

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28063

State of South Dakota,
Plaintiff and Appellee,
v.
Russell Ray Bertram,
Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Gregory County, South Dakota

The Honorable Kathleen F. Trandahl
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed on the 06th day of December, 2016

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JURISDICTIONAL STATEMENT

In this appeal, Russell Ray Bertram seeks review of the following orders: (1) Order Re: Defendant's Motion to Exclude Other Acts Evidence Pursuant to SDCL § 19-19-404(b) signed on February 5, 2016, filed on February 5, 2016; (2) the Court's Order on State's Motion in Limine Re: Polygraph Evidence or Reference, and (3) the Court's Ruling during Trial that the Order on State's Motion in Limine Re: Polygraph Evidence or Reference would not be lifted.

Bertram respectfully submits that jurisdiction exists pursuant to SDCL §15-26A-3(1) (appeal from final judgment as a matter of right).¹

STATEMENT OF THE ISSUES

I. Did the Trial Court commit constitutionally reversible error and abuse its discretion in refusing to allow Bertram to cross-examine Doug Dailey regarding Bertram's polygraph?

Relevant Cases and Statutes:

State v. Larson, 512 N.W.2d 732, 735 (S.D. 1994)

U.S. v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)

U.S. v. Love, 329 F.3d 981, 984 (8th Cir. 2003)

U.S. v. Tenorio, 809 F.3d 1126 (10th Cir. 2015)

¹ For purposes of this brief, references are as follows: (1) "JT" designates the jury trial transcript; (2) "MH" designates the Motions Hearing held on January 28, 2016; (3) "Appx." designates Appellant's Appendix.

II. Did the Trial Court commit reversible error and abuse its discretion in refusing to preclude evidence that Bertram had sex with a stripper and had participated in a threesome during his engagement to Leonila Stickney?

Relevant Cases and Statutes:

State v. Moeller, 1996 SD 60, 548 N.W.2d 465

State v. Wright, 1999 SD 50, 593 N.W.2d 792

SDCL § 19-19-404(b)

STATEMENT OF THE CASE

On September 8, 2015, Russell Bertram was indicted on First Degree Murder charges for the October 24, 2009, death of Leonila Stickney.

A Motions Hearing was held on January 28, 2016, on Bertram's Motion to Exclude Other Acts Evidence Pursuant to SDCL § 19-19-404(b) and Defendant's Motions in Limine. Testimony and evidence was presented by both sides. In its February 5, 2016 Order, the trial court denied Bertram's motion to exclude evidence of his sexual relationships with other women during his relationship with and engagement to Leonila Stickney. *Appx.* 1-2.

On February 5, 2016, the State filed a Petition for Leave to File Intermediate Appeal with the South Dakota Supreme Court. An Order Denying Petition for Allowance of Appeal from Intermediate Order was issued on March 11, 2016.

On August 10, 2016, the State filed Motion in Limine Re: Polygraph Evidence or Reference asking the Court to prohibit any evidence of or reference to Bertram's polygraph examinations. *Appx.* 3-5. The Motion was granted by the trial court.

Bertram's jury trial commenced September 12, 2016. Two days of jury selection was conducted in Gregory County, Burke, South Dakota. Opening statements were given on September 14, 2016. During the afternoon of September 19, 2016, David Stickney, Leonila Stickney's estranged husband, testified about the settlement negotiations surrounding the life insurance proceeds, his understanding that Bertram would be foreclosed from collecting any insurance proceeds if Leonila's death was intentional, and his reliance on his attorney, Doug Dailey's advice regarding settlement. The following day, September 20, 2016, Attorney Doug Dailey testified regarding the settlement negotiations between himself and Attorney Clint Sargent. Dailey testified that Sargent responded "no way" when Dailey asked Bertram to turn the insurance proceeds over to the Estate. When questioned by Assistant Attorney General Paul Swedlund as to the rationale Sargent provided with his "no way" response, Dailey said "[j]ust that they disputed that it was an intentional act." Bertram's counsel objected and inquired with the trial court as to whether Swedlund's examination regarding the reasons for settlement subsequently opened the door to everything discussed in that conversation. The trial court said yes.

Once the State concluded Dailey's direct examination, the jury was removed and Bertram's counsel asked the trial court for relief from the previous motion in limine precluding evidence of Bertram's polygraph. Bertram's attorneys made an offer of proof. Bertram's counsel asked Dailey about a July 28, 2011 settlement negotiations letter from Attorney Sargent which referenced a polygraph administered to Bertram by former Division of Criminal Investigation polygraph analyst, Loren Pankratz. *Appx. 9*. The State

then had the opportunity to re-direct Dailey on the issue. The trial court recessed for lunch and took the matter under advisement.

The trial court ruled that although the State had opened the door to the polygraph evidence when it questioned the reasons Stickney settled, evidence of the polygraph and the polygraph results would be unfairly prejudicial to the State. Bertram's counsel was allowed to cross-examine Dailey on the factors that went in to the settlement agreement, but not the polygraph.

On September 26, 2016, Bertram was found guilty of First Degree Murder. On November 22, 2016, Bertram was sentenced to life without patrol in the South Dakota State Penitentiary. The Judgment and Conviction was signed and filed on November 22, 2016. Notice of Appeal was filed with the Gregory County Circuit Clerk on December 6, 2016.

STATEMENT OF THE FACTS

On October 24, 2009, Bertram and his fiancé, Leonila Stickney, were road hunting in Gregory County. After shooting his limit, Bertram returned to the vehicle in which Stickney was a passenger. As Bertram was placing his Remington 870 shotgun in the vehicle it discharged, striking Stickney in her upper left torso. Bertram applied pressure to the wound, called 911, and advised dispatch that he was headed to the Gregory County Hospital.

At the hospital, Bertram spoke with Gregory County Sheriff Charlie Wolf about what had happened. Sheriff Wolf confirmed there were three dead pheasants in Bertram's truck bed. *JT.* 185:22-24. One was warm to the touch. *JT.* 185:22-24. Bertram brought Deputy Sheriff Tim Drey to the area in which he and Stickney had been hunting. *JT.*

185:25-186:3. When Bertram returned to the Gregory County Hospital he was informed that Stickney had died from her injuries. Sheriff Wolf took three pictures of Bertram's vehicle interior and then let Bertram leave. *JT.* 137:7-8.

Sheriff Wolf continued his investigation. The requested autopsy revealed Leonila was pregnant at the time of her death. *JT.* 154:3-20. In December 2009, Sheriff Wolf learned that there were two life insurance policies in Leonila's name listing Bertram as beneficiary. *JT.* 154:15-17. Documents were subpoenaed from both Globe Life Insurance and New York Life. *JT.* 154:21-23.

Attorney Doug Dailey was retained by David Stickney to represent the Estate of Leonila Del Valle Stickney shortly after Leonila died on October 24, 2009. *JT.* 661:15-22. The Estate learned about Leonila's life insurance policies naming Bertram as beneficiary in June and July 2010. *JT.* 665:22-25; 669:6-10. On November 4, 2010, Dailey advised Bertram's attorney that it was the Estate's position that Bertram had intentionally killed Leonila and, as a result, Bertram was not entitled to any of the insurance proceeds. *JT.* 670:10-19. "No way," said Bertram's attorney, who thereafter informed Dailey that Bertram passed a polygraph. On November 15, 2010, Dailey emailed Chief Deputy General Charles McGuigan questioning the criminal investigation being conducted by Sheriff Wolf. *JT.* 673:2-675:5; *Exhibit 157*; *Appx.* 6-8. Dailey's email included no mention of Bertram's polygraph result. *JT.* 673:2-675:5; *Exhibit 157*; *Appx.* 6-8.

Bertram was not arrested on any charges in 2009 or 2010.

On January 21, 2011, Bertram, accompanied by legal counsel, voluntarily met with Sheriff Wolf and DCI Agent Guy DiBenedetto. *JT.* 154:24-155:19. The interview was recorded. When confronted with information that Leonila was pregnant, Bertram told

Sheriff Wolf and Agent DiBenedetto that Leonila had mentioned she was late on their drive from Sioux Falls to Burke. *JT*. 159:12-22.

When questioned about the life insurance policies, Bertram explained that Leonila purchased the \$750,000 New York Life policy for her family in the Philippines in the event something happened to her. *JT*. 167:4-19. Bertram shared that Leonila named him as beneficiary because she was concerned her family would squander the insurance proceeds if received all at once. Bertram told Sheriff Wolf and Agent DiBenedetto that he took out the Globe Life Insurance policy on Leonila due to her poor driving skills.

During the recorded interview, Bertram's counsel informed Sheriff Wolf and Agent DiBenedetto that Bertram had taken and passed a polygraph administered by former DCI polygrapher, Loren Pankratz.

Bertram was not arrested on any charges following the January 2011 interview.

In October 2011, Bertram and David Stickney reached a settlement regarding the insurance proceeds. The Estate of Leonila Stickney received the \$600,000 New York Life Policy; Bertram received the remaining death benefit and interest on the New York Life Policy and the proceeds from the Globe Life Policy. The Settlement Agreement & Mutual Release of All Claims provided:

WHEREAS Leonila D. Stickney was shot in a hunting accident on October 24, 2009, in Gregory County, South Dakota, by a shotgun being operated by Russ Bertram, hereinafter referred to as "the accident[.]"

On October 11, 2011, David Stickney filed a Petition for Order Approving Settlement Agreement and Mutual Release of All Claims with McCook County Circuit Court. First Judicial Circuit Judge Timothy W. Bjorkman signed the Order Granting Petition for Authority to Enter into Compromise Agreement and Mutual Release of All Claims on October 17, 2011.

Bertram was not arrested on any charges in 2011, 2012, or 2013.

On January 14, 2014, Agent DiBenedetto made an unannounced visit to Bertram's residence. Bertram agreed to speak with Agent DiBenedetto in his vehicle. Bertram did not have counsel present and did not ask Agent DiBenedetto to contact his attorney. Bertram answered DiBenedetto's questions regarding the shooting, the insurance proceeds, and his marriage to Leonila's sister, Melizza.

Bertram was not arrested on any charges following the January 2014 interview.

In the six years between Leonila's death and Bertram's arrest, Bertram sent \$39,000 to Leonila's family in the Philippines via Moneygram. *JT.* 266:18-267:13; 269:10-12. He also visited Leonila's family in the Philippines three times – in 2010, 2011, and 2012. Bertram withdrew large amounts of cash before each trip and spent the money on Leonila's family.

Sheriff Wolf retired in January 2015. *JT.* 183:22-24. Sheriff Wolf never sought an arrest warrant for Bertram. *JT.* 203:6-20. Nine months after Sheriff Wolf's retirement, in September 2015, Bertram was indicted for First Degree Murder by a Gregory County Grand Jury.

STANDARD OF REVIEW

On appeal, this Honorable Court will “review a circuit court’s decision to admit or deny other-act evidence under Rule 404(b) for an abuse of discretion.” *State v. Boe*, 2014 S.D. 29, ¶ 20, 847 N.W.2d 315, 320. “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable.’” *Kaberna v. Brown*, 2015 S.D. 34, ¶ 13, 864 N.W.2d 497, 501 (quoting *Gartner v. Temple*, 2014 S.D. 74, ¶ 7, 855 N.W.2d 846, 850).

“When a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion.” *State v. Packed*, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859 (quoting *State v. Guthrie*, 2001 S.D. 61, ¶ 30, 627 N.W.2d 401, 415).

ARGUMENT

I. Bertram’s Sixth Amendment Rights Violated by Trial Court’s Refusal to Admit Polygraph Results During Doug Dailey’s Cross-Examination

The United States Constitution mandates that Bertram has a right to “be confronted with witnesses against him.” U.S. Const. Amend VI; S.D. Const. Art. 6, § 7. The Confrontation Clause includes Bertram’s right to effectively cross-examine the State’s witnesses. *Davis v. Alaska*, 415 U.S. 308 (1974).

The right of cross-examination is an essential safeguard of factfinding accuracy in an adversary system of justice and “the principal means by which the believability of a witness and the truth of his testimony are tested.”

U.S. v. Lindstrom, 698 F.2d 1154, 1160 (11th Cir. 1983) (quoting *Davis*, 415 U.S. at 316).

The U.S. Supreme Court has emphasized that “it is the essence of a fair trial that reasonable latitude be given the cross-examiner.” *Alford v. U.S.*, 282 U.S. 687, 691 (1931). This is especially true in matters relevant to a witness’ credibility. *U.S. v. Williams*, 592 F.2d 1277, 1281 (5th Cir. 1979). “Where the witness the accused seeks to cross-examine is the ‘star’ government witness, providing an essential link in the prosecution’s case, the importance of full cross-examination to disclose possible bias is necessarily increased.” *Greene v. Wainwright*, 634 F.2d 272, 275 (5th Cir. 1981).

Although the Confrontation Clause provides individuals with “the right to cross-examine those who testify against” them, it is well recognized “that the right to cross-examine is not absolute.” An individual is only guaranteed “an opportunity for *effective* cross-examination, not cross-

examination that is effective in whatever way, and to whatever extent, the defense might wish.”

Milstead v. Smith, 2016 S.D. 55, ¶ 13, 883 N.W.2d 711, 717 (internal citations omitted) (emphasis in original).

“One goal of effective cross-examination is to impeach the credibility of opposing witnesses.” *U.S. v. Lindstrom*, 698 F.2d 1154, 1160 (8th Cir. 1983). The U.S. Supreme Court has observed “the cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.* discredit the witness.” *Davis*, 415 U.S. at 316. “[C]ross-examination in ‘matters relevant to credibility ought to be given wide scope.’” *Lindstrom*, 698 F.2d at 1160 (quoting *United States v. Williams*, 592 F.2d 1277, 1281 (5th Cir. 1979)).

In Bertram’s case, effective cross-examination as contemplated by the Confrontation Clause required inquiry into the State’s witness, Attorney Doug Dailey’s, knowledge that Bertram submitted to a polygraph. David Stickney, Leonila’s estranged husband, hired Dailey to obtain Leonila’s life insurance proceeds after learning of the New York Life Policy’s existence. Dailey handled all settlement negotiations on Stickney and the Estate’s behalf. *JT.* 676:10-12. At trial, Stickney testified that he settled the civil dispute regarding Leonila’s life insurance proceeds on Dailey’s advice and with full knowledge that South Dakota law prohibited Bertram from receiving the insurance proceeds if he intentionally killed Leonila. *JT.* 597:16-599:6.

Attorney Clint Sargent: Did you understand that there’s a statute in South Dakota that says if somebody has intentionally caused the death of someone else, if it’s a homicide, an intentional killing, that that person can’t recover any benefits from the person’s estate, including life insurance. Did you understand that?

Witness David Stickney: Yes.

Sargent: So, you understood, in dealing with these claims, that, if Russ Bertram intentionally murdered Nila, he couldn't get any money from a life insurance policy. You knew that.

Stickney: Well, that wasn't for me to decide.

Sargent: And, you didn't – but you did decide that there was enough risk involved in all of this, there was enough uncertainty in all of this, that you were going to go ahead and settle these claims and waive any objections that you had.

Stickney: When the matter was brought before the court, and the lawyers handled it and all of that, it was stated that she was dead of an accident.

Sargent: Right.

Stickney: Not at that time was there ever any other thing that was considered. So, we weren't thinking to try to deal with a murder or something like that. I mean, that – at that point, that was not there.

Sargent: And the “point” we're talking about is in 2012 --.

Stickney: It was an accident, and that was what we were going on at that point.

JT. 593:12-594:5.

Attorney Clint Sargent: You already have talked about you understood that there were provisions that could have allowed Russ not to collect. And, you're representing to the court that you believe that, “the proposed settlement as set forth herein is fair and equitable under the circumstances, and believe that the acceptance of the settlement would be in the best interest of the estate, the heirs, and all other persons concerned.” You're agreeing to that.

Witness David Stickney: Yes.

Sargent: And, you're saying that you hadn't, at that time, considered claims regarding negligence, damages, and contributory negligence.

Stickney: No, I hadn't.

Sargent: The settlement agreement that you signed, that was attached to the petition, the first line stated that, “Leonila was shot in a hunting accident on October 24, 2009;” is that right?

Stickney: At the time those were filed, that's what we had – you know, the conclusion. We didn't have any further evidence.

Sargent: Didn't have any more evidence --.

Stickney: At that time.

Sargent: At that time, you knew that Sheriff Wolf had been investigating, correct?

Stickney: He wasn't really actively investigating.

Sargent: Okay. So, you don't approve of how Sheriff Wolf did his investigation?

Stickney: His approach was, "he'll make a mistake, and I'll catch him when he makes a mistake." That's not active investigation.

Sargent: All right. And, you ultimately ended up -- the court ended up approving this settlement and you signed it; is that right?

Stickney: On advice of a lawyer, I did.

Sargent: So, if your lawyer testifies and tells us what things were considered in deciding this settlement agreement, you would rely on what your lawyer said?

Stickney: Yes.

Sargent: Is it all right if we ask him questions about what you two talked about, about what went in to this settlement?

Stickney: Sure.

Sargent: You don't have any objections to us asking him, if he testifies, all of the things he was considering in deciding whether to recommend a settlement, do you?

Stickney: No, that's fine; I don't mind.

JT. 597:16 -599:6.

During settlement negotiations, Bertram's attorney informed Dailey that Bertram had submitted to and passed a polygraph administered by former Division of Criminal Investigation polygraph analyst, Loren Pankratz. *Appx.* 9. At trial, pursuant to the trial court's order precluding polygraph evidence, Dailey omitted any mention of Bertram's polygraph as a factor or consideration in settlement. *JT.* 670:11-672:14; 676:10-12.

Witness Doug Dailey: Well, I think the next thing, according to my notes, I had a telephone call with attorney Clint Sargent on November 4th of 2010. I know that we had some back and forth going on with regard to leaving messages and trying to get hold of each other.

At that time, I advised Mr. Sargent that we believed that Mr. Bertram had intentionally killed Leonila and that he should not be entitled to any of the life insurance proceeds and asked for them to pay those over to the estate.

Attorney Paul Swedlund: Did you ask – so, you asked Mr. Sargent to pay the Globe policy over to the estate or the New York Life?

Dailey: Just the life insurance policies in general. I don't think it was differentiated between the two or which one we wanted paid over at that time. We were simply asking for all of the proceeds to be paid to the estate.

Swedlund: Okay. And, what was Mr. Sargent's response to that?

Dailey: My notes have the quote of, "no way."

Swedlund: So, that's a direct quote from Mr. Sargent.

Dailey: According to my notes.

Swedlund: What did Mr. Sargent tell you about his reason for saying, "no way"?

Dailey: Just that they disputed that it was an intentional act.

Swedlund: And, did he say that the proceeds had another --.

Attorney Clint Sargent: Your honor, I'm just going to object. If Mr. Swedlund is going to ask about things we talked about, I have no objection to that. But, I hope that then opens the door to everything that we talked about in that conversation.

The Court: It does. You may continue.

Swedlund: Proceed.

Dailey: Well, just that he disagreed. I don't – you know, as far as the details, I don't really know how in depth we got in to the details of that. But he just disagreed.

...

Swedlund: And, were you also talking to Mr. Stickney about some other potential legal action involving –

Dailey: Well, we were discussing the issue of whether or not we would pursue what's called a wrongful death claim, which is a civil claim against a person who may cause a person – another person to die, through negligence or recklessness or an intentional act.

Swedlund: Okay. So, we're talking about the bases for a wrongful death claim; one of them can be negligence you said?

Dailey: Correct.

JT. 670:11-672:14.

Dailey: Well, without going in to details, we ultimately negotiated a settlement with Mr. Bertram and his attorney for the distribution of the insurance proceeds.

JT. 676:10-12.

Once Dailey's direct examination ended, Bertram's counsel sought relief from the trial court's earlier prohibition on polygraph evidence. Bertram's attorneys explained that the State opened the door to the reasons why the civil case settled, thereby constitutionally entitling Bertram to cross-examine on the polygraph issue as a settlement factor. *JT.* 689:19-690:17; 692:9-18.

Attorney Clint Sargent: Your honor, I request relief from the court's order on motion in limine precluding evidence that Mr. Bertram passed a polygraph examination. I think the State has opened the door by representing to this jury that the reasons that Mr. Stickney decided to settle this case were in large part just because he wanted to get out of the country and he wanted this over with fast.

The last letter that I sent to Mr. Dailey that has been referenced here in the settlement negotiations included an explanation of the polygraph, what my intentions were if this went to civil litigation, and I believe that's a fair area of cross-examination after the State has presented it to this jury that, "oh, they just wanted it over with to get out of the country."

I should be allowed to cross-examine that I had presented the strength of my case in defending these matters; that that was a critical part of what they considered in deciding whether to settle this case.

I believe the State's opened the door, and I ask permission to go into that; for that limited purposes. And, the court can give a limiting instruction, telling the jury that they're not to consider whether or not he actually

passed the polygraph, but to consider it as to the issue as to why the estate settled the claims against Mr. Bertram.

JT. 689:19-690:17.

Attorney Clint Sargent: Whatever Mr. Dailey says doesn't mean that the ability to cross-examine him on that issue should be limited. It's a constitutional issue that we're talking here: The right to confront and cross-examine your accusers and the witness.

And, it's clearly, indisputably an issue that was discussed in the settlement process. It's in letter form. So, however, Mr. Dailey answers the question, it's for the jury to decide his credibility in admitting or denying that he considered that.

JT. 692:9-18.

With Dailey still under oath and on the witness stand, Bertram made an offer of proof.

Attorney Clint Sargent: May I just do an offer of proof with the witness and what I intend to ask him, if the court allowed me to do it?

The Court: You may.

Sargent: All right. Mr. Dailey, I'm showing you Exhibit 212. Do you recognize that document?

Dailey: Yes, sir.

Sargent: Is that a letter that I sent to you on July 28, 2011 regarding settlement negotiations in the Stickney Life Insurance Matter?

Dailey: Yes.

Sargent: Did you receive it?

Dailey: I did.

Sargent: Did you review it –

Dailey: I did.

Sargent: You read the whole letter –

Dailey: Yes.

Sargent: -- at the time you receive it? And, that was before we reached a final settlement agreement in this case.

Dailey: Correct.

Sargent: Sometime after this letter, we reached a settlement agreement.

Dailey: Within a day or two, yes.

Sargent: Okay. That would be what the evidence would be that I would offer in front of the jury.

JT. 703:23-704:24.

Attorney Paul Swedlund: May I, your Honor?

The Court: You may.

Swedlund: There's a portion of the letter at issue here that states:

I wanted to let you know that Mr. Bertram did submit to a polygraph examination –

...

Swedlund: polygraph examination with Loren Pankratz, and Mr. Pankratz has opined that Mr. Bertram is telling the truth regarding this being an accidental shooting. If this matter does go to litigation, I will seek to have Mr. Pankratz's opinion admitted as evidence. I'm aware that polygraphs are generally inadmissible; however, I will be asking the court to carve out an exception for life insurance litigation. If I am successful, your client risks getting nothing from these policies. There are certainly risks on both sides of this case.

Now, did the fact that Mr. Bertram submitted himself to a polygraph, and that his expert opinion that Mr. Bertram was telling the truth, have any bearing on your decision to settle this case?

Dailey: It wasn't my decision to settle the case.

Swedlund: Okay. Did it have any bearing on the advice that you gave your client to settle the case?

Dailey: Honestly, I don't believe it did. If you look at the state of the negotiations, we were this far apart; I mean, just mere days before. In fact, we made an offer to settle it for \$650,000 the day before, with no strings attached to the money that was to go to Bertram. And, this was the response that we had gotten to that.

I don't recall it ever being a consideration, because frankly, my client believed all along that it was an intentional act.

Swedlund: Okay. And, in your experience as a criminal defense attorney, what's your opinion of a polygraph test?

Dailey: Well, I don't think they're reliable. Every time I've dealt with them, they come back saying they're inconclusive, or something that was other than what was anticipated. And, I do recall now that you bring that up, having some conversations with Mr. Stickney, and I believe that I would have given him my opinion as to reliability.

Swedlund: Okay. That the polygraph taken by Mr. Bertram was not reliable?

Dailey: Well, I didn't have the opinion whether that one was specifically not reliable or not, but generally I don't believe they are.

Swedlund: Okay. And, if this test had been reliable and inadmissible in court, and proof of Mr. Bertram's claim that this was an accident, then that would have entitled him to the full \$900,000 of insurance money, would it not?

Dailey: I don't necessarily agree with that. I mean, it's a civil matter at that point.

Swedlund: But his case for the whole [\$]900,000 would be stronger.

Dailey: Depends on whether you believe it to be true or not.

Swedlund: Right. And, in any event, the bulk of the money was paid to the estate.

Dailey: I think majority of the two policies together went to the estate.

Swedlund: Okay. So, if the polygraph evidence had reliability and strength, it wouldn't make sense for Mr. Bertram to say, "pay the bulk of it to the estate," would it?

Dailey: Well, I'd like to say no, you know. But, I don't know what his thought process was. I mean, you know how a civil matter can go either way.

JT. 704:25-707:17.

Despite the trial court's acknowledgment and agreement that the State opened the door to the polygraph evidence, the Court declined to overturn its prior order.

The Court: So, the court finds that the State did open the door as to the polygraph evidence when it questioned the reasons why David Stickney entered into the settlement agreement regarding the insurance proceeds.

The letter of Clint Sargent, Exhibit 212, evidences the fact that the two attorneys had discussed the fact that Bertram did take a polygraph.

When the court applies the 403 balancing test to this evidence, the court takes in to consideration the following:

The evidence of the polygraph is relevant to rebut the assertion that David Stickney entered in to the settlement agreement – basically allowed the language regarding the “accidental shooting” to be included in that agreement – because he just wanted to settle the estate so he could resolve the issues quickly and then leave the country.

The State then argues that this is a collateral issue and in fact not relevant to the issues present. Yet, the State opened the door.

In doing the 403 balancing test at this time, the court considers the evidence of the polygraph and the results of that test to be unfairly prejudicial to the State for the following reasons:

Number One, there is tremendous risk that the jury will speculate and only consider the evidence for the truth of the matter asserted, even if the court gives a limiting instruction. I think juries have a hard time wrapping their head around that.

Secondly, this would allow the Defense to introduce evidence which is not admissible in South Dakota as direct evidence in its case in chief.

Number three, it would subject the jury – unless the court said no – to basically a mini-trial without experts, or require experts to be brought in to consider this small piece of evidence.

So, what’s the remedy? Because the State has had the opportunity through direct examination to give the appearance that really the only, or the major reason, for the settlement is that Mr. Stickney wanted to leave the country.

The fact of the matter is, especially on the agreement with the insurance company, if it was not accidental, there would be no money paid out. There are certainly other reasons that that agreement was entered in to and negotiated between the attorneys.

So, the Defense can certainly cross-examine as to the numerous factors that went in to that settlement agreement, but not the polygraph.

JT. 709:14- 711:9.

A. Trial Court’s Personal Concerns Re: Jury Tendencies Should Not Trump

Bertram’s Constitutional Right to Confront and Cross-Examine

In the wake of the State opening the door on the settlement factors, it was a “fundamental error of judgment” for the trial court to forgo a limiting instruction on the

polygraph evidence and instead disallow it in its entirety. *Kaberna*, 2015 S.D. 34, ¶ 13, 864 N.W.2d 497 at 501 (quoting *Gartner*, 2014 S.D. 74, ¶ 7, 855 N.W.2d at 850). Under South Dakota law, “[i]t is presumed that a jury understands and alludes by the court’s instructions.” *Fjerstad v. Sioux Valley Hospital*, 291 N.W.2d 786, 788 (S.D. 1980). It is “arbitrary and unreasonable” for the trial court to disregard South Dakota law and instead let its personal opinion that juries have “a hard time wrapping their head” around a limiting instruction to color its decision to keep out the polygraph evidence. *Kaberna*, 2015 S.D. 34, ¶ 13, 864 N.W.2d 497 at 501 (quoting *Gartner*, 2014 S.D. 74, ¶ 7, 855 N.W.2d at 850).

B. Polygraph Evidence Was Constitutionally Necessary; Time Evidence is Introduced Irrelevant

Until now, South Dakota has not had occasion to rule on polygraph admissibility when such evidence is offered to challenge witness credibility. “[W]here polygraph evidence is not offered as scientific evidence, neither Rule 702 nor a per se rule against admissibility applies.” *U.S. v. Tenorio*, 809 F.3d 1126, 1130 (10th Cir. 2015) (citing *U.S. v. Hall*, 805 F.2d 1410, 1416-17 (10th Cir. 1986)).

The circuits have uniformly held, before and after *Daubert*, that when the defendant opens the door to polygraph evidence, such as attacking the nature of a criminal investigation or asserting that testimony was coerced, polygraph evidence is admissible rebuttal evidence subject to Rule 403’s probative value and prejudicial effect considerations.

Id. at 1131.

In *U.S. v. Tenorio*, Defendant took a polygraph exam administered by an FBI polygrapher. 809 F.3d at 1128. The FBI polygrapher suspected Tenorio was being deceptive and followed up with a series of confrontational questions. *Id.* Tenorio subsequently confessed and wrote an apology letter to the victim. *Id.* Prior to Tenorio’s

trial, “the government filed a motion *in limine* to permit testimony related to the polygraph test ‘in responding to any claim Tenorio [might make] that his confession was coerced or involuntary, or that the United States’ investigation was inadequate.’” *Id.* Tenorio subsequently moved to prevent the polygraph test’s admission. *Id.*

The trial court reserved ruling on the government’s and Tenorio’s motion. The trial court “warned that testimony regarding the polygraph test would likely be overly prejudicial and therefore inadmissible, but that it would revisit the ruling ‘*depending on what evidence [Tenorio] elicits during the course of his questioning about the confession.*’” *Id.* at 1128-29 (emphasis supplied). “During the trial, Tenorio’s attorney asked about the apology letter. Tenorio repeatedly claimed that he only wrote down what the FBI agent told him to write. He also claimed that he could not understand why the agent did not believe his innocence.” *Id.* at 1129.

