IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 29095

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

HARRY DAVID EVANS,
Defendant and Appellant.

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

THE HONORABLE JEFFREY DAVIS

APPELLANT'S BRIEF

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I. PRELIMINARY STATEMENT

The following citations are used in this brief: Appellant, Harry David Evans, is referred to as "Evans"; Appellee, the State of South Dakota, is referred to as "the State"; witnesses are referred to by last name, except Kathy Evans is cited by full name; the jury trial transcripts are cited as "JT"; other transcripts are cited by name and date; exhibits are cited as "Exh.": documents in the settled record are cited as "SR"; and the appendix is cited as "App."

II. JURISDICTIONAL STATEMENT

Evans was indicted in circuit court on state felony charges in Custer County, South Dakota. SR 1. A jury returned guilty verdicts on multiple counts. App. 1, SR 1259. Evans was sentenced on March 21, 2019, by the trial court, SR 1015, and that sentence was reimposed on August 12, 2019. App. 1, SR 1259. The written judgment was filed on August 14, 2019. App. 1, SR 1259. Evans' Notice of Appeal was filed on August 15, 2019. SR 1267. Because the reimposed judgment of conviction is a final judgment in a criminal case from a circuit court within South Dakota, this Court has jurisdiction over Evans' appeal. SDCL 23A-32-2. Evans' Notice of Appeal was timely filed. SDCL 23A-32-15.

III. STATEMENT OF THE LEGAL ISSUES

A. Whether the trial court erred in admitting other-acts evidence?

The trial court overruled Evans' objection to the other-acts evidence.

State v. Armstrong, 2010 S.D. 94, 793 N.W.2d 6

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

State v. Lassiter, 2005 S.D. 8, 692 N.W.2d 171

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

SDCL 19-19-404

B. Whether the trial court erred in dismissing potential jurors from the venire?

The trial court *sua sponte* dismissed the potential jurors.

State v. Blem, 2000 S.D. 69, 610 N.W.2d 803

State v. Daniel, 2000 S.D. 18, 606 N.W.2d 532

State v. Darby, 1996 S.D. 127, 556 N.W.2d 311

State v. Fool Bull, 2009 S.D. 36, 766 N.W.2d 159

SDCL 23A-20-6

SDCL 23A-20-13.1

C. Whether the trial court erred in admitting evidence seized from Evans' motel room and vehicle?

The trial court denied Evans' motion to suppress.

Calvello v. Yankton Sioux Tribe, 1998 S.D. 107, 584 N.W.2d 108

State v. Cummings, 2004 S.D. 56, 679 N.W.2d 484

State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990)

U.S. Const. amend. IV

S.D. Const. art. VI § 11

D. Whether the trial court erred in admitting opinion and corroboration testimony?

The trial court overruled Evans' objection to the testimony.

State v. Packed, 2007 S.D. 75, 736 N.W.2d 851

SDCL 19-19-701

IV. STATEMENT OF THE CASE AND FACTS

A. Procedural History:

On September 22, 2017, Evans was indicted on the charges of Kidnapping in the First Degree (Count I, SDCL 22-19-1(2)), Kidnapping in the First Degree (Count IA, SDCL 22-19-1(3)), Rape in the Second Degree (Count II, SDCL 22-22-1(2)), First Degree Burglary (Count III, SDCL 22-32-1(3)), Aggravated Assault-DV (Count IV, SDCL 22-18-1.1(5)), Stalking (Count V, SDCL 22-19A-1(1) & 22-19A-2), and Violation of a Protection Order (Count VI, SDCL 25-10-3). SR 1. Evans was prosecuted by the Custer County State's Attorney's Office and the Office of the Attorney General. The Honorable Jeff W. Davis, Circuit Court Judge, presided. Appellate counsel was not trial counsel.

On February 1, 2019, the jury returned guilty verdicts on counts IA, II, III, IV, V, and VI. App. 1, SR 1259. On March 21, 2019, Evans received life without the possibility of parole on Count IA, and the maximum sentences allowed by statute on all remaining counts1, with no time suspended. SR 1015. On August 12, 2019, to address a service issue, the trial court reimposed the sentence. App. 1, SR 1259. Written judgments were issued for the initial and reimposed sentences on March 22, 2019, and August 14, 2019, respectively. SR 1015, SR 1259, App. 1. Evans appeals his

1 Count II, 50 years' imprisonment, Count III, 25 years' imprisonment, Count IV, 15 years' imprisonment; Count V, 2 years' imprisonment; and Count VI, 2 years' imprisonment.

convictions on all counts.

B. Case Overview:

In this section, Evans provides an overview of the case. Then, in the following sections, he cites facts in the record that are specific to the issue being discussed.

Evans and Shelly Benson began their relationship in 2016. MH 10/11/18 p. 38. Benson lived in Pennington County. MH 10/11/18 p. 41. Evans moved in with Benson. MH 10/11/18 p. 41. The relationship deteriorated in January and February of 2017, and Benson called law enforcement on Evans twice. MH 10/11/18 pp. 48-55. Benson alleged that Evans assaulted and confined her. JT Vol. 3, pp. 585-90. Later, Benson asked for the charges to be dismissed because Evans had just been trying to prevent her from driving drunk. JT Vol. 3, pp. 585-90.

Benson moved from Pennington County to Custer County in the summer of 2017. First, she lived in a camper at a campground, then in a house near Hermosa. JT Vol. 1, p. 57. Initially, Benson said that her relationship with Evans ended when she lived in Pennington County. JT Vol. 2, p. 168. Later, she admitted that their work and sexual relationship continued at both of her Custer County residences up to eight weeks before the alleged crimes. JT Vol. 1, pp. 55-57; JT Vol. 2, pp. 172-73, 177-80, 267.

On the morning of September 6, 2017, Benson told law enforcement that, earlier that morning, Evans had broken into her home, bound her face and body with duct tape, drugged her, dragged her from the house wrapped in a blanket, taken her by vehicle from

the residence, returned her to the residence, raped her, had her drive him to his car, which was parked nearby, then left. JT Vol. 1, pp. 111-43.

Evans' theory of defense was that he and Benson had a continuing relationship and that Benson alleged this to be a rape as an explanation for Evans' presence at her home and to cover up her allowing Evans to violate a protection order. *E.g.* JT Vol. 1, pp. 22-25. Key factual issues in the case were inconsistencies in Benson's story and Benson's failure to call law enforcement or alert others during the alleged incident.

C. Summary of Facts Related to Appeal Issues:

After the venire was sworn but prior to attorney voir dire, the trial court *sua sponte* dismissed 19 potential jurors. During attorney voir dire, the trial court dismissed an additional potential juror without notice to counsel.

During trial, Kathy Evans, Evans' ex-wife, was permitted to testify about Evans' character and two acts of domestic violence committed on her by Evans 27 years before the allegations involving Evans and Benson. And, the State was permitted to introduce evidence it had seized from Evans' motel room and vehicle on the Pine Ridge Indian Reservation that was obtained without a tribal search warrant or tribal permission. Also, the State was permitted to elicit a law enforcement officer's opinion that Benson's story was corroborated by the physical evidence.

D. Facts Related to Benson's Credibility:

At trial, Evans elicited substantial evidence that Benson's testimony was not credible and that her conduct was inconsistent with her allegations. Evans is not raising a sufficiency of the evidence claim. However, these facts are relevant to several issues

on appeal and to the strength of the State's case and, therefore, are set forth prior to the issue-by-issue discussion of facts later in this brief.

Evans did not contest that he and Benson had sex, that he was at her home on September 6th, or that a protection order was in place. Thus, much of the evidence introduced at trial (protection orders, DNA, fingerprints, ballistics) was collateral to the two main issues: (1) whether Benson's testimony was credible when she alleged that she Evans raped and kidnapped her; and (2) whether Benson's conduct and behavior was consistent with that of a person who had been raped and kidnapped or consistent with that of a person who was trying to cover up her complicity in violating a protection order.

Benson had a history of filing, then withdrawing, protection orders against men. JT Vol. 2, p. 167-68. In regard to Evans, Benson had previously alleged he assaulted and confined her, then recanted and admitted Evans was stopping her from her own driving drunk. JT Vol. 3, pp. 584-89.

During the same time frame that Benson was seeking protection orders and calling law enforcement against Evans, Benson was communicating with him, letting him stay with her, letting him store property at her residence, and having sex with him. JT Vol. 1, pp. 54-56; JT Vol. 2, p. 168, 172-73, 177-80, 210, 267. This happened at three residences in two counties over a one-year period during. JT Vol. 1, pp. 54-56; JT Vol. 2, p. 168, 172-73, 177-80, 210, 267.

Benson appeared to be hiding from the jury the extent of her continued relationship with Evans after she left Pennington County. First, she claimed the relationship ended when she lived in Pennington County. *E.g.* JT Vol. 2, p. 168. Then,

she admitted that she continued to have contact with Evans, which included having sex with him and letting him spend the night at both of her Custer County residences. JT Vol. 2, pp. 172-73, 177, 178-80, 209-10, 267. In fact, Evans was at Benson's Custer County house so frequently that her neighbor recognized Evans' truck as being there on the day of the alleged crimes. JT Vol. 3, pp. 437-39. Benson initially claimed that Evans was not permitted to have any possessions at her Custer County house, and stated that any items of his found in her home must have been snuck in by Evans. *E.g.* JT Vol. 2, pp. 177-80. Later, she admitted that she not only allowed him to have possessions at her home, but that his family had partially paid for a shed to be erected on her property to store Evans' property. *E.g.* JT Vol. 2, pp. 177-80.

Benson gave contradictory statements regarding three sexually suggestive photographs found by law enforcement on her phone that were taken on the morning of the alleged crimes. First, Benson told DCI Agent Goble that she did not take any of the photographs, that Evans did so without her knowledge. JT Vol. 4, p. 671. Eight days later, she told Goble that she took all of the pictures and sent them to a new boyfriend in Colorado. JT Vol. 4, p. 668, 673-75. At trial, she claimed that she took two of the pictures, but that Evans took the third without her knowledge. JT Vol. 2, pp. 189-95; JT Vol. 4, p. 673. Goble acknowledged that her changing versions of events, including her trial testimony, surprised him. JT Vol. 4, p. 668, 673-75.

Benson's version of the alleged attack was inconsistent with the physical evidence. Benson claimed that Evans entered her home by climbing through a window 6 feet off the ground and dropping into the bathtub adjoining her bedroom; that he stepped

over her two large dogs in the bedroom and climbed onto the bed; that he attacked her in the bed while she struggled, kicked, scratched, and punched him; that he forcibly drugged and duct taped her in the bed; and that he dragged her by her feet from the home, then forced her back into the bedroom, where she was raped on her bed. JT Vol. 2, pp. 198-204. Benson admitted that items were not disturbed in her bathroom, around the tub, or in the bedroom after the alleged attack, and law enforcement photographs taken a few hours later showed that items in her bathroom and bedroom were largely undisturbed. JT Vol. 2, pp. 198-204, 212-216. Officers who arrived on the scene did not notice substantial disarray in the bathroom or bedroom. JT Vol. 2, p. 374; JT Vol. 3, pp. 422-23; JT Vol. 3, p. 527. Benson's claim that her dogs were docile and slept through the incident, JT Vol. 2, p. 201-02, was countered by the testimony of another person who, like Evans, knew the dogs and who reported them as running around and barking when he came to Benson's home. JT Vol. 2, p. 369.

Benson's testimony as to whether she was duct taped when she and Evans left the home was contradicted by prior testimony. Benson testified that "there was still duct tape all over me" when she drove Evans to his vehicle.2 JT Vol. 2, p. 229. But Benson told the grand jury that, prior to getting into her vehicle, Evans had removed almost all of the tape from her and that she had removed the remaining "little bit" of tape by herself in the bathroom. JT Vol. 2, p. 231-32.

The biggest weakness in the State's case was Benson's conduct during and after

2 The tape issue was important to whether Benson was always under Evans' control, and whether this was consensual sex play or criminal restraint.

the alleged attack. It suggested Benson was hiding Evans' presence in her home from her neighbors and law enforcement. Multiple times during the alleged ordeal, while Evans was outside or in another room, Benson had her cellphone. JT Vol. 2, p. 244-46. And, Benson had access to her loaded handgun after she was allegedly raped while Evans was in the kitchen getting food. JT Vol. 2, pp. 241-44, 403-04; JT Vol. 3, p. 422, 583.

During the alleged crimes, while Evans was in another room or outside the home in the shed, Benson exchanged text messages and phone calls with her next-door neighbor, Kim Ellerton. 2, p. 246-47, 251; JT Vol. 3, pp. 437-38. Ellerton had texted Benson because Evans' truck – a truck she recognized – was parked on the side of the road near Benson's home. JT Vol. 3, pp. 437-439. Ellerton sent Benson a picture of the truck. JT Vol. 3, p. 437. Benson responded that she didn't recognize the truck and said someone's vehicle must have broken down. JT Vol. 3, p. 437-439. Minutes later, Ellerton and Benson spoke on the phone about a fence being down on her property. JT Vol. 3, pp. 447-49. While they were on the phone talking, Ellerton was watching Evans going in and out of Benson's shed. JT Vol. 2, p. 251-52; JT Vol. 3, p. 450; JT Vol. 4, p. 456. Though she had multiple opportunities, Benson never texted or told Ellerton she was in danger or asked for help. JT Vol. 2, p. 251; JT Vol. 3, pp. 447-450.

Benson also acted inconsistently with law enforcement. Benson spoke with Custer County Constable Marshal Daggett the night before the alleged attack. JT Vol. 2, p. 358. Daggett told Benson that he would stop by her house in the morning. JT Vol. 2, p. 358. On the morning of the alleged attack, Benson called Daggett and told him not to come by her house. JT Vol. 2, pp. 358-59. Rather than admit the behavior, Benson

adamantly denied calling Daggett on the morning of the alleged crimes. JT Vol. 2, p. 248. Daggett testified unequivocally that he and Benson spoke by phone that morning and that Benson told him not to come by her home that morning. JT Vol. 2, p. 358-59. Benson's failure to alert Ellerton, and her call to Daggett, supported Evans' theory that Benson made up the attack once it became known that she had permitted Evans over to her house again in violation of the protection order.

The conflict between Daggett's and Benson's testimony was noteworthy because even after Daggett went to Benson's home that morning, Benson did not say she had been raped. JT Vol. 2, p. 361-62. Instead, Benson merely said that Evans had been to her home. JT Vol. 2, p. 361-62. It wasn't until Daggett asked her if she had been raped that Benson made the claim. JT Vol. 2, p. 361-62.

V. AUTHORITY AND ARGUMENT

A. The Trial Court Erred in Admitting Other-acts Testimony and Refusing to Give a Limiting Instruction:

1. Preservation of Issue and Standard of Review:

Evans objected to the admission of the evidence, received adverse final rulings, and proposed a limiting instruction that was rejected by the trial court. MH 10/11/18 pp. 12-82; MH 12/27/18 pp. 74-82; MH 1/25/19 pp. 6-12. Therefore, Evans' claim is reviewed for abuse of discretion. *State v. Wright*, 1999 SD 50 ¶ 12, 593 N.W.2d 792. A trial court abuses its discretion when it misapplies a rule of evidence. *State v. Packed*, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859.

2. Legal Principles Applicable to the Admission of Other-acts Evidence:

The admission of other-acts evidence is governed by SDCL 19-19-404.

Although the statute is one of inclusion, *State v. Wright*, 1999 S.D. 50, ¶ 13, 593 N.W.2d 792, 799, there are statutory and case-law limitations for the admission of other-acts evidence.

A trial court may not admit other-acts evidence "to prove the character of a person in order to show that he acted in conformity therewith." SDCL 19–19–404(b)(1). And, other-acts evidence must be factually and legally relevant to be admitted. *State v. Armstrong*, 2010 S.D. 94, 793 N.W.2d 6.3

Factual relevance is whether the intended purpose of the evidence is relevant to a material issue other than character. *Armstrong, supra* at ¶ 12. Other-acts evidence is factually irrelevant if "offered for the sole purpose of establishing a propensity to commit a crime[.]" *Armstrong, supra* at ¶ 13 (internal quotations and citations omitted). "It is a settled and fundamental principle that persons charged with crimes must be tried for what they allegedly did, not for who they are." *State v. Armstrong*, 2010 S.D. 94, ¶ 10, 793 N.W.2d 6, 10 (citations omitted). The evidence must be relevant to "some point genuinely in issue in the case." *Id.* "Much more is demanded than the mere repeated commission of crimes of the same class." *Id.*

Legal relevance addresses whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *Id.* "Evidence is unduly prejudicial if it persuades the jury in an unfair or illegitimate manner[.]" *State v. Thomas*, 2019 S.D. 1, ¶ 22, 922 N.W.2d 9, 15. When assessing unfair prejudice, courts may consider the

3 The second prong is sometimes described as logical relevancy. *State v. Stone*, 2019 S.D. 18, ¶ 24, 925 N.W.2d 488, 497, *reh'g denied* (Apr. 16, 2019).

factors in SDCL 19-19-403, such as confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *State v. Huber*, 2010 S.D. 63, ¶ 59, 789 N.W.2d 283, 302. Also, the admission of remote or dissimilar acts may create unfair prejudice.

"The remoteness and similarity of the prior act to the charged offense are significant factors in balancing probative value and prejudicial effect." *State v. Armstrong*, 2010 S.D. 94, ¶ 16, 793 N.W.2d 6, 12 (citations omitted). Remoteness and similarity are closely related. "Strikingly similar" prior acts may be remote in time and still be considered legally relevant, whereas less-similar circumstances need to be closer in time to be considered relevant. *Id.*

When considering whether acts are similar, the court must assess whether the similarities pertain to a material issue: "Prior bad act evidence is not admissible simply because it shows conduct similar to the charged offense. The question is whether the prior bad act relates to a point genuinely in issue." *State v. Fisher*, 2010 S.D. 44, ¶ 24, 783 N.W.2d 664, 672 (other acts inadmissible due to 14-year gap, acts involved a different victim, and acts were not sufficiently similar on a material point).

Motive may be a permissible basis for admitting a prior act under SDCL 19-19-404(b). This Court has specifically addressed the admission of prior acts of domestic violence to prove motive.

