IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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NO. 29333

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee*,

vs.

KEVIN XAVIER DICKERSON,

*Defendant and Appellant*.

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

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HONORABLE ROBIN HOUWMAN
Circuit Court Judge

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# APPELLANT'S BRIEF

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Notice of Appeal Filed on May 22, 2020

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**PRELIMINARY STATEMENT**

All references herein to the Settled Record are referred to as "SR." The transcript of the Arraignment held December 9, 2019 is referred to as "AH." The transcript of the Jury Trial held March 4, 2020 through March 5, 2020 is referred to as "JT."[1] The transcript of the Court Trial held April 15, 2020 is referred to as "CT." The transcript of the Sentencing Hearing held April 23, 2020 is referred to as "ST." All references to documents will be followed by the appropriate page number. Exhibits are referred to as "Ex." followed by the exhibit number.

[1] The jury trial transcript was separated into three volumes with a continuous page count.

Defendant and Appellant, Kevin Dickerson, will be referred to as "Dickerson."

## JURISDICTIONAL STATEMENT

Dickerson appeals the Judgment and Sentence entered April 23, 2020, by the Honorable Robin Houwman, Circuit Court Judge of the Second Judicial Circuit. SR 192. Dickerson's Notice of Appeal was filed May 22, 2020. SR 333. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

## STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ERRED BY GRANTING THE STATE'S MOTION TO EXCLUDE MENTION OF VICTIM'S IMMIGRATION STATUS, RESULTING IN A VIOLATION OF DICKERSON'S SIXTH AMENDMENT.

The circuit court granted to State's motion, finding the testimony was not relevant, and the danger of unfair prejudice outweighed the probative value.

*Romero–Perez v. Commonwealth*, 492 S.W.3d 902 (Ky. Ct. App. 2016)

*State v. Perez*, 423 S.C. 491, 816 S.E.2d 550 (2018)

*State v. Podzimek*, 2019 S.D. 43, 932 N.W.2d 141

II. WHETHER THE CIRCUIT COURT ERRED IN ADMITTING ROJAS' BANK RECORDS WITHOUT LAYING PROPER FOUNDATION THOUGH TESTIMONY FROM THE CUSTODIAN OF RECORDS FOR THE BUSINESS.

The circuit court admitted the bank records over Dickerson's objection, finding the evidence fit within the business records exception to the rule against hearsay.

*State v. Stokes*, 2017 S.D. 21, 895 N.W.2d 351

*Dubray v. SD Dept. of Social Services*, 2004 S.D. 130, 690 N.W.2d 657

SDCL 19-19-803(6)

III. WHETHER THE TRIAL COURT ERRED IN DENYING DICKERSON'S MOTION FOR JUDGMENT OF ACQUITTAL.

The circuit court denied Dickerson's motion, finding the State's evidence, if believed by the jury, enough to find Dickerson guilty on all counts of the Indictment.

SDCL 22-30-4

*State v. Martin*, 2015 S.D. 2, 859 N.W.2d 600

*State v. Miland*, 2014 S.D. 98, 858 N.W.2d 328

## STATEMENT OF CASE

On December 4, 2019, a Minnehaha County Grand Jury returned an Indictment charging Dickerson with the following: Count 1 – Robbery in the First Degree, in violation of SDCL 22-30-3(1); Count 2 – Burglary in the First Degree – Dangerous Weapon, in violation SDCL 22-32-1(2)-5; Count 3 – Burglary in the First Degree – Nighttime, in violation of SDCL 22-32-1(3); Count 4 – Aggravated Assault – Extreme Indifference, in violation of SDCL 22-18-1.1(1); Count 5 – Aggravated Assault – Dangerous Weapon, in violation of SDCL 22-18-1.1(2); Count 6 – Aggravated Assault – Physical Menace, in violation of SDCL 22-18.1.1(5). SR 1. Dickerson was charged as a co-defendant with Ariana Reecy. *Id*. Arraignment on the Indictment was held on April 4, 2019. *See* AH. On December 6, 2020, the State filed a Part II information, alleging Dickerson had three or more additional felony convictions including one or more crimes of violence. SR 16.

Jury trial on the matter began on March 4, 2019. *See generally* JT. Prior to

trial, the State filed a motion to exclude mention of victim's immigration status. SR 58. Dickerson objected to the State's motion, arguing Rojas could receive a substantial immigration benefit by applying for a U-Visa,[2] making his immigration status relevant. JT 12.

Before ruling, the circuit court heard testimony from the Julio Gomez-Rojas ("Rojas"). *Id*. at 140. Rojas admitted he was in the country illegally. *Id*. at 141. A week after the incident, he spoke with an immigration attorney about being the victim of a crime. *Id*. at 143. He did not ask the immigration attorney for information about having his immigration status adjusted based on being the victim of a crime. *Id*. He also stated he hadn't filed an application, specifically an I-918 form, to have his status adjusted. *Id*. When Dickerson asked if Rojas intended on applying for a U-Visa in the future, Rojas replied "I don't have any plans yet, but if it comes to that point perhaps, yes, of course." *Id*. at 144.

In recognizing that Rojas' credibility would be a fundamental issue for the jury to determine, Dickerson argued that Rojas' immigration status was probative of bias. *Id*. at 148. Furthermore, Dickerson argued that he had a constitutional right to effectively confront and cross-examine his accuser. *Id*. at 147. The State argued Rojas' immigration status was irrelevant and of limited impeachment value. *Id*. at 149. The circuit court granted the State's motion. *Id*. at

[2] A U-Visa provides immigration benefits to crime victims, if the victim has been helpful and cooperative in the investigation or prosecution of criminal activity. JT 11-12; SR 88; Ex. A (USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification).

151. In making that ruling, the circuit court determined Rojas' immigration status was of limited relevance, and found that the evidence was more prejudicial than probative. *Id*. at 150.

During the State's direct-examination of Rojas, it sought to introduce a record purporting to show a list of attempted transactions on Rojas' debit card. *Id*. at 190; Ex. 1. Dickerson objected, asserting the State failed to lay adequate foundation to admit the exhibit, and that it contained hearsay. *Id*. at 190-91. The circuit court received the exhibit over Dickerson's objection, stating:

> "I believe [the evidence] does fit within the business records exception of the hearsay rule and that this is the record of the witness' own bank accounts and he has spoken to some of the transactions himself, so I believe it fits within that exception."

*Id*. at 192.

At the conclusion of the State's case-in-chief, Dickerson motioned the circuit court for a Judgment of Acquittal on Counts 1 through 6. *Id*. at 356. Dickerson argued the State failed to make a prima facia case on the First Degree Robbery charge because Rojas' testified the wallet was not taken from his person or immediate presence. *Id*. Also, Dickerson argued the State did not meet its burden on the First Degree Burglary charges, as it did not provide evidence showing what Dickerson specifically intended to do inside of the apartment building. *Id*. Finally, Dickerson pointed to the State's failure to produce the gun, as well as the witness' testimony and surveillance video which did not show Dickerson in possession of a gun. *Id*. at 356-57.

The jury returned a verdict finding Dickerson guilty on Count 1 - First Degree Robbery, Count 3 – First Degree Burglary - Nighttime, and Count 4 – Aggravated Assault – Extreme Indifference. SR 141, JT 467. On April 15, 2020, a Court Trial on the Part II Information commenced. *See generally* CT. Due to the COVID-19 pandemic, Dickerson waived his right to a jury trial on the Part II Information. CT 3. The circuit court found Dickerson guilty of the allegations in the Part II Information. CT 28.

Sentencing was held before Judge Houwman on April 23, 2020. *See generally* ST. On Count 1, the circuit court imposed thirty-five years in the penitentiary, with fifteen years suspended. ST 19. On Count 3, the circuit court imposed twenty years in the penitentiary, with five years suspended. *Id*. On Count 4, the circuit court imposed fifteen years in the penitentiary, with five years suspended. *Id*. All sentences were ordered to run concurrent to each other. *Id*.

**STATEMENT OF FACTS**

On November 19, 2019, around 8:51 p.m., Metro Communications toned out a robbery at 1015 S. Duluth Avenue in Sioux Falls, SD. JT 256. Sioux Falls Police Department Officers Christian O'Brien ("O'Brien") and Trent Ehler ("Ehler") reported to the location and started an investigation. *Id*. at 256, 282. Ehler photographed the apartment. *Id*. at 282; Ex. 8–16. He also took pictures of the victim, Julio Gomez-Rojas ("Rojas"). *Id*. at 288; Ex. 3-7.

O'Brien interviewed Rojas. *Id*. at 258. He immediately noticed a laceration

on Rojas' head and called for an ambulance. *Id*. Rojas told O'Brien that a woman he knew as "Kisses" called him earlier and told him she wanted to visit.[3] *Id*. at 259. Later that night, she entered his unlocked apartment while he was sitting on the couch. *Id*. at 259, 264, 270. According to Rojas, she looked around, asked if he was alone, then went to the door and allowed an unknown black man to enter. *Id*. The man put a gun to his head and demanded money. *Id*. After Rojas told him he didn't have any money, the man demanded his wallet. *Id*. Rojas gave up his wallet, which didn't have any cash in it. *Id*. The man told Kisses to look for money. *Id*. When the man tried to advance toward the bathroom, Rojas confronted him. *Id*. In response, the man hit him in the head with a gun. *Id*. They left the apartment in a black Chevrolet SUV with Iowa license plates. *Id*. at 260. O'Brien documented his investigation with a police report, which listed Rojas' phone number as 605-370-7305, and Kisses' phone number as 605-305-6317. *Id*. at 276.

At trial, Rojas provided testimony that did not match up with O'Brien's report. In the State's direct-examination, Rojas testified that he'd been calling and text messaging Kisses, who was later identified as Ariana Reecy ("Reecy"), throughout the day. *Id*. at 174. On prior occasions, Reecy had asked him for money to support her children and pay bills. *Id*. He denied her requests,[4] but

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[3] Rojas met Kisses at Lanie's Bar in Lesterville, SD. JT 172. He told O'Brien she visited his apartment about a month and a half earlier. *Id*. at 261.
[4] On one prior occasion, Rojas met her at a Walmart parking lot but did not give her money. *Id*. at 174.

continued communicating with her because he was romantically interested. *Id*. at 174-75. On the night of the incident, she agreed to visit his apartment between 7:00 – 7:30 p.m. *Id*. at 176. He saw her arrive in a black SUV with Iowa license plates and let her in the apartment building. *Id*. at 176-77. Inside his apartment unit, she asked for money – according Rojas, he gave her $200 and she left. *Id*. She was in the apartment for under five minutes. *Id*.

In addition to Reecy's first visit, Rojas provided testimony about a second interaction with Reecy that night. *Id*. At trial, Rojas recalled Reecy contacting him again to say she was coming back to his apartment at 8:30 p.m. *Id*. He thought she was coming back to commence a physical relationship. *Id*. at 178-79. When he let her into the apartment this time, Reecy told him to go first and followed him up the stairs. *Id*. at 179. He locked the door to his apartment after they entered. *Id*. at 180.

Inside the apartment, Reecy asked if Rojas was alone and unlocked the apartment door. *Id*. Then, a black man wearing a face mask came through the door, aimed a gun at him, and asked for his money. *Id*. The man grabbed him by the hair, lifted him from the sofa, grabbed him by the back of the neck, and pointed the gun at him. *Id*. at 180. The man told Reecy to look for money. *Id*. at 181. When Rojas tried to get away, the man hit him with the gun and he fell to the floor. *Id*. at 181, 182. The man grabbed Rojas' billfold from the table. *Id*. Rojas ran to the bathroom, held the door closed, locked it, and called out to his neighbor for help. *Id*. When his apartment fell silent, he came out of the

bathroom and told his neighbors what happened. *Id*. at 182-83.

O'Brien acknowledged on cross-examination that Rojas didn't tell him he was texting Reecy throughout the day, didn't tell him he let Reecy into the apartment building, and didn't tell him Reecy had been in his apartment earlier that night. *Id*. at 266. According to O'Brien, Rojas made it seem as though Reecy showed up to his apartment unannounced. *Id*. at 267. When O'Brien asked about communications with the Reecy, Rojas disclosed one phone call earlier in the day. *Id*. at 278. Also, O'Brien agreed that the apartment did not appear to be in disarray - the cupboards weren't open and the drawers weren't taken out. JT 273.

