88-93, 643 N.W.2d 735, 756-57 (autopsy photographs are admissible, even when disturbing and cumulative). Dr. Snell also used these photographs to illustrate the degree of force, which was necessary to end the victim's life; and to show the nature and location of her wounds. SR 490-501; JT 1084-95; EX 60-61, 100-01, 103-04, 107-09, 113-17. *State v. Hart,* 1998 S.D. 93, ¶¶ 21-23, 584 N.W.2d 863, 867; *State v. Knecht,* 1997 S.D. 53, ¶¶ 9, 11-12, 563 N.W.2d 413, 417-19. Defendant, therefore, cannot manufacture any mistakes on such flimsy grounds.

IV

JUDGE SALTER DID NOT ERR WHEN HE ADMITTED DEFENDANT'S SPONTANEOUS REMARKS ABOUT HIS CRIMINAL MIND, DURING KRYGER'S INTERVIEWS WITH DETECTIVES FORSTER AND HOFFMAN, AS STATEMENTS AGAINST INTEREST.

A. Overview and Standard of Review.

Defendant faults the trial court, in his fourth issue, because it admitted Kryger's voluntary remarks about his criminal mind, during his interviews with investigators. DB 24-27. Defendant also insists that

these statements were related to a prior dismissed charge against him, and a "matter of general concern with his girlfriend/fiancée," and amounted to inadmissible character evidence. DB 25-27.

A criminal admission is an "avowal of a fact or of circumstances from which guilt may be inferred." *State v. Corean,* 2010 S.D. 85, ¶ 40, 791 N.W.2d 44, 58. Admissions are "the words or acts of a party opponent," offered against him. *Id.* Admissions may include a defendant's interview statements to police, or instances from his demeanor, conduct and behavior. *Johnson v. O'Farrell*, 2010 S.D. 68, ¶¶ 22-25, 787 N.W.2d 307, 315-16.

B. Legal Summary.

Contrary to Defendant's claims, Judge Salter determined that Kryger's spontaneous remarks about his criminal mind (EX 39, 45), during his interviews with Forster and Hoffman, were admissible as statements against interest at trial. DB 24-27; SR 426-27, 442-43, 670-71, 676-77; JT 1140-41, 1269-71, 1449-57, 2056-61. *Goodshot,* 2017 S.D. 33, ¶¶ 14-15; *Corean,* 2010 S.D. 85, ¶ 40, 791 N.W.2d at 58. This judge indicated that Defendant had been using common everyday language during his interviews, when he talked about his criminal mind; that Kryger had not been referring to any legal terms of art; and that the jury could interpret these remarks as admissions and not as anything, which related to the existence of a depraved mind or premeditation, in this context. JT 1140-41, 1269-71, 1449-57, 2056-61; EX 39, 45.

Johnson, 2010 S.D. 68, ¶¶ 22-25, 787 N.W.2d at 315-16. In addition, Judge Salter struck a balance and found that the probative force of Defendant's statements was not substantially outweighed by the danger of unfair prejudice; that Kryger himself had raised the specter of his criminal mind in his "unsolicited admission[s]"; and that jury confusion was unlikely. JT 1453-57, 2056-61; EX 39, 45. *Corean,* 2010 S.D. 85, ¶ 40, 791 N.W.2d at 58. The court also noted (during the settlement of jury instructions) that Defendant's criminal mind instructions were unnecessary due to the informal nature of his remarks; that there was no reason to draw more attention to this evidence; and that other instructions covered the same ground. SR 532-33, 535-51, 583-85; JT 449-57, 2056-61; JI 17-18, 20-32. *State v. Janklow,* 2005 S.D. 25, ¶ 24, 693 N.W.2d 685, 695. As such, Kryger's fourth issue is without merit.

V

TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THREE OF DEFENDANT'S MOTIONS FOR MISTRIAL, WHICH PERTAINED TO HIS JAIL, PAROLE AND CUSTODIAL STATUS.

A. Background and Standard of Review.

Defendant asserts, in his fifth issue, that Judge Salter made a mistake when he rejected three of Kryger's motions for mistrial, which were based upon: (1) Dectective Forster's inadvertent reference to obtaining Kryger's cell phone from his parole agent; (2) an automated message in Defendant's telephone call with Nagel, which revealed his jail

status; and (3) an accidental encounter between Kryger and the jurors, when he was being escorted out of the courthouse. DB 27-29. Defendant also maintains that "prejudice was inflicted" on his right to a fair trial, despite the lower court's benevolent intentions, when it rejected these requests. DB 28-29.

A trial judge's denial of a motion for mistrial is evaluated under an abuse of discretion standard. *State v. Kvasnicka,* 2013 S.D. 25, ¶ 17, 829 N.W.2d 123, 127-28. An abuse of discretion is defined as a fundamental error of judgment, a choice outside the range of permissible choices, and a decision that is arbitrary or unreasonable. *Id.* Error is prejudicial when, in all probability, it produces some effect upon the final result at trial. *Id.*

B. Legal Analysis.

1. Inadvertent Reference to Obtaining Defendant's Cell Phone Number from his Parole Agent.

Judge Salter disposed of Defendant's first motion for mistrial, because Detective Forster had inadvertently referred to obtaining Kryger's cell phone number from his parole agent, by immediately granting the defense's motion to strike. DB 27-29; SR 378-81, 672-73; JT 1139-40, 1146-55. *State v. Owen,* 2007 S.D. 21, ¶¶ 18-19, 729 N.W.2d 356, 364. In addition, the judge addressed this problem in an in-chambers hearing; rejected Defendant's motion for mistrial because it was such an extreme measure; and decided to "neutralize the impact" of this testimony, by instructing the jury to disregard Forster's comment