In *State v. Lassiter*, 2005 S.D. 8, ¶¶ 21-25, 692 N.W.2d 171, 177–79, Lassiter was charged with assaulting a man in retaliation for his dating Lassiter's ex-girlfriend, Tobin. At trial, the court allowed the State to admit evidence from Beckman, Lassiter's prior ex-

girlfriend. Beckman testified that Lassiter became assaultive when she ended her relationship with him. The trial court admitted the evidence to show motive: that Lassiter responds violently when women terminate romantic relationships with him. *Id.*

In reversing Lassiter's conviction, the Court noted that a prior act may help establish a defendant's motive to commit a crime in one of two ways. *Id.* at ¶ 21. First, the prior act can supply a motive for the charged act, such as if the past act creates the motive for committing the present crime. *Id.* That theory was inapplicable to Lassiter's case because "there was no relationship between the two offenses or the two victims." *Id.*

Second, "the uncharged act evidences the existence of a motive, but the act does not supply the motive." *Id.* at ¶ 22. This typically applies where "the motive is in the nature of hostility, antipathy, hatred, or jealousy." *Id.* (citation omitted). This kind of motive evidence is admissible only if there is "some relationship between all the victims." *Id.* It is impermissible to admit other acts involving a different victim because the other-act evidence would "show only the defendant's general violent nature." *Id.* The Court in *Lassiter* cited to numerous state and federal cases for support. *Id.*

Lassiter expressly rejected the theory of admissibility put forth by the State in that case: that the defendant's resentment for being jilted by the two women was his motive for committing the assaults. *Id.* at ¶ 23. The Court held that this theory was improper in that it "only tended to prove that because defendant had done it before, he must have done it again." *Id.* This was the kind of character and propensity evidence that legal commentators warned against: "Evidence of other crimes cannot be used to prove

conduct through an inference about the defendant's character, i.e., a general propensity to commit assaults when rejected by girlfriends." *Id.* at ¶ 24.

Lassiter was affirmed by *State v. Phillips*, 2018 S.D. 2, ¶¶ 16-18, 906 N.W.2d 411, 415–16. *Phillips* noted the substantial distinction between admitting prior acts of domestic violence against the same victim and admitting prior acts involving different victims: "Prior instances of domestic abuse against the same victim are often relevant in the familial context because they show the nature of the relationship, which explains the interactions between the parties." *Id.* at ¶ 16. The Court distinguished the facts of that case, where prior acts regarding the same victim were admitted, and the facts of *Lassiter*, which involved different victims. *Id.* at ¶ 18.

Similarly, in *State v. Laible*, 1999 S.D. 58, ¶ 21, 594 N.W.2d 328, 335, the Court noted that "[p]rior acts of violence by the same defendant against the same victim may be admissible because an accused's past conduct in a familial context tends to explain later interactions between the same persons." *Id.* (citations omitted). It did not extend this rationale to cases involving unrelated victims.

3. Facts Related to the Admission of Kathy Evans' Testimony:

Evans and Kathy Evans were married in 1987, had children, separated in 1992, and divorced in 1998. MH 10/11/18 pp. 4-6. During their separation, Kathy Evans reported several instances of domestic violence by Evans. MH 1011/18 pp. 12-19. The State provided notice that it intended to offer this evidence at trial against Evans. SR 116.

Kathy Evans alleged that, in 1993, after she and Evans had separated, he entered her home with a rifle during the night while she was sleeping, woke her up, made her

disrobe, physically assaulted her, and tried unsuccessfully to persuade her to have sex with him. MH 10/11/18 pp. 17-19. A year later, in 1994, after Kathy Evans had received a protection order against Evans, Evans showed up during one of their children's school Christmas program. MH 10/11/18 pp. 12-13. After the program, Kathy Evans found a mounted deer head in the back seat of her car and discovered that a family picture in the car had been replaced with some bullets. MH 10/11/18 pp. 12-13. Upon returning home the next morning, Kathy Evans found Evans' vehicle parked at her residence. MH 10/11/18. The police entered the house and found Evans locked in Kathy Evans' bedroom, with a rifle, in medical distress after a suicide attempt. MH 10/11/18 pp. 13-15.

Evans objected to Kathy Evans' testimony and cited *Lassiter*. The trial court agreed that *Lassiter* was the controlling case on point. MH 12/27/18 p. 79. However, the trial court held that the State could introduce evidence of the 1993 and 1994 incidents. MH 12/27/18 p. 81. And, the court allowed Kathy Evans to testify as to "how Mr. Evans behaves at a given point in his life when relationships change." MH 1/25/19 p. 4.

The trial court summarily rejected Evans' remoteness argument: it held that the 27 year gap between the alleged acts didn't make a difference "in these sorts of events." MH 12/27/18 p. 80. The trial court conceded that Kathy Evans' testimony went "strictly, I think, to an individual's character." MH 12/27/18 p. 81. But, the trial court held that the evidence was admissible to show motive: that Evans committed acts of violence when he is about to be jilted. MH 12/27/18 p. 81, MH 1/25/19 p. 4 (evidence admissible to show how Evans "tends to react" and "behaves" when his romantic

relationships are "about to be terminated.").

In response, Evans proposed limiting instruction that he asked to be read "to the jury shortly before Ms. Kathy Evans testifies." MH 1/25/19 p. 6. The trial court said it would not give preliminary or limiting instructions on the issue:

> It's generally not my practice – I don't give preliminary instructions to the jury in any way, shape or form, and it's generally not my practice to instruct the jury during the trial as to what the law is. It would certainly be presented to them in the jury packet at the conclusion of the trial, if appropriate, and they're directed that they have to follow all of the instructions and they determine the facts. So within those parameters submit all your instructions and we'll get them sorted out.

MH 1/25/19 pp. 6-7.4

The State referenced Kathy Evans' other-acts evidence during opening statements. JT Vol. 1, p. 16. Then, the State called her as its final witness.

Kathy Evans testified as to Evans' bad character. She said he bounced from job to job and "had no real sense of responsibility towards the family," JT Vol. 4, pp. 813-14; that she supported the family because he would keep his paychecks to himself, JT Vol. 4, p. 814; and that Evans was critical of her, uncooperative, irresponsible toward the family, argumentative, and sarcastic. JT Vol. 4, pp. 815-16.

Kathy Evans also testified about the 1993 and 1994 domestic violence instances. She testified that in February of 1993, Evans came through the door of her bedroom brandishing a firearm and marched her into the living room. JT Vol. 4, pp. 816-17. Once in the living room, he shoved her, put her in a headlock, and put a pillow over her face. JT Vol. 4, pp. 817-18. He then required her to disrobe and threatened to force

4 An other-acts-evidence instruction was given at the close of the evidence. SR 644.

her to have sex with him. JT Vol. 818-19.

Kathy Evans also testified that in 1994 Evans came to a school program in violation of a protection order. JT Vol. 4, p. 822. After the program, she found a mounted deer head in the back seat of her car and ammunition on the dashboard. JT Vol. 4, pp. 825, 831. The next day, when she returned to her house, Kathy Evans saw Evans' truck at her house. JT Vol. 4, p. 826. Law enforcement was called, and Evans was found unconscious from a drug overdose in Kathy Evans' bedroom, armed with a rifle. JT Vol. 4, pp. 828-30. In Evans' truck was Kathy Evans' mail. JT Vol. 4, pp. 831-32.

4. The Trial Court Abused its Discretion in Admitting this Evidence:

Kathy Evans' other-acts and character testimony should not have been admitted. This evidence irreparably prejudiced Evans.

a. The trial court failed to consider remoteness and dissimilarity.

Without citing authority, the trial court held that the 27-year gap between alleged events didn't matter in domestic violence cases. MH 12/27/18 p. 80. That determination is contrary to case law, which holds that the remoteness inquiry is an integral part of the legal relevancy prong of the other-acts balancing test, and that overly remote conduct may cause undue prejudice. *E.g. State v. Armstrong*, 2010 S.D. 94, 793 N.W.2d 6.

The trial court did not take in to account the substantial differences between the allegations: The two cases involved different alleged victims; Evans was married and had children with Kathy Evans, whereas he and Benson had a short-term relationship; Kathy Evans alleged Evans didn't want to spend time with her or the children and moved

out of the marital residence, whereas Benson said Evans was possessive, wanted to live with her, and wanted to buy real estate together; Kathy Evans said that, at the time of the events, their only connection was the children, whereas Benson said she and Evans had an ongoing work/sex relationship; and Kathy Evans never claimed to have been taped, drugged, raped or removed from the house, but Benson alleged all of these things.

The similarities between the allegations did not pertain to a material issue in dispute. In Evans' trial, the issue was consent. It was never alleged that Evans claimed his conduct toward Kathy Evans in 1993 or 1994 was consensual. And nothing alleged about 1993 or 1994 went to whether Benson consented to sex with Evans in 2017.

b. The trial court admitted the evidence on impermissible grounds.

The trial court candidly acknowledged it was admitting character and propensity evidence. The trial court said that Kathy Evans' testimony went "strictly" to Evans' character. MH 12/27/18 p. 81. The trial court was correct: Kathy Evans' testimony was offered to show that Evans was a wife-beater, a bad father, mentally and verbally abusive, and one who didn't prioritize his family. Other-acts evidence is not admissible "to prove the character of a person in order to show that he acted in conformity therewith." SDCL 19–19–404(b)(1).

In addition, the trial court tacitly acknowledged that Kathy Evans' testimony was propensity evidence. The trial court said her testimony showed how Evans "tends to react" and "behaves" when "relationships change" or when a romantic relationship "was about to be terminated." MH 12/27/18 p. 81, MH 1/25/19 p. 4. Propensity and

tendency are synonymous.[5] Her testimony established for the jury Evans' propensity to act violently when jilted. Propensity evidence like this is factually irrelevant and inadmissible. *Armstrong,* 2010 S.D. 94, at ¶ 13.

The facts in Evans' case are closely aligned with those in *Lassiter*. The only theory of admissibility available to the trial court was that the acts against Kathy Evans evidenced the existence of a motive but did not supply the motive. *Lassiter, supra,* at ¶ 22. That theory did not apply because there was no relationship between the alleged victims. *Id.*

c. The prejudice to Evans from the trial court's error warrants reversal of his conviction.

The prejudice to Evans by the admission of Kathy Evans' testimony was overwhelming and irreparable. Kathy Evans was the last witness heard by the jury. She gave graphic testimony of Evans' assaults, mistreatment of his children, abandonment of his family responsibilities, and psychologically disturbing conduct, such as leaving a deer head in her car. As in *Lassiter,* the jury was presented with overwhelming evidence of "the defendant's general violent nature" and was left to conclude that "because defendant had done it before, he must have done it again." *Lassiter, supra* at ¶ 22-23. Kathy Evans' testimony was the kind of "propensity to commit assaults when rejected by girlfriends" evidence that was rejected in *Lassiter*. *Id.* at ¶ 24. Admitting this evidence shifted the burden from the State having to prove

5 Dictionary.com defines propensity as a natural inclination or tendency; Thesaurus.com lists propensity and tendency as synonyms; Merriam-Webster.com lists the two terms as synonyms.

Evans guilty, to Evans having to prove that he didn't do it again.

Compounding the prejudice was the trial court's rejection of Evan's request for a limiting instruction before Kathy testified. The court gave no reason for rejecting the proposal. This Court has repeatedly identified the use of a limiting instruction as an appropriate mechanism to address potential misuse of other-acts evidence by jurors. *E.g. State v. Medicine Eagle,* 2013 S.D. 60, ¶ 23, 835 N.W.2d 886, 895.

Even if a limiting instruction had been given, it would not have been sufficient to cure the prejudice caused by Kathy Evans' testimony. In *Lassiter,* the trial court gave a limiting instruction, but this Court held that the prejudice caused by admitting evidence of a defendant's propensity to act violently when jilted was so substantial that reversal of the conviction was warranted. *See Lassiter, 2005 S.D. 8,* ¶ 10.

B. The Trial Court Erred in Dismissing Prospective Jurors:

1. Preservation of Issue and Standard of Review:

Evans alleges that the trial court's procedures during voir dire were erroneous. Trial counsel did not object to these procedures. Notwithstanding the lack of objection, the abuse of discretion standard of review applies. *State v. Daniel,* 2000 S.D. 18, ¶¶ 10-12, 606 N.W.2d 532 (applying abuse of discretion standard when reviewing trial court errors in voir dire procedures even when defendant did not object); *State v. Fool Bull,* 2009 S.D. 36, ¶ 41, 766 N.W.2d 159, 168 (Court "reviews a claimed error in the trial court's voir dire procedure under the abuse of discretion standard.").

2. Legal Principles Applicable to Voir Dire Procedures:

In criminal cases, the way voir dire is conducted, and the roles of the various actors, is tightly regulated by statute. *See* SDCL Ch. 23A-19 & 23A-20. These procedures are intended to eliminate "the vagaries of human subjectivity and arbitrariness from the jury selection process." *State v. Blem*, 2000 S.D. 69, ¶ 29, 610 N.W.2d 803, 810.

a. The parties, not the trial court, should conduct voir dire.

The parties, not the trial court, are primarily responsible for conducting voir dire. SDCL 23A-20-6; *State v. Daniel*, 2000 S.D. 18, ¶ 11, 606 N.W.2d 532, 534 ("In South Dakota, voir dire examination of the prospective jurors is largely reserved to the parties' attorneys."). The trial court may only conduct a "general examination," SDCL 23A-20-6, which is limited by the right of the parties to have an impartial jury. *Daniel*, *supra* at ¶ 11. This examination should not delve into the specifics of the case or potential jurors' attitudes about the case. *Id.* at ¶¶ 10-12.

Attorney-directed voir dire is meant "to enable *counsel* to determine whether any prospective jurors are possessed of beliefs which would cause them to be biased in such a manner as to prevent his client from obtaining a fair and impartial trial." *State v. Fool Bull*, 2009 S.D. 36, ¶ 44, 766 N.W.2d 159, 169 (internal quotations and citations omitted) (emphasis added). The information obtained during voir dire should give the defendant information from which he or she can make a "reasonably knowledgeable exercise of the right to challenge." *State v. Fool Bull*, 2009 S.D. 36, ¶ 41, 766 N.W.2d 159, 168. When a trial court's voir dire process fails to provide counsel with this information, it abuses its discretion. *Id.*

b. Only the parties can challenge a potential juror for cause, and the trial court's role is to impartially try the challenge.

By statute, only the parties can move for removal of a prospective juror for cause. *Compare* SDCL 23A-20-9 *with* SDCL 23A-20-29. Only after voir dire is completed does a trial court get the authority to remove jurors for cause, and then only for substantial reasons. SDCL 23A-20-29.

Only the State or the defendant may challenge a potential juror for cause. SDCL 23A-20-9. SDCL 23A-20-10 defines the order for making challenges, and limits that process to the parties, not the trial court. The trial court's role is to be an impartial magistrate and to conduct a trial on challenges for cause after the parties have conducted voir dire. SDCL 23A-20-16. The trial court's "[d]etermination of a juror's qualifications must be based upon the whole voir dire examination; single isolated responses are not determinative." *State v. Darby*, 1996 S.D. 127, ¶ 34, 556 N.W.2d 311, 320. The rules of evidence apply to these trials on challenges for cause. SDCL 23A-20-17.

c. There are a limited number of grounds for challenging a potential juror, and these are narrowly defined by statute.

The grounds upon which a challenge for cause may be made are detailed in SDCL 23A-20-13.1. The statute sets forth 21 grounds for challenging a juror and, by its plain language, is exclusive. There is no "catch-all" provision allowing prospective jurors to be excused on general, vague, or ill-defined grounds.

Most of the grounds for removal are based on objectively determinable facts that

relate to the prospective juror's relationships with the parties, past jury experience, or past or present involvement in the case being tried. SDCL 23A-20-13.1 (1) – (10), (13)-(20). The remaining grounds for removal relate to the prospective juror's opinions about the case based on prior knowledge of the facts, SDCL 23A-20-13.1(11), state of mind for or against one of the attorneys or parties, SDCL 23A-20-13.1 (12), or the existence of actual bias such that the juror cannot try the case impartially, SDCL 23A-20-13.1(21).

Physical limitations are not, by themselves, grounds for removal. If a person is disabled, accommodations must be offered to assist that potential juror to serve. *See* Americans with Disabilities Act of 1990, PL 101-336, 42 U.S.C. § 12101 *et. seq; Jurors With Disabilities,* Nation Center for State Courts, Smith & Hurley (2018).

A prospective juror's opinion about the case or a party is not sufficient by itself for removal. It is only if a potential juror cannot "set aside preconceptions and render an impartial verdict" that an opinion should result in removal. *Darby, supra* at ¶ 34.

When assessing impartiality, the record must show that the juror understands the state's burden of proof, the defendant's presumption of innocence, and that a jury's determination of guilt must be based solely on the evidence and testimony introduced at trial. *State v. Darby*, 1996 S.D. 127, ¶ 43, 556 N.W.2d 311, 322. It follows that, prior to removal for cause, the trial court should determine that the potential juror's bias prevents him or her from accepting one or more of these propositions.

Similarly, prior knowledge of the facts -- even a "high degree of familiarity" -- by itself, is not sufficient for a potential juror to be removed. *State v. Owens*, 2002 S.D. 42, ¶ 19, 643 N.W.2d 735, 744. The potential juror must have knowledge of the material

facts and "an *unqualified* opinion or belief as to the merits of the case." *Owens, supra* at ¶ 19 (emphasis in original).

d. Violations of these procedures create structural error.

Substantial deviations from the jury selection statutes create structural error, and this requires reversal of a conviction regardless of whether prejudice is established. *State v. Blem*, 2000 S.D. 69, ¶¶ 22-30, 610 N.W.2d 803, 808–10 (a "substantial failure to comply with jury selection statutes is a structural error because it affects the framework within which the trial proceeds, rather than simply an error in the trial process itself."). In *Blem*, the trial court's dismissal of two potential jurors prior to attorney voir dire was structural error. *Id.* at ¶¶ 24-25.

