IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO: 26803

JESSE JOHNSON,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE Janine M. Kern, Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal was filed on August 29, 2013.

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STATE OF SOUTH DAKOTA,
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JESSE JOHNSON
Defendant and Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Jesse Johnson, will be referred to as "Johnson." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." References to documents in the record herein will be designated as "SR" followed by the appropriate page number. References to the Grand Jury Transcript held on February 23, 2012 will be designated "GT" followed by the page number. References to the Suppression Motion Hearing held on November 8, 2012 will be designated as "MH1" followed by the appropriate page number. References to the Suppression Motion Hearing held on November 28, 2012 will be

designated as “MH2” followed by the appropriate page number. References to the Motion Hearing held on December 13, 2012 will be designated as “MH3” followed by the appropriate page number. References to the Evidentiary Hearing on May 14, 2013 will be designated as “EH” followed by the appropriate page number. References to the Jury Trial held June 4, 2013 through June 7, 2013 will be designated as “JT” followed by the appropriate page number. References to the Sentencing Hearing held August 14, 2013 will be designated as “SH” followed by the appropriate page number. References to the Restitution Hearing held on October 2, 2013 will be designated as “RH” followed by the appropriate page number. Reference to the Appendix will be designated as “Appx” followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Jesse Johnson appeals from a final judgment of conviction for First Degree Rape, Sexual Contact with a Child, and Aggravated Incest, the judgment was orally pronounced on August 14, 2013, and entered on August 16 by the Honorable Janine M. Kern, Seventh Judicial Circuit Court Judge, Rapid City, Pennington County, South Dakota and filed on August 19, 2013. (SR 264, Appx 13). Appeal is by right pursuant to SDCL 23A-32-2. Notice of appeal was filed on August 29, 2013. (SR 269).

STATEMENT OF LEGAL ISSUES

I. **WHETHER JESSE JOHNSON WAS "IN CUSTODY" ON FEBRUARY 6, 2012 FOR THE PURPOSE OF MIRANDA, AND WHETHER HIS STATEMENTS WERE VOLUNTARY?**

The trial court concluded Johnson was not in custody at the time of his February 6, 2012 interrogation for the purposes of Miranda. The trial court further found Johnson's statements were voluntary. The trial court denied Johnson's Motion to Suppress

State v. Wright 2009 S.D. 51, 768 N.W.2d 512
State v. Hoadley 2002 S.D. 109, 651 N.W.2d 249
State v. Tuttle 2002 S.D. 94, 650 N.W.2d 20
State v. Rogers 760 N.W.2d 35 (Neb 2009)

U.S. Const. Amend. 5 & 14
S.D. Const. Art. VI, Section 9

II. **WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE TESTIMONY OF DR. LESLIE FIFERMAN?**

The trial court allowed the testimony of Dr. Leslie Fiferman over defense counsel's objection.

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)
SDCL 19-15-2

III. **WHETHER THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO DECLARE THE COUNTS AS ALTERNATIVE WAS A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUION?**

The trial court denied Johnson's request to declare First Degree Rape and Aggravated Incest in the alternative.

State v. Cates, 2001 S.D. 99, 632 N.W.2d 28
U.S. Const. Amend 5 & 14
SD Const. Article VI, §9

IV. **WHETHER THE TRIAL COURT IMPROPERLY DENIED DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL AND WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE JURY VERDICT?**

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

State v. Disanto, 2004 S.D. 112, 688 N.W.2d 201

V. **WHETHER THE LACK OF DISCLOSURE OF A PHYSICAL EXAM IN VIOLATION OF THE DISCOVERY ORDER WAS MATERIALLY PREJUDICIAL TO JOHNSON'S DEFENSE AND CONSTITUTED REVERSIBLE ERROR?**

State v. Krebs, 2006 S.D. 43, 714 N.W.2d 91
State v. Corean, 2010 S.D. 85, 791 N.W.2d 44

STATEMENT OF CASE AND FACTS

Case History

On February 13, 2012, Johnson made his initial appearance in Pennington County, South Dakota and was charged in a Complaint with First Degree Rape, SDCL 22-22-1(1). (SR 1). Johnson submitted an application for court-appointed counsel, and the Pennington County Public Defender's Office was appointed. (SR 4).

This matter was presented to the Pennington County Grand Jury on February 23, 2012. (GT 1). At the close of the grand jury proceedings, an Indictment was issued charging Johnson with Frist Degree Rape (SDCL 22-22-1(1)), Sexual Contact with a Child (SDCL 22-22-7), and Aggravated Incest (SDCL 22-22A-3). (SR 6). The Indictment was filed that same day alleging First Degree Rape, alleged to have occurred between May 2010 and September 2010, Sexual Contact with a Child, alleged to have occurred in December 2011, and Aggravated Incest, alleged to have occurred between May 2010 and September 2010. (SR 6). On March 5, 2012, Johnson was arraigned in front of the Honorable Janine M. Kern on the

Indictment and Johnson pled not guilty. On December 13, 2012, Johnson was arraigned a second time on the same charges. The interpreter that transliterated Johnson's March 5, 2012 Arraignment was the same interpreter that transliterated Johnson's interrogation on February 6, 2012.

A jury trial was held on June 4, 2013 through June 7, 2013. (JT 1). The jury found Johnson guilty of First Degree Rape under SDCL 22-22-1(1), guilty of Sexual Contact with a Child under SDCL 22-22-7, and guilty of Aggravated Incest under SDCL 22-22A-3. (SR 219). On August 14, 2013, the Defendant was sentenced on all counts in front of the Honorable Janine M. Kern, and received a forty (40) year sentence on the first degree rape, a fifteen (15) year sentence on the sexual contact with a child, and a fifteen (15) year sentence on the aggravated incest with all counts to run concurrently. (SH 16). Johnson provided the court a handwritten letter requesting an appeal at the sentencing hearing. The judgment was filed on August 19, 2013. (SR 264). Notice of Appeal was filed August 28, 2013. (SR 269).

Statement of Facts

On February 6, 2012, Pennington County Sheriff's office set up an interrogation of Johnson to investigate the alleged sexual penetration of K.J. (DOB 04-16-04) by her step-father Johnson. (MH1 7). Johnson was the sole suspect. (MH1 8-9). A forensic interview by Child Advocacy had

already been completed. (M1 24). Johnson was deaf and an interpreter was contacted through dispatch. (M1 8). Upon Katie Petersen's arrival to act as the interpreter, Investigator Schulz brought her into the interview room away from Johnson and explained what Johnson was being accused of doing and asked for her "help" in interviewing Johnson. (MH1 8). Johnson was not advised of his Miranda rights. (MH1 9). The interview was approximately two hours and 45 minutes. (MH1 12). Schulz controlled the interview and utilized techniques of interrogation from the Reed School as well as other "interrogation schools." (MH1 20).