Following Tenorio’s testimony, the government requested permission to cross-examine Tenorio about the polygraph exam and its result. *Id.* “The district court determined that Tenorio opened the door to this questioning, and allowed evidence of the voluntary polygraph but not the results.” The trial court explained:

[T]he jury will be grossly misled if they are allowed to rest on the directive of Mr. Tenorio that he could not understand why Ms. [FBI polygrapher] Sullivan continued to tell him to tell the truth and repeatedly said she thought he was lying.

Id.

The trial court further clarified that the polygraph evidence was to be admitted to explain the FBI polygrapher’s actions in challenging the defendant’s credibility. *Id.* At the close of trial, the trial court gave the jury a limiting instruction regarding the polygraph examination:

The defendant testified he did not know why Agents Sullivan and LeBeaux continued to question him after a certain point in time, and he has referred to a polygraph examination. Federal law does not permit you to consider polygraph examinations, and it was admitted only to explain the action of the agents. I am going to instruct you you are not to speculate or take into consideration anything regarding the polygraph examination or its potential results in reference to the guilt or innocence of the defendant or in reference to whether or not he did or did not commit the acts charged in the indictment.

Id. at 1130.

Tenorio was convicted. *Id.* On appeal he argued that the district court improperly admitted the polygraph evidence under Federal Rule of Evidence 403. *Id.* “Specifically, he argues the district court did not weigh the prejudicial effect of the evidence.” *Id.* The Tenth Circuit U.S. Court of Appeals affirmed. *Id.* at 1130-32. In holding that the trial court properly exercised its discretion, the Tenth Circuit explained:

In response to the motions *in limine*, the district court weighed the prejudicial and probative value of the polygraph evidence. The court decided at that time that the prejudicial effect of testimony would outweigh its probative value. The court warned, however, that it would revisit the ruling depending on what Tenorio said about the confession.

It is not true, then, that the district court failed to consider the prejudicial effect of the testimony. The prejudicial value of the evidence remained constant when Tenorio took the stand. The court accurately noted, however, that Tenorio’s presentation of half of the story gave the government a strong interest in completing the other half. Even so, the court did not allow evidence regarding results and instructed the jury to consider the polygraph test only in explaining the agent’s action. Cross-examination was brief and of limited scope. Further, any prejudice can hardly be “unfair” when Tenorio, who was explicitly warned about this possibility, went on to argue that he was coerced anyway.

Id. at 1132.

Tenorio’s attorneys knew what elicited testimony may open the door to the polygraph evidence and chose to go forward with that line of questioning. Faced with the same knowledge during Betram’s trial, the State made the same choice. The

government's "strong interest" to provide the jury with the full story in *Tenorio* by introducing the polygraph evidence is elevated to a constitutional requirement when, as here, introduction of the polygraph evidence was critical to Bertram's constitutional right to cross-examine Dailey and "complet[e] the other half of the story" for the jury. *Id.* As illustrated by Bertram's offer of proof, Dailey knew Bertram's counsel more than "just disagreed" with David Stickney receiving Leonila's life insurance policy proceeds. *JT.* 703:23-704:24. The trial court's refusal to allow cross-examination on the polygraph grossly misled the jury who only received half of the story from Dailey. *Tenorio*, at 1129.

Extending the *Tenorio* Court's holding and analysis, Bertram's constitutional right to confront and cross-examine the witnesses against him mandated an opportunity to cross-examine Dailey on the polygraph evidence, thereby exploring Dailey's credibility by "completing the other half" of the settlement story. *Id.*

Additionally, there is nothing under South Dakota or federal law that requires polygraph evidence offered for a non-scientific purpose to only be allowed in rebuttal. Such a rule would violate defendants' due process and fair trial rights as it would make such evidence only available to the prosecution. The trial court's enunciated reliance on this constitutionally deficient position is an abuse of discretion. *See Kaberna*, ¶ 13, 864 N.W.2d at 501; *Packed*, ¶ 24, 736 N.W.2d at 859.

C. State Created Prejudice Cannot Prejudice the State

Nothing in Bertram's offer of proof required expert testimony. *JT.* 703:23-704:24. The back-and-forth exchange regarding Dailey's receipt and review of the July 2011 settlement negotiations letter and the settlement shortly thereafter did not give rise to the need for expert testimony or a "mini trial" regarding polygraph accuracy. Rather,

acknowledgment and introduction of the settlement letter would have provided the jury with evidence of additional factors considered in the settlement decision - an issue the State chose to explore in Dailey's direct examination. The trial court's "mini trial"/expert testimony concern was created by the State's intended re-direct. *JT*. 704:25-707:17. The State manufactured prejudice in its questions to Dailey about polygraph reliability.

The trial court's refusal to allow cross-examination on Dailey's knowledge of Bertram's polygraph stripped Bertram of his Sixth Amendment right to confront and cross-examine the witnesses against him. The evidence made off-limits to the jury would not only have challenged Dailey's "perceptions and memory" regarding settlement negotiations but called into question Dailey's explanation for the settlement. In short, it was evidence ripe for the jury's role in weighing Dailey's credibility. Denied the opportunity to effectively impeach Dailey's credibility, Bertram was stuck with the incomplete picture Dailey painted for the jury.

Additionally, the prohibited polygraph evidence would have provided the jury with much-needed context for Sargent's "no way" response during the November 4, 2010 phone call testified about by Dailey. The State knew Dailey would testify that Sargent responded "no way" upon Dailey's inquiry about Bertram turning the life insurance proceeds over to the Estate. The State also knew that the strength and rationale of Sargent's "no way" statement resulted from Bertram passing a polygraph regarding the accidental nature of the shooting; a fact that was shared with Dailey during the November 4, 2010 phone call. The State was also aware of the settlement timeline, specifically Dailey's receipt of Sargent's July 28, 2011, settlement letter which discussed the polygraph, and the settlement a few days later. Without the context that would have been

afforded upon cross-examination on the polygraph, the State was able to mischaracterize the basis for Sargent's statement and mislead the jury regarding a central fact of the negotiations and civil settlement.

Dailey also omitted his conversation with Sargent and Sargent's mention of Bertram's polygraph in his November 15, 2010. email to the Attorney General's Office. *JT.* 672:25-675:17; *Exhibit 157*; *Appx.* 6-8. Admission of the polygraph evidence would have afforded Bertram an additional opportunity to challenge Dailey's credibility based upon Dailey's selective information sharing with the Attorney General's Office. Again, both in testimonial and documentary evidence, the jury was only provided the State's version of a very complicated story.

The trial court's ruling allowed the State to both open and close the door on the polygraph evidence thereby guaranteeing Bertram could not meaningfully "confront and cross-examine" one of the State's key witnesses. It is hypocritical for the State to elicit testimony from Dailey regarding the civil settlement negotiations which directly implicated the polygraph evidence the State had filed a motion in limine to keep out, and then claim that the full settlement story would prejudice the State. *Appx.* 3-5. It was an abuse of discretion for the trial court to condone the State's deliberate and calculated gamesmanship in its refusal to lift the prohibition on the polygraph evidence. The trial court's ruling provided an advantage to the State to the detriment of the accused.

A Confrontation Clause violation is shown when a defendant demonstrates that a reasonable jury might have received a significantly different impression of a witness's credibility had counsel been permitted to pursue the proposed line of cross examination.

U.S. v. Love, 329 F.3d 981, 984 (8th Cir. 2003) (citing *Harrington v. Iowa*, 109 F.3d 1275, 1277 (8th Cir. 1997)).

A constitutional violation may constitute harmless error, and thus not require reversal, if the court can declare beyond a reasonable doubt that the error was harmless and did not contribute to the verdict obtained.

State v. Larson, 512 N.W.2d 732, 735 (S.D. 1994) (quoting *State v. Schuster*, 502 N.W.2d 565, 570–71 (S.D.1993)).

The prohibition on the polygraph evidence foreclosed the jury from making an informed credibility determination as to Dailey because it was denied knowledge of and the opportunity to weigh evidence relevant to credibility. The trial court’s refusal to allow Dailey to be cross-examined on the polygraph evidence violated Bertram’s Confrontation Clause rights and violated Bertram’s Fifth and Sixth Amendment rights to a fair trial. It cannot be said “beyond a reasonable doubt” that the trial court’s ruling did not contribute to the verdict obtained. *Id.*

II. Bertram’s Sex With Other Women During His Relationship with Leonila Was Improper 404(b) Evidence

“In this country it is a settled and fundamental principle that persons charged with crimes must be tried for what they allegedly did, not for who they are.” *State v. Moeller*, 1996 SD 60, ¶ 6, 548 N.W.2d 465, 468 (citation omitted).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

SDCL § 19-19-404(b).

If the only reason for offering the evidence is to show a defendant's propensity, then it is clearly irrelevant. *State v. Wright*, 1999 SD 50, ¶ 14, 593 N.W.2d 792, 798-99.

When determining whether to admit other acts evidence under SDCL § 19-19-404(b) the trial court must decide whether the proffered evidence has “any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v.*

Birdshead, 2015 SD 77, ¶ 74, 871 N.W.2d 62, 85. The party seeking the other acts evidence admission bears the burden of establishing the relevance of the other crimes, wrongs, or other acts. SDCL § 19-19-401; SDCL § 19-19-402; SDCL § 19-19-404(b).

On December 1, 2015, the State filed a Notice of Intent to Introduce Other Acts Evidence Pursuant to SDCL 19-19-404(b). Specifically, the State sought admission of “Bertram’s sexual relationships with other women during the time he was engaged to [Leonila].” The State characterized such evidence as “motive evidence.”

Attorney Paul Swedlund: Again the issue here is motive, Your Honor. And that's the purpose of this evidence is to show that Mr. Bertram had no attachment to Leonila, that his claim that he was in love with her, that he misses her to this day, that it was the best relationship he ever had, all those things that he would introduce into this record to show that this was an accident are contradicted by the way that he was living his life immediately prior to the murder.

The evidence shows that he was engaging in sexual encounters with numerous women both before and after -- immediately prior to, in fact days before the murder he is having these relations with these women. And these are, as pointed out in the Greineder case and in the Mendes case, these are offered to show that Mr. Bertram was not in a serious relationship with Leonila, that there really was no attachment there, that his lifestyle was in fact incompatible with his supposed intent to marry and pursue a long-term relationship with her, and that his claim to be forming a sincere relationship with her at the time of the murder is contradicted by this behavior. So the State would submit that this is more probative than prejudicial in this case and that it should be admitted.

MH. 60:5-61:4.

The State’s “motive evidence” assertion was a consistent theme throughout the January 28, 2016, Motions Hearing. The “motive,” however, depended upon the individual evidence the State wanted admitted.

Bertram's Court-Appointed Attorney Application:

Attorney Paul Swedlund: The State would submit that this evidence is highly probative of the motive in this case, which is jealousy and greed.

MH. 40:21-24.

Bertram's November 2008 Bankruptcy:

Attorney Paul Swedlund: The motive for the murder in this case, Your Honor, is money.

MH. 57:17-18.

Bertram's Ex-Wives' Domestic Violence and Jealousy Claims:

Attorney Paul Swedlund: It's being offered to prove that he has a motive to kill her and that motive is an irrational level of jealousy and an irrational level of possessiveness with his women.

MH. 78:14-17.

Bertram argued that evidence he was sexually involved with other women during his relationship with Leonila was only evidence of bad character, not motive, and should therefore be prohibited from reaching the jury.

Mr. Bertram has said he cared for this person and he had sex outside of that relationship. Therefore, he had a motive to murder. That doesn't provide motive to murder. It may call into question to some level or degree whether or not he's as moral as we would like every citizen in the community to be. But the fact of the matter is people have affairs and even while caring for the person they are married to or -- it's a complicated thing but it goes on in this world.

When a court says you get to put in evidence of sexual relationships tied to the motive specifically rather than as being said here, well, he had sex with somebody and paid them, therefore, he wanted to kill Ms. Stickney, that is not logical, it is not rational, it is not reasonable. It is highly prejudicial and it's certainly not probative of his motive.

A little while ago we heard the concerns of the prosecutor about the reputation of Ms. Stickney. And while so deeply concerned for it there, here he wants to take this reputation of this man and say it proves he's a killer. It proves he's a killer. It's not tied, Judge, to the facts of the case. Just because it's close in time does not mean it proves motive or lack of accident. It's just bad character.

MH. 64:2-25.

None of the witnesses the State intended to call to testify at trial regarding their sexual relationship with Bertram testified at the January 28, 2016, Motions Hearing. The trial court ruled the “other acts” evidence admissible.

The Court: Mr. Bertram has made statements that he was in the best relationship he had ever had so the sexual encounters with other women go to rebut that claim.

...

So the sexual encounters, relevant and pass the 403 balancing test.

MH. 66:16-67:1.

On the 8th day of trial, the State called two witnesses to testify regarding their sexual relations with Bertram.

Attorney Paul Swedlund: Would you state your name, please, for the record?

Katrina Ezell: My name's Katrina Ezell.

Swedlund: Katrina, how were you employed in the year 2009?

Ezell: I was a dancer.

Swedlund: You're going to have to speak up a little. Sorry.

Ezell: I was a dancer.

Swedlund: You were a dancer?

Ezell: Yes.

Swedlund: And, that was in a strip-type club?

Ezell: Yes.

Swedlund: Okay. And, while employed as a dancer, did you become acquainted with a patron named Russell Bertram?

Ezell: Yes.

...

Swedlund: ...Did you eventually become acquainted with Russ Bertram outside the dance club, during off hours?

Ezell: Yes.

Swedlund: And, did that lead to sexual encounters with Russ Bertram?

Attorney Michael Butler: Your honor, for the record, renew the objection we made prior to trial to this line of questioning.

The Court: One moment, please. The objection is noted and overruled. You may continue.

Ezell: Yes.

Swedlund: Okay. And, when did some of the encounters occur?

Ezell: 2009, late 2009; September.

Swedlund: So, there were sexual encounters with Russ Bertram in September and October of 2009?

Ezell: Yes.

Swedlund: And, where did these encounters occur?

Ezell: My place; his place.

Swedlund: Nothing further.

JT. 760:8-762:1.

Attorney Paul Swedlund: ...And, during this visit to Mr. Bertram's home, was there a sexual encounter between you and Mr. Bertram and another person?

Attorney Michael Butler: Your honor, [f]or the record, I'm renewing our objection to this line of inquiry.

The Court: Your objection is noted and overruled. You may continue.

Swedlund: Can you answer: Was there a sexual encounter involving you and I think the lady's name was Heaven Mueller (phonetic)?

Elizabeth McCaw Pina: Yes.

Swedlund: And, you, Heaven Mueller, and Mr. Bertram had a sexual encounter?

Pina: I didn't, but Heaven did.

Swedlund: Okay. Did you have some physical contact –

Pina: Yes.

Swedlund: -- but not full sex.

Pina: No.

Swedlund: But, Heaven Mueller did have full sex?

Pina: Yes.

Swedlund: Okay. Do you know when that encounter occurred?

Pina: I met with him on October 19th of 2009, and then we went back again the very next day.

Swedlund: Okay. Nothing further, your Honor.

JT. 766:25-767:23.

Testimony from a former stripper and a participating member of a threesome went beyond evidence of “Bertram’s sexual relationships with other women during his engagement to Leonila.” It portrayed Bertram “as an insatiable, amoral person-making it more likely that the jury would draw the impermissible character inference.” *People v. Smith*, 2001 WL 1699704, *2 (Mich. Ct. App. 2001) (citing *People v. Sabin (After Remand)*, 614 N.W.2d 888 (Mich. Ct. App. 2000)). This is specifically precluded under SDCL § 19-19-403 and SDCL § 19-19-404(b). The State then reiterated and capitalized upon Bertram’s improperly impugned character during its closing arguments:

Attorney Paul Swedlund: How much does Russ Bertram really love this girl, when he's having sex with Katrina Ezell in September and October of 2009?

How much does Russ Bertram love this girl when he's having a threesome with Elizabeth McCaw and Heaven Miller five days before Leonila's shot? Is that love?

JT. 1238:11-15.

Bertram was to be tried on the State’s allegation of First Degree Murder, not, as it happened here, tried for who he is. *Moeller*, ¶ 6, 548 N.W.2d at 468. The trial court knew

that Bertram’s “sexual relationships with other women during his engagement to Leonila” involved a stripper and a threesome. *MH*. 60:5-68:4. During the January 28, 2016 Motions Hearing, the trial court had ruled that evidence Bertram paid for sex with money and gifts was inadmissible, stating that such “evidence is unfairly prejudicial because that evidence has the ability to turn a jury with no other evidence there,” and was “not willing to let the jury have that information.” *MH*. 67:21-24. Strippers and threesomes carry a distinct and disfavored connotation that “has the ability to turn a jury with no other evidence.” *MH*. 67:21-24. Without explicitly saying “Bertram paid for sex,” the trial court’s ruling still allowed the State to tell the jury “Bertram paid for sex.” It was an abuse of discretion for the trial court to green-light such evidence. *See Kaberna*, ¶ 13, 864 N.W.2d at 501; *Packed*, ¶ 24, 736 N.W.2d at 859.

Evidence of Bertram’s sexual encounters with strippers and a threesome during his engagement to Leonila was not relevant to any element of First Degree Murder and, even if relevant, was more prejudicial than probative. It was an abuse of discretion for the trial court to allow this evidence at trial. Furthermore, characterization of such evidence as “motive” is disingenuous. Ms. Ezell and Ms. McCaw’s combined testimony for the State was less than ten minutes. The State’s true motive, money and jealousy, was illustrated by days, not minutes, of testimony and evidence. Additionally, nothing Ms. Ezell or Ms. McCaw said made the murder charge more or less likely – it simply, and impermissibly, interjected Bertram’s character and morality for the jury’s improper consideration.

CONCLUSION

Based upon the foregoing and this Honorable Court's duty to uphold the tenets of the U.S. and South Dakota Constitution, Bertram's First Degree Murder conviction should be vacated due to constitutional violations and evidentiary deficiencies. The conviction must be vacated and not remanded because Bertram was denied his Fifth and Sixth Amendment Rights in the prohibition on the polygraph evidence.

Respectfully submitted this 19th day of June, 2017.

/s/ Clint Sargent

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing

Appellant's Brief and all appendices were mailed by first class mail, postage prepaid to:

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On this 22nd day of July, 2017.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 8,539 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

APPENDIX

Tab 1 - 2016-02-05 Order Re: Defendant's Motion to Exclude Other Acts	
Evidence Pursuant to SDCL §19-19-404(b)	Appx. 1-2
Tab 2 – 2016-08-10 State's Motion in Limine Re: Polygraph Evidence or	
References	Appx. 3-5
Tab 3 – Exhibit 157 – 2010-11-15 Email from Doug Dailey to Attorney	
General's Office	Appx. 6-8
Tab 4 – 2011-07-28 Letter from Clint Sargent to Doug Dailey	Appx. 9
Tab 5 – 2016-11-22 Judgment and Conviction	Appx. 10-12

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STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF GREGORY)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

RUSSELL RAY BERTRAM,

Defendant.

26CR15-000072

**ORDER RE:
DEFENDANT'S MOTION TO
EXCLUDE OTHER ACTS
EVIDENCE PURSUANT TO
SDCL § 19-19-404(b)**

A Motions Hearing was held on January 28, 2016 at the Tripp County Courthouse, the Honorable Kathleen F. Trandahl presiding. The State of South Dakota appeared through its attorney, Paul Swedlund. Defendant Russell Ray Bertram appeared personally and through his attorneys, Clint Sargent and Michael J. Butler. The Court considered Defendant's Motion to Exclude Other Acts Evidence Pursuant to SDCL § 19-19-404(b).

Now, therefore,

IT IS HEREBY ORDERED as follows:

1. Defendant's motion to exclude evidence of Bertram's November 2008 bankruptcy is DENIED;
2. Defendant's motion to exclude evidence of Bertram's gifts of money to women and payment of money to women for sex is GRANTED IN PART and DENIED IN PART. Evidence of Bertram's sexual relationships with other women during the time of his relationship with Leonila Stickney may be presented. Evidence that Bertram gave monetary gifts to women or paid women for sex is excluded.
3. Defendant's motion to exclude evidence of his marriage history and allegations of Beverly Bertram, Gwendolyn Peterson and Nancy Gruhlke is GRANTED for the

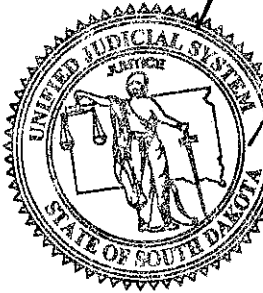
reasons stated in the Court's Findings of Fact & Conclusions of Law Re: Other Acts
Evidence, which are incorporated herein by reference.

4. Defendant's motion to exclude evidence of alleged prior acts of insurance fraud is

GRANTED;

5. Defendant's motion to exclude evidence of Bertram's sexual relationships with other
women during his engagement to Leonila Stickney is DENIED.

Dated this 5th day of February, 2016.



BY THE COURT:

Kathleen P. Trandahl
KATHLEEN P. TRANDAHL
Circuit Court Judge

ATTEST:
Clerk

BY: *Sandy Teigen*

STATE OF SOUTH DAKOTA
CIRCUIT COURT, GREGORY CO
FILED

FEB 05 2016

Sandy Teigen Clerk
By _____ Deputy

STATE OF SOUTH DAKOTA
COUNTY OF GREGORY

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

RUSSELL RAY BERTRAM,

Defendant.

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

CR. 15-72

MOTION *IN LIMINE* RE:
POLYGRAPH EVIDENCE OR
REFERENCES

The State of South Dakota, through its counsel, Paul S. Swedlund and Mikal G. Hanson, Assistant Attorneys General, hereby files this motion *in limine* for exclusion of any evidence or reference to polygraph examinations of the defendant from the trial of this case.

1. During the pretrial hearing, defendant's counsel elicited testimony that his client had allegedly passed a polygraph test administered by a polygrapher hired his own counsel. MOTIONS HEARING TRANSCRIPT at 102, excerpt attached.
2. It is well settled law that "[i]n South Dakota criminal cases, polygraph results are not admissible evidence." *Sabag v. Continental South Dakota*, 374 N.W.2d 349 (S.D. 1985); *State v. Muetze*, 368 N.W.2d 575, 588 (S.D. 1985)("[p]olygraph results are not admissible as evidence in South Dakota courts"). As observed in *Sabag*:

The rationale advanced for admitting evidence of polygraph results, in civil or criminal cases, is that such evidence is irrelevant because of dubious scientific value; it has no "general scientific acceptance as a reliable and accurate means of ascertaining truth or deception;" it is not reliable; it has no probative value; and it is likely to be given significant, if not conclusive weight by the jury, so that "the jurors' traditional responsibility to collectively ascertain the facts and adjudge the guilt or innocence is [thereby] preempted."

Sabag, 374 N.W.2d at 353 (citations omitted).

3. Also, any introduction by defense counsel of evidence that defendant allegedly passed a polygraph examination would open the door to allow

the state to introduce evidence that: (1) the polygraph test administered by a private-sector polygrapher hired by his counsel was not a valid test; (2) because the test was not valid, it is not accurate to state that the defendant had "passed" a polygraph; (3) defendant refused to take a another polygraph test administered by a certified law enforcement polygrapher; and (4) that defendant's counsel hired a polygrapher to administer a second polygraph test to the defendant on or about January 18, 2016, and those results have not been turned over to law enforcement, which implies that defendant failed the test. *State v. Dornbusch*, 384 N.W.2d 682, 687 (S.D. 1986); MOTIONS HEARING TRANSCRIPT at 132-35, excerpt attached.

ACCORDINGLY, the state requests a pretrial order *in limine* excluding all evidence or testimony concerning polygraph testing and instructing all counsel in this case to inform all witnesses that they are to refrain from making any advertent or inadvertent references to any polygraph testing in this case.

Dated this 9th day of August 2016.

MARTY J. JACKLEY
ATTORNEY GENERAL



Paul S. Swedlund
Mikal G. Hanson
ASSISTANT ATTORNEYS GENERAL
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: 605-773-3215
paul.swedlund@state.sd.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of August 2016 a true and correct copy of the foregoing motion *in limine* re: polygraph evidence or references was served on Clint Sargent, Raleigh Hansman and Mike Butler via e-mail at clint@meierhenrylaw.com and raleigh@meierhenrylaw.com respectively and Mike Butler via mike.butlerlaw@midconetwork.com.

A handwritten signature in black ink, appearing to read "Paul S. Swedlund", written over a horizontal line.

Paul S. Swedlund
ASSISTANT ATTORNEY GENERAL

Enclosure

Enclosure #: 1

Case Number: 1104375

**Enclosure Description: Copy of email
from Attorney Doug Dailey to Chief
Deputy Attorney General Charles
McGuigan reference Leonila
Stickney, dated 11-15-10**

of Pages: 2

Agent: Guy DiBenedetto

DiBenedetto, Guy

Subject:

FW: Leonilla Del Valle Stickney

-----Original Message-----

From: Doug Dailey [mailto:ddailey@morganteeler.com]**Sent:** Monday, November 15, 2010 5:05 PM**To:** McGuigan, Charles**Cc:** Crystal Jager**Subject:** Leonilla Del Valle Stickney

Good afternoon Chief Deputy General McGuigan,

I represent the Estate of Leonila "Nila" Del Valle Stickney, Nila's husband, David Stickney and her son Adrian. I have received your contact information from Assistant Attorney General Doug Barnett and was advised to send you an e-mail to outline my concerns with the investigation of the death of Nila being conducted by Gregory County Sheriff Charlie Wolf.

My clients and I believe the shooting death of Nila on October 24, 2009, was a homicide and that the Gregory County Sheriff has not investigated the death appropriately. As such, we are asking for the assistance of the Attorney General's office in looking further into this matter.

Nila was killed in a hunting accident in Gregory County by Russ Bertram of Sioux Falls, SD. At the time of her death, Nila was married to David Stickney but was separated from him and a divorce proceeding was pending in McCook County. Both she and David were residents of Bridgewater, SD. They have one son, Adrian, born October 25, 2004, who was in the temporary custody of David.

During the divorce, David was concerned about Mr. Bertram's conduct as Nila was taking Adrian to his home when she had visitations. As such, he retained Tim Mulloy of Star Enterprises of Sioux Falls to follow her. He has reported that a week or so prior to her death he followed Nila, that she had dinner with Mr. Bertram and following went to another individual's residence in Sioux Falls and spent most of the night. We have not followed up with this individual. WE have some information that indicates Mr. Bertram has a law enforcement background.

A few days later, Nila was reportedly killed in the hunting accident. As I have been told she was sitting in the passenger seat of Mr. Bertram's pickup and was shot when the gun discharged as he was getting back into the pickup. They were apparently road hunting. An autopsy was conducted by Brad B Randall who determined that she was killed by a "close range shotgun wound to the left side of the lower chest resulting in extensive destruction of the aorta and liver with subsequent massive blood loss". The autopsy also revealed that Nila was early in the first trimester of a pregnancy.

At the time of her death, we were unaware of any life insurance policies. In May of 2010 David Stickney received a letter from New York Life requesting information to evaluate a claim for life insurance benefits. Through our investigation we were advised that a \$750,000 life insurance policy was issued in January of 2009 naming Russ Bertram as the only beneficiary. In June of 2010 Mr. Stickney received another letter from Globe Life and Accident requesting information to evaluate a claim for life insurance benefits. We have determined that this policy was for a face value of \$25,000 but has a \$150,000 accidental death benefit. The Globe policy also names Russ Bertram as the only beneficiary and we've determined that Mr. Bertram paid the premiums. It is very unusual that Nila had this much life insurance, much less any. She worked for a nursing home as an assistant in Bridgewater and made less than \$30,000 per year. She was only 25 years old and was an immigrant from the Philippines with no formal education.

This information was presented to Sheriff Wolf as soon as it was received. He indicated he was going to try to talk to Mr. Bertram but wanted to

Aug 15, 2013

South Dakota Office of The Attorney General

ATPR14819

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nc. 1 Pg. 1

1104375 ENC # 1

I requested a police report from Sheriff Wolf in December of 2009 and he indicated he would provide me with a copy once the investigation was completed. To date the investigation has not been completed and I have not received a copy of any reports. I have spoken to the Sheriff a couple times to be kept up to speed. The last time I had communication with him was by telephone on Thursday, November 4, at which time I tried to pinpoint him down on the timing of completing the investigation. He indicated that he hasn't talked to Mr. Bertram despite wanting to do so and that the report has not been updated since prior to the information about the life insurance policies. I inquired as to the status of any potential charges and he indicated that he and the Gregory County State's Attorney have discussed the matter and that no charges will be forthcoming unless they receive additional information. I also inquired if he had any contact with the DCI or the Attorney General's office about this matter and he indicated that he had not and that he had no reason to. He has promised to send me the latest report which is more than 5 months old but to date have not yet received it.

We feel that it may be helpful to have your agency take a look into this death and would appreciate your assistance. If you need any additional information or would otherwise like to discuss this matter please do not hesitate to call.

Thank you for your courtesies.

Sincerely,

Doug Dailey

MorganTheeler LLP

P.O. Box 1025

221 East Third Avenue

Mitchell, SD 57301-7025

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(605) 996-5588

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Aug 15, 2013

South Dakota Office of The Attorney General

ATPR14819

Enc. 1 Pg. 2

Meierhenry Sargent LLP

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CLINT SARGENT
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July 28, 2011

Via Facsimile & Email

Douglas Dailey
Morgan Theeler
PO Box 1025
Mitchell, SD 57301

Re: Stickney Life Insurance

Dear Doug:

I have communicated your client's offer to mine. We are close, but I have a counter proposal, which is:

1. The Estate receives \$600,000.00 from the New York Life proceeds. The remainder of any payments under the policy will go to Russ for the benefit of Leonila's family.
2. The Estate will cooperate with the processing of the Globe Life policy claim and provide any information needed to complete the claim. Further, the Estate will notify Globe Life that the Estate is not making a claim for the proceeds under the policy and has no objection to the proceeds being distributed to Mr. Bertram.

Please let me know if this arrangement is acceptable. If so, I will draft a formal settlement agreement.