In *Blem*, the Court relied upon *State v. LaMere*, 2000 Mont. 45, 2 P.3d 204, to identify the four factors that make jury selection errors structural: The error occurs before evidence is presented; the error cannot be quantitatively weighed against the evidence introduced at trial; the error affects the framework within which the trial proceeds; and, because the impartiality of the jury goes to the integrity of the justice system and the right to an impartial jury is so essential to the concept of a fair trial, these errors cannot be considered harmless. *Id.* at ¶ 28. Compliance with the statutory process is essential to eliminate "subjectivity and arbitrariness" from the jury selection process. *Id.* at ¶ 29 (citation and quotation omitted).

3. Facts Related to Removal of Potential Jurors in Evans' Case:

On the first morning of trial, the trial court introduced itself to the venire, administered the oath, and told the venire the defendant's name, what he was charged with, and how long the trial was expected to last. JT Vol. 1, pp. 3-10. The venire was not advised of the State's burden, the presumption of innocence, or that the jury's duty was to decide the case only on the evidence presented. JT Vol. 1, pp. 3-10.

The trial court then invited individual potential jurors to discuss any "red flags" with the court in chambers. JT Vol. 1, pp. 9-10; Voir Dire Tr. p. 3.[6] Twenty-two potential jurors came back to chambers.

Once in chambers, potential jurors were asked to discuss their "concerns."[7] Jury Trial/Voir Dire pp. 3-25. During this in-chambers conference, the trial court dismissed, on its own motion, 19 potential jurors. Jury Trial/Voir Dire. Tr. pp. 3-25. Neither party moved for dismissal of any of the potential jurors, and counsel was not asked whether it approved of the trial court's dismissals.[8] Jury Trial/Voir Dire. Tr. pp. 3-25.

The colloquies between the court and the potential jurors were perfunctory, and jurors were often dismissed after giving vague or ambiguous explanations as to their

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6 The transcripts may be confusing to follow on this issue. One transcript is titled "Jury Trial/Voir Dire." It begins with the in-chambers conference where more than 20 jurors were excused. Jury Trial/Voir Dire Tr. pp. 3-25. The transcript then records the attorneys' voir dire. The next transcript, which is titled "Jury Trial Vol. 1," begins with the trial court's introduction to voir dire, ceases at the point the in-chambers conference begins, then resumes at the venire strike down and opening statements.

7 Not all of them wanted to get off the case, and some asked to remain in the venire despite concerns or issues. Jury Trial/Voir Dire pp. 6-7, 11-12.

8 In one instance, defense counsel asked permission to ask a follow-up question, which was granted. Voir Dire Tr. p. 15. Ironically, this prospective juror was allowed to stay in the venire by the trial court even though he reported being good friends with, and having learned details about the case from, one of the State's key witnesses, Kim Ellerton. Jury Trial/Voir Dire Tr. pp. 15-16.

situation. Jury Trial/Voir Dire Tr. pp. 3-25. None stated a reason that would constitute a basis to be automatically removed for cause, and none were offered accommodations for health, family, or work related issues. Jury Trial/Voir Dire Tr. pp. 3-25. There was little inquiry into whether potential jurors had unqualified opinions as to the merits, whether they could set aside preconceptions, or whether they could follow the court's instructions regarding the State's burden, the presumption of innocence, or the role of jurors to decide the case on the evidence. Jury Trial/Voir Dire Tr. pp. 3-25.

The following is a summary of the 19 potential jurors removed by the trial court during the in-chambers conference:[9] (1) S.G. stated he was a psychologist who worked with survivors of domestic violence, had domestic violence and rape in his family, and that it might be "a little bit" hard to be fair and impartial, p. 4; L.N. stated he might run out of bottled oxygen during the trial and his oxygen concentrator was noisy, p. 5; D.R. stated that he "knew the party involved and I've worked for his mother off and on in the past," pp. 5-6; A.B. stated she was a survivor (presumably of sexual assault, but this is never clarified) and that she didn't think she'd be a fair and impartial juror, pp. 7-8; M.S. stated he recently had been diagnosed with cancer and had a doctor's appointment on the last day scheduled for the trial, p. 8; R.M. stated "I'm familiar with Mr. Evans' family. I've had dealings with Evans Post & Pole of Pringle (Evans' family's business)," p. 8; M.B. stated that she had a close friend die that week and that she had been raped, pp. 9-10; M.M. stated he had been having "a little bladder problem," p. 10; A.S. stated that she had a "past history of a similar incidence" and didn't feel she could be fair, p. 12; K.M.

9 All page references are to the Jury Trial/Voir Dire transcript.

stated she had "an issue with anything dealing with sexual rapes, abuse" based on personal experience, pp. 12-13; J.S. stated her husband needed a ride to Rapid City for doctors' appointments related to a knee surgery during the week of the trial, p. 13; C.A. had plans for a family vacation that week, p. 17; T.C. had plans to compete in some events at the stock show during the week of the trial and didn't have a hired hand to work his ranch, pp. 17-18; C.F. stated she had a hearing impediment and had work obligations to shovel snow for the City of Hermosa, p. 19; S.K. stated she knew Evans and his ex-wife and didn't think she could be fair, pp. 19-20; M.B. stated he had a history leading him to have a preconceived judgment regarding rape cases, pp. 20-21; E.C. stated, without any elaboration, "I just don't think I can give a fair judgment at this point in time because of the events that have taken place in my life over the last three or four days," pp. 21-22; M.G. stated he didn't know if he could be fair because he had a younger sister who had been raped, p. 22; and K.H. was excused without further inquiry because she was "a little bit uncomfortable with the case just because 20 years ago I was involved with a high-profile case," p. 23.

After the in-chambers conference was over, attorney-directed voir dire began. During a recess in voir dire, the trial court judge excused another prospective juror, K.B. Jury Trial/Voir Dire Tr. p. 86. The trial court's interaction with K.B. was not recorded. Voir Dire Tr. p. 86. The trial court later stated that K.B. was a diabetic, "having issues," and the trial court "just took it upon myself at the moment to excuse her[.]" Jury Trial/Voir Dire Tr. p. 133.

4. The Trial Court Committed Structural Error:

The trial court judge substantially deviated from the procedures set forth in statute for selecting a jury. The trial court's errors include: (1) not letting the parties direct the examination of the potential jurors, SDCL 23A-20-6; (2) exceeding the permissible scope of its general examination, SDCL 23A-20-6, *Daniel, supra*; (3) not letting counsel explore potential jurors' beliefs, opinions, and biases before dismissing them, *Fool Bull, supra*; (4) not eliciting, during its questioning of the potential jurors, information that counsel could use to reasonably assess impartiality or bias, *Fool Bull, supra*; (5) dismissing potential jurors for cause on its own motion during the voir dire process without statutory authority, SDCL 23A-20-9/29; (6) dismissing potential jurors on grounds not amounting to the kinds permitted by statute in instances where voir dire has been concluded, SDCL 23A-20-29; (7) dismissing potential jurors for suspected bias without determining whether the potential juror could set aside his or her preconceptions, SDCL 23A-20-13.1 *Darby, supra;* (8) removing potential jurors based on single, isolated responses rather than the voir dire as a whole, *Darby, supra;* (9) dismissing potential jurors without ascertaining whether they understood the State's burden, the defendant's presumption, or the jury's duty to render a verdict solely on the evidence, *Darby, supra;* (10) removing potential jurors based on alleged knowledge of the case without determining whether they had an unqualified opinion as to guilt based on that, SDCL 23A-20-13.1, *Owens, supra;* (11) not conducting a hearing as directed by statute on the issue of whether a particular challenged juror met the standards for removal, SDCL 23A-20-14/15/16/17/18; (12) not making sufficient accommodations or exploring options for disabled jurors; and (13) not limiting removal for cause to the statutory grounds listed in

SDCL 23A-20-13.1.

The trial court's approach to dismissing prospective jurors interjected the subjectivity and arbitrariness that the statutory scheme was designed to eliminate. *State v. Blem*, 2000 S.D. 69, ¶¶ 29, 610 N.W.2d 803, 810. A number of prospective jurors were summarily excused after expressing some qualms about the subject matter or some vague familiarity with Evans or his family. Some gave inconsistent statements, such as the juror who wanted to be excused to attend some rodeo events but also claimed he needed to be excused to tend to his ranch, yet didn't explain how he would tend to the ranch if at the rodeo.

The trial court's arbitrariness was clearly demonstrated during its discussion with potential juror P.T. P.T. was "good friends" with Benson's next-door neighbors, Kim and Brian Ellerton, and knew "a fair amount of details" about the case from them. Jury Trial/Voir Dire Tr. pp. 15-16.10 Kim Ellerton was on the State's witness list, was called by the State at trial, and was an eyewitness to an important event. JT Vol. 3, pp. 434-458. Though the trial court had previously dismissed prospective jurors on lesser grounds, such as having a past business relationship with Evans' family's business, or a family connection to someone who had been raped, the trial court did not remove P.T., notwithstanding his familiarity with the case and one of the State's witnesses. Jury Trial/Voir Dire pp. 15-16.

In total, 20 potential jurors were removed by the trial court without regard to the

10 Defense counsel asked the trial court for permission to question this prospective juror, which was granted. This is the one instance during the conference when this happened.

statutes that govern the process and which reduce subjectivity and arbitrariness. This error was structural. It attacked the foundation of the jury trial system and diminished the integrity of the process. The trial court's examination of potential jurors paid no deference to the grounds for removal set forth under SDCL 23A-20-13.1 and disregarded the role of counsel in voir dire. Instead, the trial court substituted its assessment of who should be removed, rather than following the direction given to courts by the legislature. Accordingly, Evans' conviction should be vacated.

C. The Trial Court Erred in Denying Evans' Motion to Suppress:

1. Preservation of Issue and Standard of Review:

The federal and state constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; S.D. Const. art. VI § 11. Evans moved to suppress evidence obtained from his vehicle and motel room based on these rights. SR 126. A hearing was held, MH Tr. 12/27/18, the trial court denied the motion, MH 1/25/19 pp. 8-10, and Evans' standing objection was noted. MH 1/25/19 p. 11.

The trial court's factual findings are reviewed for clear error. *State v. Rolfe*, 2018 S.D. 86, ¶ 10, 921 N.W.2d 706, 709–10 (citations omitted). Once the facts have been determined, this Court gives no deference to the trial court's application of a legal standard to those facts, and all questions of law are reviewed *de novo. Id.*

2. Facts Related to the Seizure of Evidence from the Motel Room and Evans' Vehicle:

After Benson reported the alleged rape, multiple state law enforcement agencies

were involved in collecting evidence. No federal authorities were involved in the case.

DCI Agent Robert Palmer was asked by DCI Agent Brett Garland to write a search warrant for Benson's residence in Custer County. MH 12/27/18 p. 8. Palmer requested a search warrant from the circuit court in Custer County, and this warrant was granted and executed. MH 12/27/18 pp. 9-10 & MH Exh. 2. Neither Evans nor his vehicle was located at Benson's residence.

On September 7, 2017, Palmer received information that Evans might be on the Pine Ridge Indian Reservation. MH 12/27/18 p. 12. By this time, Custer County had issued an arrest warrant for Evans. MH 12/27/18 p. 12 & MH Exh. 3. Palmer orally received permission to travel onto the reservation from Oglala Lakota County Sheriff and an officer from the Oglala Sioux Tribe's police department. MH 12/27/18 pp. 13-14. DCI did not ask for or receive tribal permission to seize Evans or his vehicle, or to search Evans, his vehicle, or any place on the reservation.

Palmer and DCI Agent Goble traveled to the Prairie Wind Casino on the Pine Ridge Indian Reservation and located Evans' vehicle. MH 12/27/18 pp. 13-17. They made contact with law enforcement officers from the Oglala Sioux Tribe (OST) and the Oglala Lakota County Sheriff's Office (OLCSO). MH 12/27/18 p. 17. Investigation led them to believe Evans was in room 105 at the casino's motel. MH 12/27/18 p. 18-19.

Surveillance of the room suggested that the man in room 105 was not moving. MH 12/27/18 p. 21. Based on information that Evans had previously made a suicide attempt when confronted by law enforcement, MH 12/27/18 p. 23, OST officers, Palmer,

Goble, and OLCSO agents entered the motel room. MH 12/27/18 p. 24. The man in the room was Evans, and he was initially unresponsive and later showed signs of impairment. MH 12/27/18 p. 25. An empty Ambien pill bottle with Benson's name on it was found in the room by an OST officer. MH 12/27/18 p. 25. Evans was placed under arrest by the OLCSO on the Custer County arrest warrant. MH 12/27/18 p. 27. Evans was transported by ambulance to the Fall River County Hospital. MH 12/27/18 p. 26-27. The motel room was secured. MH 12/27/18 p. 28.

After Evans was removed, Palmer and Goble seized Evans' vehicle, moved it off tribal land, and transported it to Hermosa. MH 12/27/18 p. 29, 48. The sole purpose of seizing and transporting the vehicle was to search it if a warrant was obtained. JT Vol. 3, p. 633 ("The car had been towed away to the Hermosa substation to be searched the following day[.]"). Prior to its being seized and removed, Evans' vehicle was parked at the casino and had been sealed with evidence tape. JT Vol. 3, p. 633. There was no evidence that it was parked illegally, that casino or tribal authorities asked for it to be removed, that any attempt was made to seek a tribal search warrant, or that there was any other purpose for removing the vehicle than to search it on state land.

Palmer, Goble, and Garland then prepared search warrants for Oglala Lakota County to search the motel room and Evans' vehicle. MH 12/27/18 p. 30. At this juncture, the vehicle was in Custer County and Evans was in Fall River County. MH 12/27/18 pp. 28-30.

Palmer, Goble and Garland acknowledged their lack of certainty as to whether they had authority to search these places, or whether they could search them pursuant to a

state-court-issued search warrant. *E.g.* MH 12/27/18 p. 30-31. Garland made contact with Assistant United States State's Attorney Megan Poppen regarding his jurisdictional questions. MH 12/27/18 p. 30-31. Poppen told him that no federal crime had occurred, neither the victim nor the defendant were tribal members, and, if a state crime had occurred, it didn't occur on federal land. MH 12/27/18 p. 33, 67. She did not provide assistance in drafting a warrant. MH 12/27/18 p. 33, 67. DCI went to a state circuit court judge for Oglala Lakota County and obtained a search warrant for the room and vehicle. MH 12/27/18 p. 32 and MH Exh. 4.

Pursuant to the search warrant, room 105 was searched. Palmer and Garland seized a number of items, including a cellphone, Gatorade bottle, chewing tobacco tin, and a prescription bottle that had Benson's name on it. MH 12/27/18 p. 36. Palmer acknowledged that the search and seizure were conducted under the authority of the state search warrant, not on a tribal warrant. MH 12/27/18 p. 50-51. Palmer and Garland then searched Evans' truck. They seized a number of items of evidentiary value, including ammunition, gloves, Evans' diaries, and duct tape. MH 12/27/18 p. 38.

In response to Evans' motion to suppress, and to legitimize his conduct on the Pine Ridge Indian Reservation, Palmer testified that he was part of the Northern Plains Safe Trails Drug Task Force [hereinafter "Task Force"]. MH 12/27/18 p. 6. The Task Force is an FBI task force that primarily investigates drug crimes on Indian reservations. MH 12/27/18 p. 6.

Palmer claimed that his Task Force membership allowed him to operate on Indian reservations. MH 12/27/18 p. 6. He also claimed that he had a Special Deputation Oath

of Office authorizing him to make arrests on reservations. MH 12/27/18 p. 6. Palmer strongly implied to the trial court that his work on the Evans case was pursuant to that deputation. MH 12/27/18 p. 8.

During cross-examination it became clear that Palmer overstated and misrepresented the facts regarding his authority to work on Evans' case on Pine Ridge under the authority of either the Task Force or Special Deputation. Palmer admitted: (1) that his deputation was limited to monitoring Title III intercepts and to seeking and executing Title 18 (of the United States Code) arrest and search warrants under the supervision of the United States Marshals Service, MH 12/27/18 pp. 39-40 and MH Exh. 1; (2) the deputation stated that he was not otherwise authorized to participate in federal investigations unless deputized by the FBI or DEA, MH 12/27/18 pp. 39-40 and MH Exh. 1; (3) his work on the Evans case was not authorized or conducted pursuant to his deputation or his work on the Task Force, MH 12/27/18 p. 39-40; (4) his work on the Evans case was not a Title III intercept case, not a Title 18 investigation, and that no one from the U.S. Marshals Service authorized him to travel to the Pine Ridge Reservation pursuant to Evans' case, MH 12/27/18 p. 40; (5) the deputation had been issued to Palmer only one day prior to his work on the Evans case, MH 12/27/18 p. 39 & MH Exh. 1; (6) no federal agency had ever instructed him to follow up on any leads related to the Evans case, MH 12/27/18 p. 41; and, (7) though he claimed he had signed some "other document" in which the FBI allegedly gave him "full arrest" authority on the reservation11, he didn't know what this document was and admitted that his work on the

11 This document was not admitted at trial, and no other record exists as to its contents.

Evans case was not with the FBI, MH 12/27/18 p. 42.12

None of the other law enforcement witnesses claimed that their work was done as part of any Task Force operation, under federal supervision, or pursuant to federal authority. Goble acknowledged, "I'm a state agent and don't have criminal jurisdiction on the Pine Ridge Indian Reservation." JT Vol. 3, p. 629.

At trial, items seized during the search of Evans' motel room and vehicle were admitted at trial. From Evans' vehicle: bullets, JT Vol. 3, p. 635; Gatorade bottle, JT Vol. 3, p. 571, 635; cans of spray paint, JT Vol. 3, p. 574-75, 634; gloves, JT Vol. 3, p. 577, 636; a knife, JT Vol. 647; and Evans' notebooks/diaries, JT Vol. 3, p. 579, 637. From the motel room: a Copenhagen chewing tobacco tin, JT Vol. 3, p. 578; a bottle of Gatorade, JT Vol. 3, p. 578; Evans' cellphone, JT Vol. 3, p. 578; and an empty bottle of Ambien with Shelly Benson's name on it, JT Vol. 3, pp. 562, 567. Two cellphones were recovered during the searches, one from the truck and the other from the motel room. JT Vol. 3, p. 648.

