IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 29644

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

v.

LEE TODD MALCOLM,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CARMEN MEANS,
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed May 21, 2021.

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PRELIMINARY STATEMENT

Throughout this Brief, Plaintiff/Appellee, State of South Dakota will be referred to as "State." Defendant/Appellant Lee Todd Malcolm will be referred to as "Malcolm." References to the alleged victim, Jamaica Christensen, will be referred to as "JC." References to the Codington County criminal file CRI 20-60 will be made by "SR". References to the jury trial transcript will be referred to as "JT." References to the motion hearing transcript will be referred to as "MH."

JURISDICTIONAL STATEMENT

Malcolm respectfully appeals from a Judgment of Conviction which was entered on April 28, 2021.

Malcolm timely filed his Notice of Appeal on May 21, 2021 pursuant to SDCL 23A-32-15. The jurisdiction of this Court is invoked under SDCL 23A-32-2, SDCL 21-34-13 and SDCL 15-26A-7. The scope of review is authorized under SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUE

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW THE DEFENDANT TO PRESENT A DEFENSE.

Malcolm was charged by Superseding Indictment with nine alternate counts of 3rd Degree Rape in violation of

SDCL 22-22-1(3) and SDCL 22-22-1(4). He was acquitted of all counts pertaining to 22-22-1(3), but was convicted of the alternate counts alleging violations of 22-22-1(4). The trial court refused to allow the Defendant to present any evidence to the jury regarding his claim that he and JC had a longstanding and intimate relationship where, in the privacy of their own home, she gave her advanced consent to sex. The trial court further prohibited the Defendant from presenting his version of the facts and circumstances as they occurred on the morning he and JC had, what he believed, was consensual sexual relations. The trial court erred in prohibiting the Defendant from providing a defense and as a result, failed to properly instruct the jury that it should consider all of the circumstances in determining whether JC's intoxication rendered her unable to exercise reasonable judgment.

Most relevant case authorities:

Cases:

Lawrence v. Texas, 539 U.S. 558 (2003)

State v. Jones, 2011 SD 60

State v. Jackson, 2020 SD 53

People v. Dancy, 124 Cal. Rptr.2dn 898 (Cal. Ct. App 2002)

Most relevant statutes:

SDCL 22-22-1(3)

SDCL 22-22-1(4)

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN NOT PROPERLY INSTRUCTING THE JURY ON THE ISSUE OF INTOXICATION.

The State alleged JC was incapable of consenting to sexual activity with the Defendant on the grounds that she was incapable because of any intoxicating, narcotic or anesthetic agent or hypnosis. The trial court failed to instruct the jury as to the definitions of intoxication, anesthetic agent, or hypnosis. More problematic is the trial court failed to instruct the jury that they should take into consideration all of the facts and circumstances of the events that took place to determine whether JC was able to consent.

Most relevant case authorities:

State v. Jones, 2011 SD 60

State v. Leinweber, 228 N.W.2d 120 Minn. (1975)

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RULING ON GRAPHIC VIDEO EVIDENCE WITHOUT FIRST VIEWING THE EVIDENCE.

The State's case involved the showing of several private video recordings the Defendant and the alleged victim had made, in the privacy of their own home, showing them having intimate sexual relations. The court ruled on the admission of these extremely graphic videos, and subjected the jury to viewing them, without first reviewing the proposed evidence and without conducting a 403 balancing test. The court did the exact same thing as to the issue of previous video tapes the defense wished to present at trial. The State offered the trial court the opportunity to review the evidence before ruling on its admission. The court declined, instead relying on the State's oral description of the evidence.

Most relevant case authorities:

United States v. Cunningham, 694 F3d 373 (3rd Cir. 2012)

United States v. Curtin, 489 F3d 935 (9th Cir. 2007)

United States v. Loughry, 660 F3d 965 (7th Cir. 2011)

Most relevant statutes:

SDCL 19-19-403

IV. WHETHER DEFENDANT'S TRIAL COUNSEL WAS SO DEFICIENT THAT HE WAS NOT GIVEN A FAIR TRIAL.

Trial counsel's conduct, before and during the trial, fell so far below the standard of competent representation

that it deprived the defendant of a fair trial and confused the jury. Despite the court's pre-trial ruling that the Defense could not introduce any evidence of previous acts of sex between Malcolm and the alleged victim, counsel advised the jury during both voir dire and his opening statement that they would hear evidence of "pass out sex" and "advanced consent". Counsel also stated in voir dire that the jury may hear evidence that acts of sexual penetration took place when the victim wasn't capable of consenting. Counsel advised the jury that they would hear from a number of defense witnesses. However, only Malcolm and JC's mother were called, as the court ruled that evidence relating to advanced consent or pass out sex would not be admissible for a number of reasons, including counsel's failure to file the appropriate pretrial motion to raise the issue before trial.

Most troubling was trial counsel failed to file any pretrial motions in this case, other than one motion seeking permission to have the Defendant wear street clothes at trial, which was filed a day before trial. Counsel did not file a Discovery Motion, a Motion to Prohibit Bad Acts and Prior Convictions, a Motion to Introduce Evidence of Prior Sexual Acts between the

Defendant and the alleged victim, or a Motion For Expert Witness to contradict the State's expert.

Counsel failed to prepare for trial in that he wholly failed to investigate the case, and at the critical motion hearing involving 19-19-412, counsel failed to appear, instead sending an associate to argue the motion, despite him not being familiar with the requirements of 19-19-412.

Trial counsel did not meet with Malcolm to discuss the trial strategy on more than a couple of occasions, and though he called witnesses at trial, he had not met or interviewed any of the witnesses until they showed up at trial to testify. Further, trial counsel did not object when law enforcement witnesses said they knew the Defendant from prior dealings with him.

Most relevant case authorities:

Cases:

State v. Dillon, 2001 SD 97

State v. Tchida, 347 NW2d 338 (SD 1984)

Strickland v. Washington, 466 US 668 (1984)

United States v. Cronic, 466 US 648 (1984)

Most Relevant constitutional provisions:

S.D Const. Art. VI, § 7.

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

On August 31, 2020, Malcolm was charged by Superseding Indictment with nine alternate counts of 3rd Degree Rape in violation of SDCL 22-22-1(3) and SDCL 22-22-1(4). Malcolm was tried by jury on March 16, 2021 and acquitted of the nine counts of 3rd Degree Rape in violation of SDCL 22-22-1(3), but convicted of nine counts of 3rd Degree Rape in violation of SDCL 22-22-1(4).

Throughout the proceedings Malcolm was represented by court appointed counsel. The State's theory of the case was that the alleged victim was unable to consent due to physical or mental incapacity, or that she was too intoxicated to consent. The Defense theory of the case was that the couple had engaged in sexual activities on multiple occasions in the past where the alleged victim consented in advance to sex in the event she was passed out or fell asleep. Malcolm claimed that's exactly what she did here. The court rejected that defense before and during trial on numerous grounds including the lack of proper notice by the defense. In fact, Malcolm was not able to tell the jury his side of the story, or anything related to what was on the video tape, as the court ruled it wasn't a defense to the charges. The defense made an offer of proof during trial pertaining to the advanced consent defense by

calling a variety of witness, but inexplicably failed to call Malcolm.

Though a number of State witnesses were called to testify at trial, the State's case relied on video evidence that law enforcement seized from Malcolm's place of residence. The court admitted this video evidence, and prohibited video evidence showing the couple having previous sexual relations, without viewing any of the video evidence. The evidence showed the Defendant and the alleged victim having sexual relations throughout the morning, and the State claimed the victim was unable to consent due to incapacity, or being too intoxicated to consent.

Malcolm faced 225 years in prison and though counsel was appointed, he essentially was left on an island, representing himself. Despite a myriad of complex legal issues, trial counsel inexplicably failed to investigate, interview witnesses, or file any pretrial motions, other than one to allow the defendant to wear street clothes. Trial counsel allowed law enforcement witnesses to testify they knew the defendant from previous dealings with him. The transcripts reveal a desperate Malcolm attempting to argue his case to the trial court, both at a pretrial hearing and at trial.

STATEMENT OF THE FACTS

Malcolm and JC had known each other for 33 years. (JT 199). They were in previous relationships over the years, including dating in 1999 and 2000 (JT 200). The couple began dating again in 2015, and again started living together. (JT 202). The couple took a break in 2017-2018, but quickly got back together and ended up living with Malcolm's mother in June/July of 2019. (JT 203). Through an offer of proof, the defense presented testimony outlining the couple's sexual relationship by calling Stacy Thennis, Deb Tobin, Amanda First in Trouble and Sarah Waldner.

Stacy Thennis, the mother of Malcolm's 15 year old son, testified that she and Malcolm remained close friends and that she knew JC for over 25 years. (JT 167). Thennis testified that on the night of October 27, 2019 she spoke by phone with JC and JC said she and Malcolm were going to go out and get drunk and then they were going to have 'pass out' sex. (JT 168). The court denied this testimony on the grounds that, 'there's no such thing as pass out sex', hearsay, and cited the defense's failure to provide notice. (JT 172).

Malcolm's mother, Deb Tobin, testified that Malcolm and JC lived with her and on October 27, 2019 or the early morning hours of October 28, 2019, she overheard them talking and JC said she wanted to have sex "like we always

do, crazy sex with me, or whatever." (JT 176). The court denied this testimony indicating it would create confusion for the jury because prospective consent is not a defense. (JT 185).

Malcolm's sister, Amanda First In Trouble, testified that she met JC through Malcolm and that she and JC were good friends. (JT 186). She testified that at a grill out in 2019 she and JC were discussing having participated in sex when they were sleeping and JC said she and Malcolm don't ever deprive each other. (JT 189). The court denied this testimony on the grounds that it wasn't relevant and that there was no basis to toll the 14 day requirement of advance notice. (JT 190).

Sarah Waldner testified that she has known Malcolm for quite some time and met JC through Malcolm. (JT 191). Waldner testified that she and JC discussed a variety of sexual topics, including threesomes, bondage, toys, and games. (JT 192). She admitted to borrowing them games, but had no direct knowledge of the allegations. The court denied this testimony on the ground that it was specifically excluded by the rape shield statute and no notice was given, further that it was irrelevant and hearsay. (JT 193).

Malcolm was not called to testify during the offer of proof, and every attempt to discuss any aspect of his romantic relationship with JC was cut off by the trial court. (JT 201). He was not able to defend himself in any way against the charges, as he wasn't able to tell the jury exactly what happened that morning, let alone, discuss their previous sexual relationship.

Most problematic in the case is trial counsel's complete failure to effectively represent Malcolm. No pretrial motions were filed, other than one to allow Malcolm to appear in street clothes. Trial counsel failed to properly investigate the case, to consult with any expert witnesses, to properly advise and prepare Malcolm for trial, and presented a defense which was basically no defense, given the court's ruling.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANTS DUE PROCESS RIGHTS AND ABUSED ITS DISCRETION WHEN IT PROHIBITED THE DEFENDANT FROM PRESENTING A DEFENSE TO THE CHARGES.

A. STANDARD OF REVIEW

The standard of review on the court's ruling prohibiting the Defendant from testifying to, and presenting evidence of his defense as it pertained to the

specific allegations, is whether the court abused its discretion.

State v. Roach, 2012 SD 91.

The trial court committed error when it prohibited the Defendant from presenting a defense to the allegations based on the trial court's pre-trial and trial rulings. Though the previous sexual relationship of the parties was at the heart of the case, the State, not the defense, filed the motion under SDCL 19-19-412. Because the defense was not prepared to argue the motion, the trial court granted the State's motion, but invited defense counsel to schedule another hearing in advance of the trial, which it failed to do. At trial, during an offer of proof in an attempt to show the jury evidence of the parties' previous sexual relationship, the court erred in ruling that it had no authority to admit the evidence because proper notice was not given. (JT 172, 190, 193.) When Malcolm attempted to describe the parties' previous romantic relationship, the trial court sustained an objection under "412" and told Malcolm and the jury that, "I think that this testimony appears to be heading in violation of the Court's order in limine, I'll sustain the objection." (JT 201).

In State v. Golliher-Weyer, 2016 SD 10, this Court held that the trial court erred when it interpreted SDCL 19-

19-412 to mean that, absent notice 14 days before trial, the defendant could not have a hearing. In Golliher-Weyer, the State attempted to argue on appeal that the trial court was aware that a hearing could be held during the trial, however, this Court correctly determined there was nothing in the record to support that position. Similarly, there is nothing in the record here to support the proposition that the trial court was aware that a hearing could be held during trial to admit evidence pursuant to SDCL 19-19-412. This error was clearly prejudicial error in that the admission of the excluded evidence would have produced an effect upon the final result. State v. Reay, 2009 SD 10.

The trial court compounded the error by refusing to allow Malcolm to specifically tell the jury what happened on the morning of the allegations. He was wholly prohibited from explaining to the jury what happened on the morning of the allegations. The trial court ruled this way, despite the State conceding at the Motion Hearing, that it couldn't stop Malcolm from telling his side of what occurred that morning, "While the State cannot limit evidence of consent on the date in question, we can ask that prior acts of sexual intercourse between the parties be limited or excluded because of its lack of probative value."(MH, P. 5) Instead, the Defendant was never given one opportunity to tell the jury his side of

the story as it pertained to the allegations that the victim was unable to consent. The trial court incorrectly determined that the rape shield statute prevented the defendant from discussing any aspects of the specific sexual activity for which he was charged.