Investigator Schulz had never interviewed a deaf suspect before February 6, 2012 and had never received any training on interviewing a deaf suspect or on using an interpreter. (MH1 22-24). On February 6, 2012, it was very likely that Investigator Schulz was going to be putting in a warrant request for Johnson for the allegation of first degree rape. (MH1 24). No additional information was derived or evidence gathered between February 6, 2012 and February 10, 2012 when Johnson was arrested. (MH1 26).

During the February 6, 2012 interrogation, and before any factual information regarding the alleged offenses was obtained, Johnson asked "if we finish, then what?" and was told "we'll worry about that later." (MH1 35). Johnson expressed a specific question as to whether he was truly

free to leave and he was met with a brush off, which error was compounded by Ms. Katie Petersen's error in voicing Johnson's signs. (Appx 1.16) He clearly signed "If we finished, then what?" and her interpretation was "I guess I don't know what the point is… like when we are finished, then what happens?" pointing to a request of what will happen in the future. (Appx 1.16) Mr. Johnson's question was immediate: if I can end the interrogation and leave, then what? However, he was not allowed to end the interrogation or told that he could voluntarily do so.

Ms. Katie Petersen acknowledged American Sign Language (ASL) is a unique and validated language in the deaf community… "not just English put on your hands, it's its own language with its own grammar and setup." (MH1 40). Ms. Petersen claimed to be ASL certified, but upon further questioning acknowledged that she didn't pay to keep it current and therefore is not actually ASL certified. (MH1 40). The ASL certification Petersen stated she received in 2004, and let expire, was NAD Level 3. (MH1 23). This certification which would not make her qualified to interpret in a felony court proceeding. Petersen's "legal setting" training prior to the February 6, 2012 interview occurred in 2005. (MH1 65). Petersen's current certification is a Certificate of Transliteration which, as stated by Petersen, is intended to be used for clients who

are using more English than ASL and not for those with prelingual deafness, that is people who lost hearing prior to English language development. (MH1 40). Petersen was aware that Johnson uses ASL. (MH1 49). Petersen had worked with Johnson prior to the interrogation, but her work was limited to "general work-related settings" and not in complex legal settings or interrogations. (MH1 49). Petersen claimed to understand the best practice of an ASL Interpreter, but failed to follow them with Johnson as a client and in this interrogation. (MH1 67). Petersen had never interpreted any police interrogation prior to February 6, 2012 let alone one for Johnson. (MH1 69). She was not aware of the significance of the situation and lacked familiarity with many of the concepts discussed. Ms. Petersen acknowledged that when transliterating she makes hundreds of decisions every couple minutes. (MH1 17).

Anna Witter-Merithew's qualifications as an expert are set forth in her Curriculum Vitae. (Appx 2). Her education, certification, and publication qualified her as an expert and her application of her expertise to the facts of the case made her a relevant expert in this case. Further, she has provided expert reports and/or offered testimony in six matters in the past five years. Her expert report or testimony has included work for the District Attorney's Office in Colorado, the Public Defender's Office, and the

Court. Anna Witter-Merithew interviewed Johnson on two separate days and reviewed the recordings of the interrogation of Johnson on February 6, 2012. Ms. Witter-Merithew generated a Report that was received into evidence. (MH1 80, Appx 1). Much of the factual information and understanding of the significant errors in interpretation can be revealed by reviewing her Report. This brief will focus on the errors involved around the alleged "non-custodial" dialog, but her Report should be considered in its entirety on the issues before the court. During her interview of Johnson, Witter-Merithew determined Johnson is "a very fluent American Sign Language user." (MH1 82). Witter-Merithew reviewed the February 6, 2012 interrogation videos and made the following initial observations:

- the interpreter was fluent in terms of her signs
- it was English based, so it was a transliteration and not an interpretation
- the interpreter frequently nodded her head throughout the two and a half hours of the interrogation "as if affirming that everything that was being signed was accurate and as it should be"
- the interpreter worked for a very long period of time without a break
- throughout the interview certain errors were observed

MH1 84). Witter-Merithew also noted with regard to the portion of the tape where Johnson was allegedly informed he was free to leave:

> In terms of semantics, in terms of the meaning of the concept, the legal concept of being detained, the legal concept of custodial versus

> noncustodial, that those two concepts were never clearly or accurately established. They were not clearly established in the transliteration nor were they clearly established – and they were not interpreted so they weren't ever generated in American Sign Language which is the language that Mr. Johnson uses. As well, there was a significant deviation in meaning between what was being indicated on a piece of paper that Mr. Johnson was being asked to sign and what was actually said by Investigator Schulz and what the interpreter said. What the interpreter transliterated at that moment was accurate in terms of what Mr. – I mean Investigator Schulz said that it was not what was on the piece of paper. And I had a copy of that piece of paper as I was looking at all the documents.

(MH1 86-87) (emphasis added).

Dr. Stephen Manlove qualifications as an expert are set forth in his Curriculum Vitae. (Appx 5). Dr. Manlove conducted six interviews of Jesse Johnson, reviewed the discovery in the file, and addressed whether, in his expert opinion, Johnson was able to give a knowing and voluntary waiver of his rights. His conclusions are fully set forth in his Report received into evidence as (MH2 15), Defendant Exhibit D. When analyzing Johnson's comprehension of Miranda rights, Dr. Manlove found that when dealing with the vocabulary Johnson was unable to define several words when he read them, but was able to define them when the words were signed to him. (MH3 33).

ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT DETERMINED JOHNSON WAS NOT IN CUSTODY AND HIS STATEMENTS WERE

VOLUNTARY AT THE TIME OF HIS FEBRUARY 6, 2012 INTERROGATION AND DENIED DEFENDANT'S MOTION TO SUPPRESS.

STANDARD OF REVIEW

The standard of review for the findings of facts on Johnson's Fifth Amendment contention is under the clearly erroneous standard, but the application of these facts to the question of law is reviewed de novo. State v. Wright, 2009 S.D. 51, ¶ 18; 768 N.W.2d 512, 519. South Dakota Constitution Article VI § 9 states "no person shall be compelled in any criminal case to give evidence against himself…" The Fifth Amendment to the United States Constitution proclaims the same right against self-incrimination and is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. State v. Morato, 2000 S.D. 149, ¶11, 619 N.W.2d 655, 659.

ARGUMENT

Defendant moved to suppress his statements, gestures, and demonstrations as voiced by Katie Petersen and written statements made to Investigator Ed Schulz on February 6, 2012. Evidentiary hearings were held on the Motion on November 9, 2012, November 28, 2012, and December 13, 2012. The court denied defendant's motion as to the February 6, 2012 interrogation by a letter decision dated March 22, 2013. (Appx 7). Findings of Fact and conclusions of Law were entered and filed on June 19, 2013. (SR 220).