The most damaging item seized was the notebooks/diaries taken from Evans' truck, of which 43 pages were admitted into evidence and read to the jury. JT Vol. 3, p. 580, 638-47; Exh. 187; JT Vol. 4, p. 697. Also damaging was Evans' cellphone, which included text messages he had sent to Benson. JT Vol. 2, pp. 386-389. These text messages were read to the jury. JT Vol. 2, pp. 386-89. Both the diaries and text messages made Evans appear to be unable to control his thoughts or emotions, and

12 At trial, Goble repeated some of the misrepresentations made by Palmer: "Agent Palmer is cross-deputized and has federal authority and jurisdiction[.]" JT Vol. 3, p. 628.

supported the notion that he was obsessed with Benson.

3. The Trial Court's Erroneous Factual Findings:

In denying Evans' motion to suppress, the trial court made a number of factual findings. The trial court correctly noted that the Prairie Wind Casino -- where Evans, the motel room, and the vehicle were located – "is on tribal land and it does present some jurisdictional questions," and that no tribal court orders or warrants were obtained prior to the searches and seizures. MH 1/25/19 p. 10.

The trial court also made a number of erroneous factual findings. First, it claimed that "all" the officers were "cross-deputized" and members of a joint task force that permitted them to act on the reservation. MH 1/25/19 p. 10. Palmer was the only officer who claimed to be deputized and on a task force. Goble claimed no deputation or task force membership, and said he had no authority on the reservation, whereas Garland said he had been on a sex crimes task force at some time in the past. MH 12/27/18 p. 50, 60-61; JT Vol. 3, p. 629. And, as set forth above, Palmer admitted that neither the deputation nor his role on the Task Force gave him jurisdiction or authority to operate on the reservation in regard to Evans' case.

Second, the trial court stated that "Agent Garland worked with the United States Attorney's Office in preparation of a warrant with Assistant United States Attorney Poppen. There was full disclosure of the situation to her and her advice was just go with the state warrant." MH 1/25/19 pp. 10-11. No one from the United States Attorney's Office worked with state agents in the preparation of the warrants. State agents reached out to an Assistant United States Attorney who advised them that this was not a federal

matter. Poppen did not work with state agents at any time in the preparation of the warrants. This was not a joint state/federal matter as believed by the trial court.

These factual errors by the trial court were pivotal to its conclusion that this evidence was admissible. The trial court incorrectly perceived this to be a joint state/federal investigation. The trial court believed that *all* the state law enforcement agents were members of this Task Force, and that they were working in conjunction with the United States Attorney's Office on the search warrant. It appears that the trial court believed, incorrectly, that this was a state/federal action and that, therefore, there were no issues with abridging tribal sovereignty or overstepping jurisdictional lines.

4. The Motion to Suppress Should Have Been Granted:

Several undisputed facts exist. Evans was located in a motel room on the Pine Ridge Reservation. His vehicle was parked at the motel. Neither the motel room nor the vehicle was searched pursuant to a tribal or federal warrant. No state, tribal or federal court order or warrant authorized the removal of the vehicle from the reservation. No tribal or federal authorities asked for Evans' vehicle to be removed from the reservation. And no federal agents were involved in the search of the motel room or vehicle.

Resolution of this case is governed by two cases: *State v. Cummings*, 2004 S.D. 56, 679 N.W.2d 484, and *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990). Both of these cases hold that state law enforcement officers cannot seize evidence from defendants who are located on an Indian reservation without a federal or tribal warrant authorizing them to do so, or a state/tribal compact giving state law enforcement

jurisdiction over reservation lands. Both cases upheld the suppression of evidence obtained on the reservation by state agents as the appropriate remedy.

In *Spotted Horse,* law enforcement pursued a driver onto a reservation, seized him, took him back onto state law, and obtained evidence from him. The Court held:

> Because we view Krone's actions in pursuing Spotted Horse down the reservation highway, into the housing area and onto his front lawn to be a constitutional violation, far above simple statutory violations, we hold that the evidence attained by the unconstitutional arrest is not admissible against Spotted Horse. We therefore reverse the conviction for driving under the influence.

State v. Spotted Horse, 462 N.W.2d 463, 469 (S.D. 1990). Evidence and observations obtained while the defendant was on state land were deemed admissible, but observations and evidence obtained while the defendant was on tribal land were not. *Id.*

In *Cummings*, a state law enforcement officer pursued a driver onto the Pine Ridge reservation. The officer had notified tribal authorities he was coming onto the reservation but did not get express permission to take any specific action while there. Once on the reservation, he apprehended the defendant, took him back to state land, and arrested him for eluding and speeding. This Court affirmed its holding in *Spotted Horse,* suppressed evidence that was obtained on the reservation, and stated:

> The holding of *Spotted Horse* controls our decision. State has presented no authority or argument other than *Hicks* as a basis for overruling *Spotted Horse.* In the absence of a compact between the Tribe and the State, the state officer was without authority to pursue Cummings onto the reservation and gather evidence without a warrant or tribal consent. Therefore, all evidence gathered after the officer entered the reservation was properly suppressed. As in *Spotted Horse*, everything the officer observed before entering the reservation, including the Defendant's alleged speed and attempt to elude the officer, was admissible.

State v. Cummings, 2004 S.D. 56, ¶ 18, 679 N.W.2d 484, 489.

For many reasons, these two cases are important to the issue presented herein.

First, both cases involve law enforcement in "hot pursuit" of a suspect who was believed to have committed a crime off reservation. Even with the exigencies of a "hot pursuit" scenario, and even though both defendants were located in motor vehicles (which have a low expectation of privacy), in each case the Court held that evidence obtained on the reservation must be suppressed.

Second, in neither case was the defendant's status as an Indian a dispositive fact. The Fourth Amendment applies to non-Indians on Indian reservations. *State v. Madsen,* 2009 S.D. 5, 760 N.W.2d 370. The issue is not the race or status of the defendant, but state law enforcement's lack of authority to act on a reservation without a tribal warrant.

Third, the *Spotted Horse* case involved reviewing the matter for plain error. 462 N.W.2d at 469. Even under that standard of review, the Court held that the evidence obtained from the defendant on the reservation must be suppressed.

Fourth, at the trial level in Evans' case, the State relied extensively on dicta within *Nevada v. Hicks,* 533 U.S. 353 (2001), as a basis for its argument against suppression. SR 164, p. 9. The language from *Hicks* relied upon by the State is the exact same language from *Hicks* that this Court rejected in *Cummings* as being a basis to overrule *Spotted Horse. Cummings, supra* at ¶¶ 11-18.

Fifth, the State is likely to argue that *Cummings* and *Spotted Horse* are distinguishable because the State ultimately got state search warrants in Evans' case. This argument fails to recognize the tribal sovereignty issue at the heart of this argument. *Spotted Horse* and *Cummings* describe seizures and searches on reservations as matters implicating tribal sovereignty. *See Cummings, supra* at ¶ 17 ("We decline to usurp the

power of the United States Congress to make laws with respect to Native American rights and sovereignty and the authority of the Supreme Court to interpret those laws[.]"). *See also Spotted Horse*, 462 N.W.2d at 467 (tribal consent was a prerequisite "to any new assumption of jurisdiction" by South Dakota based on the "interests of the tribes in self-government") (concluding that "South Dakota does not have jurisdiction over Indian country, nor may the State exercise partial jurisdiction over highways running through the reservations.").

To permit DCI's conduct in Evans' case based on the state court warrants would subvert tribal sovereignty over places and things on the reservation. All state law enforcement would need to go on to a reservation and search a place or seize an item would be a state-issued warrant. This would place a tribe's right to control its territory in a subordinate position to a state trial court's authority to issue a search warrant. Nothing in *Cummings* or *Spotted Horse* suggests this Court intended to divest tribes of their authority over their reservations by the mere existence of a state-court search warrant. Contrarily, this Court has recognized the importance of tribal sovereignty to Indian tribes: "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Calvello v. Yankton Sioux Tribe*, 1998 S.D. 107, ¶ 10, 584 N.W.2d 108, 112 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 1675).

Sixth, the State is likely to argue that tribal sovereignty does not extend to nontribal members such as Evans. This Court has noted that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of

the tribe." *Red Fox v. Hettich*, 494 N.W.2d 638, 647–48 (S.D. 1993) (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)). That argument misconstrues the issue. Evans is not challenging his arrest. It is the search of areas and seizure of things on the reservation that is at issue. Evans' motel room and his vehicle were located on tribal ground, and only tribal or federal authorities had the authority to authorize the search and seizure of those areas and things.

The trial court made erroneous factual findings that led to its misapplication of the law in Evans' case. The motion to suppress should have been granted in regard to Evans' motel room and vehicle.

D. The Trial Court Erred in Allowing Goble to Opine that Benson was Credible:

1. Preservation of Issue and Standard of Review:

Evans objected when the State asked Goble whether Benson's story was corroborated by photographic evidence. JT Vol. 3, p. 608. His objection was overruled. JT Vol. 3, p. 608. Thus, the issue should be reviewed for abuse of discretion. *State v. Guthrie*, 2001 S.D. 61, ¶ 30, 627 N.W.2d 401, 414–15.

2. Legal Principles Applicable to Issue:

For a lay witness to present opinion testimony, three conditions must be met: The opinion must be rationally based on the witness' perception, it must help the jury to understand the witness' testimony or to determine a fact at issue, and it must not be based on scientific, technical, or other specialized knowledge. SDCL 19-19-701. Neither lay nor expert witnesses may testify as to the credibility of another witness "because such testimony would invade the exclusive province of the jury to determine the credibility of

a witness." *State v. Packed*, 2007 S.D. 75, ¶ 34, 736 N.W.2d 851, 862.

3. Goble's Opinion Testimony Invaded the Province of the Jury:

The State called DCI Agent Goble as a fact witness. He was not offered as an expert. Goble was called after Benson, Ellerton, and Daggett had testified. By this time, Benson's credibility had been damaged by her inconsistent statements and actions.

Goble had interviewed and photographed Benson on the morning of the alleged crime. JT Vol. 3, p. 597-602. After describing the photographs and summarizing the interview, the following colloquy occurred:

State: You stated, and when you began your testimony, that you interview a subject then take pictures to corroborate the interview?

Goble: That's definitely one of the things I do to corroborate what they say.

State: And in this case you took pictures?

Goble: Yes.

State: And you also interviewed the victim?

Goble: Correct.

State: And in your opinion did the pictures corroborate her story?

Evans: Objection; invades the province of the jury.

Court: Overruled.

Goble: There was corroboration in the location where she said she was taped and that the injuries she had could possibly be consistent with being dragged through a house and out a house.

JT Vol. 3, p. 608.

Goble's testimony was improperly admitted lay-witness opinion testimony. No foundation was laid to establish that Goble had the requisite qualifications to assess what

injuries Benson had, what caused them, or whether the things he observed were consistent with the mechanism of injury she reported. The opinion Goble rendered was one that required scientific, technical, or other specialized knowledge.

Goble's testimony invaded the province of the jury. It was elicited to convince the jury it should believe Benson because Goble believed her story was corroborated. Goble's beliefs were irrelevant. Benson's credibility was the primary issue in this case, and it was the jury's duty to assess whether her story added up. Opinion testimony such as this, particularly from a person in authority like Goble, invaded the province of the jury to make this crucial determination on its own.

The prejudice to Evans was substantial. Goble's testimony consisted of restating Benson's version of events, then stating his opinion that her story was corroborated by his photographs. The allegations Goble corroborated were essential parts of the State's case. There were substantial factual disputes as to where and how Benson was taped, and whether she had been dragged from the house. Goble's testimony took away from the jury its duty to resolve those conflicts.

It was an abuse of discretion for the trial court to admit this evidence, and this error was highly prejudicial to Evans. Evans' conviction should be vacated.

CONCLUSION

Based on the foregoing facts, authority and argument, Evans asks that all of his convictions be vacated and that the case be remanded for a new trial.

REQUEST FOR ORAL ARGUMENT

Based on the meritorious nature of the issues presented, and the seriousness of the case, Evans requests oral arguments.

Dated this _____ day of March, 2020.

MURPHY LAW OFFICE, P.C.

_____

John R. Murphy
Attorney for Harry David Evans
328 E. New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

APPENDIX TABLE OF CONTENTS

FILED IN CIRCUIT COURT
CUSTER COUNTY, SOUTH DAKOTA
DATE 8-14-19
[redacted]

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
COUNTY OF CUSTER	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff	)	FILE NO.: 16CRI17-131
vs.	)	**RE-IMPOSED** JUDGMENT OF CONVICTION AND
HARRY DAVID EVANS, Defendant	)	ORDER OF TRANSPORTATION

An Indictment was filed with this Court charging the Defendant with the crimes of (Count 1) KIDNAPPING IN THE FIRST DEGREE, SDCL 22-19-1(2), Or in the Alternative, (Count 1A) KIDNAPPING IN THE FIRST DEGREE, SDCL 22-19-1(3); (Count 2) RAPE IN THE SECOND DEGREE, SDCL 22-22-1(2); (Count 3) FIRST DEGREE BURGLARY, SDCL 22-32-1(3); (Count 4) AGGRAVATED ASSAULT – DOMESTIC VIOLENCE, SDCL 22-18-1.1(5); (Count 5) STALKING SDCL 22-19A-1(1) and 22-19A-2; (Count 6) VIOLATION OF A PROTECTION ORDER, SDCL 25-10-13. The Defendant, with his former attorney, Angela Colbath, and Wendy T. Lampert McGowan, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges against the Defendant. The Defendant pled not guilty to the charges in the Indictment. The Defendant requested a Jury Trial on the charges contained in the Indictment.

A Jury Trial commenced on the 28th day of January, 2019, in the County of Custer, State of South Dakota on the charges. The Defendant appeared with his counsel, Ellery Grey and Paul Eisenbraun. Tracy L. Kelley, Custer County State's Attorney and Robert Haivala, Assistant Attorney General, appeared on behalf of the State.

On the 1st day of February, 2019, the Jury returned a verdict of:

Guilty of Count 1A:	KIDNAPING IN THE FIRST DEGREE, in violation of SDCL 22-19-1(3);
Guilty of Count 2:	RAPE IN THE SECOND DEGREE, in violation of SDC: 22-22-1(2);
Guilty of Count 3:	FIRST DEGREE BURGLARY, in violation of SDCL 22-32-1(3);
Guilty of Count 4:	AGGRAVATED ASSAULT – DOMESTIC VIOLENCE, in violation of SDCL 22-18-1.1(5);
Guilty of Count 5:	STALKING, in violation of SDCL 22-19A-1(1) and 22-19A-2;
Guilty of Count 6:	VIOLATION OF A PROTECTION ORDER, in violation of SDCL 25-10-13;

SENTENCE

On the 21st day of March, 2019, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced sentence. On the 12th day of August, 2019, this matter came back before this Court upon the request of Defendant's attorney, Ellery Grey, pursuant to SDCL 23A-27-51, the Defendant appearing in person with counsel, Ellery Grey, and the Custer County State's Attorney, Tracy L. Kelley appearing on behalf of the State. The Court, finding that the requirements of SDCL 23A-27-51 have been met and thereafter advising the Defendant of his rights associated with an appeal from a criminal conviction and rights of appeal, and the Court inquiring of the Defendant if any legal cause existed to show why Judgment should not be re-imposed pursuant to SDCL 23A-27-51, and there being no cause offered, the Court thereupon re-imposed the following sentence previously entered by the Court:

IT IS HEREBY ORDERED that on Count 1A of the Indictment, the Defendant, HARRY DAVID EVANS, shall be sentenced to serve life without the possibility of parole in the South Dakota State Penitentiary; and it is further

ORDERED that the Defendant shall pay court costs in the amount of $104.00; and it is further

ORDERED that the Defendant shall pay to the Custer County Clerk of Courts for reimbursement to Custer County for the costs of court appointed attorney fees in the amount of $13,860.00: and it is further

ORDERED that the Defendant shall pay to the Custer County Clerk of Courts for reimbursement to Custer County for the transcript costs in the amount of $992.15; and it is further

ORDERED that the Defendant shall pay to the Custer County Clerk of Courts for reimbursement to Custer County for the costs of the psychological evaluation provided by Dr. Stephen Manlove, in the amount of $3,600.00; and it is further

ORDERED that the Defendant shall pay to the Custer County Clerk of Courts for reimbursement to Custer County for the costs of R O Investigation and Research in the amount of $1,086.25; and it is further

ORDERED that the Defendant shall pay to the Custer County Clerk of Courts for reimbursement to the South Dakota Crime Victims Compensation Program in the amount of $81.00; and

IT IS HEREBY ORDERED that on Count 2 of the Indictment, the Defendant, HARRY DAVID EVANS, shall be sentenced to serve fifty (50) years in the South Dakota State Penitentiary; and it is further

ORDERED that the Defendant shall pay court costs in the amount of $104.00; and it is further

ORDERED that the Defendant shall pay to the Custer County Clerk of Courts for reimbursement to the South Dakota Network Against Family Violence and Sexual Assault in the amount of $384.00; and

IT IS HEREBY ORDERED that on Count 3 of the Indictment, the Defendant, HARRY DAVID EVANS, shall be sentenced to serve twenty-five (25) years in the South Dakota State Penitentiary; and it is further

ORDERED that the Defendant pay court costs in the amount of $104.00; and

IT IS HEREBY ORDERED that on Count 4 of the Indictment, the Defendant, HARRY DAVID EVANS, shall be sentenced to serve fifteen (15) years in South Dakota State Penitentiary; and it is further

ORDERED that the Defendant shall pay court costs in the amount of $104.00; and it is further

ORDERED that the Defendant shall pay the Domestic Violence fee in the amount of $25.00; and

IT IS HEREBY ORDERED that on Count 5 of the Indictment, the Defendant, HARRY DAVID EVANS, shall be sentenced to serve two (2) years in the South Dakota State Penitentiary; and it is further

ORDERED that the Defendant shall pay court costs in the amount of $104.00; and

IT IS HEREBY ORDERED that on Count 6 of the Indictment, the Defendant, HARRY DAVID EVANS, shall be sentenced to serve two (2) years in the South Dakota State Penitentiary; and it is further

ORDERED that the Defendant shall pay court costs in the amount of $104.00; and

IT IS HEREBY FURTHER ORDERED that in Counts 1A, 2, 3, 4, 5 and 6, the Defendant shall receive credit for the five hundred forty-five (545) days already served in jail and any time served while awaiting transport; and it is further

ORDERED that the sentences in Counts 1A, 2, 3, 4, 5 and 6 shall be served concurrently to each other; and it is further

ORDERED that the Defendant, HARRY DAVID EVANS, shall have no contact with the victim, Shelly Benson, either in person, through written communication, through any electronic means, or through any third party; and it is further

ORDERED that all costs incurred by Custer County associated with the Defendant's incarceration in the Pennington County Jail shall be entered as a lien against the Defendant by the County of Custer; and it is further

ORDERED that the Defendant shall be remanded to the immediate custody of the Custer County Sheriff for transport to the Pennington County Jail to await transport by the Pennington County Shuttle to the South Dakota State Penitentiary, at the expense of the Custer County Sheriff; and it is further

ORDERED that any and all bond posted in this matter shall be discharged and the bondsman exonerated; that the bond may be applied to fine and court costs herein.