In a case strikingly similar, the Supreme Court of Washington reversed the Defendant's conviction for rape on the grounds that the trial court violated the defendant's 6th Amendment rights by refusing to allow him to testify about the sexual activity on the night in question, citing the rape shield statutes. In State v Jones, 168 Wn2d 713 (WA 2010), the Defendant was charged with forcibly raping his niece. At trial he attempted to tell his side of the story, but the trial court ruled that he had no such right as his version of the events would violate the victim's credibility and was barred by the rape shield statutes. The Supreme Court disagreed saying, 'this is not marginally relevant evidence that a court should balance against the State's probative value; it is Jones's entire defense.'

Prior to, and during trial, much discussion was had regarding State v Jones (2011 SD 60), State v Jackson (2020 SD 53) and most notably, People v Dancy, 104 Cal. App 4th 21 (2002) However, in each of those cases the defendant was able to tell the jury his side of the story, unlike the Defendant

here.

In Jones, the defendant was charged with 3rd degree rape (SDCL 22-22-1-(4), alleging that the victim was too intoxicated to consent. Jones told the jury, "I don't know if she was too intoxicated" and explained his version of the events that took place. In Jackson, the defendant was charged with 3rd degree rape (SDCL 22-22-1(3) and testimony was presented to the jury that Jackson knew the victim, 'was in a nursing home and doesn't understand.'

Further in Jones v. Cate, 2011 U.S Dist. Lexis 39433; 2011 WL 1327139, the Petitioner, Michael Jones, unsuccessfully sought Habeas Corpus relief for convictions of rape involving allegations he had sexual intercourse with three different women while they were passed out. Jones was allowed to testify at the trial that he believed that at least one of the women consented to the sexual encounter before she fell asleep. The Court noted that, "no evidence at trial suggested that any of the victims ever consented in advance to having sex with the defendant while they were asleep or unconscious. Instead, Elisa was shocked and upset when she awoke and found defendant having sex with her. Sharon was outraged when she awoke and found defendant lying naked on top of her." Nonetheless, the trial court allowed Jones to testify about his side of the story and that side

was effectively rebutted by the victims.

In a hearing held outside the jury's presence, the trial court specifically made reference to People v Dancy, 124 Cal. Rptr. 2d 898 (Cal. Ct App 2002) to justify why the court was not allowing any testimony from the defense on issues relating to advance consent. (JT pages 193-194). However, the trial court failed to consider that in Dancy, both the alleged victim and the defendant were allowed to testify in front of the jury as to their recollection of the events that occurred. The alleged victim was allowed to testify the sexual acts were consistent with their habitual practices. Dancy was convicted, but he had a fair trial.

In this case the Defendant was never given an opportunity to explain to the jury his defense and why he reasonably thought that JC consented. The Defendant was prohibited by the Court from discussing the parties' previous sexual activity and what transpired that morning. He attempted to do so by an Offer of Proof in which five witnesses would have testified to support his defense, but each was prohibited from testifying by the court. More importantly, the Defendant himself attempted to testify to the events as they transpired on the date in question, not what had previously occurred, but was not allowed to do so. On direct examination he was asked by his counsel, 'what do

you next recall?' The Defendant attempted to answer, but was not allowed. 'Getting woke up to her being upset with me, waking me up, and I said, 'what?' and she said, you know, she said that she wanted me to give her attention. I said, 'what? what do you want me to do?' And she said, 'I want you to make love to me.' The State objected without citing any grounds for the objection, yet the trial court sustained the objection, stating, 'this testimony is in violation of the Court's Order and the objection is sustained and that answer will be stricken.' (JT page 221).

The bottom line is Malcolm had no ability to present any facts regarding the parties' sexual relationship whatsoever. Nor was he allowed to tell the jury exactly what was happening shortly before the parties engaged in sexual activities. This court has determined that when a defendant's theory is supported by law and has some foundation and evidence, however tenuous, the defendant has a right to present it. State v. Klaudt, 2009 S.D. 71, citing State v. Packed, 2007 S.D. 75. Malcolm was robbed of the opportunity to present any defense and any facts despite engaging in consensual sexual relations in the privacy of his own home.

In Lawrence v. Texas, 539 U.S. 558 (2003),

the Supreme Court of the United States addressed the issue of whether consenting adults could engage in sexual activities of their choosing within the confines of their residence. In Lawrence, two men were found to be having sexual relations when law enforcement entered their residence on a reported weapons complaint by a neighbor. Upon entering the residence, law enforcement found two men engaging in anal sex. The court found the Texas statute prohibiting this activity to be unconstitutional. In doing so, the Supreme Court made very clear that the homosexuals had a fundamental right in engaging in private sexual activity and that the state did not have the right to impose its own moral perspective on individuals.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO PROPERLY INSTRUCT THE JURY.

A. STANDARD OF REVIEW

The standard of review as to whether the court erred in instructing the jury is whether the court abused its discretion in properly instructing. State v Waloke, 2013 S.D. 55; State v. Doap Deng Chuol, 2014 S.D. 33.

The trial court improperly instructed the jury as to the elements of Third Degree Rape in 22-22-1(4). The trial court failed to properly instruct the jury on the issue of

JC's ability to consent being hampered by her intoxication. The instruction failed to instruct the jury that all of the factors and circumstances should be analyzed to determine if JC was unable to give consent. Further no definitions of intoxication, anesthetic agent, or hypnosis were given to the jury.

The trial court listed two elements of Third Degree Rape in violation of SDCL 22-22-1(4):

1. The defendant accomplished an act of sexual penetration with J.C.; and
2. The defendant knew, or reasonably should have known, that J.C. was incapable, because of any intoxicating, narcotic or anesthetic agent or hypnosis, of giving consent to such act of sexual penetration. (JI 10).

Appellate counsel acknowledges that Malcolm's trial attorney failed to request instructions pertaining to the jury considering all the circumstances to determine consent, and instructions defining intoxication, anesthetic agent, or hypnosis. However, the trial court has an obligation to properly instruct the jury, regardless of whether defense counsel proposed the instructions. State v. Leinweber, 228 N.W.2d 120 Minn. (1975). The instructions, must accurately state the law. State v. Waloke, 2013 SD 55.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN RULING ON THE ADMISSIBILITY OF VIDEO EVIDENCE WITHOUT CONDUCTING A 403 BALANCING TEST AND WITHOUT FIRST VIEWING THE VIDEO EVIDENCE.

A. STANDARD OF REVIEW

The Standard of Review on the court admitting video evidence without conducting a 403 balancing test and without viewing the evidence, is whether the court abused its discretion. United States v. Cunningham, 694 F.3d 373 (3rd Cir. 2012).

In United States v. Cunningham, 694 F.3d 373 (3rd Cir. 2012), the Court held that the trial court committed reversible error by failing to engage in the Rule 403 balancing test prior to allowing videos to be shown to the jury. The Court stated, "The court overruled the Rule 403 objection, relying only on the Government's description of the videos and without watching the videos itself before it ruled. We hold that it had abused its discretion, agreeing with several other circuits that a trial court must see the challenged exhibits for itself and because the trial court did not watch the videos, we did not afford it the usual 403 deference." Citing United States v. Curtin 489 F3d 935 (9th Cir. 2007) and United States v Loughry 660 F3d 965 (7th Cir. 2011)

The scenario described in Cunningham is exactly

what occurred in this case at the pre-trial hearing, where the State invited the trial court to review the video evidence and the court declined, instead relying on counsel's brief oral description of the evidence, ultimately determining that the video evidence was inadmissible. The court did so without conducting any 403 balancing test whatsoever, instead simply voicing its displeasure with the defense for being unprepared for the hearing.

Further, the videos shown at trial were videos of sexual activity between Malcolm and JC on the date in question. Again, the court abused its discretion when it allowed the video evidence to be played to the jury without conducting any sort of balancing test whatsoever.

IV. THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

A. STANDARD OF REVIEW

To address the Defendant's claim of ineffective assistance of counsel on direct appeal, this Court must find exceptional circumstances.

This Court has long held that absent exceptional circumstances it will not address ineffective assistance of counsel claims on direct appeal, and it will not depart from that rule unless trial counsel was, 'so ineffective' and counsel's representation was 'so casual' that it

represents a manifest usurpation of Malcolm's constitutional rights. State v. Dillon, 2001 SD 97. Further, to prevail on his claim, Malcom must show that his trial counsel was ineffective and that he was prejudiced as a result. State v. Thomas, 2011 SD 15.

Although Malcolm believes that his trial counsel was ineffective and he was prejudiced thereby, he encourages this court to review counsel's performance in accordance with US v. Cronic, 466 US 648 (1984). In Cronic, the United States Supreme Court acknowledged that there are cases where the defendant's counsel was so ineffective that the defendant does not need to show prejudice under the second prong on Strickland. Cronic specifically stated that, 'there are, however, circumstances that are so likely to produce prejudice to the accused that the cost of litigating their effect in a particular case is unjustified." Id at 648.

The following establish why Malcolm was prejudiced, and also why Cronic applies. Despite Malcolm facing 225 years in prison, trial counsel inexplicably only filed one single motion, a motion to allow the defendant to wear street clothes during the trial. There is simply no strategy or justification for failing to file vital, necessary, pretrial motions. In addition to a standard

discovery motion, the following motions simply had to be made to defend the case.

Motion regarding SDCL 19-19-412. This statute affords either party the opportunity to present evidence pertaining to the previous sexual behavior between the accused and the victim. To do so, 19-19-412 requires that the party seeking admission must file a motion at least 14 days before trial, unless for good cause, the court sets a different time. Obviously in nearly every case, it is the Defendant who seeks its admission. Unfortunately, in this case, defense counsel did not file the motion, so the State filed a Motion in Limine Regarding Prior Sexual Acts on March 3, 2021. A hearing was held on March 10, 2021 and trial counsel did not appear, but instead sent his associate who was not able to address the issue as to what evidence would be presented in terms of prior sexual activity between the victim and the accused. (MH P. 9, 10). When asked by the court what evidence or witnesses he would be presenting in support of 19-19-412, counsel indicated he hadn't talked with trial counsel about that, admitted he didn't know, but thought trial counsel would know. (MH P. 9-10). The trial court voiced its displeasure with the defense's inability to advise the court as to what evidence they were seeking to admit and what witnesses would

substantiate their position, and found no good cause to toll the 14 day requirement. The trial court invited counsel to come back before trial to address the motion, but the record shows that was never done. (MH P. 16).

More troubling was the fact that Malcolm had never met the associate that was advocating for him and Malcolm ended up having a lengthy discussion with the Court about 19-19-412, having done his own independent research on the issue. (MH P. 13).

This case involved a sexual relationship between Malcolm and JC, spanning years. A motion regarding their previous sexual activity was an obvious motion to file and likely would have been successful as the evidence in question concerned similar video recording that the trial court allowed the State to play during trial. It is completely unacceptable that a desperate Malcolm addressed the trial court, citing cases and statutes, as he witnessed his counsel fail to protect his interests at this hearing. (MH P. 13-15)

Motion to Suppress Evidence-The State's case was largely dependent on the video evidence that was played for the jury, without any objection from counsel and without first challenging the manner in which it was obtained, and its relevance. When law enforcement responded

to the 911 call, they met with Malcolm who was seriously distraught as he was unable to revive JC. Malcolm made statements and those statements served as the basis for the search warrant that was granted to search the residence and it was during the search that the video evidence was seized.

Motion regarding Prior Bad Acts and Prior Crimes

Trial counsel did not file a Motion to Prohibit the State and its witnesses from introducing any evidence or testimony regarding Malcolm's criminal history. Instead two different law enforcement witnesses happily told the jury that they knew Malcolm. Officer Brandon Johnson testified that he had been a police officer for the City of Watertown for 14 years. (JT p.18). Johnson testified that upon receiving the 911 call he arrived at the residence and 'I discovered a female later identified at Jamaica Christensen laying on the floor on her back next to her bed with a male I knew to be Lee Malcolm kneeling next to her." (JT pg 19).

Detective Chad Stahl testified for the State and told the jury he has been a detective sergeant since 2014, but was nearing 18 years in law enforcement, and that he had 12 to 13 years' experience in investigations. (JT p. 61). When asked by the prosecution if Stahl spoke with Mr.

Malcolm when Stahl interviewed him, Stahl immediately said, 'I've known Mr. Malcolm for years, so we have a relationship where we can talk back and forth with each other so I probably had a little better rapport than some of the other—or Detective Hardie.' (JT 64).

Instead of ignoring Stahl's statement and not calling further attention to it, the prosecution instead piled on and asked, "You indicated you've known Mr. Malcolm for a number of years, would you be able to identify him?" (JT 64).

The statements by Johnson and Stahl, and the questions by the prosecution, were all allowed to be heard by the jury without objection from defense counsel, and without filing any type of pretrial motion to ensure they wouldn't be brought up. Had they been filed and objected to, the trial court would have had no choice but to grant Malcolm a mistrial.

Motion for Expert Witness—

Malcolm was convicted of SDCL 22-22-1(4) alleging that the victim was incapable of giving consent because of an intoxicating narcotic. The State called two expert witnesses to bolster their claim that the victim was unable to consent. Dr. Al Lawrence, a surgeon of 25 years, was called by the State to testify about his familiarity with

the Glascow Coma Scale and where JC stood in terms of her ability to react and consent to what was happening to her. The State also called Dr. Kenneth Snell, a forensic pathologist to testify that the cause of the victim's death was combined Hydroxyzine and Baclofen toxicity. Snell testified the manner of death was an accident. Snell advised the jury he was board certified in several areas including forensic pathology. Most telling that Malcolm needed his own experts in toxicology was when counsel asked Dr. Snell questions about the effects the drugs would have on JC and how long before she would expire with those levels in her system, Dr. Snell simply replied, 'That would be for a toxicologist.' (JT p. 112)

To what degree, if any, JC was intoxicated was at the heart of the defense in defending the charges alleged in 22-22-1(4). What was in her system and how it affected her ability to consent and understand what was happening was at the crux of the trial for the defense, and not one expert witness was requested, consulted, or called by the defense.