Also, I wanted to let you know that Mr. Bertram did submit to a polygraph examination with Loren Pankratz and Mr. Pankratz has opined that Mr. Bertram is telling the truth regarding this being an accidental shooting. If this matter does go to litigation, I will seek to have Mr. Pankratz's opinion admitted as evidence. I am aware that polygraphs are generally inadmissible, however, I will be asking the Court to carve out an exception for life insurance litigation. If I am successful, your client risks getting nothing from these policies. There is certainly risks on both sides of this case.

With best regards,

MEIERHENRY SARGENT LLP

Clint Sargent

cc: Russ Bertram

STATE OF SOUTH DAKOTA
COUNTY OF GREGORY

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

RUSSELL RAY BERTRAM,

Defendant.

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IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

CR. 15-72

JUDGMENT OF CONVICTION

An indictment was filed with this court on September 8, 2015, charging the defendant, RUSSELL RAY BERTRAM, with the crime of FIRST DEGREE MURDER in causing the death of LEONILA DEL VALLE STICKNEY on October 24, 2009, in violation of SDCL 22-16-4(1), a Class A felony. The defendant was arraigned on the indictment on September 29, 2015. The defendant and his counsel, Clint Sargent, appeared at the arraignment. The court advised the defendant of his constitutional and statutory rights pertaining to the charges filed against him. The defendant pled not guilty to the indictment and requested a jury trial.

A jury trial commenced at the Gregory County courthouse in Burke, South Dakota, on September 12, 2016. At trial, the defendant was represented by his attorneys, Clint Sargent and Mike Butler, and the state of South Dakota was represented by Assistant Attorneys General Paul S. Swedlund and Mikal G. Hanson and Gregory County State's Attorney Amy Bartling. On September 26, 2016, a Gregory County jury found the defendant GUILTY of FIRST DEGREE MURDER.

It is, therefore, the JUDGMENT of this court that the defendant, RUSSELL RAY BERTRAM, is GUILTY of the crime of first degree murder.

On November 22, 2016, the defendant, Russell Ray Bertram, and his counsel, Clint Sargent and Mike Butler, and the prosecuting attorneys, Assistant Attorneys General Paul S. Swedlund and Mikal G. Hanson

appeared for the defendant's sentencing. The court inquired whether any legal cause existed to show why sentence should not be pronounced and, there being none, the court entered the following sentence:

IT IS ORDERED that the defendant, RUSSELL RAY BERTRAM, be and hereby is SENTENCED to LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE in the South Dakota State Penitentiary in Sioux Falls, South Dakota, there to be housed, boarded and clothed for the remainder of his natural life according to the rules and discipline governing the institution;

IT IS FURTHER ORDERED that the defendant receive credit for 394 days of time already served awaiting trial, plus credit for each day served while awaiting transport to the South Dakota State Penitentiary;

IT IS FURTHER ORDERED that the defendant pay court costs pursuant to SDCL 23-3-52, 23-28B-42 and 16-2-41 in the amount of \$104 to the Gregory County Clerk of Courts;

IT IS FURTHER ORDERED that the defendant pay prosecution costs in the amount of \$21,926.80;

IT IS FURTHER ORDERED that the defendant reimburse Gregory County through the Gregory County Clerk of Courts for the costs of his court-appointed fees which have been incurred in this matter in the amount of \$165,912.32 plus such further billings as are submitted to the court for payment;

IT IS FURTHER ORDERED that any bond which has been posted in this matter be discharged and the bondsman exonerated; and

IT IS FURTHER ORDERED that the defendant be remanded to the custody of the Gregory County Sheriff for transportation and delivery to the Warden of the South Dakota State Penitentiary in Sioux Falls, South Dakota.

Dated this 22nd day of November 2016.



Kathleen F. Trandahl
Kathleen F. Trandahl
Circuit Court Judge

ATTEST:
SANDY TEIGEN, CLERK

By: Sandy Teigen
Deputy Clerk
SEAL

RIGHT TO APPEAL

You, **RUSSELL RAY BERTRAM**, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota by filing a copy of the same, together with proof of such service, with the clerk of this court within 30 days from the date that this judgment of conviction was signed, attested and filed.

STATE OF SOUTH DAKOTA
CIRCUIT COURT, GREGORY CO

FILED

NOV 22 2016

Sandy Teigen Clerk
By _____ Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28063

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RUSSELL RAY BERTRAM,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
6th JUDICIAL CIRCUIT
GREGORY COUNTY, SOUTH DAKOTA

THE HONORABLE KATHLEEN F. TRANDAHL
Circuit Court Judge

APPELLEE'S BRIEF

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JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

DID THE TRIAL COURT ERR IN EXCLUDING POLYGRAPH EVIDENCE?

State v. Muetze, 368 N.W.2d 575 (S.D. 1985)

United States v. Scheffer, 523 U.S. 303 (U.S. 1998)

United States v. Montgomery, 635 F.3d 1074 (8th Cir. 2011)

State v. Ellison, 676 P.2d 531 (Wash.App. 1984)

The trial court excluded evidence that Bertram had allegedly passed a polygraph offered as “impeachment” of a witness.

DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE THAT BERTRAM HAD SEX WITH A DANCER AND HAD PARTICIPATED IN A *MENAGE A TROIS* DAYS BEFORE HE KILLED HIS FIANCE?

State v. Huber, 2010 SD 63, 789 N.W.2d 283

People v. Franklin, 2003 WL 21518916 (Ct.App.Cal.3rd)

State v DiBartolo, 101 Wash.App. 1039 (Wash.Ct.App.3rd 2000)

Commonwealth v. Mendes, 806 N.E.2d 393 (Mass. 2004)

The trial court admitted evidence of Bertram’s sexual liaisons in the weeks and days immediately prior to the murder as evidence of motive and absence of mistake.

PRELIMINARY STATEMENT

The jury trial transcript will be cited as TRIAL followed by a reference to the volume number and cited page/line. Trial exhibits will be cited as EXHIBIT. Motions hearing transcripts will be cited as HEARING followed by the date and reference to the cited page/line. Salient record items are attached in the Appendix hereto.

STATEMENT OF THE CASE AND FACTS

On October 24, 2009, former law enforcement officer Russell Ray Bertram killed his alleged fiancé, Leonila Stickney, by shooting her through the heart at close range with a Remington 870 pump action shotgun. Bertram claimed the shooting was accidental, but gave nonsensical and contradictory explanations to law enforcement about how the shotgun came to be aimed at Leonila and what had caused it to fire. At the time of her death, Bertram was the sole beneficiary of \$920,000 in insurance on Leonila's life.

Leonila had come to the United States in 2004 as the 22-year-old Filipina "mail-order bride" of 73-year-old David Stickney. Leonila had been raised in the harshest conditions of poverty short of starvation. She lived with her parents, three brothers and four sisters in a one-room, plank board, tin-roofed hut on a dirt lot carved out of the Philippine jungle. TRIAL IV at 466/15-21, 467/14-21, 468/11, 491/16; TRIAL V at 561/20. The hut had no windows or running water. TRIAL V at 561/17-20. Before he died, Leonila's father scratched out a living doing carpentry work. Her mother was a laundress. TRIAL IV at 467/8. The family planted vegetables to have food. TRIAL IV at 469/1. Despite these privations growing up, Leonila was a "sweet and happy" girl with "lots of dreams." TRIAL IV at 469/6.

After they married, Stickney and Leonila lived in a \$25,000 house in Bridgewater, South Dakota. They had a son in October of 2004. TRIAL V at 562/25. Stickney received income from Social Security and occasionally driving truck; Leonila worked at the nursing home in Bridgewater taking care of the elderly residents. TRIAL V at 536/13. She was “a phenomenal nursing assistant. She worked a lot . . . she was like two people,” “reliable,” ever willing “to work an extra shift” and “was very good with the residents.” TRIAL V at 537/11-16. Each month Leonila sent \$300 from her paltry earnings to her family in the Phillipines – enough to lift them out of poverty in a country where the average monthly income is \$289. TRIAL V at 491/21, 579/6. Leonila was close with her son. TRIAL V at 537/22; TRIAL VI at 773/19. During her marriage to Stickney, Leonila’s own needs were “modest,” not desirous of material items, clothes, jewelry or restaurant meals. TRIAL V at 579/11-25.

In late 2008, Leonila left Stickney and took up with Bertram, then age 56. Leonila believed a former police officer like Bertram could help steer her through her divorce. TRIAL II at 158/21, 230/18. At the time, Bertram was in bankruptcy. TRIAL V at 547/3. He was \$100,513 in debt. TRIAL V at 555/2. His monthly living expenses equaled his monthly income. His assets included his \$3,000 trailer house in Sioux Falls, some land worth \$1,100 and household items. TRIAL V at 549/20,

550/6. He had no savings and no credit – so no means to buy guns, tools, cars, vacations and other material things that he wanted out of life.

In early 2009, Bertram and Leonila visited an insurance agent and took out a 5-year term policy on her life in the amount of \$750,000. Supposedly the money was for her family in the Philippines “should something tragic happen to her.” EXHIBIT 28.1, Appendix 004, 021, 022; TRIAL II at 167/15. Bertram gave conflicting stories for why a 26-year-old girl suddenly felt the need to purchase life insurance. In one version, it was because she was afraid of Stickney. EXHIBIT 28.1, Appendix 005. In another, it was because she was a terrible driver. EXHIBIT 28.1, Appendix 003. In yet another version, it was for “mortgage protection.” EXHIBIT 43. These pretexts did not hold up at trial: there was no evidence that Stickney posed any kind of a threat to Leonila, all evidence showed that Leonila was a good driver, and Leonila and Bertram had no mortgage to protect. TRIAL II at 241/19-242/4; TRIAL IV at 483/24-484/9; TRIAL VI at 774/23; TRIAL VII at 774/23; EXHIBIT 28.1, Appendix 023.

Bertram also obtained a mail-order policy of \$170,000 on Leonila’s life. This policy was also earmarked for Leonila’s family “should something tragic happen to her.” EXHIBIT 28.1, Appendix 021. Both policies named Bertram – not Leonila’s family in the Philippines or her 4-year-old son – as the sole beneficiary of both policies, supposedly

because Leonila did not trust her family to not “blow” the money if they received it in one lump sum. EXHIBIT 28.1, Appendix 003, 021; TRIAL II at 169/15, 248/3. According to Bertram, Leonila trusted him, a man she had only known a few months, to send the proceeds to her family in installments and keep none for himself. EXHIBIT 28.1, Appendix 021. The policies listed Bertram as her “fiancé” even though she was still married to Stickney.

Bertram and Leonila continued their “courtship” throughout 2009. Leonila, however, was not loyal to Bertram. In August or September, Bertram became “suspicious” of late-night calls on Leonila’s cell phone bill. A series of texts between Leonila and a paramour, Nathan Meeter, starting four days prior and ending the night before the shooting reveal that Leonila was pregnant with Meeter’s child. TRIAL II at 237/1-17; TRIAL VII at 775/14-778/17; EXHIBIT 50.1.

On the day she died, Leonila was accompanying Bertram on a pheasant hunting trip to Gregory County where Bertram had once lived and worked as a law enforcement officer. According to Bertram, on the drive to Gregory Leonila told him she was “late” menstruating that month, which Bertram took to mean that she was pregnant. EXHIBIT 28.1, Appendix 007-009, 024; TRIAL II at 159/22, 231/21, 232/4; TRIAL III at 312/3, 313/4. Bertram told Leonila “you better not be.” TRIAL II

at 277/14. He demanded she tell him who she had been “fooling around with” and who she had “been messing around with.” TRIAL II at 159/23, 231/23. Leonila told him “nobody.” TRIAL II at 160/9.

Unbeknownst to Leonila, Bertram had had a vasectomy in 1976 so he knew he “couldn’t have been the father” of Leonila’s child. EXHIBIT 28.1, Appendix 008, 009; TRIAL II at 160/22, 161/1, 232/11. For Bertram, already “suspicious” of Leonila because of her phone activity, the pregnancy was proof that Leonila was cheating on him . . . and Bertram was not someone who “took that crap” from his woman.

EXHIBIT 29.1, Appendix 039. Bertram took the pregnancy to mean that Leonila planned to “run off” with Meeter. EXHIBIT 28.1, Appendix 012.

Despite the revelation of Leonila’s pregnancy – or perhaps because of it – Bertram continued driving toward Gregory. Out on an isolated section line road about 7 miles north of Gregory, Bertram shot two pheasant. TRIAL II at 217/12. After shooting a third pheasant and throwing it back into the bed of his truck, Bertram loaded his shotgun into the cab barrel forward intending to place it barrel down on the transmission hump and stock up against the front of the seat. EXHIBIT 17, Appendix 001; TRIAL II at 251/12. Despite having shot his limit, the

gun was inexplicably loaded and pointed at Leonila.¹ TRIAL I at 119/1: TRIAL II at 270/14. Bertram's finger was on the trigger and the safety was off. EXHIBIT 29.1, Appendix 030, 032; TRIAL II at 171/18, 273/17, 274/3; TRIAL VII at 969/15, 975/8. Leonila was seated on the passenger side. The blast entered Leonila's torso just to the left and below the left breast severing the aorta from her heart. TRIAL I at 87/1-11, 90/18, 115/24. It was a non-survivable wound. TRIAL I at 91/17, 92/2, 116/2.

Bertram drove Leonila to the Gregory hospital. He told ER personnel that he had been standing outside the driver's side door of his truck unloading the shotgun when it accidentally fired. TRIAL I at 66/23, 76/25, 100/14, 117/13, 118/23; EXHIBIT 6.1, Appendix at 054. He was stoic, showing little emotion or concern for his mortally-wounded "fiancé." EXHIBIT 12, Appendix 057; TRIAL I at 67/3, 77/14, 106/10-13, 136/2. While Leonila clung to life on the operating table, rather than stay at the hospital with her, Bertram drove to the shooting site with a

¹ Bertram gave conflicting explanations for why the gun was loaded. He first told the insurance investigator that he reloaded in case he saw another bird, which made no sense because Bertram had shot his limit of pheasant for the day. TRIAL VI at 752/23-753/1. Then he said he reloaded in case the third bird ran, which made no sense because it was already dead and in the bed of Bertram's truck when Leonila was shot. EXHIBIT 28.1, Appendix 014, 017. Then Bertram said he reloaded because he planned to hunt some grouse, which made no sense because he would not have needed to get into the truck to hunt grouse because he was already parked next to the field where he planned to hunt. EXHIBIT 28.1, Appendix 015. Then Bertram said he did not realize the gun was loaded. EXHIBIT 29.1, Appendix 044.

deputy sheriff to demonstrate his “accident” story. TRIAL II at 135/19-23. When told upon his return to the hospital that Leonila had died, Bertram asked a nurse to clean her blood and body tissue off his car seat so he could go home. TRIAL I at 78/12; TRIAL II at 141/7.

When interviewed at the hospital by law enforcement, Bertram told a different story than what he had told ER personnel. Bertram told Gregory County Sheriff Charlie Wolf that he was loading the gun into the truck with his right hand. TRIAL II at 134/19. He said Leonila said “Kiss me,” grabbed the barrel of the gun and pulled it toward her, and that the gun then instantly discharged into Leonila’s chest. TRIAL II at 172/6; EXHIBIT 12, Appendix 056. Though not directly asked, Bertram gave Sheriff Wolf the impression that he had seen Leonila grab the barrel. TRIAL II at 172/3-8. Based on this account, Sheriff Wolf initially investigated the shooting as accidental. But Sheriff Wolf was not entirely convinced by Bertram’s story, and the more he learned the more Bertram’s story did not add up. TRIAL II at 323/18.

Bertram concealed motive factors from Sheriff Wolf from the start. He did not tell Sheriff Wolf that his “fiancé” was pregnant, that the child was not his, or that he was the beneficiary of \$920,000 of insurance on her life. TRIAL I at 122/20; TRIAL II at 161/11, 193/2-194/12; TRIAL V at 547/3; 555/2-11. Sheriff Wolf learned about the pregnancy from the autopsy report and about the insurance during follow-up investigation in 2009 and 2010. TRIAL II at 154/16, 154/20.

Still fuming over Leonila's cuckolding of him, Bertram texted Meeter from Leonila's phone about a month after the shooting posing as Leonila. Meeter did not yet know that Leonila was dead because her final text to him the night before she died had told him she wanted a couple weeks alone to think about his offer to be with her and care for their child together. TRANSCRIPT VI at 777/6-778/2. Bertram's texts asked Meeter "What did you feel when you were fucking me?" and "I want to know if you think I was good in bed." EXHIBIT 50.2, Appendix at 059, 060; EXHIBIT 28.1, Appendix 019, 020; TRIAL II at 162/25, 163/2, 234/11, 235/9; TRIAL III at 306/25-307/14, 358/5; TRIAL VI at 779-780.

Meeter detected the ruse because the language was nothing like Leonila and demanded to know who was on the other end of Leonila's phone. TRANSCRIPT VI at 780/12-15. Meeter did not learn of Leonila's death until Sheriff Wolf came to his door seeking information about her. Meeter turned his phone with Bertram's "sick" texts on it over to Sheriff Wolf for evidence. TRIAL VI at 780/3, 781/17.

As the investigation transitioned from "accident" to homicide, Sheriff Wolf sought assistance from DCI. Together with DCI Agent Guy DiBenedetto, Sheriff Wolf reinterviewed Bertram in 2011. Bertram's 2011 interview resulted in more conflicting accounts of the salient facts of the shooting. As he had at the hospital, Bertram told Sheriff Wolf and Agent DiBenedetto that he had planned to position the shotgun with the

barrel down on the transmission hump and stock against the front of the seat as depicted in a photo taken by Sheriff Wolf at the hospital.

EXHIBIT 17, Appendix at 001; EXHIBIT 28.1, Appendix 025; TRIAL II at 173/6. Bertram again said that the gun fired when Leonila “jerked” or “tugged” on the barrel. EXHIBIT 28.1, Appendix 025-027. But Bertram now said he had been looking down the road when the gun fired so he “did not see her reach with either hand, grab the gun and pull it.”

EXHIBIT 28.1, Appendix 026, 027; TRIAL II at 171/23, 172/13, 250/15. So Bertram said that Leonila possibly had not tugged on the barrel at all but, instead, the gun maybe fired because Bertram had bumped the stock on the seat back. EXHIBIT 28.1, Appendix 026; TRIAL II at 170/22, 274/13.

Bertram apparently had forgotten that he had earlier specifically told insurance investigator, Edwin Webster, in June of 2010 that Leonila had tugged on the gun barrel with her *left* hand. TRIAL VI at 754/7; EXHIBIT 45. By this point, Bertram had given four different accounts of what had caused his finger to activate the trigger – he was unloading it, he was putting it into the truck when he saw Leonila tug on it with her left hand, he felt (but did not see) Leonila tug on it, it fired when he hit it against the seat. TRIAL II at 274/17, 275/20, 276/16; TRIAL III at 306/4-21; TRIAL IV at 415/2; EXHIBIT 45; EXHIBIT 28.1, Appendix 013, 025-027. He would later say that the gun had possibly fired because it slipped in his hand. EXHIBIT 29.1, Appendix 042.

Bertram fibbed in other ways to try to make the shooting appear less premeditated:

- He claimed he was unfamiliar with the Remington 870 gun that had killed Leonila. Bertram said that he had only shot the Remington 870 four or five times because he usually hunted pheasant with a Browning semi-auto. EXHIBIT 28.1, Appendix at 016, 018.
- He denied monitoring Leonila's cell phone or suspecting her of being unfaithful before the shooting. EXHIBIT 28.1, Appendix at 011, 019.
- He said he had learned of the pregnancy only four hours before Leonila was shot. EXHIBIT 28.1, Appendix at 024.

With the passage of time, Bertram had lost sight of the integral role of these lies in negating premeditation. When he was re-interviewed in 2014, Bertram told Agent DiBenedetto that he had used the Remington 870 "quite a bit" because it was his favorite gun. EXHIBIT 29.1, Appendix 044, 045. Bertram also admitted monitoring Leonila's phone records and seeing "suspicious" calls to Meeter's number *before* the shooting. EXHIBIT 29.1, Appendix at 034, 035-041, 047. And Bertram said that he learned of the pregnancy 3-4 days before the hunting trip, which would correlate with Bertram seeing Leonila's texts to Meeter about the pregnancy on her phone *before* the shooting. Exhibit 29.1, Appendix 051-053; TRIAL II at 277/20.

But the fundamental circumstance not explicated by any of Bertram's stories was *why* the gun was pointed at Leonila's heart in the first place. Positioning the shotgun with the barrel on the transmission hump and stock against the front of the seat (EXHIBIT 17, Appendix at 001) did not in any way necessitate pointing the gun at the passenger. TRIAL II at 252/20-253/5. All that was required to effect that positioning was to sweep the gun barrel over the driver's side floorboard muzzle pointed at the floor and onto the transmission hump. TRIAL II at 182/20. Indeed, during his interview with Webster, Bertram said that he usually pointed the barrel at the floor when loading a gun into his truck. EXHIBIT 45; TRIAL VI at 752/22, 755/20. Bertram's children also testified that, when out hunting, Bertram always loaded the gun into the truck by pointing it at the floor.

But when interviewed by Agent DiBenedetto in 2014, Bertram offered strained and contradictory explanations for why the gun was pointed at Leonila instead of at the floor. Bertram now said that he wanted to position the gun barrel on the *passenger* side floorboard because that's where he "always carried the gun" when road hunting. EXHIBIT 29.1, Appendix 033, 051. He now claimed the armrest on the seat was folded *down* which allegedly required him to lift the gun up over the armrest with it pointed at Leonila in order to maneuver it over to the passenger side floorboard. EXHIBIT 29.1, Appendix 033, 044.

None of this made any sense because (1) in his initial interview Bertram had said that he always carried the gun atop the transmission hump (EXHIBIT 17, Appendix 001) and (2) that the armrest was folded *up* and (3) because nothing prevented him from sweeping the gun barrel-down over both the driver's side floorboard and transmission hump onto the passenger side floorboard. EXHIBIT 28.1, Appendix 015; TRIAL II at 139/12, 174/16, 252/5-10, 254/19; TRIAL III at 307/20, 308/7, 308/17. If the gun had "accidentally" discharged while sweeping it barrel-down over the floorboards and transmission hump, Leonila would only have sustained the survivable injury of having her foot blown off. Ultimately, Bertram blamed his failure to point the gun at the floor (per his usual practice) on his lifelong habit of being "careless" in his handling of firearms. TRIAL II at 269/20, 272/12; EXHIBIT 29.1, Appendix 029, 031, 050.

Except that there was no corroboration of Bertram's claim of habitual carelessness. To the contrary, in his first interview Bertram said he understood gun safety rules, which made sense because Bertram was drilled in gun safety throughout his 18-year law enforcement career. EXHIBIT 28.1, Appendix 018; TRIAL II at 157/10, 228/24. He was trained to NEVER point a loaded gun at a person unless he intended to shoot them. TRIAL IV at 394/19, 396/4. He was trained to NEVER put his finger on the trigger of a loaded gun unless he had a target in site and he intended to fire. TRIAL IV at 395/10, 396/4. He was trained to

render a shotgun “inert” or incapable of firing before loading it into a police vehicle by opening the action. TRIAL IV at 397/4, 397/24, 398/2-20. If Bertram had exhibited habitual carelessness about gun safety during annual trainings, he could not have maintained his law enforcement certification for 18 years. TRIAL IV at 392/10-393/8, 396/22, 400/20, 403/9-19, 405/2-16, 416/14; EXHIBIT 30 at 00029, 00042, 00052, 00073.

Law enforcement also learned from Bertram’s ex-wives and children that he religiously adhered to his law enforcement safety training in his civilian life. According to family members, Bertram was “very adamant” about gun safety. TRIAL IV at 422/2-21, 426/17; TRIAL VII at 855/18. Bertram’s sons described how, consistent with his training, he always unloaded his gun, opened the action, and pointed the barrel toward the floorboard when loading a shotgun into a truck. TRIAL IV at 422/20, 423/11-19, 424/10; TRIAL VII at 873/2. Thus, it defied all his training and practice – not to mention all common sense – to load a loaded shotgun into a truck with the barrel pointed at the passenger, finger on the trigger, safety off. TRIAL IV at 395/16.

And within the space of just a few sentences, Bertram contradicted himself on whether he saw Leonila grab the barrel. When Agent DiBenedetto asked if he actually saw her grab it, Bertram said he had. EXHIBIT 29.1, Appendix 032. But when he suddenly remembers that her

fingerprints were not found on the barrel, Bertram said that he had not seen her grab it. EXHIBIT 29.1, Appendix 032; TRIAL II 276/19-25; TRIAL III at 333/5.

Even with Bertram's account of the shooting riddled with inconsistencies, motive was still something of an open question when Sheriff Wolf and Agent DiBenedetto re-interviewed Bertram in 2011. During the 2011 interview, Bertram told them that he planned to provide *all* the insurance money to Leonila's family and to build Leonila's mother a new house. EXHIBIT 28.1, Appendix 022; TRIAL II at 242/15. Doing so certainly would vitiate money as a motive; but since the policies were not paid out until July of 2012, there was no way of knowing in 2011 if Bertram was telling the truth. TRIAL II at 167/22, 242/8, 260/1.

Suspicious of Bertram's story but without conclusive evidence of motive, Sheriff Wolf and Agent DiBenedetto bided their time. Sheriff Wolf was waiting for Bertram to make a mistake, to say or do something that would shed light on what had happened or what Bertram was thinking. TRIAL V at 598/16.

Once the insurers paid the claims, Agent DiBenedetto started to trace the disposition of the money. The trail led to interesting and revealing places.

At first, Bertram tried to keep the insurance a secret from Stickney's attorney. TRIAL VI at 662/16, 663/9-18, 664/10-23. Stickney eventually learned about the insurance when the companies

contacted him directly questioning why Bertram, not he, was the listed beneficiary on the policies. TRIAL VI at 666/6, 667/25, 669/6.

On November 4, 2010, Stickney's attorney, Doug Dailey, called Bertram's civil attorney, Clint Sargent, and demanded that Bertram pay the proceeds to Leonila's estate. TRIAL VI at 670/11. Sargent responded "No way." TRIAL VI at 671/2; EXHIBIT 58.2, Appendix 088.

Meanwhile, Bertram was ghost writing letters for Leonila's family in the Philippines to send to Sargent asking him to help them secure the money that Leonila (according to Bertram) had intended them to receive. TRIAL IV at 480/12-483/10; TRIAL V at 525/9-526/11, 531/3-533/1; EXHIBITS 54.1/54.2, Appendix 070, 072; EXHIBITS 151, 208, 209, 210, 211. Bertram needed the letters from the family to maintain the pretense that the insurance would go to them and not to him so that the insurance companies would pay the benefits. TRIAL IV at 480/12-483/10.

Despite letters entreating his help, Sargent never informed Leonila's family that he was not working on their behalf. Indeed, during settlement negotiations, Sargent induced Stickney and the insurance companies to settle by representing that the insurance proceeds from the larger policy "would not go to Russ, personally, but will go directly into a trust with Leonila's family as the beneficiaries. I want it to be clear and binding that Russ will not receive any benefit from these proceeds."

TRIAL VI at 679/19; EXHIBIT 58.1, Appendix 087. Sargent affirmatively

represented that Stickney would not “have to worry about [Bertram] keeping the money and not giving it to her family.” TRIAL VI at 679/25; EXHIBIT 58.1, Appendix 061.

The parties eventually settled by agreeing that \$600,000 of the \$920,000 would be paid to Leonila’s estate² and the balance of \$320,000 plus approximately \$82,000 in interest would be paid to Bertram. After attorney fees, Bertram netted approximately \$321,000. The ultimate settlement agreement provided that the proceeds from the larger policy were “for the benefit of Leonila D. Stickney’s family in the Philippines.” TRIAL VI at 684/11; EXHIBIT 40.1, Appendix 064.

Despite this explicit provision allocating the proceeds of the larger policy to Leonila’s family, despite the fact that the smaller, mail-order policy (according to Bertram’s own story) had also been taken out for the benefit of Leonila’s family, and despite knowing that Leonila’s family was counting on him to secure the money that was rightfully theirs, Sargent wrote a check from his trust account for the full net proceeds directly to Bertram! EXHIBIT 28.1, Appendix 021; TRIAL VI at 685/14; EXHIBITS 23/24, Appendix 062, 063; EXHIBIT 40.1, Appendix 064; EXHIBITS 54.1/54.2, Appendix 070, 072. Not into a trust set up for the benefit of

² Stickney netted approximately \$400,000 after attorney fees. He deposited half into a trust account for his son’s benefit and has used the other half to buy a home for him and his son – ownership of which is held as joint tenants by Stickney and his son – and to allow his son to travel to foreign countries.

Leonila's family. Not even into the court so that a judge could determine the amounts due to Leonila's family and (if any) to Bertram.

In the wake of the shooting, Bertram had contacted Leonila's sister, Melissa Del Valle, in the Phillipines to break the news about Leonila's death. He told Melissa a different version of the hunting "accident" than what he had told Sheriff Wolf. Bertram told Melissa that Leonila had been handling the gun and that Leonila had accidentally pulled the trigger and shot herself. TRIAL IV at 472/10. Bertram whitewashed the shooting because he needed Leonila's family's help to convince the insurance companies to pay the benefits. TRIAL V at 530/13-20. He started sending them small amounts of money each month to buy their trust. EXHIBIT 112.

He also had designs on Melissa. Bertram told Melissa that Leonila had told him that he should marry Melissa "should something tragic happen to her." TRIAL IV at 473/17. Yet another of Leonila's strangely prescient preparations for her own death. Melissa married Bertram in July 2013 so she could "help [her] family . . . from being poor." TRIAL IV at 474/4, 475/8, 485/14.

When she arrived in America as Bertram's bride, Melissa asked him to take her to Leonila's grave. Bertram drove to the cemetery but Melissa did not get to visit her sister's grave because Bertram did not know where it was. TRIAL IV at 476/16. Bertram falsely told Melissa

that he did not collect any insurance money. TRIAL IV at 484/16-485/7; TRIAL V at 530/5. He told her that all of the money went to David Stickney and Leonila's son.