Syvlia and Sofia Parada lived in the neighboring apartment. *Id*. at 228, 241. Sylvia testified about hearing Rojas yell for help.[5] *Id*. at 229. She and Sofia crossed the hall to Rojas' apartment but couldn't open his door. *Id*. at 230, 242. After approximately three minutes elapsed, they saw a black male and light skinned female run from Rojas' apartment.[6] *Id*. at 231-34, 242. Neither Sylvia nor Sofia saw either of the individuals holding a gun or wallet. *Id*. at 239, 251. Sofia called the police from Rojas' phone. *Id*. at 233, 244.

On cross-examination, Sofia recounted the 911 call she made on Rojas' behalf. *Id*. at 247; Ex. 2. According to Sofia's testimony, Rojas said he knew Reecy

[5] Sylvia told O'Brien she heard a loud cry coming from Rojas' apartment. *Id*. at 274, 278.

[6] Sylvia was unable to pick Reecy or Dickerson out of a lineup. JT 234. Although Sofia indicated she would be able to recognize the female, at trial, she did not identify Reecy as the woman she saw on the night of the incident. JT 243.

and let her into the apartment. *Id*. In the recorded 911 call, Sofia told the operator that Reecy entered the apartment without knocking. Ex. 2. She also told the operator the black male was wearing black clothing, but said he was not wearing a mask. JT 250; Ex. 2. When Sylvia and Sofia spoke with O'Brien, neither said the black male was wearing a mask. JT 274. Sofia agreed that the answers she provided to the 911 operator came from Rojas. *Id*. at 248.

Detective Scott Vandervelde ("Vandervelde") was assigned to the case – he tracked the cell phone number in O'Brien's report to Reecy.[7] *Id*. at 321. After reviewing a lost child report from 2019, he believed Reecy was in a relationship with Dickerson. *Id*. He discovered an address associated with Dickerson in Luverne, Minnesota and contacted Jeff Wieneke ("Wieneke") of the Rock County Sheriff's Office to investigate. *Id*. at 322. Weineke surveilled the address, located the suspect vehicle, and identified Reecy as a passenger in the vehicle. *Id*. at 322-24.

A couple days after the incident, Rojas contacted Vandervelde to let him know about some attempted transactions on his debit card. *Id*. at 328-29. Vandervelde met Rojas at Metabank and obtained a list of the attempted transactions. *Id*. at 329. Vandervelde also met with Rojas' landlord to review the surveillance footage from the apartment building on the night of the incident.[8] *Id*.

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[7] Rojas did not tell Vandervelde that he had been texting with Ariana throughout the day. JT 349.

[8] Rojas' landlord testified about the location of the security cameras at the

at 335; Ex. 20-21. He used his cell phone to record a copy of the video. *Id*. at 338. In reviewing the surveillance footage, he saw Rojas let Reecy into the apartment building at 7:11 p.m. - she stayed for approximately six minutes. *Id*. at 335, 337. While watching this segment of the video, he saw a male wearing dark clothing and white tennis shoes approach, but not enter, the front of the building. *Id*. at 336.

The surveillance footage also showed Rojas let Reecy in a second time at 8:10 p.m. *Id*. When Reecy entered the apartment the second time, she let Rojas go first. *Id*. at 335. Vandervelde also saw a male's hand prevent the door from closing. *Id*. at 336. The male entered the apartment and went upstairs. *Id*. Based on the clothing, Vandervelde believed it was the same man that approached the building in the first video. *Id*. On the second occasion, Reecy spent about four minutes inside the apartment. *Id*. at 337. In looking at still photographs from the surveillance video, Vandervelde believed the male to be Dickerson. *Id*. at 338; Ex. 22, 23.

Vandervelde presented two separate photo lineups to Rojas - one including Reecy, and one including Dickerson. *Id*. at 325. Rojas identified Reecy, but not Dickerson. *Id*. at 326; Ex. 21. Vandervelde obtained an arrest warrant and instructed Weineke to initiate a traffic stop of the vehicle. *Id*. at 328. Both Reecy

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apartment building and provided the recordings to Vandervelde. JT 293; Ex. 20-21.

and Dickerson were taken into custody after a traffic stop in Minnehaha County. *Id*.

Officer Chase Vanderhull ("Vanderhull") reported to the location of the traffic stop.[9] *Id*. at 306. He searched the Tahoe and located eight 40-calibur bullets inside the center console. *Id*. at 307. He also noticed bruising on Reecy's hand. *Id*. at 308, 312, 317. Reecy complained of pain in her arm and told him the injury occurred while exotic dancing. *Id*. at 308; Ex. 17. On cross-examination, Vanderhull acknowledged he never contacted the registered owner to determine who the bullets belonged to. *Id*. at 311. Also, he agreed that Reecy was wearing a jacket during the arrest, and he noticed bruising on Reecy's hand, not her arm. *Id*. at 312, 317.

Dickerson called Derek Kuchenreuther in his defense.[10] *Id*. at 365. Through Kuchenreuther, Dickerson offered cell phone records[11] from Verizon showing multiple text messages sent between the numbers associated with Rojas and Reecy, with the last message sent between the two numbers at 7:08 p.m. from

[9] Another individual named Lorenzo Jackson was present in the car. Law enforcement found bullets while searching Jackson's belongings. JT 313.

[10] At the time of his testimony, Kuchenreuther was working as a forensic examiner with Computer Forensic Resources. He formerly worked as a Detective for Minnehaha County. JT 366.

[11] The Court received Dickerson's "Certificate of Authenticity of Business Records", signed by a custodian of records at Verizon Wireless. Ex. B.

Reecy's phone number.[12] JT 369-70; Ex. A. In addition, Dickerson offered a Verizon call detail record, which showed Rojas calling Reecy at 6:41 p.m. and 8:40 p.m. on November 19, 2019. JT 371-75; Ex. B. Finally, Kuchenreuther testified that Rojas sent Reecy a picture message at 7:22 p.m. on the night of the incident. JT 375-377; Ex. C.

Reecy testified in her own defense. JT 380. She recalled meeting Rojas in Lesterville and taking his phone number. *Id.* at 382-83. She contacted him when she was in need of money. *Id.* at 383. Reecy was texting with Rojas throughout the day of the incident. *Id.* at 384. She planned on meeting him at 7:00 p.m., and was hoping he could help her with money. *Id.* In their earlier conversation, Rojas told Reecy he would give her three-hundred to four-hundred dollars. *Id.* at 385. When she showed up to the apartment, he told her he only had twenty dollars. *Id.* Rojas gave her his debit card, which she placed in her fanny pack. *Id.* at 387. She tried to leave, but Rojas requested sex. *Id.* When Reecy declined, he blocked the door. *Id.* at 388. She told him she'd come back, hugged him, and he kissed her. *Id.* After that, he allowed her to leave. *Id.*

After Reecy left, Rojas sent a picture message showing cash, and told her to bring the card back. *Id.* She did go back, but took Dickerson with her for protection. *Id.* at 388-89. Reecy had Rojas go first because he groped her while going up the stairs on the first occasion. *Id.* at 389. When they got to Rojas'

[12] The cell phone records did not show the substance of the message. JT 370.

apartment unit, he locked the door after she entered. *Id*. at 390. According to Reecy, she felt uncomfortable with the door locked, so she unlocked it. *Id*. After she unlocked the door, Rojas grabbed her arm, pulled her onto the couch, and tried forcing her to perform oral sex. *Id*. She was able to slip away and ended up on the living room floor. *Id*. at 391. Rojas restrained her and put his hands down her pants. *Id*. Reecy fought back – she choked him, then hit him with a cell phone. *Id*. He grabbed his head and yelled. *Id*. At that point, Dickerson entered the apartment and Rojas let Reecy go. *Id*. at 392. Reecy and Dickerson fled the apartment without giving back the debit card. *Id*.

Reecy had bruising on her arms a week after the incident. *Id*.; Ex. 50, 51, 52, 53. With regard to the comments to Vanderhull about her arm hurting, Reecy testified that she meant her wrist, not her arm. *Id*. at 396. Neither Reecy nor Dickerson made a police report about the incident. *Id*. at 394. Reecy stated she did not tell Dickerson about the details of what transpired in the apartment and wanted to forget about it. *Id*. at 394-95. Reecy stated she did not use Rojas' debit card, but discarded it on the night of the incident. *Id*. at 395. She testified that she did not go to Rojas' apartment with the intent to rob him. *Id*.

## ARGUMENT

### I. THE CIRCUIT COURT ERRED BY GRANTING THE STATE'S MOTION TO EXCLUDE CROSS-EXAMINATION RELATED TO ROJAS' IMMIGRATION STATUS AND KNOWLEDGE OF THE U-VISA PROGRAM, RESULTING IN A VIOLATION OF DICKERSON'S SIXTH AMENDMENT RIGHT TO EFFECTIVE CONFRONTATION.

*A. The evidence was probative of Rojas' bias in the outcome of the State's*

*prosecution, and was not outweighed by the danger of unfair prejudice.*

"This Court reviews a decision to admit or deny evidence under the abuse of discretion standard." *Ferebee v. Hobart*, 2009 S.D. 102, 776 N.W.2d 58 (citing *Fiechuk v. Wilson Trailer Co., Inc.*, 2009 S.D. 62, ¶ 8, 769 N.W.2d 843, 846). "This applies as well to rulings on motions in limine." *Id*. (citing *Dahlin v. Holmquist*, 235 Mont. 17, 766 P.2d 239, 241 (1988); *Gray v. Allen*, 677 S.E.2d 862, 865 (N.C.Ct.App.2009)).

"Although relevant evidence is generally admissible . . . it may be excluded 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Id*. (citing *Fiechuk*, 2009 SD 62, ¶ 8, 769 N.W.2d at 846); SDCL 19-19-403. "Trial courts are vested with wide discretion in their evidentiary rulings and this discretion is afforded as well in a court's balancing of unfair prejudice against probative value." *Id*.

The admissibility of a victim's immigration status, as it relates to the U-Visa program, has not been addressed by this Court. The Court of Appeals of Kentucky dealt with this issue in *Romero–Perez v. Commonwealth*, 492 S.W.3d 902 (Ky. Ct. App. 2016). In *Romero-Perez*, the defendant attempted to cross-examine the victim about her immigration status and U-Visa application, but the prosecution objected. *Id*. at 904. Romero-Perez argued he had the right to question the witness concerning bias and motive to fabricate the allegations. *Id*.

at 904-05. The trial court refused to allow Romero-Perez to broach either subject, citing "concerns about the case turning into an immigration trial, concerns over a potential conflict of interest, and concerns that permitting cross-examination would 'fly in the face' of the purpose of the visa." *Id*. at 905. Romero-Perez appealed. *Id*.

The Court of Appeals of Kentucky agreed with Romero-Perez, finding that the trial court erred in excluding the evidence of the victim's pending U-Visa application. *Id*. at 907. The *Romero-Perez* court recognized "[the victim] successfully obtaining a U-Visa was dependent on her being a victim of domestic violence." *Id*. at 907. The court "conclude[d] that the evidence of [the victim's] U-Visa was relevant evidence from which the jury could infer that [the victim] had a personal interest in the outcome of the case." *Id*. Ultimately, the *Romero-Perez* court found the trial court's error to be harmless. *Id*. at 908.

Here, the circuit court abused its discretion by excluding relevant evidence that was probative of Rojas' bias. SDCL 19-19-401 provides:

> Evidence is relevant if:
>
> (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) The fact is of consequence in determining the action.

In this case, like *Romero-Perez*, Rojas' knowledge of the U-Visa program had a tendency to explain why his initial report to O'Brien did not mention details that were testified to at trial, which include an allegation Dickerson was wearing a

mask, and that Dickerson put Rojas in a chokehold. JT 180-81. The circuit court's ruling prevented the jury from receiving a full picture of Rojas, and his motivation to fabricate important details related to the charges. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 1731 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (alterations in original).

Because a U-Visa is granted to the victim of a crime, it would be a rational decision for Rojas to exaggerate the allegations against Dickerson and Reecy, thereby elevating and solidifying his status as a crime victim. The ultimate question - whether or not Rojas was in fact providing truthful or embellished testimony – was a credibility determination that should have remained within the sole discretion of the jury. "It is the function of the jury to resolve evidentiary conflicts, determine the credibility of the witnesses, and weigh the evidence." *State v. Buchholtz*, 2013 S.D. 96, 841 N.W.2d 449 (citing *State v. Packed*, 2007 S.D. 75, ¶ 34, 736 N.W.2d 851, 862).