"concerning the source" of Kryger's cell phone number. JT 1139-40, 1146-55. *Kvasnicka,* 2013 S.D. 25, ¶ 17, 829 N.W.2d at 127-28; *State v. Dillon,* 2010 S.D. 72, ¶¶ 27-29, 788 N.W.2d 360, 369 (curative instruction was proper). The court also warned Forster not to make any "more references to parole, prison, or [Defendant's] criminal history, whatsoever"; ruled that this investigator's remark was an unintended aberration; and that it did not create any unfair prejudice or mislead the jury. JT 1144-55. *State v. Toohey,* 2012 S.D. 51, ¶ 21, 816 N.W.2d 120, 129.

2. Automated Message in Jail Telephone Call.

Judge Salter stressed (outside the presence of the jury) that he was denying Defendant's next motion for mistrial, despite the fact that an automated computer message had not been redacted from Kryger's jail telephone call with Nagel, before this recording was played for the jury at trial. DB 27-29; JT 911-15, 2432-34, 2440-47; EX 37. *Bausch,* 2017 S.D. 1, ¶ 12, 889 N.W.2d at 408-09; *Kvasnicka,* 2013 S.D. 25, ¶ 17, 829 N.W.2d at 128-29. Equally pivotal, this judge emphasized that he was concerned about Defendant's custodial status as a jail detainee and his past criminal record, but that this mechanized voice message did not mention Kryger's previous involvement with the criminal justice system; did not violate any prior orders, or reference any prohibited other acts evidence; and did not amount to any miscarriage of justice. JT 911-15, 2432-34, 2440-47; EX 37. *Owen,* 2007 S.D. 21, ¶¶ 18-19, 729 N.W.2d

at 364. The court also formulated a limiting instruction (rather than putting a new exhibit into evidence) and admonished the jury to disregard the automated portion of this message in its entirety. JT 911-15, 2432-34, 2440-47; EX 37. *State v. Medicine Eagle,* 2013 S.D. 60, ¶ 23, 835 N.W.2d 886, 895 (limiting instruction cured any problems).

3. Accidental Encounter Between the Jurors and Defendant, When He was Being Escorted Out of the Courthouse.

Judge Salter rejected Defendant's final motion for mistrial, after an accidental encounter had taken place between the jury and Kryger, when he was being escorted out of the courthouse and back to jail. DB 27-29; JT 1562-78. *United States v. Carr,* 647 F.2d 867-68 (8th Cir. 1981); *Williams v. State,* 705 S.W.2d 896-97 (Ark. App. 1986); *State v. Buchhold,* 2007 S.D. 15, ¶¶ 53-56, 727 N.W.2d 816, 828-29. This judge listened to Bailiff Pfeifer's testimony, during an in-chambers hearing, and found out that the jurors were on an elevator when it stopped on the fourth floor, where Defendant and law enforcement personnel had been waiting for a ride. JT 1562-78. In addition, this judge detailed that the two deputies, who had been transporting Defendant, were wearing civilian clothes; that they were not carrying any weapons, or restraints; and that one juror had probably heard the noise from Deputy Brewer's keys, when this individual said that "he could hear them coming." JT 1562-78. This judge also pointed out that the jury had inadvertently run into Defendant, who was wearing civilian clothes; that Kryger did not have any "discernable" restraints and was not wearing leg shackles; that this

encounter had taken place in the back hallway of the courtroom after hours, where the jury had frequently seen other participants in this case; and that it was reasonable for them to think that Defendant was being protected by law enforcement personnel, particularly when two members of the Johnson's family had been excluded from the trial. JT 1562-78. *State v. Mollman,* 2003 S.D. 150, ¶¶ 21-27, 674 N.W.2d 22, 28-30. The court also confirmed that this situation did not constitute "the straw that broke the camel's back"; that Bailiff Pfeifer had tried to shield the jury from this encounter; and that there was no prejudice, either alone or in concert, which justified the remedy requested. JT 1562-78. *Buchhold,* 2007 S.D. 15, ¶¶ 53-56, 727 N.W.2d at 828-29. Hence, Defendant's fifth issue rings hollow.

VI

JUDGE SALTER DID NOT ERR WHEN HE REJECTED DEFENDANT'S PROPOSED JURY INSTRUCTIONS WHICH RELATED TO: (A) KRYGER'S ADMISSIONS ABOUT HIS CRIMINAL MIND; (B) THE DEFINITIONS OF SPECULATION AND CONJECTURE; AND (C) A SO-CALLED ALIBI DEFENSE.

A. Overview and Standard of Review.

As previously noted, State has combined Defendant's sixth, seventh and ninth issues into one argument due to word restrictions. DB 29-33, 38-42. Defendant posits, in his sixth issue, that the trial court improperly denied three of the defense's state of mind jury instructions (SR 583-85); and that the jury could have confused this concept with the "notions that [Kryger] also possessed a depraved mind

or mind with premeditated design," because these terms sound alike. DB 21-31. In addition, Defendant attacks Judge Salter, in his seventh issue, because he rejected five of the defense's jury instructions, which dealt with speculation and conjecture (SR 587-91), and prevented Kryger from mitigating Dr. Snell's speculative opinion and the volumes of evidence, which were not tested or linked to this case. DB 31-33. Defendant also maintains, in his ninth issue, that the trial court erred by refusing the defense's proposed alibi instruction (SR 586) because Kryger had said, in his police interviews, that he was almost hit by an SUV and could not have been at Kari's address; and that the Family Market video simultaneously showed a bicyclist going north on Garfield, while the victim's "SUV pulled into view" in front of her home and went south on this same street. DB 38-42; JT 1316-17, 1320, 1322-25, 1373-74; EX G.