In truth, what money Bertram had not used to recruit the family to send his ghost-written letters to Sargent and lure Melissa to the United States, he spent on a brand new Chevrolet Silverado pickup truck, a double-wide trailer in a better class of trailer park, an RV, a brand new Kia SUV, a snowmobile, a 1967 Pontiac LeMans convertible project car, guns, electronics, travel and other amenities beyond his means without Leonila's money. EXHIBIT 26; TRIAL II at 264/23; TRIAL III at 305/11.

Between 2010 and 2012, Bertram made three trips to the Philippines to "court" Melissa. TRIAL V at 526/22-529/5; EXHIBIT 113. Though he was in the Philippines for 2, 5½ and 3½ weeks respectively on these three trips, he spent only one week visiting Melissa and her family each time. He told them he could not visit them longer because he could not bear the Philippine heat. TRIAL V at 527/24. And though he took tens of thousands of dollars to the Philippines with him on his trips, he spent little of it on Melissa and her family while there, and gave them only a few hundred dollars when he left. TRIAL III at 342-345; TRIAL IV at 478/4.

Melissa did not know that Bertram had stayed in the Philippines longer than his one week visits with her. TRIAL V at 528/5, 529/2. Armed with thousands of dollars of Leonila's money, Bertram just

disappeared for weeks in the Philippines – likely to spend the money on other young Filipina women with whom he was in contact via Facebook. TRIAL V at 529/4; TRIAL VI at 784/9; TRIAL VII at 784/9.

By the time of his arrest in 2015, Bertram had depleted all but \$21,300 of the \$321,000. Bertram had trickled a small fraction of the money to Leonila's family, but only under circumstances that bought Bertram something in return – ghost-written correspondence from the family to Sargent to pressure the insurers to pay him the benefits, a young replacement Filipina wife, tourism to a foreign country where money buys love, and a motive alibi should law enforcement question him about whether the family received the money. TRIAL II at 269/2; TRIAL III at 359/16; EXHIBIT 27; EXHIBIT 151.

Between Bertram's bitterness with Leonila's pregnancy and taking and using all of the insurance proceeds for himself, the motive picture was sufficiently complete to arrest and charge Bertram with Leonila's murder.

ARGUMENT

Bertram raises two issues challenging his conviction: that the trial court erred in (1) excluding evidence that he had allegedly passed a polygraph test and (2) admitting evidence of sexual liaisons between Bertram and three different women in the weeks and days prior to Leonila's murder. Neither of Bertram's claims warrant relief.

A. Polygraph Evidence Was Properly Excluded

The wild card in Bertram's plan to kill Leonila and collect \$920,000 was the pregnancy. But for the pregnancy, Bertram could have waited until after her divorce to kill Leonila, cutting her husband out of any claim to the insurance proceeds. The pregnancy accelerated Bertram's plan because he was justifiably concerned she would "run off" with the younger and much more gentlemanly Nathan Meeter. EXHIBIT 28.1, Appendix 012. If that happened, he could not be certain she would renew the policies in January of 2010 or, if she did, that he would remain the beneficiary. Moreover, once Leonila "ran off" – which was probably only a matter of days away – Bertram would not be in a position to stage her "accidental" death. Once he learned of the pregnancy – whether three days before the shooting or the day of – Bertram had to quickly stage the "accident" while Leonila would still go somewhere in a car with him.

But killing Leonila while she was still married left her estate in the hands of her husband, David Stickney. The settlement agreement with the estate – written by Bertram's civil lawyer, Clint Sargent – characterized the shooting as an "accident" because no insurer pays a claim for an intentional act. Sargent's other stratagem for convincing the estate and insurers that the shooting was not intentional was to hire a polygrapher to administer a "unilateral" polygraph to Bertram at his office. Bertram supposedly "passed" this friendly polygraph "test."

The state moved for exclusion of the polygraph evidence. The trial court heard argument on the motion at the January 28, 2016, pretrial conference. Agent DiBenedetto testified that DCI had reviewed the charts of Sargent's test and deemed it invalid. HEARING 28JAN16 133/20, Appendix 076. Indeed, the United States Court of Appeals for the 8th Circuit regards "unilateral" polygraph tests commissioned by a criminal defendant's attorney as inherently invalid because they are not administered under adversarial conditions. *United States v. Montgomery*, 635 F.3d 1074, 1093-94 (8th Cir. 2011).

Also, Agent DiBenedetto testified that he asked Bertram if he would take a DCI-administered test. Bertram refused. HEARING 28JAN16 134/17, Appendix 076. Finally, Agent DiBenedetto testified that Sargent had hired another polygrapher to administer a second (presumably more rigorous) test in January of 2016. The results of the second test were never shared with DCI – strongly suggesting that Bertram had flunked. Thus, the notion that Bertram had "passed" a polygraph was dubious at best. HEARING 28JAN16 135/1, Appendix 077. The court excluded all polygraph evidence.

At trial, Stickney's lawyer, Doug Dailey, testified that Stickney agreed to settle the insurance dispute because the process had "drug out long enough that [his] client wanted to get the matter over with," so he could "move forward" and "move out of South Dakota" or out of the country. TRIAL VI at 681/23, 688/21, Appendix 081, 083. Knowing

that “litigation could be drawn out and take a significant amount of time,” Stickney just wanted “to get the matter resolved and move on.” TRIAL VI at 688/21, Appendix 083.

Based on this testimony, Bertram’s counsel moved for leave to admit evidence of the polygraph test. Defense counsel argued that he believed the real reason Stickney settled was because Bertram had “passed” the polygraph and that, therefore, the polygraph evidence was necessary to impeach Dailey’s testimony that Stickney had settled simply out of a desire to get it “over with” and “move on.” Specifically, defense counsel sought to impeach Dailey with a letter dated July 28, 2011, in which Sargent wrote “I wanted to let you [Dailey] know that Mr. Bertram did submit to a polygraph examination with Loren Pankratz, and Mr. Pankratz has opined that Mr. Bertram is telling the truth regarding this being an accidental shooting.” EXHIBIT 212, Appendix 090.

The trial court took testimony from Dailey outside of the presence of the jury in order to examine the impact of the polygraph (if any) on Stickney’s decision to settle the dispute. Dailey testified that the polygraph was no factor in his decision to advise Stickney to settle the case because he does not believe polygraphs are reliable. TRIAL VI at 705/25, 706/12, Appendix 085, 086. As proof of the polygraph’s irrelevance, Dailey pointed out that the parties were already on the verge of settling before Sargent informed him of the polygraph test. TRIAL VI at 706/1, Appendix 086; see also EXHIBIT 58, Appendix 089. Indeed,

Dailey observed that Bertram's willingness to "pay the bulk of [the insurance money] to the estate" showed Bertram's own lack of confidence in the validity of the polygraph test. TRIAL VI at 707/14, Appendix 087. The court denied the motion to impeach Dailey with the polygraph.

It is well-settled "[i]n South Dakota criminal cases [that] polygraph results are not admissible evidence." *Sabag v. Continental South Dakota*, 374 N.W.2d 349 (S.D. 1985); *State v. Muetze*, 368 N.W.2d 575, 588 (S.D. 1985). As observed in *Sabag*:

The rationale advanced for admitting evidence of polygraph results, in civil or criminal cases, is that such evidence is irrelevant because of dubious scientific value; it has no "general scientific acceptance as a reliable and accurate means of ascertaining truth or deception;" it is not reliable; it has no probative value; and it is likely to be given significant, if not conclusive weight by the jury, so that "the jurors' traditional responsibility to collectively ascertain the facts and adjudge the guilt or innocence is [thereby] preempted."

Sabag, 374 N.W.2d at 353 (citations omitted).

The court's ruling precluding impeachment of Dailey with the polygraph was proper because: (1) Bertram's proffered evidence was not impeachment; (2) the state did not "open the door" to the "impeachment" as the defense claims; (3) impeachment is not permitted on a collateral matter; (4) exclusion of the polygraph for "impeachment" purposes did not violate Bertram's right to confront Dailey; and (5) the polygraph testing was not competent evidence under SDCL 19-19-403.

1. Bertram's Proffered Evidence Was Not Impeachment

Per SDCL 19-19-613 impeachment is accomplished by confronting a witness with a prior statement *of the witness* that is inconsistent with

the witness' trial testimony. Thus, in order to impeach Dailey's testimony that the polygraph did not induce settlement, SDCL 19-19-613 required Bertram to produce some prior statement from *Dailey* acknowledging that it did. Bertram did not produce any such statement.

All that Bertram produced was Sargent's letter to Dailey suggesting that Stickney should settle because Bertram had "passed" a polygraph. For Sargent to confront Dailey with his own letter and demand that Dailey admit that Stickney settled for Sargent's reasons and not his own is simply argumentative, not impeaching.

As in *Muetze*, the "impeachment" sought here was simply a pretext to introduce, via Sargent's letter, the hearsay opinion of Bertram's polygraph examiner that Bertram had "passed" the test. *State v. Gage*, 302 N.W.2d 793, 798 (S.D. 1981)(error to admit hearsay on "pretext of impeaching" witness). "The trial court was correct in not allowing the rule against introduction of polygraph results to be circumvented in this way." *Muetze*, 368 N.W.2d at 588.

2. The State Did Not Open The Door

Bertram argues that the state "opened the door" to the polygraph by questioning Dailey about a conversation he had with Sargent on November 4, 2010, and because Dailey testified that Stickney settled because he wanted the civil dispute "over with" so he could "move on." The transcript does not support Bertram's argument that these matters "opened the door."

During the November 4, 2010, conversation, Sargent told Dailey there was “no way” Bertram would pay the insurance money to the estate. EXHIBIT 58.2, Appendix 088. Dailey’s contemporaneous note of the telephone conversation does not reflect that Sargent informed him of Bertram’s polygraph and there is no evidence that Bertram had taken the polygraph before November 4, 2010. EXHIBIT 58.2, Appendix 088. Indeed, the fact that Sargent prefaced his comments about the polygraph with “I wanted to let you know” reflects that he was informing Dailey about the polygraph for the first time in his July 28, 2011 letter. Thus, there is *zero* evidence of (and no record citations supporting) the assertions in Bertram’s brief that “Sargent’s ‘no way’ statement resulted from Bertram passing a polygraph,” that the polygraph was a “fact shared with Dailey during the November 4, 2010, phone call,” or that “Dailey omitted . . . Sargent’s mention of Bertram’s polygraph in his November 15, 2010, e-mail to the Attorney General’s Office.” APPELLANT’S BRIEF at 22, 23.

So, even if the state’s questioning of Dailey about his November 4, 2010, conversation with Sargent “open[ed] the door to everything that [Dailey and Sargent] talked about in *that* conversation,” there is no evidence that Sargent talked to Dailey about the polygraph in *that* conversation. TRIAL VI at 671/12, Appendix ; EXHIBIT 58.2, Appendix 088. Consequently, questioning Dailey about his November 4, 2010,

conversation with Sargent did not “open the door” to the polygraph evidence.

Nor did any of the state’s subsequent questions. While Dailey did give testimony regarding the reasons for settlement, the argument that this “opened the door” rests on the erroneous premise that the state had “questioned the reasons why David Stickney entered into the settlement agreement.” TRIAL VI at 709/14, Appendix 085. With the benefit of a transcript, hindsight reveals that the state did not question Dailey about Stickney’s reasons for settling.

Rather, the state questioned Dailey about why the settlement agreement allocated all of the money from the smaller, mail-order policy to Bertram when Bertram had told Sheriff Wolf and Agent DiBenedetto that the smaller policy had also been purchased for Leonila’s family. EXHIBIT 28.1, Appendix 021; TRIAL VI at 681/14, Appendix 081. The first part of Dailey’s answer is responsive to the question. He said they allocated the smaller policy to Bertram because there was still some question at that time as to whether the insurer would even pay. TRIAL VI at 681/16, Appendix 081. The larger policy was a surer payout so the settlement agreement allocated the risk of non-payment on the smaller policy to Bertram – hardly the actions of a man confident in the validity of his polygraph results.

The second part of Dailey’s testimony – in which he describes the reasons for settling and which supposedly opened the door for the

polygraph impeachment – was not responsive to or elicited by the state’s question. Indeed, the transcript reflects that there was not even a question pending when Dailey offered up the reasons for the settlement. Satisfied with Dailey’s explanation of why the smaller policy was allocated to Bertram, the state prepared to transition to the next question with an “Okay.” TRIAL VI at 681/21, Appendix 081. Dailey then just kept talking and that is when he unilaterally described the reasons for settling. TRIAL VI at 681/22, Appendix 081. The defense did not object to Dailey testifying to this un-elicited information. The defense did not move to strike this un-elicited information. The defense did not move to instruct the jury to disregard the un-elicited portions of Dailey’s testimony. The complained-of testimony regarding the reasons for settling came into evidence un-elicited by the state and without objection or motion to strike or for a curative instruction from the defense.

The same scenario played out again in regard to the other question by which the state supposedly opened the door. The subject question asked whether any witness ever testified in any proceeding related to the civil case about whether the shooting was an accident or not. TRIAL VI at 688/13, Appendix 083. Again, the first part of Dailey’s answer is responsive, again the state said “Okay” after Dailey responded, and again Dailey veered off into un-elicited testimony about the reasons for the settlement. And again, there was no objection or motions to strike and for a curative instruction from the defense.

With the benefit of a transcript, it is now clear that Dailey's Dailey's forays into Stickney's reasons for settling entered the record as un-elicited afterthoughts that were not responsive to any question from the state exploring the reasons for settlement. If the state did not actually open the door to the polygraph evidence, the trial court certainly did not err in excluding it.

3. Impeachment Is Not Permitted On Collateral Matters

It is well established that a witness may not be impeached on a collateral matter. *State v. Luna*, 264 N.W.2d 485 (S.D. 1978) (impeachment "cannot be of a collateral nature and not deal with irrelevant matters"). Stickney's reasons for settling the civil dispute were collateral because they had no bearing on Bertram's guilt or innocence. As observed in *United States v. Scheffer*, 523 U.S. 303, 314 (U.S. 1998), exclusion of polygraph evidence serves the legitimate interest of the criminal justice system in avoiding litigation of matters other than the guilt or innocence of the accused. The trial court accordingly did not abuse its discretion in excluding polygraph evidence to "impeach" Dailey on the collateral matter of Stickney's reasons for settling the civil dispute. *Luna*, 264 N.W.2d at 489.

4. Precluding Use Of Polygraph Testing For Impeachment Purposes Does Not Offend The Confrontation Clause

Obviously, if Bertram's proffered evidence was not really impeaching, there is no basis for his confrontation claim. But even assuming Sargent's letter was genuinely impeaching, it is black letter law

that the confrontation clause does not compel introduction of polygraph evidence for impeachment purposes.

The confrontation clause “does not guarantee that the defense may cross-examine a witness ‘in whatever way, and to whatever extent, the defense might wish.’” *Delaware v. Fensterer*, 474 U.S. 15, 20 (US. 1985). Confrontation rights are subject to other legitimate interests of the criminal justice system, such as the exclusion of unreliable evidence, preserving the jury’s function of making credibility determinations at trial, and avoiding litigation of collateral issues. *Sheffer*, 523 U.S. at 309.

As observed in *Scheffer*, “most states maintain *per se* rules excluding polygraph evidence” for any purpose, including impeachment. *Sheffer*, 523 U.S. at 314-15. Given that “scientific field studies suggest [that] the accuracy of the ‘control question technique’ polygraph is ‘little better than could be obtained by the toss of a coin,’” the *Sheffer* court found that a *per se* rule excluding polygraph evidence for any purpose, including impeachment, “does not implicate a sufficiently weighty interest of the defendant to raise a constitutional concern.” *Sheffer*, 523 U.S. at 309, 310.

The *Sabag* and *Muetze* decisions appear to align South Dakota with the *per se* exclusionary rule prevailing in the majority of states. *Muetze*, 368 N.W.2d at 588 (rejecting authority from state that allows

introduction of polygraph evidence as “inapposite” in South Dakota); *Sabag*, 374 N.W.2d at 352 (citing the “clear majority” rule excluding polygraph evidence in criminal cases). Indeed, *Muetze* specifically rejected Bertram’s contention that the rule excluding polygraph evidence can be “circumvented” by offering the evidence as “impeachment” rather than as direct evidence. *Muetze*, 368 N.W.2d at 588.

It would certainly be “anomalous to conclude that the admission of [polygraph] evidence for impeachment purposes is required by the confrontation clause” when the United States Supreme Court has affirmed a *per se* rule banning any admission of such evidence for any reason. *State v. Ellison*, 676 P.2d 531, 535 (Wash.App. 1984).

As in *Muetze*, where the defendant relied on New York case authority for his argument that polygraph evidence was admissible impeachment, Bertram’s reliance on *United States v. Tenorio*, 809 F.3d 1126 (10th Cir. 2015), is likewise “inapposite” because New Mexico, unlike South Dakota, does not adhere to a *per se* rule excluding polygraph evidence. *Muetze*, 368 N.W.2d at 588. The *Tenorio* decision was strictly evidentiary pursuant to New Mexico rules of evidence that permit admission of polygraph evidence under certain circumstances. True to *Sheffer*, the *Tenorio* court did not opine that admission of the polygraph evidence was compelled on any constitutional grounds.

5. The Polygraph Testing Was Not Competent Evidence Under SDCL 19-19-403

Recently, in *People v. McKinnon*, 259 P.3d 1186 (Cal. 2011), the California Supreme Court affirmed that the state's "statutory ban against admission of polygraph evidence 'is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence.'"

Exclusion of Bertram's proffered polygraph "impeachment" was appropriate here because there was no evidence that the subject test was valid. To the contrary, every indication was that it was not valid.

HEARING 28JAN16 134-35/1, Appendix 076, 077.

Even in courts that do not adhere to *per se* exclusion of polygraph evidence, a "unilateral" polygraph – *i.e.* one administered by a polygrapher hired by a defendant's own lawyer – is inherently invalid. *Montgomery*, 635 F.3d at 1093-94. Such tests are of "extremely dubious probative value" because they are administered "without the possibility that [a defendant] might suffer negative consequences from a failed examination." *Montgomery*, 635 F.3d at 1094. Additionally, the facts that Bertram refused to submit to another polygraph test administered by a certified law enforcement polygrapher and had failed to disclose the results of a second unilateral polygraph test administered January 2016 call the validity of the proffered polygraph into evidence into question.

HEARING 28JAN16 134-35/1, Appendix 076, 077.

South Dakota's *per se* exclusion of polygraph evidence is meant to shut the door not only on the evidence itself, but the collateral litigation that flows from admitting it. *State v. Dornbusch*, 384 N.W.2d 682, 687 (S.D. 1986)(introduction of polygraph evidence by the defense opens door to collateral litigation). At best, "admission of the polygraph evidence would have necessitated collateral proceedings regarding the validity of a unilateral polygraph examination." *Montgomery*, 635 F.3d at 1094. At worst, admission of the polygraph evidence could have precipitated a mistrial or future *habeas corpus* claim of ineffective assistance of counsel. *Dornbusch*, 384 N.W.2d at 687.

Stickney's reasons for settling the civil dispute over the insurance proceeds were not in the least bit probative of Bertram's guilt or innocence. *Sheffer*, 523 U.S. at 314. Defense counsel was allowed to cross-examine Dailey under oath about the effect, if any, of his letter on Stickney's decision to settle. Dailey denied that Sargent's letter had any effect, explaining that (like the *Sheffer* court) he does not regard polygraphs as reliable and the parties were already in a settlement posture when he received Sargent's letter. TRIAL VI at 706/1, Appendix 086; EXHIBIT 58, Appendix 089 (describing parties as "close" to settlement"). Any "impeachment" in the form of Sargent demanding that Dailey admit that Stickney settled for the reasons in Sargent's letter would have just been argumentative.

Where, as here, the impeachment value was so minimal, courts must be wary of proffers of bogus polygraph testing as “mere pretext” to circumvent the rule against “admit[ting] polygraph evidence as an indicator of honesty.” *Muetze*, 368 N.W.2d at 588; *Tenorio*, 809 F.3d at 1131. Accordingly, the trial court did not abuse its discretion in excluding the proffered polygraph evidence.

B. Sexual Liaison Evidence Was Properly Admitted

The cases of cheating husbands or wives killing their spouses for insurance money are legion; consequently, so are rulings admitting evidence of infidelity for proof of motive in murder cases. Indeed, “[n]o rule is more firmly established than that, upon the trial for murder of a husband or wife, evidence tending to show illicit relations of the accused is admissible to show lack of love and affection for the defendant’s lawful spouse.” *People v. Smith*, 203 P. 816, 821 (Cal.Ct.App.2nd 1921).

In *People v. Miller*, 53 Cal.Rptr. 720 (Cal.App.2nd 1966), a woman killed her husband by doping him into unconsciousness on a barbiturate and staging a “car accident” in which he burned to death. The court admitted evidence of the wife’s torrid affair with another man as evidence that she killed her husband in order to collect on a \$100,000 policy on his life (\$750,000 in 2017 dollars)³ and to be with her paramour.

³ www.saving.org/inflation/inflation.php?amount=1.00&year=1966

In *People v. Franklin*, 2003 WL 21518916 (Ct.App.Cal.3rd), a husband killed his wife by staging a snowmobile “accident.” The court admitted evidence of the husband’s many extramarital affairs as proof of motive to kill his wife to collect \$1.87 million in insurance on her life and to rebut the husband’s claims that he “loved [his] wife,” that his wife was his “best friend,” and that their relationship was “special.” The affairs tended to prove that the husband “wished to obtain the funds to insure his continued opportunity, through virtually unlimited time and money resulting from his wife’s murder, to carry on multiple affairs.” *Franklin*, 2003 WL 21518916 at *25.

In *State v DiBartolo*, 101 Wash.App. 1039, *1 (Wash.Ct.App.3rd 2000), a deputy sheriff shot and killed his wife (and himself in the abdomen for effect) in a staged “robbery” by “three black males.” The court admitted evidence of the husband’s simultaneous affairs with three different women – including a tryst with a paramour the afternoon of the murder – as proof that the husband “wanted [his wife] dead so he could continue having affairs (while \$100,000 richer from insurance money).” *DiBartolo*, 101 Wash.App. 1039 at *7, *10. This evidence was “highly probative” rebuttal of the husband’s assertions that his sex life with his wife was “very good,” that the evening his wife was killed had been “romantic like a first date,” and that they had told each other “I love you” as they walked arms around each other toward the shooting site. *DiBartolo*, 101 Wash.App. 1039 at *6, *7, *11.

Likewise, in *People v. Houston*, 29 Cal.Rptr.3d 818 (Cal.Ct.App.1st 2005), where a husband shot his wife while they were in the midst of a divorce, the court admitted evidence of his affairs with two women to rebut the husband's claim that he loved his wife and that their relationship was good in spite of the divorce. See also *State v. Connor*, 7 F.2d 313, 314 (9th Cir. 1925)(evidence of husband's affair admitted to rebut assertion that "he and his wife had had a reconciliation about ten days before she disappeared").

In *State v. Rhodes*, 627 N.W.2d 74 (Minn. 2001), a husband killed his wife, who could not swim, by pushing her overboard in a remote part of a lake during a nighttime boating excursion. The court admitted evidence of the husband's affair with another woman approximately one year prior to the murder to rebut the husband's claim that he and his wife had been "watching the stars and 'necking'" just prior to when she "fell overboard" and as proof of motive to collect \$233,000 in life insurance on a policy taken out four months prior to his wife's death. *Rhodes*, 627 N.W.2d at 78, 81.

In *Andrew v. State*, 164 P.3d 176 (Ct.App.Ok. 2007), a wife shot and killed her estranged husband (and herself in the arm for effect) in a staged "home invasion" in the garage of the marital residence. The court admitted evidence of the wife's two affairs – including one with *the agent* who had sold her an \$800,000 policy on her husband's life – as proof of

motive to collect the insurance in order to travel the world with her paramour. See CAIN, JAMES M., *Double Indemnity* (1936).

South Dakota likewise attaches high probative value to evidence of infidelity when one spouse is “accidentally” killed by the other. In *State v. Huber*, 2010 SD 63, 789 N.W.2d 283, a former police chief “accidentally” shot his wife in the head while cleaning his gun. Expressly rejecting the proposition that a defendant is “entitled to have a jury decide his case on a pretense that his behavior and feelings toward [the victim were] nothing but routinely warm and affectionate,” the *Huber* court affirmed admission of evidence of the husband’s extramarital affairs as “relevant to establishing . . . motive and intent, and specifically whether the shooting in question was accidental or intentional.” *Huber*, 2010 SD 63 at ¶¶ 57, 58, 789 N.W.2d at 301.

The probative value of evidence of bad acts to establish intent and an absence of mistake or accident is “well established.” *State v. Wright*, 1999 SD 50, ¶ 14, 593 N.W.2d 792, 798. Though prior bad acts may impugn a defendant’s character, they may yet be admitted if “offered for a logically relevant purpose other than character.” If so, “the balance tips emphatically in favor of admission” unless the prejudicial effect of the prior bad acts evidence “substantially” outweighs its probative value. *Wright*, 1999 SD 50 at ¶ 23, 593 N.W.2d at 803.

As in other “accident” cases, Bertram’s sexual liaisons were highly probative of his state of mind when he shot Leonila – “did he intend to

harm [Leonila] with the shotgun or was it an accident?” *State v Boe*, 2014 SD 29, ¶ 24, 847 N.W.2d 315, 322.

- As in *Miller, Franklin, DiBartolo, Rhodes* and *Andrew*, Bertram stood to collect hundreds of thousands of dollars in insurance money from Leonila’s death.
- As in *Franklin, Rhodes* and *Andrew*, the insurance was taken out only months before Leonila’s death.
- As in *Huber, Miller, Franklin* and *Rhodes*, the evidence rebutted Bertram’s claim that the shooting was an “accident.”
- As in *Franklin, DiBartolo* and *Rhodes*, Bertram was engaged in a sexually promiscuous lifestyle that he hoped to facilitate with insurance money.
- As in *DiBartolo* and *Andrew*, Bertram’s sexual liaisons with other women occurred in close temporal proximity to the shooting.
- As in *Franklin, DiBartolo, Houston, Connor* and *Rhodes*, the evidence rebutted Bertram’s claims of affection for his victim, *i.e.* that his relationship with Leonila was the “best” he ever had, that he was not in the relationship for the money, that he was “in love” with her and that he “cared a lot about her.” EXHIBIT 28.1, Appendix 006, 010, 018; TRIAL II at 169/24, 170/7, 201/25, 265/11.
- Bertram’s sexual liaisons were one example among many of conduct demonstrating that Bertram never loved Leonila, such as

the facts that he (1) did not know the location of her grave, (2) was supposedly weeks away from marrying her but had not told her about his vasectomy even though Leonila wanted more children, (3) had failed to keep his promise to provide for her family in the event of her death, (4) could not remember her last words, (5) was trolling other Filipina women on his Facebook page, (6) wanted the gun that had killed Leonila returned to him, (7) left the hospital while Leonila was dying, (8) was relaxed and unemotional while at the hospital and, (9) upon learning of Leonila's death, was most immediately concerned with having someone clean her blood and tissue from his car seat so he could go home. Compare EXHIBIT 28.1, Appendix 013, 027 with EXHIBIT 29.1, Appendix 046, 050; EXHIBIT 12, Appendix 055; EXHIBIT 28.1, Appendix 018; TRIAL VI at 777/2, 784/9.

As in the cases above, Bertram's serial infidelity during his brief "engagement" to Leonila was not offered solely to portray him as a "bad" person. *Wright*, 1999 SD 50 at ¶ 17, 593 N.W.2d at 800. Evidence that Bertram wanted Leonila out of the picture so he could indulge a lifestyle of casual sexual liaisons (funded with proceeds from her life insurance) was highly "relevant in that it [did] make . . . the charge of murder, more . . . likely" – and the defense of accident less likely. *Huber*, 2010 SD 63 at ¶ 57, 789 N.W.2d at 301.

Bertram cannot escape the “highly probative” nature of the infidelity evidence by complaining that the inference that his liaisons were paid encounters with prostitutes was unduly prejudicial. Though the fact of payment was excluded, it would not have been error to admit it.

For example, in *Commonwealth v. Mendes*, 806 N.E.2d 393 (Mass. 2004), the court found that defendant’s “lifestyle” of drug use and patronizing prostitutes, paid for by money his wife inherited from her family, “was relevant to the motive to kill” his wife. *Mendes*, 806 N.E.2d at 400-01. “The only way the defendant, who was frequently unemployed, could sustain his lifestyle was to gain unfettered access to his wife’s inheritance.” *Mendes*, 806 N.E.2d at 400-01. His wife’s stated intention of leaving him would have “effectively cut off the supply of money he had relied on to support his cocaine habit and his pursuit of prostitutes.” *Mendes*, 806 N.E.2d at 401.

Again, in *Commonwealth v. Greineder*, 936 N.E.2d 372 (Mass. 2010), the defendant met charges of murdering his wife by claiming that an unknown assailant had killed her. The prosecution admitted evidence that “[d]uring the week before the murder the defendant feverishly sought a wide range of sexual relations and activity.” *Greineder*, 936 N.E.2d at 397. One week prior to the murder, the defendant arranged a tryst with a prostitute in a New Jersey hotel. The

defendant had patronized another prostitute several months prior to the murder, and was reestablishing contact with her the days before and after the murder. *Greineder*, 936 N.E.2d at 397. *Greineder* believed this timing suggested that his wife's "presence had become an inconvenience" to him. *Greineder*, 936 N.E.2d at 397. The *Greineder* court found that the probative value of defendant's prostitution habit was "very high" in that it "provided a reasonable basis to infer a motive to kill, and it was connected in time and place with the facts of th[e] case." *Greineder*, 936 N.E.2d at 398.

Here, there is a similar pattern of patronizing prostitutes as in *Mendes* and *Greineder*. In the weeks before Leonila's death, Bertram had several paid sexual encounters with a dancer named Katrina. TRIAL VI at 761/23. Just five days before Leonila's death, one of Bertram's friends arranged for two young addicts, Elizabeth and "Heaven," to come to Bertram's trailer and perform sex acts in exchange for drug money. TRIAL VI at 767/149. The next day "Heaven" returned to Bertram's trailer and again performed sex for money. TRIAL VI at 767/21.