Furthermore, the circuit court's focus on the timing of the U-Visa application is misplaced. JT 150. Cross-examination related to Rojas' *knowledge* of the U-Visa was directly connected to Dickerson's defense. Evidence of this nature would have informed the jury that Rojas stands to benefit, in the future, by

providing embellished testimony, thereby increasing the probability of a conviction. Because nothing prevents an immigrant victim from submitting a U-Visa application after providing testimony, the timing of an application is irrelevant and should not have been considered as a basis for excluding the evidence. In fact, Rojas said "I don't have any plans [to apply for a U-Visa] yet, but if it comes to that point, perhaps, yes, of course." *Id*. at 144. Also, Rojas testified that an immigration attorney told him "you can go ahead, proceed helping out with the case. And then, yes, you are eligible to . . . apply at some time for a U-Visa." *Id*. at 144-45.

In addition, the circuit court's belief that the evidence "would distract the jury and . . . constitute a mini trial" is unfounded. *Id*. at 150. Rojas, in a straightforward, on the record statement, admitted that he was in the country illegally, thereby eliminating the need to litigate that issue. *Id*. at 141.

Moreover, the prejudicial effect is minimal. Like the court in *Romero-Perez*, Dickerson acknowledges that "some prejudice might result from allowing examination into the U-Visa application," however, "a criminal defendant's right to effectively probe into a matter directly bearing on witness credibility and bias must trump any prejudice that would result from the jury's knowledge of the victim's immigration status." 492 S.W.3d at 906-07. And Dickerson did not intend to impeach Rojas' character through an inflammatory denigration of individuals residing in the United States illegally. JT 11. Dickerson recognized that Rojas' immigration status, standing alone, would have little relevance. *Id*. Instead,

Dickerson simply believed it was his right to provide the jury with information tending to show Rojas' bias in the outcome of the case. *Id*. at 12

*B. Excluding the evidence violated Dickerson's Sixth Amendment right to effectively confront and cross-examine his accuser.*

The admissibility issue discussed above is inherently tied to Dickerson's Sixth Amendment right to effectively confront and cross-examine his accuser. However, this Court employs the *de novo* standard when reviewing "[t]he [constitutional] question of whether a defendant's Sixth Amendment right to confrontation was violated . . . ." *State v. Podzimek*, 2019 S.D. 43, ¶ 13, 932 N.W.2d 141, 146 (citing *State v. Spaniol*, 2017 S.D. 20, ¶ 23, 895 N.W.2d 329, 338). "The Confrontation Clause of the Sixth Amendment to the United States Constitution, as applied to South Dakota through the Fourteenth Amendment, requires that in all criminal cases, the defendant has the right 'to be confronted with the witnesses against him.'" *Id*. "The Confrontation Clause applies to witnesses testifying at trial and to the admission of hearsay." *Id*. (quoting *Spaniol*, 2017 S.D. 20, ¶ 24, 895 N.W.2d at 338).

"This right is generally satisfied when the defense is given a *full and fair* opportunity to probe and expose a witness'[s] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness'[s] testimony." *Id*. (Emphasis added). In order to state a violation of the Confrontation Clause, a defendant must establish "facts from which jurors . . . could appropriately draw inferences related to the

reliability of the witness." *Romero–Perez,* 492 S.W.3d at 902 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436 (1986)).

In *State v. Perez*, 423 S.C. 491, 495, 816 S.E.2d 550, 552 (2018), reh'g denied (Aug. 2, 2018), the trial court excluded evidence of a witness's U-Visa application.[13] Perez was convicted and appealed. 423 S.C. at 496, 816 S.E.2d at 553. The South Carolina Court of Appeals determined the trial court erred in excluding evidence of the witness's U-Visa application, resulting in a violation of the defendant's rights under the confrontation clause of the Sixth Amendment to the United States Constitution. 423 S.C. at 497, 816 S.E.2d at 553. However, the Court of Appeals found the error to be harmless beyond a reasonable doubt. *Id*. (citing *State v. Perez*, Op. No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015), 2015 WL 1933739, *3-4).

Perez appealed to the South Carolina Supreme Court, contending the Court of Appeals erred in finding the trial court's refusal to admit the evidence was harmless error. 423 S.C. at 496, 816 S.E.2d at 553. The South Carolina Supreme Court agreed with Perez, finding the trial court's failure to admit the evidence was not harmless beyond a reasonable doubt. 423 S.C. at 500, 816 S.E.2d at 555. "[P]rohibiting [the witness] from testifying about her U-visa application prevented Perez from establishing a full picture of the witnesses' biases." *Id*. The

[13] The trial court did allow the defense to cross-examine the first victim's mother about her immigration status and U-Visa application. *Perez*, 423 S.C. at 495, 816 S.E.2d at 552.

Court reversed the Court of Appeals' decision and remanded for a new trial. 423 S.C. at 501, 816 S.E.2d at 555.

In this case, like *Perez*, the circuit court's ruling violated Dickerson's right to effectively confront and cross-examine Rojas. If Dickerson had been allowed to question Rojas about his awareness of the U-visa program, the jury could have "appropriately draw[n] inferences related to the reliability" of Rojas' testimony. *Romero–Perez,* 492 S.W.3d at 906.

*C. The circuit court's error was not harmless beyond a reasonable doubt.*

Pursuant to SDCL 23A-44-14, harmless error is "[a]ny error, defect, irregularity or variance which does not affect substantial right[s]." *State v. Brown*, 480 N.W.2d 761, 764 (S.D. 1992). In determining whether an error is harmless, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Pursley*, 2016 S.D. 41, ¶ 10, 879 N.W.2d 757, 760. *See also State v. Reay*, 2009 S.D. 10, ¶ 50, 762 N.W.2d 356, 370. An error may be deemed harmless "provided the court is able to declare a belief beyond a reasonable doubt that the error is harmless and did not contribute to the verdict obtained." *State v. Zakaria*, 2007 S.D. 27, ¶ 19, 730 N.W.2d 140, 146.

Rojas' credibility was the most consequential issue at trial. Because the circuit court's ruling hindered Dickerson's ability to effectively cross-examine Rojas on this issue, it is difficult to believe beyond a reasonable doubt that the error did not contribute to the verdict. The jury was tasked with determining

who was telling the truth – Reecy or Rojas. The circuit court's error was not harmless, as it allowed the State to play up the notion that Rojas was a bias-free witness in closing argument. At the beginning of the State's closing argument, the prosecutor asked the jury: "Really it comes down to one question: Who do you believe?" JT 417. As the closing argument continued, the prosecutor suggested that Rojas had no interest in the outcome of the case:

> "Why would [Rojas] want to do this? He ends up talking to the police on five different occasions; came in and testified at the Grand Jury and then he was here again yesterday for a couple of hours. He's testifying to a bunch of people in a courtroom that's using language that isn't his strong suit. He can speak English but he said he prefers to speak Spanish. And he doesn't have anything at stake in this case. Why do that? Why would you do that? Well, you will do it because he's the victim and he wants to see a just outcome in the case."

JT 436. Because of the circuit court's abuse of discretion, Dickerson was prevented from rebutting a critical point – the credibility of the alleged victim – which was emphatically bolstered in the State's closing. "An individual is not entitled to a perfect trial, but he is entitled to a fair trial." *State v. Larson*, 512 N.W.2d 732 (S.D. 1994) (citing *State v. Lybarger,* 497 N.W.2d 102, 105 (S.D.1993); *State v. Bennis,* 457 N.W.2d 843, 847 (S.D.1990)). The circuit court's ruling deprived Dickerson of a fair trial.

## II. THE CIRCUIT COURT ERRED IN ADMITTING ROJAS' BANK RECORDS WITHOUT LAYING PROPER FOUNDATION THROUGH TESTIMONY FROM THE CUSTODIAN OF RECORDS FOR THE BUSINESS.

### *A. The State did not provide a certificate of authenticity, or testimony from a custodian of records.*

"[A] trial court has broad discretion in determining the admissibility of documents such as business records." *Brown*, 480 N.W.2d at 764 (quoting *U.S. v. Wigerman*, 549 F.2d 1192, 1194 (8th Cir. 1977)). This Court "review[s] a trial court's ruling on the admissibility of evidence under an abuse of discretion standard." *Johnson v. O'Farrell*, 2010 S.D. 68, ¶ 12, 787 N.W.2d 307, 311-12 (quoting *State v. Williams*, 2006 S.D. 11, ¶ 8, 710 N.W.2d 427, 430). An "admission of evidence in violation of a rule of evidence is an error of law that constitutes an abuse of discretion." *Dubray v. South Dakota Dept. of Social Services*, 2004 S.D. 130, ¶ 8, 690 N.W.2d 657, 661 (citing *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 S.D. 144, ¶ 26, 619 N.W.2d 644, 651). However, if the trial court admits evidence on an erroneous basis, the court's ruling will still be upheld if the evidence was admissible on other grounds. *Dubray*, 2004 S.D. 130, ¶ 8, 690 N.W.2d 657, 661.

Hearsay is an out-of-court statement offered by someone other than the declarant at trial to prove the truth of the matter asserted.[14] SDCL 19-19-801. Hearsay is generally inadmissible. SDCL 19-19-802. SDCL 19-19-803 provides in relevant part:

> The statements described in this section are not excluded by the rule against hearsay regardless of whether the declarant is available as a witness: . . .
>
> (6) Records of regularly conducted business activity. A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) The record was made at or near the time by—or from

[14] In deciding the bank records fell under the hearsay exception, the circuit court tacitly agreed that the records were hearsay. JT 192.

information transmitted by—someone with knowledge;

(B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) Making the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule or a statute permitting certification; and

(E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

SDCL 19-19-901(a) provides:

In general. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

SDCL 19-19-902 provides, in relevant part:

The following items of evidence are self-authenticating. They require no extrinsic evidence of authenticity in order to be admitted. . . .

(11) Certified domestic records of a regularly conducted activity. The original or copy of a domestic record that meets the requirements of subdivision 19-19-803(6)(A)-(C) as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

SDCL 19-19-902(11)'s federal counterpart, Federal Rule of Evidence

902(11), was adopted by amendment in 2000 to work in tandem with Rule 803(6) and "create 'a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness.'" *U.S. v. Komasa*, 767 F.3d 151, 155 (2nd Cir. 2014) (quoting Fed.R.Evid. 902 advisory committee's note (2000 amendment)). Likewise, Rule 803(6) was amended to allow the foundational requirements of the rule to be satisfied "without the expense and inconvenience of producing time-consuming foundation witnesses." *Komasa*, 767 F.3d 151, 155 (2nd Cir. 2014) (quoting Fed.R.Evid. 803(6) advisory committee note (2000 amendment)). "Working hand in glove with Rule 803(6)'s business-records exception, Rule 902(11) 'permits a party to establish the authenticity of documents as domestic business records through a declaration from the records' custodian.'" *U.S. v. Jenkins*, 540 Fed.Appx. 893, 900 (10th Cir. 2014) (quoting *U.S. v. Lewis*, 594 F.3d 1270, 1278 (10th Cir. 2010); *see also U.S. v. Yeley-Davis*, 632 F.3d 673, 678 (10th Cir. 2011) (finding the written certification and affidavit from the custodian of Verizon records satisfied the foundational requirements under 803(6)); *U.S. v. Thompson*, 686 F.3d 575, n. 5 (8th Cir. 2012) (noting that there would be no abuse of discretion by the court in admitting employment records accompanied by an affidavit which satisfied the foundational requirements under 803(6)).

To satisfy the foundational requirements under SDCL 19-19-803(6), this Court has observed that "a proper foundation must be made through the 'testimony of the custodian or other qualified witness.'" *Johnson v. O'Farrell*, 2010

S.D. 68, ¶ 18, 787 N.W.2d 307, 314 (quoting *Dubray*, 2004 S.D. 30, ¶ 15, 690 N.W.2d 657, 662). Offering testimony through such a witness "who can explain the record-keeping of his organization is ordinarily essential." *Brown*, 480 NW.2d 761, 763 (S.D. 1992) (quoting *N.L.R.B. v. First Termite Control Co., Inc.*, 646 F.2d 424, 427 (9th Cir. 1981)). "Further, if a witness cannot vouch that the requirements of Fed.R.Evid. 803(6) have been met, 'the entry must be excluded.'" *Id*. (quoting *Liner v. J.B. Talley And Co., Inc.*, 618 F.2d 327 (5th Cir. 1980)).