It was the State's burden to prove Johnson was not in custody at the time of the February 6, 2012 interview and therefore his 5th Amendment right under the United State's Constitution did not apply. It was also the State's burden to establish the voluntariness of Johnson's statements by a preponderance of the evidence. Wright at ¶32, 768 N.W.2d at 524 (quoting State v. Tuttle, 2002 S.D. 94, ¶21, 650 N.W.2d 20, 30).

The court relied heavily upon the following when determining Johnson was not in custody: (1) Johnson able to read the statement; and (2) the statement was signed to him. (Appx 5.8) However, the trial court ignored errors in transliteration and ignored the inconsistent nature of Johnson's answers to the questions on the written statement. The court ignored that qualified interpreters are rare and Johnson was forced to accept what Communication Service for the Deaf (CSD) provides. Johnson did not contact Ms. Petersen, the police hired her, and they paid her to interpret the interrogation. (MH1 70). Petersen's prior interactions with Johnson were in vocation related settings and a few counseling sessions. (MH1 51). The concepts discussed and covered in a police interrogation are different than those discussed in vocational and counseling settings. There are different issues, words, plans, and goals. (MH3 52).

The written form of the non-custodial explanation lacks significance unless placed in the context of the video. The questions on the form do not correspond with the questions as stated by Schulz and transliterated to Johnson by Petersen. An illustration of Johnson's confusion and lack of understanding is the fact that upon the written form after the written question "do you understand what I explained to you" Johnson wrote "JJ." (Appx 3). However, and more importantly, the video clearly shows Johnson appeared confused after reading the paper. When Petersen signed "Do you understand… just put down yes or no," he wrote "NO." (MH1 72–73, MH2 18, MH3 53, Appx 3, and Appx 1.16, DVD approximately 15:31:45 – 15:31:57). Yet, Johnson wrote "NO" in response to the question that was signed to him. The question on the paper is "Do you have any questions?" (Appx 3). The interrogation continued.

The Court also ignored that Petersen repeatedly contradicted herself when representing her qualifications, specifically with regard to her ability and qualifications to sign ASL and particularly ASL in a legal setting. When asked whether her certification allows her to adequately interpret for someone whose primary language is ASL, she responded, "Yes. I mean, it's a specialized certification for transliteration, but my degree is in interpreting and that's the bulk of my work." (MH1 46). So the correct

answer to whether her certification allows her to adequately interpret for someone whose language is ASL should have been no, she isn't. This is based on her own statement of what transliteration is, and the fact ASL is a distinct language and not just English on the hands. The sign language that was conveyed in the interrogation on February 6, 2012 by Petersen was not an interpretation to ASL, but rather was a transliteration into signed English. (MH1 14). Petersen's attempts to make herself appear qualified to interpret ASL should be disregarded as the actual evidence of the interrogation clearly demonstrates she is not.

The undisputed expert testimony of Anna Witter-Merithew establishes there were significant interpretation errors and the nature of the interrogation resulted in:

(1) Johnson did not clearly understand he could leave.
(2) It's "highly unlikely with what transpired any deaf person would have left the room."
(3) Johnson did not "understand his rights. What his choices were or how he could exercise his rights in that moment."
(4) Johnson experienced "additional pressure beyond what the environment, the context would have inspired already."
(5) Petersen's interpretation affected Johnson's ability to resist the additional pressure.

(MH1 90). Her undisputed expert conclusions are directly on point with the analysis that Wright requires.

Particular errors in the interpretation are addressed in Witter-Merithew's report and the more significant errors

are set forth on page 16, 20-22 of Witter-Merithew's Report. (Appx 1.16 and 1.20-22). The errors highlighted by Anna-Witter-Merithew in her report were undisputed. Even when asked specifically about Ms. Witter-Merithew's report, Petersen's only disagreement was with whether Johnson was using ASL in the interview on February 6, 2012 and whether she should have done more to explain "non-custodial" rather than finger spell it. (MH1 57-58). Words are finger spelled when there is not a corresponding sign in ASL or Signed English. In fact, Petersen acknowledged that Johnson specifically signed "if we're done, then what?" and yet she voiced his sign as "so when we are done, then what happens." (MH1 75-76). As the right to leave, which also means the right not to answer questions, was not meaningfully communicated to Johnson, his state of mind was that he was in custody and not free to leave and had to answer Schultz's questions, therefore Miranda was required. As Johnson was not advised of his Miranda rights, all statements, gestures, signs that were made by Johnson on February 6, 2012 should be suppressed.

In the analysis of whether Johnson could resist pressure, Witter-Merithew found it relevant and significant that Petersen continually nodded her head through the interview. (MH1 92). The reason set forth by Witter-Merithew is:

> deaf people and interpreters do have a unique relationship in that even when interpreters may not be as competent as are warranted for the situation, they wind up being the only person that deaf people have in the immediate environment with who[m] they can communicate and so they – they feel a sense of connection with the interpreter. The ongoing use of the head nod created a sense of affirmation that, you know, as if what the officer was saying was accurate and because if, as can be viewed on the DVD, you see that it extends even after the end of the interpretation or the transliteration of the information.

(MH1 92).

Dr. Stephen Manlove set forth in his report and testified that it was his opinion "with reasonable certainty that… Johnson's abilities to meaningfully understand his right to remain silent and appreciate the consequences of waiving this right were compromised when he was interrogated by Investigator Schultz with the interpreter" on February 6, 2012. (MH2 32)

State v. Hoadley sets forth an analysis the court should utilize when determining whether an interrogation is custodial and therefore warrants a Miranda warning. Most relevant to the analysis is:

- Whether an individual is in custody is determined by "how a reasonable man in the suspect's position would have understood his situation." State v. Anderson, 2000 SD 45, ¶79, 608 N.W.2d 644, 666 (quoting State v. Herting, 2000 S.D. 12, ¶13, 604 N.W.2d 863, 866).
- *See also* State v. Darby, 1996 SD 127, ¶25, 556 N.W.2d 311, 319 (stating that the test for custodial interrogation is whether the interrogators deprived the suspect of the freedom to leave) (internal quotations and citations omitted).

State v. Hoadley 2002 S.D. 109, ¶24, 651 N.W.2d 249, 255.

The determination of whether Johnson was in custody requiring Miranda is how a reasonable man *in his position* would have understood his situation. Johnson's position was that of a Deaf man, the only suspect in a first degree rape, told to come to the public safety building for an interview, placed with an interpreter aligned with the investigator, provided inferior transliteration that was confusing at best, and provided an interpreter who made significant errors in transliterating Johnson's statements to the Investigator as well as significant errors in transliterating the Investigator's statements to Johnson.