Bertram's motive to acquire money to fund sexual encounters was further corroborated by the large sums of money he had in his possession when he disappeared for weeks in the Philippines. If, as in *Mendes* and *Greineder*, direct evidence that Bertram had paid for his

encounters with Katrina, Elizabeth and “Heaven,” there certainly was no error in allowing an inference of prostitution to stand unspoken.

Where Bertram’s defense portrayed Leonila as an object of genuine affection, and denied any designs on collecting any part of the \$920,000 insurance on her life, the probative value of Bertram’s sexual liaisons was “very high” because they evidenced lifestyle aspirations incompatible with his penury and the sincere relationship he claimed to be forming with Leonila. *Greineder*, 936 N.E.2d at 398. Thus, the court did not abuse its discretion in admitting testimony regarding Bertram’s sexual liaisons as evidence of motive and absence of accident.

CONCLUSION

Since blanket exclusion of polygraph evidence from criminal trials for any and all purposes “offends no constitutional principle,” the trial court did not err in excluding Bertram’s bogus polygraph test for purposes of “impeaching” of Doug Dailey on a wholly collateral issue. *Sheffer*, 523 U.S. at 314; *Muetze*, 368 N.W.2d at 588.

Likewise, the rule that infidelity is admissible to rebut assertions of love and affection for a murdered spouse or significant other, and as proof of motive and absence of accident, is just as “firmly established.” *Smith*, 203 P. at 821; *Huber*, 2010 SD 63 at ¶ 58, 789 N.W.2d at 301.

Accordingly, this court may comfortably affirm Russell Ray Bertram's conviction for the murder of Leonila Stickney.

Dated this 25th day of July 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 9,980 words.

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

Paul S. Swedlund
Assistant Attorney General

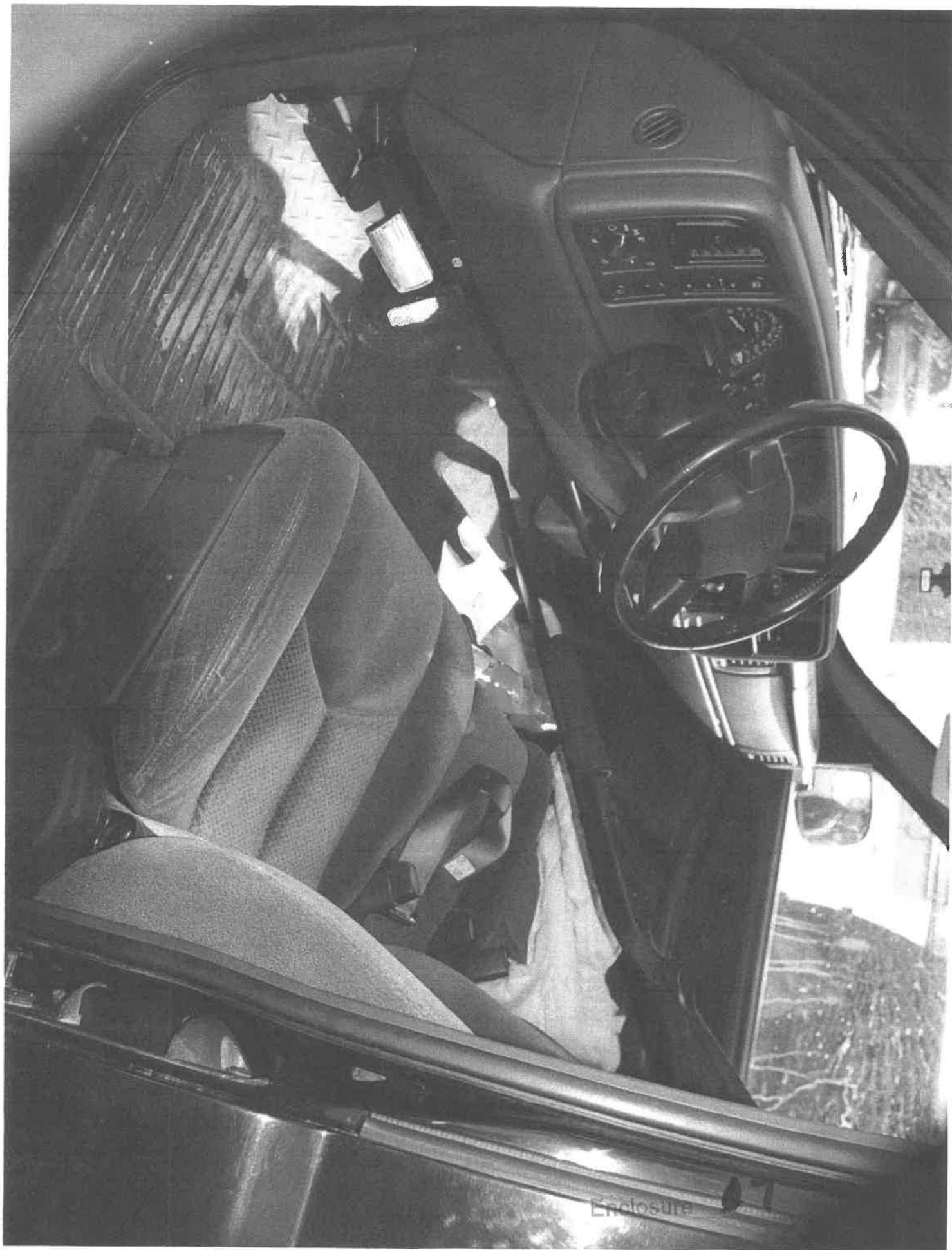
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of July 2017 a true and correct copy of the foregoing brief was served on via e-mail on Michael J. Butler at mike.butler@midconetwork.com and Clint Sargent at clint@meierhenrylaw.com.

Paul S. Swedlund
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APPENDIX

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Interview Russell Bertram

Case 1104375

Date: January 21, 2011

GD: SA Guy DiBenedetto – DCI
CS: Attorney Clint Sargent
RB: Russell Bertram
CW: Charlie Wolf, Gregory County Sheriff

CS: Hi. Clint Sargent, yeah.

GD: Guy DiBenedetto

CS: Yeah, good to see you again.

VS



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APPENDIX 002

CW: Yeah.

RB: I mean, 'cause her brother works uh for the government and makes \$5 a day.

CW: Um hum.

RB: Or what would be five American dollars. And I've learned that. And her one brother works in the gold mine and makes \$12 a day and he's a wealthy guy. (inaudible) its just, so I understand.

CW: No, no no no, considering that, I thought when the two of you bought these two policies. Now, the agent, when I visited with the agent she didn't think it was unusual for for people to buy an insurance policy of that size, even though they weren't married but they were obviously planning on getting married.

RB: Right.

CW: Which my thought about that was if she's planning on marrying you what's she doing farting around with a guy on the other side of town. Well so obviously my concern, is...

RB: Yeah. and I didn't know if she was

CW: ...at what point, at what point did you find those things out.

RB: Well. I'll be honest with you. Just like I have with Clint. Right away at the beginning, she told me and she told her sister that she was gonna take an insurance policy out for them in the Philippines.

CW: Um hum.

RB: So if anything happened to her, that I could give them the money and distribute the money. And she didn't want to give it all at one time, because they would blow it. And

CW: Did, did she write this down anyplace?

RB: No, it's not written down. Honestly it's not. I wished it was. I honestly wished it was. I took the one, the small, the Globe Life one out, because she's a terrible driver.

CW: Um hum.

RB: And I could see her getting killed any minute in a car accident. I mean she was one of the worst drivers. I, I was afraid to ride with her. So, that's why and I took that out uh just, I don't know why, just because I guess.

CW: Sure. The Globe Life you took out

RB: Yeah

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APPENDIX 003

CW: yourself.

RB: With her, she knew.

CW: With her.

RB: Yep.

CW: Okay. So, when you guys decided, to happen to get this policy did, did the two of you decide that together or did uh

RB: Yes. Well, no. She wanted the, the one that she could afford. She could afford \$500.

CR: Um hum.

RB: So she wanted as much insurance as she could get for the \$500.

CW: five hundred a year?

RB: For her family. Yes.

CW: Um hum. And she wanted to give it to her family

RB: That was gonna go

CW: or for her son?

RB: For her family, in the Philippines. He's worth a lot of money. So she felt he would be able to take care of her son.

CW: The ex, the estranged husband?

RB: Yeah.

CW: Mr. Stickney.

RB: Yes.

CW: Okay. Did you guys go to uh, to David and, and ask him for money to go to the Philippines?

RB: No.

CW: Did she do that?

RB: Well, I don't know if she did or not.

CW: Um hum.

RB: Not to my knowledge.

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APPENDIX 004

CW: Okay.

RB: After we started going together, we had a pretty rough relationship. Well, you know of course he was mad at me.

CW: She was mad at you?

RB: No no. Him.

CW: Him, he was mad.

RB: David, because he felt I stole her away from him.

CW: Um hum.

RB: Well, and I explained to him. He come to my house one day, when he found out we were having sex and he threatened me and all this. And I said, "Listen. She came to me. I never went to her one bit."

CW: Um hum.

RB: And she did. She came to me to begin with and I just started helping her out and then things progressed from there on.

CW: Okay. You two, where did you guys meet? Where did you meet those two?

RB: At uh China Buffet in Sioux Falls.

CW: Okay

RB: At the café uh, well, it's a Chinese café

CW: Yeah, I know where it is. So uh, she wanted an insurance policy to, to take care of her family?

RB: She thought David, honestly she thought David was gonna kill her. Because he

CW: Was gonna kill her?

RB: He was doing stuff to her car and everything and, and so she felt, he was threatening her all the time and everything.

CW: Okay.

RB: Threatened to send her back to the Philippines.

CW: Did uh. Did she ever write any of these things down. Do you have anything of hers that she

RB: I have nothing.

GD: To David's place?

RB: Maybe the first couple times she went home. Seemed like pretty quick after that she moves on her own into an apartment building. She was in an apartment building before we ever slept together.

GD: Which you think was uh about December '08, January '09.

RB: Right.

GD: And, was that uh at your place?

RB: Yeah.

GD: The trailer home that we were at the other night?

RB: Yup.

GD: You're in love with this girl?

RB: Yeah.

GD: You fall in love with Nila?

RB: Yeah. I cared a lot about her.

GD: Do you have any children yourself?

RB: Yes I do.

GD: How many children do you have?

RB: Three.

GD: And the ages?

RB: Thirty, uh Travis is 38, Misty's 36, Trent's 35.

GD: So your youngest is 35?

RB: Yeah.

GD: Do you uh, were you married to their mother?

RB: No. I'm divorced. I've been divorced for

GD: Okay, you were married to their mother but you're divorced from her now?

RB: Oh, yeah.

vs

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APPENDIX 006

RB: No. She had two children. I had uh my three and then Gwen had a little boy. She had been married before.

GD: Okay. You have a few kids with your first wife and then you remarried. Did you ever have a vasectomy?

RB: Yes I did.

GD: What year did you have a vasectomy?

RB: '76.

GD: Did you ever have that vasectomy reversed?

RB: Nope.

GD: So when Nila's pregnant, you couldn't have been the father.

RB: Correct.

GD: When she told you she was pregnant, did you know that she was fooling around with someone other than you?

RB: Well I knew she had to be, but I thought it might be her husband because her husband was always going over to her house. But I didn't know.

GD: So you thought maybe she was banging David on the side?

RB: Yeah.

GD: Because. How does she disclose to you that she is pregnant? Tell me about that conversation.

RB: She made the comment that she was late.

CW: When did she make that comment?

RB: In fact it was the day we was coming out here.

GD: So that day, she makes a comment to you that she was late?

RB: Yep.

GD: Okay. And correct me if I'm wrong, but I mean assuming she didn't have her period and?

RB: Right.

GD: And you know, I'm late it might mean I could be pregnant.

RB: Yup. And I asked her, I said who you been messing around with? She says nobody. That was her answer.

GD: Did she try to . . . you guys are having sex?

RB: Yes.

GD: And uh, are you wearing a condom?

RB: No.

GD: Are you ejaculating?

RB: Yes.

GD: Okay.

CW: Are you? You're not fixed are you?

RB: Yes.

CW: You're fixed.

RB: Yeah, I had a vasectomy.

CW: So

RB: I said in 1976 or '77.

CW: But I mean, you're not the daddy.

RB: Exactly, right.

GD: So, she makes a comment to you, she's late and first of all, where are you exactly when she makes that comment? Because that's probably something you'll remember forever. This is the woman you're gonna marry.

RB: Probably by Parkston.

GD: In the truck?

RB: In the truck.

GD: Traveling.

RB: Yeah.

GD: Having a conversation?

RB: Yup.

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APPENDIX 008

GD: By Parkston, or somewhere in the vicinity, I mean, the area. Uh

RB: Because right at that point in time she was supposed to be having her period.

GD: Okay. So she comments to you that she's late.

RB: Yeah.

GD: Meaning, hey I could be pregnant.

RB: Yeah. And I asked her who you been with. And she said I haven't been with anybody. And I said well then

GD: Anybody but you?

RB: That's what she said.

GD: Okay. So

RB: she just made the comment. She said I haven't been with anybody. And I said well then you shouldn't be late. But I said, 'cause you know it can vary a couple of days or whatever.

GD: Right.

RB: So I didn't say nothing, I didn't say nothing more.

GD: That was the end of it.

RB: Yup.

GD: She says that she's late. You say who have you been with?

RB: Yup, uh huh.

GD: Because you know you can't be the father.

RB: Right.

GD: Because of your vasectomy in '76.

RB: Right.

GD: So, you ask her who she's been with and she tells you um she hasn't been with anybody.

RB: Right.

GD: Does she tell that to you uh. Do you think she tells you she hasn't been with anybody in order to lead you to believe that you're the dad?

RB: Probably.

GD: Probably. Because she

RB: She did not know I had a vasectomy.

GD: She didn't know that you had a vasectomy. She was fooling around on the side but you didn't know it.

RB: Right.

GD: So when she tells you she's maybe pregnant. She's thinking, well you know, me, me and Russ are fucking. He ain't wearing a condom. He's ejaculating inside of me. Therefore, he could be the father. I'm pregnant. I'm not gonna tell him about this other guy. I'll lead him to believe he's the dad. But then you're like a light bulb goes off. She don't know that I've had a vasectomy, so she's been screwing around on me.

RB: If she was pregnant. Yes, I, it's like

CS: I think you're I mean. Again, Guy. Don't try to make this out like he knew she was pregnant that morning. What he just said was when he told her that she'd been with nobody else but you

RB: I just thought she was late a couple of days.

CS: And then you thought that she didn't have anything to worry about.

RB: Right.

CS: And so don't make it out like on this day they're driving out here and he finds out that she's screwing around and pregnant and then he blows her away. What he was telling you, what he was telling you was if only she. If she was only having sex with him, she was gonna have her period. She said she was late. She didn't say she was pregnant.

RB: Yeah.

CW: So, how's the relationship between you and her up to.

RB: Good. Very good.

CW: Well now

RB: Honestly the best relationship I've ever been in in my life.

CW: My impression of this girl goes from, all of the things that I've heard, and I've probably heard more than everybody, except you, in this room for damn sure.

RB: Probably.

CW: Um. The impression I've got of this girl is that she's using everybody for something. And

RB: You know

CW: if you're. You've been a cop. You're a smart man.

RB: And that, I you know since this

CW: You got

RB: I kinda thought that myself.

CW: But yeah, yeah

RB: And I will say she was a very horny person. I mean, she loved sex, you know.

CW: But, but I'm talking, that's immaterial. Sex is uh, something, and uh, if you're, you know I'm not going anywhere with this other than I'm trying to understand the situation. If you found out on the way over that it's a possibility that she's pregnant and uh you feel. What I'm trying, what I'm getting at is how do you honestly think your relationship was going at that point. Do you feel

RB: I thought it was good. Honestly. I really thought it was good and I just thought, hey, she might you know may have it. She may even have it today. You know, never thought anything about it. 'Cause I honestly didn't think she was screwing around, until later on after I found out, well, when I got her phone. That's why I texted this. She had a couple texts on that phone.

CW: Um hum.

RB: And I don't even remember the guys name. But, so that's when I text him a couple of questions to find out. Try to get him to admit they were having sex.

CW: Well if you read all of the, I guess I don't know everything that her phone said other than that; but I know all the texts that she sent to him. If you read all of those texts. If they were all still on her phone.

RB: They weren't. There was only like two.

CW: Okay.

RB: And see. That's when

CW: I don't, I. Honestly. I'll tell you this.

Unless you're

blinded by love and stupidity, you had to have seen that this girl was looking to get money out of you, him, Mr. Stickney, anybody else that she's dealing with and uh

RB: Well

RB: You know, but I'm gonna be honest with you. After, after this has all taken place and I found out that she was pregnant and stuff. I see there's a lot of flags that went up too.

CW: Um hum.

RB: You know. I mean, I shouldn't be probably saying that, but it's

CS: Well it's alright.

RB: You know

CS: It's the truth.

CW: I want you to be honest. And you know if

RB: And I am. I'm very honest.

CW: Well that's, that's

RB: I'm not gonna lie to you.

CW: I'm trying to satisfy me. 'Cause that's the bottom line in this whole picture is me, if I'm satisfied.

RB: But I see where she was trying to maybe manipulate me out of some money too.

CW: Yeah. And, and that's something that

RB: Because I don't know, maybe she was gonna take off and run with this other guy. I have no idea.

CW: Um hum.

RB: I really don't know.

CW: That. The day you were hunting. I'm gonna get back to the beginning. As I, we, that's what I wanted you to do in the beginning was tell me exactly what happened that day and then we got off on something else but.

RB: Well we, we talked about going hunting. I wanted to go out the first weekend.

CW: Um hum.

RB: And, and I was gonna go and she says I'll go with you next weekend, I can't go this weekend and stuff. And I said okay, I'll wait. So then she worked that night.

She came in and she was excited about going. She had never went hunting before.

CW: Um hum.

RB: And so we come out and then we go out, um uh, by Dixon and cut in the back way through that little road and go by Sperle's and on in that way and then right into, oh I can't remember. Rempters I think. Just on past the, Sperles are on that road going to the north and south. And they live south of there. And there were some birds run across the road and I shot one. Got up and shot it out of the ditch and went and picked the bird up and put in the back end and put the gun in and we go on down the road. And then we got down the road a ways and um I forget whose place that is too. Use to be an old guy lived there. Um, Ataberry I think farms the ground now. It's his daughter-in-law. Jerry something.

CW: Yeah.

RB: And there was a bird down on that corner, of, just past his place and I shot that bird and got back. And then we drove on up the road, went around over by uh where my ex-wife has that quarter and we went to the bathroom, turned around and I was coming back and there was a bird run from one side of the road to the other. And I got out. I shot it, went out and got it. Put it in the back end and was getting in and she jerked on the deal and said kiss me. And,

CW: She did what?

RB: She said kiss me.

CW: Yeah. But what did she do, physically do?

RB: She grabbed the end of the barrel and jerked on it. That's when the gun went off.

CW: Um hum.

RB: And I wasn't even looking. I mean, I was getting in and then the next thing, I looked over and she was (inaudible) back, to the back of the seat.

CW: Okay. How long was it from the time you shot the second bird until the time you shot the third bird?

RB: Fifteen, twenty minutes.

CW: Fifteen, twenty minutes. And you and a deputy went out that day and looked for that empty

RB: Right.

CW: Spent casing.

RB: And I'll, I was in a daze. I don't know, we didn't find it, but I don't know. Did you guys find it?

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APPENDIX 013

CW: No. We never did find it either.

RB: Okay.

CW: So, uh, then you just, you called 911 right?

RB: I called 911. I, put, she was setting kind of on her coat. I put my coat, 'er her coat, excuse me, up against the wound, and I called 911 and talked to them. And I said I would be at the hospital, take her to the hospital. She said should we send an ambulance? I said no, I can be to the hospital before the ambulance can, you know get here. And I said I'll be right in. Call the hospital that I'm coming. And then I drove in and I tried to hold that on her side, the whole way.

CW: Um hum. Guy you still uh

GD: So, she's in the passenger seat. And this is that same dark colored pickup truck with the cap on it.

RB: Yup.

GD: Is it out here?

RB: No.

GD: You didn't bring it today?

RB: No. I brought my car.

GD: Okay. But it's the one that's over at the trailer house

RB: Yeah.

GD: We saw the other night. And it had the topper on it at that time?

RB: Yes.

GD: Okay. So

RB: When it, when I put the pheasants in, I'd open the topper, put the pheasant in, shut it and then go and get in.

GD: And she's in the front passenger seat?

RB: Well, the deal's kind of divided. It's got a deal that folds up and down and that was folded up. And she was kind'a more. I honestly can't say for sure where she was; but I think she was kind of setting up towards the front and. 'Cause when I got in, I just, I always stick the gun in like this. And when I shot the bird, I did, I jacked the shell out and reloaded in case it was gonna run. And that's why the gun was loaded.

vs

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APPENDIX 014

GD: Okay. So you, was the driver's door closed or open

RB: Open.

GD: when you, when you shot the bird?

RB: Open. I got out and left the door open.

GD: We won't tell GF&P that.

CS: Yeah, I was gonna say this isn't gonna turn into some game violation is it?

GD: No.

CS: Okay.

RB: No. I was out of the. I was out of the pickup.

GD: Right. You get out of the pickup. You leave the door open. You shoot the bird. You take the bird. You throw it in the back of the truck.

RB: Right.

GD: Uh, you go and start to climb in the truck through the open driver's door. You've got the gun in, if you remember right hand or left?

RB: Right hand.

GD: Right hand.

RB: Yup.

GD: Okay. And the door's open so all you have to do is climb in. Is that correct?

RB: Yeah. Well, I stuck the gun in. Usually I stick it and put it down and it rides you know on the, on the, barrel on the floor and the hand, stock back here.

GD: Okay. So barrel, barrel towards the floor; stock up. Do you put it uh by the gas pedal? Do you put it closest to the door? Do you put the barrel on the hump that the transmission.

RB: On the hump where the transmission is.

GD: Okay. I think most everybody does. Okay.

RB: And then, honestly, from there, there's grouse on that quarter and I was gonna go over there and try to shoot some grouse.

GD: Okay.

RB: Otherwise maybe I'd never, probably unloaded the gun.

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APPENDIX 015

GD: Do you, do you remember uh putting the gun on safe? You fire the gun. You reload. You're getting back in the truck. Where

RB: You know, I thought I did.

GD: what position is the safety in?

RB: I thought I did. I really did. I thought, I don't know. I, I can't tell you. I thought I did.

GD: You thought you put it on safe.

RB: It's a push button safe you know.

GD: Yep.

RB: And I honestly thought I did, but

GD: Did you ever have problems with the safety on that shotgun before?

RB: Not that I know of. I'd only shot that gun probably 4 or 5 times.

GD: Where's that shotgun now?

RB: Uh Charlie I think has it.

GD: Charlie still has it. And so you never did get to put it barrel down and butt up because it, it went off.

RB: It had come out of my hand. I think I did shove it in, uh, where did you find it?

CW: Sitting, standing straight up like it should be.

RB: Okay. That's where it was.

GD: So, the gun fires um and then you apply some pressure. You gotta drive, so you put the gun, do you put the gun in the

RB: I put the gun in right away.

GD: In the correct, into the correct position which you

RB: Yeah

GD: would have put it in.

RB: Right. And I put her deal up. Her coat up and put it against her side. I called 911. Started, in fact the pickup was running. And I drove straight to the hospital.

GD: And is she, is she able to communicate with you after

RB: She was moaning. She moaned.

GD: Did she say anything?

RB: I don't recall.

GD: Do you remember

RB: All is I remember is her moaning.

GD: Do you remember saying anything to her?

RB: I think I said I'm sorry and I, I just said don't die. You know don't die on me, and

GD: And so then you traveled?

RB: Well yeah, well, I'm saying that on the way.

GD: Right.

RB: And I was praying that nothing would happen, you know. And then we sat at the hospital and I prayed all the while and.

CW: How sure are you that you left the door open in the pickup when you got out?

RB: I'm positive I left the door open.

CW: Okay. So the door was open when you went back to get in the pickup after you shot the bird?

RB: Yup. The gun, the pickup was in park. The door was open and I went back and like I said went to the back end. Put the rooster in the back end and went to get in the pickup.

CW: Yeah.

GD: Do you hunt? You live in Sioux Falls, so do you get to hunt regularly throughout the season?

RB: I

GD: I'm in Pierre. I'm out

RB: I had a lease on the property. Well I use to farm it. When we got divorced, I got a ten year hunting agreement that I could hunt on that land any time. So, yes I hunted quite regularly.

GD: Okay. And this gun, was it a Winchester or was it Remington?

RB: Remington 870.

GD: 870, you had that gun for a long time, you're familiar with that gun?

RB: Yeah, I've had it for quite awhile. I, I can't say, ten years probably.

GD: Okay.

RB: But I didn't use that gun normally. I don't know why I grabbed it. Normally I, I have a Browning Auto 5 that I use mostly; but I just grabbed that gun.

CW: You want this gun back?

RB: If you're done with it.

GD: Ever do any time in the military?

RB: No I did not.

GD: But you're a law enforcement officer

RB: I was

GD: for a number of years.

RB: Eighteen years.

GD: Okay and carried a shotgun when you, when you were a cop or a rifle?

RB: And a pistol.

GD: So you're familiar with the operation of a long gun and a handgun?

RB: Right. I have hunted for, I've shot rabbits since I been 8 years old. Lived on the farm and we used to take a gun to school when I was in grade, first, second and third grade. You know today, you'd be locked up.

GD: Yeah.

RB: I mean we hunted on the way home and on the way to school, and that was just how it was. I've had a hunting license since I was twelve years old. I took that uh, NRA Safety Course when I was twelve.

GD: What was Nila's cell phone number?

RB: God, I don't know.

GD: Do you have her as a contact in your cell phone?

RB: No I don't. Not now.

GD: You deleted it?

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APPENDIX 018

RB: Yeah. I, I can. I cant' tell youh. I can probably go home and find the records. I paid for the phone. I mean, so.

GD: She was in your phone as a contact. Uh, since her death you deleted her.

RB: Yes.

GD: You miss her?

RB: Yeah I do.

GD: And the phone was in your name?

RB: Yes. it was uh on my plan. Charlie might have the number. I don't know.

GD: Had you ever checked her phone to kind of feel out what she was doing before her death?

RB: No.

GD: Okay. So any, any text messages that she sent prior to her death or received, you had never looked at those?

RB: No I had not.

GD: But then afterwards, you, you did.

RB: I did afterwards. That's right.

GD: Okay. And you realized from the content of the text messages you read that she was apparently involved with someone else?

RB: Yes.

GD: Okay. So then while you have the phone in your possession, uh, there are times where you sent text messages to the person on the other end.

RB: Yes. I was trying to get him to say that they had sex.

GD: Okay. And why was that important to you Russ?

RB: To make, to find out if she was cheating. 'Cause I said she was pregnant.

GD: Yeah.

RB: So you know she said she was late.

GD: Um hum.

RB: So I wanted to find out what was going on.

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APPENDIX 019

RB: If I can find it, you bet.

GD: So on November 24th, 2009, there's a text message from that phone; well after she has died, say's I want to know if you think I was good in bed. You would, do you remember sending that text message?

RB: Yes I do.

GD: Okay. And then of course the response is, of course you were great, why? That important and how are things go'n, I miss you. So, now you know she's, for sure, if you didn't know it before, you know now.

RB: Yeah, I know it now, yup.

GD: And you, you felt it was necessary to know that about the woman that you were in love with.

RB: Yes.

GD: I mean for well over a month it's, you're thinking about it because for well over a month

RB: Right

GD: Before you send that text message.

RB: Right. Well, actually

GD: A month to the day maybe.

RB: Actually I, I don't remember when I found the phone. It might have been right at the time I found the phone and then that's when I looked and read the text messages that were on it.

GD: But you never checked her phone before that?

RB: No I never. I didn't think I had any reason to, to be honest with you.

GD: You guys were gonna get married?

RB: Well we talked about it.

GD: But you hadn't set a date or location or anything?

RB: No.

CW: Did you have any idea when you might be gonna do that?

RB: Well, we had hoped after, well when her divorce was final and stuff.

CW: Um hum.

vs

GD: Russ, when you did the insurance policies, um, the one you went to Sioux Falls and did. And

RB: One we were in, yeah she came

GD: Yeah, you met with that lady, the agent.

RB: Oh yeah. I can't remember her name.

GD: And the other one you did through the mail?

RB: The other one they were sending policies out and so we took it and we were gonna take one out on her; well we had talked about taking one out on her son.

GD: But that was all done through the mail, not with an agent?

RB: Right.

GD: If. And what was her intentions should something tragic happen to her, what was her intentions for that insurance money?

RB: To send it to her family and not, in moderation so that they wouldn't blow it all.

GD: Okay.

RB: 'Cause she knew, she knew how they were. She knew how I live and so she said just give them so much a year and she wanted them all to have it, not just one.

GD: So she wanted to make you the beneficiary so that you would properly

RB: Mainly because I was in the United States.

GD: Because you're in the United States and what, to properly dispense the money to them so

RB: To them.

GD: they don't win the lottery and blow it all at one time.

RB: Right, right.

GD: And she trusted you to do that?

RB: Yes.

GD: And was that, were you okay with that?

RB: Sure.

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APPENDIX 021

GD: Were you gonna do that if that's the case?

RB: Yeah.

GD: And so if you get the money from the insurance company, do you plan on providing all of that money to the family?

RB: Yup.

GD: Okay. So as you're sitting here with the sheriff and me and your attorney, if that money is provided to you, your intention is to provide, to pass on all of it to

RB: Their family.

GD: Her family and not keep any of it for yourself?

RB: Yeah,

CW: So this money, you're gonna keep it and give it to them; decide how much to give them a month 'er a year 'er something.

RB: I would give them monthly allotments.