The circuit court's decision to admit the bank records is in direct conflict with this Court's decision in *State v. Stokes*, 2017 S.D. 21, 895 N.W.2d 351. In *Stokes*, this Court found that cell phone records admitted without testimony from a custodian of records, or a certificate explaining how and when the data was generated, did not meet the foundational requirements necessary to admit hearsay evidence under SDCL 19-19-803(6). *Id*. at ¶ 15, 895 N.W.2d 351, 355. As explained by this Court in *Stokes*, "the hearsay rules require this additional foundational showing, a proponent seeking admission must not only authenticate in accordance with SDCL 19–19–901 (show that the exhibit is a record of what the proponent claims it is), but also lay the foundation required in SDCL 19–19–803(6) (show that the exhibit was kept and prepared in the course of a regularly conducted business activity)." *Id*. at ¶ 18, 895 N.W.2d 351, 356.

In this case, like *Stokes*, the circuit court admitted the bank records under the business records exception of the hearsay rule. JT 192. In fact, the circuit court used the same improper basis for admitting the records as the circuit court did in

*Stokes*, stating "this is the record of the witness' own bank accounts and he has spoken to some of the transactions himself, so I believe it fits within that exception." *Id*. No testimony or written certification by "the custodian of records or another qualified person" was offered by the State in order to certify that the records were kept and prepared during the course of regularly conducted business activity, as required by SDCL 19-19-902(11) and SDCL 19-19-803(6). *Id*. The Court simply relied on Rojas' representation that the bank record was in fact associated with his Metabank account. *Id*. Also of concern is the document itself, which does not show Metabank's letterhead, or any other symbols or insignia that indicate the document was produced by Metabank. Ex. 1. Furthermore, the document does not contain Rojas' name, or any other identifying information tying the document to Rojas. Ex. 1. Moreover, the document provides no information indicating when, or how the data was generated. Ex. 1.

Here, the State did not satisfy SDCL 19–19–901 by "show[ing] that the exhibit is a record of what the proponent claims it is." *Stokes*, 2017 S.D. 21, ¶ 18, 895 N.W.2d 351, 356. Additionally, the State did not satisfy SDCL 19–19–803(6) with a "show[ing] that the exhibit was kept and prepared in the course of a regularly conducted business activity." *Id*. Accordingly, the circuit court abused its discretion by admitting the bank records.

*B. The circuit court's error prejudiced Dickerson.*

An error in admitting evidence under SDCL 19–19–803(6) "does not warrant reversal absent a showing that substantial rights of the party were

affected." *Brown*, 480 N.W.2d at 764. This requires a showing that the error must have "in all probability" affected the jury's decision. *State v. Martin*, 2015 S.D. 2, ¶ 7, 859 N.W.2d 600, 603.

The State used the bank records to discredit Reecy's testimony, to prove that Dickerson and Reecy were in possession of Rojas' debit card, and to allege the attempted transactions after the incident were consistent with identify theft. JT 434. The prosecutor acknowledged the bank records as a significant aspect of his case, submitting to the jury in closing argument that "[the] card is a big piece of the evidence and the *transactions that occurred on it are a big piece of evidence in this case*." As the closing argument continued, the State urged the jury to consider the powerful evidentiary value of the bank records:

> "And the reason for that is that those transactions don't correspond with someone who's been some kind of victim. They correspond with what you're looking to go get from this robbery attempt. You're looking to get money fast, so what do you do? Get the debit card. We know they're [] staying in Luverne about a half hour outside of town. So this robbery occurs about 8:45. . . [t]hen about an hour later we see 19 transactions over the course of an hour and fifteen minutes. [Vandervelde] told you that's consistent with what is typically seen in an ID theft case."

JT 434-35.

Here, it is not improbable to question if the jury would have reached a unanimous verdict on Counts 1, 3, and 4 of the Indictment *without* a piece of evidence the State deemed to be "a big piece of evidence in this case." JT 434. In all probability, this evidence had an effect on the jury's verdict.

## III. THE CIRCUIT COURT ERRED IN DENYING DICKERSON'S MOTION FOR JUDGMENT OF ACQUITTAL.

"'The denial of a motion for judgment of acquittal presents a question of law that [the Court] review[s] de novo." *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 14, 772 N.W.2d 117, 122). "The ultimate question in such an appeal is 'whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d 600, 606 (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). The Court "accept[s] the evidence and the most favorable inferences that can be fairly drawn from it that support the verdict." *Id.* The Court will "not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal." *Id.* "[T]he evidence is insufficient only when no rational trier of fact could find guilt beyond a reasonable doubt." *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606 (quoting *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140) (internal quotation omitted).

In this case, Rojas' testimony specifically negated the elements of Count 1, First Degree Robbery, which required the State to prove that Dickerson "intentionally took personal property in the possession [of] Julio Gomezrojas from his person or immediate presence." SR 116 (Instruction No. 14). In addition, the State was required to prove "[t]he personal property was taken against the will of Julio Gomezrojas, *who was in possession thereof, that is, with the knowledge of Julio Gomezrojas and against his wish." Id*.

At trial, when Rojas was asked about the specific details related to his wallet, he said "[w]ell, the billfold was there and then the billfold was gone." JT 212. On redirect, Rojas reiterated that the wallet was missing after he came out of the bathroom, saying "I saw him grabbing the wallet, dropping the wallet after he couldn't find anything and after I locked myself into the bathroom and after I came out then the wallet was gone."[15] JT 218. SDCL 22-30-4 provides:

> The taking of property from the person of another or in the immediate presence of the person is not robbery if it clearly appears that the taking was fully completed without the person's knowledge.

Based on Rojas' testimony, the wallet was not taken with his knowledge. With only Rojas' testimony to prove what occurred inside of the apartment unit, the remaining record was lacking evidence that the wallet was taken from his person or immediate presence.

In Count 3, Dickerson was charged with First Degree Burglary – Nighttime, which required the state to prove beyond a reasonable doubt that Dickerson "unlawfully entered or unlawfully remained in an occupied structure "with the intent to commit the crime of Robbery." SR 116 (Jury Instruction No. 19). The only evidence tending to show that Dickerson entered with the intent to commit a crime is Rojas' testimony alleging Dickerson was wearing a mask. However, Rojas did not say anything to O'Brien on the night of the incident about Dickerson wearing a mask. JT 268. Also, Sylvia and Sofia Parada

[15] At the Grand Jury proceeding, Rojas testified that Dickerson grabbed the wallet and dropped it on the floor. JT 213.

definitively stated they did not see the male wearing a mask when he exited Rojas' apartment on the night of the incident. JT 274. Moreover, Kuchenreuther's testimony proving Rojas sent a picture message to Reecy's phone at 7:22 p.m. is consistent with Reecy's testimony that she went back to Rojas' apartment to retrieve the cash he photographed and messaged to her, not with the intent to commit a crime. JT 375-377; Ex. C.

In Count 4, Dickerson was charged with aggravated assault pursuant to SDCL 22-18-1.1(1), which provides "[a]ny person who . . . [a]ttempts to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life . . . is guilty of aggravated assault." SR 13.

In *State v. Miland*, this Court discussed how other courts have interpreted the phrase "circumstances manifesting extreme indifference to the value of human life." 2014 S.D. 98, ¶ 17, 858 N.W.2d 328, 332. Other courts have focused on "whether the facts demonstrate a disregard for the risk to the victim's life." *Id*. Ultimately, this Court makes a case by case, fact based inquiry to determine if "the circumstances of the crime . . . manifest extreme indifference." *Id*. (citing *State v. Saucier*, 128 N.H. 291, 512 A.2d 1120, 1125 (1986)).

In this case, the circumstances of the crime did not show that Dickerson manifested extreme indifference by "attempt[ing] to cause or caus[ing] serious bodily injury to Julio Gomezrojas . . . under circumstances manifesting extreme indifference to the value of human life." SR 116 (Jury Instruction No. 25). Rojas'

testimony regarding the circumstances of the physical altercation described being grabbed by the hair, lifted from the sofa, grabbed by the back of the neck with one hand, and hit one time with a pistol. JT 182. After Rojas' fell to the ground, there weren't any further instances of physical contact. *Id*. The State did not present any medical records describing the seriousness of the injury. *Id*. While there was testimony from Rojas and O'Brien concerning the injury, the record lacked evidence that the injury was "grave and not trivial, and [gave] rise to apprehension of danger of life, health, or limb." SR 116 (Jury Instruction No. 28).

Based upon the testimony of Rojas', the lack of evidence showing Dickerson's intent, and the lack of evidence demonstrating Dickerson caused, or attempted to cause serious bodily injury, no rational trier of fact could find Dickerson guilty beyond a reasonable doubt on Count 1, 3, and 4 of the Indictment.

## CONCLUSION

The circuit court abused its discretion in granting the State's Motion to Exclude Mention of Victim's Immigration Status. In doing so, the circuit court violated Dickerson's constitutional right to effectively confront and cross-examine his accuser. Moreover, the State's evidence was insufficient to sustain convictions on Count 1, 3, and 4. For the aforementioned reasons, authorities cited, and upon the settled record, Dickerson respectfully asks this Court to vacate the Judgment and Sentence, or in the alternative, remand the case to the

circuit court with an Order directing the court to reverse the Judgment and Sentence and schedule a new trial.

## REQUEST FOR ORAL ARGUMENT

The attorney for the Appellant, Kevin Dickerson, respectfully requests thirty (30) minutes for oral argument.

Respectfully submitted this 7th day of December, 2020.

*/s/ Christopher Miles*
Christopher Miles
Minnehaha County Public Defender
ATTORNEY for APPELLANT

## CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 8,049 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 7th day of December, 2020.

*/s/ Christopher Miles*
Christopher Miles
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the Appellant's Reply Brief were electronically served upon:

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Dated this 7th day of December, 2020.

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**APPENDIX**

## APPENDIX

1CC-21-5HC
1CC Jail
Scan to pm

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|---|---|---|
| STATE OF SOUTH DAKOTA ) : SS | | IN CIRCUIT COURT |
| COUNTY OF MINNEHAHA ) | | SECOND JUDICIAL CIRCUIT |
| | | SFPD 2019023678 |
| STATE OF SOUTH DAKOTA, Plaintiff, | + | 49CRI19008818 |
| vs. | + | JUDGMENT & SENTENCE |
| KEVIN XAVIER DICKERSON, Defendant. | + | |

An Indictment was returned by the Minnehaha County Grand Jury on December 4, 2019, charging the defendant with the crimes of Count 1 Robbery 1st Degree-Dangerous Weapon-Inj/Fear Vic on or about November 19, 2019, Count 2 Burglary 1st Degree-Dangerous Weapon on or about November 19, 2019, Count 3 Burglary 1st Degree-In NightTime on or about November 19, 2019, Count 4 Aggravated Assault-Extreme Indifference on or about November 19, 2019, Count 5 Aggravated Assault-Dangerous Weapon on or about November 19, 2019, Count 6 Aggravated Assault-Physical Menace on or about November 19, 2019 and a Part II Habitual Offender Information was filed. The defendant was arraigned upon the Indictment and Information on December 9, 2019, Jon Leddige appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Mark Hodges, Deputy State's Attorney appeared for the prosecution and, Jon Leddige, appeared as counsel for the defendant. A Jury was impaneled and sworn on March 4, 2020 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on March 5, 2020 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, KEVIN XAVIER DICKERSON, guilty as charged as to Count 1 Robbery 1st Degree-Dangerous Weapon-Inj/Fear Vic (SDCL 22-30-1, 22-30-3(1), 22-30-6, 22-30-7), guilty as to Count 3 Burglary 1st Degree-In NightTime (SDCL 22-32-1(3)) and guilty as to Count 4 Aggravated Assault-Extreme Indifference (SDCL 22-18-1.1(1)." The defendant was found not guilty as to Count 2 Burglary 1st Degree, Count 5 Aggravated Assault and Count 6 Aggravated Assault. The Sentence was continued for the Part II Information trial.

A Part II Habitual Offender Information was filed on December 6, 2019, to which the defendant pleaded not guilty. On April 15, 2020 the defendant appeared with counsel, Jon Leddige, the State by Deputy State's Attorney Mark Hodges. The defendant waived his right to a jury trial as to the Part II Habitual Offender Information. A Court trial was held before the Honorable Judge Robin J. Houwman. The defendant was found guilty of the Part II Habitual Offender Information, with sentencing delayed.

Thereupon on April 23, 2020, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

A-1

AS TO COUNT 1 ROBBERY 1ST DEGREE-DANGEROUS WEAPON-INJ/FEAR VIC-HABITUAL OFFENDER : KEVIN XAVIER DICKERSON shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for thirty five (35) years, with fifteen (15) years suspended, credit 154 days served (concurrent with Count 3 & 4). The defendant shall comply with all terms and conditions of parole. The defendant shall pay $106.50 court costs and $3164.30 restitution (to be paid joint & several with co-defendant Arianna Reecy CR 19-8819) collected by the Board of Pardons and Paroles.