Trial counsel's opening statement and closing argument were confusing to the jury given the court's pretrial rulings. Counsel told the jury in his opening statement that, "At some point earlier in the evening

Jamaica had said we—I may end up passing out. If I do, let's have pass-out sex." (JT p12). In ending his opening statement, counsel said, "Ladies and gentlemen, from Lee's standpoint the activity that took place was consensual, had been talked about and planned earlier and in fact, Jamaica told him to video, that's why it was videoed." (JT p. 14).

Additionally during voir dire, defense counsel named six individuals that may be called by the defense, but as a result of the trial court's ruling during the trial, only one was able to be called by the defense.

Based on the trial court's ruling that defense counsel would not be able to have witnesses support the defense claim that the parties frequently engaged in advanced consent sex, defense counsel attempted to convince the jury in closing that the police botched the investigation.

None of the foregoing were the result of trial strategy. State v. Tchida, 347, NW2d 338 (SD 1984). There was no strategy involved justifying this defense and it robbed Malcolm of a fair trial. There was no strategy in failing to file pretrial motions, failing to investigate the case, failing to interview witnesses, and failing to object to inflammatory testimony.

These failures were clearly prejudicial to

Malcolm's case. At the conclusion of the Motion Hearing, The trial court touched on just one area of a lack of a due diligence, but it was essentially a summary of Malcom's representation:

> "I expect the attorneys to understand their duties under the rape shield law to give notice of the specific things that they want to get in. As you sit here today, 5 days before trial, you're not able to tell me who your witnesses are and what they are going to say. I can't conduct a meaningful hearing and I am not going to give you free reign to walk in Monday morning on jury selection and say , 'oh by the way, we found witnesses, A,B, and C that we want to now get in. You need to exercise your due diligence to track down these witnesses." (MH P. 12)

CONCLUSION

Malcolm understands fully and completely that he isn't entitled to a perfect trial. He is, however, entitled to a fair trial. The trial court would not let him present a defense, video evidence was admitted erroneously, and his representation was inadequate. Representation that according to Cronic is the type with circumstances that are so likely to produce prejudice to the accused that the cost of litigating their effect in a particular case is unjustified.

WHEREFORE, Malcolm requests that this Court reverse his convictions for 3rd Degree Rape, and remand to the trial court with instructions to strike the convictions and enter Judgments of Acquittal on all counts. In the

alternative, Malcolm requests that the Judgments of Conviction be reversed and the case remanded for a new trial.

Respectfully submitted March 3, 2022.

BRATLAND LAW

BY: _____

Scott R. Bratland
Attorney for Appellant
15 1st AVE SE P. O. Box 3
Watertown, SD 57201
Telephone: (605) 753-5957

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, hereby certifies that the Appellant's Brief was duly served upon Appellee by emailing true copies thereof to the following this March 3, 2022:

SCClerkBriefs@ujs.state.sd.us

Jason.Ravnsborg@state.sd.us

atgservice@state.sd.us

RReeves@Codington.org

The undersigned further certifies that he mailed the original and two copies of Appellant's Brief to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, South Dakota 57501-50701
by United States mail, postage prepaid, March 3, 2022.

BRATLAND LAW

BY: _____

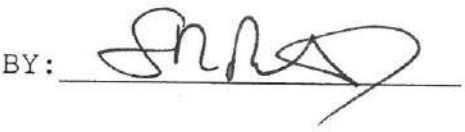
Scott R. Bratland
Attorney for Appellant
15 1st AVE SE P. O. Box 3
Watertown, SD 57201
Telephone: (605) 753-5957

CERTIFICATE OF COMPLIANCE

Scott R. Bratland of Bratland Law, attorney for Appellant, hereby certifies that the Appellant's Brief dated March 3, 2022, complies with SDCL 15-26A-66(b) in that it contains 5,930 words and 35,524 characters.

Dated at Watertown, South Dakota, March 3, 2022.

BRATLAND LAW

BY: 

Scott R. Bratland
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15 1st AVE SE P. O. Box 3
Watertown, SD 57201
Telephone: (605) 753-5957

APPENDIX

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, to the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT I, committed on or about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Twenty (20) years, there to be kept, fed and clothed according to the rules and disciplines governing said institution.
Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

Shall reimburse Codington County Auditor for the court appointed attorney fees.
Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Carol D Lemmon

Clerk of Courts/Deputy

BY THE COURT:

Carmen Means

CIRCUIT COURT JUDGE

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL ON March 18, 2021, or the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT II, committed on or about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, consecutive to Count I, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

Shall reimburse Codington County Auditor for the court appointed attorney fees.

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Carol Delmore

Clerk of Courts/Deputy

BY THE COURT:

Carmen Means

CIRCUIT COURT JUDGE

FILED

APR 28 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction
and
Order Suspending Execution of Sentence

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, of the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT III, committed on about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, concurrent with Counts IV-IX, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

SUSPENDED EXECUTION OF SENTENCE

IT IS FURTHER ORDERED that all of the Defendant's prison sentence is suspended on the following conditions:

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.
Shall reimburse Codington County Auditor for the court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Clerk of Courts/Deputy

BY THE COURT:

CIRCUIT COURT JUDGE

FILED
APR 28 2021
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA)
ss.
COUNTY OF CODINGTON)
* *
STATE OF SOUTH DAKOTA,
Plaintiff

vs.

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

14CRI20-000060

Judgment of Conviction
and
Order Suspending Execution of Sentence

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, of the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT IV, committed on about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, concurrent with Counts III, and Counts V- IX, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

SUSPENDED EXECUTION OF SENTENCE

IT IS FURTHER ORDERED that all of the Defendant's prison sentence is suspended on the following conditions:

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.
Shall reimburse Codington County Auditor for the court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Carol D Lemme

Clerk of Courts/Deputy

BY THE COURT:

Carmen Means

CIRCUIT COURT JUDGE

FILED
APR 28 2021
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction
and
Order Suspending Execution of Sentence

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, of the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT V, committed on about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, concurrent with Counts III and IV, and Counts VI- IX, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

SUSPENDED EXECUTION OF SENTENCE

IT IS FURTHER ORDERED that all of the Defendant's prison sentence is suspended on the following conditions:

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.
Shall reimburse Codington County Auditor for the court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Carol D Lammers

Clerk of Courts/Deputy

BY THE COURT:

Carmen Means

CIRCUIT COURT JUDGE

FILED

APR 28 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction
and
Order Suspending Execution of Sentence

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, of the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT VI, committed on about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, concurrent with Counts III- V, and Counts VII- IX, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

SUSPENDED EXECUTION OF SENTENCE

IT IS FURTHER ORDERED that all of the Defendant's prison sentence is suspended on the following conditions:

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.
Shall reimburse Codington County Auditor for the court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Cindy Feldmeyer

Clerk of Courts/Deputy

BY THE COURT:

Carmen Means

CIRCUIT COURT JUDGE

FILED

APR 28 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction
and
Order Suspending Execution of Sentence

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, of the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT VII, committed on about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, concurrent with Counts III-VI, and Counts 8-9, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

SUSPENDED EXECUTION OF SENTENCE

IT IS FURTHER ORDERED that all of the Defendant's prison sentence is suspended on the following conditions:

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.
Shall reimburse Codington County Auditor for the court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Craig Feldmeyer
Clerk of Courts/Deputy

BY THE COURT:

Carmen Means
CIRCUIT COURT JUDGE

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

FILED
APR 28 2021
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction
and
Order Suspending Execution of Sentence

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, of the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT VIII, committed on about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, concurrent with Counts III-VII, and Count 9, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

SUSPENDED EXECUTION OF SENTENCE

IT IS FURTHER ORDERED that all of the Defendant's prison sentence is suspended on the following conditions:

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.
Shall reimburse Codington County Auditor for the court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Clerk of Courts/Deputy

BY THE COURT:

Carmen Means

CIRCUIT COURT JUDGE

FILED

APR 28 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

ss.

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

* *

STATE OF SOUTH DAKOTA, # 14CRI20-000060
Plaintiff

vs.

Judgment of Conviction
and
Order Suspending Execution of Sentence

LEE TODD MALCOLM
Date of Birth: 01/22/1977
Defendant.

* *

A Superseding Indictment was filed in this Court on August 31, 2020. The Defendant was arraigned on September 16, 2020. Appearing at the Arraignment before the Honorable Carmen Means, Third Circuit Judge, were the Defendant, Defendant's Attorney Terry J Sutton and Alison Bakken of the Codington County State's Attorney's Office. The Court advised the Defendant of constitutional and statutory rights pertaining to the charges filed herein.

The Defendant was FOUND GUILTY AT JURY TRIAL on March 18, 2021, of the offense Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(4) & 22-6-1(5)) COUNT IX, committed on about October 28, 2019.

It was the determination of this Court that the Defendant has regularly held to answer for said offense; that the plea was voluntary, knowing and intelligent; that the defendant was represented by competent counsel and that a factual basis exists for the plea.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Rape - Third Degree - Class 2 Felony (SDCL 22-22-1(3) & 22-6-1(5)).

SENTENCE

On the April 28, 2021, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence.

IT IS HEREBY ORDERED that the Defendant:
Be imprisoned in the South Dakota State Penitentiary, for the State of South Dakota, situated in the City of Sioux Falls, South Dakota, for the term of Fifteen (15) years, concurrent with Counts III-VIII, also imposed on this date, there to be kept, fed and clothed according to the rules and disciplines governing said institution.

Shall be and is assessed and shall pay the statutory liquidated costs and surcharge in the amount ordered by the Court.

SUSPENDED EXECUTION OF SENTENCE

IT IS FURTHER ORDERED that all of the Defendant's prison sentence is suspended on the following conditions:

Shall reimburse Codington County for the costs of any psycho-sexual evaluation billing that is submitted to the County.
Shall reimburse Codington County Auditor for the court appointed attorney fees.

IT IS FURTHER ORDERED that the Defendant is given credit of 449 (four hundred forty-nine (449) Days served in the Codington County Detention Center.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all of the terms of this Order at any time.

Dated this 28th day of April, 2021.

ATTEST

Cindy Fleamyer
Clerk of Courts/Deputy

BY THE COURT:

Carmen Means
CIRCUIT COURT JUDGE

FILED

APR 28 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT, CLERK OF COURT

By

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29644

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LEE TODD MALCOLM,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CARMEN MEANS
Circuit Court Judge

APPELLEE'S BRIEF

JASON R. RAVNSBORG
ATTORNEY GENERAL

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

ATTORNEY FOR PLAINTIFF
AND APPELLEE

Scott R. Bratland
15 1st Avenue SE
Watertown, SD 57201
Telephone: (605) 753-5957
E-mail: scott@bratlandlaw.com

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed May 21, 2021

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TABLE OF AUTHORITIES

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29644

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LEE TODD MALCOLM,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee is referred to as "State." Defendant/Appellant is referred to as "Defendant." The settled record in the underlying case is denoted as "SR." Defendant's Brief is denoted as "DB." The Jury Trial transcripts are cited as "JT." All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On April 28, 2021, the Honorable Carmen Means, Circuit Court Judge, Third Judicial Circuit, entered Judgments of Convictions in *State of South Dakota v. Lee Todd Malcolm*, Codington County Criminal File No. 20-60. SR:154-71. Defendant filed his Notice of Appeal on May 21, 2021. SR:214-15. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE PERTAINING TO AN UNLAWFUL DEFENSE.

The trial court excluded the evidence after determining that Defendant's proposed defense was not based in law.

People v. Dancy, 127 Cal.Rptr.2d 898 (Cal. App. 4th 2002)

State v. Bennis, 457 N.W.2d 843 (S.D. 1990)

State v. Lykken, 484 N.W.2d 869 (S.D. 1992)

United States v. Prather, 69 M.J. 338 (2011)

SDCL 19-19-401

SDCL 19-19-403

SDCL 19-19-412

SDCL 22-3-1

II

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

The trial court did not rule on this issue as it was not raised before or during trial.

State v. Bosworth, 2017 S.D. 43, 899 N.W.2d 691

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

State v. Roedder, 2019 S.D. 9, 923 N.W.2d 537

III

WHETHER THE TRIAL COURT PROPERLY EXCLUDED VIDEO EVIDENCE WITHOUT FIRST VIEWING ALL OF THE VIDEOS.

Defendant did not raise this issue before or during trial. Defendant raised this issue for the first time after trial in a Motion for a New Trial. The trial court denied Defendant's Motion for a New Trial and Defendant does not appeal the trial court's ruling regarding that motion.

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

State v. Taylor, 2020 S.D. 48, 948 N.W.2d 342

IV

WHETHER DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS RIPE FOR APPELLATE REVIEW.

The trial court did not rule on this issue.