A trial judge has wide latitude in the wording and arrangement of its jury instructions, which are reviewed under an abuse of discretion standard. *Spaniol,* 2017 S.D. 20, ¶ 49, 895 N.W.2d at 346-47. It is not error for the court to refuse instructions offered only to amplify principles already embodied in other instructions. *State v. Jensen,* 2007 S.D. 76, ¶¶ 18-22, 737 N.W.2d 285, 290-91.

B. Legal Synopsis

1. State of Mind Instructions.

Defendant's complains about Judge Salter's rejection of his three state of mind instructions overlap to some degree with his fourth issue.

DB 24-27, 29-31. But as they relate to the jury instructions in question, this judge explained that he had revised his position about giving any state of mind instructions, after reviewing the other instructions in this case. SR 532-33, 535-51, 583-85; JT 1449-57; JI 17-18, 20-32. *State v. Traversie,* 2016 S.D. 19, ¶ 12, 877 N.W.2d 327, 331 (jury instructions are considered as a whole). Equally important, Judge Salter pointed out that Defendant's references to his criminal mind, during his police interviews (EX 39, 45) were based upon ordinary "everyday language," and not any legal terms of art; that Kryger's voluntary statements were not "in any way shape or form interchangeable" with specific intent, premeditated design, or depraved mind; and that the jury could decide what Defendant meant in this context. SR 583-85; JT 1449-57. *Spaniol,* 2017 S.D. 20, ¶ 49, 895 N.W.2d at 346-47. Judge Salter also stated that he did not want to restrict the jury's ability to consider Kryger's comments; draw attention to them in any clarifying directives; and that the other instructions here were sufficient. SR 532-33, 535-51, 583-85; JT 1449-57; JI 17-18, 20-32. *State v. Diaz,* 2016 S.D. 78, ¶ 42, 887 N.W.2d 751, 763; *Jensen,* 2007 S.D. 76, ¶¶ 18-22, 737 N.W.2d at 290-91. The defense also had a full opportunity to challenge Defendant's remarks to Forster and Hoffman, during cross and re-cross examination at trial. DB 30; JT 1164-65, 1297-1302; 1323-26, 1331-32, 1339, 1382-89, 1390-91. *State v. Birdshead,* 2015 S.D. 77, ¶ 37, 871 N.W.2d 62, 76.

2. Instructions Defining Speculation and Conjecture.

As for his seventh issue, Defendant criticizes Judge Salter because he denied five of the defense's jury instructions (587-91), which pertained to the definitions of speculation and conjecture; and supposedly were necessary to counteract Dr. Snell's input, the testing protocols in this case, and the large number of extraneous items collected by the police. DB 31-33; JT 1466-70. This judge indicated, however, that he had decided to use Jury Instruction 58 (SR 577), in lieu of two of Defendant's definitional instructions, because it was a better expression of South Dakota law and the concepts of speculation and conjecture; and had been vetted "with an eye toward" the law in our state. SR 587-91; JT 1466-70. *Diaz,* 2016 S.D. 78, ¶ 42, 887 N.W.2d at 763; *State v. Nekolite,* 2014 S.D. 55, ¶ 17, 851 N.W.2d 914, 919; *Jensen,* 2007 S.D. 76, ¶¶ 18-22, 737 N.W.2d at 290-91. In addition, Judge Salter rejected Defendant's three remaining instructions because they did not fit the facts here and implied that a quantum of evidence was more important than its force, which was not accurate, given the small but critical amount of DNA that linked Kryger to his crimes. SR 587-91; JT 1222-23, 1466-70. *Traversie,* 2016 S.D. 19, ¶¶ 12-13, 877 N.W.2d at 331-32. The court also noted that the defense was not prevented from arguing that the jury could not speculate or guess about any of the evidence presented by the State, even without any additional instructions. SR 577; JT 1469-70, 1517; JI 58.

3. Alibi Instruction.

Lastly, Defendant avers, in his ninth issue, that Judge Salter erred when he refused to give the defense's alibi instruction, which violated Kryger's due process and fair trial rights. DB 38-42; JT 1437-43. This judge detailed that the prosecution had filed a Demand for Notice of Alibi (SR 21, 28), which encompassed the late hours of March 14 and into the early morning hours of March 15, 2014; that Defendant had not been able to pin down his whereabouts, during his interviews with Detective Hoffman (EX 39-40); and that Kryger had maintained that he was riding his bike in the victim's neighborhood, but not know the local street names by heart. SR 18-21, 28, 586; JT 1282, 1322-25, 1373-74, 1437-43. *State v. Nuzum,* 2006 S.D. 89, ¶¶ 11-23, 723 N.W.2d 555, 558-60; *State v. Sonen,* 492 N.W.2d 303, 305 (S.D. 1992). In addition, Judge Salter factored the mosque and Family Market videos (EX 46-47 and G) into the equation and the fact that Defendant had not complied with SDCL §§ 23A-9-1 and 23A-9-4, or even mentioned any alibi defense, until the settlement of jury instructions; but decided to evaluate Kryger's request on the merits. SR 18-21, 28, 586; JT 1437-43; *State v. Chipps,* 2016 S.D. 8, ¶ 51, 874 N.W.2d 475, 492-93; *Jensen,* 2007 S.D. 76, ¶¶ 18-22, 737 N.W.2d at 290-91. This judge also concluded that Defendant's alibi instruction did not conform to the evidence here because Kryger's whereabouts were unaccounted for, during most of the time period which related to Kari's death; and that Defendant had only