DATED this 14 day of August, 2019, and entered nunc pro tunc the 12th day of August, 2019.

BY THE COURT:

HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE

ATTEST:
Clerk of Courts
By: Deputy
(SEAL)

NOTICE OF RIGHT TO APPEAL

You, HARRY DAVID EVANS, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Custer County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said clerk.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29095

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

HARRY DAVID EVANS,

Defendant and Appellant.

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

THE HONORABLE JEFFREY W. DAVIS
Retired Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed August 15, 2019

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29095

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

HARRY DAVID EVANS,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Harry David Evans, is called "Evans," while Plaintiff and Appellee, State of South Dakota, is called "State." The victim is called "S.B." in this brief. Citations to the settled record and other documents are as follows:

Defendant's Brief..... DB

Jury Trial Exhibits ..... EX

Jury Trial Transcript ..... JT

Motions Hearing Transcript (December 27, 2018) ..... MH

Motions Hearing Transcript (January 25, 2019)..... MH2

Sentencing Hearing Transcript ..... SH

Settled Record (Custer County Criminal File 17-131)..... SR

Jury Trial – Voir Dire Transcript..... VT

The appropriate page number follows each citation.

JURISDICTIONAL STATEMENT

On March 22, 2019, the Honorable Jeffrey W. Davis, Retired Circuit Court Judge, Seventh Judicial Circuit, entered a Judgment of Conviction and Sentence in *State of South Dakota v. Harry David Evans*, Custer County Criminal File Number 17-131. SR 1015-1019. Evans filed an appeal but later moved to dismiss it, which this Court granted. SR 1247. Then Evans requested the circuit court for a new judgment under SDCL 23A-27-51. SR 2547. The circuit court agreed, reimposing the sentence and filing a new Judgment of Conviction on August 14, 2019. SR 1259-64, 2549. Evans filed an appeal from that judgment the next day. SR 1265. This Court accordingly has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT PROPERLY ADMITTED OTHER ACTS EVIDENCE?

The circuit court ruled that Kathy Evans's testimony about Evans's other acts was (1) relevant to show his common plan and motive, and (2) not unfairly prejudicial.

State v. Boe, 2014 S.D. 29, 847 N.W.2d 315

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

State v. Medicine Eagle, 2013 S.D. 60, 835 N.W.2d 886

State v. Armstrong, 2010 S.D. 94, 793 N.W.2d 6

SDCL 19-19-401

SDCL 19-19-404(b)

II

WHETHER THE CIRCUIT COURT COMMITTED STRUCTURAL ERROR DURING THE JURY SELECTION PROCESS?

The circuit court excused 20 jurors in-chambers without objection.

Miller v. Young, 2018 S.D. 33, 911 N.W.2d 644

State v. Verhoef, 2001 S.D. 58, 627 N.W.2d 437

State v. Daniel, 2000 S.D. 18, 606 N.W.2d 532

Rivera v. Illinois, 556 U.S. 148 (2009)

III

WHETHER THE CIRCUIT COURT PROPERLY DENIED EVANS'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS MOTEL ROOM AND VEHICLE?

The circuit court denied Evans's motion to suppress.

State v. Vandermay, 478 N.W.2d 289 (S.D. 1991)

Duro v. Reina, 495 U.S. 676 (1990)

State v. Smith, 458 N.W.2d 779 (S.D. 1990)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

IV

WHETHER THE CIRCUIT COURT PROPERLY ADMITTED SPECIAL AGENT GOBLE'S TESTIMONY?

The circuit court overruled Evans's objection to Agent Goble's testimony.

State v. No Heart, 353 N.W.2d 43 (S.D. 1984)

State v. Buchholtz, 2013 S.D. 96, 841 N.W.2d 449

State v. Condon, 2007 S.D. 124, 742 N.W.2d 861

State v. Andrews, 2001 S.D. 31, 623 N.W.2d 78

SDCL 19-19-701

STATEMENT OF THE CASE

On September 22, 2017, the Custer County Grand Jury indicted Evans. SR 1-4. It levied six counts, two of which were in the alternative:

- (1A) First-Degree Kidnapping, in violation of SDCL 22-19-1(2); or in the alternative,
- (1B) First-Degree Kidnapping, in violation of SDCL 22-19-1(3);
- (2) Second-Degree Rape, in violation of SDCL 22-22-1(2);
- (3) First-Degree Burglary, in violation of SDCL 22-32-1(3);
- (4) Aggravated Assault, in violation of SDCL 22-18-1.1(5);
- (5) Stalking, in violation of SDCL 22-19A-1(1) and SDCL 22-19A-2; and
- (6) Violation of a protection order, in violation of SDCL 25-10-13.

Id.

About a year later, the State filed a Notice of Intent to Use Other Acts Evidence. SR 116. The other acts, listed in the State's brief-in-support, detailed Evans's behavior towards S.B. and his ex-wife, Kathy Evans. SR 119-22. For his behavior towards S.B., the State detailed Evans's threatening behavior during their relationship and after that relationship had ended. SR 119-20. As for Evans's behavior towards his ex-wife, the State explained that his behavior in that prior relationship would establish his motive, intent, state of mind,

preparation, a plan or scheme of criminal activity, knowledge, and absence of mistake or accident. SR 123. Evans opposed the notice. SR 134-36.

Evans then filed a motion to suppress evidence on November 24, 2018. SR 126-32. Evans sought the suppression of evidence pertaining to (1) law enforcement's initial entry into his motel room at the Prairie Wind Casino, (2) the second entry into that same hotel room under the authority of a search warrant, and (3) the seizure and search of his vehicle. SR 128. Law enforcement officers, according to Evans, did not have the authority for the second search of the room because the circuit court didn't have the jurisdiction to issue a warrant for a hotel room on tribal ground. SR 131. Evans also asserted that his vehicle was illegally seized from tribal ground and transported to state land to obtain a warrant. *Id.*

At a pretrial hearing, the circuit court considered the motion to suppress and the notice of intent to introduce other acts. MH 1-86. It first took testimony on the suppression issue from Division of Criminal Investigation ("DCI") agents on the suppression issue and allowed the parties to brief the issue, MH 4-71, before ruling on the admission of the other acts evidence, MH 73-81. In that ruling, the court acknowledged other acts evidence is only admissible for a permitted purpose. MH 79. Then it cited common reasons for the admission of other acts evidence, including admission based on people involved in a

romantic relationship. MH 79-80. After that, the circuit court held that the State could introduce two instances other acts evidence through Kathy Evans under the motive and plan exceptions to SDCL 19-19-404(b). MH 80-81. That ruling was later memorialized in the court's findings of fact and conclusions of law, which included an analysis that the other acts evidence was more probative than prejudicial. SR 994.

Each side submitted briefs on the suppression issue after the hearing. SR 164-75, 262-66. The State first argued that law enforcement had the legal authority to enter the room. SR 169-71. Then it argued that law enforcement had the legal authority to later search the room after obtaining a state-issued search warrant. SR 171-73. Those two arguments rested on the State's exclusive jurisdiction of criminal offenses committed by non-Indians outside the boundaries of Indian country. SR 173. And for its final argument, the State asserted that law enforcement acted reasonably by seizing the vehicle, removing it to a secure location and then waiting to search until securing a search warrant from a neutral, detached magistrate. SR 173-74. Evans disagreed. SR 262-65.[1] He claimed that the State lacked jurisdiction to enter tribal land to search the hotel room without a warrant authorized by the tribal court. SR 264-65. He made

[1] The circuit court allowed supplemental briefing strictly focusing on how the holding of *Carpenter v. United States*, 138 S.Ct. 2206 (2018), affected Evans's motion to suppress. SR 269-72, 282-84.

essentially the same argument for the seizure and removal of the vehicle from tribal lands. SR 265.

The circuit court denied the motion to suppress in late December 2018. MH2 10-11. The court's ruling on the suppression issue, like the admission of other acts evidence, was memorialized in findings of fact and conclusions of law. SR 995-96. It first held that law enforcement had the legal authority to enter Evans's hotel room and arrest him. SR 986. Then it held that law enforcement had the legal authority to reenter Evans's hotel room after that arrest and search it based on the state-issued search warrant. SR 986. And finally, it held that the seizure and later search of Evans's vehicle was legally valid. *Id.*

With the pretrial issues now resolved, the case proceeded to a five-day jury trial that began on January 28, 2019. JT 1-951. The court informed the jury panel of the charges against Evans at the start of jury selection. JT 8. Then it told the panel that the trial would last all week. JT 9. And it next surveyed the panel about whether the schedule or charges would "make it impossible for you to sit and be fair and impartial jurors." JT 9-10. Because some members of the panel raised their hands in response to that question, the court recessed to chambers to discuss any issues they had with the State and Evans's counsel. JT 10.

In chambers, the court asked each juror preliminary questions to discern each potential juror's issue. VT 3-24. The following table summarizes those issues:

Juror	Excused or not excused	Explanation	Citation
D.S.	Excused	Familiar with Evans's family members	VT 3
S.G.	Excused	Family members affected by domestic violence and rape	VT 4
L.N.	Excused	Health Issues	VT 5
D.R.	Excused	Familiar with Evans and his mother	VT 5-6
B.W.	Not Excused	Molested as child; expressed desire to stay on panel	VT 6-7
A.B.	Excused	Personally affected by nature of charges	VT 7-8
M.S.	Excused	Health issues	VT 8-9
R.M.	Excused	Familiar with Evans's family	VT 9
M.B.	Excused	Raped	VT 9-10
M.M.	Excused	Health Issues	VT 10
N.N.	Not Excused	Familiar with Evans's family	VT 11
A.S.	Excused	Affected by nature of charges	VT 12
K.M.	Excused	Affected by nature of charges	VT 12-13
J.S.	Excused	Family member health issues	VT 13
R.M.	Not Excused	Familiar with parties	VT 14
P.T.	Not Excused	Familiar with State witness	VT 15-16
C.A.	Excused	Nonrefundable vacation plans	VT 16-17
T.C.	Excused	Ranch owner without hired hand	VT 18
C.F.	Excused	Hearing and work scheduling issues	VT 19
S.K.	Excused	Familiar with Evans	VT 19-20
M.B.	Excused	Affected by nature of charges	VT 20-21
E.C.	Excused	Unable to provide impartial judgment	VT 21-22
M.G.	Excused	Family member affected by the nature of charges	VT 22-23
K.H.	Excused	Scheduling issues and affected by nature of the charge	VT 23

After questioning the first juror, the court asked whether any party objected to excusing that juror. VT 3. Neither party objected. *Id.* Then the court continued its questioning of each potential juror without an objection from either party. VT 3-24. The court allowed both the State and Evans to ask questions of those potential jurors. VT 11-12, 15-16. Of the twenty-four panel members called back, twenty were dismissed, all without objection from either party. VT 3-24. Jury selection continued and Evans passed the jury panel for cause. VT 87.

After that, jury selection moved back into the courtroom and the trial proceeded to its next phases. VT 27. In the State's case-in-chief, it called DCI Special Agent Jeff Goble as a witness. JT 594-725. He testified that he interviewed S.B. at Rapid City Regional Hospital and took photographs of her injuries before starting that interview. JT 595-602. Agent Goble explained his rationale for interviewing and photographing witnesses: they are tools "to determine the veracity of someone's statement." JT 597. In other words, he uses those tools "to either refute what someone [had] told [him] or corroborate what they have told." *Id.* After that, the State elicited what Agent Goble learned from his interview of S.B. and then asked, in his opinion, "did the pictures corroborate [S.B.]'s story?" JT 608. Evans objected, claiming the question invaded the province of the jury. *Id.* The court overruled the objection, allowing Goble to answer: "[t]here was corroboration in the location where she said she was taped and that the injuries she had

could possibly be consistent with being dragged through a house and out a house." *Id.* The State later finished its case-in-chief. JT 870. Once the parties concluded closing arguments, the court submitted each count to the jury, which found Evans guilty on all counts. JT 945, 947-48.

The circuit court sentenced Evans about two months later. SH 1-24. The court imposed a life sentence without possibility of parole in the South Dakota State Penitentiary on the first-degree kidnapping count. SH 22. It also imposed a 50-year sentence on the second-degree rape count, a 25-year sentence on the first-degree burglary count, a 15-year sentence on the aggravated assault count, and a 2-year sentence for both violating the restraining order and the stalking count. SH 21-22. The court entered a judgment of conviction the next day, which it reimposed after the dismissal of Evans's initial appeal. SR 1015-19, 1259-64.

STATEMENT OF FACTS

S.B. tried starting a new life with her husband and two children in Rapid City in 2009. JT 35-36. They moved from Iowa onto an 11-acre property near Rockerville: she enjoyed spending time with her animals and remodeling the family home. *Id.* Despite that new start, the marriage crumbled and S.B. filed for divorce in May 2015. JT 36. That left her alone to tend the large property and animals, including her beloved horses. JT 37.

S.B. needed help and companionship. *Id.* So she tried dating through FarmersOnly.com. *Id.* Eventually, she met Evans. *Id.* They had a common interest in horses and ranch work. *Id.* And that common interest led to Evans helping S.B. tend to her horses and expansive property. JT 39. S.B., in turn, allowed Evans to stay in her basement. JT 40. An intimate romantic relationship between the two developed about four months later. JT 41.

But that relationship deteriorated rapidly. Once S.B. became more independent in her life and moved on from her divorce, Evans's behavior became threatening and angry "at the drop of a hat." JT 43. He rarely left S.B.'s side, followed her whenever she left the property, and texted her incessantly to determine her whereabouts. *Id.* That obsessive and controlling behavior led to intense situations.

One such situation occurred in December 2016. JT 46, 54. S.B. confronted Evans about him receiving mail at her home. JT 46. The argument escalated. *Id.* S.B. tried deescalating it. JT 47. It didn't work. *Id.* Evans followed S.B., cornering her in a room in the basement. JT 47-48. Then he ripped a kitten from S.B.'s arms and threw it out into the cold. JT 48. S.B. tried to retrieve the kitten, but Evans blocked the door—she was trapped. JT 48. What she heard next terrified her: Evans said he would kill her and then kill himself. JT 49. Luckily, that didn't happen. JT 50-51. S.B. escaped and called law enforcement. JT 52.

Another situation occurred a few days later at S.B.'s home. JT 53. Evans threw S.B. over his shoulders and carried her up to the bedroom to show her "how it's going to be." JT 53-54. He owned S.B. JT 53. Once in the bedroom, Evans threatened that if he couldn't have her, nobody would. *Id.* Then he gave her three choices: (1) she could make love to him; (2) he could rape her; or (3) he could murder her. JT 53-54. S.B. took A fourth option: she somehow managed to call law enforcement, causing Evans to flee the scene. JT 54. S.B. limited contact with Evans after that incident. JT 55.

After a hiatus, the two reconnected the following summer. JT 56-60. S.B. decided to sell her home in Rapid City and buy some land near Hermosa to place a modular home on. *Id.* But she needed help. JT 60. She needed to build a fence on the new property and move her belongings there. *Id.* So, Evans offered to help. *Id.*

Warily, S.B. agreed. JT 58-60. She had no desire to continue the relationship, yet she was too scared to cut off all contact with Evans. JT 61-62. She wanted to "gently" end all contact with him out of a fear of making him angry enough to cause "something bad [to] happen." *Id.* S.B. tried implementing her "gentle" plan, but Evans would not leave that easy. JT 65.

S.B.'s wary proved prescient: Evans's anger and obsession soon returned, as he strove to rekindle their intimate relationship. JT 62.

In June 2017, S.B. discovered that Evans not only slept at her new, unoccupied home but also kept some of his belongings there. JT 796-98. Upset, S.B. called law enforcement. *Id.* Law enforcement offered two pieces of advice: first, leave the unoccupied home immediately; and second, seek a protection order against Evans. JT 799, 803. S.B. followed that advice; she left and later obtained a protection order. JT 68, 75; EXs 1-2.

The protection order didn't deter Evans. He left S.B.'s favorite treats in her mailbox and a love letter near her vehicle. JT 92-93; EX 160. He also left hay bales, a water tank, and fencing materials at the end of her driveway. JT 71. S.B. suspected Evans was stealing her garbage and mail. JT 89-91. And his threatening text messages to S.B. continued. JT 74-75; EX 3. After each uninvited contact, S.B. called law enforcement. JT 73, 77-78, 92. Law enforcement eventually placed game cameras around S.B.'s property. JT 731-32.

Evans's obsession peaked on September 5, 2017. That evening S.B. received a strange message on her computer. JT 97; EX 4. She understood that message's purpose: Evans was always watching and would be coming for her. *Id.* Concerned, she called law enforcement. JT 98, 341; EX 151. Hermosa Town Marshal Daggett eventually responded and searched the property for any sign of Evans. JT 99-100. Marshal Daggett then reviewed the threatening message, searched her

home briefly, and attempted to console S.B. by telling her that he would stop by the next morning. JT 357-58.