Denoyer v. Weber, 2005 S.D. 43, 694 N.W.2d 848

State v. Phillips, 2018 S.D. 2, 906 N.W.2d 411

State v. Vortherms, 2020 S.D. 67, 952 N.W.2d 113

STATEMENT OF THE CASE

On August 31, 2020, a Codington County Grand Jury returned a nine-count Superseding Indictment against Defendant. SR:30-34. Counts 1 through 9 charged Defendant with third-degree rape in violation of SDCL 22-22-1(3). SR:30-34. Each count charged, in the alternative, third-degree rape in violation of SDCL 22-22-1(4). SR:30-34.

On March 3, 2021, the State filed a Motion in Limine requesting the trial court exclude evidence of prior sexual acts between Defendant

and the deceased victim, J.C. SR:52-56. The trial court granted the motion, finding that the related videos and prospective witness testimony was not relevant to the issues at trial. SR:695, 698-99. The trial court also reasoned that Defendant did not comply with the fourteen-day notice requirement of SDCL 19-19-412 ("Rule 412"). SR:695-96. This ruling is discussed in greater detail under Issue I.

A three-day jury trial began on March 16, 2021. Through an offer of proof, Defendant presented the testimony of four witnesses describing various aspects Defendant and J.C.'s sexual relationship, including references to Defendant and J.C.'s practice of engaging in "pass out sex."[1] JT:166-93. The court excluded most of the testimony, finding that it would be confusing to the jury and constituted impermissible hearsay. The court also noted that notice was not provided for some of the testimony, as required under Rule 412. Defendant testified at trial. The court sustained two objections to Defendant's testimony, based on the court's orders. JT:201, 221.

The jury found Defendant guilty of the nine counts of rape charged under SDCL 22-22-1(4) and not guilty of the alternative counts charged under SDCL 22-22-1(3).[2] SR:147-51. The trial court sentenced

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[1] "Pass out sex" is the term Defendant used to describe his practice of having sexual intercourse with J.C. after she had become intoxicated and "passed out."

[2] References to "third-degree rape" in this brief refer to charges of rape under SDCL 22-22-1(4).

Defendant to twenty years in the state penitentiary for Count 1 and fifteen years for Count 2, with the sentences to run consecutive to each other. SR:154-57. The trial court sentenced Defendant to fifteen years for Counts 3 through 9, with the sentences to be suspended and to run consecutive to each other. SR:158-71.

After his conviction, the trial court appointed different counsel to represent Defendant on appeal. SR:221. Defendant's appellate counsel moved for a new trial based on 1) newly discovered impeachment evidence regarding one of the State's witnesses; and 2) alleged errors of law that, in Defendant's view, violated his due process rights. SR:721-31. The trial court denied the motion. SR:764-65. Defendant appeals only his judgment of conviction.

STATEMENT OF THE FACTS

Defendant and the victim, J.C., had been dating for several years before the October 2019 sexual assault. JT:201-03. They shared the upstairs bedroom in Defendant's mother's home. JT:203; *see generally* Exhibit 2. Around 4:30PM on October 27, 2019, Defendant and J.C. went to Walmart to fill J.C.'s prescriptions, including one for Baclofen, a muscle relaxer. JT:27, 44, 205-06. Defendant and J.C. also purchased a six-pack of beer and two shots of vodka to drink at home. JT:206. When the alcohol was gone, J.C. and Defendant went to two different bars in Watertown and continued drinking. JT:208-10. According to Defendant, he and J.C. both consumed around five sixteen-ounce cans of

beer, three to four "double" alcoholic drinks, and several shots of liquor before going home around 2:15AM. JT:209-13; Ex. 13 at 3:06; Ex. 15 at 4:30-6:50. Defendant stated that he and J.C. drank "excessively" and consumed much more than they usually do when they drink. Ex. 11 at 1:09-20.

After arriving at home, J.C. was upset with Defendant because he did not pay enough attention to her. Ex. 15 at 6:50-7:00. Defendant and J.C. had sex and then continued to argue. JT:214; Ex. 15 at 7:40. At one point, J.C. said she was going to take all of her medication and not wake up. Ex. 15 at 13:30-38; Ex. 16 at 6:35-55. J.C. had threatened to take sleeping pills to hurt herself in the past. Ex. 15 at 31:40-33:00.

As Defendant and J.C. were arguing, J.C. also threatened to leave. Ex. 15 at 14:50-15:00. Defendant told her she was too drunk to drive. *Id.* J.C. said she was not going to drive, returned inside, and went to bed. Ex. 15 at 17:06, 19:35-45. Defendant returned upstairs and went to bed as well. Ex. 15 at 19:50-52.

Defendant woke up to something hitting him in the eye. JT:217; Ex. 15 at 11:32-37. J.C. was laying face down on the floor on Defendant's side of the bed and had a "big gash" on her head. JT:218-19; Ex. 15 at 11:40-50. Defendant assumed that J.C. fell while trying to grab something from the end table and believed she fell because her medication was "kicking in." Ex. 9 at 3:10-20. Defendant described J.C.

as "out of it" and very drunk. JT:23; Ex. 6 at 2:16-21; Ex. 13 at 7:10-30. J.C. was still upset with Defendant and was yelling at him. JT:220-21; Ex. 13 at 4:25-5:00; Ex. 15 at 14:30-35. Defendant described her actions as a "panic attack" and tried to calm her down. JT:215; Ex. 14 at 14:20-30.

J.C. went downstairs to put a bandage on her head around 5:00AM. JT:219-20; Ex. 6 at 3:13-23. Defendant claimed that, when J.C. returned upstairs, she was still upset with him and said she wanted him to make love to her. JT:221 (sustaining the State's objection to Defendant's testimony). Defendant told J.C. he was going to take a shower and, according to Defendant, J.C. told him that he could have sex with her, even if she passed out, and asked him to record the intercourse. JT:12-14 (Defendant's opening statements explaining "pass out sex."), 221.[3]

A few hours later, from approximately 8:13AM to 10:20AM, Defendant used a black ZTE smart phone to record himself 1) inserting a can of window cleaner, a bottle of sunscreen, and his fist into J.C.'s vagina and anus; and 2) using his penis to vaginally, anally, and orally penetrate J.C. JT:79-81; *see generally* Exs. 18-27. J.C. was snoring in the videos and did not open her eyes in response to stimuli. JT:118. At

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[3] After opening statements, the trial court excluded references to "pass out sex" and J.C.'s alleged advance consent to the sexual intercourse on the morning of October 28th. JT:88-89, 160-62.

one point, Defendant held J.C.'s eye open. *See* Ex. 23. J.C.'s pupils were small and did not react to her eyelids being opened. *Id.* J.C. made incomprehensible sounds and showed little response to stimuli. JT:118. Defendant forcefully pushed his hand into J.C.'s vagina several times, causing her to urinate. *See* Ex. 25. J.C.'s breathing pattern changed, sounding like she was gasping for air, and then she continued to snore. *Id.* When he was finished penetrating J.C., Defendant went to sleep. JT:221.

Defendant woke around 2:00PM and noticed that J.C. was no longer snoring and was cold and unresponsive. JT:20; JT:221. Defendant called 911 and reported that J.C. was "really wasted" last night, took some of her medication, and was not waking up. JT:20; Ex. 1 at 0:55-1:03. Law enforcement and an ambulance were dispatched to Defendant's home.

When law enforcement arrived, J.C. was fully nude, wrapped in a blanket, and laying on her back on the floor.[4] JT:19-20. Defendant was kneeling next to J.C. JT:19-20. The emergency medical technicians ("EMTs") attempted to resuscitate J.C. while Defendant talked with law enforcement. The EMTs transported J.C. to the hospital where she later died. JT:195. Law enforcement found an empty Baclofen pill bottle on

[4] 911 dispatch instructed Defendant to move J.C. to the floor to administer CPR. JT:29; Ex. 1.

the floor next to the bed. JT:27. The prescription was written for J.C. and was filled with thirty pills on October 27, 2019. JT:27-28.

After the EMTs removed J.C. from the bedroom, Defendant walked in and grabbed several items off his dresser, including a phone and a black case. JT:42, 223; Ex. 8 at 0:00-50. Law enforcement stopped Defendant and asked what he grabbed. *Id.* Defendant showed the items and explained that the black case contained memory cards. *Id.*; Ex. 9 at 3:30-40. Later, law enforcement asked to see the black case and Defendant retrieved it from his shave case in the bathroom. JT:27, 46; Ex. 9 at 3:50-59; Ex. 10 at 0:49-59. Law enforcement also found a black ZTE smart phone in Defendant's shave case. JT:59, 78, 223-24.

An examination of the contents of the memory cards showed prior recorded sexual intercourse between J.C. and Defendant. SR:86, 688, 770. An examination of the phone revealed the videos of Defendant and J.C. on the morning of October 28th. JT:79.

On October 29, 2019, Dr. Kenneth Snell performed an autopsy on J.C. JT:101. Dr. Snell determined that the injury to J.C.'s left eye was not a fatal injury. JT:104. Dr. Snell also conducted a toxicology report that revealed J.C.'s blood contained a fatal level of Hydroxyzine and a toxic level of Baclofen. JT:105. Based upon these results, Dr. Snell determined the cause of death to be the combined Hydroxyzine and Baclofen toxicity. JT:107. On October 29, 2019, J.C.'s mother found an

undated, hand-written suicide note in J.C.'s drawer. JT:196; SR:104-10 (Ex. A).

ARGUMENTS

I

DEFENDANT'S THEORY OF THE CASE WAS NOT SUPPORTED BY LAW OR BY FACTS.

A. *Standard of Review and Background.*

This Court reviews evidentiary rulings for an abuse of discretion and presumes the rulings are correct. *State v. Bausch*, 2017 S.D. 1, ¶12, 889 N.W.2d 404, 408. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Birdshead*, 2015 S.D. 77, ¶51, 871 N.W.2d 62, 79. Under this standard, Defendant must demonstrate error and show that it was prejudicial. *Bausch* at ¶12, 889 N.W.2d at 408. "Error is prejudicial when, in all probability, it produced some effect upon the final result and affected rights of the party assigning it." *Id.*

Defendant's theory was based on his belief that J.C. gave her "advance consent" to "pass out sex." Before trial, the trial court granted the State's motion seeking to exclude witness testimony and videos regarding prior sexual intercourse between Defendant and J.C. The court found that the videos were not relevant to the issue of whether J.C. was incapacitated on October 28th, or whether Defendant reasonably

should have known that J.C. was incapable of consent. SR:695, 698-99. Additionally, the court noted that Defendant did not comply with the fourteen-day notice requirement in Rule 412 if he intended to offer the videos at trial. SR:695-96; *see* SDCL 19-19-412(c).

During the trial, the court questioned whether a person could give advance consent to sex that occurs after incapacitation. JT:88-89. On the second day of trial, the trial court revisited the legal validity of advance consent. JT:161. Based upon its research and review of the law, the court precluded Defendant from introducing any notion of "pass out sex." JT:161-62. The court explained:

> [T]he concept of an advanced consent to unconscious sexual intercourse is based on a fallacy, a decision to engage in sexual intercourse is necessarily an ad hoc decision made at a particular time with respect to a particular act. While a woman may expressly or impliedly consent to conscious sexual intercourse in advance, she remains free to withdraw that consent and ordinarily has the ability to do so since she is conscious. Even if a woman expressly or impliedly indicates in advance she is willing to engage in an unconscious sexual intercourse, a man who thereafter has sexual intercourse with her while she is unconscious necessarily deprives her of the opportunity to indicate her lack of consent.

JT:193-94 (quoting *People v. Dancy*, 127 Cal.Rptr.2d 898, 911 (Cal. App. 4th 2002)).

Through an offer of proof, Defendant presented the testimony of four witnesses describing various aspects of the sexual relationship between Defendant and J.C., including their habit of having "pass out sex." JT:166-93. The court excluded most of the testimony, finding that

it would be confusing to the jury, since pass out sex was not a valid defense; and constituted impermissible hearsay. The court also noted that notice was not provided for some of the testimony, as required under Rule 412. The court did not preclude portions of testimony from two of Defendant's witnesses related to the night before and morning of October 28th. JT:184-85, 190.

In Defendant's trial testimony, he first offered a detailed timeline of he and J.C.'s friendship and romantic relationship, which spanned over twenty years. JT:199-203. He then provided a detailed account of what he and J.C. did on October 27th, including "being romantic" in the morning, filling J.C.'s prescriptions in the afternoon, and then drinking throughout the late afternoon, night, and into the following morning. JT:204-12. Defendant testified about how J.C. was upset with him when they returned home, mentioned that he and J.C. had sex, and then recounted how J.C. fell in the middle of the night. JT:213-20. The State objected to Defendant's testimony twice. The first objection was based on Rule 412, the rape shield statute, and the court sustained the objection as a violation of the court's order in limine. JT:201. The second objection was based on the court's order precluding Defendant from introducing the concept of "pass out sex." JT:220-21. Defendant did not request to make an offer of proof for his excluded testimony.

B. *Defendant's Theory of "Advance Consent" is not Based in Law or in Fact.*

"An accused must be afforded a meaningful opportunity to present a complete defense." *State v. Reay*, 2009 S.D. 10, ¶34, 762 N.W.2d 356 (cleaned up). But a defendant's theory must: 1) be supported by law; and 2) have some foundation in the evidence. *Id.* Defendant's proposed theory, that J.C. consented in advance to have "pass out sex," is not supported by law, and Defendant did not present any evidence of valid consent, or J.C.'s capacity to consent, at the time of intercourse.