been able to interpose a partial alibi (or something even less), when Kryger said that he was almost struck by a dark-colored SUV without lights, while riding his bike around Sioux Falls. SR 18-21, 28, 586; JT 1282, 1322-25, 1373-74, 1437-43; EX 39. *Nuzum,* 2016 S.D. 89, ¶¶ 18-24, 723 N.W.2d at 559-60. The court further informed the jury, in Jury Instruction 16, that the exact date of the crimes was not required in this case because of the "on or about language" in the Indictment; and that a date "reasonably near" the victim's demise would suffice. SR 18-21, 28, 531; JT 1437-43. *Janklow,* 2005 S.D. 25, ¶ 25, 693 N.W.2d at 695 (no prejudice exists unless the jury would have returned a different verdict). Accordingly, all of the Defendant's jury instruction claims are specious.

VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Background and Standard of Review.

As noted above, State has combined the three jury instruction protests raised by Defendant into one issue and redesignated Kryger's eighth argument, as its seventh issue. DB 33-38, 48. Specifically, Kryger argues that Judge Salter made a mistake when he rejected the defense's motion for judgment of acquittal. DB 33-38, 48; JT 1413-33. In addition, Defendant contends that the facts in this case are similar to those, in *State v. Lacroix,* 423 N.W.2d 169 (S.D. 1998); that the

prosecution's evidence "invited too much conjecture and speculation, not otherwise defined by the jury instructions"; and that proof of Kryger's state of mind, let alone his status as the actual perpetrator of any crimes, was absent in this case. DB 33-38, 48. Defendant also urges that Dr. Snell's testimony was lacking, with respect to the time and place of Kari's death; that this expert could not establish whether the victim's vaginal injuries had been caused by consensual or nonconsensual sex; that the mosque video did not show who had been driving Kari's SUV and whether the person walking towards the victim's home had permission to enter, or why there were no signs of a forced entry at the crime scene; that the jury was left to guess about where and when the perpetrator formed the intent to commit the crimes in question; and that no one could tell where the victim died. DB 33-38, 48.

This Court reviews the denial of a motion for judgment of acquittal de novo. *State v. Bosworth,* 2017 S.D. 43, ¶ 11, 899 N.W.2d 691, 694. It also does not resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of an explanation, or weigh the evidence. *Id.*

B. Legal Analysis.

Defendant wants to capitalize upon the fact that he tried to commit the perfect crime, by cleaning up Kari's home; immersing the victim's body in a bathtub full of water and bleach; cutting Kari's fingernails to the quick; and getting rid of his plaid jacket and the victim's personal

belongings. DB 33-38; JT 907-1586, 1642-3095; EX 46-47, 64-66, 98, 105-06, 118. *State v. Boston,* 2003 S.D. 71, ¶ 10, 665 N.W.2d 100, 104 (concealment shows consciousness of guilty). In addition, Kryger had a full opportunity to challenge the efficacy of the police investigation at trial; the practical reasons why testing procedures had to be prioritized; the fact that many of the items, which had been collected by the police, could not be tied to this case; and the contents of the mosque and Family Market videos. JT 1136-74, 1282-91, 1302-34, 2340-67, 3076-90; EX 38, 46-47, 118, G. *Chipps,* 2016 S.D. 8, ¶ 51, 874 N.W.2d at 492-93. Defendant also ignores that the jury had the intelligence and the ability to interpret the facts here and understand the court's instructions. SR 524-79; JT 1413-33. *Owens,* 2002 S.D. 42, ¶¶ 95-99, 643 N.W.2d at 757-58; *State v. Holzer,* 2000 S.D. 75, ¶ 20, 611 N.W.2d 647, 653-54.

Moreover, Judge Salter determined that both direct and circumstantial evidence existed in this case; that the medical, video, audio, photographic and forensic evidence was sufficient to submit this matter to the jury; that DNA testing on Kari's vaginal swabs had revealed a match with Defendant's genetic profile; and that Kryger had been riding his bike in the victim's neighborhood, at the time of her demise.[3] JT 1076-1118, 1141-45, 1222-23, 1237-58, 1302-91, 2340-56, 3000-06, 3075-91; EX 37-40, 45-47, 83, 100-18, F. *Chipps,* 2016 S.D. 8, ¶ 51,

[3] Detective Hoffman noted that the bicyclist, in the Family Market video, who was going north on South Garfield, did not have any reflectors on his bike, unlike Kryger's Huffy Ironman, which had white reflectors on both wheels. JT 1036-37, 1318-20; EX 46, 99, G.