AS TO COUNT 3 BURGLARY 1ST DEGREE-IN NIGHT TIME-HABITUAL OFFENDER : KEVIN XAVIER DICKERSON shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for twenty (20) years, with five (5) years suspended, credit 154 days served (concurrent with Count 1 & 4). The defendant shall pay $106.50 court costs to be collected by the Board of Pardons and Paroles.

AS TO COUNT 4 AGGRAVATED ASSAULT-EXTREME INDIFFERENCE-HABITUAL OFFENDER : KEVIN XAVIER DICKERSON shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years, with five (5) years suspended, credit 154 days served (concurrent with Count 1 & 3). The defendant shall pay $106.50 court costs to be collected by the Board of Pardons and Paroles.

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

The defendant was remanded into custody for transport to the South Dakota State Penitentiary, there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 23 day of April, 2020.

FILED
APR 23 2020
Minnehaha County, S.D.
Clerk Circuit Court

BY THE COURT:

JUDGE ROBIN J. HOUWMAN
Circuit Court Judge

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

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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No. 29333

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STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

KEVIN XAVIER DICKERSON,

*Defendant and Appellant.*

---

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

---

THE HONORABLE ROBIN J. HOUWMAN
Circuit Court Judge

---

# APPELLEE'S BRIEF

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Notice of Appeal filed May 22, 2020

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

---

No. 29333

---

STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

KEVIN XAVIER DICKERSON,

*Defendant and Appellant.*

---

## PRELIMINARY STATEMENT

Defendant and Appellant, Kevin Xavier Dickerson, is called "Dickerson," while Plaintiff and Appellee, State of South Dakota, is called "State." Dickerson's codefendant, Ariana Cherelle Reecy, is called "Reecy." Citations to the settled record and other documents are as follows:

Settled Record ..... SR

Defendant's Brief ..... DB

Pre-jury Selection Trial Transcript ..... PT

Jury Trial Transcript ..... JT

Sentencing Hearing Transcript ..... SH

The appropriate page number follows each citation.

## JURISDICTIONAL STATEMENT

On April 23, 2020, the Honorable Robin J. Houwman, Circuit Court Judge, Second Judicial Circuit, entered a Judgment of Conviction and Sentence in *State of South Dakota v. Kevin Xavier Dickerson*, Minnehaha County Criminal File Number 19-8818. SR 192-93. Dickerson filed his Notice of Appeal on May 22, 2020. SR 333-34. This Court has jurisdiction under SDCL 23A-32-2.

## STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT PROPERLY GRANTED THE STATE'S MOTION TO EXCLUDE MENTION OF VICTIM'S IMMIGRATION STATUS?

The circuit court granted the State's motion to exclude mention of the victim's immigration status.

*State v. Karlen,* 1999 S.D. 12, 589 N.W.2d 594

*Delaware v. Van Arsdall*, 475 U.S. 673 (1986)

*State v. Buccheri-Bianca,* 312 P.3d 123 (Ariz. Ct. App. 2013)

*People v. Chavez Limon*, 2019 WL 2635550 (Cal. Ct. App. 2019)

II

WHETHER DICKERSON FAILS TO SHOW PREJUDICIAL ERROR WHEN THE CIRCUIT COURT ADMITTED A LIST OF THE VICTIM'S BANK TRANSACTIONS?

The circuit court, overruling Dickerson's objection, admitted the list of bank transactions.

*State v. Dunkelberger*, 2018 S.D. 22, 909 N.W.2d 398

*State v. Stokes*, 2017 S.D. 21, 895 N.W.2d 351

*State v. Martin*, 2015 S.D. 2, 859 N.W.2d 600

III

WHETHER SUFFICIENT EVIDENCE EXISTS TO SUPPORT DICKERSON'S CONVICTIONS?

After the circuit court denied Dickerson's motion for judgment of acquittal, the jury found Dickerson guilty of first-degree robbery, first-degree burglary, and aggravated assault.

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

*State v. Wolf*, 2020 S.D. 15, 941 N.W.2d 216

*State v. Fasthorse*, 2009 S.D. 106, 776 N.W.2d 233

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

SDCL 22-30-1

SDCL 22-32-1

SDCL 22-18-1.1(1)

## STATEMENT OF THE CASE

On December 4, 2019, the Minnehaha County Grand Jury indicted Dickerson and Reecy, levying six counts:

(1) First-Degree Robbery, in violation of SDCL 22-30-1 and -30-6;
(2) First-Degree Burglary, in violation of SDCL 22-32-1(2);
(3) First-Degree Burglary, in violation of SDCL 22-32-1(3);
(4) Aggravated Assault, in violation of SDCL 22-18-1.1(1);
(5) Aggravated Assault, in violation of SDCL 22-18-1.1(2); and
(6) Aggravated Assault, in violation of SDCL 22-18-1.1(5).

SR 13-15.

About three months later, the State moved to exclude mention of the victim's, Julio Gomez-Rojas's, immigration and citizenship status. SR 58-59. That evidence, according to the State, was irrelevant and immaterial to any issue at trial. *Id.* It would thus be more prejudicial than probative under SDCL 19-19-403. *Id.* The State also explained that Gomez-Rojas's right against self-incrimination would be violated if he testified about that irrelevant and immaterial matter. *Id.*

Before the jury trial began, the circuit court first took up the State's motion to exclude. SR 452 (PT 9). Reecy objected to the motion.[1] SR 452-53 (PT 9-10). Dickerson echoed that objection. SR 453-55 (PT 10-12). Dickerson learned that Gomez-Rojas was an undocumented immigrant and believed he applied for a U-Visa.[2] SR 454 (PT 11). If Gomez-Rojas successfully petitioned for that U-Visa, he could possibly obtain certain benefits, including legal resident status. *Id.* Gomez-Rojas, according to Dickerson, thus had a motive to lie so he could obtain those benefits. SR 455 (PT 12). Dickerson asserted that he needed to cross-examine Gomez-Rojas on his citizenship status to show that alleged bias. *Id.* The court did not render a decision, and the case proceeded to trial. *Id.*

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[1] Dickerson and Reecy were tried jointly and each represented by separate counsel. SR 439.

[2] A U-Visa may provide noncitizens temporary authorization to remain in the United States if that person is a victim of a certain crime and assists in the prosecution of that crime. *See* 8 U.S.C. § 1101(a)(15)(U); 8 U.S.C. § 1184(p).

After jury selection ended, the circuit court took up the motion to exclude again. SR 592 (JT 139). This time, though, the court heard testimony from Gomez-Rojas outside the presence of the jury: Gomez-Rojas admitted that he was in the United States illegally.[3] SR 593-98 (JT 140-45). Then Gomez-Rojas relayed how he had approached an immigration attorney a week after the assault to determine if cooperating with the investigation would "hurt" him due to his immigration status. SR 596 (JT 143). The immigration attorney, he said, advised that he could cooperate with law enforcement. SR 597 (JT 144). But while the immigration attorney advised that he could eventually apply for the U-Visa, Gomez-Rojas had not yet done so. SR 596-97 (JT 143-44). Yet Gomez-Rojas said he might apply for the visa if it came to it (or if it was necessary). SR 597 (JT 144). Concerned that he might have gained some benefit, the court asked Gomez-Rojas to clarify. SR 598 (JT 145). Gomez-Rojas obliged: he had not received any promises "about speaking on [his] behalf with immigration officials or doing anything to [his] benefit" for cooperating and testifying in the case. *Id.*

Each side then made their argument. Since Gomez-Rojas had not applied for the visa, the State asserted the probative value of his citizenship status did not outweigh the risk of prejudice. SR 599 (JT

[3] The court advised Gomez-Rojas of his constitutional right to remain silent before this testimony. SR 594 (JT 141).

146). On the other hand, Dickerson argued that Gomez-Rojas indicated that he would apply for the visa "likely in the future." SR 600-01 (JT 147-48). That application would only be successful if law enforcement certified that Gomez-Rojas cooperated with them. SR 600 (JT 147). So Dickerson argued that Gomez-Rojas should be subjected to cross-examination on his citizenship status to "explore all avenues regarding his credibility issues or bias." SR 601 (JT 148).

Ultimately, the court agreed with the State. SR 603-04 (JT 150-51). In doing so, the court held that Gomez-Rojas's citizenship status was "limited in its relevancy" and would distract the jury from the issues at trial. *Id.* It granted the State's motion. SR 604 (JT 151).

With the pretrial issues now resolved and the jury selected, the case proceeded to the next phase. Gomez-Rojas testified for the State. SR 624-73 (JT 171-220). During his direct examination, the State offered a list of debit card transactions obtained by Gomez-Rojas and law enforcement from his bank. SR 643 (JT 190); EX 1 (List of transactions). Dickerson objected to the admission of the bank transactions, asserting that the State did not lay proper foundation for admission. SR 645 (JT 192). The court overruled the objection, holding the exhibit fit within the business-records exception to hearsay. *Id.* Once the State's case-in-chief ended, Dickerson made a motion for judgment of acquittal. SR 809 (JT 356). The court denied it. SR 811-12 (JT 358-59). Then the defendants put on their case-in-

chief, closing argument occurred, and the court submitted the case to the jury. SR 918 (JT 465). The jury convicted Dickerson, finding him guilty of one count of first-degree robbery, first-degree burglary, and aggravated assault. SR 920 (JT 467).

The circuit court sentenced Dickerson a month later. SR 388-408 (SH 1-21). For the first-degree robbery, the court imposed a 35-year penitentiary sentence with 15 years suspended. SR 406 (SH 19). For first-degree burglary, the court imposed a 20-year penitentiary sentence with 5 years suspended. *Id.* For the aggravated assault, the court imposed a 15-year penitentiary sentence with 5 years suspended. *Id.* Dickerson would serve those sentences concurrently and the court gave him credit for 154 days previously served. *Id.* The judgment of conviction was filed after the sentence was handed down. SR 192-93.

## STATEMENT OF FACTS

Gomez-Rojas, a construction worker, lived alone in Sioux Falls. SR 624, 632 (JT 171, 179). In late summer 2019, he decided to pass the time by going to the strip club in Lesterville. SR 625 (JT 172). That decision changed his life.

Gomez-Rojas met a stripper, "Kisses," who was later identified as Reecy,[4] and it was attraction at first sight. SR 625, 628 (JT 172, 175).

[4] Law enforcement identified Kisses as Reecy after Gomez-Rojas provided her phone number. SR 774 (JT 321). Gomez-Rojas then

The two exchanged phone numbers that night and texted each other back and forth for the next few months. SR 625-26 (JT 172-73). Eventually, the conversation turned to money: Reecy asked if Gomez-Rojas's construction job paid well and if he could loan her some money to care for her children. SR 626-27, 632 (JT 173-74). Reluctant to provide her money yet wanting to impress Reecy, Gomez-Rojas decided to give her a loan. SR 627-28, 631 (JT 174-75, 178). So he invited her over to his apartment on November 19, 2019. SR 628 (JT 175).

Reecy arrived around 7:00 p.m. in a black SUV with an Iowa license plate. SR 629-30 (JT 176-77). She exited the passenger side of the SUV and then waited at the locked front door of the apartment building until Gomez-Rojas opened the door. SR 630 (JT 177); EX 20-A 00:14-01:51. The two talked inside his apartment before Gomez-Rojas loaned Reecy about $200. *Id.* Unbeknownst to Gomez-Rojas, the driver of the black SUV—later identified as Dickerson—had gotten out, approached the front door of the apartment building, and peered inside. SR 789 (JT 336); EX 20-A 02:21-03:31. Reecy told Gomez-Rojas she would come back later and then left the building. SR 631-32 (JT 178-79); EX 20-A 05:04-05:09.

Reecy kept her promise. She came back to the apartment about an hour later. SR 632, 790 (JT 179, 337). Gomez-Rojas again opened the door for her, but this time she insisted he go upstairs first. SR

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identified Reecy in a photo lineup, SR 779 (JT 326), and at trial, SR 637 (JT 184).

632, 788 (JT 179, 335); EX 20-B 01:10-01:15. Not thinking anything of the request, Gomez-Rojas complied. *Id.* And as Reecy walked up the stairs, she quickly glanced back. SR 788-89 (JT 335-36); EX 20-B 01:15-01:17. As the door inched ever closer to being shut—and locked—Dickerson appeared out of the blue and nonchalantly grabbed the door. SR 789 (JT 336); EX 20-B 01:21-01:25. His trespass went unnoticed by all except the apartment building's surveillance camera. EXs 22, 23.