1. Advance consent is not based in law.

At issue is whether Defendant's proposed theory—that he "reasonably thought J.C. consented" to "pass out sex" based on her alleged "advance consent"—was a legally valid defense that he had a right to present at trial. DB:7, 16. At its core, Defendant is asserting that his belief about consent and practice of engaging in "pass out sex" negated the intent necessary to commit third-degree rape. SDCL 22-3-1(4) allows a mistake-of-fact defense, if it disproves criminal intent, but forecloses a mistake of law defense because "ignorance of the law does not excuse a person from punishment for its violation." Defendant's alleged misunderstanding of J.C.'s consent amounted to a mistake of law, not a mistake of fact that would negate his criminal intent. As a result, the concept of "advance consent" to "pass out sex" is not a legally recognized defense to rape.

Legally Valid Consent

Consent contemplates a freely given agreement by a person with the capacity to consent. *See State v. Roach*, 2012 S.D. 91, ¶16, 825 N.W.2d 258, 263 (explaining that, if a victim freely and voluntarily consents without the use of force, coercion, or threat, consent is a defense to forceable rape); *State v. Jones*, 2011 S.D. 60, ¶14, 804 N.W.2d 409, 414 (noting that submission is not equal to consent and rape can occur when the victim submits out of fear of injury or violence; explaining that nonconsent is conclusively presumed when the victim is a certain age or has a physical or mental incapacity); SDCL 22-22-1(4) (criminalizing sexual intercourse with people who are incapable of consenting due to intoxication). Further, an act of sexual intercourse does not begin and end with initial penetration. The timing of consent is essential. A person who indicates their consent to engage in a sexual act has the right to withdraw their consent both before and during sexual intercourse. *Dancy*, 102 Cal.Rptr.2d at 910. If a person withdraws consent to sexual intercourse, and the other person continues, a rape is committed.[5] *United States v. Rouse*, 78 M.J. 793, 796-97 (2019)

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[5] In *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1994), this Court affirmed the rejection of a jury instruction stating that rape does not occur if a woman initially consents to sexual intercourse and then withdraws her consent after penetration. This Court explained that it had never held that initial consent foreclosed a rape prosecution and declined to adopt (continued . . .)

(discussing the plethora of jurisdictions that have held that consent to sexual intercourse may be withdrawn at any time and rejecting the opposing view as "archaic and unrealistic.").

The right to withdraw consent to sexual intercourse, either before or during sexual intercourse, explains why "advance consent" to sexual intercourse during a period of incapacity is not valid consent. Unlike a man who engages in sexual intercourse with woman capable of giving consent under the reasonable but mistaken belief that the woman consents, a man who intentionally engages in intercourse with a woman he knows is incapable of consenting wrongfully deprives the woman of her right to withdraw her consent at the time of penetration. *United States v. Prather*, 69 M.J. 338, 343 (2011); *Dancy*, 102 Cal.Rptr.2d at 910-11. "Advance consent" to sexual intercourse cannot amount to valid consent under the law unless the victim had the capacity to consent—and withdraw consent—at the time of and during intercourse. *Id.*; *see also Tyson v. State*, 619 N.E.2d 276, 286 (Ind. Ct. App. 1993) (explaining that the only consent that is a defense to rape is the consent that immediately precedes the sexual conduct). For these reasons, any alleged "advance consent" J.C. may have given to "pass out sex" was legally invalid.

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the reasoning of *People v. Vela*, based on the facts in *Jones*. *Id.* (citing *Vela*, 218 Cal.Rptr. 161 (Cal. App. 1985) (*overruled by In re John Z.*, 60 P.3d 183 (Cal. 2003)).

Defendant's "Beliefs" about Consent are a Mistake of Law

Defendant was found guilty of third-degree rape under SDCL 22-22-1(4), which states:

> Rape is an act of sexual penetration accomplished with any person under any of the following circumstances: . . .
>
> > (4) If the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis.

Rape is a general intent crime, meaning the State is only required to show Defendant had the intent to do the prohibited act. *Jones*, 2011 S.D. 60, ¶¶11, 15, 804 N.W.2d at 413-14 (holding that the State must prove that the defendant knew or reasonably should have known that the victim's intoxicated condition rendered her incapable of giving consent). Under SDCL 22-22-1(4), the prohibited act is sexual intercourse with a person who the perpetrator knows is incapable of giving consent because of the person's intoxicated condition. In this case, Defendant knew the facts that brought his actions within the statute—i.e. that J.C. was incapable of giving consent when Defendant engaged in sexual intercourse with her. Indeed, Defendant's defense was built on his practice of engaging in "pass out sex" with J.C. after she was intoxicated.

Defendant's claim that J.C.'s "advance consent" made it reasonable for him to believe that she consented did not amount of a mistake of fact

that would disprove his criminal intent.[6] *See* SDCL 22-3-1(4). Whether Defendant "honestly" or "reasonably" believed that J.C. would have either consented to sex prior to her incapacitation or would consent to sexual intercourse at some time in the future is not relevant to whether J.C. consented at the time of the sexual intercourse. *Tyson*, 619 N.E.2d at 286 (affirming the exclusion of witness testimony that alleged the victim was hugging and kissing the defendant before the sexual assault at issue). A reasonable belief that someone will consent at some point in the future is not a defense to rape. *Id.* The only consent that is a defense to rape is consent that immediately precedes the sexual contact—it is Defendant's "reasonable belief" at that point, not at any other point, which is relevant. *Id.* Any mistaken belief about the legal validity of "advance consent" to engage in "pass out sex" is a mistake of law that cannot be used to disprove criminal intent. *See* SDCL 22-3-1(4); SDCL 22-1-2(c) (explaining that the "knowledge" mens rea does not require knowledge of the unlawfulness of the act).

Other courts have litigated this topic and agree with the State's position. *See Prather* and *Dancy, supra*; *United States v. Roumer*, 2012 WL 267983, at *3 (N-M. Ct. Crim. App. Jan. 31, 2012) (affirming the rejection of an "advance consent" jury instruction because it was not

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[6] Defendant does not explicitly claim he was entitled to present a mistake of fact defense, but his claim that it was "reasonable for him to believe that J.C. consented" is similar.

supported by law and did not have foundation in the evidence); *see also Nolan v. State*, 863 N.E.2d 398, 403 (Ind. App. Ct. 2007) (noting that a person who is "unaware" of the sexual conduct (sleeping) cannot voluntarily consent). One court recently explained "advance consent" is "where a person consents in advance to being sexually violated while unconscious." *People v. Miranda*, 276 Cal.Rptr.3d 503, 516 (Cal. App. 5th 2021). And "[b]ecause the law does not recognize an unconscious person's advance consent to a rape, making the sexual act a crime, it is [unlawful] to intentionally commit that act even if there was advance consent." *Id.* Further, the court explains, "[w]here sex with an unconscious person is a rape and thus unlawful regardless of consent, it is not reasonable to believe that [advance consent] is lawful[.]" *Id.* In another case, the court held "neither advance consent of the victim nor a belief that the victim gave advance consent is a defense to sex crimes by intoxication." *People v. Roppolo*, 2011 WL 721470, at *5 (Cal. Ct. App. Mar. 2, 2011) (citing *Dancy*, 102 Cal.Rptr.2d at 910-11). Even if there were evidence showing the victim gave advance consent, as Defendant suggests, that evidence would not have a basis in the law, rendering it inadmissible.[7]

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[7] In his brief, Defendant asserts that he engaged in consensual sexual relations in the privacy of his home and seems to rely on *Lawrence v. Texas*, to challenge the illegality of J.C.'s alleged "advance consent." (continued . . .)

Because the Legislature has not recognized "advance consent" as a defense to rape, it must be excluded from the jury's consideration. This Court instructs that a trial court may reject a defense if it does not comply with the law when it is presented. In *State v. Bennis*, the defendant attempted to introduce an "intervening cause" defense in his murder trial. *Bennis*, 457 N.W.2d 843, 845-46 (S.D. 1990). To secure a conviction for murder, the State was required to prove that the stab wound to the chest, which Defendant inflicted, was the proximate cause of the victim's death. *Id.* at 845. In response to the State's evidence, the defendant sought to argue that medical malpractice was an intervening cause that ultimately caused the victim's death. *Id.* Recognizing that the proposed defense was in issue of first impression in South Dakota, this Court explained that evidence establishing a victim might have recovered with more skillful treatment was no defense to the charge of murder. *Id.* Instead, "medical malpractice will break the chain of causation and become the proximate cause of death *only if it constitutes the sole cause*

DB:17-18 (citing *Lawrence*, 539 U.S. 558 (2003)). *Lawrence* stands for the proposition that people have a fundamental right to engage in *consensual* sexual activity in the privacy of their home. 539 U.S. at 578. Unlike this case, the persons in *Lawrence* were both awake and had the opportunity to withdraw consent at any time. *See also Lemons v. Hedgpeth*, 2011 WL 7293432, at *5-6 (S.D. Cal. Aug. 31, 2011). South Dakota does not criminalize sexual relations between *consenting* adults. *Jones*, 2011 S.D. 60, ¶12, 804 N.W.2d at 414. The sexual activity in this case is illegal because J.C. was not capable of consenting, or withdrawing consent, at the time of the activity.

of death." *Id.* (adopting the reasoning in *State v. Sauter*, 585 P.2d 242 (Ariz. 1978)) (emphasis in original).

Similarly, when applied to charges of forceable or coercive rape under SDCL 22-22-1(2), "consent may be a defense when there is evidence offered and received that the victim did indeed consent; however, that evidence would also have to utterly negate any element of force, coercion, or threat." *State v. Waugh*, 2011 S.D. 71, ¶25, 805 N.W.2d 480, 486. The same concept is applicable when the victim is incapable of giving consent due to intoxication. In order for consent to be a defense, Defendant must, at the very least, offer evidence that would show J.C.'s capacity to consent. *Prather*, 69 M.J. at 343 (explaining that a defendant cannot prove consent to sexual intercourse without first proving capacity to consent on the part of the victim); *State v. Klaudt*, 2009 S.D. 71, ¶26, 772 N.W.2d 117, 125 (explaining that force or coercion and consent cannot co-exist). Thus, a victim's "advance consent" to a sexual act is not a defense to third-degree rape when the victim was incapable of consenting at the time of the sexual act. *C.f. State v. Jenner*, 451 N.W.2d 710, 721 (S.D. 1990) (explaining that claimed amnesia is not a defense to murder unless the defendant can show their condition was caused by an illness or trauma); *Birdshead*, 2015 S.D. 77, ¶24, 871 N.W.2d at 72 (explaining that a defendant cannot raise a defense to illegally possessing a firearm unless he came into control of the firearm for purposes of self-defense). Defendant failed to

show his defense was valid under the law and the trial court properly excluded it.

2. No evidence of J.C.'s capacity to consent or valid consent was presented.

Defendant failed to present any evidence before or during trial that J.C. had the capacity to consent at the time of intercourse. A trial court is free to reject a proposed defense when there are insufficient facts to support the proposed theory. *See Jenner*, 451 N.W.2d at 721 (affirming the rejection of defense when defendant did not present any evidence that she was suffering from a condition that would cause unconsciousness); *Birdshead*, 2015 S.D. 77, ¶24, 871 N.W.2d at 72 (rejecting defense to illegal possession of a firearm when defendant did come into control of the gun for purposes of self-defense). In rejecting the defendant's proposed "intervening cause" defense, the trial court in *Bennis* indicated that there was no testimony suggesting gross negligence on the part of the medical staff and noted that the coroner determined the stab wound was the cause of the victim's death. *Bennis*, 457 N.W.2d at 845-46. This Court affirmed the trial court's findings and held that 1) it was not error to refuse the defendant's requested instruction on intervening cause; 2) it was not error to deny the defendant's request for a continuance to allow expert testimony on his theory; and 3) it was not improper to deny the defendant an opportunity to present his theory to the jury. *Id.* at 845-46.

The same principles apply to Defendant's proposed defense in this case. The videos presented to the jury clearly show that J.C.'s level of intoxication prevented her from consenting to the acts depicted. Defendant's self-serving testimony that J.C. consented to these acts *hours* before they occurred does not negate the incapacity clearly shown in the videos at the time of the sexual intercourse.

Additionally, even if "advance consent" was a legally valid defense, the evidence in this case showed that Defendant knew or should have known that J.C. did not have the capacity to give advance consent before she passed out. When J.C. walked out of the house, Defendant told her she was too drunk to drive. When J.C. fell and hit her head at 5:00AM, Defendant described her as "out of it" and really drunk and assumed that her medication was "kicking in." It would not have been "reasonable" for a person to think that J.C. was capable of consent in that condition.

C. *The trial court properly excluded Defendant's proposed evidence.*[8]

Defendant argues that his right to present a defense was violated because he was not allowed to "tell his story." However, "presenting a defense is not a simple matter of telling one's story, [it] requires adherence to various technical rules governing the conduct of a trial."

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[8] Defendant discusses the trial court's handling of the excluded prior intercourse videos and Defendant's proposed witness testimony in both Issues I and III in his brief. For clarity and brevity, the State will address Defendant's Issue III in this section.

State v. Craig, 2014 S.D. 43, ¶21, 850 N.W.2d 828, 835 (reciting the warnings given to a defendant before he exercises his right to self-representation). While the rules of evidence cannot be mechanistically used to defeat the ends of justice, Defendant is required to follow the rules of procedure and evidence designed to assure reliability and fairness. *State v. Larson*, 512 N.W.2d 732, 739 (S.D. 1994); *State v. Crawford*, 2007 S.D. 20, ¶20, 729 N.W.2d 346, 350-51 (relying upon *Mississippi v. Chambers*, 410 U.S. 284 (1973)).