874 N.W.2d at 492-93; *Ralios,* 2010 S.D. 43, ¶ 49, 783 N.W.2d at 600-01. In addition, this judge explained that the evidentiary picture at trial included the mosque videos and the people who had come forward to identify Defendant in this footage; the fact that Kari had returned to her residence after a family get together at Pizza Ranch; that the victim lived alone and had never had any relationship, or contact with Kryger; that Defendant was not licensed, privileged to enter, or to remain in the victim's home, even in the absence of a forced entry; and that Kari had died from ligature strangulation, which required extensive pressure to her neck. JT 1076-1118, 1130-39, 1166-74, 1222-23, 1302-28, 1413-33, 2340-58, 2999-3006, 3075-91; EX 38, 46-47, 118, F. *Bosworth,* 2017 S.D. 43, ¶ 11, 899 N.W.2d at 694 ; *Chipps,* 2016 S.D. 8, ¶ 51, 874 N.W.2d 492-93 (jury makes the call on identity of defendant in video recordings); *Running Bird,* 2002 S.D. 86, ¶¶ 39-40, 649 N.W.2d at 617. The court also found that premeditation can be instantaneous, and proven by the manner in which Kari had died. JT 1413-33. *State v. Berhanu,* 2006 S.D. 94, ¶ 16, 724 N.W.2d 181, 185-86.

Lastly, the facts in this case most closely resemble those, in *Owens,* 2002 S.D. 42, ¶¶ 95-99, 643 N.W.2d at 757-58, because of the brutality and force, which it took to leave two ligature marks on Kari's neck and to viciously strangle her; the damage to the victim's fractured hyoid bone and thyroid cartilage; the multiple red marks in Kari's vaginal area; and her numerous other traumatic injuries. DB 37-38; SR 490-

501; JT 1076-1118; EX 60-61, 100-17. Kari's naked body was also submerged in a bathtub full of water and bleach, or a cleaning product, to destroy any evidence of Defendant's guilt; Kryger suddenly had sufficient funds to buy an engagement ring, a new cell phone and calling plan after the victim's death, and the disappearance of her purse from her home; and Defendant changed his story and insisted that he had had consensual sex with Kari after DNA-testing results linked him to the sperm cell fraction on the victim's vaginal swabs. SR 490-501; JT 1076-1118, 1142-44, 1211-12, 1222-23, 1237, 1244, 2407, 2424-25, 2432-34; EX 37, 64-66, 98, 100-17, 124. *Uhring,* 2016 S.D. 93, ¶ 12, 888 N.W.2d at 554 (jury sorts out the truth). Thus, no phantom perpetrator exists here and Kryger sealed his own fate with his lies.

VIII

THE CUMULATED EFFECT OF JUDGE SALTER'S SO-CALLED ERRORS DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL.

A. Overview and Standard of Review.

Again, State has reclassified Defendant's tenth argument, as its eighth issue in this brief. DB 42-48. Kryger submits that "overwhelming evidence" of his guilt did not exist in this case, and that the "combined sum" of all the errors deprived him of a fair trial. DB 42-48. In addition, Defendant rehashes his position that Dr. Snell could not ascertain whether Kari's vaginal injuries had been caused by consensual or nonconsensual intercourse; that neither the mosque videos, or the DNA

evidence, established who was in the victim's residence or vehicle, and whether this person had permission to enter the victim's home; that the burn pit evidence was never tested or tied to the crimes in question; and that the trial court failed to use any of the jury instructions, which were proposed by the defense. DB 42-48. Defendant also alleges that "numerous anomalies" existed at trial because the blood stains found near Kari's bathroom and the residue behind her ear were never tested; that the mosque videos did not show anyone on a bicycle wearing gloves, or carrying any bedding and cleaning products; and that the jury had to speculate whether the bleach pictured at Kryger's work place was used to clean up the victim's home, before her family members arrived at the crime scene. DB 45-48 n.16; EX 98.

This Court has previously held that the cumulative effects of errors by a trial judge may support a finding that the defendant was denied his constitutional rights to a fair trial. *State v. Birdshead,* 2016 S.D. 87, ¶ 23, 888 N.W.2d 209, 216. The question is whether a review of the entire record shows that a fair trial was conducted below. *State v. Davi,* 504 N.W.2d 844, 857 (S.D. 1993).

B. Legal Synopsis.

Judge Salter did not commit any errors, prejudicial or otherwise here, and none of Kryger's allegations support the conclusion that he was denied his constitutional rights to a fair trial. DB 42-48; JT 907-1586, 1642-3095; EX 1-127, A-G. *Stanley,* 2017 S.D. 32, ¶ 34, 896

N.W.2d at 680; *State v. Wright,* 2007 S.D. 51, ¶ 69, 768 N.W.2d 512, 534; *State v. Perovich,* 2001 S.D. 96, ¶ 30, 632 N.W.2d 12, 18. The prosecution presented sufficient evidence of Defendant's guilt at trial, as demonstrated by a review of the entire record and as detailed throughout this brief; Kryger cannot show that the cumulative effect of any so-called mistakes somehow compromised this proceeding, even if not every item collected by the police was linked to Kari's death; the forensic experts needed to prioritize their testing protocols in this case; and the evidence confirmed that bleach and fire can degrade or eliminate DNA evidence. JT 1207-12, 1222-23, 1229, 1236-46, 1288-90, 1333-42, 1374-78, 1385-86. *Birdshead,* 2016 S.D. 87, ¶ 23, 888 N.W.2d at 216; *Chipps,* 2016 S.D. 8, ¶ 51, 874 N.W.2d at 492-93; *State v. Charger,* 2000 S.D. 70, ¶ 39, 611 N.W.2d 221, 229; *McDowell v. Solem,* 447 N.W.2d 646, 651 (S.D. 1989). Defendant also is entitled to a fair but not a perfect trial. *Perovich,* 2001 S.D. 96, ¶ 30, 632 N.W.2d at 18; *Davi v. Class,* 2000 S.D. 30, ¶ 51, 609 N.W.2d 107, 118. As such, Kryger has failed to establish any cumulative errors and no relief is justified on this record.