CW: What's that?

RB: I'll give them monthly allotments.

CW: Monthly allotments. Alright.

GD: At your discretion?

RB: Yeah. I'm not gonna let them blow it all. The deal was is that her mom gets a new house. Her mother gets a new house and then they'll get money monthly so they don't blow it all.

GD: You're, you're gonna marry the girl and it turns out she was pregnant from somebody else and you told us that if she was pregnant I sure as hell wasn't gonna marry her because you knew she would've been screwing around on you.

RB: Right.

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APPENDIX 022

RB: We asked for five hundred thousand.

CW: Nah, She's telling me six hundred thousand. Uh

RB: She, she brought up that uh she could have seven hundred fifty thousand for like five hundred dollars and Nila said she could afford five hundred dollars.

CW: Um hum.

RB: So that's when she took the seven hundred fifty because she could afford the five hundred dollars.

GD: A year

RB: Yeah

GD: The annual premium?

RB: Right.

GD: Was it monthly payments or one annual?

RB: No. She wrote a check for five hundred. I think it was five hundred and five, I don't remember.

GD: Okay, but

RB: She wrote the check out.

GD: Annual, not monthly?

RB: Right.

GD: Okay. And she only did that once because she's dead in less than a year.

RB: Right.

CS: Let me ask you Charlie. You know obviously way more about this than anybody, you know. You don't believe that she was scared of her ex-husband or soon to be ex-husband?

CW: Well, I, I haven't seen anything about the man that would lead me to believe that he would be dangerous; And

CW: I never saw anything from him that would lead me to believe that he was anything more than than uh bummed out that he wasn't getting laid any more

RB: He wasn't getting laid to begin with because she told me they would only have sex once or twice a year.

CW: Um, at seventy one, that's getting laid I guess.

RB: That's what she told me.

GD: But then you thought when she was pregnant, when she said she was late

RB: I knew that she was pregnant for four hours. Or I mean I didn't know, but she was late. I knew she was late for four hours. A really lot of things don't go through your head

GD: But Russ you told me a few minutes ago that well I figured she was having sex with her husband. But then just now, you say they're not having sex but once or twice a year.

RB: Well she went back. I don't know you know who she'd had sex with. I didn't know who she was messing around with.

GD: Yeah. Do, do you have any reason to believe that she was afraid of him?

RB: Yeah I do.

GD: Why?

RB: Because he would follow her every place she would go. He harassed her. And I just and I mean

GD: And who was saying this? Where, what are you basing this on?

RB: Well Nila would see him. I, I, In fact, I seen him outside my place a number of times. He would go up and where I live there's a little hill up on top. And when she would be there, he would be setting up there. And then when she would leave

GD: That's all I got Charlie.

CW: How sure are you that, that the door was open on the pickup when you got out to shoot the pheasant? When you came back the door was open?

RB: I'm gonna say (pause) I'm almost positive it was open Charlie. I'm almost positive.

CW: Okay.

RB: God, now you got me thinking. I, I, I'm almost positive it was open.

CW: So she. When you put the gun in, you put the gun with your right hand?

RB: Yes.

CW: Door was open, so your left hand was free. You put the gun in. You would've pointed the barrel towards the center console?

RB: Right.

CW: The gun was uh sitting there. Is that where you normally set it?

RB: Yup.

CW: And that's how it normally would have ridden in the pickup?

RB: Yup.

CW: That's how it was sitting when I opened the door on the pickup.

RB: Yup.

CW: Okay. So, as you're putting the gun in, putting the gun in the pickup, she reaches over and grabs the barrel of the gun?

RB: To my recollection she was setting up on the seat kinda at an angle. And I turned my head like this. I was sticking the gun in. And, I felt a jerk and it went off. And I dropped the gun. I picked the gun up, stuck it in and I seen blood coming out of her side.

CW: Um hum.

RB: And I put her coat. She's setting on her jacket. And I put her coat up against her side. I dialed 911. And I talked to them. And I, the pickup I'm positive was already running. And I shut the door and put it in gear and went. We went right to the hospital.

vs

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APPENDIX 025

CW: Um hum. So you, you didn't actually see her grab the barrel of the gun?

RB: No I did not.

CW: You assume that she did because the gun jerked?

RB: Jerked.

CW: Or did, did you hit something on the way with the gun? Do you know?,
You don't know? Do you know?

RB: I, I can't swear to anything on that. I don't think I hit anything. I think she. I don't
know. I think she jerked on the gun.

CW: We didn't find any fingerprints on the gun so

RB: Okay.

GD: Where were you looking? I mean, you're, you're getting in.

RB: Right.

GD: The guns in your right hand

RB: Right

GD: and you're putting it in and. Do you know where on the gun you were holding it?

RB: Yeah. Right on the pistol grip

GD: Where you would normally hold it with your right hand to shoot. The pistol grip. In
close proximity to the trigger. Okay. And your left hand is where, if you
remember?

RB: I think I had it on the door.

GD: On the door.

RB: Yep.

GD: And where are you looking?

RB: Well I looked over and seen her and I looked away for just a second. And I think
probably glad (inaudible) the door you know, getting in. And about that time. I
might've hit the back, I don't know. I can't say if I hit the back seat. If I hit
something with the gun but it went off.

CW: And what did she say?

RB: Ohhh. She started moaning.

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APPENDIX 026

CW: Before that?

RB: Kiss me.

CW: Kiss me?

RB: Yeah, kiss me.

CW: As you were getting in the pickup?

RB: Yes.

GD: And you were at that moment you were looking in, in a different direction

RB: When the gun went off I was, I was looking kind of, I don't, I was looking straight ahead or what, I wasn't looking at her at the moment the gun went off.

GD: And so you did not see her reach with either hand, grab the gun and pull it?

RB: No.

GD: You just felt, you're getting in

RB: I felt a tug like.

GD: You felt a tug and the gun went away from you towards her. Okay.

CW: Do, do you know if this lady was at all familiar with guns?

RB: Do I what?

CW: Do you know whether she was familiar with guns at all?

RB: No. She'd never been hunting before.

CW: Okay, but there are a lot of guns in the Philippines.

RB: Well, I, I

CW: You don't know. I guess you weren't there. You were gonna say Clint?

CS: What's up with the door?

CW: Well he told me that day twice that the door, he opened the door with his left hand, put the shotgun in with his right hand. And uh, I, actually he told me that three times that day..

RB: Did I?

CW: The first time

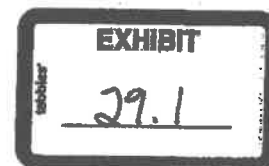
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APPENDIX 027

INTERVIEW WITH RUSS BERTRAM
January 14, 2014

1
2
3
4
5 RB: Russ Bertram
6 GD: Guy DiBenedetto
7
8 GD: This is Agent Guy DiBenedetto, today's date is January
9 14, 2014, this will be an attempt to locate and interview
10 Russ Bertram at his residence, 203 North Juniper, in Sioux
11 Falls South Dakota.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26 GD: Russ?
27
28 RB: Yea.
29
30 GD: How you doing? Do you remember me?
31
32 RB: Yea.
33
34 GD: Guy DiBenedetto.
35
36 RB: Yea.
37
38 GD: From the DCI.
39
40 RB: Yep.
41
42 GD: Ah, can we visit?
43
44 RB: Sure.
45
46 GD: Can I come in and visit with you?
47
48 RB: Sure.
49



1
2 GD: O.k. Well let me ask you this, you're a cop, you were a
3 cop for a very long time.
4
5 RB: Right.
6
7 GD: You know all about ah, firearms handling, the safeties.
8
9 RB: Yes, that's right.
10
11 GD: You know safety precautions, um, I mean Russ you don't
12 disagree with me could you, that when you were getting in
13 with the gun and it was a mistake to have the, the barrel in
14 her direction, that's just plain not safe.
15
16 RB: Exactly but I've done it for fifty years that way, you
17 know what I mean? I'm an old ranch boy from out west and you
18 know I took guns to school, you do that now you'd be in jail.
19
20 GD: Yea.
21
22 RB: You know, I can remember carrying my gun to school, I
23 went to an outdoor school, put the gun in the closet, had
24 school all day, took the gun and walked back home and rabbit
25 hunted all the way home.
26
27 GD: O.k.
28
29 RB: So you know, so you know I probably, I probably wasn't
30 the safest person with a gun, I mean, you know I mean I just
31 probably wasn't.
32
33 GD: O.k. but, but that day specifically Russ, you know,
34 you're getting in, getting into the truck and, and if you've
35 got the, you've got the, you're supposed to have that barrel
36 down to the floor board, you're not supposed to have that
37 barrel pointing straight across and.
38
39 RB: I was putting it in and, and going to put it on the
40 floor board sir.
41
42 GD: Uh huh.
43
44 RB: And that's how I've always done it.
45
46 GD: Yeah, but.
47
48 RB: It's hard to get the gun in when you put it on the
49 floor, drag it across, you know.

1
2 GD: Again with shit happens, why is your finger on the
3 trigger when you're putting the, the gun in because if she
4 grabs the barrel you know, you've been around guns
5
6 RB: Right.
7
8 GD: Your whole life and when you have children.
9
10 RB: I think it's easier to control when you only have three
11 fingers on that hand.
12
13 GD: Yea, because you.
14
15 RB: So I think.
16
17 GD: You're missing what finger.
18
19 RB: My index finger.
20
21 GD: You're missing your index finger, o.k. right, right.
22
23 RB: And.
24
25 GD: So tell me.
26
27 RB: So I think I have better control with it when I have it
28 like that, you know.
29
30 GD: When you have it like how Russ?
31
32 RB: Like, say my grip on there and then my grip, say on the
33 trigger, uh, not the trigger but on the, the guard, the
34 trigger guard.
35
36 GD: The trigger guard.
37
38 RB: Yea, and I just stuck it in now, like I said it, shit
39 happened so fast I, it was unreal.
40
41 GD: Yea.
42
43 RB: And as soon as it happened I went and I got her deal up,
44 I called 911.
45
46 GD: Yea, I know you did.
47
48

1 RB: And I said, called them, and I said I can be to the
2 hospital before you can get the ambulance out here. I said,
3 you know, and I will meet you at the emergency room and
4 everything and that's where, what I did.
5
6 GD: Whereas, people, people are not gonna disagree with me
7 and, and correct me if I'm wrong, but I don't think you'd
8 disagree with me that you should have handled the gun better
9 that day.
10
11 RB: Oh I, definitely I should have.
12
13 GD: Reckless?
14
15 RB: I'm not saying that.
16
17 GD: Were you reckless with the gun that day?
18
19 RB: No I wouldn't say I was reckless.
20
21 GD: What would you, what would you say, how would you
22 describe it?
23
24 RB: I'd say, I'm just taking things for granted and, and
25 I've done it that way for years, you know I've done the same
26 thing for, well as long as I've been hunting.
27
28 GD: So, on, on your right hand you've got a thumb, three
29 fingers, you're missing your pointer finger.
30
31 RB: Yea, I'm missing my index finger.
32
33 GD: Your index finger, and normally that would be your
34 trigger finger.
35
36 RB: Right.
37
38 GD: So because you've only got three fingers and a thumb, if
39 you will, you used two fingers on the grip, the pistol grip
40 of the...
41
42 RB: Gun.
43
44 GD: butt, of the stock.
45
46 RB: Right.
47
48 GD: And then you keep one finger on the trigger, one finger.
49

1 RB: Well normally I have it on the guard, the finger guard.
2
3 GD: Finger guard. So still, how does the gun go off then?
4
5 RB: My finger must have slipped and hit the trigger or I had
6 it in there. You know I don't know, I've tried to think of
7 that a hundred times how.
8
9 GD: Me too.
10
11 RB: I had that.
12
13 GD: Right.
14
15 RB: You know, I've tried, I don't know, I don't know if I
16 had my trigger inside the trigger guard or on the outside and
17 it slipped or what.
18
19 GD: O.k.
20
21 RB: You know, I don't remember.
22
23 GD: Well now.
24
25 RB: And if I did, I'd tell you.
26
27 GD: When, did you see her grab the barrel of the gun?
28
29 RB: Yes I did.
30
31 GD: O.k.
32
33 RB: And they said there's no prints on it, so.
34
35 GD: Right, right, I, yea, we shared that with you.
36
37 RB: Right.
38
39 GD: O.k. But you saw her grab the barrel of the gun?
40
41 RB: I did, no I didn't see her grab the barrel of the gun,
42 excuse me.
43
44 GD: O.k.
45
46 RB: I felt her tug it.
47
48 GD: You felt her tug it?
49

1
2 GD: Is there a cup holders in there.
3
4 RB: Yes.
5
6 GD: Arm rest?
7
8 RB: Yes.
9
10 GD: O.k. alright, so the bottom seat is a bench, the top is
11 kind of buckets but with this arm rest.
12
13 RB: Right.
14
15 GD: So it looks like a bench back or sometimes if you fold
16 it down you use the, the cup holders there, it becomes an arm
17 rest.
18
19 RB: Right.
20
21 GD: and it almost looks like bucket seats.
22
23 RB: Right.
24
25 GD: O.k. alright, I'm clear on that.
26
27 RB: And then I got a, the gun when it was going over the top
28 of that, cause I was going to put the gun, there wasn't room,
29 there's not room in that pickup to put the gun barrel right
30 in here because of that gun deal and I was going to put it
31 over on Leonila's side and that's where I always carried the
32 gun.
33
34 GD: O.k. so you're saying in that vehicle there's no room to
35 put the barrel down to the hump.
36
37 RB: Right, because it would stick clear, you know clear
38 high.
39
40 GD: O.k.
41
42 RB: And if I put it down on this side of the hump.
43
44 GD: Uh huh.
45
46 RB: Then it would set down in here and that's where it had
47 ridden all day.
48

1
2 RB: But, see a lot of times. O.k., here, here's the thing.
3
4 GD: If she's just going out with her girlfriends,
5 supposedly, why isn't she coming back to you? Why does she
6 drive all the way back to.
7
8 RB: A lot of time.
9
10 GD: Bridgewater, that's a long way.
11
12 RB: A lot of the times I did not know when she went to
13 Borrowed Bucks.
14
15 GD: O.k.
16
17 RB: You know a lot of the times I thought she was working
18 and supposedly she was at Bucks.
19
20 GD: Oh, o.k. o.k. Well how did you figure that out?
21
22 RB: Well I just kind of figured it between the text messages
23 and, and I did look at her phone record.
24
25 GD: O.k.
26
27 RB: So I kind of figured that, that she was, was going but I
28 still she always told me she was with, a, she was al, she
29 always said she was going with friends or to meet friends at
30 Bucks you know so I didn't take it as she's meeting
31 boyfriends.
32
33 GD: O.k. She, well, you thought she was at work, and she
34 wasn't at work, she was going to Bucks.
35
36 RB: Well at different time, different time, yea.
37
38 GD: Then a different time she tells you.
39
40 RB: She's going to meet friends there from work and, and
41 stuff, yeah.
42
43 GD: So, I mean when, when you have the phone records why
44 don't you ask her about it? I mean do you ask her, well, I,
45 I, there's a little discrepancy here Nila we need to, we need
46 to be honest with each other if we're gonna.
47
48 RB: Yea, but I, I didn't say anything to her.
49

1 RB: Or something like that.
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16 GD: You thought, you thought you and her could have a good.
17
18 RB: Relationship.
19
20 GD: Relationship.
21
22 RB: I really did.
23
24 GD: O.k. So let me ask you this then Russ, if you think you
25 could have a good relationship, and.
26
27 RB: And that's probably why I let her do a lot more than I
28 did my other wives, you know.
29
30 GD: O.k.
31
32 RB: And I was less carefree because, I don't know I, the
33 first, with my first wives I had kids, I was busy, I worked
34 my ass off all the time, I was getting were I'm, was a, had
35 better finances, where you know I could do things and, I
36 don't know if you want to say more carefree or what but I was
37 just happy with everything that was going on.
38
39 GD: But when you're engaged to this woman, and you think
40 you're going to become husband and wife and you're going to
41 be...
42
43 RB: I never thought of her pissing around on me. I really
44 didn't.
45
46 GD: O.k. but you, but you said just a moment ago that you're
47 looking at the telephone records, you.
48
49 RB: I did, I seen that.

1
2 GD: Become a little suspicious.
3
4 RB: Yes I, I did.
5
6 GD: What did you notice in the telephone records Russ, that
7 made you suspicious?
8
9 RB: The calls at like ten-thirty, 11:00 at night not to my
10 phone.
11
12 GD: O.k. late night phone calls not to your phone?
13
14 RB: Yea.
15
16 GD: Did you see a frequency of the same phone number over
17 and over?
18
19 RB: (heavy sigh) Yea, I think it wa, but I mean I just, I
20 thought it was, there again she kept saying it was her
21 friend. It was her friend, and when I'd say something to her
22 she says I called my friend.
23
24 GD: So.
25
26 RB: You know in fact the one time I brought it up and she
27 says, well I was at work, I called my friend and if you
28 looked at the phone records she did, she called me a lot of
29 times when she went on break from work.
30
31 GD: O.k. But, so the bills, it was your phone, you gave it
32 to her, you lent it to her.
33
34 RB: Right.
35
36 GD: The phone bills coming here, you get the phone bill, you
37 look at it and you look at the calls that she's making, and
38 correct me if I'm wrong in any of this, but you're looking at
39 the phone calls she's making and you, being a cop for a
40 longtime, a light bulb goes off and says these telephone
41 calls don't jive with her work schedule or the time of day is
42 odd, is that right? I mean.
43
44 RB: Well, but she'd call me a lot of times at ten-fifty at
45 night, you know and who's to say, I didn't call the number to
46 see if it was a boy or a woman or who, either.
47
48 GD: O.k. Now.
49

1 RB: You know and if she says it's her friend I took it as it
2 might have been her girlfriend at work, you know.
3
4 GD: So.
5
6 RB: That she works with.
7
8 GD: But you did ask her about her it?
9
10 RB: Yea I did.
11
12 GD: O.k.
13
14 RB: That was about, oh hell, I'm going to say that might
15 have been about in December, that I brought that up. No, no,
16 no, it would have been later than that, it would have been
17 probably in September or October. I forget where I even, was
18 I on the road at that time or not? No I wasn't, I was working
19 I think for Soukup, when I went with her I think I, so I was
20 home every night.
21
22 GD: O.k.
23
24 RB: See now I'm on the road so I wouldn't.
25
26 GD: Yea, yea, but.
27
28 RB: (inaudible).
29
30 GD: So you get the phone bill, um, as a, as a trained
31 investigator if you will, you, you look at it.
32
33 RB: But I'm not trying to do an investigation on her.
34
35 GD: No, no, no, that, I'm not, you're not trying to pull
36 police work on your fiancé but you can't get that police
37 work, you know that, that thinking out of your head. So, so
38 you get the phone bills and correct me if I'm wrong, you get
39 them here at your house over there.
40
41 RB: Yep, over there.
42
43 GD: You look, they come in the mail, paper form?
44
45 RB: Right.
46
47 GD: Or do you go on line and look at them?
48
49 RB: No, no, they come in, 3, 4 sheets, or 5 sheets of paper.

1
2 GD: And you look at the phone calls, you look at the phone
3 calls that she has made from her phone.
4
5 RB: Uh huh.
6
7 GD: Is that right? yeah?
8
9 RB: Yea.
10
11 GD: O.k. and so then you see phone calls that are late at
12 night, a moment ago you said well they were calls there that
13 were late at night and things started..
14
15 RB: Right.
16
17 GD: ...to kind of click, and so then you ask her about those
18 phone calls?
19
20 RB: Yea, I asked her and she said it was to her friends.
21
22 GD: O.k.
23
24 RB: And I didn't say, was it a boyfriend or nothing I didn't
25 bring that up.
26
27 GD: Did you tell her, well how are you making phone calls
28 because you're supposed to be working?
29
30 RB: Well but that she would say she was on break because
31 she'd call me a lot of times at break.
32
33 GD: O.k.
34
35 RB: And there would be sometimes she would call my number
36 and then her, and then the other number too. I mean within 5
37 minutes you know.
38
39 GD: O.k.
40
41 RB: So she would have been calling probably both of us, you
42 know.
43
44 GD: O.k.
45
46 RB: So I mean that's, that's why I was saying I, I didn't
47 suspect it that much because of the fact a lot of times she
48 would call me and then make this other phone call or
49 whatever, you know.

1
2 GD: O.k.
3
4 RB: And.
5
6 GD: But.
7
8 RB: And all the time I was with her she never ever made a
9 phone call or got a phone call
10
11 GD: Yea, that makes sense.
12
13 RB: From somebody else, you see, I mean.
14
15 GD: So why even bring up to her these phone calls? Why do
16 you bring that up Russ?
17
18 RB: I don't know, just I suppose at that point in time I, I
19 wondered what was going on.
20
21 GD: O.k. You get the phone records.
22
23 RB: You know.
24
25 GD: You look at them.
26
27 RB: She give.
28
29 GD: There's late night phone calls, and so you ask her.
30
31 RB: Yea, and she give me a decent answer so I must have
32 thought it was good enough and I let it go.
33
34 GD: What, what did you think was going on, what were you
35 afraid of going on?
36
37 RB: Well I didn't know but I, I didn't, you know I had no
38 idea that she was out seeing all these guys, I really didn't.
39 Otherwise it would have been, I wouldn't have pulled, you
40 know took that crap.
41
42 GD: You wouldn't have pulled what?
43
44 RB: I wouldn't have, I'd have told her to knock the shit off
45 or get on her own, you know. Cause I mean I give her money
46 too, to make her, her payments and, and to help her you know
47 with her rent and her gas and, and uh she was sending money
48 to the Philippines and so I mean, cause David pretty much cut
49 her off.

1
2 GD: O.k. but these, these phone records and you.
3
4 RB: She didn't make that many phone calls. I looked.
5
6 GD: I bet she made a ton. From the guys I spoke to, I think
7 she made a ton and they would have been on the phone records
8 and you would have seen that.
9
10 RB: Well they wouldn't, they weren't that long because.
11
12 GD: She was pretty active the month or so, August,
13 September, before she died, she was pretty active with these
14 phone calls the best I can tell.
15
16 RB: And see I, I was working construction, and working quite
17 a few hours so I was.
18
19 GD: But, and you know, again I'm not saying I'm a
20 bullshitter, you know if you can't bullshit a bullshitter, I
21 mean we're 2 cops talking and so clearly, you know, if you
22 get those bills and you look at them and you question her
23 about these calls, something in your mind has got to be a
24 little suspicious or concerned that something is going on
25 because you don't question her about the daytime calls, you
26 question her about the late night calls. The calls right
27 after.
28
29 RB: Right.
30
31 GD: She called you.
32
33 RB: Yea, and I just, I mainly what I said to her, is I said
34 who you calling at, at this time of night or something like
35 that, I don't, I can't say exactly and she and uh, she said
36 well she calls a friend or that she works with so.
37
38 GD: O.k.
39
40 RB: That's all I can go by.
41
42 GD: Why ask her, why even ask her about the phone calls? You
43 trust her, you love her, you gave her the phone to use, what
44 are you so concerned about who she's calling?
45
46 RB: Well I just wondered who she called at that time at
47 night, you know that's, that's all.
48
49 GD: Why.

1
2 RB: It isn't that I doubted her, it wasn't that I doubted
3 her.
4
5 GD: O.k. Why even bother looking at the phone records?
6
7 RB: I don't know why, normally I don't, I'll be honest. I
8 don't look at mine now.
9
10 GD: O.k. Were you always looking at her.
11
12 RB: I go and pay.
13
14 GD: Did you look.
15
16 RB: No.
17
18 GD: At all of her phone records.
19
20 RB: No.
21
22 GD: Or just towards the end when.
23
24 RB: No, I did.
25
26 GD: These calls were.
27
28 RB: I did one month, that's how I caught it. I didn't look
29 every month, hell, most of the time I don't look at them
30 period. I just go down and pay them.
31
32 GD: O.k. So there's one month you get the bill, you look at.
33
34 RB: And I look at them.
35
36 GD: And what?
37
38 RB: And that's when I ask her.
39
40 GD: O.k.
41
42 RB: You know and I can't tell you how many bill, I mean I
43 didn't think there was that many calls on there, cause all of
44 my calls are on there, you know I had 2 different sheets of,
45 my phone number and then her phone number.
46
47 GD: O.k.
48
49 RB: And.

1 gun in as I was sticking it in and anyway she jerked on it
2 just as I was getting in and it, it went off.
3
4 GD: But you don't know that she jerked on it.
5
6 RB: Well I thought.
7
8 GD: Because.
9
10 RB: I felt a tug or something. I don't know, maybe the gun
11 slipped out of my hand and it slipped down and my finger hit
12 the trigger, I don't know.
13
14 GD: O.k. Well, explain that for me, maybe the gun slipped
15 out of my hand and slipped down?
16
17 RB: Well maybe, I thought it, when I was putting it in the
18 gun could have slipped in my hand, I don't know. I have no
19 idea. I've, I've went over this I don't know how many times.
20
21 GD: O.k.
22
23 RB: And I know I was sticking the gun in like that, she was
24 sitting up ahead in the seat.
25
26 GD: Uh huh.
27
28 RB: And it went in here and shot her about right in here.
29
30 GD: Yea, it shot her right there, but yea you know I'm just,
31 and this is what intrigues me so much, um, because you know
32 Russ I think from our last conversation and, and you're still
33 cool speaking with me?
34
35 RB: Yea.
36
37 GD: O.k. You're comfortable, you know, are you too cold, too
38 warm?
39
40 RB: No.
41
42 GD: Need a drink or anything?
43
44 RB: No, I'm fine.
45
46 GD: O.k. you're still o.k. speaking with me, o.k. cause I've
47 got to cover that every now and then right because last time.
48
49 RB: Right.