Meanwhile, Gomez-Rojas and Reecy had just entered his apartment. SR 632 (JT 179). Gomez-Rojas locked the door behind them. *Id.* And as Gomez-Rojas sat down on the sofa and made himself comfortable, Reecy walked towards the door and asked him a question: was anyone else home. SR 633 (JT 180). There wasn't. *Id.* Gomez-Rojas had barely finished answering when Reecy unlocked the apartment door and in burst Dickerson—masked and armed with a gun. *Id.* He immediately demanded that Gomez-Rojas give him all his money. *Id.* But Gomez-Rojas didn't have any. *Id.* So Dickerson grabbed him by the scruff of the neck, aimed the gun at his head, and then ordered Reecy to search the apartment. SR 633-34 (JT 180-81). Gomez-Rojas continued to struggle, so Dickerson struck him in the head with the gun. SR 634 (JT 181). Battered and bloodied by the blow, Gomez-Rojas fell to the floor. *Id.* While Dickerson grabbed Gomez-Rojas's wallet from the table, Gomez-Rojas returned to his feet

and ran towards the bathroom, shouting to his neighbors—in Spanish—for help as he ran. *Id.*

His pleas were answered. Sylvia, his neighbor across the hall, heard Gomez-Rojas's cry for help. SR 683 (JT 230). Sylvia and her sister, Sofia, darted across the hall. *Id.* But they couldn't open the apartment door until Dickerson and Reecy burst out of the apartment, fleeing on foot before jumping in the black SUV and racing away. SR 683-84, 792-93 (JT 230-31, 339-40); EX 20-B 01:58-2:05; EX 20-B 03:08-03:14. The sisters did not pursue them; they instead tended to a bloodied Gomez-Rojas. SR 686 (JT 233). While doing so, Gomez-Rojas told them that the two people they just saw took his wallet. *Id.* Sofia then called 911. SR 697 (JT 244); EX 2.

Law enforcement arrived not long after. SR 698 (JT 245). Gomez-Rojas explained what happened as his injuries were treated. SR 711-14 (JT 258-61). Importantly, he described the assailants clothes, the vehicle in which they arrived (including that the license plates were from Iowa), and Reecy's phone number. SR 712-14 (JT 259-61).

Armed with this information, law enforcement continued its investigation. Gomez-Rojas's bank told him that there were attempted transactions on his account after the robbery. SR 781-82 (JT 328-29). So he went to his bank, accompanied by law enforcement, and learned

that 19 transactions were attempted on his card after the robbery. SR 783-84 (JT 330-31); EX 1.

Law enforcement's search continued. It discovered that the phone number provided by Gomez-Rojas belonged to Reecy. SR 774 (JT 321). It also discovered that Dickerson spoke to law enforcement earlier that year—he told officers that he and Reecy were dating. *Id.* Then law enforcement learned that Dickerson lived in Luverne, Minnesota, and contacted Investigator Jeff Wieneke with the Rock County Sherriff's Office. SR 749, 775 (JT 296, 322).

Investigator Wiekneke acted on all the information provided to him. He traveled to Dickerson's known address. SR 749-50 (JT 296-97). Upon arrival, he immediately saw a black Chevrolet Tahoe with an Iowa license plate parked outside Dickerson's residence. SR 750 (JT 297). Another car, registered to Reecy, was parked behind the Tahoe. *Id.* Investigator Wiekneke followed the Tahoe as it left the residence. SR 751 (JT 298). He saw Reecy exit the passenger side of the SUV when it made a stop. SR 752 (JT 299). Sioux Falls law enforcement later stopped the vehicle, identified Dickerson and Reecy, and arrested them both. SR 760 (JT 307). Law enforcement searched the Tahoe and found 8 .40-caliber bullets in the center console. *Id.*

## STANDARD OF REVIEW

This Court reviews an alleged violation of a constitutional right *de novo*. *State v. Spaniol*, 2017 S.D. 20, ¶ 23, 895 N.W.2d 329, 338

(citation omitted). A circuit court's conclusions of law are likewise reviewed *de novo*, but its findings of fact are reviewed for clear error. *State v. Mousseaux*, 2020 S.D. 35, ¶ 10, 945 N.W.2d 548, 551 (citation omitted).

In contrast to those stringent standards, this Court applies a deferential standard to evidentiary rulings—abuse of discretion. *State v. Kihega,* 2017 S.D. 58, ¶ 20, 902 N.W.2d 517, 524 (citations omitted). Indeed, those rulings are "presumed correct." *Id.* (cleaned up). So for a court to abuse its discretion the ruling must be 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. Kvasnicka*, 2016 S.D. 2, ¶ 7, 873 N.W.2d 705, 708 (citation and internal quotation marks omitted).

And as for a challenge to the sufficiency of the evidence, it is a question of law and thus reviewed *de novo*. *State v. Harruff*, 2020 S.D. 4, ¶ 15, 939 N.W.2d 20, 25 (citation omitted). Yet that *de novo* review is limited to "whether 'there is evidence in the record, which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *State v. Beck*, 2010 S.D. 52, ¶ 7, 785 N.W.2d 288, 292 (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). So a guilty verdict will not be set aside "if the evidence, including circumstantial evidence and reasonable inferences drawn

therefrom, sustains a reasonable theory of guilt." *Id.* (cleaned up and citation omitted).[5]

## ARGUMENTS

I

THE CIRCUIT COURT PROPERLY GRANTED THE STATE'S MOTION TO EXCLUDE MENTION OF THE VICTIM'S IMMIGRATION STATUS.

Dickerson first argues that the circuit court erred when it excluded mention of Gomez-Rojas's immigration and citizenship status. DB 14-22. He insists that the exclusion of that testimony prevented him from effectively cross-examining Gomez-Rojas on his alleged bias. DB 19-21. He concludes that this alleged error is not harmless and deprived him of a fair trial. DB 21-22.

Yet Dickerson's assertions are misplaced. A person's right to confront and cross examine isn't absolute; it, like other rights, is subject to reasonable restrictions. And as appellate courts across the country have explained, trial courts have the discretion to exclude topics from cross examination if they are irrelevant and more prejudicial than probative. And that's what the circuit court did here: it acted within its discretion to prohibit questions about Gomez-Rojas's immigration status. In doing so, it determined the relevancy was limited because Gomez-Rojas (1) didn't know about a U-Visa when the

[5] *See also State v. Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d 550, 554 (quoting *State v. Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d 145, 149).

crime occurred and (2) hadn't applied for the visa at the time of trial. Then the court determined that inquiry into his immigration status and U-Visa would be more prejudicial than probative because it would distract from the issues at trial: whether the codefendants robbed, burgled, and assaulted Gomez-Rojas. Thus, no error occurred.

Dickerson's right to cross-examination is not limitless. "The Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v Karlen*, 1999 S.D. 12, ¶ 38, 589 N.W.2d 594, 602 (cleaned up and citation omitted).[6] That's because trial courts retain broad discretion to impose reasonable limits on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Trial courts may thus properly limit cross-examination into the bias of a prosecution witness. *Id.*

The circuit court here exercised that broad discretion. And in doing so, its decision aligns with two intermediate appellate courts that have addressed the issue.[7]

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[6] *See also Milstead v. Smith*, 2016 S.D. 55, ¶ 13, 883 N.W.2d 711, 717.
[7] *See also People v. Villa*, 270 Cal. Rptr. 3d 46 (Cal. Ct. App. 2020); *State v. Love*, 2020 WL 3957240 (Minn. Ct. App. 2020); *State v. Lopez*, 852 S.E.2d 658 (N.C. Ct. App. 2020); *Ramos Pabon v. State*, 2019 WL 4122611 (Tex. App. 2019); *State v. Petithory-Metcalf*, 881 N.W.2d 470

First, the Court of Appeals of Arizona. In *State v. Buccheri-Bianca*, 312 P.3d 123 (Ariz. Ct. App. 2013), the victim filed an application for a U-Visa nearly a year after she made allegations that the defendant molested her. *Id.* at 127. The defendant argued that the possibility of successfully obtaining authorization to remain in the United States would give the victim and her family "a substantial motive to fabricate or exaggerate any allegations." *Id.* But the trial court disagreed and precluded the defendant from asking any questions about the victim's immigration status. *Id.*

The appellate court upheld the trial court's decision. The record, it reasoned, did not show that the victim or her family members knew about the U-Visas when the molestation allegations were made. *Id.* It also noted that the victim did not apply for a U-Visa until a year after the underlying crime was reported. *Id.* So the court concluded that the mere possibility of the victim obtaining a U-Visa was not relevant to her accusation. *Id.* Logically, then, it held that the trial court did not violate the defendant's constitutional right to confrontation when it properly limited irrelevant and prejudicial evidence. *Id.*

Second, the Court of Appeal of California came to a similar decision in *People v. Chavez Limon*, 2019 WL 2635550 (Cal. Ct. App. 2019). There, the victim of the assault approached prosecutors nearly

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(Iowa Ct. App. 2016) (*per curiam*); and *Mariano v. State*, 129 Nev. 1136 (2013).

two years after the assault to informally ask for help in applying for a U-Visa. *Id.* at *2. The prosecutor denied the request. *Id.* The victim requested the underlying police report but never applied for the U-Visa. *Id.* Defense counsel requested to cross-examine the victim on his intention to apply for a U-Visa, which the trial court denied. *Id.*

The appellate court agreed. It found that the issue of whether the victim intended to apply for a U-Visa was a collateral matter that had "no direct relationship with the facts surrounding the [underlying crime]." *Id.* at *3. (citation omitted). A cross-examination impeaching the victim's credibility based on a theoretical benefit "available through a U visa was too tenuous to have made the issue relevant . . . at trial." *Id.* The Court found the defendant's argument to be unpersuasive. The victims in the cases cited by the defense "already applied for a U visa by the time of the defendant's trial." *Id.* The court distinguished the circumstances in those cases from the victim in *Limon*. *Id.* Unpersuaded by the defendant's caselaw, it then held that the trial court properly limited the cross-examination "about the [victim's] to apply for a U visa." *Id.*

The same logic applies here. Gomez-Rojas knew nothing about the U-Visa when Dickerson robbed, burgled, and assaulted him. *Compare Buccheri-Bianca*, 312 P.3d at 128, *with* SR 595 (JT 142). He only learned of the U-Visa a week later when he spoke with an immigration attorney. SR 596 (JT 143). Despite that knowledge,

Gomez-Rojas still had not applied for a U-Visa at the time of trial. SR 596-97 (JT 143-44). What's more, Gomez-Rojas testified that he received neither promises nor benefits for his cooperation and testimony. *Compare* SR 598 (JT 145), *with Chavez Limon*, 2019 WL 2635550, at *3 ("traditional sources of bias were weak because [the victim] had not been offered any inducements and did not have a substantial basis to expect benefits to be gained by giving testimony favorable to the prosecution.").

Given that, the theoretical benefit of obtaining a U-Visa is not relevant to the underlying crimes and would only prejudice Gomez-Rojas. *Buccheri-Bianca*, 312 P.3d at 128 (defendant's confrontation rights are limited "to evidence which is relevant and not unduly prejudicial"). The court properly exercised its "wide latitude" when it imposed a reasonable limit on Dickerson's cross-examination for concerns of prejudice and an issue with little relevance to the crime. *Van Arsdall*, 475 U.S. at 679; SR 603 (JT 150).

The circuit court's limits were not only reasonable but also preventative in that the ruling avoided a distracting and confusing issue from being presented to the jury. Gomez-Rojas's immigration status and his intentions to apply for a U-Visa were a collateral matter to the robbery, burglary, and assault here. *Cf. Chavez Limon*, 2019 WL 2635550, at *3. Delving into that issue would have caused side litigation on Gomez-Rojas's immigration status, the requirements of

obtaining a U-Visa, and whether Gomez-Rojas qualified for that visa. *People v. Villa*, 270 Cal. Rptr. 3d at 54 (Cal. Ct. App. 2020). It would also call for an expert witness. *Id.* And all those collateral matters would only serve to cause confusion. *Id.*; *Cf. State v. Huber*, 2010 S.D. 63, ¶ 41, 789 N.W.2d 283, 296. As a result, the circuit court limited Dickerson's cross-examination to prevent a "mini-trial" on Gomez-Rojas's immigration status that would have only served to confuse the jury. SR 603 (JT 150).