CONCLUSION

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

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

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

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 8,996 words.

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

Dated this 19th day of September 2017.

Ann C. Meyer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this September 19, 2017, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Christopher Dean Kryger* was served via electronic mail upon:

Mark Kadi at mkadi@minnehahacounty.org
Austin Vos at avos@minnehahacounty.org

Ann C. Meyer
Assistant Attorney General

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

NO. 27869

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHRISTOPHER DEAN KRYGER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE MARK SALTER

Circuit Court Judge

MARK KADI & AUSTIN VOS
Public Advocate's Office
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorneys for Appellant.

MARTY JACKLEY
Attorney General
1302 E. Hwy. 14, Ste. 1
Pierre, SD 57501-5070
Attorney for Appellee.

AARON MCGOWAN
Minnehaha Co. State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorney for Appellee.

Notice of Appeal Filed May 20, 2016.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,	*	
Plaintiff and Appellee,	*	Case #27869
v.	*	REPLY BRIEF
CHRISTOPHER DEAN KRYGER,	*	
Defendant and Appellant.	*	

PRELIMINARY STATEMENT

The Appellant renews factual statements and legal arguments originally presented in the Appellant's brief. Reference to the trial court's record remains the same.

ARGUMENT

The Appellee erroneously argues that an abuse of discretion standard pf review should be applied to determine whether the trial court erred preventing the Defendant from cross examining the decedent's brother regarding issues of bias and motive. Appellee Brief at 13. The Appellant argued that his Constitutional Confrontation Clause rights to cross examination were infringed by the total ban, and not necessarily his rights solely pursuant to state evidence law. Appellant's Brief at 14, n.4. This

Court applies de novo review regarding issues of Constitutional Law. State v. Medicine Eagle, 2013 S.D. 60, ¶27, 835 N.W2d 886, 896 (2013). Since constitutional arguments regarding the Confrontation Clause are raised, this Court must presently apply de novo review. State v. Spaniol, 2017 S.D. 20, at ¶23-24, 895 N.W.2d 329, 323 citing Crawford v. Washington, 541 U.S. 36 (2004); See also Davis v. Alaska, 415 U.S. 308, 317 (1974); Appellant's Brief at 13-17. In addition, the Court must examine the effect of the exclusion of evidence regarding the jury's evaluation of the testifying witness, and not on the eventual result or verdict, per Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). Cf. Appellee Brief at 14.

The distinction between use of heightened review for Consitutional issues rather than state evidence law issues was illustrated by this Court in State v. Packed, 2007 S.D. 75, 736 N.W.2d 851. In Packed, the defendant, accused of Rape, presented a theory of defense that the alleged juvenile victim lied about being raped by the defendant to avoid getting in trouble with having a relationship with a boyfriend living next door. Packed, 2007 S.D. at ¶¶10-11, 736 N.W.2d at 855. The State sought to exclude evidence regarding this on third party perpetrator grounds via a motion in limine, which was granted by the trial court.

Id. In an offer of proof, the defendant inquired of adult witnesses who admitted the alleged victim had been confronted about their concerns regarding her relationship with the boyfriend. Id.

On appeal, this Court reversed the trial court's decision excluding the evidence. It noted that, "More to the point here, however, it must be recognized that there is a distinction between evidence offered to prove the guilt of another uncharged individual and evidence offered to show that a witness has a motivation to accuse the wrong person. To deny without rational basis evidence of the latter contravenes a defendant's due process rights". 2007 S.D. at ¶23, 736 N.W.2d at 859. This Court cited Davis v Alaska in Packed for its justification to place (third party) evidence issue via application of Rule 401 (Relevancy) in secondary priority to Confrontation Clause issues regarding the exposure of motives to lie. Id.

Abuse of discretion review contains a component focusing on an initial legal determination whether discretion to admit or exclude evidence is even justified. Although trial courts are accorded with wide discretion to admit or exclude evidence, when a "a trial court misapplies a rule of evidence, as opposed to merely allowing or

refusing questionable evidence, it abuses its discretion." Packed, at ¶24, 736 N.W.2d at 859 citing Koon v. U.S., 518 U.S. 81, 100 (1996).[1] By excluding evidence on third party perpetrator grounds, the trial court in Packed ignored the evidence's admissibility on Due Process and Confrontation Clause grounds. Packed, at ¶24, 736 N.W.2d at 859

Such prioritization of de novo review for Constitutional issues is constitutionally required in light of due process. This Court below noted "due process is in essence the right of a fair opportunity to defend against the accusations. State evidentiary rules may not be applied mechanistically to defeat the ends of justice." Id. citing Chambers v. Mississippi, 410 U.S. 284 (1973); *see also* Holmes v. South Carolina, 547 U.S. 319, 321 (2006).

The State seeks to dictate the result of this appeal by steering this Court's review away from de novo review for Constitutional issues to those dealing with rules of evidence *alone*. The trial court below ruled on state evidence grounds solely despite the Appellant's efforts to raise Constitutional Confrontation clause issues. T6:40-41.

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[1] *See also* State v. Harris, 2010 S.D. 75, ¶16, 789 N.W.2d 303, 310 (legal determination that admitted statements were hearsay preceded the conclusion that "the trial court abused its discretion by overruling Harris's hearsay objection to the recordings.")

The effect of the alteration caused the federal subject matter of the objection to be minimized and eclipsed by issues of state law.