Johnson did not have meaningful access to understand his rights. His rights also extended to the right to leave. This was not communicated in a meaningful way to Johnson nor was his response communicated in a meaningful way to Investigator Schulz. This deprived Johnson of his ability to leave and as such he was in custody.

In addition, Johnson's question after being told to write yes or no "if he understood" (which he wrote "NO") should have been clarified by Investigator Schulz and not ignored. Defense submits it was a clear answer that warranted stopping the interrogation to address Johnson's understanding. If Johnson's response is ambiguous or "when an officer receives an equivocal response to the reading of

Miranda rights, the officer must limit questioning to clarifying the subject's response." State v. Tuttle 2002 S.D. 94, ¶14, 650 N.W.2d 20, 28. While Tuttle deals with the waiver of the Miranda rights, the same analysis should hold true for the waiver of the right to leave and when determining the voluntariness. Investigator Schulz had a duty to inquire further to clarify Johnson's answer of "no" to whether he understood and Johnson's request as to what happens when the interrogation is over. Schulz should not have ignored Johnson's lack of understanding and should not have told Johnson that Johnson's concern about ending the interview would be dealt with at a later point.

A suspect's will is overborne if the confession is not the product of a free and unconstrained choice. State v. Tuttle 2002 S.D. 94, ¶30, 650 N.W.2d 20, 35. Johnson had no choice. He asked if he could make a choice to leave and his question was brushed away as if it was never said. His statements on February 6, 2012 can't be voluntary.

The Nebraska Court, in State v. Rogers, held a defendant was in custody at the time of the confession for Miranda purposes. 760 N.W.2d 35 (Neb 2009). As with Johnson's interrogation, Rogers was allowed to leave after her statements were elicited, she was the sole suspect, her interview went hours, and she was told she could leave the room. The Court held the interview was custodial and stated

it "must examine all of the circumstances surrounding the interrogation to determine whether a reasonable person in the suspect's position would have thought he or she was "sitting in the interview room as a matter of choice, free to change his [or her] mind and go."" Id 760 N.W.2d at 54, quoting Kaupp v. Texas 538 U.S. 626, 632, 123 SCt 1843, 155 L.Ed.2d 814 (2003). All of the circumstances in Johnson's interrogation support an "in-custody" determination, specifically: he was in the Public Safety Building and not free to move about the building, the interrogation lasted hours, the significant interpretation errors, his confusion over the note and the explanation about whether he was free to leave, his question about his ability to leave which was ignored, the fact he was the sole suspect in a first degree rape allegation, the alleged victim had been interviewed by the Child Advocacy Center (and Johnson was informed of this), and for all practical purposes, the investigation was complete.

Other circumstances set forth as relevant to the custody inquiry include:

> (1) the location of the interrogation and whether it was a place where the defendant would normally feel free to leave;
> (2) whether the contact with the police was initiated by them or by the person interrogated, and, if by the police, whether the defendant voluntarily agreed to the interview;
> (3) whether the defendant was told he or she was free to terminate the interview and leave

at any time;
(4) whether there were restrictions on the defendant's freedom of movement during the interrogation;
(5) whether neutral parties were present at any time during the interrogation;
(6) the duration of the interrogation;
(7) whether the police verbally dominated the questioning, were aggressive, were confrontational, were accusatory, threatened the defendant, or used other interrogation techniques to pressure the suspect; and
(8) whether the police manifested to the defendant a belief that the defendant was culpable and that they had the evidence to prove it.

Rogers, 760 N.W.2d at 54. Rogers relied upon the factors the Eight Circuit Court of Appeals determined relevant in the analysis of custody in US v. Axsom 289 F3d 496 (8th Cir 2002). See, id, 760 N.W.2d at 56.

As previously mentioned, in Johnson's interrogation, the interrogation occurred at the Public Safety Building and he would not be allowed to freely move around the building, the contact was initiated by Investigator Schulz through a text message, he was not told in a meaningful way he was free to terminate the interview and leave at any time, Johnson never moved during the interrogation, he was told to wait while Investigator Schulz and Petersen left the room, there were no neutral parties present as Petersen was hired by law enforcement and was informed of the reason for the interrogation and was asked to "help" Schulz interrogate Johnson, and the interview lasted over two hours and thirty minutes. Further, Investigator Schulz verbally dominated

the questions, controlled the topics and direction of the communications, employed Reed techniques in addition to other techniques to pressure Johnson, was accusatory, and he manifested a clear belief and a representation that he had the evidence to prove it which was enhanced by Petersen's constant head nodding and affirmation of Schulz's words. The head nodding also conveyed to Johnson that he was required to answer the questions. While Johnson was not arrested at the end of the February 6, 2012 interrogation he was arrested four days later and no additional information or investigation was done by anyone after the interview with Johnson. (MH1 26). Investigator Schulz knew he was going to be making a warrant request for first degree rape. (MH1 24) Johnson submits, the only reason Johnson was allowed to go was so that the State could continue the guise that he was not in custody and use it as a factor to suggest the same to the Court. In that vein, Investigator Schulz continued to be in contact with Johnson, knew where he worked, where he was staying, and knew where he could be found.

Dr. Manlove is board certified in forensic psychiatry which is a specialty that looks at the interface between psychiatry and law. (MH2 7-8). Dr. Manlove's testimony regarding interview techniques and Investigator Schulz's repeated declaration that "he knows" is directly on point to the manifestation that Investigator Schulz already had the

evidence to convict Johnson and, in essence, he had already lost his rights and freedom of choice. (MH2 19-20). Dr. Manlove's testimony considered with Ms. Witter-Merithew's testimony regarding the constant head nodding by Petersen clearly demonstrates the interpreter's role in the interrogation created a coercive environment

The role of an interpreter in an interrogation setting is not like any other interpretation setting and requires a higher level of due diligence as stated by Ms. Witter-Merithew:

> Interpreting for law enforcement is - well, it's a unique role in that it - an interpreter typically works under the auspices of the professional relationship that typically the hearing person has in that situation. So, for example, in a doctor's office, the doctor and the patient typically share a common goal. And when a client and their attorney are meeting, they typically share a common goal. In a courtroom, the system has a standard goal. That in law enforcement the interpreter has an obligation to function with greater due diligence to represent themselves as a neutral individual who is represented - who is interpreting for two individuals who are exchanging information and to recognize that the potential for it to be adversarial is great. But the basic role of rendering the information that's being communicated by all the parties in an accurate manner, in an equivalent manner is the same.

(MH3 80). When one considers the DVD of the interrogation, and the testimony of Investigator Schulz, Katie Petersen, Anna Witter-Merithew and Dr. Manlove, it is evident due diligence was not done and best practices for a police

interrogation of a deaf suspect were not met. Therefore, a reasonable person in Johnson's position would believe he was not free to leave and Johnson's statements were not voluntary.