Dickerson's arguments to the contrary are unpersuasive. In the cases Dickerson cites, the victims there had already applied for a U-Visa at the time of trial. *Romero-Perez v. Commonwealth*, 492 S.W.3d 902, 904; *State v. Perez*, 816 S.E.2d 550, 552-53 (S.C. 2018). But here Gomez-Rojas hadn't done that. SR 596-97 (JT 143-44). Nor did he even know about the visa's existence until he went to an immigration attorney a week after being robbed, burgled, and assaulted because he was scared that he might have some negative immigration consequences for being a victim. SR 596 (JT 143). Those two facts distinguish Dickerson's cases and make them inapplicable here.

Dickerson's right to cross-examine is not absolute. *Karlen*, 1999 S.D. 12, ¶ 38, 589 N.W.2d at 602. The circuit court didn't violate that right when it limited his cross-examination of Gomez-Rojas. Its

reasonable limitation ensured that the jury didn't hear irrelevant or unduly prejudicial evidence.

II

DICKERSON FAILS TO SHOW PREJUDICIAL ERROR WHEN THE CIRCUIT COURT ADMITTED A LIST OF THE VICTIM'S BANK TRANSACTIONS

During Gomez-Rojas's direct, he told the jury how he checked his bank account while in the hospital to see if he was missing any money and then froze his account after learning there wasn't any missing. SR 640 (JT 187). The next day Gomez-Rojas's bank called him about some transactions that were attempted on his now frozen account. SR 642 (JT 189). Gomez-Rojas, accompanied by Detective Scott Vandervelde of the Sioux Falls Police Department, traveled to Metabank to request information about those attempted transactions. *Id.* After the State offered a list of those transactions, Dickerson objected, asserting that the State had not laid proper foundation. SR 644 (JT 191). Overruling Dickerson's objection, the circuit court admitted the exhibit into evidence under the business-records exception to hearsay. SR 645 (JT 192).

Dickerson now argues that the court erred in admitting that evidence. DB 22-28. His argument is twofold. First, the State failed to show that the list of transactions was a record of what it claimed it to be. DB 27. And second, Dickerson also asserts that the State failed to show that the list of bank transactions "was kept and prepared in

the course of a regularly conducted business activity." *Id.* These two errors, Dickerson reasons, are not harmless when coupled with "a piece of the evidence the State deemed to be 'a big piece of evidence.'" DB 27-28.

Although the circuit court's evidentiary rulings are presumed correct, this Court need not answer that question because Dickerson cannot establish he suffered prejudice from the transactions admission into evidence. Indeed, reversal is not warranted "absent a showing that substantial rights of [Dickerson] were affected." *State v. Stokes*, 2017 S.D. 21, ¶ 20, 895 N.W.2d 351, 357 (quoting *State v. Brown*, 480 N.W.2d 761, 764 (S.D. 1992)). Such a showing requires that the admission of the bank transactions "must have 'in all probability' affected the jury's decision." *Id.* (quoting *State v. Martin*, 2015 S.D. 2, ¶ 7, 859 N.W.2d 600, 603).

Dickerson has failed to make that necessary showing. That's because the exhibit added no value; it was merely cumulative to Gomez-Rojas's testimony or a fair inference therefrom. And even if this Court concludes otherwise, the State presented significant evidence to the jury to connect Dickerson to the robbery. *Cf. State v. Dunkelberger*, 2018 S.D. 22, ¶ 17, 909 N.W.2d 398, 401 (admission of a surveillance video was harmless where evidence independent of that video established the defendant's guilt).

The admission of the exhibit added no value. Gomez-Rojas confirmed in his testimony that he froze his bank account while he was in the hospital recovering from his injuries. SR 640 (JT 187). He learned the next day that some transactions were attempted on his account. SR 642 (JT 189). Yet he didn't use his card; the account was frozen. SR 640, 642 (JT 187, 189). It also just so happened that his wallet—and card—were forcibly taken from him after he was beaten and left bloodied. SR 671 (JT 218). The man who did that to him? Dickerson. SR 634 (JT 181). Those are the facts the jury heard. *Id.* And the exhibit, which is a ledger that the bank created, simply reiterates the existence of the attempted transactions. SR 643 (JT 190). And to claim prejudice from that properly admitted evidence—evidence the jury has already heard (or a fair inference therefrom)—cannot logically cause prejudice. What the jury heard from Gomez-Rojas alone is enough to affirm.

But the jury also heard the rest of the State's case. Gomez-Rojas's neighbor corroborated his story. She heard his cries for help. SR 682-83 (JT 229-30). The neighbor, along with her sister, saw a man and a woman dart out of the apartment. SR 684, 696 (JT 231, 243). They quickly tended to a bloodied Gomez-Rojas who explained that he was robbed. SR 686 (JT 233). Law enforcement arrived on the scene, interviewed everyone, and took photos of Gomez-Rojas's injuries and the scene. SR 711-12 (JT 258-59); EXs 3-16. Law enforcement

then acted on that information, identified Dickerson and Reecy as suspects, and arrested them. SR 759-60, 774-77 (JT 306-07, 321-24).

The jury chose to believe Gomez-Rojas and the other evidence presented by the State. In doing so, it found Dickerson guilty of burglary, robbery, and aggravated assault. SR 920 (JT 467). The bank transaction exhibit admitted by the state was merely collateral to the issues at trial and added nothing to Gomez-Rojas's testimony (or a fair inference therefrom). Accordingly, the admission of the bank transactions did not "in all probability" affect the jury's decision to convict Dickerson of those crimes. *Martin*, 2015 S.D. 2, ¶ 7, 859 N.W.2d at 603.

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DICKERSON'S CONVICTIONS.

Dickerson contends that the State presented insufficient evidence to support the jury's verdict of guilty on the burglary, robbery, and aggravated assault convictions. DB 28-32. Dickerson first argues that Gomez-Rojas's wallet "was not taken with his knowledge." DB 30. Thus, Dickerson asserts, the State did not provide sufficient evidence to show that "the wallet was taken from [Gomez-Rojas's] person or immediate presence." *Id.* Dickerson also alleges that the State did not show Dickerson entered Gomez-Rojas's apartment with the intent to commit a crime. DB 30-31. Dickerson

concludes that the State failed to show that Dickerson caused Gomez-Rojas's injuries with "extreme indifference" to his life. DB 31-32.

Those arguments cannot withstand scrutiny. Indeed, the record is replete with evidence to support the convictions. Dickerson's claims therefore fail.

*First-Degree Robbery*. Under SDCL 22-30-1, robbery occurs when there is an "intentional taking of personal property, regardless of value, in the possession of another from the other's person or immediate presence, and against the other's will, accomplished by means of force or fear of force[.]" So to convict under that statute, the State must prove beyond a reasonable doubt that "the personal property was so taken against the will of Julio Gomez-Rojas who was in possession thereof, that is, with the knowledge of Julio Gomez-Rojas and against his wish." SR 119. The circuit court instructed the jury accordingly. *Id.*

The State proved that element of robbery beyond a reasonable doubt. SR 920 (JT 467). Gomez-Rojas testified that a masked man—Dickerson—burst into his apartment when Reecy opened his door. SR 633 (JT 180). Dickerson immediately demanded that Gomez-Rojas hand over all his money while aiming a gun at him. *Id.* When Gomez-Rojas denied having any money, Dickerson lifted him off the sofa by his hair and then grabbed him by the neck. *Id.* Gomez-Rojas struggled to escape Dickerson's grasp—and Gomez Rojas's struggle led

to Dickerson pistol-whipping him in the head. SR 634 (JT 181). After bloodying Gomez-Rojas, Dickerson continued to demand money. *Id.* Then Dickerson grabbed Gomez-Rojas's wallet from the table and threw it to the floor after finding no money. SR 634, 671 (JT 181, 218). Gomez-Rojas escaped to the bathroom and when he ventured out his wallet was gone. SR 671 (JT 218). Gomez-Rojas then told Sylvia, who had just come to his aid, that the assailants had taken his wallet. SR 686 (JT 233). So Gomez-Rojas's testimony alone would enable a trier of fact to find Dickerson guilty of robbery. *See State v. Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d 327, 330 (explaining that when determining whether evidence of the record is sufficient, "the jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence").

*First-degree Burglary*. Under SDCL 22-32-1, first-degree burglary occurs when a person "enters or remains in an occupied structure, with the intent to commit any crime[.]" So one of the elements the State must prove is that Dickerson "unlawfully entered or unlawfully remained therein with the intent to commit the crime of Robbery." SR 122. Dickerson argues that the State failed to show he entered Gomez-Rojas's apartment with the intent to commit a crime. DB 30.

But Dickerson's argument views the evidence in a light most unfavorable to the verdict—something this Court has said litigants

can't do. *State v. Hemminger*, 2017 S.D. 77, ¶¶ 39-40, 904 N.W.2d 746, 758-59. The jury heard Gomez-Rojas's testimony about a masked and armed Dickerson bursting into his apartment. *See supra*. And, again, this testimony—alone—is enough to allow a rational trier of fact to find Dickerson guilty of first-degree burglary. *See Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d at 330.

Even so, the jury saw more evidence that incriminates Dickerson. The surveillance video from Gomez-Rojas's apartment building showed the jury what happened before the robbery. EXs 20A, 20B. The jury saw Reecy hold the door wide open and insist Gomez-Rojas enter the apartment building first. EX 20-B 01:10-01:15. Dickerson needed that access to the building—the access that Reecy just provided. *Id.* Then the jury saw Dickerson tiptoe up to the doorway, grab the door right before it closed, and sneak into the building. EX 20-B 01:21-01:25.

And jury also heard evidence linking Dickerson to the crime. For example, Gomez-Rojas testified that Dickerson used a gun that day. SR 633 (JT 180). He also testified that the assailants arrived in a black SUV with Iowa license plates—a description that matched Dickerson's vehicle. SR 749-50 (JT 296-97). And law enforcement found bullets in that SUV when Dickerson was arrested. SR 760 (JT 307).

That evidence helped the jury determine that Dickerson intended to rob Gomez-Rojas when he entered the apartment. SDCPJI 1-12-3 (citations omitted) (explaining that "the intent with which an act is done is shown by the circumstances surrounding the act, the manner in which it is done, and the means used.").

*Aggravated Assault*. Under SDCL 22-18-1.1(1), an aggravated assault occurs when a person "attempts to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life". Dickerson argues that the State did not prove the second element of that crime—whether he "acted under circumstances manifesting extreme indifference to the value of human life." DB 31-32; SR 125.

When assessing what constitutes extreme indifference to the value of human life, our Legislature "deemed significant the nature of the assaultive act or acts themselves." *State v. Wolf*, 2020 S.D. 15, ¶ 15, 941 N.W.2d 216, 221. Evidence will be sufficient to convict for an aggravated assault under SDCL 22-18-1.1(1) if the "accused's conduct was of the most threatening sort, such that circumstances demonstrate a blatant disregard for the risk to the victim's life, and the accused either attempted to or did cause seriously bodily injury[.]" *Id.* (cleaned up). The focus of aggravated assault for extreme indifference is "on the conduct of the accused." *Id.* And this Court has rejected

the claim that "serious bodily injury must exist to support a conviction under SDCL 22-18-1.1." *Id.* ¶ 20, 941 N.W.2d at 222.

Dickerson's actions here showed that he had a "blatant disregard for the risk to Gomez-Rojas's life": he whipped a metal object into Gomez-Rojas's head. SR 634 (JT 181). The vicious strike bloodied Gomez-Rojas, and the area around the cut swelled. SR 686, 711 (JT 233, 258); EXs 3-7. Law enforcement immediately called for emergency services when it saw the wound Dickerson had inflicted. *Id.* And even if Gomez-Rojas's injuries were considered minimal, the focus should remain on Dickerson's conduct. *State v. Fasthorse,* 2009 S.D. 106, ¶ 11, 776 N.W.2d 233, 237. Dickerson ignores the definition of aggravated assault under SDCL 22-18-1.1(1)—a definition that includes "attempts to cause serious bodily injury . . . under circumstances manifesting extreme indifference to the value of human life." The State thus presented sufficient evidence to enable the jury to find Dickerson guilty of aggravated assault.

When the evidence is viewed, as it must, in the light most favorable to the verdict, with all reasonable inferences drawn therefrom, it conclusively establishes Dickerson was guilty of his charged crimes. His claim fails.

## CONCLUSION

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

Respectfully submitted,

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1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 5,749 words.

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

Dated this 8th day of March 2021.