Staub v. City of Baxley, 355 U.S. 313 (1958) provides an example showing a state appellate court's under inclusive approach that avoided reviewing federal issues by only resorting to state law to determine an appeal's outcome. In Staub, a defendant appealed his conviction of a city ordinance precluding soliciting members for membership in organizations, unless a permit was granted by the mayor (per his discretion following payment of a license fee). Staub, 355 U.S. at 315. The defendant asserted before the trial court that the ordinance violated his First and Fourteenth Amendment rights. Id. These issues were restated at the state appellate level as well, but the state appellate courts declined to consider them. Id. at 316-17. The state appeals court ruled noted "that '(t)he attack should have been made against specific sections of the ordinance and not against the ordinance as a whole'; that '(h)aving made no effort to secure a license the defendant is in no position to claim that any section of the ordinance is invalid." Id. at 317.

Before the U.S. Supreme Court, the appellee-state argued for dismissal of the appeal "based upon state procedural grounds [which therefore rested] upon an adequate nonfederal basis". Id. at 318. This Court disagreed noting that "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law and, where a case coming from a state court presents that question, this court must determine *for itself* the sufficiency of the allegations displaying the right or defense, and *is not concluded by the view taken of them by the state court.*" Id. (emphasis *added*).

In Staub, the defendant's objections and assigned constitutional errors controlled issues that ultimately resolved the case despite the state trial and appellate court's initial under inclusive analysis that was limited to state law only. The Appellee now invites this Court to undertake a similar path to avoid federal issues by resolving assigned issues via state law only. It seeks to avoid reviewing Constitutional issues, assuming arguendo that state law issues fell short of granting relief. The Constitution, however, forbids travel down that path as shown in Staub.

The Appellee suggests that confronting bias or motive of the decedent's brother was collateral. Appellee Brief at 15. Precedence demonstrates that evidence as to motive and bias are probative as to whether factual accusations reported by the complaining witness were influenced by the alleged victim's own interests. Such issues are never collateral. See People v Gaskin, 565 N.Y.S.2d 547, 548 (N.Y. 1991); U.S. v. Moore, 529 F.2d 355, 357 (DC.Cir. 1976); U.S. v. Harvey, 547 F.2d 720, 722, (2nd Cir. 1976). Cross examination of Johnson therefore would have addressed a significant and not a collateral issue.

The Appellant tacitly concedes that evidence submitted throughout the case was not relevant, yet was admitted anyway. For instance, 297 pieces of evidence were submitted "many of them were not related to the victim's death." Appellee's Brief at 13. Testing of items from the burn pit, be they burned or not burned, is regarded as "futile". Id. at 12. If the State regards such evidence as not related to the victim's death, it stands to reason it could not be relevant per SDCL 19-19-401 in a trial regarding the victim's death. Their admission calls into question why many of the 297 items were admitted at all, leaving a jury to speculate as to their probative value, if

any. Jury instructions on speculation were not provided to mitigate the effects of such confused issues.

The Appellee asserts that the suspect was not privileged to enter or remain the decedent's residence "even in the absence of forced entry". Appellee Brief at 36. The State therefore concedes a lack of proof regarding forced entry. T11:31. The concession reveals that speculation was required to ever conclude that forced entry occurred, or whether a suspect was allowed into the residence with or without the decedent's consent.

The lack of evidence of forced entry, or the circumstances of any entry, belies notions that the State proved the suspect was not privileged to enter or remain on the premises. These contradictory statements also reveal the State's tacit concession that there was no proof of the suspect's intent while entering the house, or remaining in the house. (See Det. Bakke testimony T8:18-25). The jury was left to speculate as to the suspect's mental state at any position in time or on the decedent's property, as well as whether the decedent died inside or outside the house, or on the decedent's property. (See Det. Bakke testimony T8:18-25).

Similarly, the jury was asked to speculate if any theft occurred. A purse is claimed to be missing, but no

evidence links the taking of any purse by the Appellant. Appellee's Brief at 15-16. The Appellant's residence and workplace were both thoroughly searched and photographed (although nothing was tested). No purse, or clues leading to finding a purse, or other things of value of the decedent were ever found. E95-98.

In addition, any connection between moneys expended by the Defendant to purchase an engagement ring, and money that *may* have been in a purse, or in the residence is similarly speculative. Despite raising initial suspicions that $1400 in rent money may have been in the freezer, the State subsequently produced evidence suggesting such money may never had been at the residence at all. T6:115-17.

Fortunately, the time when bleach odors arose in the residence requires no speculation. It clearly arose after first responders left the residence, leaving the crime scene to the unbridled discretion of the decedent's family. Paramedic Matt Hardwick examined the decedent while in the tub and assisted removing the decedent's body from the bath tub. T7:67. He had to have made contact with the water in the tub. The body was removed from the water causing it to be in motion during the removal. He described smelling a conditioner smell but denied smelling bleach. T7:67. Other first responders denied smelling bleach on their first

entry into the residence. T7:41. Law enforcement officers only smelled the strong bleach odor only upon their return. T7:42; T10:121.

Yet, friends noted overwhelming bleach odors. T6:168.