In the February 6, 2012 interrogation, Katie Petersen was acting as a state agent and her actions and errors resulted in a suspect not understanding his rights, specifically his right to leave. Her actions and errors, coupled with Schulz's actions and interrogation techniques, and her failure to clarify issues created a coercive environment in which the suspect could not resist the pressure. Any person would have felt he or she was not free to leave and felt the coercive pressure, regardless of whether they were deaf or not when the information as stated by Investigator Schulz was said in such a way as transliterated by Petersen.

Further, the lack of training and awareness of Investigator Schulz as to the role of the interpreter, any procedure for ensuring understanding, and his private conversation with Katie Petersen created an environment in which Johnson did not understand he was free to leave. A deaf individual is reliant upon the interpreter as the interpreter is the only link to the hearing world in a given situation. Under the totality of circumstances, Johnson was in a coercive environment and Johnson did not understand his

constitutional rights, including his right to leave; as such, his statements were not voluntary and should be suppressed.

The Trial Court found Johnson was not in custody on February 6, 2012. (Appx 5.10). The Court then made the determination that Johnson's statement on February 6, 2012 was voluntary. (Appx 5.12). The trial court misplaced its reliance on Johnson's lack of a clear expression he wasn't comprehending. To suggest he should know what he wasn't understanding creates an unattainable burden on anyone in our judicial system whose first language is something other than English. The interpreter was the only person in the room on February 6, 2012 that should have known that her interpretation wasn't sufficient, that she was making errors, and that Johnson was lacking a full and meaningful understanding. As Witter-Merithew reviewed the DVD, she concluded exactly what the interpreter should have known.

The trial court relied upon the history of Johnson and Peterson and exclusively relied upon Peterson's testimony and the fact Johnson had prior DUI's and simple assaults, but the record is absent of whether those interactions included an interview/investigation. The reliance upon that history is unfounded and further ignores the undisputed testimony of Witter-Merithew.

The trial court erred in concluding Johnson's was not

in custody and erred in concluding his statements were voluntary. Johnson's statements, gestures and demonstrations as voiced by Katie Petersen, and his writings, on February 6, 2012 should be suppressed. Defense would request the convictions be reversed and the matter remanded for a new trial without the evidence of Johnson's February 6, 2012 interrogation.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE TESTIMONY OF DR. LELSIE FIFERMAN.

STANDARD OF REVIEW

"A trial court's decision regarding the qualification of experts and the admission of their testimony will only be reversed upon a showing of an abuse of discretion." State v. Well, 2000 S.D. 156, ¶11,620 N.W.2d 192.

ARGUMENT

Johnson objected to the testimony of Dr. Leslie Fiferman as his testimony did not meet the requirements as set forth in SDCL 19-15-2. (SR 78). A hearing was held on May 14, 2013 to determine the admissibility. The court overruled Johnson's objection and allowed the testimony. (SR 157). Johnson renewed his objection at the time of trial, which objection was again overruled. (JT 313).

The Court ignored SDCL 19-15-2 in its decision and relied entirely upon the Daubert standard and case law that occurred prior to the modification of SDCL 19-15-2. Daubert

v. Merrell Dow Pharm., Inc., 509 US 579, 597 (1993). (SR 157, Appx 9.2). The admissibility of Expert testimony is controlled by SDCL 19-15-2 which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data,
>
> (2) The testimony is the product of reliable principles and methods, and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

(Appx 7.1).

Further, the purpose of expert testimony is to "assist the trier of fact to understand the evidence or determine a fact in issue" and Dr. Fiferman's lack of knowledge of the case precludes his testimony from fulfilling this purpose.

While testimony from Dr. Fiferman may have been deemed appropriate in other cases, although it was not provided on which specific cases, it should not have been allowed in this case. The plain reading of SDCL 19-15-2 provides that the "expert" must apply the area of expertise to the facts of the case. Dr. Fiferman, without any knowledge of the case, was unable to do so. (JT 334-335).

It is acknowledged that under the prior SDCL 19-15-2, such testimony was more likely deemed admissible. (Appx 8.1). However, the modification of the statute in 2011 to

provide the three specific elements precludes such testimony now.

The determination of whether an expert should be allowed to testify rests on the three factors set forth in SDCL 19-15-2. Dr. Fiferman's testimony fails all three. The testimony is not based upon sufficient facts or data, and the testimony is not the product of reliable principles and methods. When asked if there was "any way to clearly establish whether any of your opinions are right or wrong?" Dr. Fiferman answered "[p]robably not." (JT 330). If something can't be tested it is not reliable and certainly isn't based on facts or data. Dr. Fiferman represented the facts or data he relied upon was his "experience and education." (JT 336). He testified that his principle or method used when forming an opinion is "scientific or empirical basis." (JT 336). This conclusory statement was vague and unsupported by the remainder of his testimony stating there is no way to know he is wrong. However, even if this Court finds the "principles and methods" sufficient, Dr. Fiferman acknowledged the "empirical method" wasn't applied to the facts of this case. (JT 336).

With regard to the third prong, Dr. Fiferman testified at both the evidentiary hearing, and the jury trial, that he knew nothing about the facts of case, including the alleged victim, her mother, Johnson, or any of the allegations in

the case. (EH 71, 72 and JT 334-335). He hadn't reviewed police reports or the forensic report from Child's Voice, nor had he watched any videos. (JT 335). Dr. Fiferman can make himself available to review the case and offer an opinion that's relevant. (JT 337). However, he did not do so in this case. As it pertains to the instant case, Dr. Fiferman acknowledged he "knows nothing." (JT 337-338). Therefore, the third requirement that the witness has "applied the principles and methods reliably to the facts of the case" has not been met and as such his testimony should have been prohibited.

The State failed to establish this expert's relevancy to this case during the motions hearing and during its case-in-chief, and, as such, allowing the expert to testify was an abuse of discretion and denied Johnson a fair trial. Johnson requests the Court reverse the trial court's decision permitting Dr. Fiferman to testify and remand for a new trial.

III.

THE TRIAL COURT'S DENIAL OF DFENDANT'S MOTION TO DECLARE THE COUNTS AS ALTERNATIVE IS A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT TO THE UNITED STATE'S CONSTITUTION.

STANDARD OF REVIEW

"When analyzing the double jeopardy provisions of the state and federal constitutions, we encounter a question of law, reviewable *de novo*." State v. Cates 2001 S.D. 99, ¶6, 632 N.W.2d 28, 33.

ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article VI § 9 of the South Dakota Constitution prohibit a defendant from being subjected to multiple punishments for the same offense. Id. Johnson was punished for both first degree rape and aggravated incest. Both convictions require an act of sexual penetration. At the jury trial, the alleged victim did not clearly testify penetration occurred. However, if it is found she did, it must be acknowledged she stated it happened one time. (JT 359, 364, 366, 370). At the close of the State's case defense counsel properly moved, based on the evidence, the counts be declared to be in the alternative as there was only one, at best, alleged penetration. (JT 589).

To constitute a separate offense, there must be a separate act of sexual penetration. Cates held that each act of sexual penetration constitutes a separate offense. Cates at ¶1, 632 N.W.2d at 31. As there was more than one

act of sexual penetration in Cates, he was not subject to double jeopardy. The same factors do not exist in the instant case as there is only an allegation of, at best, one act of penetration. (JT 359, 364, 366, 370).

The dates in the indictment are identical as to the first degree rape and the aggravated incest counts, specifically alleging that the act of penetration occurred between May 2010 and September 2010, inclusive. (Appx 10.1). Therefore, Johnson was subject to double jeopardy for the one alleged act.

The Court is not permitted to impose multiple punishments for the same conduct, unless there is a "clear indication" of legislative intent to do so. State v. Dillon, 2001 S.D. 97, ¶14, 632 N.W.2d 37, 44, (citing Whalen v. United States 445 U.S. 684, 691-92, 100 SCt 1432, 1437-38 (1980)). There is no such clear legislative intent in this case. "No words in our rape and pedophilia statutes make it clear that cumulative punishments are explicitly intended." Dillon at ¶17, 632 N.W.2d at 44-45. The same holds true for the rape and incest statutes.

As there is no "explicit indication of legislative intent to create cumulative punishments," then the rule of lenity would require the presumption that "a single act constitutes a single offense." Dillon at ¶21, 632 N.W.2d at

46 (citing Staples v. United States, 511 U.S. 600, 619, 114 S.Ct. 1793, 1804 (1994)).

Since Johnson was "illegally convicted and punished twice for the same act… the remedy is to vacate both the conviction and sentence on the lesser offense" and remand for resentencing. Dillon at ¶22, 632 N.W.2d at 46-47.

IV.

THE TRIAL COURT IMPROPERLY DENIED DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL.

STANDARD OF REVIEW

"The denial of a motion for judgment of acquittal presents a question of law, and thus our review is de novo." State v. Jensen, 2007 S.D. 76, ¶7, 737 N.W.2d 285, 288 (citing State v. Berhanu, 2006 S.D. 94, ¶7, 724 N.W.2d 181, 183).

ARGUMENT

Defense properly moved at the close of the State's case, and at the close of the Defense case, for a Judgment of Acquittal. (JT 586 and 657). The court denied this motion. "We must decide anew whether the evidence was sufficient to sustain a conviction." Jensen at ¶7, 737 N.W.2d at 288.

In determining evidentiary sufficiency, the Court views the evidence in the light most favorable to the prosecution and asks "whether any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." State v. Disanto, 2004 S.D. 112, ¶14, 688 N.W.2d 201.

To sustain a conviction for First Degree Rape under SDCL 22-22-1(1) the State must show that Johnson accomplished an act of sexual penetration with a person less than 13 years of age. The State failed to do so. To sustain a conviction for Sexual contact with a Child under SDCL 22-22-7 the State must show that Johnson knowingly engaged in sexual contact with another person under the age of 13 years. The State failed to do so. To sustain a conviction for Aggravated Incest under SDCL 22-22A-3(1) the State must show that Johnson knowingly engaged in an act of sexual penetration with a person less than 18 and such person is the child of a spouse. The State failed to do so.

The State provided no physical evidence of penetration. It is important to note that the first Defense learned of a sexual assault examination was when the State was requesting restitution. (SH 8 and PH 3-5). It can only be assumed that it was not provided as it provided no physical evidence of penetration and was exculpatory evidence. Had it resulted in inculpatory evidence that supported the theory of penetration, surely the State would have offered it in its case in chief. This failure to disclose was a violation of the court's Discovery Order and prevented Johnson from

receiving a fair trial.

In fact, the alleged victim testified that Johnson touched her hip bone. (JT 365). When asked if Johnson's finger did anything where she goes pee, she answered no. (JT 366). When asked if the "bone" was near where she goes pee, her response was "kind of." (JT366). The alleged victim also stated that "He didn't actually go right inside me, he just went rubbing and yeah." (JT 372). When further clarifying about when exactly it hurt and when asked if it hurt because it went inside or just from rubbing, she answered that it was just from rubbing. (JT 373).

The State called only one medical professional, and it was not even the physician that physically examined the alleged victim, it was Dr. Fiferman who knew nothing of the facts of the case. (JT 334-335).

There was insufficient evidence to sustain a verdict of guilty to First Degree Rape and Aggravated Incest. The State's witnesses repeatedly stated penetration did not occur. (JT 365, 366, 372 and 373). Penetration is a required element of both First Degree Rape and Aggravated Incest.

The trial court erred by not granting the judgment of acquittal and the convictions should be vacated.

V.

THE FAILURE OF THE STATE TO PROVIDE EXCULPATORY DISCOVERY SHOULD RESULT IN A DISMISSAL OR BE REMANDED FOR A NEW TRIAL.

STANDARD OF REVIEW

The standard of review for the application of evidentiary rules is abuse of discretion. State. Krebs 2006 S.D. 43, ¶19, 714 N.W.2d 91, 99.

ARGUMENT

While the standard of review is abuse of discretion, the evidence still has not been provided, and defense counsel only learned of its existence after sentencing. The failure to disclose the existence of the evidence until after the sentencing and after the Notice of Appeal was filed resulted in the trial court not having jurisdiction over the issue. The trial court made no findings of fact and did not enter a decision. Therefore, defense would submit the standard of review must be *de novo*.

Failure to disclose the results of the sexual examination conducted on the alleged victim is a violation of the discovery Order and warrants a remedy far greater than a reversal. Defendant would submit SDCL 23A-13-17 allows the Court to dismiss the charges as it allows the Court to "enter such other order as it deems just under the circumstances." (Appx 12).

If the State is permitted to either willfully fail to disclose or inadvertently fail to disclose such significant evidence without consequences, what incentive do they have

to follow the rules and comply with the Discovery Order. What message does it send to young prosecutors that it is okay to not provide evidence, or not be prepared, or willfully avoid obtaining or reviewing evidence?

The defense learned the exam occurred and the evidence existed after sentencing, only after Johnson questioned the request for restitution. (SE 7-8). It was then that a letter was provided to the Court and defense which informed parties a sexual assault examination occurred. (Appx 13.2). To date, counsel has not received any evidence related to the sexual assault examination.

If a dismissal is not granted, a remand for consideration of an appropriate remedy by the trial court of either a dismissal or a new trial is Johnson's request.