Evidence at Issue

Before trial, the State sought to exclude videos of prior sexual acts between Defendant and J.C. and possible witness testimony regarding the Defendant and J.C.'s "crazy sex life." SR:52-56, 687-90. The trial court clarified with the State that the videos depicted consensual sex and the State responded affirmatively. SR:698.

As previously noted, the trial court ruled that the videos were not relevant to the issue of whether J.C. was incapacitated on October 28th or whether Defendant reasonably should have known that J.C. was incapable of consent. SR:695, 698-99. Additionally, while the State, not Defendant, brought the matter before the trial court, the court reasoned that Defendant did not comply with the fourteen-day notice requirement in Rule 412 if he intended to offer the videos at trial. SR:695-96; SDCL 19-19-412(c). The trial court explained that the ruling could be revisited,

and likely would need to be revisited, with regard to the defense's proposed witnesses. SR:695-96.

During the trial, the court maintained its previous ruling regarding the videos. JT:88. The court also precluded Defendant from introducing evidence related to "pass out sex." JT:161-62; JT:193-94 (relying on *Dancy*, 124 Cal.Rptr.2d at 911).

Through an offer of proof, Defendant presented the testimony of four witnesses:

1. Stacy Thennis, Defendant's former partner and the mother to Defendant's son, testified that she spoke to J.C. on the night of October 27th over the phone. During the conversation, J.C. mentioned that her and Defendant were going to go get drunk and then have "pass out sex." Stacy claimed J.C. brought up "pass out sex" on a previous occasion as well. JT:168-69.

2. Debra Tobin, Defendant's mother, testified that she overheard Defendant and J.C. talking about sex and heard Defendant say he wanted to take a shower. JT:175-76. Debra claimed that she heard J.C. tell Defendant that she might be passed out when he returned, so to just tape it so they could watch it later. JT:177. Debra also testified that J.C. came downstairs to get a bandage for her head around 5:00AM. JT:176.

3. Amanda First In Trouble, Defendant's sister, testified that she was talking to J.C. on October 27th and J.C. told her about her back pain. JT:178. Amanda also testified about a prior grill out where J.C. told her that J.C. and Defendant never deprive each other of sexual intercourse. JT:189.

4. Sarah Waldner, a friend of Defendant and J.C., testified that she and J.C. would talk about their interested in bondage, toys, and games and would exchange those items with each other. JT:191-92.

See generally JT:166-93. The court excluded most of the testimony, finding that it would be 1) confusing to the jury, since pass out sex was not a valid defense; and 2) constituted impermissible hearsay. The court also noted that notice was not provided for some of the testimony, as required under Rule 412. The court did not preclude Debra from establishing a timeline for the night by explaining that J.C. came downstairs to get a band aid or Amanda from describing the interaction she had with J.C. on the night of October 27th. JT:184-85, 190.

Through his trial testimony, Defendant gave a detailed history of his and J.C.'s romantic relationship. JT:199-203. The State objected to Defendant's testimony describing prior sexual intercourse, based on Rule 412, and the court sustained the objection as a violation of the court's order in limine. JT:201. Defendant did not make an offer of proof. Defendant then provided a detailed account of what he and J.C. did on October 27th, as previously outlined above. JT:213-20. The second objection went as follows:

> Mr. Sutton: What do you next recall?
>
> Defendant: Getting woke up to her being upset with me, waking me up, and I said what? And she said, you know, she said that she wanted me to give her attention. I said what? What do you want me to do? And she said I want you to make love to me.
>
> Ms. LaFromboise: Objection.
>
> The Court: This testimony is in violation of the Court's order and the objection is sustained and that answer will be stricken.

> Mr. Sutton: The videos are in evidence, I don't want to go into the sexual activity. But I do want to skip forward past that. What do you next remember, beyond the sexual activity?
>
> Defendant: Well, before the sexual activity I went downstairs and took a shower.
>
> Mr. Sutton: Okay.
>
> Defendant: And then after that I fell asleep next to her.

JT:220-21. Defendant did not request to make an offer of proof.

The admission of evidence involves two inquiries: first, whether the evidence is relevant and, second, if relevant, whether the prejudicial effect of the evidence substantially outweighs its probative value. *See* SDCL 19-19-401 ("Rule 401"); SDCL 19-19-402; SDCL 19-19-403 ("Rule 403"); *State v. Shelton*, 2021 S.D. 22, ¶17, 958 N.W.2d 721, 727. "Evidence is relevant if: (a) [i]t has any tendency to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action." *Shelton* at ¶17. "Upon a trial court's determination that the proffered evidence is relevant, the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 substantially outweigh probative value." *State v. Taylor*, 2020 S.D. 48, ¶33, 948 N.W.2d 342, 352.

A defendant's right to present evidence is strong, but the State's legitimate interest in reliable and efficient trials is substantial. *Larson*, 512 N.W.2d at 739. Where the State's interest is strong, only the

exclusion of critical, reliable, and highly probative evidence will violate due process. *Larson* at 739.

Testimony Related to Pass Out Sex

As the trial court determined, the testimony related to "pass out sex" was not relevant to the issues at trial—i.e. whether J.C. was able to consent or whether Defendant reasonably believed J.C. was capable of consenting at the time of intercourse on October 28th. The trial court also properly excluded the testimony under Rule 403, finding that the testimony would be confusing to the jury.

The self-serving testimony from Defendant and his mother, sister, and former partner regarding Defendant and J.C.'s habit of engaging in "pass out sex," was hearsay derived from a deceased victim. Defendant cites to *State v. Jones*, 230 P.3d 576 (Wash. 2010) for the proposition that exclusion of his testimony about "his side of the story" violated his right to present a defense. DB:12. In *Jones*, the Washington Supreme Court reversed a conviction for *forceable rape* because the defendant's excluded testimony was highly relevant and "if believed, would *prove consent* and would provide a defense to the charge of second degree rape." 230 P.3d at 580; *see also Chambers*, 410 U.S. at 299-301 (the witnesses' improperly excluded testimony consisted of highly exculpatory statements made against the declarant's interest and corroborated by other evidence).

As explained above, "advance consent" to "pass out sex" is not a legally permissible defense. Even if J.C. gave Defendant her "advance consent", any testimony in support of that legally impermissible defense would not have been relevant or legitimately exculpatory. *Jones*, 230 P.3d at 580 (stating that defendants only have a right to present *relevant* evidence and do not have a constitutional right to present *irrelevant* evidence). Instead, testimony about J.C.'s alleged agreement to "pass out sex" and Defendant's "reasonable belief" that she consented would have confused the jury about the intent required to commit the prohibited act and could have persuaded the jury to absolve Defendant of criminal responsibility based on his ignorance of the law, not an ignorance of the relevant facts. This is the perfect example of persuading the jurying in an unfair or illegitimate manner. *See State v. Bowker*, 2008 S.D. 61, ¶41, 754 N.W.2d 56, 69 ("Evidence is unduly prejudicial if it persuades the jury in an unfair or illegitimate manner."). The trial court properly excluded the witness testimony regarding "pass out sex" because any possible relevance was substantially outweighed by the danger unfair prejudice to the State.

Defendant's regular practice of raping J.C. while she was "passed out" does not make his actions on October 28th lawful, reasonable, or relevant. The State's strong interest in conducting efficient trials based on relevant and reliable evidence is strong and substantially outweighs

Defendant's interest in presenting unreliable evidence in support of his unlawful defense.

Evidence of prior sexual intercourse

The videos and witness testimony regarding prior sexual intercourse between Defendant and J.C falls squarely within Rule 412, also known as the rape shield statute. The rape shield statute prohibits admission of a rape victim's prior sexual conduct or evidence offered to prove the victim's sexual predisposition. The statute stands as a legislative determination that, in most cases, a rape victim's prior sexual conduct is not relevant and is highly prejudicial to the victim. *State v. Lykken*, 484 N.W.2d 869, 874 (S.D. 1992) (interpreting a previous, but similar, version of the statute). The exceptions to the statute's prohibition include:

> (A) Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
>
> (B) Evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
>
> (C) Evidence whose exclusion would violate the defendant's constitutional rights.

SDCL 19-19-412.

The trial court sustained an objection to Defendant's testimony describing prior sexual intercourse with J.C. and excluded testimony from Sarah Waldner about J.C. and Defendant's use of bondage and sex

toys. JT:201, 191-93.[9] Defendant's testimony was expressly prohibited under SDCL 19-19-412(a)(1), and Waldner's was expressly prohibited under SDCL 19-19-412(a)(2). Additionally, there was no dispute that Defendant and J.C. previously engaged in sexual intercourse and Defendant was allowed to testify about the couple's practice of being romantic in the morning and the sexual intercourse that occurred when Defendant and J.C. returned home from the bar on October 28th. *See State v. Brings Plenty*, 490 N.W.2d 261, 266 (S.D. 1992) (concluding that any error in excluding evidence was not prejudicial because evidence was cumulative of other admitted evidence). Waldner's testimony about sex toys and bondage was irrelevant and, as the court stated, is the exact type of evidence that Rule 412 is meant to prohibit. *See Lykken*, 484 N.W.2d at 873-74.

With regard to the excluded prior sexual intercourse videos, there is no indication that Defendant's trial counsel desired to introduce the videos at trial. The State, not Defendant, brought the videos to the pre-

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[9] In his brief, Defendant argues that there was no indication that the trial court knew it could hold Rule 412 hearings during the trial. The offer of proof hearings during the trial conclusively show that the trial court was aware of that option. Some of the excluded witness testimony could have been excluded on the basis of Rule 412, as prior sexual intercourse, or under the court's order related to "pass out sex." To the extent the trial court excluded evidence on the basis of Defendant's failure to give notice under Rule 412, this Court may affirm a trial court's ruling for any reason. *State v. Willis*, 370 N.W.2d 193, 201 (S.D. 1985). As explained in this brief, the trial court provided adequate alternative reasons for excluding the evidence.

trial hearing and made the videos available to the trial court. SR:688, 698. At the hearing, the State described the videos as prior sexual intercourse between Defendant and J.C. Defendant did not request that the trial court watch the videos or make any opposition to the State's characterization of the videos before or during trial. At trial, Defense counsel requested Detective Ahmann describe the data that was extracted from Defendant's media cards. JT:86-89. Counsel clarified, twice, that he was not asking to play the videos. On appeal, Defendant is asking this Court to review an issue that did not exist at trial regarding evidence that neither his appellate nor trial counsel considered important enough to put in the record. *Owens v. Moyes*, 530 N.W.2d 663, 665 (S.D. 1995) (Appellant bears the burden of providing the Supreme Court with an adequate record; absent an adequate record, this Court presumes the trial court acted properly). Defendant has waived his right to challenge the trial court's actions on appeal. *See State v. Uhing*, 2016 S.D. 93, ¶13, 888 N.W.2d 550, 554-55.

Further, based on the description of the videos (from the State and Defendant's appellate counsel) the videos would not have been admissible to support Defendant's theory. In fact, the videos could have been prejudicial *to Defendant* if they had been admitted, precluding any claim of reversible error. *Bausch*, 2017 S.D. 1, ¶12, 889 N.W.2d at 408 (requiring a defendant to show *prejudicial* error under the abuse of discretion standard). The State described the videos as prior sexual

intercourse between Defendant and J.C. and noted that J.C. was wearing lingerie, the items being used in the videos were commonly considered "sex toys," and J.C. was actively participating in the intercourse. SR:688, 698. Defendant's appellate counsel also described the videos and noted that:

> . . there are times in those excluded videotapes that the victim appears to be nonresponsive for quite some time but she actually is well aware of what's going on, she reacts to the sexual act that he performed, there are times when she like I said is silent for quite some time.

SR:770 (hearing on Defendant's post-conviction Motion for New Trial).

Under both descriptions, J.C. was actively participating, at times, and was aware and responsive. This is a stark contrast to the videos from October 28th showing J.C. "passed out," unresponsive, and completely unaware of the sexual acts being performed on her. *See Lykken*, 484 N.W.2d at 874 (affirming the exclusion of videos showing prior sexual activity that was different than the sexual activity at issue). Interestingly, this stark contrast also could have supported an inference that Defendant *knew* J.C. was incapable of giving consent on October 28th, seeing as she did not participate in the sexual intercourse at all, was not responsive, and did not react to the sexual acts being performed.

Either way, the videos were properly excluded under Rules 401 and 412 because they were not relevant evidence that could be used in support of Defendant's improper consent defense. The trial court did not

abuse its discretion or error in its rulings regarding the videos of prior sexual relations.

October 28th Videos

Finally, the trial court did not abuse its discretion by failing to view the rape videos and perform a Rule 403 balancing test. First, Defendant never raised these issues regarding the rape videos before or during trial. And Defendant's arguments mischaracterize the trial court record. Defendant states, "The court ruled on the admission of these extremely graphic videos, and subjected the jury to viewing them, without first reviewing the proposed evidence and without conducting a 403-balancing test." DB:4. Defendant's statements suggest that the trial court ruled on the admissibility of the rape videos based upon a Rule 403 objection and after it declined a request by Defendant to view the videos. However, the *only* ruling the trial court made regarding the rape videos was based on a foundation objection at trial, a ruling that Defendant is not challenging on appeal. JT:80-81.