1
2 GD: We sat down, but this is a new visit. So, o.k. so,
3 you're getting in and she's sitting there but you know you've
4 said, and I can give you the different versions, I mean you
5 said she, she tugged the gun, then you.
6
7 RB: Well I said it felt like a tug, she tugged the gun.
8
9 GD: Well no, you said she tugged the gun.
10
11 RB: O.k. she tugged the gun, o.k. whatever.
12
13 GD: well, no it's not whatever to me, I'm just reciting to
14 you.
15
16 RB: O.k.
17
18 GD: What, what you've said to me and at one point you said
19 she tugged the gun, another point, just now you said well
20 maybe it slipped out of my hand, I just.
21
22 RB: Well I don't know what happened. I really don't know
23 what happened, o.k.
24
25 GD: Well if you're getting in with a gun, right.
26
27 RB: Yep.
28
29 GD: And you're going to put the barrel down there.
30
31 RB: Yep.
32
33 GD: Being cautious, being a firearms guy, teaching children,
34 you're children I would assume, are they hunters?
35
36 RB: Yea.
37
38 GD: Did you take your kids hunting?
39
40 RB: A couple of them are.
41
42 GD: Did you teach them hunting safety, and road hunting.
43
44 RB: Right.
45
46 GD: Is a popular thing in, in South Dakota.
47
48 RB: We did a lot of it yep.
49

1 GD: So you teach them safety to put the gun muzzle first,
2 down, down to the ground, you don't teach them to point the
3 gun across the seat because as guys are getting.
4
5 RB: Well you couldn't get in, in the deal because of this
6 deal, you had to go up and above and over it.
7
8 GD: O.k.
9
10 RB: To get it down there.
11
12 GD: O.k. alright.
13
14 RB: So that's what I was putting the gun in like that,
15 sliding it in, and, and like I said I just, it was above
16 this.
17
18 GD: Arm rest.
19
20 RB: Arm rest or whatever you want to call it there.
21
22 GD: Yep.
23
24 RB: Cup holders and, and, and she, like I said she was
25 sitting clear up towards the front here. We're talking,
26 listening to the radio and, before hand, and I went out and
27 shot the pheasant, I threw it in the backend, I come in, slid
28 the gun in, I didn't realize that it was loaded and in fact
29 normally it would have had a spent shell in it, but I don't
30 know, I must have jacked another shell in it, went to get in
31 and bang.
32
33 GD: O.k. You didn't, you didn't know it was loaded or you
34 must have.
35
36 RB: No I did not realize it had a shell in it. A lot of
37 times after I shoot a pheasant and stuff why I leave the,
38 it's a pump, and I leave the empty shell in the chamber and
39 evidently when I shot I jacked another shell in and walked
40 out to get the bird, put it back in the backend of my pickup,
41 come in, was getting in, sliding the gun in and it went off.
42
43 GD: O.k. Um, was that your favorite gun, I mean you're
44 comfortable with that gun, that's the gun.
45
46 RB: Yea, I shot it.
47
48 GD: You use all the time or what?
49

1 RB: Quite a bit, yep.
2
3 GD: O.k. and was that your, like I've got a favorite
4 shotgun, I've got several shotguns but I've got a favorite
5 shotgun.
6
7 RB: Right.
8
9 GD: Was that your favorite shotgun?
10
11 RB: Yes.
12
13 GD: Was that the one you use most?
14
15 RB: Yes.
16
17 GD: O.k.
18
19 RB: It's an 870.
20
21 GD: 870, and as cops we use 870's that's pretty.
22
23 RB: Right.
24
25 GD: Much the standard, maybe a Mossberg or something.
26
27 RB: Right.
28
29 GD: But, o.k. so, so Russ the gun goes off, your hand is on
30 it, you're not sure if she tugs it or if it slips or if it
31 hits something, there's different versions.
32
33 RB: Right.
34
35 GD: And then when worse comes to worse you say I, I just
36 don't know.
37
38 RB: I really don't, I don't know, you know what happened.
39
40 GD: But since the day it happened, since the day you met the
41 doctor at the hospital you've given versions. You told the
42 doc.
43
44 RB: I told the doctor I was sliding it in.
45
46 GD: And she grabbed it.
47
48 RB: And, and it went off, that's what I said, yes.
49

1 GD: O.k. When, when you're putting the, the gun in, do you
2 say anything to her, like sit back, be careful, or anything.
3
4 RB: No I didn't.
5
6 GD: Does she say anything to you?
7
8 RB: She said you're, that was a lucky shot. We were talking
9 about it being a lucky shot cause I'd shot 3 pheasants with 3
10 shells.
11
12 GD: O.k.
13
14 RB: And stuff and she said we were lucky, like I said all
15 day we had joked around, we had a great time, and everything
16 and it just.
17
18 GD: Do you remember her saying anything else to you?
19
20 RB: No I don't.
21
22 GD: O.k. Um, Russ do you take any medications?
23
24 RB: Yea, I do.
25
26 GD: What do you take?
27
28 RB: Stuff for asthma and stuff for um, uh, high blood
29 pressure and, and ah, diabetes.
30
31 GD: O.k. Sounds like my family history.
32
33 RB: Yeah.
34
35 GD: What do you take for high blood pressure?
36
37 RB: Metformin.
38
39 GD: Oh, o.k. I can't take that, I take.
40
41 RB: Oh, blood pressure, no that's for my diabetes,
42 Metformin, I take for my blood pressure I take Lisinopril.
43
44 GD: O.k. I take that Clorifid or something like that.
45
46 RB: O.k.
47
48 GD: Yeah. Um, uh, you've taken your medications today?
49


1 RB: Yea, I take it every morning and every night.
2
3 GD: O.k. Your conversation with me is clear and accurate
4 and complete and.
5
6 RB: Yep.
7
8 GD: O.k. You haven't lost your mind or suffered Dementia or
9 anything?
10
11 RB: (laughing)
12
13 GD: We've gotten a couple years older since.
14
15 RB: That happens all the time.
16
17 GD: Well you got a couple years older since our last visit,
18 3 years older since our last visit but your mind still
19 strong?
20
21 RB: Yep.
22
23 GD: Body slows down a little bit?
24
25 RB: Slows down a lot.
26
27 GD: So Russ, she's stepping out on you, and you become
28 suspicious that she's stepping out on you, you see the phone
29 bills, you, you know her behavior, you see the phone bills,
30 um, and.
31
32 RB: I only seen one bill.
33
34 GD: Well, and that told you enough didn't it? Enough to
35 confront her about the calls.
36
37 RB: Well I, I asked her about it, yes I did.
38
39 GD: So I mean.
40
41 RB: I didn't look at any more.
42
43 GD: Things are building, things are building and, and I mean
44 I'm not going to ask you because you know I'm not here to
45 embarrass you or anything, but you know I, I think at some
46 point Russ, when you see the phone bill and you know her, her
47 past behavior with you and you just know things because
48 you're instinctive. You, I think you become suspicious or

1 wary that something's going on and then she tells you I think
2 I'm late and low and behold what does that tell you?
3
4 RB: Nothing. I mean it tells me that if she, if she was
5 pregnant why then it wouldn't have been mine.
6
7 GD: Because?
8
9 RB: Well, I can't have kids. Well I can, but I mean I don't
10 have kids, I had a vasectomy.
11
12 GD: You had a vasectomy. So, and she didn't know that?
13
14 RB: No.
15
16 GD: So when, when you see the phone records and she's.
17
18 RB: That had nothing to do with it.
19
20 GD: going to Borrowed Bucks.
21
22 RB: If that's where you going, that had nothing to do with
23 it.
24
25 GD: No I think the phone records had quite a lot to do with
26 it Russ. I, I think the phone records to you.
27
28 RB: You can think what you want, o.k.
29
30 GD: Sure. But I, and I, but I'm telling you what I think,
31 and I think.
32
33 RB: O.k.
34
35 GD: The phone records were, were the conformation to you
36 what your suspicions are and then, you, then you know of
37 course we all know what, what you did afterwards with the
38 texting, you know how does it, how did you feel when you were
39 fucking me? I mean that's.
40
41 RB: I don't remember what I said to him.
42
43 GD: That's exactly, I think that's word for word what you
44 said.
45
46 RB: O.k.
47
48 GD: How did you feel when you were fucking me? to this other
49 guy, because you know, you're pretending to be Nila to see how
50

1 RB: Right
2
3 GD: this other guys going to respond. O.k. because it was
4 just, it was just irking you so much. And obviously so
5 because, again like I said, Nila is, Nila is, she's young,
6 she's impressionable, she likes to have a good time, she's at
7 the club, she's got this fiancé but then I don't know maybe
8 she, because she's got a small body she gets a couple of
9 drinks in her, and suddenly these guys are, these guys are
10 getting further with your fiancé than they should be getting
11 and maybe, maybe she's allowing it because she doesn't care
12 for you, I think as she, I think maybe it's the alcohol. Do
13 you drink?
14
15 RB: No.
16
17 GD: O.k.
18
19 RB: Well I do but very little.
20
21 GD: O.k. How's about her drinking?
22
23 RB: Well we, she never drank around me.
24
25 GD: O.k. So then she goes out to the bar and she has a
26 little bit to drink and, she was a pretty small girl.
27
28 RB: Yea she was.
29
30 GD: And you know as a, as a cop for a long time, DUI's and
31 stuff like that, you know that it doesn't take many drinks
32 to.
33
34 RB: Right.
35
36 GD: To affect someone with a, with a small figure like that,
37 right?
38
39 RB: Right.
40
41 GD: So, do you, do you think that she was manipulated by
42 these guys? You think she goes to a club thinking to do, do
43 you think.
44
45 RB: You know what, I don't know.
46
47 GD: She goes there to fool around or do you think she goes
48 there to do the right thing and.
49

1 RB: I have no idea.
2
3 GD: Well, no idea, but what, what do you think, what are you
4 thinking?
5
6 RB: Well I think she was going to have fun, is what I think,
7 you know.
8
9 GD: I mean you certainly not a.
10
11 RB: She was going to go dance or, she went to dances in
12 Bridgewater also with her, supposedly her friends, now I
13 don't know if it's male friends or female, supposedly I
14 thought it was female but.
15
16 GD: Did she tell you it was female, lead you to believe it
17 was female?
18
19 RB: She didn't say either, she said she was going with some
20 friends.
21
22 GD: Do you ask her who, who are your friends?
23
24 RB: No.
25
26 GD: I mean why wouldn't you want to get to know her friends?
27
28 RB: I just don't.
29
30 GD: So, careless handling of the firearm.
31
32 RB: Right.
33
34 GD: And it goes off. Um, you didn't say anything to her at
35 the moment the trigger goes off, um, she didn't say anything
36 to you other than lucky shot?
37
38 RB: Well no, that was before the gun went off.
39
40 GD: O.k. right, before the gun went off.
41
42 RB: Yes.
43
44 GD: Did she say anything, anything else before the gun goes
45 off?
46
47 RB: Not really, I was just getting in like I said and, just
48 going to get in.
49

1 GD: Alright, so you're getting in the truck and, and the
2 gun, the gun's in your hand, the gun goes off, it discharges
3 into her, you call 911 and, and then you rush her to the
4 hospital.
5
6 RB: Uh huh.
7
8 GD: Right? O.k. You're right hand.
9
10 RB: The gun was in my right hand.
11
12 GD: O.k. And, and that's how you usually, how do you
13 usually put the gun into the vehicle from road hunting Russ?
14
15 RB: I just slide it in the pickup and get in.
16
17 GD: O.k. and the barrel to.
18
19 RB: It comes right across the deal here, down.
20
21 GD: To the passenger side.
22
23 RB: Yes.
24
25 GD: Footboard?
26
27 RB: So it's on the passenger side.
28
29 GD: Footboard, muzzle down.
30
31 RB: Yep.
32
33 GD: Butt up?
34
35 RB: Yep.
36
37 GD: Safety on or off?
38
39 RB: Well usually I have the safety on I think, but depends
40 on, you know, I don't know I just put it in there whatever
41 way it is.
42
43 GD: O.k. I mean.
44
45 RB: Normally if I shoot the gun, I usually try to have a
46 blank cartridge in the magazine but I.
47
48 GD: O.k. so at what point.
49



1 RB: If I don't, if I jack another shell in then I put it in
2 like that.
3
4 GD: At what point Russ does she tell you she's late? What
5 point is that.
6
7 RB: Oh that was, probably 3, 4 days before we went hunt, I
8 don't know, week before we went hunting or whatever and I
9 thought she was even having her period because I went to do
10 something and, and she said no, we can't, you know so I mean
11 so I thought she was having her period honestly.
12
13 GD: O.k. So did she tell you that day that she was late or
14 was this a conversation days before?
15
16 RB: I think it was before.
17
18 GD: O.k. Now that's your fiancé not knowing you've had a
19 vasectomy telling you she's late, that's going to be a pretty
20 significant moment in your relationship.
21
22 RB: But if, there again, if she had her period then she
23 wouldn't have been late.
24
25 GD: O.k.
26
27 RB: You know.
28
29 GD: So you don't remember, are you telling me that the
30 comment that she thinks she's late was that day, that moment,
31 or days before?
32
33 RB: God, you know I look, I'm thinking it was before we went
34 out hunting.
35
36 GD: Before the day you went hunting?
37
38 RB: Yea.
39
40 GD: O.k. not while you were out on the road looking for
41 birds or traveling?
42
43 RB: I, I believe it was like a couple, we decided we were
44 going to go hunting.
45
46 GD: Yep.
47
48 RB: Was about 3 or 4 days before we went.
49

1 GD: O.k. and then.
2
3 RB: And she told me that, about, I'm thinking a day or so
4 before that.
5
6 GD: O.k. o.k.
7
8 RB: I, I just.
9
10 GD: And how did that conversation go?
11
12 RB: Oh we were just bullshitting and talking you know.
13
14 GD: Uh huh, and she says.
15
16 RB: And she said something about she might be late, and I
17 said well you better not be, you know and something like that
18 and I, it just, still I just didn't think nothing of it. You
19 know I just thought well she's probably late from something
20 upsetting her or some, I don't know, you know.
21
22 GD: O.k.
23
24 RB: Her and Dave, she had kind of a hard time with David,
25 all the time I know that. He was really, I don't know,
26 putting pressure on her and.
27
28 GD: So did you tell me why you're address was on the
29 insurance policies and not her address?
30
31 RB: Because she was going to move in with me.
32
33 GD: O.k. and whose idea was it for the insurance?
34
35 RB: Hers, she wanted the insurance.
36
37 GD: Why did she want the insurance?
38
39 RB: In case something happened to her, that her family would
40 be taken care of.
41
42 GD: O.k. She's got a son.
43
44 RB: Yes.
45
46 GD: O.k. Adrian.
47
48 RB: Adrian.
49



Gregory Healthcare Center
400 Park Avenue, P.O. Box 48

Gregory, SD 57533

P#: 605-835-8394 F#: 605-835-9105

Patient: STICKNEY, LEONILA DELVALLE

DOB: 01/17/1983 F/26

Acct: GH0000225141 MR: GH00025148

Adm: 10/24/09 Dsch:

Loc: GH.ED Rm: Status: REG ER

Attending:

ER REPORT

Leonila was brought in by her boyfriend to the Emergency Room with a history of having been shot with a 12-gauge shotgun accidentally from a distance of he estimated 1 to 2 feet. The gun went off as she grabbed the barrel. He was unloading it and placing it in the vehicle with the barrel pointed toward her and when she reached for the barrel apparently something hit the trigger and it went off with the shell still in the chamber. He called 911 and began driving her into the hospital. They were up toward the Dixon area and 911 did call to warn us that they were on their way. The patient arrived unconscious with immediate CPR started. There was serosanguineous fluid and some air bubbles coming out of the wound, which was in the lower left anterior ribs just at the level of the diaphragm. The patient's situation was immediately addressed with intubation. Jim Arit, CRNA was able to get a tube in and was able to get her aerated. Auscultation showed good air movement with this and equal breath sounds bilateral. She had the pulses not palpable. Color was pale. She had large bore IV line started in the neck bilateral and immediate high flow saline started for fluids, continuous CPR was done, pulses were never able to be felt. Her monitor did show that she still had some sinus rhythm beats but these only persisted for the first few minutes during her CPR. Her cardiac beats were palpable through the abdominal wound as the edge of the heart could be felt through the wound but no pulses were able to be felt. Any ventricular beats were very weak. She had wound inspected and initial phone call made to Dr. Kosina up in Winner to see if there would be an option of bringing her up to the OR for exploration of the wound. He did not feel unless we could get a pulse established that that would be advisable, that we would be better off to try and evaluate here and explore the wound as much as needed to determine whether there was a repairable wound. Situation was also discussed with the electronic monitor and the ER staff directly in Sioux Falls and decision made at that point to go ahead with opening the wound. A 15-blade was used to open the skin and then layer by layer the opening made along the area between the ribs. We were just below the diaphragm anteriorly and bone fragments and then a shotgun shell wad packing was removed. This was down about 3 to 4-inches into the depths of the wound and was able to be removed with the finger. This was placed in a jar and marked and was placed off in the hands of Brenda Lane, RN. She did give this subsequently to Charlie Wolf, county sheriff direct from her possession. The wound was explored further and the stump of the aorta was felt and appeared to be completely shattered by the gunshot as well as the vena cava. X-ray was inspected and showed the BBs that had entered from the left side now present scattered through the right abdominal cavity, lower chest and diaphragm. Code was called with patient sustaining non-survival injury.


John A Malm MD

cc: Malm, John A MD

D: 10/24/09 1500 Malm, John A MD

Meditech report ID number: 1026-0421 Facility: GHC/MR

Medical Records' copy

Page 1 of 2

ER REPORT

OFFENSE REPORT

OFFENSE: Unattended Death

CASE: 088-09

**PLACE OF OFFENSE: 335th Ave.
283rd St.**

COUNTY: Gregory

DATE OF OFFENSE: 10-24-09

OFFICER: Wolf 301A

SUBJECT:

**Russell Ray Bertram (Home 605-271-8866 Cell 605-351-3245)
"Russ Bertram"
613 South Newton Place
Sioux Falls, SD 57106
DOB: 11-28-51
SOC: 503664949
W/M, 6-00, 250, blu/brn**



APPENDIX 055

3. One x-ray of victim.
4. Copy of voice recording of 911 call from Russ Bertram.

NARRATIVE:

On 10-24-09 at 1346 hours, I received a call from 911 Dispatch reporting a gunshot victim being transported to the Gregory Hospital.

I arrived at the Gregory Hospital at approx. 1400 hours and learned that a 26 year old female, LEONILA DELVALLE STICKNEY, 443 North Main Street, Bridgewater, SD, had been brought in by her boyfriend with a gun-shot wound to the left lower chest.

FIRST INTERVIEW: RUSS BERTRAM, GREGORY HOSPITAL

I spoke first to the boyfriend, a RUSS BERTRAM, 613 South Newton Place, Sioux Falls, SD, asking him to give me his account of what had happened. His statement was that he and his girlfriend, LEONILA STICKNEY of Bridgewater, S.D. were 5 miles north of Gregory on 283rd Street, a section line road, when he exited the vehicle, shot a pheasant and then returned to the vehicle to leave. He stated that he opened the driver's door, and with his left hand, was putting his 12 gauge shotgun into the front seat with his right hand, when LEONILA grabbed the barrel of the gun, and said, "Kiss me". He stated that he was not sure if he had his finger on the trigger of the gun, but that at the moment she grabbed the barrel, the gun went off, striking her in the chest. He said that he immediately called 911, and drove directly to the Emergency Room at the Gregory Hospital.

At this point I asked MR BERTRAM to accompany Deputy TIM DREY to the scene of the shooting, I asked Deputy DREY to attempt to locate the spent shell casing used to kill the pheasant. When the two returned Deputy DREY stated that he was unable to find the spent casing in the area where MR BERTRAM had told him that he had shot the pheasant. BERTRAM stated that he wasn't sure, because he reloads shells, if he picked up the casing and threw it in the pickup or if it should have been still lying in the area where he fired the shot.

The emergency room staff were at that time working on the patient. I then did a short inventory of the BERTRAM vehicle, noting blood on the front passenger's seat, a 12 gauge Remington 870 pump shotgun, located between the drivers and passengers front seats, and two boxes of Winchester 4 shot shells, with one box missing 7 rounds, located on the rear drivers side seat. In the back of the pickup, and inside the topper were three dead pheasants, two were cold to the touch, and

one was still slightly warm, indicating that it had died more recently than the other two.

INTERVIEW: DR JOHN MALM, GREGORY HOSPITAL

A short time later I spoke to DR JOHN MALM, who told me that the young lady had not survived. I then entered the emergency room and examined the body, finding a 1 and ½ inch diameter wound in the left upper chest, located approx. 2 inches below and to the left, of the left breast. An incision had been made by DR MALM, leading from the wound towards the center of the chest, in an attempt to save the individual. There was a hole of approx. the same size in both garments worn by the victim, along with powder burns on both. MALM stated that he had found the wad from the round approx. 3 to 4 inches inside of the wound. He stated that the shot had severed the aorta, and possibly struck the heart. He continued by saying that they were unable to get a heart beat at any time during their attempts to resuscitate the victim.

INTERVIEW: CRISTI HAMILTON, JOAN GRIM GREGORY HOSPITAL

I then spoke to CRISTI HAMILTON, and JOAN GRIM both employees of the Gregory Hospital. These two ladies were the first to enter the BERTRAM vehicle when it arrived. HAMILTON stated that the young lady was seated in the passenger's seat leaning against the door when she opened it. That she was unresponsive and that there was very little blood present.

SECOND INTERVIEW: RUSS BERTRAM, GREGORY HOSPITAL

After Deputy DREY and BERTRAM returned I spoke to MR BERTRAM. I told him that MS STICKNEY had died of her wounds, then gave him a few minutes to collect himself, and again asked him to tell me about the accident. His statement at this point was the same as he had told me the earlier. His demeanor was stoic; he showed very little emotion considering the circumstances. He answered my questions pointedly, his voice nor his demeanor never changing. I explained to him that I was going to take his shotgun and shells, and asked him if there was anyone I should contact about the incident. He replied that he would take care of all of that. He appeared to be sad, but not distraught, and told me that he was alright, and could drive himself home. MS STICKNEY'S personal affects, including her cell phone, were released to BERTRAM, and he left the hospital.

BERTRAM'S vehicle was then photographed; the gun and a partial box of Winchester Super X shells were removed and seized as evidence.

10/24/09 9:46 PM

Sent to Nila: You going to bucks?

10/25/09 6:36 PM

Sent to Nila: Tell adrian happy birthday from the guy

10/28/09 2:58 PM

Sent to Nila: Do you miss me yet?

10/31/09 5:48 PM

Sent to Nila: I miss you

11/5/09 3:11 PM

Sent to Nila: Hey its been two weeks so what's up do I get to see you?

11/9/09 9:25 PM

From Nila: NO I can't see you any more

11/9/09 9:27 PM

Sent to Nila: Ok can you tell me why not then?

11/9/09 9:34 PM

Sent to Nila: I really do like you a lot and want a relationship with you I have miss you a lot and just don't understand why you won't see me anymore

11/9/09 9:36 PM

From Nila: I'm married

11/9/90 9:37 PM

Sent to Nila: No divorce then and what about pregnancy



11/9/09 9:39 PM
From Nila: youthefather

11/9/09 9:40 PM
Sent to Nila: I know that never questioned that so your not getting divorced then?

11/9/09 9:41 PM
From Nila: would you marry me its your baby

11/9/09 9:46 PM
From Nila: no answer

11/9/09 9:47 PM
Sent to Nila: If I felt you loved me enough and I was convinced that it was the right thing for all of us me you adrian and baby and steph

11/9/09 9:48 PM
Sent to Nila: Just dnt know what your feeling

11/9/09 9:49 PM
Sent to Nila: You didn't answer about your divorce

11/9/09 9:53 PM
Sent to Nila: Are you getting back with your x?

11/9/09 9:53 PM
From Nila: yes what did you feel when you were fucking me did you like it

11/9/09 9:57 PM
Sent to Nila: Call me on your break

11/9/09 9:58 PM
From Nila: write me now

11/9/09 10:01 PM
From Nila: NO

11/9/09 10:02 PM
Sent to Nila: Just want to make sure I'm talking to you and not someone who has your phone

11/9/09 10:03 PM
From Nila: yes you are talking to me

11/9/09 10:04 PM
Sent to Nila: Prove it

11/9/09 10:06 PM
From Nila: I want to know if you think I was good in bed

11/9/09 10:11 PM
Sent to Nila: Who is this?

11/9/09 10:20 PM
Sent to Nila: If this is nila what did I say to you when we met

11/9/09 10:35 PM
Sent to Nila: Well?

11/10/09 7:52 PM
Sent to Nila: Hi

11/14/09 9:33 PM
Sent to Nila: hi whatcha doing

11/24/09 4:07 PM
From Nila: I want to know if you think I was good in bed

11/24/09 3:24 PM
Sent to Nila: Of course you where great. y that important and how r things going I miss you

12/15/09 12:22 AM
Sent to Nila: So what's up are you going to talk to me should I get a lawyer what's going on? I don't know what to do here

Doug Dailey

From: Clint Sargent [clint@meierhenrylaw.com]
Sent: Monday, July 25, 2011 11:46 AM
To: Doug Dailey
Subject: Stickney Matter

AmicusDealtWith: Yes
AmicusFileId: 1787
AmicusFileName: Stickney, David - Nila Probate
AmicusId: 99861
AmicusStatus: Saved

Doug --

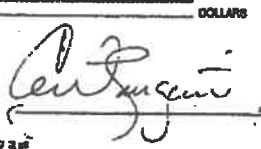
I forgot to mention in our conversation that it will be my recommendation that any insurance proceeds that go to Russ under the NY Life policy will not go to Russ, personally, but will go directly into a trust with Leonila's family as the beneficiaries. I want it to be clear and binding that Russ will not receive any benefit from these proceeds. I am sure you can explain to your client that once the money is placed in trust, he doesn't have to worry about Russ keeping the money and not giving it to her family. It might be a good idea for your client to agree to a similar trust for his son. This should take the emotion out of it on both sides.


Thanks much. I look forward to hearing from you.

Best, Clint

DIN: 299290838	
Iti inst BRANCH 29	01/03/2012 Amount: \$178665.97 AN: 3773894 DDA Credit 101
AUX RT291471134	TC 009
1/3/2012 - 0 - \$178,665.97	

1/3/2012 - 0 - \$178,665.97	
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BERTRAM SARGENT LLP TRUST ACCOUNT 810 S. PHILLIPS AVE. SIOUX FALLS, SD 57104-0815 (605) 336-0075		6207 12/2012
PAY TO THE ORDER OF <u>Bertram, Russ</u> One Hundred Seventy-Eight Thousand Six Hundred Sixty-Five and 97/100	\$178,665.97 DOLLARS	
MEMO <u>Bertram Settlement Distribution</u> ⑈006207⑈ ⑈0911400172⑈ ⑈090023373⑈		
1/3/2012 - 6207 - \$178,665.97		

	
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DIN: 299291024

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BRANCH 29

07/03/2012
Amount: \$142970.00
AN: 3773994

DDA Credit
101

AUX RT291471134 TC 009
7/3/2012 - 0 - \$142,970.00

7/3/2012 - 0 - \$142,970.00

MEMPHIS SARGENT LLP
TRUST ACCOUNT
319 S. PHILLIPS AVE.
SIOUX FALLS, SD 57104-6816
(605) 339-3073

WACOMER BANK
78-17854

5867

8/28/2012

PAY TO THE ORDER OF Bertram, Russ \$142,970.00

One Hundred Forty-Two Thousand Nine Hundred Seventy and 00/100 DOLLARS

Bertram, Russ

MEMO Bertram Settlement Distribution

005867 0091400172 050023373

7/3/2012 - 5867 - \$142,970.00

7/3/2012 - 5867 - \$142,970.00

EXHIBIT

24

APPENDIX 063

SETTLEMENT AGREEMENT & MUTUAL RELEASE OF ALL CLAIMS

WHEREAS Leonila D. Stickney was shot in a hunting accident on October 24, 2009, in Gregory County, South Dakota, by a shotgun being operated by Russ Bertram, hereinafter referred to as "the accident";

WHEREAS Leonila D. Stickney suffered personal injuries and consequently died as a result of the accident;

WHEREAS at the time of the accident, Leonila D. Stickney was separated, but still legally married to David Stickney;

WHEREAS Leonila D. Stickney and David Stickney had a minor child together, Adrian B. Stickney, and David Stickney remains the custodial parent of said minor child;

WHEREAS David Stickney was duly appointed as Personal Representative of the Estate of Leonila D. Stickney, hereinafter referred to as "Estate";

WHEREAS attorney Mike Fink was appointed by the Court as the guardian ad litem for the minor child for the purpose of representing the interests of the minor child in the settlement of all claims of the Estate against Russ Bertram, and handling of the life insurance proceeds of the below referenced New York Life policy and Globe Life and Accident Insurance Company policy both written upon the life of Leonila D. Stickney.

WHEREAS Leonila D. Stickney was the insured under a life insurance policy with New York Life Insurance Company, Policy No. 49 201 060, with a death benefit of \$750,000, hereinafter referred to as "NY Life Policy";

WHEREAS Leonila D. Stickney was the insured under a life insurance policy with Globe Life and Accident Insurance Company, Policy No. 001b96918, with a death benefit of \$20,000 and \$150,000 of accidental death coverage, hereinafter referred to as "Globe Life Policy";

WHEREAS at the time of the accident, Russ Bertram was the fiancé of Leonila D. Stickney, and the named beneficiary on both the NY Life Policy and Globe Life Policy;

WHEREAS New York Life Insurance Company has indicated its willingness to pay the full death benefit plus interest under its policy, but has received competing claims from the Estate and Russ Bertram;

WHEREAS New York Life Insurance Company has agreed to distribute the proceeds of the NY Life Policy in whatever manner is agreed to by David Stickney, individually and as Personal Representative of the Estate of Leonila D. Stickney, Mike Fink, as guardian ad litem of Adrian B. Stickney, and Russ Bertram;

WHEREAS Globe Life and Accident Insurance Company has refused to distribute any proceeds under its policy until it receives additional information from the Estate and/or Russ Bertram;

WHEREAS the parties have reached an agreement regarding the distribution of life insurance proceeds and the settlement of all claims between the parties;

NOW THEREFORE, it is hereby agreed as follows:

1. The Estate will receive \$600,000.00 from the NY Life Policy.
2. Any proceeds from the NY Life Policy over \$600,000.00, whether in the nature of death benefits, interest or any other payment, will go to Russ Bertram for the benefit of Leonila D. Stickney's family in the Philippines.
3. Any proceeds from the Globe Life Policy, whether in the nature of death benefits, interest or any other payment, will go to Russ Bertram.
4. David Stickney, individually and as Personal Representative of the Estate and Mike Fink, as guardian ad litem of Adrian B. Stickney, will cooperate with the processing of the Globe Life Policy claim and provide any information needed to complete the claim.
5. David Stickney, individually and as Personal Representative of the Estate and Mike Fink, as guardian ad litem of Adrian B. Stickney, will notify Globe Life and Accident Company that the Estate, David Stickney, and Adrian B. Stickney, are withdrawing any claims previously made or claims they may have for payments under the Globe Life Policy and the Estate, David Stickney, and Adrian B. Stickney, have no objection to the proceeds of the Globe Life Policy being distributed to Russ Bertram.
6. David Stickney, individually and as Personal Representative of the Estate of Leonila D. Stickney and Mike Fink, as guardian ad litem of Adrian B. Stickney, do hereby fully and forever release and discharge Russ Bertram from any and all liability, claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities for any personal or bodily injury, medical expenses, wrongful death damages, loss of consortium, survival damages, restitution, claims for life insurance proceeds or other benefits and all other damages which David Stickney, Adrian B. Stickney or the Estate of Leonila Stickney may have or claim to have or in the future may have in any manner whatsoever, directly or indirectly, arising out of the injury and death of Leonila Stickney on October 24, 2009.

This settlement and release is intended to include and apply to all injuries resulting from the accident, and all past, present and future effects of such injuries, whether such injuries and the effects thereof are now known or unknown.

7. Russ Bertram does hereby fully and forever release and discharge David Stickney, the Estate of Leonila D. Stickney and Adrian B. Stickney, the minor child of David and Lenolia Stickney, from any and all liability, claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities for life insurance proceeds or other benefits owed as a result of the death of Leonila Stickney.
8. In exchange for payment of the full policy proceeds under the NY Life Policy and upon receipt of payment thereof, David Stickney, individually and as Personal Representative of the Estate of Leonila D. Stickney and as natural parent of Adrian B. Stickney, Mike Fink, as guardian ad litem of Adrian B. Stickney, and Russ Bertram do hereby fully and forever release and discharge New York Life Insurance Company from any and all liability, claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities for life insurance proceeds or other benefits owed as a result of the death of Leonila Stickney.
9. There are hereby discharged and released not only the person or persons, corporation or corporations specifically named herein as discharged and released, but also in like manner and to the same extent all other persons and corporations whatsoever such as are classed as joint tortfeasors under South Dakota law, completely barring any right of action against any of such joint tortfeasors whether or not named herein, and vesting in the parties, all rights whatsoever under such laws as to contribution from any such joint tortfeasor not specifically named herein.
10. The parties agree that David Stickney and Mike Fink will determine how the proceeds received by the Estate under this agreement will be divided up among the respective interests. David Stickney and Mike Fink agree to obtain all necessary court approval concerning the payments made under this agreement.
11. It is agreed that this settlement is in full compromise of disputed claims, both as to the question of liability, if any, and as to the nature and extent of any damages, and that nothing herein is to be construed as an admission of liability by any party.
12. The undersigned represent that they have read and understand the terms of this agreement and release and have voluntarily entered into this agreement willingly, knowingly, and voluntarily, and have executed the same as their own free and knowing act. Further, the undersigned represent that they have had the opportunity to have this agreement reviewed by legal counsel of their own choice.
13. This document contains the entire agreement between the parties hereto, and the terms of this release are contractual and not a mere recital.
14. The parties agree this document may be signed in counterparts and copies have the same force and effect as the originals.

Dated this 19th day of October, 2011.