The failure to disclose exculpatory evidence materially prejudiced Johnson's defense and constitutes reversible error. In Krebs, the State failed to provide inculpatory evidence that "completely undercut Kreb's defense." 2006 S.D. 43, ¶21, 714 N.W.2d 91, 99. The Krebs court found the failure to disclose the witness's statements was reversible error and remanded for a new trial. This is analogous to Johnson as the physical evidence, or lack thereof, contained exculpatory evidence that was consistent with Johnson's defense that the penetration did not occur. Further, it is possible the alleged victim made statements, admissions,

disclosures, or provided another version of the story that would bring to light questions as to the credibility, reliability and veracity of her testimony.

In determining whether a new trial is warranted, the Court must answer the following three questions in the affirmative:

1. Was the evidence at issue favorable to the Defendant because it is exculpatory or impeaching;
2. Was the evidence suppressed by the State either willfully or inadvertently; and
3. Did prejudice ensue from the suppression.

State v. Corean, 2010 S.D. 85, ¶23, 791 N.W.2d 44, 54. In this case, the answer to all three is yes. The evidence is exculpatory and impeaching. It is unknown whether the evidence was withheld willfully, but at a minimum it was inadvertently withheld as it still hasn't been provided. Prejudice to Johnson ensured from the suppression as he was not provided the physical exam when the primary issue was whether penetration occurred. It can only be assumed that the physical exam demonstrated no physical penetration or any diligent prosecutor would have included the evidence in its case-in-chief.

The evidence goes beyond merely the ability to attack the credibility and impeach the witnesses. Physical evidence, specifically the lack thereof, is substantially material to the charges of first degree rape and aggravated

incest and there is a reasonable probability that the result would have been different if the evidence had been disclosed and as such Johnson was prejudiced. See Stickler v. Green, 527 U.S. 263, 119 SCt 1936 (1999).

Johnson requests the convictions be dismissed or in the alternative, the convictions be vacated and the matter remanded for the trial court to determine an appropriate remedy, to include dismissal or a new trial.

CONCLUSION

The individual prejudice from the above issues are each significant, and cumulatively prevented Jesse Johnson from receiving a fair trial.

Jesse Johnson respectfully requests this Court reverse his convictions, reverse the ruling on the Suppression of Statements and remand the case to the trial court for further proceedings consistent with the Supreme Court's rulings.

REQUEST FOR ORAL ARGUMENT

Jesse Johnson requests to present oral arguments on these issues.

Dated this 15th day of May 2014.

Respectfully submitted,

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26803

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JESSE JOHNSON,

Defendant and Appellant.

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

THE HONORABLE JANINE M. KERN
Circuit Court Judge

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Notice of Appeal filed August 29, 2013

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26803

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JESSE JOHNSON,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Jesse Johnson, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name.

The various transcripts and reports will be cited as follows:

Motion Hearing – November 9, 2012 ..... MH1

Motion Hearing – November 28, 2012 ..... MH2

Motion Hearing – December 13, 2012 ..... MH3

Motion Hearing – October 2, 2013 ..... MH4

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Sentencing Transcript – August 14, 2013 ..... ST

Jury Trial Transcript – June 4-7, 2013 ..... JT

The settled record in the underlying criminal case, *State of South Dakota v. Jesse Johnson,* Pennington County Criminal File No. 12-523, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." The interview with Defendant by Investigator Schulz will be referred to by "DVD," and referenced by the approximate video time. The forensic interview with K.J. by Hollie Strand will be referred to as "FI" and referenced by the approximate video time. All other references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Defendant appeals from a Final Judgment of Conviction and Sentence entered by the Honorable Janine M. Kern, Circuit Court Judge, Seventh Judicial Circuit, on August 16, 2013, to be effective August 14, 2013. SR 264. Defendant filed a Notice of Appeal on August 29, 2013. SR 269. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER DEFENDANT WAS IN CUSTODY ON FEBRUARY 6, 2012, FOR THE PURPOSE OF *MIRANDA*, AND WHETHER HIS STATEMENTS WERE VOLUNTARY?

The trial court determined Defendant was not in custody for purposes of *Miranda* and that Defendant's statements were voluntary.

State v. Aesoph, 2002 S.D. 71, 647 N.W.2d 743.

State v. Thompson, 1997 S.D. 15, 560 N.W.2d 535.

State v. Wright, 2004 S.D. 50, 679 N.W.2d 466

State v. Cottier, 2008 S.D. 79, 755 N.W.2d 120.

II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE TESTIMONY OF DR. LESLIE FIFERMAN?

The trial court held that Dr. Fiferman's testimony is admissible.

State v. Cates, 2001 S.D. 99, 632 N.W.2d 28

State v. Fisher, 2011 S.D. 74, 805 N.W.2d 571.

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

State v. Edelman, 1999 S.D. 52, 593 N.W.2d 419.

III

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO GRANT DEFENDANT'S MOTION TO DECLARE THE COUNTS INSTRUCTED TO THE JURY AS ALTERNATIVE COUNTS?

The trial court denied Defendant's motion to declare the First Degree Rape Count and the Aggravated Incest Count in the alternative.

State v. Dillon, 2001 S.D. 97, 632 N.W.2d 37.

State v. Wright, 2009 S.D. 51, 768 N.W.2d 512.

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

State v. Augustine, 2000 S.D. 93, 614 N.W.2d 796.

IV

WHETHER THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE JURY VERDICT?

The trial court denied Defendant's motion and held there was sufficient evidence to sustain the jury verdict.

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

State v. Mozko, 2006 S.D. 13, 710 N.W.2d 433.

State v. Lewis, 2005 S.D. 111, 706 N.W.2d 252.

V

WHETHER THE LACK OF DISCLOSURE OF A PHYSICAL EXAMINATION WAS MATERIALLY PREJUDICIAL TO DEFENDANT'S DEFENSE AND CONSTITUTED REVERSIBLE ERROR?

The trial court held because this issue was raised after filing a Notice of Appeal, it lacked jurisdiction to address this issue.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Thompson v. Weber, 2013 S.D. 87, 841 N.W.2d 3.

State v. Toohey, 2012 S.D. 51, 816 N.W.2d 120.

State v. Leisinger, 2003 S.D. 118, 670 N.W.2d 371.

STATEMENT OF THE CASE

On February 10, 2012, the Pennington County State's Attorney filed a Complaint alleging that Defendant committed First Degree Rape by accomplishing an act of sexual penetration with a person less than thirteen years of age, in violation of SDCL 22-22-1(1). SR 1. On February 23, 2012, the Pennington County Grand Jury returned an Indictment charging Defendant with one count of First Degree Rape, in violation of SDCL 22-22-1(1); one count of Sexual Contact with Child Under Thirteen, in violation of SDCL 22-22-7 and SDCL 22-22-1.2(2); and one count of Aggravated Incest, in violation of 22-22A-3(1). SR 6.