S.B. felt more at ease after the marshal left. JT 102. So she decided to start her nightly ritual of taking a hot bath. JT 104. As she bathed, S.B. noticed her cat pawing at the window blinds; she had cracked a window to let some steam escape. JT 102-03; EX 35. Thinking nothing of it, she carried on with her bath and drank two glasses of wine to ease her anxiety. JT 104. After toweling off, she took a sleeping pill and went to bed around 1:15 a.m. JT 108.

Later that morning, S.B. suddenly awoke to the sound of Evans's voice as he lay right beside her. JT 111. She screamed and tried to fight back by kicking and scratching Evans. JT 111-12. Evans, in turn, overpowered S.B. and put duct tape across her mouth and around her hands. JT 112. Evans complemented S.B. on how well she secured her home but not well enough: she forgot to close the bathroom window. JT 131; EXs 33-40. Then he said that S.B. had three options: (1) she could make love to him; (2) he would rape her; or (3) he would kill her and then himself. JT 113. Evans grabbed S.B.'s sleeping pills, ripped off the duct tape, forced a handful in her mouth, and replaced the duct tape across her mouth. JT 114-15. He continued wrapping duct tape around S.B.'s head and entire body. JT 115. S.B. began to feel the effects from the dissolved sleeping pills. JT 116.

Evans's continued his assault. *Id.* He wrapped S.B. up in a blanket and dragged her down the steps outside the home and into S.B.'s vehicle. JT 116-18. Then he drove off the property.[2] JT 119. As he drove around, S.B. drifted in and out of consciousness.[3] JT 120. Evans eventually decided to go back to S.B.'s home and took her back inside. *Id.*

S.B. next remembered waking up in bed to Evans cutting the tape away from her. *Id.* S.B. feared for her life as he cut that tape around her, starting at her ankles and up to her groin area. JT 121. Groggy from the pills and in shock, S.B. just laid there in defeat. JT 122. Evans then raped S.B. vaginally while her arms were still bound, finishing by ejaculating on her chest.[4] JT 123. Then S.B. succumbed to the sleeping pill's effects. JT 125.

S.B. woke later that morning in a daze. *Id.* She thought Evans had gone for a moment, but then heard him rummaging around the kitchen. *Id.* A text message from her neighbor, Kim Ellerton, came across her phone. JT 126, 440; EXs 24-25. Ellerton was concerned about a truck—partially painted gray—parked up on Dry Creek road so she took a picture of it and sent it to S.B. JT 126. S.B., scared Evans

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[2] The game camera on S.B.'s property showed her vehicle departing and returning that morning. JT 752-53; EXs 16-18.
[3] Evans explained to Kathy Evans, his ex-wife, that he planned to kill S.B. by shooting her after he put S.B. in the vehicle. JT 839.
[4] Traces of Evans's semen were found through forensic testing of swabs taken from S.B.'s vagina, her chest, and a washcloth she used to wipe off her chest after the rape. JT 480-81, 494.

would harm her if he saw her texting, quickly replied that the truck must have broken down.[5] *Id.* Once Evans returned to the bedroom, he forced S.B. to give him a ride to his truck down the road. JT 131. He left with a warning: tell anyone and he would come back and kill her friends and animals. JT 132.

S.B. returned to her home in shock. JT 133. Marshall Daggett arrived later that morning to check on her. JT 360. Initially hesitant to report the rape, S.B. agreed and traveled to the hospital. JT 364-65. There, a nurse examined her injuries and completed a rape kit. JT 309; EXs 203-15. Agent Goble then arrived, taking pictures before interviewing her. JT 596.

Evans fled to the Pine Ridge Indian Reservation after he broke into S.B.'s home to rape and kidnap her. JT 562. DCI agents, in cooperation with Oglala Sioux Tribe law enforcement and the Oglala Lakota County Sheriff's Office, attempted to locate Evans. JT 562-63. They learned that Evans, a non-Indian, sought refuge within the Prairie Wind Casino that's located on the reservation. *Id.* When law enforcement arrived, they learned that Evans had a room there. JT 564. Evans could be seen inside the room lying motionless on the bed. JT 565. He failed to respond to repeated attempts by hotel staff and law enforcement to contact him. JT 565.

[5] Ellerton later called S.B. to inform her of a downed electric fence. JT 449. While speaking to an antsy S.B., Ellerton saw a man near S.B.'s shed outside her home. JT 450-52. Ellerton saw S.B.'s vehicle leave shortly after speaking to her. JT 453.

Concerned for Evans's well-being, law enforcement entered the hotel room. JT 566. An incoherent Evans laid on the hotel bed with an empty prescription pill bottle belonging to S.B. within reach. JT 567; EX 79. Law enforcement arrested Evans and seized his vehicle, taking it to a more secure location in Custer County. JT 571, 573; EX 82. They got a state-search warrant the next day to search the hotel room and vehicle.[6] JT 571, 576-77.

Law enforcement later learned that Evans's ex-wife, Kathy Evans, spoke to him that day. JT 846. Out of a concern for their children, Kathy called Evans. JT 833-34. Evans admitted to Kathy that he broke in S.B.'s home through a window and raped her. JT 837.

Hearing Evans's confession took Kathy back to similar events that Evans subjected her to. In February 1993, while the two were separated, Evans broke into Kathy's home while she slept. JT 816-17. He woke Kathy at gunpoint and explained that he was going to rape her. JT 818. Kathy eventually coaxed Evans into leaving the home. JT 820. She later obtained a restraining order. JT 823. About a year later, Evans ignored that restraining order; he called her incessantly. JT 823. One December night, while attending their children's elementary Christmas program in Hot Springs, Kathy was informed that

[6] During that search of Evans's vehicle, law enforcement found (1) Evans's notebooks used to journal his controlling and obsessive thoughts of S.B., (JT 579; EX 93), (2) work gloves similar to gloves found in S.B.'s vehicle, (JT 636; EX 95), (3) a box of .22 bullets, (JT 635; EX 98), and (4) an orange Gatorade bottle (JT 636; EX 95). A .22-caliber pistol was found in S.B.'s vehicle. JT 48; EX 5.

Evans was in the building looking for her. JT 823. She returned to her car, accompanied by law enforcement, to find a mounted deer head in the back of her station wagon.[7] JT 825. After staying at a friend's house, Kathy returned to her home to find Evans's vehicle parked in her driveway. JT 825-26. She called law enforcement who found an unresponsive Evans in Kathy's bedroom—he tried to overdose. JT 829. After that incident, Kathy found Evans had used her appointment book as a journal. JT 830. Kathy also checked Evans's vehicle and discovered Evans had been taking her mail. JT 831-32.

STANDARD OF REVIEW

This Court reviews a circuit court's admission of other acts evidence, alleged errors in the jury selection process, and other evidentiary rulings for an abuse of discretion. *State v. Phillips*, 2018 S.D. 2, ¶ 13, 906 N.W.2d 411, 415 (other acts evidence); *State v. Verhoef*, 2001 S.D. 58, ¶ 13, 627 N.W.2d 437, 440 (alleged error in jury selection process); *State v. Scott*, 2019 S.D. 25, ¶ 11, 927 N.W.2d 120, 125 (evidentiary ruling on lay witness testimony). A circuit court abuses its discretion if its decision 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. Kvansnicka*,

[7] Kathy later noticed that a family photo placed on her dash was missing. JT 831. Instead, bullets were strewn about the dash. *Id.*

2016 S.D. 2, ¶ 7, 873 N.W.2d 705, 708 (citation and internal quotation marks omitted).

Unlike evidentiary rulings, this Court reviews a circuit court's decision to grant or deny suppression motions based on an alleged violation of a constitutional right *de novo*. *State v. Sheehy*, 2001 S.D. 130, ¶ 6, 636 N.W.2d 451, 452 (citation omitted). A circuit court's conclusions of law are likewise reviewed *de novo*, *State v. Guthrie*, 2002 S.D. 138, ¶ 5, 654 N.W.2d 201, 204, but its findings of fact are reviewed for clear error. *State v. Fierro*, 2014 S.D. 62, ¶ 12, 853 N.W.2d 235, 239 (citation omitted).

ARGUMENTS

I

THE CIRCUIT COURT PROPERLY ADMITTED THE TESTIMONY OF KATHY EVANS AS OTHER ACTS EVIDENCE.

Evans first argues that the circuit court erred by admitting the other acts testimony of Kathy Evans. DB 10-19. He insists that the admission only showed his "propensity to act violently when jilted." DB 18. So, according to Evans, the circuit court abused its discretion. DB 17-19.

His assertion fails. It ignores the well-settled principle that Rule 404(b) is a rule of inclusion, not exclusion. *Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d at 415 (citation omitted). The witness's testimony was relevant to both Evans's motive and plan.

SDCL 19-19-404(b) governs the admissibility of other act evidence. It provides:

> (1) Prohibited uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) Permitted uses; notice in a criminal case. This evidence may be admissible for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
> (A) Provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
> (B) Do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

SDCL 19-19-404(b).

The statute created a dichotomy. *See id.* One half is the "general rule that evidence of crimes or other acts, other than the ones with which a defendant is charged, is inadmissible." *State v. Chamley*, 1997 S.D. 107, ¶ 9, 568 N.W.2d 607, 611 (*overruled on other grounds by State v. Boe*, 2014 S.D. 29, ¶ 25, 847 N.W.2d 315, 322). It protects against undue prejudice created by admission of character evidence that evinces a general propensity to do something. *Id.* But the other half of the dichotomy can overcome the general rule if the proponent of the other act evidence can "persuade the [circuit] court that the evidence has some" permitted use. *State v. Lassiter*, 2005 S.D. 8, ¶ 15, 692 N.W.2d 171, 176 (citations omitted). And because the permitted uses listed in the rule are nonexclusive, "the possible uses for other act

evidence are limitless[.]" *State v. Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d 792, 798 (citation omitted).

To determine whether the other acts evidence is admissible, the circuit court must engage in a two-part balancing test that focuses on the factual and legal relevance of the proffered evidence. *State v. Birdshead*, 2015 S.D. 77, ¶ 57, 871 N.W.2d 62, 81 (citations omitted).

First, the circuit court must determine "whether the intended purpose of the [other] acts evidence is relevant to some material issue in the case other than character." *State v. Armstrong*, 2010 S.D. 94, ¶ 12, 793 N.W.2d 6, 11 (citation omitted). Evidence is relevant when "[i]t has any tendency to make a fact [of consequence] more or less probable than it would be without the evidence[.]" SDCL 19-19-401. All relevant evidence is admissible. SDCL 19-19-402. And "the law favors admitting relevant evidence no matter how slight its probative value." *State v. Bowker*, 2008 S.D. 61, ¶ 39, 754 N.W.2d 56, 68 (quoting *State v. Bunger*, 2001 S.D. 116, ¶ 11, 633 N.W.2d 606, 609). For example, "[i]t is sufficient that the evidence has a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence." *Id.* (citation omitted). Upon a finding of relevancy by the circuit court, "the balance tips emphatically in favor of admission." *State v. Huber*, 2010 S.D. 63, ¶ 59, 789 N.W.2d 283, 302 (citation and internal quotation marks omitted). That's

because it's a rule of inclusion, not exclusion. *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 17, 835 N.W.2d 886, 892 (citation omitted).

Second, with the relevancy determination made, the circuit court must then determine "whether the probative value of the evidence is substantially outweighed by its prejudicial effect." *Armstrong*, 2010 S.D. 94, ¶ 12, 793 N.W.2d at 11 (citation omitted). Exclusion based on "mere damage to a defendant's position is not" proper. *Medicine Eagle*, 2013 S.D. 60, ¶ 17, 835 N.W.2d at 893 (citation omitted). Instead, the prejudicial effect from admission of the other acts must *substantially* outweigh the probative value of the evidence—it must amount to unfair prejudice. *Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d at 82 (citations omitted); *Armstrong*, 2010 S.D. 94, ¶ 15, 793 N.W.2d at 12. In this context, "[p]rejudice refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d at 83 (citations and internal quotation marks omitted). So "[u]nless trials are to be conducted on scenarios, on unreal facts tailored and sanitized . . . , the application of [SDCL 19-19-403] must be cautious and sparing." *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799 (first alteration in original) (citations and internal quotation marks omitted).

A. Factual Relevance

The circuit court determined that the proffered other acts testimony provided context to Evans's threatening and harassing

behavior after S.B. broke up with him. So it admitted that testimony under two permitted uses: motive and plan. MH 81; SR 994 (Findings of Fact and Conclusions of Law on State's Notice of Intent to use other acts evidence pursuant to SDCL 19-19-404(b)). Each is discussed in turn.

Motive. Under the motive permitted use, "[e]vidence of a prior [act] can . . . demonstrate a defendant's motive to commit the current crime or demonstrate the existence of a motive when there is a relationship between the victims." *Boe*, 2014 S.D. 29, ¶ 21, 847 N.W.2d at 321 (citing *Lassiter*, 2005 S.D. 8, ¶¶ 21-24, 692 N.W.2d at 177-79). It's critical to consider whether the prior acts concerned similar victims and similar crimes. *Novak v. McEldowney*, 2002 S.D. 162, ¶ 15, 655 N.W.2d 909, 914 (citation omitted). That's especially true in domestic-violence situations: "[d]omestic abuse often has a history highly relevant to the truth-finding process." *State v. Liable*, 1999 S.D. 58, ¶ 21, 594 N.W.2d 328, 335 (citation omitted)

Kathy Evans testified to Evans's prior aggressive and obsessive behavior, threats, and physical violence. JT 816-32. Those actions were all a concerted effort to control and isolate her. JT 817. Evans's conduct towards Kathy evinced his motive to regain the control he lost once the relationship ended. *Cf. Phillips*, 2018 S.D. 2, ¶ 15, 906 N.W.2d at 415 (explaining how prior acts are relevant to provide context to a controlling and hostile relationship). Kathy's testimony showed a

similar crime committed against similar victims and provided context to Evans's motive to regain control over S.B.

Evans argues that *Lassiter* precludes the State from offering the other acts evidence to show Evans's motive. DB 17-18. That's misplaced.

In *Lassiter*, the State relied on the motive exception to argue that Lassiter's prior aggravated assault conviction tended to identify him as the person who committed the crime charged. *Lassiter*, 2005 S.D. 8, ¶ 20, 692 N.W.2d at 177. In assessing the admissibility of Lassiter's prior aggravated assault, this Court indicated that other acts evidence may supply the "existence of a motive, but the act does not supply the motive." *Id.* ¶ 22, 692 N.W.2d at 178 (quoting 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 3:18, at 103 (Rev. ed. 1999 & Supp. 2004)). For example, "motive is in the nature of hostility, antipathy, hatred, or jealously." *Id.*

The victims here share a connection unlike the victims in *Lassiter*. Lassiter assaulted his former girlfriend's new boyfriend; the State there introduced evidence of Lassiter's prior assault of another former girlfriend. *Id.* ¶¶ 2-9, 692 N.W.2d at 173-74. S.B. and Kathy are members of a class of victims—each woman here faced domestic violence because they broke up with Evans. *See id.* ¶ 22, 692 N.W. 2d at 178 (citation omitted) (noting that other acts evidence may be admissible under motive "to illustrate an accused's ill will toward all

persons within a certain class of people"). Logically, then, it follows that the other acts evidence here would be relevant to show Evans's hostility, antipathy, hatred, or jealously towards S.B. And, unlike the victims in *Lassiter*, the threats, harassment, and physical violence experienced by S.B. and Kathy share substantial similarities. *Compare infra* p. 26, *with Lassiter* ¶ 25, 692 N.W.2d at 179.

Common design, plan, or scheme. Other acts evidence may also be admitted under the plan permitted use "where the uncharged misconduct is sufficiently similar to support the inference that they are manifestations of a common plan, design, or scheme . . . ." *Medicine Eagle*, 2013 S.D. 60, ¶ 18, 835 N.W.2d at 893 (quoting *State v. Big Crow*, 2009 S.D. 87, ¶ 8, 773 N.W.2d 810, 812) (citation omitted). The plan permitted use can be proven "circumstantially with evidence that the defendant committed a series of similar, but 'unconnected' acts." *Id.* ¶ 19 (quoting *Wright*, 1999 S.D. 50, ¶ 19, 593 N.W.2d. at 801). The proponent must show "that the charged and uncharged events 'have sufficient points in common.'" *Id.* (quoting *Wright*, 1999 S.D. 50, ¶ 19, 593 N.W.2d at 800). And those other acts "must demonstrate 'not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" *Id.* (quoting *Wright*, 1999 S.D. 50, ¶ 19, 593 N.W.2d. at 801) (citation omitted).

Evans's threatening and harassing behavior towards his ex-wife is sufficiently similar to the charged act.[8] Evans subjected each victim to that threatening and harassing behavior after the relationship ended. *See supra.* He called incessantly. *Compare* JT 65, *with* JT 823. He stole each victim's mail. *Compare* JT 91, *with* JT 831. He broke into each victim's house at night while they slept and physically assaulted them. *Compare* JT 111-12, *with* JT 817. He came armed.[9] *Compare* JT 121 *with* JT 817. What's more, Kathy's testimony helps refute the notion that S.B. welcomed Evans into her home with open arms to have consensual sex. *See Medicine Eagle*, 2013 S.D. 60, ¶ 18, 835 N.W.2d at 893 (quoting *State v. Ondricek*, 535 N.W.2d 872, 875 (S.D. 1995)) (citation omitted) (explaining that if a defendant denies the charged act, then "evidence of a common plan or scheme to achieve the act is directly relevant to refute this general denial."). Kathy's testimony thus establishes Evans's common design, plan, or scheme after a relationship ends.

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[8] While Evans's assault on Kathy is remote, the circuit court was not subjected to a "rigid rule" when it analyzed that remoteness. *Armstrong*, 2010 S.D. 94, ¶ 16, 793 N.W.2d at 12. Even a remote other act "may still be relevant if it strikingly similar to the charged offense." *Id.* (citation omitted).

[9] S.B. feared for her life when Evans used a hunting knife to cut some of the duct tape from her body. JT 121. A knife and pistol were found in S.B.'s vehicle—neither item belonged to her. JT 136-37; EXs 58, 60, 64, 65.