/s/ *Quincy R. Kjerstad*
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 8, 2021, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kevin Xavier Dickerson* was served via email upon Christopher Miles at cmiles@minnehahacounty.org.

/s/ *Quincy R. Kjerstad*
Quincy R. Kjerstad
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

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NO. 29333

---

STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee*,

vs.

KEVIN XAVIER DICKERSON,

*Defendant and Appellant*.

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

---

HONORABLE ROBIN HOUWMAN
Circuit Court Judge

---

# APPELLANT'S REPLY BRIEF

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Notice of Appeal Filed on May 22, 2020

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IN THE SUPREME COURT

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STATE OF SOUTH DAKOTA,

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---

**PRELIMINARY STATEMENT**

In an attempt to avoid repetitive arguments, Defendant and Appellant, Kevin Dickerson ("Dickerson"), will limit discussion to the issues that need further development or argument. Any matter raised in Dickerson's initial brief, but not specifically mentioned herein, is not intended to be waived. Dickerson will attempt to avoid revisiting matters adequately addressed in the initial brief.

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "SB." All citations will be followed by the appropriate page number. Dickerson relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his initial brief, filed with the Court on December 7, 2020.

## ARGUMENT

### I. THE CIRCUIT COURT ERRED BY GRANTING THE STATE'S MOTION TO EXCLUDE MENTION OF VICTIM'S IMMIGRATION STATUS, RESULTING IN A VIOLATION OF DICKERSON'S FIFTH AND SIXTH AMENDMENT.

Because Dickerson is asserting a constitutional violation of his Sixth Amendment right to effective confrontation, this Court should employ the *de novo* standard of review to his claim. *State v. Spaniol*, 2017 S.D. 20, ¶ 23-24, 895 N.W.2d 329, 338; *State v. Ball*, 2004 S.D. 9, ¶ 20, 675 N.W.2d 192, 199; U.S. Const.Amend. VI, XIV. In addition to the Sixth Amendment violation, the circuit court's ruling violated Dickerson's fundamental right to present a defense. *State v. Huber*, 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 294; U.S. Const.Amend. V, XIV. This Court does not defer to the circuit court's discretion in reviewing these constitutional issues.

Here, Dickerson prepared a defense which was premised on Rojas' motivation to fabricate testimony. "When a defendant's theory is supported by law and . . . has some foundation in the evidence, *however tenuous*, the defendant has the right to present it." *Huber*, ¶ 36, 789 N.W.2d at 294 (citing *State v. Packed*, 2007 S.D. 75, ¶ 25, 736 N.W.2d 851, 859 (emphasis added) (citations omitted). "It is only fair that a defendant in a criminal trial be allowed to present his theory of the case." *Id*. ¶ 37 (citing *State v. Lamont*, 2001 S.D. 92, ¶ 16, 631 N.W.2d 603, 608-09). The circuit court's ruling did not allow Dickerson to question Rojas about how the U-visa application and the successful prosecution of Dickerson and

Reecy were related. When the circuit court denied Dickerson the ability to probe Rojas for bias, it denied his opportunity to present his defense per *Huber*. At trial, Dickerson alerted the circuit court to the centrality of the U-visa inquiry in relation to his defense. JT 148. Rojas' testimony, which confirmed he was in the country illegally, and that he spoke with an immigration attorney only one week after the incident, provided adequate foundation for Dickerson to cross-examine Rojas in support of his defense.

To buttress the circuit court's ruling, the State's brief over emphasizes the application of the abuse of discretion standard. In doing so, the State's brief cites two cases in which the appellate courts examined the issue under the less stringent standard. In *State v. Buccheri-Bianca*, the court examined the length of time that elapsed between the witness's allegations and the U-visa application. 312 P.3d 123 (Ariz. Ct. App 2013). Because nearly a year had passed from the time the witness reported the criminal act to the time she filed for the visa, the court deemed the "possibility of obtaining a U-Visa [to be] not relevant to her accusation." *Id*. at 127. Also, the record in *Buccheri-Bianca* did not contain any evidence that the witnesses were actually in the country illegally. *Id*. Finally, unlike Dickerson's case, the trial attorney representing *Buccheri-Bianca* did not object on constitutional confrontation grounds at trial. *Id*. When *Buccheri-Bianca* raised the issue on appeal, it was reviewed "for fundamental error." *Id*. In light of these facts, the court's decision in *Buccheri-Bianca* cannot be applied to Dickerson's case.

Like the Arizona Court of Appeal in *Buccheri-Bianca,* the California Court of Appeal in *People v. Chavez Limon* reviewed the trial court's decision to exclude evidence under the abuse of discretion standard. 2019 WL 2635550 (Cal Ct. App. 2019). The court's reason for excluding the evidence was because "the relationship between [the complaining witness's] credibility as a witness and a potential motivation to testify untruthfully based upon benefits theoretically available through a U visa was too tenuous to have made the issue relevant for cross examination at trial." *Id*. at *3. The complaining witness in *Chavez Limon* did not apply for a U-visa until two and half years following the incident. *Id*. at *2. Also, when the complaining witness requested the prosecutor's assistance with the U-visa application, the prosecutor rejected the request. *Id*.

Considering the complaining witness was rebuffed by the prosecution, the court in *Chavez Limon* said "traditional sources of bias were weak because [the complaining witness] had not been offered any inducements and not have a substantial basis to *expect benefits to be gained* by giving testimony favorable to the prosecution." *Id*. at *3 (emphasis added). Also, the complaining witness provided testimony about the possibility of applying for a work permit, not a U-visa. *Id*. at *3. That added layer of uncertainty factored into the court's decision, as it was not clear that the complaining witness actually intended on applying for a U-visa. *Id*. These facts bear little resemblance to Dickerson's case. *Chavez Limon*, like *Buccheri-Bianca*, is not persuasive due to the factual differences presented in Dickerson's case, and the lower standard employed by the appellate courts.

Unlike the *Buccheri-Bianca* and *Chavez Limon*, Rojas consulted with an immigration attorney only a week after the incident. JT 143. The testimony from Rojas showed that he did expect to receive a benefit in the form of a U-visa. JT 144. Rojas had an immigration interest related to this case, and his immigration attorney told him that he could apply for a U-visa at a later date. *Id*. Different than *Chavez Limon*, the potential for Rojas' bias is greater because he was under the impression that he could apply for the U-visa if he continued cooperating with the prosecution. JT 144. Rojas' immigration interest provided a circumstance ripe for bias, and the jury should have known about its existence. Instead, the circuit court invaded the province of the jury and made its own credibility determination.

Also, the State suggests the circuit court correctly excluded the topic from cross-examination because it was irrelevant, and more prejudicial than probative. SB 13. But the circuit court's elevation of Rule 403 to negate Dickerson's due process claim is not allowed. *Packed*, 2007 S.D. ¶ 23, 736 N.W. 2d 851, 859 (citing *State v. Luna*, 378 N.W.2d 229, 233 (S.D. 1985)). In *Packed*, this Court examined a circuit court's ruling which "completely disregarded the defendant's interest in presenting his defense that [the witness] was motivated to fabricate the allegation to avoid getting in trouble . . . ." ¶ 24, 736 N.W. 2d at 859. In reversing the circuit court, this Court stated "[e]vidence tending to establish a motive of [the witness] to fabricate allegations against the defendant was certainly relevant and probative, as it casts doubt on the State's evidence that defendant committed

the crimes." *Id*. ¶ 26. When the circuit court "exclud[ed] all references to [the victim's motive to lie], the court's ruling in all probability affected the final result and prejudiced defendant's right to a fair trial, requiring a new trial." *Id*. ¶ 27. The parallels between Dickerson's case and *Packed* are apparent. The circuit court disregarded the constitutional claims Dickerson argued during the pretrial hearing. JT 147-151. Instead, the circuit court alluded to public policy considerations, incorrectly framed the excluded testimony as character evidence, and focused on Rojas' statement indicating he hadn't been promised anything in return for his testimony. *Id*. at 149-151. These considerations are misplaced when Dickerson's constitutional rights hang on the other side of the balance.

Furthermore, when a defendant is prevented from probing a witness's motivation to lie and limited in presenting his defense, another heightened standard is triggered. An alleged violation Dickerson's Fifth and Sixth Amendment rights, applicable to the states through the Due Process Clause of the Fourteenth Amendment, require this court to apply the *Chapman* harmless error analysis. "Since this issue involves a federal constitutional question, we apply the *Chapman* harmless error analysis rather than the harmless error analysis developed in the South Dakota cases." *State v. Swallow*, 405 N.W.2d 29, 37 (S.D. 1987) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct 824 (1967)).

This limitation on Dickerson's cross-examination was not harmless beyond a reasonable doubt. The restriction is similar to *Delaware v. Van Arsdall*, where the United States Supreme Court found the lower court's decision

"cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony . . . violated respondent's rights secured by the Confrontation Clause." 475 U.S. 673, 679 (1986). This is not, as the State suggests, a reasonable restriction of Dickerson's right to confront and cross-examine Rojas. SB 9. Like the lower court in *Van Arsdall*, the circuit court violated Dickerson's constitutional rights by cutting off *all* questioning related to Rojas' motivation to lie.

In this case, the circuit court disregarded constitutional safeguards which are guaranteed to Dickerson. Accordingly, the circuit court's ruling should be reversed, and Dickerson should be granted a new trial.

## II. THE CIRCUIT COURT ERRED IN ADMITTING ROJAS' BANK RECORDS WITHOUT LAYING PROPER FOUNDATION THROUGH TESTIMONY FROM THE CUSTODIAN OF RECORDS FOR THE BUSINESS.

The State's brief suggests this Court "need not answer [this] question because Dickerson cannot establish he suffered prejudice from the transactions admission in to evidence." SB 20. Instead of supporting the circuit court's ruling, the State moved directly to harmless error analysis. SB 21. On appeal, the State is unwilling to recognize the significance of trial prosecutor's own words regarding the importance of the bank transactions in presenting its case to the jury. SB 20; JT 434.

Dickerson is not alone in identifying the significance of this evidence, or in

recognizing the evidence would in all probability have an affect on the jury's verdict. At trial, the prosecutor made the same argument Dickerson now makes on appeal - during his closing, the prosecutor said "that card is a big piece of evidence and the transactions that occurred on it are a big piece of evidence in this case." *Id*. The trial prosecutor also implored the jury to "think about those transactions that occurred and what that means." *Id*. at 435. Because the State cannot reconcile the argument advanced in its appellate brief with the trial prosecutor's own words, the inconsistency ignored.

The State's brief also asserts the exhibit "added no value" and "was merely cumulative to Gomez-Rojas's testimony. . . ." SB 21. However, using the inadmissible exhibit, Rojas performatively counted out each individual transaction, one through eighteen, during his testimony. JT 193. The prosecutor told the jury that "[the transactions] correspond with what you're looking to go get from this robbery attempt." *Id*. at 434. As referenced in Dickerson's initial brief, the prosecutor used the *number* of declined transactions on the card to suggest Rojas was the victim of robbery and identity theft, thereby discrediting Reecy's testimony stating Rojas sexually assaulted her. JT 435.

This exhibit, which had no basis for admission under the rules of evidence, was deliberately used to bolster the State's theory at trial. The prosecution's focus on the evidence resulted in prejudice. Because the prejudicial element of the evidence is patently apparent throughout the underlying record, it "must have 'in all probability' affected the jury's decision. *State v. Stokes*, 2017

S.D. 21, ¶ 20, 895 N.W.2d 351, 357. This erroneous admission of evidence requires reversal and a new trial.

### III. THE CIRCUIT COURT ERRED IN DENYING DICKERSON'S MOTION FOR JUDGMENT OF ACQUITTAL.

Dickerson relies on the argument submitted in his initial brief, filed with the Court on December 7, 2020.

## CONCLUSION

The circuit court circuit court violated Dickerson's constitutional right to present a defense, and his right to effectively confront and cross-examine his accuser. In addition, the circuit court's admission of the bank records was not supported with adequate foundation. Finally, the State's evidence was insufficient to sustain convictions on Count 1, 3, and 4. For the aforementioned reasons, authorities cited, and upon the settled record, Dickerson respectfully asks this Court to vacate the Judgment and Sentence, or in the alternative, remand the case to the circuit court with an Order directing the court to reverse the Judgment and Sentence and schedule a new trial.

Respectfully submitted this 6th day of April, 2021.

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## CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 1,919 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007.

Dated this 6th day of April, 2021.

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The undersigned hereby certifies that true and correct copies of the Appellant's Reply Brief were electronically served upon:

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