Like Defendant's claims under Issue II, Defendant did not give the trial court the opportunity to consider the issues that Defendant now attempts to place before this Court. *State v. Bryant*, 2020 S.D. 49, ¶18, 948 N.W.2d 333, 338. These videos were not addressed in the State's Motion in Limine, nor were these videos addressed at the pre-trial hearings. Furthermore, Defendant did not challenge the admission of the videos played at trial for these reasons and does not ask this Court to

review this claim for plain error.[10] *See Taylor*, 2020 S.D. 48, ¶34 n.4, 948 N.W.2d at 352. Accordingly, Defendant has failed to show error by the trial court. *Id.*

On appeal, Defendant merely contends that the videos are "private." DB:3. Defendant has cited no authority for the proposition that a court abuses its discretion or commits plain error under these similar circumstances regarding the rape videos. Therefore, Defendant has failed to meet his burden and his claim fails.

II

DEFENDANT FORFEITED HIS CLAIM TO CHALLENGE WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

A. *Standard of Review and Background.*

If a defendant proposes a jury instruction which is denied by the trial court, the trial court's denial of the instruction is reviewed by this Court for an abuse of discretion. *State v. Nelson*, 2022 S.D. 12, ¶42, ___ N.W.2d ___. If a defendant fails to propose a jury instruction or fails to object to a jury instruction, this Court is limited to plain error review if a defendant invokes plain error review on appeal. *See Mulligan*, 2007 S.D.

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[10] The State is not requesting or invoking plain error review on behalf of Defendant. *State v. Mulligan*, 2007 S.D. 67, ¶25, 736 N.W.2d 808, 818 (refusing to apply plain error review in the absence of a party's request). Any references to plain error in this brief are arguments made in the alternative if this Court holds that Defendant did invoke plain error review. *See id.* ("As a general rule, an appellate court may review only the issues specifically raised and argued in an appellant's brief.").

67, ¶25, 736 N.W.2d at 818. Ordinarily, this Court will not apply a standard of review to a waived issue where plain error review is not invoked because this Court simply will decline to review the issue at the appellate level. *See State v. Podzimek*, 2019 S.D. 43, ¶27, 932 N.W.2d 141, 149.

Defendant argues that the trial court abused its discretion in instructing the jury on the elements of third-degree rape in violation of SDCL 22-22-1(4)[11] and by failing to give instructions defining intoxication, anesthetic agent, or hypnosis. DB:16-17. Defendant has waived this issue for appellate review by failing to object to the final instructions or propose his own jury instructions that support his view of the law.

B. *Defendant Forfeited His Right to Challenge Whether the Trial Court Properly Instructed the Jury.*

Where a defendant fails to object and even acquiesces to a ruling below, the defendant is deemed to have accepted that ruling and waived his right to argue the issue on appeal. *See State v. Roedder*, 2019 S.D. 9, ¶11 n.2, 923 N.W.2d 537, 542 n.2; *Uhing*, 2016 S.D. 93, ¶13, 888 N.W.2d at 554-55. This is because "[t]he trial court must be given an opportunity to correct any claimed error before [this Court] will review it on appeal." *State v. Gard*, 2007 S.D. 117, ¶15, 742 N.W.2d 257, 261.

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[11] The trial court relied upon Criminal Pattern Jury Instruction 3-3-6 for the elements of third-degree rape.

Indeed, "[e]ven a fundamental right may be deemed [unpreserved and] waived if it is raised for the first time on appeal." *State v. Wright*, 2009 S.D. 51, ¶68, 768 N.W.2d 512, 534 (declining to consider an unpreserved double jeopardy challenge).

Specifically, when a defendant does not object to a jury instruction or propose instructions of his own, "the jury instructions [are] the law of the case." *State v. Bosworth*, 2017 S.D. 43, ¶36, 899 N.W.2d 691, 701; *see also Willis*, 370 N.W.2d at 200. Here, Defendant did not object at trial to Instruction 10, propose an alternative instruction, or request additional instructions defining intoxication, anesthetic agent, or hypnosis. JT:231. Defendant did not give the trial court the opportunity to consider the issues that Defendant now attempts to place before this Court. Thus, Defendant has waived any issue regarding Instruction 10 or the alleged lack of additional instructions. *See State v. Talarico*, 2003 S.D. 41, ¶33, 661 N.W.2d 11, 23 (citations omitted).

Further, Defendant contends that the trial court erred without arguing what the alleged correct action should have been. He is obligated to present the reasons for his argument and the citations to the authorities relied on, but he fails to do so. SDCL 15-26A-60(6). Additionally, Defendant has failed to show that Instruction 10 or the absence of other instructions affected the verdict and harmed his substantial rights. Defendant does not even argue that any harm occurred because of the alleged error. Without such analysis, Defendant

has failed to meet his burden of establishing that the jury would have returned a different verdict if Defendant's instructions were given.

Defendant also failed to invoke, and therefore is not entitled to, plain error review, waiving its application on appeal because well-settled precedent dictates that Defendant's failure to invoke plain error review precludes its application. *Mulligan*, *supra*. Thus, this Court need not address any jury-instruction related issue. *Id.* [12]

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH REGARD TO ANY EVIDENTARY RULINGS CONCERNING VIDEO EVIDENCE.

This issue is addressed, *supra*, Section I(C).

IV

ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT RIPE FOR DIRECT APPEAL.

A. *Standard of Review and Background.*

Defendant makes several complaints that question the actions of his trial counsel and argues that his counsel was ineffective. DB:21-29. The complaints include failing to raise objections, failing to make

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[12] To the extent the second element—requiring the jury to find that J.C. was incapable of giving consent due to her intoxication—was inadequately covered, as explained above, Defendant did not dispute that J.C. was incapable of giving consent and there was no evidence suggesting she was capable of giving consent at the time of the sexual activity. Nor did Defendant dispute that J.C.'s *intoxicated* condition rendered her incapable of consent. Thus, Defendant cannot establish prejudice based on any jury instruction or lack thereof.

motions, failing to interview witnesses, failing to call an expert witness in toxicology, and counsel's overall performance before and during trial. DB:21-29. Defendant's claim of ineffective assistance of counsel is not ripe for appellate review.

Absent exceptional circumstances, "[i]neffective-assistance-of-counsel claims are generally not considered on direct appeal. Rather, such claims are best made by filing a petition for a writ of habeas corpus which, if granted, will result in an evidentiary hearing." *State v. Vortherms*, 2020 S.D. 67, ¶30, 952 N.W.2d 113, 120 (cleaned up). "This is because on direct appeal, trial counsel is unable to explain or defend actions and strategies and give a more complete picture of what occurred for our review." *State v. Kiir*, 2017 S.D. 47, ¶19, 900 N.W.2d 290, 297 (citation omitted). A claim of ineffective assistance of counsel will be addressed on direct appeal "only when trial counsel was so ineffective and counsel's representation so casual as to represent a manifest usurpation of the defendant's constitutional rights." *Vortherms*, at ¶30, 952 N.W.2d at 120.

In bringing this claim, a defendant must demonstrate that trial counsel was ineffective, and the defendant was prejudiced as a result.[13]

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[13] Prejudice is presumed only in a narrow set of circumstances when counsel is actually or constructively denied at trial, not when counsel is allegedly deficient. *Luna v. Solem*, 411 N.W.2d 656, 658 (S.D. 1987) (continued . . .)

State v. Golliher-Weyer, 2016 S.D. 10, ¶8, 875 N.W.2d 28, 31. Counsel is ineffective when "counsel's representation [falls] below an objective standard of reasonableness." *Id.* Prejudice is demonstrated by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

B. *Defendant has Not Shown that Counsel's Actions Resulted in Manifest Usurpation of His Constitutional Rights.*

1. Motion Regarding Expert Witness

Defendant argues that counsel should have called a toxicology expert witness to testify regarding what substances were in the victim's system at the time of her death and how it affected her ability to consent. *See* JT:112. The videos of J.C.'s rape already speaks volumes of her unconsciousness and inability to consent. It may have been sound trial strategy to avoid drawing further attention to J.C.'s incapacitation. But this Court cannot know that without a record.

In *State v. Hannemann*, this Court declined to address a defendant's claim on direct appeal that trial counsel was deficient in failing to secure an expert to challenge the State's evidence. 2012 S.D. 79, ¶¶13-14, 823 N.W.2d 357, 360-61. On appeal, this Court was

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(citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)); *United States v. Chronic*, 466 U.S. 648, 658-59, 658-59 nn.25-26 (1984). Aside from an outright denial of counsel, or other circumstances of that constitutional magnitude, Defendant retains the burden to establish prejudice. *See Luna*, 411 N.W.2d at 658.

limited to the trial record where factual questions were not resolved like the factual questions could be through a habeas hearing. *Hannemann* at ¶14, 823 N.W.2d at 360. This Court reasoned that "trial strategy may have been the motivation for trial counsel's failure to utilize an arson expert witness to challenge the State's scientific evidence." Therefore, this Court held "[b]ecause the existing circuit court record does not establish a 'manifest usurpation of [the defendant's] constitutional rights,' [defendant]'s ineffective assistance of counsel claim is not ripe for review." *Id.* at ¶8, 823 N.W.2d 357, 362.

Here, like *Hannemann*, Defendant's claim is not ripe for review. Counsel has not been given an opportunity to be heard to explain or defend his actions. *See State v. Phillips*, 2018 S.D. 2, ¶22, 906 N.W.2d 411, 417 (discussing how trial counsel's tactical decisions are not suited to review on direct appeal because "trial counsel is not afforded the opportunity to explain and defend his or her actions"). Without such an opportunity, this Court is left with an incomplete picture of what occurred. And where his Court is left to speculate, Defendant's claim should not be addressed on direct appeal.

Furthermore, if the claim is addressed, Defendant is required to show prejudice. He cannot. "In order to show prejudice, the [defendant] must show how the potential witnesses would have changed the outcome of the trial." *Denoyer v. Weber*, 2005 S.D. 43, ¶29, 694 N.W.2d 848, 857 (citations omitted); *see also State v. Beck*, 2010 S.D. 52, ¶24, 785 N.W.2d

288, 296. Defendant has failed to identify a toxicology expert that would have provided helpful information to change the outcome of the trial. *See Vortherms*, 2020 S.D. 67, ¶32, 952 N.W.2d at 121 (declining to address ineffective assistance claim for an alleged failure to call witnesses when the record did not show "whether this potential witness could have provided helpful information").

2. Motion regarding Rule 412

For the same reason explained, *supra*, Issue I(C), defense counsel was not ineffective for failing to move for admission of the videos depicting prior sexual intercourse. The trial court considered Defendant's witness testimony regarding prior sexual intercourse and properly excluded it under Rule 401 and 403. Again, there is no demonstration of a probable different result, nor obvious mistake in the record generating a "manifest usurpation" of Defendant's constitutional rights regarding trial counsel's approach to evidence of prior sexual intercourse. *See Vortherms*, *supra*.

3. Motion to Suppress Evidence

Defendant also contends his counsel was ineffective for failing to file a motion to suppress the video evidence played during his trial. DB:24-25. Generally, the decision of whether to make an objection or motion is a decision within the discretion of trial counsel. *Boyles v. Weber*, 2004 S.D. 31, ¶68, 677 N.W.2d 531, 551. Regardless, on the last day of trial, the following exchange took place:

> LEE MALCOLM: . . . I believe that if motions were filed that should have been filed in a timely manner certain evidence could have and more than likely would have been suppressed that would have ultimately changed the outcome.
>
> THE COURT: You are incorrect in your assertion.

See JT:241. The court's response indicates it would have denied a motion to suppress. As such, no "manifest usurpation of [Defendant's] constitutional rights" exists that would cause this Court to address Defendant's ineffective-assistance-of-counsel claim on direct appeal. *See Vortherms*, *supra*.

4. Motion Regarding Prior Bad Acts and Prior Crimes

Next, Defendant contends that his counsel was ineffective for failing to make a motion or objection regarding alleged prior bad acts and prior crimes evidence presented at trial. DB:25. Specifically, Defendant alleges that law enforcement should not have been allowed to testify that they knew Defendant from before this investigation and should not have been asked to identify Defendant based upon knowing Defendant. DB:25. Notably absent from Defendant's argument is any reference to a prior bad act or crime Defendant committed. Defendant has failed to cite any statute or case law in support of his assertion that an officer testifying that he merely knew a defendant, without stating how he knew him, is prior bad acts evidence. Defendant's "mistaken belief as to the laws of this state cannot make his counsel deficient." *Denoyer*, 2005 S.D. 43, ¶37, 694 N.W.2d at 858. Counsel cannot be said to have been

ineffective for failing to challenge prior bad acts and prior crimes when the challenged evidence of an officer merely knowing Defendant has not been established to be prior bad acts or prior crimes.

5. Remaining Claims

Defendant makes other vague claims which allege ineffective assistance of counsel based on facts absent from the settled record. "[F]actual questions are more appropriately resolved in a habeas hearing." *Hannemann*, 2012 S.D. 79, ¶14, 823 N.W.2d at 361. Thus, these claims are not cognizable on direct appeal.

Defendant was not convicted because of his counsel's performance. As the trial court stated, Defendant is likely "frustrated by the fact that the evidence in this case is overwhelming." JT:240. Indeed, the settled record and Defendant's own actions, including recording his crimes and making incriminating statements, are the reasons why the jury chose to convict Defendant.

Therefore, counsel's performance is not obviously constitutionally deficient. This claim is more properly addressed in a habeas corpus proceeding so that trial counsel may have the opportunity to defend his tactical decisions and an adequate record can be developed. *State v. Hauge*, 2019 S.D. 45, ¶18, 932 N.W.2d 165, 171. Thus, Defendant's ineffective assistance claim is not one of the rare cases that this Court should review on direct appeal.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,923 words.