B. Legal Relevance

After finding factual relevance existed under two permitted uses, the circuit court next found that the "probative value of the February 1993 and December 1994 incidents, as testified to by Kathy Evans, [were] not outweighed by any prejudicial effect resulting in [Evans]'s case". SR 994. That testimony made it more or less probable that Evans kidnapped and raped S.B. SDCL 19-19-401. And although it didn't paint Evans in a positive light, he "[is] certainly not entitled to have the jury decide his case on a pretense that his behavior and feelings toward [S.B. were] nothing but routinely warm and affectionate." *Huber*, 2010 S.D. 63, ¶ 57, 789 N.W.2d at 301-02 (first alteration in original) (quoting *Liable*, 1999 S.D. 58, ¶ 23, 594 N.W.2d at 336). So even if Evans suffered some prejudice, it didn't *substantially* outweigh the probative value of the evidence. *Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d at 82 (citations omitted).

What's more, the circuit court properly circumscribed the proffered testimony and instructed the jury on the other act testimony it heard. First, the court didn't allow every statement by Kathy that the State intended to proffer—it found some statements irrelevant and unfairly prejudicial. MH 80; SR 991. That, in turn, alleviated any concerns of unfairly prejudicial evidence being heard by the jury. And second, at trial, the circuit court instructed the jury that the other acts evidence could "be used only to show common scheme or plan or

motive." SR 686 (Jury Instruction No. 43). Those actions ensured the jury wasn't persuaded "in an unfair or illegitimate way." *State v. Kihega*, 2017 S.D. 58, ¶ 23, 902 N.W.2d 517, 525 (citations and emphasis omitted).

Evans thus suffered no unfair prejudice. *Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d at 82-83 (citations omitted). Kathy's testimony was not only relevant but also necessary to provide the jury with a complete picture of Evans's plans and motive. And it refuted his theory that S.B. welcomed him into her home for consensual sex. The circuit court ensured the testimony wasn't prejudicial through mitigation before and at trial. As a result, the circuit court did not abuse its discretion.

II

THE CIRCUIT COURT DID NOT COMMIT STRUCTURAL ERROR DURING JURY SELECTION.

Evans argues that the circuit court's in-chamber discussions with potential jurors substantially deviated from the jury selection statutes. DB 19-28. Those deviations, according to Evans, created structural error and warrant a new trial. DB 28. Contrary to his assertions, the circuit court's alleged errors do not rise to the level of structural error.

The United States Supreme Court has held that some constitutional errors may be structural. *Chapman v. California*, 386 U.S. 18 (1967). Those errors, if structural, "necessarily render[] a trial

fundamentally unfair." *Miller v. Young*, 2018 S.D. 33, ¶ 14, 911 N.W.2d 644, 648. This Court has recognized only six categories of structural error: "(1) a deprivation of the right to counsel; (2) a biased judge; (3) an unlawful exclusion of grand jurors of the defendant's race; (4) a deprivation of the right of self-representation at trial; (5) a deprivation of the right to a public trial; and (6) an erroneous reasonable doubt standard." *Id.* That list is exhaustive. *Id.* Even so, this Court has held that "structural error can occur in the jury selection process." *Id.* ¶ 19, 911 N.W.2d at 650.

Structural error doesn't always occur if a court fails to comply with the jury selection process. In fact, "[t]echnical departures from the jury selection statutes and violations which do not threaten the goals of random selection and objective disqualification do not constitute a substantial failure to comply." *Id.* (quoting *State v. Bearchild*, 103 P.3d 1006, 1009 (Mont. 2004). If a "competent and unbiased juror[,]" for example, is improperly seated, that error could "rank as harmless under state law." *Id.* (quoting *Rivera v. Illinois*, 556 U.S. 148, 162 (2009)). That error does not automatically "convert the jury into an ultra vires tribunal." *Id.*

No structural error occurred here. Take the circuit court's in-chamber discussion with the first prospective juror, D.S. VT 3. The circuit court asked her what concerns she had. *Id.* She informed the court that she knew Evans's daughter and grandson. *Id.* The court

exercised its "broad discretion in determining juror disqualification" and informed the parties of its intent to excuse D.S. VT 3; *State v. Verhoef*, 2001 S.D. 58, ¶ 12, 627 N.W.2d 437, 440. And when asked, Evans didn't object. VT 3. In fact, Evans didn't object to any prospective juror being excused in chambers. VT 3-24. Like *Miller*, the circuit court's alleged errors didn't deny Evans the opportunity to demonstrate that the jurors were biased. *Miller,* ¶ 17, 911 N.W.2d at 649. Not only did the circuit court afford Evans that opportunity but also it granted it. That's clear in his discussion with one prospective juror, P.T. VT 14-16. The circuit court didn't deny Evans's request to ask P.T. more questions after the court asked its own. VT 15. So it follows that the court didn't deny Evans's ability to "eliminate as far as possible the vagaries of human subjectivity and arbitrariness from the jury selection process." *Id.*

In addition to being nonstructural, any alleged errors committed by the circuit court were harmless. Harmless error review requires this Court to assess whether it can "declare a belief beyond a reasonable doubt that the error[s were] harmless and did not contribute to the verdict obtained." *Miller*, 2018 S.D. 33, ¶ 21, 911 N.W.2d at 650. A conviction, however, will not be reversed on error alone—a reversal requires "error plus injury." *State v. Daniel*, 2000 S.D. 18, ¶ 17, 606 N.W.2d 532, 535 (citation omitted). Each of the jurors that served were passed for cause by Evans. VT 87. Evans thus received a fair trial

before an impartial jury. *Verhoef*, 2001 S.D. 58, ¶ 19, 627 N.W.2d at 442. Evans suffered no prejudice.

Any alleged errors by the circuit court weren't structural: Evans's right to an impartial jury wasn't violated. And even if there were error, Evans suffered no prejudice, rendering any error harmless. The circuit court therefore did not abuse its discretion in excusing the prospective jurors.

III

THE CIRCUIT COURT PROPERLY DENIED EVANS'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS MOTEL ROOM AND VEHICLE.

In his penultimate argument, Evans asserts his right against unreasonable searches and seizures, as guaranteed by the federal and state constitutions, was violated when law enforcement searched his motel room and seized his vehicle at the Prairie Wind Casino located on the Pine Ridge Indian Reservation. DB 29-39. To Evans, law enforcement's search and seizure usurped the tribe's "sovereignty over places and things on the reservation." DB 38.

His argument cannot withstand scrutiny. That's because caselaw, from both the United States Supreme Court and this Court, forecloses his argument.

The United States Supreme Court's precedent is clear. When a crime on the reservation involves only non-Indians, state courts retain exclusive jurisdiction over those crimes. *Duro v. Reina,* 495 U.S. 676,

680 n.1 (1990).[10] Indian tribes have no inherent jurisdiction to try and punish non-Indians for crimes committed in Indian country. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). This Court has recognized that long-standing precedent. *State v. Vandermay*, 478 N.W.2d 289, 290 (S.D. 1991).

Applying that precedent here leads to one conclusion: the State retained exclusive jurisdiction over the crime. *Id.* Evans is a non-Indian. MH 14. S.B. is a non-Indian. MH 67. And the crime occurred in Custer County. MH 8. A tribal search warrant doesn't change those facts. In other words, the tribe lacked any of the necessary prerequisites for jurisdiction over this crime—it was committed by a non-Indian against a non-Indian on State land. *Cf. Vandermay*, 478 N.W.2d at 291. Evans's argument fails.

And law enforcement's decision to secure Evan's vehicle likewise fails: it was not only justified but also reasonable. This Court has recognized that "[a] seizure affects only the person's possessory interest; a search affects a person's privacy interests." *State v. Smith*, 458 N.W.2d 779, 782 (S.D. 1990) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). So a seizure does not give rise to the "heightened protection [which courts] accord privacy interests" when a search occurs. *Id.* (quoting *Segura v. United States*, 468 U.S. 796, 810 (1984)).

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[10] *See also United States v. McBratney*, 104 U.S. 621 (1881); *Solem v. Bartlett*, 465 U.S. 463 (1984); *United States v. Wheeler*, 435 U.S. 313 (1978).

Law enforcement thus may seize property, based on probable cause, for the time necessary to secure a warrant. *Id.*

In *Smith*, this Court found law enforcement's warrantless seizure of a defendant's vehicle proper. *Id.* at 783. The vehicle was parked on a public street and not being used for residential purposes. *Id.* Law enforcement would have been justified, under the "vehicle exception," in searching the vehicle if probable cause existed.[11] *Id.* So it followed that if a search was justifiable, then a less intrusive seizure was justified. *Id.*

So too here. Evans parked his vehicle in the parking lot outside the Prairie Wind casino. *Compare* MH 17, *with Smith*, 458 N.W.2d at 783. The vehicle was not being used for residential purposes; Evans had already rented a room. MH 19. Those circumstances reduced Evans's expectation of privacy in his vehicle. Law enforcement already had probable cause to search the vehicle—it obtained a search warrant, found to have probable cause, the day before by a court of competent jurisdiction. MH 9-10. It chose to secure Evans's vehicle until an additional warrant was obtained. MH 30. Just like *Smith*, the circumstance relating to the "vehicle exception" would have justified not only the seizure of Evans's vehicle but also the search of that vehicle. *Smith*, 458 N.W.2d at 783.

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[11] This Court applied the "vehicle exception," explaining that "there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling." Quoting *California v. Carney*, 471 U.S. 386, 392 (1985)).

Law enforcement's search and seizure of Evans's hotel room and vehicle was reasonable. The State's jurisdiction over the crime here was exclusive. The circuit court thus properly denied Evans's motion to suppress.

IV

THE CIRCUIT COURT PROPERLY ALLOWED AGENT GOBLE'S NONEXPERT TESTIMONY.

Evans finally asserts that the circuit court erred by admitting Agent Goble's testimony about whether S.B.'s story corroborated the injuries he saw at the hospital.[12] DB 39-41. Evans contends that Agent Goble's testimony qualified as expert testimony and vouched for S.B.'s credibility. DB 41. Thus, according to Evans, his testimony

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[12] The relevant testimony is as follows:

State:	You stated, and when you began your testimony, that you interview a subject then take pictures to corroborate the interview?
Goble:	That's definitely one of the things I do to corroborate what they say.
State:	And in this case you took pictures?
Goble:	Yes.
State:	And you also interviewed the victim?
Goble:	Correct.
State:	And in your opinion did the pictures corroborate her story?
Evans:	Objection; invades the province of the jury.
Court:	Overruled.
Goble:	There was corroboration in the location where she said she was taped and that the injuries she had could possibly be consistent with being dragged with being dragged through a house and out a house.

JT 608.

invaded the province of the jury, and the State should have qualified the agent as an expert before being allowed to present his testimony. *Id.*

But Evan's argument misses the mark. Agent Goble's testimony merely relayed to the jury how he not only investigates alleged crimes but also recounting his perceptions about the trauma inflicted on S.B. and how those perceptions supported S.B.'s report to him. JT 597-607. Indeed, Agent Goble first explained that he uses interviews and pictures to either corroborate or refute what someone has told him. JT 597. And Agent Goble's nonexpert opinion was narrowly confined—his interview and photos corroborated only the locations of where S.B. was taped and the possible cause of her injuries. JT 608. The jury then heard that Agent Goble's investigation didn't simply end after the interview. *Id.* He testified shortly after that he needed to further corroborate S.B.'s statements by heading to the crime scene. *Id.* That testimony helped the jury to understand Agent Goble's pursuit of evidence to either confirm or refute S.B.'s statements to him. The agent's testimony thus qualified as lay-not expert-testimony. *See* SDCL 19-19-701. As result, the circuit court didn't abuse its discretion when it allowed that testimony.

A lay opinion needs no foundation. *State v. Andrews*, 2001 S.D. 31, ¶ 17, 623 N.W.2d 78, 83 (citations omitted). Yet it still must meet SDCL 19-19-701. Under the statute, a lay witness may give an opinion when it's "(a) rationally based on the witness's perception; (b) helpful to

clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of § 19-19-702." SDCL 19-19-701. The focus is on the witness's perception of an event, not the witness's education or experience gained before the event occurred. *State v. Condon*, 2007 S.D. 124, ¶ 29, 742 N.W.2d 861, 870.

Agent Goble's testimony is not beyond the realm of an average person's experience. He gave his opinion about the cause of S.B.'s injuries. And the cause of S.B.'s injuries here are not so unusual that expert testimony is needed. *See State v. No Heart*, 353 N.W.2d 43, 48 (S.D. 1984) (holding an officer's opinion on the cause of an injury he perceived was not beyond the realm of common experience). Agent Goble, moreover, never testified that S.B.'s statements were honest or truthful. *Compare* JT 608, *with State v. Buchholtz*, 2013 S.D. 96, ¶ 16, 841 N.W.2d 449, 455 (noting that "the credibility of a witness—whether a witness tells the truth—is a question for the jury."). Instead, his independent observations supported S.B.'s story in a narrow scope. His testimony was within the parameters of what he had observed based on his perceptions of S.B.'s injuries. *No Heart*, 353 N.W.2d at 48.

Even if the circuit court admitted Agent Goble's testimony erroneously, Evans must still establish that he "suffered material prejudice" from the alleged error before this Court will reverse. *Scott*, 2019 S.D. 25, ¶ 15, 927 N.W.2d at 126. Material prejudice occurs only

"when in all probability . . . it produced some effect upon the final result and affected the rights of the party assigning it." *Id.* (citation omitted).

Evans cannot establish that he suffered material prejudice. The circuit court exercised its discretion in allowing Agent Goble's testimony. It let the jury perform its function to decide the weight and credibility of the agent's testimony. *No Heart*, 353 N.W.2d at 48. That testimony didn't infringe on the jury's province. *Id.* Whether S.B.'s injuries perceived by Agent Goble supported her statements to him was still for the jury to decide. *Id.* His testimony required no foundation. *Id.* Evans therefore suffered no material prejudice as a result of Agent Goble's testimony.

Upon full consideration of the entire record and evidence presented, the admission of Agent Goble's testimony was not arbitrary or unreasonable. The circuit court thus didn't abuse its discretion.

CONCLUSION

The State respectfully requests this Court affirm the circuit court's judgment and sentence.

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 8,375 words.

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

Dated this 4th day of June 2020.

/s/ Quincy R. Kjerstad
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 4, 2020, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Harry David Evans* was served via email upon John R. Murphy, at john@murphylawoffice.org

/s/ Quincy R. Kjerstad
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Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL # 29095

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

HARRY DAVID EVANS,
Defendant and Appellant.

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

THE HONORABLE JEFFREY DAVIS

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In reply to the State's Brief, Appellant, Harry David Evans, responds as follows:

1. The Trial Court Erred in Admitting Other Acts Evidence:

Pursuant to SDCL 19-19-404 and the well-reasoned holding in *State v. Lassiter*, 2005 S.D. 8, 692 N.W.2d 171, the trial court should not have admitted Kathy Evans' testimony regarding Evans' alleged acts of violence against her in 1993 and 1994 during Evans' trial for assaulting Benson in 2017. In its response, the State generally ignores the plain language of *Lassiter*. Instead of confronting *Lassister*, the State tries to distract the Court by directing it to the *Phillips* decision, which is neither legally nor factually on point. And, the State attempts to re-construct the facts by alleging that Kathy Evans and Benson were connected to each other, and were members of the same class, to support the trial court's admission of the evidence.

In *Lassiter*, the Court held that evidence of a defendant's assault against a past girlfriend after she ended the relationship was not admissible against the defendant when he was charged with similar conduct against a different girlfriend (and her new boyfriend) after she broke up with him. 2005 S.D. at ¶¶ 21-25. The Court distinguished between cases where the past and present victims are the same person, and those where the victims are different. Admitting the former may be admissible to show the familial relationship between the parties, whereas admitting the later unfairly prejudices the defendant by suggesting "the defendant's general violent nature" and because it, essentially, an argument that "because defendant had done it before, he must have done it again." *Id.* The Court warned that admitting past assaults against a

different victim presents the jury with evidence of a defendant's "general propensity to commit assaults when rejected by girlfriends." *Id.* at ¶ 24. This is impermissible. Yet, when it admitted Kathy Evans' testimony, the trial court expressly acknowledged this evidence went to Evans' bad character and showed his propensity to assault girlfriends when he felt jilted. MH 12/27/18 p. 81; MH 1/25/19 p. 4.

The State acknowledged that Kathy Evans' testimony was introduced to establish how Evans' tended to behave or act – his propensities – when relationships end. State's Brief pp. 23-24. The State asserts that Evans' alleged acts of violence towards Kathy Evans were admissible because the prior acts "evince his motive to regain the control he lost once the relationship ended." State's Brief 23. In other words, Evans' prior acts of abuse towards Kathy Evans when she ended the marriage show his propensity to abuse women, like Benson, when they end a relationship with him. This is not admissible under SDCL 19-19-404 or *Lassiter*.

In a veiled attempt to distinguish Evans' case from *Lassiter*, the State asserts that Kathy Evans and Benson "share[d] a connection unlike the victims in *Lassiter*." State's Brief p. 24. The State never explains what this "connection" is or how it differs from the connection between the two former girlfriends in *Lassister*. Benson and Kathy Evans shared no connection. They did not know each other or live in the same community, their relationships with Evans were materially different, their relationship with Evans was separated by a 27-year gap, and they never claimed to have any familial or other ties to each other. This alleged "connection" between Kathy Evans and Benson is a fiction created by the State to get around the holding in *Lassiter*.

Because there is no material difference between Evans' case and *Lassiter*, and

because this "connection" between Kathy Evans and Benson is fiction, the State tries to analogize Evans' case to *State v. Phillips,* 2018 S.D. 2, 906 N.W.2d 411. *Phillips*, however, affirms Evans' argument. It holds that past acts of domestic violence against the *same* alleged victim may be admissible to show the dynamics of the familial relationship. *Id.* at ¶¶ 20-22. It deals with situations where the past and present subject of alleged abuse is the same person. *Phillips* is not on point to Evans' case. *Lassiter* is on point. It deals with situations where the past and present subjects of alleged abuse are different people. Kathy Evans and Benson are different people and, therefore, *Lassiter* is the relevant case.