David Stickney

David Stickney, individually, and as
Personal Representative of the Estate of
Leonila D. Stickney and as natural parent of Adrian
B. Stickney

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF Dawson)

On this 19 day of October, 2011, before me, the undersigned officer,
personally appeared David Stickney, individually, and who also acknowledged himself to be the
Personal Representative of the Estate of Leonila Stickney and the natural parent of Adrian B.
Stickney, and that he individually, and as such Personal Representative of the estate of Leonila
D. Stickney and natural parent of Adrian B. Stickney, being authorized so to do, executed the
foregoing instrument for the purposes therein contained by signing his name individually and as
Personal Representative of Leonila D. Stickney an as natural parent of Adrian B. Stickney.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Douglas M. Dailey
Notary Public

My Commission Expires: 12-5-15
Notary Print Name: Douglas M Dailey

Dated this 19 day of October, 2011.

Mike Fink
Mike Fink, as Guardian ad litem of
Adrian B. Stickney

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF McCook)

On this 19 day of October, 2011, before me, the undersigned officer, personally appeared Mike Fink, who acknowledged himself to be the guardian ad litem of Adrian B. Stickney, and that he and as such guardian ad litem of Adrian B. Stickney, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing his name as the guardian ad litem of Adrian B. Stickney.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

[Signature]
Notary Public
My Commission Expires: 12-5-15
Notary Print Name: Douglas D. Bailey

Dated this 17 day of OCT, 2011.

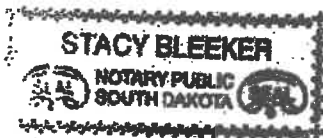


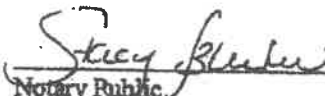
Russ Bertram

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF Minnehaha)

On this 17 day of October, 2011, before me, the undersigned officer, personally appeared Russ Bertram, known to me to be the person who is described in and who executed the within and foregoing instrument and acknowledged to me that he executed the same freely.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.





Notary Public.
My Commission Expires: 11-17-16
Notary Print Name: Stacy Bleeker

Re: MISS YOU SO MUCH

Subject: Re: MISS YOU SO MUCH
From: rr bert <rr_bert@yahoo.com>
Date: 11/08/2010 4:10 PM
To: Melisa Del Valle <simplemelisa@yahoo.com>

Melissa

Please take this letter to a lawyer in the philippines and have him send it to my lawyer.

Clint Sargent

315 S. Phillips Ave.

Sioux Falls, South Dakota

That is my lawyers name and address, please have your lawyer send him a letter something like this.

Dear Clint

This letter is from the family of Leonila Stickney, Leonila told her sister Melissa Delvalle in Dec of 2008 that she was takeing out a life insurance policy for her family in the philippines, she was makeing Russ Bertram the benificiary because he lived in the USA and would distribute the money to her family if something happened to her. Leonila was going to file for divorce and was affraid of what David Stickney would do to her.

I (Melissa DelValle) feel that my family should get the money from the insurance because that is what my sister wanted.

Russ Bertram will give my family the money once he recieves it from the insurance company. David Stickney does not deserve any of this because it was intended for us in the Philippines.

We pray that you will get the money so Russ Bertram can give it to our family.



Re: MISS YOU SO MUCH

Thank you,

Melissa DelValle

From: Melisa Del Valle <simplemelisa@yahoo.com>

To: r_bert@yahoo.com

Sent: Sat, June 19, 2010 9:39:03 PM

Subject: MISS YOU SO MUCH

HUNEY,

**HOW ARE YOU? I EMAIL YOU ITS BCOZ I MISS YOU SO MUCH AND I AM
WONDERING WHY YOU SENT ME EMAIL WITHOUT KNOWING ME THAT YOUR
HOME I MISS YOU HUN, HOPE YOU WILL CALL ME WHEN YOU GOT
HOME, MWAHHH. LOVE YOU SO MUCH....**

LOVE & CARE, MELISSA

12 November 2010

Clint Sargent
315 S. Phillips Ave.
Sioux Falls, South Dakota 57104

Dear Mr. Sargent,

Good day!

I am writing in behalf of the family of the late **Leonila Stickney**, who was my younger sister.

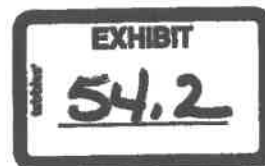
Sometime in December of 2008, my sister Leonila told me that she was taking out a life insurance policy for her family here in the Philippines. She said that she was making **Russ Bertram** the beneficiary of the life insurance policy because he lived in the USA and he promised to remit and distribute the insurance proceeds to her family here in the Philippines if something happened to her. Leonila was going to file for divorce and was afraid of what her husband, **David Stickney**, would do to her.

I strongly believe that my family should get the money from the insurance because that is what my sister wanted. Russ Bertram will give my family the money once he receives it from the insurance company. David Stickney does not deserve any of this because it was intended for us here in the Philippines. I, together with my family, pray that you will be able to find a way to get the money from the insurance company so Russ can give it to our family.

Thank you and more power to you.

Very truly yours,

Melissa DelValle
Melissa DelValle
Purok # 1 Gamaon,
Mangagoy, Bislig City,
Surigao del Sur, Philippines



Bertram
012

From: Melissa G. Del Valle
Purok #1 Camaron
Mangagoy, Bislig City
Surigao del Sur
Philippines 8311

NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

5710485318

To: Clint Sargent
315 S. Phillips Ave.
Sioux Falls, South Dakota
57104



1	STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	SS	
2	COUNTY OF GREGORY)	SIXTH JUDICIAL CIRCUIT
3	STATE OF SOUTH DAKOTA,	CR #15-72
4	Plaintiff,	TRANSCRIPT OF
5	vs.	MOTIONS HEARING
6	RUSSELL RAY BERTRAM,	
7	Defendant.	
8		

9
10 BEFORE: THE HONORABLE KATHLEEN F. TRANDAHL,
11 Circuit Court Judge of the Sixth Judicial
Circuit, in Winner, South Dakota, on
the 28th day of January, 2016.

12
13 APPEARANCES:

14 MR. PAUL SWEDLUND
15 Assistant Attorney General
16 1302 E. Hwy 14
Pierre, South Dakota 57501;
17 Counsel for the State.

18	MR. MICHAEL BUTLER	MR. CLINT SARGENT
19	100 S. Spring Ave, Ste 210	315 S. Phillips Ave
20	Sioux Falls, SD 57104	Sioux Falls, SD 57104
21	Counsel for the Defendant.	

22 -----
23 Mona G. Weiger, RPR
24 Official Court Reporter
25 PO Box 1238
Pierre, SD 57501
605-773-3971

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1 questions. Do you have your narratives up there of
 2 your investigation?
 3 A. I do.
 4 Q. Could you turn to page 32?
 5 A. You said 32, Mike?
 6 Q. Yes. Now, the paragraph that begins on 4-19-12,
 7 do you see that?
 8 A. Yes.
 9 Q. You received a phone call from Jessica Archambeau
 10 from Wells Fargo's subpoena department informing you
 11 they would have to notify Russ Bertram of the subpoena
 12 that you had apparently sent them if you did not
 13 provide Wells Fargo with a letter citing statutory
 14 requirement to gag the subpoena. So then you told
 15 Wells Fargo to hold off. Is that how I read that?
 16 A. Correct.
 17 Q. And that you would try to get a Grand Jury
 18 subpoena instead? The next paragraph.
 19 A. Oh, the next paragraph. Yeah, because I told her
 20 I would attempt to obtain a letter from the Gregory
 21 County State's Attorney, but then I subsequently
 22 contacted the attorney and requested a Grand Jury
 23 subpoena.
 24 Q. And would that be for the reason of not letting
 25 Mr. Bertram know you were obtaining his records?

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1 A. Yes.
 2 MR. BUTLER: I don't have any other questions.
 3 THE COURT: Redirect?
 4 MR. SWEDLUND: Thank you, Your Honor.
 5 REDIRECT EXAMINATION
 6 Q. (By Mr. Swedlund) After the 2011 interview whose
 7 investigation was this? After you hold this interview
 8 on January 21, 2011, whose investigation did this
 9 become?
 10 A. Primarily my investigation working with the
 11 sheriff's office. I mean South Dakota DCI is an
 12 assist agency but we're the agency that conducts the
 13 major criminal investigations in the state assisting
 14 local law enforcement.
 15 Q. And if the Attorney General had said, well, even
 16 if Sheriff Wolf doesn't want to go forward, we are,
 17 would your investigation have gone forward?
 18 A. I would still have jurisdiction to continue my
 19 follow-up investigation, yes.
 20 Q. So at the time that Sheriff Wolf made the
 21 statement that the decision was his, was the decision
 22 actually his?
 23 A. No. I mean Charlie can say that but he doesn't --
 24 he can't really cut off anybody's investigation.
 25 MR. SWEDLUND: And subject to my objection over

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1 the reference to polygraphs, Your Honor, I would like
 2 to continue with some questioning in that regard, if
 3 that's all right.
 4 THE COURT: You may.
 5 Q. (By Mr. Swedlund) So Mr. Sargent told you that he
 6 was satisfied this was an accident because his client
 7 supposedly passed a polygraph?
 8 A. That's correct.
 9 Q. And if this wasn't an accident -- if this was an
 10 accident then this was not a crime?
 11 A. Correct.
 12 Q. So Mr. Sargent tells you he's there because he's
 13 satisfied there isn't a crime?
 14 A. Correct.
 15 Q. And this polygraph that Mr. Bertram supposedly
 16 passed, did DCI end up eventually taking a look at
 17 that polygraph test?
 18 A. Yes.
 19 Q. And was DCI satisfied that it was a valid test?
 20 A. DCI was not satisfied with the validity of the
 21 test.
 22 Q. So as you sit here, would you say that Mr. Bertram
 23 ever passed a polygraph?
 24 A. I would say no based on what the DCI polygraphist
 25 told me.

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1 Q. And during the 2011 interview did you ask
 2 Mr. Bertram if he would take a DCI administered
 3 polygraph?
 4 A. I did ask that, yes.
 5 Q. And did he agree to do that?
 6 A. Mr. Sargent spoke up and said that we would
 7 revisit that. He recommended I speak with
 8 Mr. Pankratz first and look at their charts.
 9 Q. What was the purpose of speaking to Mr. Pankratz
 10 first?
 11 A. I guess to see if we were satisfied with the
 12 validity of Pankratz' test.
 13 Q. And then because you weren't satisfied, did you
 14 then ask to have Mr. Bertram take a polygraph test?
 15 A. Yes.
 16 Q. And did he agree to do that?
 17 A. No.
 18 Q. And were you advised that Mr. Bertram was
 19 polygraphed this last Monday at the Minnehaha County
 20 Jail by his own lawyer?
 21 A. I was told that there was an arrangement to do a
 22 polygraph. I think it would have been like the 22nd
 23 or something.
 24 Q. And has any passing polygraph test been provided
 25 to you as a result of that polygraph a week ago?

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1 A. No.
 2 Q. Now, you were present at the Grand Jury
 3 proceedings?
 4 A. Yes.
 5 Q. And was Mr. Bertram ever called to the Grand Jury?
 6 A. No.
 7 Q. Did Mr. Bertram's lawyer show up at the Grand
 8 Jury?
 9 A. Grand Jury, no.
 10 Q. So Mr. Bertram was never called to appear and
 11 appeared with representation before the Grand Jury?
 12 A. That's correct. He was not called or represented.
 13 Q. In your experience do attorneys wearing their
 14 criminal defense attorney hat come to interviews with
 15 DCI agents and allow their clients to make
 16 incriminating statements?
 17 A. I can't think of one that I've had.
 18 MR. BUTLER: I'm going to object to the
 19 question in that it states a legal factual conclusion
 20 of incriminating statement. That may be his
 21 characterization of it but, obviously, that would
 22 be -- whether it's incriminating or not is a separate
 23 matter.
 24 No one's going to dispute, Judge, the gun went
 25 off, our client was holding the gun and as a result,

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1 Ms. Stickney died. But his characterization as it's a
 2 conclusory statement, an incriminating statement, I
 3 think it's inappropriate to be on the record.
 4 MR. SWEDLUND: I asked him a statement about
 5 his experience with criminal lawyers. He's a DCI
 6 agent. He knows the elements of crimes. He knows if
 7 criminal defense lawyers allow their clients to make
 8 incriminating statements or not based on his
 9 experience because what we're talking about is whether
 10 he thought Mr. Sargent was at this 2011 interview in a
 11 criminal or civil capacity.
 12 THE COURT: I'll allow the answer.
 13 A. Could I get the question?
 14 Q. (By Mr. Swedlund) In your experience, do
 15 attorneys who are wearing their criminal defense
 16 attorney hat come to interviews with DCI agents and
 17 allow their clients to make incriminating statements?
 18 A. No.
 19 Q. So as far as you were concerned, your side of the
 20 table -- what's the objective of your side of the
 21 table during that interview?
 22 A. I'm a criminal investigator listening and asking
 23 questions to find out if a crime was committed.
 24 Q. Based on the representations made to you during
 25 the interview by Clint Sargent, what was the other

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1 side of the table, what was their objective?
 2 A. Their objective was to appear to cooperate with
 3 the sheriff because they were pursuing the insurance
 4 payout from the life insurance policies.
 5 Q. Do you have the McCook County document that was
 6 referred to?
 7 A. I don't think we referred to one.
 8 Q. Let me ask you this: Were there additional civil
 9 proceedings, to your knowledge?
 10 A. Regarding the insurance, yeah.
 11 Q. Yes. And was the insurance paid?
 12 A. Yes.
 13 Q. And with respect to the New York Life Insurance,
 14 how was that payment made to Mr. Bertram?
 15 A. New York Life sent a check to the Melerhenry,
 16 Sargent trust account.
 17 Q. So to your knowledge was Melerhenry, Sargent
 18 representing him in fact in those civil proceedings?
 19 A. Yes.
 20 MR. SWEDLUND: I have nothing further, Your
 21 Honor.
 22 THE COURT: Recross?
 23 RECROSS-EXAMINATION
 24 Q. (By Mr. Butler) What was the incriminating
 25 statements that you were referring to that were made

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1 In the interview you had in January of 2011 while
 2 Mr. Sargent was present?
 3 A. He had told Dr. Malm, according to Dr. Malm's
 4 report, that she grabbed the barrel, pulled it towards
 5 her and said, "Kiss me." During the interview he
 6 said, Well, I didn't see her tug on the -- grab the
 7 barrel; I was looking the other way; I felt a tug.
 8 And then he had, according to Sheriff Wolf, had
 9 said the door was open or closed and the statement
 10 that he made during the interview that I was present
 11 for contradicted that. And his description of the
 12 events and the handling of the gun and it went off
 13 would lead me to believe that that was reckless, which
 14 is a crime.
 15 Q. Well, you said it was reckless. He didn't agree
 16 with you. In fact you stated it several times to him
 17 and he didn't agree that he was reckless; is that
 18 right?
 19 A. I think that was in the second interview.
 20 Q. Well, before you went to meet Mr. Bertram and
 21 Clint Sargent, you had the benefit of reading the
 22 sheriff's initial interview done of Bertram?
 23 A. The sheriff's report?
 24 Q. Right.
 25 A. Yes.

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STATE OF SOUTH DAKOTA)	IN THE CIRCUIT COURT
)	
COUNTY OF GREGORY	ss	OF THE SIXTH JUDICIAL CIRCUIT
<hr/>		
THE STATE OF SOUTH DAKOTA,)	
)	
Plaintiff,)	Case No. 26CRI15-000072
)	
vs.)	Transcript of:
)	
RUSSELL RAY BERTRAM,)	JURY TRIAL, VOLUME 6 OF 10
)	Pages 625 through 796
Defendant.)	
<hr/>		

THE HONORABLE KATHLEEN F. TRANDAHL

GREGORY COUNTY COURTHOUSE
225 8 AVENUE EAST
GREGORY, SOUTH DAKOTA 57523

September 20, 2016

REPORTED BY: ED MIDGLEY,
Official Court Reporter
(605) 842-3552

2200 Bertram

1 canceled?

2 A If the premium's not paid, the policy holder has a 31-day
3 grace period, during which there's still coverage; but, after
4 that, then the coverage terminates.

5 Q Globe Life didn't send people out to interview witnesses?

6 A Not to my knowledge.

7 Q Globe Life didn't -- there was no civil trial.

8 A No, not to my knowledge.

9 MR. HANSON: That's all I have.

10 THE COURT: Any further questions, Mr. Sargent?

11 MR. SARGENT: No, your Honor.

12 THE COURT: You may step down. Thank you.

13 THE WITNESS: Thank you.

14 THE COURT: The State may call their next witness.

15 DOUG DAILEY,

16 called as a witness by the State, having been duly sworn, was
17 examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. SWEDLUND:

20 Q Can you state your name, please, for the record.

21 A Good morning. Doug Dailey.

22 Q And, Doug, how are you employed?

23 A I'm an attorney in Mitchell, South Dakota.

24 Q Do you have an area of specialization in your practice?

25 A Pretty general. I do a lot of domestic work, criminal

1 Q Okay. And, what was Mr. Sargent's response to that?

2 A My notes have the quote of, "no way."

3 Q So, that's a direct quote from Mr. Sargent.

4 A According to my notes.

5 Q What did Mr. Sargent tell you about his reason for saying,
6 "no way"?

7 A Just that they disputed that it was an intentional act.

8 Q And, did he say that the proceeds had another --.

9 MR. SARGENT: Your Honor, I'm just going to object. If Mr.
10 Swedlund is going to ask about things we talked about, I have
11 no objection to that. But, I hope that then opens the door to
12 everything that we talked about in that conversation.

13 THE COURT: It does. You may continue.

14 Q (By Mr. Swedlund) Proceed.

15 A Well, just that he disagreed. I don't -- you know, as far
16 as the details, I don't really know how in depth we got in to
17 the details of that. But he just disagreed.

18 Q And did he also say that the proceeds were earmarked for
19 some other purpose?

20 A Yes. In fact, he said they were earmarked to go to Nila's
21 family in the Philippines, as I understood it.

22 And, we had -- there was some discussion about whether they
23 should first go to the benefit of her son, the five-year old,
24 who was with Mr. Stickney or not.

25 Q And, was Mr. Sargent agreeable to that?

1 an email from Clint, is it?

2 A No, this is a phone call note.

3 Q Okay. Never mind, then. Okay, so we were at the point
4 where we were talking about the settlement agreement.

5 A Well, the settlement offer, I guess.

6 Q Settlement offer; okay. What was the offer floating around
7 in July of 2011?

8 A Well, essentially, you know, what the ultimate agreement
9 came to be was that, of the New York Life insurance policy, the
10 estate would receive \$60,000. The balance would go
11 Mr. Bertram for the benefit of Leonila's family.

12 And, then whatever proceeds, if any, were with the Globe
13 Life insurance policy, would be for Mr. Bertram.

14 Q So, how did it come about that this Globe money all goes to
15 Mr. Bertram?

16 A Well, there was an issue with regard to whether, one, it
17 was going to be paid out. It was a policy that had a \$25,000
18 life -- or, excuse me, face value on Nila's life; but it also
19 had -- if I recall correctly, it had a larger payout if the
20 death was determined to be accidental.

21 Q Okay.

22 A It got to a point where the matter was getting basically
23 drug out long enough that my client wanted to get the matter
24 over with. They intended to move out of South Dakota.

25 And, so it really was not something that he wanted to spend

1 the time and effort necessary to pursue that further.

2 Q Okay.

3 THE COURT: What exhibit number, please?

4 MR. SWEDLUND: I haven't offered this yet. Let me give you
5 a copy. If you can take a look at what we've marked as 40.1?

6 THE COURT: Say the number again?

7 MR. SWEDLUND: 40.1, your Honor. I'm sorry.

8 THE COURT: Thank you.

9 A It appears to be a copy of a settlement agreement and
10 mutual release that was signed by myself and Mr. Bertram and
11 the parties to the agreement.

12 Q Okay. I would move the admission of 40.1, your Honor.

13 MR. SARGENT: No objection.

14 THE COURT: Exhibit 40.1 is admitted.

15 (State's Exhibit 40.1 was
16 received into evidence.)

17 Q (By Mr. Swedlund) Can you also look at 40, please?

18 A This appears to be a settlement agreement and release that
19 was signed by the parties to include the New York Life
20 Insurance Company.

21 Q (By Mr. Swedlund) Okay. So, why -- I would like to move
22 for the admission of 40 as well, your Honor.

23 MR. SARGENT: No objection.

24 THE COURT: Exhibited 40 is admitted.

25

*

1 A Okay.

2 Q There was no interpleader filed?

3 A Correct.

4 Q So, was there any opportunity for a judge to hear evidence
5 about "accident" or "intentional" or "unintentional" or
6 anything like that and to enter a ruling on that?

7 A No, because we came to an agreement between Mr. Bertram and
8 the estate.

9 Q Okay. And, the probate -- what does the probate judge do
10 in this context? Does the probate judge make a decision about
11 whether it's an accident or intentional or anything like that?

12 A No.

13 Q And, did any witnesses ever testify in any proceedings in
14 court about whether it's an accident or anything like that?

15 A No. It was a mere compromise, meaning the two sides
16 completely disagreed over what led to Nila's death, and they
17 determined that they just wanted to resolve the matter without
18 having to go through I guess interpleader action or other court
19 process to try to make that determination.

20 Q Okay.

21 A If I recall correctly, if I may, my client wanted to move
22 forward, and he was talking about moving to Europe, I think, at
23 the time, and he didn't want to -- he knew that litigation
24 could be drawn out and take a significant amount of time.

25 So, it was his intent to get the matter resolved and move

1 on.

2 Q So, he just wanted it done with.

3 A Yes.

4 MR. SWEDLUND: Nothing further at this time, your Honor.

5 THE COURT: All right. We'll take our first break of the
6 morning. I must again remind the jurors that it is your duty
7 not to discuss or express any aspect of this case amongst
8 yourselves or with anyone else, and that you should not form or
9 express any opinion on this case until it is given to you for
10 your decision.

11 We'll will reconvene at five minutes to 11:00. Enjoy your
12 break. Thank you. Please stand for the jury.

13 (Whereupon, the proceedings stood in brief recess; during
14 which recess, the following proceedings were had without the
15 presence and hearing of the jury but within the presence and
16 hearing of the defendant:)

17 THE COURT: The court's on the record outside of the
18 presence of the jury. Mr. Sargent?

19 MR. SARGENT: Your Honor, I request relief from the court's
20 order on motion in limine precluding evidence that Mr. Bertram
21 passed a polygraph examination. I think the State has opened
22 the door by representing to this jury that the reasons that Mr.
23 Stickney decided to settle this case were in large part just
24 because he wanted to get out of the country and he wanted this
25 over with fast.

1 THE COURT: You may.

2 MR. SWEDLUND: There's a portion of the letter at issue here
3 that states:

4 I wanted to let you know that Mr. Bertram did submit to a
5 polygraph examination --.

6 THE COURT: Slow down, please.

7 MR. SWEDLUND: I'm sorry.

8 -- polygraph examination with Loren Pankratz, and Mr.
9 Pankratz has opined that Mr. Bertram is telling the truth
10 regarding this being an accidental shooting. If this matter
11 does go to litigation, I will seek to have Mr. Pankratz's
12 opinion admitted as evidence. I'm aware that polygraphs are
13 generally inadmissible; however, I will be asking the court
14 to carve out an exception for life insurance litigation. If
15 I am successful, your client risks getting nothing from
16 these policies. There are certainly risks on both sides of
17 this case.

18 Now, did the fact that Mr. Bertram submitted himself to a
19 polygraph, and that his expert opined that Mr. Bertram was
20 telling the truth, have any bearing on your decision to settle
21 this case?

22 THE WITNESS: It wasn't my decision to settle the case.

23 MR. SWEDLUND: Okay. Did it have any bearing on the advice
24 that you gave your client to settle the case?

25 THE WITNESS: Honestly, I don't believe it did. If you look

1 at the state of the negotiations, we were this far apart; I
2 mean, just mere days before.

3 In fact, we made an offer to settle it for \$650,000 the day
4 before, with no strings attached to the money that was to go to
5 Bertram. And, this was the response that we had gotten to
6 that.

7 I don't recall it ever being a consideration, because
8 frankly, my client believed all along that it was an
9 intentional act.

10 MR. SWEDLUND: Okay. And, in your experience as a criminal
11 defense attorney, what's your opinion of a polygraph test?

12 THE WITNESS: Well, I don't think they're reliable. Every
13 time I've dealt with them, they come back saying they're
14 inconclusive, or something that was other than what was
15 anticipated. And, I do recall now that you bring that up,
16 having some conversation with Mr. Stickney, and I believe that
17 I would have given him my opinion as to the reliability.

18 MR. SWEDLUND: Okay. That the polygraph taken by
19 Mr. Bertram was not reliable?

20 THE WITNESS: Well, I didn't have the opinion whether that
21 one was specifically not reliable or not, but generally I don't
22 believe that they are.

23 MR. SWEDLUND: Okay. And, if this test had been reliable
24 and inadmissible in court, and proof of Mr. Bertram's claim
25 that this was an accident, then that would have entitled him to

1 the full \$900,000 of insurance money, would it not?

2 THE WITNESS: I don't necessarily agree with that. I mean,
3 it's a civil matter at that point.

4 MR. SWEDLUND: But his case for the whole 900,000 would be
5 stronger.

6 THE WITNESS: Depends on whether you believe it to be true
7 or not.

8 MR. SWEDLUND: Right. And, in any event, the bulk of the
9 money was paid to the estate.

10 THE WITNESS: I think majority of the two policies together
11 went to the estate.

12 MR. SWEDLUND: Okay. So, if the polygraph evidence had
13 reliability and strength, it wouldn't make sense for Mr.
14 Bertram to say, "pay the bulk of it to the estate," would it?

15 THE WITNESS: Well, I'd like to say no, you know. But, I
16 don't know what his thought process was. I mean, you know how
17 a civil matter can go either way.

18 MR. HANSON: Your Honor, their offer of proof that they want
19 to present to the jury includes the outcome of the polygraph,
20 so it should be barred by 403.

21 THE COURT: Any final response, Mr. Sargent?

22 MR. SARGENT: We ask the court to allow the exchange the
23 court just heard be presented to the jury. The State's shown
24 its ability to redirect on this issue, and alleviate any
25 concerns about unfair prejudice.

1 we'll see you back here at 1:15. Please stand for the jury.

2 (Whereupon, the jury was excused from and left the courtroom
3 and the proceedings stood in noon recess; after which, the
4 following proceedings continued without the presence and
5 hearing of the jury but within the presence and hearing of
6 the defendant:)

7 THE COURT: We'll go back on the record outside the presence
8 of the jury. Over the noon hour, the was provided with a
9 couple of additional cases: *Unites States v. Scheffer*, 523 U.S.
10 303; and *People v. McKinnon* (phonetic) 259 P.3d 1186. And then
11 Kelsey pulled up for me *State v. Muagva* 368 N.W. 2d 575, SD; of
12 course that was prior to *Daubert*. The court has also reviewed
13 those.

14 So, the court finds that the State did open the door as to
15 the polygraph evidence when it questioned the reasons why David
16 Stickney entered into the settlement agreement regarding the
17 insurance proceeds.

18 The letter of Clint Sargent, Exhibit 212, evidences the
19 fact that the two attorneys had discussed the fact that Bertram
20 did take a polygraph.

21 When the court applies the 403 balancing test to this
22 evidence, the court takes in to consideration the following:

23 The evidence of the polygraph is relevant to rebut the
24 assertion that David Stickney entered in to the settlement
25 agreement -- basically allowed the language regarding the

Meierhenry Sargent LLP

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CLINT SARGENT
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July 28, 2011

Via Facsimile & Email

Douglas Dailey
Morgan Theeler
PO Box 1025
Mitchell, SD 57301

Re: Stickney Life Insurance

Dear Doug:

I have communicated your client's offer to mine. We are close, but I have a counter proposal, which is:

1. The Estate receives \$600,000.00 from the New York Life proceeds. The remainder of any payments under the policy will go to Russ for the benefit of Leonila's family.
2. The Estate will cooperate with the processing of the Globe Life policy claim and provide any information needed to complete the claim. Further, the Estate will notify Globe Life that the Estate is not making a claim for the proceeds under the policy and has no objection to the proceeds being distributed to Mr. Bertram.

Please let me know if this arrangement is acceptable. If so, I will draft a formal settlement agreement.

With best regards,

MEIERHENRY SARGENT LLP

Clint Sargent

cc: Russ Bertram

315 South Phillips Avenue, Sioux Falls, South Dakota 57104
(tel) 605.336.3075 (fax) 605.336.2593
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Please let me know if this arrangement is acceptable. If so, I will draft a formal settlement agreement.

Also, I wanted to let you know that Mr. Bertram did submit to a polygraph examination with Loren Pankratz and Mr. Pankratz has opined that Mr. Bertram is telling the truth regarding this being an accidental shooting. If this matter does go to litigation, I will seek to have Mr. Pankratz's opinion admitted as evidence. I am aware that polygraphs are generally inadmissible, however, I will be asking the Court to carve out an exception for life insurance litigation. If I am successful, your client risks getting nothing from these policies. There is certainly risks on both sides of this case.

With best regards,

MEIERHENRY SARGENT LLP

Clint Sargent

cc: Russ Bertram

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**Morgan Theeler LLP
Megann Davis
Phone Call Details**

Printed by: Megann Davis

Date: Nov 4/10
Time: 2:26 PM
To: Clint Sargent - 336-3075
From: Doug Dailey
Associated File(s): Stickney, David - Nila Probate - 6037/6037-004, Misc. - /

Call Summary: Advised that we believe he intentionally killed Leonilla and that he should not be entitled to any of the proceeds. Indicated that we would be willing to not file a wrongful death lawsuit if he pays over all of the proceeds. No way.

He says the proceeds were to go to her family in the Philippines. I advised that due to his actions her 5 year old son is without a mother and that his first priority should have been to care for him and not her family.

He will visit with Russ and get back to me. He thinks I should wait to file any pleadings until the money is all deposited in an account and we can fight over the proceeds.

Duration: 0:03:41

Status: Spoke

Outstanding:

Dealt With: Yes