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

Dated this 4th day of May 2022.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 4, 2022, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Lee Todd Malcolm* was served via electronic mail upon Scott R. Bratland at scott@bratlandlaw.com.

/s/ Chelsea Wenzel
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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 29644

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

v.

LEE TODD MALCOLM,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CARMEN MEANS,
Circuit Court Judge

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Throughout this Brief, Plaintiff/Appellee, State of South Dakota will be referred to as "State." Defendant/Appellant Lee Todd Malcolm will be referred to as "Malcolm." References to the alleged victim, Jamaica Christensen, will be referred to as "JC." References to the Codington County criminal file CRI 20-60 will be made by "SR". References to the jury trial transcript will be referred to as "JT." References to the motion hearing transcript will be referred to as "MH."

JURISDICTIONAL STATEMENT

Malcolm respectfully appeals from a Judgment of Conviction which was entered on April 28, 2021.

Malcolm timely filed his Notice of Appeal on May 21, 2021, pursuant to SDCL 23A-32-15. The jurisdiction of this Court is invoked under SDCL 23A-32-2, SDCL 21-34-13 and SDCL 15-26A-7. The scope of review is authorized under SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUE

The Statement of Legal Issue is the same as Appellant's Brief.

STATEMENT OF THE CASE

The Statement of the Case is the same as Appellant's Brief.

STATEMENT OF FACTS

The Statement of Facts is the same as Appellant's Brief.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANTS DUE PROCESS RIGHTS AND ABUSED ITS DISCRETION WHEN IT PROHIBITED THE DEFENDANT FROM PRESENTING A DEFENSE TO THE CHARGES.

The Defendant was not allowed to present evidence pertaining to his previous sexual activity with the victim, or the sexual activity that occurred on October 28, 2019. The State's attempt to argue the contrary is inaccurate and misplaced. Contrary to the State's position, opening statements are not considered evidence, nor is testimony that was objected to and sustained by the trial court. In the State's Statement of Facts, they assert that "Defendant claimed that when J.C. returned upstairs, she was still upset with him and she wanted him to make love to her." (State's Brief, P. 7) This is not an accurate rendition of the facts of the case as this testimony was objected to and the objection was sustained. "This testimony is in

violation of the Court's Order and the objection is sustained and that answer will be stricken." (JT, 221.)

The State includes in their Statement of Facts that "Defendant told J.C. he was going to take a shower, and according to Defendant, J.C. told him he could have sex with her, even if she passed out, and asked him to record the intercourse." (State's Brief, p.7) This quote is not from any testimony or any evidence presented, rather, it's a quote from Defense Counsel's Opening Statement. (JT 10-12).

The State further tries to convince this court that Malcolm was allowed to explain to the jury the couple's past sexual activity as well as their sexual activity on October 28, 2019. After noting that the trial court sustained an objection to Defendant's testimony describing prior sexual intercourse with J.C., the State tries to claim that he was allowed to discuss that very activity. "Additionally, there was no dispute that Defendant and J.C. engaged in sexual intercourse and Defendant was allowed to testify about the couple's practice of being romantic in the morning and the sexual intercourse that occurred when Defendant and J.C. returned home from the bar on October 28th." (State's Brief, P. 30)

There simply is no dispute that Malcolm was prohibited from going into detail about the facts and circumstances that led him to be charged with rape.

The State's claim that "Defendant did not present any evidence of valid consent, or J.C.'s capacity to consent at the time of intercourse," (State's Brief. P. 13) completely ignores the fact that Malcolm learned for the first time, during the jury trial, that he was not allowed to do so.

The Defense relied on Jones v. Cate, 2011 U.S. Dist. Lexis, 39433; 2011 WL 1327139 for the proposition that the defendant was allowed to testify that one of the women consented to the sexual encounter before she fell asleep. (Appellant's Brief P. 15). The State did not attempt to distinguish Jones v. Cate from the facts in this case. Instead, the State relies on two Armed Forces cases, United States v. Prather, 69 M.J. 338 (2011), and United States v. Rouse, 78 M.J. 793 (2019). In Prather, Airman Stephen A. Prather was charged with aggravated sexual assault and adultery. The victim claimed she had passed out and Prather claimed she consented. The U.S. Court of Appeals for the Armed Forces reversed his conviction for aggravated sexual assault, but confirmed the adultery conviction.

In Rouse, the U.S. Court of Appeals affirmed Rouse's conviction on the grounds that the alleged victim withdrew

her consent and Rouse continued sexual intercourse, despite her withdrawing consent. Like the defendants in cases cited by Appellant, Rouse and Prather were allowed to testify fully and completely about their view of what transpired on the date of their allegation. Malcolm was not.

Next, the State claims that a mistake of law, not a mistake of fact, prohibits him from presenting evidence to support his defense that he reasonably believed that J.C. consented. In fact, in the Prather case cited by the State, consent and mistake of fact were discussed thoroughly, and served as the basis for the reversal of his aggravated sexual assault conviction. Further, a mistaken belief that the victim consented was allowed in People v. Giardino, 98 Cal. Rptr 2d 315 (Cal. App. 2000). In that case, the court reversed a conviction for rape by intoxication and instructed the trial court that, "an honest and reasonable but mistaken belief that a sexual partner is not too intoxicated to give legal consent to sexual intercourse is a defense to rape by intoxication."

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO PROPERLY INSTRUCT THE JURY.

Malcolm was convicted for rape involving an intoxicated victim. No jury instruction was given as to the definition of intoxication. None was offered by the State or

the Defense. Being intoxicated due to narcotics or anesthetic agents, or hypnosis is an element of the crime charged. It was plain error to not give an instruction, which is an element. The State is correct that trial counsel failed to propose an instruction. Appellate counsel did not invoke plain error in his original brief; however, this court has the authority to invoke plain error if it finds that this alleged error seriously affects the fairness, integrity, or public reputation of judicial proceedings. State v. Mulligan, 2007 SD 67 at 14. Clearly, not including a jury instruction that pertains to an element of the crime meets the above criteria.

III.THE TRIAL COURT ABUSED ITS DISCRETION IN RULING ON THE ADMISSIBILITY OF VIDEO EVIDENCE WITHOUT CONDUCTING A 403 BALANCING TEST AND WITHOUT FIRST VIEWING THE VIDEO EVIDENCE.

Malcolm contends on appeal that the trial court erred when ruling on video evidence without reviewing the video evidence. Malcom took issue with both the videos of previous sexual activity and the videos taken on the date of the allegation in claiming the trial court abused its discretion. United States v. Cunningham, 694 F.3d 372 (3rd Cir. 2012).

Malcolm acknowledges that trial counsel failed to file a proper motion to introduce the previous videos and failed

to object to the admissibility of the videos taken on the date of the allegation. Therefore, this will be addressed further in Issue IV. (SDCL 19-19-403)

IV. THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Absent exceptional circumstances, this court will not address ineffective assistance of counsel claims on direct appeal, and it will not depart from that rule unless trial counsel was, "so ineffective" and counsel's representation was "so casual" that it represents a manifest usurpation of Malcolm's constitutional rights. State v. Dillon, 2001 SD 97. To prevail on his claim, Malcom must show that his trial counsel was ineffective and that he was prejudiced as a result. State v. Thomas, 2011 SD 15.

However, Malcolm urges this court to analyze the ineffective claim in accordance with US v. Cronic, 466 US 648 (1984) because these facts justify it. As Cronic stated, "there are, however, circumstances that are so likely to produce prejudice to the accused that the cost of litigating their effect in a particular case is unjustified." Id at 648.

The State acknowledges the following errors by trial counsel:

1. Failure to file 412 Motion (State's Brief, P. 11)

2. Failure to make multiple offers of proof (State's Brief PP. 12, 25, 26).

3. Failure to object to video evidence (State's Brief 33).

4. Failure to request jury instruction (State's Brief, P. 35).

In response to the Defendant's claims of ineffective assistance of counsel, the State makes various arguments, neglecting the fact that the cumulation of errors produced prejudice to Malcolm.

1. Motion regarding SDCL 19-19-412

The Court specifically stated on numerous occasions that evidence was not admissible due to the defense not complying with 19-19-412. The State's reply is that the evidence would not have been admissible and there is no demonstration of a probable different result, nor obvious mistake in the record, generating a manifest usurpation of Defendant's rights. As shown in Appellant's Brief, the trial court invited trial counsel to come back to court before trial and properly address the 412 Motion. The record shows trial counsel chose not to do so, instead making an offer of proof at trial, after which the Court indicated Malcolm could not argue advanced consent as a defense. The manifest usurpation of Malcolm's rights is

that this hearing was not properly held, so he had no idea what evidence he would be allowed to present at trial. Instead, trial counsel showed up for trial and told the jury in his opening statement that the defense was "pass out" sex, only to be told by the trial court that the defense would not be allowed at trial. Specifically, as the State points out, counsel told the jury the following in his opening statement: "Defendant told J.C. he was going to take a shower, and according to Defendant, J.C. told him he could have sex with her, even if she passed out, and asked him to record the intercourse." (State's Brief. P. 7).

Defense counsel's failure to address the issue before trial resulted in the trial court researching the issue of advanced consent after the trial had started. On at least three occasions, the trial court addressed the potential defense during trial. (JT 88-89, 161-62, 193-94). It wasn't until after the State had rested that the trial court indicated that it wanted to make a record because of information the trial court's law clerk had found regarding advanced consent. Ultimately the trial court ruled that Malcolm had no defense to the charges. (JT 193-94). Malcolm learned he had no defense to the charges immediately before he was supposed to put on his defense. The offer of proof trial counsel conducted during the trial should have been

made at the 412 Hearing, but counsel was not prepared for the hearing and did not have witnesses present. The result of the court's refusal to allow any testimony related to this defense was a confused and scared defendant, and an even more confused jury that was waiting to hear what was promised in counsel's opening statement.

2. Motion to Suppress Evidence

Near the end of the trial, Malcolm addressed the court and felt that his counsel was ineffective for a variety of reasons, including failing to file pretrial motions. He felt that among them would be a successful suppression motion. He did not go into detail about what type of evidence would be suppressed and who would testify at a suppression hearing. The trial court responded, "You are incorrect in your assertion." (JT. 241). The State apparently contends this constitutes an actual suppression hearing and claims, 'The court's response indicates it would have denied a motion to suppress.' (State's Brief. P. 42). Malcolm was entitled to have trial counsel file a suppression motion and to have an evidentiary hearing, one that should have been held regarding statements he made and evidence that was obtained based on those statements.

3. Motion regarding Prior Bad Acts and Prior Crimes

Malcolm alleged that his trial counsel was also ineffective for failing to file pretrial motions regarding bad acts and prior crimes, and failing to object to two different law enforcement officers telling the jury they knew Malcolm. Most telling was Detective Chad Stahl telling the jury he had been in law enforcement almost 18 years and that he'd "known Malcolm for years." (JT 64). The State attempts to excuse the conduct by claiming that trial counsel may not have known this type of evidence was related to a prior crime or bad act. Any type of pretrial motion or objection at trial would have clearly made this testimony inadmissible. Malcolm contends that the law enforcement officers' testimony was highly prejudicial, inflammatory, and obviously played a part in why he was convicted.

4. Motion for Expert Witness

The State called two experts, Dr. Al Lawrence to discuss the Glascow Coma Scale, and Dr. Kenneth Snell to discuss the autopsy. Defense counsel did not consult with, or call any experts to testify at trial, which left Malcolm unable to defend the expert testimony. An expert was needed to counter each of the State's experts.

The bottom line is trial counsel's representation was casual and ineffective. Counsel absolutely had to file

a 412 Motion and address a potential defense of advanced consent sex. The court's rulings would have played a vital role in whether Malcolm proceeded to trial and what chance he would have had at trial had he proceeded. Instead, trial counsel failed to file the 412 Motion and ignored the trial court's invitation to come back, properly prepared to argue it.

As a result of trial counsel's lack of preparation and effective representation of Malcolm, this court has grounds to address the ineffective assistance claim on direct appeal and further, grounds to find trial counsel was ineffective. There was simply no strategy involved justifying the lack of pre-trial motions and trial preparation, and it robbed Malcolm of effective assistance of counsel.

CONCLUSION

WHEREFORE, Malcolm requests that this Court reverse his convictions for 3rd Degree Rape, and remand to the trial court with instructions to strike the convictions and enter Judgments of Acquittal on all counts. In the alternative, Malcolm requests that the Judgments of Conviction be reversed and the case remanded for a new trial.

Respectfully submitted May 25, 2022.

BRATLAND LAW

BY: _____

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REQUEST FOR ORAL ARGUMENT

Defendant-Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, hereby certifies that the Appellant's Brief was duly served upon Appellee by emailing true copies thereof to the following this May 25, 2022:

SCClerkBriefs@ujs.state.sd.us

Jason.Ravnsborg@state.sd.us

atgservice@state.sd.us

RReeves@Codington.org

The undersigned further certifies that he mailed the original and two copies of Appellant's Brief to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, South Dakota 57501-50701

by United States mail, postage prepaid, May 25, 2022.

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CERTIFICATE OF COMPLIANCE

Scott R. Bratland of Bratland Law, attorney for Appellant, hereby certifies that the Appellant's Reply Brief dated May 25, 2022, complies with SDCL 15-26A-66(b) in that it contains 2194 words and 11060 characters.

Dated at Watertown, South Dakota, May 25, 2022.

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