The State did not specifically argue at trial that the Appellant somehow snuck into the residence (1) after first responders had left, but (2) while approximately 20 of decedent's various family members viewed the residence, and its belongings of the decedent (T6:71; T6:63), (3) where the Appellant managed to apply bleach to clean up the crime scene of evidence of his presence without being detected by 20 people, (4) left the decedent's residence with the cleaning materials with assorted used clean-up remnants without being detected by 20 people, and (5) spirited away these materials undetected (presumably on a bicycle).[2]

This sequence of untenable possibilities must be believed in order to conclude the victim's family members and friends testified accurately regarding when the odor of bleach was first detected. First responders such as emergency paramedics who made actual physical contact with

[2] Supporters who detected bleach odor in the house and also examined the SUV related no description of bleach odor from on the interior of the vehicle, making it unlikely that the SUV was used to transport bleached materials or used bleached refuse from the residence. T6:165-69.

the tub water and the decedent's body have no motive to testify falsely. It must yield to the certainty that bleach was not used or applied until after the first responders left, and only when the decedent's friends and family remained. The crime scene was altered prior to the return of law enforcement officials, who returned to the residence to investigate a possible crime, and no longer an accidental death.

The Appellee refers to the Appellant's "criminal mind" statements seeking to diminish the need for additional instructions. Appellee Brief at 24. This is due to the "informal nature of the remarks". Id. There "was no reason [for further instruction] to draw more attention to this evidence" through the rejected instructions. Id.

The Appellee's concerns about drawing further attention to such evidence via instructions betrays the overly prejudicial nature of the statements initial admission into evidence. The State in the court below did not refer to the statements as informal remarks. It sought introduction of the statements to establish the mens rea requirements - not "informal remarks". T1:3. The trial court admitted it for that purpose.

The State presented arguments in support of the trial court's denial of the alibi instruction. Appellee Brief at

32. It noted that the trial court instructed the jury "that the exact date of crimes was not required in this case because of the 'on or about' language in the Indictment". Id. In light of the denial of the alibi instruction, this instruction presenting the effect of expanding the scope of alleged time of the crime by days, demonstrating the futility of attempting to comply with a the State's Alibi Demand requiring notice regarding to only a few hours.

In U.S. v. Houston, 481 Fed.Appx. 188 (5th Cir. 2012), the government charged the defendant with illegal possession of a firearm as a felon, and submitted evidence that the robbery with a shotgun occurred at a set time at a specific location with a shotgun. Id. at 189. The shotgun was later discovered in the defendant's garage. Id. at 190. Soley, the defendant testified that he was at home when the alleged robbery (hence the illegal possession of the shotgun) occurred. Id.

The trial court denied his request for an alibi instruction. Id. at 192. On appeal, the Court of Appeals found the trial court committed error noting that the defendant's statements placed him at a location other than where the crime supposedly occurred. Id. It also noted, "that a defendant is entitled to an alibi instruction based upon the defendant's self-serving statements alone." Id.

In conjunction with other errors in the case, the Court of Appeals found the failure to give an alibi defense warranted a new trial. Id. at 195.

In the present case, the defendant's statements to law enforcement admitted into evidence discussed and disclosed his whereabouts in terms of riding a bike throughout Sioux Falls on the night of Friday, March, 2014 through the next morning when he arrived at the Nagel residence[3]. He did not admit to being inside or at the location of the decedent's residence. He did admit via a recorded phone conversation with Nagel that sex with decedent had occurred after he became aware of her true name via news reports[4]. However, through his conversation, and therefore the evidence, he did not indicate when or where it occurred.

Similarly, the appearance of the decedent's SUV returning to the decedent's residence virtually simultaneously with the appearance of the bicycle rider proceeding north on Garfield Street is further evidence of

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[3] Nagel's uncle, Kevin Brower, lived at her residence and wore a plaid coat similar to one owned by the Appellant, demonstrating that the coat worn by the suspect in the Mosque video is one of common availability with similar patterns. T8:108.

[4] Appellant's Senior Counsel argued in his closing argument that perhaps in some relationships, the defendant might not receive a partner's true name and number after a consensual romantic encounter concluded.

the alibi that the defendant was elsewhere throughout town riding his bike.[5] Such evidence provides a location other than the decedent's home. In conjunction with other errors in this case, as per Houston, the failure to give an alibi instruction justifies a new trial.

CONCLUSION

The Appellant was denied a fair trial in the proceedings below, or in the alternative, was denied appropriate judgment of acquittals. This Court should remand the matter with instructions to enter judgments of acquittal, or to order a new trial within the parameters accounting for the Appellant's assigned errors.

CERTIFICATE OF COMPLIANCE

This brief meets applicable page and word limitations required by this Court.

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[5]The State appears to argue that the alleged lack of reflectors on the bicycle proceeding north on Garfield somehow eliminates the possibility that it is the Defendant's bike. Appellee's Brief at 35, n.3. Detective Hoffman also acknowledged that reflectors are easily removed and replaced. T11:35-36. In addition, the state presented evidence of a number of bikes of various types and colors in order to show the extent of efforts to investigate this case. Witness Mike Miller testified the Appellant used a black color bike on the day in question. T8:82. In contrast, the State submitted evidence that the color of the alleged bicycle was blue. E99.

Dated this 6th day of October, 2017.

MARK KADI
c/o Public Advocate Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.org
Attorney for Appellant

AUSTIN VOS
c/o Public Advocate Office
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392
mkadi@minnehahacounty.org
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of October, 2017, a true and correct copy of the foregoing Appellant's Reply Brief was served electronically on:

Marty Jackley
Attorney General
1302 E. Hwy, Suite 1
Pierre, SD 57501
ATGservice@state.sd.us

Aaron McGowan
M.C. States Attorney
415 N. Dakota Ave
Sioux Falls, SD 57104
ujsservice@minnehahacounty.org

Attorney for Appellant c/o
Minnehaha County Public Advocate