Since it could not entirely avoid a discussion of *Lassiter*, the State has taken dicta from that decision, misconstrued it, and then presented that misconstrued dicta to this Court as supporting the admission of Kathy Evans' testimony. The State suggests that *Lassiter* stands for the proposition that because Kathy Evans and Benson were members of the same "class" of people, acts against Kathy Evans were admissible in Evans' trial regarding Benson. State's Brief p. 24-25 ("S.B. and Kathy are members of a class of victims – each woman here faced domestic violence because they broke up with Evans.") (citing *Lassiter, supra,* at ¶ 22).

There is no authority for the proposition that Kathy Evans and Benson became members of a recognized or distinguishable class of people because they were allegedly victims of crimes by Evans. The cited portion of *Lassiter* does not support the State's assertion. The section of *Lassiter* cited by the State says that, in some jurisdictions, evidence that a defendant had negative feelings against *all* members of a class could be used to explain why the defendant committed acts against a particular member of that

class. *Lassiter*, *supra,* at ¶ 20 (citing to *Kimble v. State,* 659 N.E.2d 182, 184–85 (Ind.Ct.App.1995) for the proposition that evidence of defendant's membership in racially biased group was relevant to show that defendant was motivated to choose victim based on her race). The cases cited in *Lassiter* refer to situations where a defendant has expressed some ill will towards the members in a group, and the group consisted of a well-defined population of people (such as people that went to the same church, were of the same race, etc.). In those situations, evidence of the defendant's antipathy towards the class might be admissible in regard to crimes against an individual member.

In addition to Kathy Evans and Benson not being members of a class, there is nothing in the record suggesting that Evans had ill-will towards all women. The fact that the State had to look back over 25 years to find another female alleged victim of abuse by Evans shows that the suggestion he hated all women is not supported by this record.

Ironically, the case referenced by the State from within *Lassiter,* and which supposedly supports its "class" theory of admissibility, is a case where the appellate court held that it was improper to admit the other acts evidence, and vacated the defendant's murder conviction as a result. *Lazcano v. State,* 836 S.W.2d 654, 659-661 (Tex.Ct.App. 1992) (cited in *Lassiter* at ¶ 20 and quoted by the State at State's Brief pp. 24-25). In *Lazcano,* the prosecution was permitted to admit evidence of the defendant's past sexual assault of one girl in his trial for the murder of another girl.

Like in Evans' case, in *Lazcano* the prosecution was permitted to admit the evidence based on the motive and common plan or scheme theories for admission of other acts evidence. And, like in Evans' case, the prosecution in *Lazcano* claimed that the two female alleged victims were in the same "class" because both were young women

who had allegedly been victimized by the defendant. This, according to the prosecution and to the trial court, made the defendant's prior acts against one admissible at the trial of the other.

On appeal, the appeals court in *Lazcano* rejected those bases for admission, and affirmed the same reasoning utilized by the Court in *Lassiter:*

> Moreover, the evidence challenged in the instant case does not pertain to the same victim, nor does it tend to show Appellant's animosity toward a particular class of persons. The evidence merely tends to show Appellant's propensity to lure susceptible females away from the public's view in order that he might obtain some sexual gratification—not that Appellant harbored some ill will or other motive to murder either the deceased, the extraneous offense witness or females in general. Such an inference is precisely the type of character conformity evidence that Rule 404(b) does not allow.

Lazcano v. State, 836 S.W.2d 654, 659 (Tex. App. 1992). The holdings in *Lassiter, Lazcano,* and the many other authorities cited within *Lassiter,* firmly establish that evidence of past acts of domestic violence against a different victim than alleged in the pending charges are not admissible because it constitutes inadmissible propensity evidence.

As an alternate theory of admissibility, the State alleges that if Kathy Evans' testimony was not admissible to show motive, it was admissible to show that Evans had a common design, plan or scheme. State's Brief p. 25. This was not the dominant theory of admissibility discussed by the trial court when it ruled in the State's favor at trial. However, regardless of the theory of admission, the State's argument fails to establish the admissibility of Kathy Evans' testimony.

First, as discussed in Evans' initial brief and above, Kathy Evans' testimony was legally irrelevant due to its highly prejudicial nature and the likelihood that the jury

would receive it as evidence of Evans' character and propensity to beat up girlfriends when jilted. The trial court acknowledged that this evidence was being offered to show Evans' character and propensities. MH 12/27/18 p. 81; MH 1/25/19 p. 4. The prejudice was exacerbated at trial when Kathy Evans was allowed to testify at length as to how bad of a father and husband Evans was. Regardless of the theory of admission under SDCL 19-19-404(b), evidence designed to attack character and establish propensity is inadmissible.

Second, the State bases its common plan or scheme argument on the holding in *State v. Medicine Eagle,* 2013 S.D. 60, 835 N.W. 2d 886. That case does not support the State's position. In that case, the issue was whether an act two and a half years *after* the charged offense could be admitted to show a common plan or scheme. The trial court ruled that the two and a half year gap was not too remote, and that a subsequent act was admissible under the predecessor to SDCL 19-19-404(b). The issue on appeal was whether subsequent acts were admissible under the rule. The Court held that there was no bar to admission of subsequent acts if they met the other foundational requirements for admissibility. *Id.* at ¶ 21. Subsequent acts is not the issue in Evans' case.

Even though *Medicine Eagle* is not on point for the issue raised in Evans' case, it does raise two important matters for consideration: remoteness and the use of limiting instructions. The State has never meaningfully addressed Evans' remoteness argument. In *Medicine Eagle,* the trial court held that a two and half year gap was not too remote to admit an other act, and this finding was not disturbed on appeal. In Evans' case, there was a 27 year gap between the two acts. The trial court, without citing any authority, summarily concluded that the remoteness doctrine was not applicable in domestic

violence cases. MH 12/27/18 p. 80. The State has failed to identify any case law supporting the trial court's conclusion. And, the State hasn't meaningfully addressed Evans' remoteness claim, particularly in regard to the theory that the two acts, which are separated by almost three decades, establish a common plan or scheme. The notion of a common plan or scheme suggests something repeated on a regular basis, not something that happens only twice, and separated by over 25 years.

Moreover, in *Medicine Eagle,* the Court took note of the fact that the trial court provided a detailed limiting instruction at the time the evidence was admitted to prevent its misuse and to limit its prejudicial impact. *Id.* at ¶ 23. Not only did the trial court in Evans' case fail to give a limiting instruction, it appeared to believe that limiting instructions served no purpose. There is no explanation or excuse for the trial court's decision in Evans' case to refusal to give a limiting instruction, particularly in light of the inflammatory and remote nature of Kathy Evans' testimony.

Third, the State's reliance on the common plan or scheme theory of admissibility is misplaced because only two, remote instances were presented, and the events do not establish a specific plan, design or scheme by Evans. This issue was directly addressed in the *Lazcano* case that was cited in *Lassiter.* As in Evans' case, in *Lazcano* the prosecution offered other acts under the motive and common plan or scheme theories.

The *Lazcano* decision rejected the notion that two incidents of assaults against young females established a common plan or scheme. And, it cautioned that the common plan or scheme theory of admission is often utilized by the prosecution to admit propensity evidence:

> The last theory upon which the State hangs its hat to support admission of the extraneous offense is that the evidence proved a common plan or scheme. As

> noted by the Court of Criminal Appeals in *Boutwell*, trial courts have routinely employed this exception as a subterfuge to admit evidence which amounts to only propensity-type evidence. In order to truly constitute a common plan or scheme, the proffered extraneous offenses must demonstrate the steps taken in furtherance of or in contemplation of accomplishing a scheme or plan. The mere occurrence of numerous similar acts is insufficient to give rise to logical and legal relevance apart from showing a propensity to commit such acts. Even if the commission of a high number of generally similar offenses increases the potential relevance, the evidence tendered in the instant case illustrated only one analogous act. Without some indication that the acts constituted the necessary steps in the completion of a formed design, we expressly decline to hold that the occurrence of a single comparable act constitutes a common scheme or plan.

Lazcano v. State, 836 S.W.2d 654, 659 (Tex. App. 1992) (internal citations omitted). In Evans' case, there was only one prior analogous act offered, that act occurred decades before the pending allegation, and the prior act did not demonstrate that Evans had a specific plan, scheme or design that linked the two events. It was erroneous to admit Kathy Evans' testimony as establishing a common plan or scheme regarding the acts allegedly committed against Benson.

Last, in support of its claim that the two incidents showed a common plan or scheme, the State tried to focus the Court on their alleged similarities, but ignored their substantial differences. Evans and Kathy Evans met and married when they were young, and were married for years. Evans and Benson met in middle age, and had a short term, primarily sexual, non-marital relationship. Evans and Kathy Evans had children, and the source of their discord was related to the children. Evans and Benson had no children and their relationship was centered around work and sex, not family. The incidents that Kathy Evans alleged occurred at a house she and Evans had shared as a married couple, whereas Benson claimed the acts alleged happened at a home she owned alone and which Evans was not allowed to be at. Kathy Evans claimed the acts against her happened after she and Evans had ended their relationship and separated; Benson claimed that

Evans behaved violently toward her throughout their relationship, and that they had an on-again off-again sexual relationship with Evans that continued through her moves to three different locations in two different counties. Kathy Evans never suggested that Evans bound her with tape, forced her to take sleeping pills, or forced her to leave the home. Benson claimed that Evans' acts were accomplished primarily through the use of duct tape and Ambien, and that she was dragged out of her house, driven away, driven back to the house, raped, then forced to drive Evans to his car. These dissimilarities are particularly important, as noted in Evans' initial brief, due to the long period of time that elapsed between the alleged events. They discount the notion of the two events being strikingly similar or unique.

Kathy Evans' testimony should not have been admitted. Its introduction irreparably and substantially prejudiced Evans.

2. The Trial Court Erred During Voir Dire:

The State is not contesting that the trial court made numerous errors and violated numerous statutes during jury selection. In his brief, Evans identified 13 violations of statute committed by the trial court. Evans' Brief, pp. 26-27. It doesn't appear the State contests any of those allegations. Rather, it responds that (1) Evans did not object to the trial court's conduct and (2) the trial court's errors were not structural.

Evans' trial counsel did not object to the trial court's conduct during jury selection.1 In many circumstances, that would have an impact on the standard of review. However, both the State and Evans' agree that, notwithstanding the lack of an objection, the trial court's errors are reviewed for an abuse of discretion. Evans' Brief,

1 Appellate counsel was not trial counsel.

p. 19; State's Brief, p. 18. Thus, the failure of Evans' trial counsel to object is of little consequence to this Court's assessment as to whether the trial court's numerous errors during the jury selection process warrant reversal of Evans' convictions.

Though it tacitly concedes that the trial court made numerous errors during jury selection, the thrust of the State's argument is that these errors were not structural and do not warrant reversal. App. Brief 28. Instead, the State claims the trial court's errors were merely technical departures from the jury selection statutes. App. Brief 29. It relies on *Miller v. Young,* 2018 S.D. 33, for this proposition.

Rather than supporting the State's position, the *Miller* decision establishes the structural nature of the errors committed by the trial court in Evans' case. In *Miller,* the Court distinguished between jury selection statutes that govern the objective procedures used to select trial jurors randomly, and technical errors such as when a judge gave one party more peremptory challenges than it was entitled to under the statute. *Id.* at ¶ 16.

The *Miller* decision did not suggest that the errors committed in Evans' case were merely technical violations. In *Miller,* the Court noted the importance of following the statutes enacted to direct jury selection to "eliminate as far as possible the vagaries of human subjectivity and arbitrariness from the jury selection process" and secure a defendant's fundamental right to an impartial jury. *Id.* at ¶ 16 (citations and quotations omitted). When a trial court departs from statutes that are meant to promote objectivity and remove arbitrariness, structural error occurs. *See id.* at ¶ 17.

In Evans' case, the trial court's errors were not mere technical violations such as one party receiving an additional peremptory challenge, as occurred in *Miller.* The errors in Evans' case adversely affected the entire process by inserting subjectivity and

arbitrariness in to this critical phase of the trial. Though the trial court violated multiple jury selection statutes, *see* Evans' Brief pp. 26-27, perhaps the best example of how the trial court's procedures impacted the objectivity of the jury selection process relate to its wholesale disregard for SDCL 23A-20-13.1. That statute memorializes the legislature's exclusive list of grounds for dismissal of potential jurors for cause. It is the legislature's attempt to set forth objective criteria for removal of potential jurors.

From the moment that the trial court took over voir dire and began dismissing jurors for reasons other than those included in the statute, to when it "just took it upon myself" to remove K.B. without a record or prior notice to counsel, the trial court inserted arbitrariness and subjectivity in to the process. This arbitrariness and subjectivity can be best illustrated by the trial court's inconsistency in its decisions to keep or dismiss a potential juror.

The trial court elected to keep P.T. in the pool, even though he was "good friends" with Kim Ellerton and had learned "a fair amount of details" from her and her husband. Ellerton was a key fact witness for the State. Yet, over and over again, the trial court excused jurors for cause based on reasons not amounting to grounds for removal under the statute, such as when it removed K.H. because she was "a little bit uncomfortable" with the case based on her involvement in another case 20 years before; or when it excused S.G., who thought it might be "a little bit" difficult to be fair because he worked with survivors of domestic violence; or when it released T.C. because he had plans to participate in a rodeo; or the removal of many other jurors who expressed minor concerns that were not grounds for removal for cause under the statute. *See* Evans' Brief pp. 25-26 for citations to each of the 19 jurors removed by the trial court for cause.

In its brief, the State prepared a chart of the trial court's reasons for dismissing jurors. State's Brief p. 8. That chart demonstrates the egregious nature of the trial court's violations of the jury selection statutes. State's Brief p. 8. It shows that numerous jurors were removed based on non-statutory grounds, such as "familiar with Evans' or his family" or "affected by nature of charges" or "family member affected by nature of charges." Those are not grounds for removal under SDCL 23A-20-13.1. The issue is not whether one is merely familiar with the defendant or his family. If that were the case, it would be nearly impossible to pick juries in many rural counties within South Dakota where most people are familiar with others in the area. The issue is whether the prospective juror is related to the defendant, or has a specific business or wardship relationship with the defendant, or has a state of mind evincing enmity against or in favor of the defendant, or any one of the other specified grounds within the statute. *E.g.* SDCL 23A-20-13.1(2)-(6). Similarly, the issue is not whether a prospective juror is "affected by the nature of the charges." There are probably few people in our state that have not been affected in some way by drugs, alcohol, child abuse, sexual assault, theft, vandalism, or other crimes. The issue is whether the prospective juror can fairly try the case, impartially and without prejudice to the rights of the parties. SDCL 23A-20-13.1(21). The State's chart demonstrates the subjectivity of the trial court's process and the blatant disregard of the statute.

Even if this Court found the trial court's errors not to be structural, the errors warrant reversal. From its inception, the jury selection process was flawed. Immediately after the pool was sworn, the trial court removed 19 jurors on its own, during judge conducted voir dire, without regard to the statutes, and without determining

whether the jurors were unable or unfit to serve. As a result, none of these potential jurors was subjected to voir dire by the attorneys, none of them were asked to examine whether their concerns or conditions could be addressed or accommodated, and neither party was required to use any of their peremptory challenges to remove these potential jurors had then not been excused for cause. This materially altered the remainder of the jury selection process by removing a substantial number of prospective jurors before voir dire or the parties' exercise of their peremptory challenges. The trial was materially different as a result of the trial court's errors, and the trial court's violation of multiple statutes affects the integrity of the result and the public's perception as to the fairness and equity of the process. Reversal is warranted.

3. Evans' Motion to Suppress Should Have Been Granted:

In its response to Evans' suppression argument, the State conflates South Dakota's personal jurisdiction over Evans to prosecute him for acts that occurred in Custer County, and South Dakota's authority to seize Evans' vehicle, and search a motel room, that were on land within the jurisdiction of an Indian tribe. State's Brief 31-33. Evans has never contested South Dakota's jurisdiction to prosecute him for crimes allegedly committed in Custer County. The issue raised by Evans is whether law enforcement had the authority to go on to the reservation, seize and remove his truck, and search his motel room, without a tribal or federal warrant.

The State has not provided any authority for the proposition that state law enforcement officers can go on to tribal land, with or without a state warrant, and seize items and search areas without a tribal or federal warrant. Instead, the State cites to numerous cases that stand for the proposition that citizens have a lesser expectation of

privacy in their vehicles than in their homes. State's Brief pp. 32-33. That is not the issue before this Court. The issue is whether state law enforcement officers can go on to a reservation – a place where they do not have jurisdiction to act – grab a vehicle, put it on a tow truck, and drive it on to state land to search. Or, whether those officers can go in to a motel room located on an Indian reservation and search a room, merely because the last occupant of the room was not a tribal member.

The State relies heavily upon *State v. Smith,* 458 N.W.2d 779 (S.D. 1990), as authority for its position. In *Smith,* two men were suspected of stealing an item from a store in the town of Custer. *Id.* at 779-80. The men were apprehended at another store in Custer. Their car, which was parked in front of the store, was seized by law enforcement, driven to the police station, and searched pursuant to a warrant. *Id.* The Court upheld the seizure and search of the vehicle. *Id.* Nothing in the decision suggested that a defendant's lesser privacy expectations in a vehicle, or the lesser constitutional protections afforded to seizures versus searches, permits law enforcement officers to travel on to land for which they have no jurisdiction, seize items, and then bring them back to their jurisdiction to search.

For these reasons, Evans' motion to suppress should have been granted.

4. Goble's Expert Testimony Was Inadmissible:

For the reasons stated in his initial brief, Evans' objection to Goble's testimony should have been granted. Goble's testimony invaded the province of the jury to make credibility determinations and to assess whether Benson's testimony was corroborated.

Dated this _____ day of June, 2020.

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_____

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, John R. Murphy, counsel for appellant Harry David Evans, submits the following:

The forgoing reply brief is 15 pages in length. It is typed in proportionally spaced 12 point Times New Roman. The left hand margin is 1.5 inches, the right hand margin is 1.0 inches. It contains 4,440 words and 22,557 characters.

Dated June _____, 2020.

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