Defendant was arraigned in front of the Honorable Janine M. Kern on March 5, 2012. MH3. After several motions hearings, Defendant was re-arraigned in front of the Honorable Janine M. Kern on December 13, 2012, on the same charges. MH3, *generally*. Interpreter Katie Peterson interpreted both Defendant's interview with Investigator Schulz, and the March 5, 2012, arraignment. MH3 3. Because Defendant raised an issue regarding Peterson's qualifications the court re-arraigned Defendant, substituting Peterson with two other Court Interpreters. MH3 3-4. Defendant continued his plea of not guilty to all of the charges at the re-arraignment. MH3 14.

The jury trial was held from June 4, 2013, to June 7, 2013. JT, *generally*. On June 7, 2013, the jury found Defendant guilty on all counts charged against him. JT 658. On August 14, 2013, the trial court sentenced Defendant to forty years imprisonment for First Degree Rape conviction, fifteen years imprisonment for Sexual Contact with a Child under the age of thirteen conviction, and fifteen years imprisonment on the Aggravated Incest conviction. ST 16. All of the sentences were to run concurrently. ST 16. The Judgment was filed on August 19, 2013 (SR 267), and Defendant filed a Notice of Appeal on August 29, 2013. SR 269.

STATEMENT OF FACTS

On January 29, 2012, victim K.J. told her mother, Jamie Davis (Davis) that Defendant had raped her, sexually assaulted her, and made her watch pornography. JT 414-19. K.J. was seven years old at the time she reported the rape, sexual assaults, and pornography viewings. JT 240. K.J. asserted that the sexual assaults and rape had been going on since she was six years old. JT 300. Because K.J.'s mother is deaf, Davis instructed K.J. to write down the sexual abuse. JT 421. K.J. wrote down four incidents, on four separate pieces of paper. JT 421-22. On those pieces of paper, Davis wrote questions for K.J. to answer, so that K.J. would not have to retell Defendant's crimes against her. JT 421-22. Davis wrote down questions "Where," "Do," "Reaction," "Times," "K.JO. ask," and "K.JO. doing what," and K.J. provided answers

next to Davis's questions. JT 421-22; State's Exhibits 4-7 June 11, 2013. K.J. wrote that Defendant showed K.J. his penis twice, and three instances of Defendant showing K.J. pornography. Defendant's Exhibit A. Davis then had a friend call the police. JT 416. Davis gave the police officer the four sheets of paper describing Defendant's sexual crimes against K.J. JT 421.

On February 6, 2012, K.J. was brought into the Child Advocacy Center in Rapid City, South Dakota, for a forensic interview with Hollie Strand (Strand). EH 35. In Strand and K.J.'s interview, K.J. explained to Strand the instances Defendant sexually assaulted her, of which she reported to the police. FI 0:06:21. K.J. explained that the Defendant showed K.J. pornography several times. FI 00:07:00; 00:09:24. K.J. told Strand that Defendant showed K.J. his penis. FI 00:09:30. K.J. told Strand that while Defendant showed K.J. pornography, he instructed K.J. not to tell Davis. FI 0:06:47, 0:09:20. In the forensic interview, K.J. recalled additional instances where Defendant sexually abused her. Defendant showed K.J. pictures of Defendant's penis, and pictures of Defendant and Davis engaging in sexual intercourse. FI 0:10:40. K.J. told Strand that Defendant touched K.J.'s "pussy" and "private parts" with "mostly his finger," and touched under K.J.'s dress, "he kinda digged in there and kinda got my bone." FI 0:13:45. Strand asked K.J. to show her where Defendant touched her on a drawing of a girl. FI 00:14:15. K.J. pointed to the vaginal area, and Strand asked K.J. if

Defendant's finger "[did] something with that line" (pointing to the vaginal area), and K.J. replied, "usually he went in it." FI 00:14:15. K.J. further explained that Defendant showed K.J. his penis, and K.J. demonstrated to Strand the masturbating motions Defendant had K.J. do on his penis. FI 00:15:05. K.J. also demonstrated to Strand how Defendant tried to force K.J.'s mouth on his penis, and K.J. told Strand that Defendant wanted K.J. to copy what was shown on the pornography. FI 00:19:30. K.J. asserted to Strand that Defendant would kiss K.J. on the lips and wanted to "French kiss" her. FI 00:27:45.

On the same day as K.J.'s forensic interview with Strand, February 6, 2012, Investigator Schulz (Schulz) asked Defendant to come to the Rapid City Public Safety Building for a noncustodial interview. JT 479. Defendant arrived at the Public Safety Building either by walking there or by someone dropping him off. JT 479. To prepare for the interview, Schulz called dispatch to request an interpreter at the interview, because Defendant is deaf. JT 479. Katie Peterson (Peterson), a Level III Certified Transliterator (MH1 42-43) was hired by the Pennington County Sheriff's Office to interpret at the interview. JT 480, 568. Schulz had never met Peterson before the February 6, 2012 interview, but Defendant and Peterson had worked together for approximately three years. JT 570. Upon Defendant's arrival at the Public Safety Building, Defendant and Peterson engaged in pleasantries about their families. JT 571. Before the interview, Schulz told Peterson

about the nature of the interview, and explained that they would be going into the interview room. JT 480. Schulz informed her on where to sit so that the two video cameras would focus on Peterson and Defendant. JT 480. Peterson, Schulz, and Defendant were all present in the interview room, with no one blocking Defendant's ability to exit the interview room. JT 480.

Peterson holds a certificate of transliteration by the registry of interpreters for the deaf. JT 564. This was the first noncustodial interview for which Peterson had interpreted. JT 569. However, Peterson had provided sign language services for Defendant for the past three years in employment, counseling, and courtroom settings. JT 570. For the past three years, Peterson and Defendant conversed using a blend of ASL and signed English. JT 574.

Schulz began the interview by informing Defendant that the interview was "noncustodial." DVD 00:02:55. Schulz explained a noncustodial interview to Defendant both by providing a prepared written statement, and also having Peterson sign the prepared written statement to Defendant. JT 482. The prepared statement read:

> Jesse, whenever I talk with people, I need to explain a few things. This will be a noncustodial interview. You are not under arrest and you are not being detained. You don't have to talk with me, if you don't want to. The door is shut for privacy purposes and unlocked. At any time you feel you don't want to talk anymore, you can leave. No matter what you tell me, I'm not arresting you today.
>
> Do you understand what I just explained to you?

Do you have any questions?

JT 493; State's Exhibit 9, June 11, 2013; DVD 00:03:08. Defendant asked, "I guess I don't know what the point like when we're finished, then what happens?" to which Schulz replied "[w]hen we're finished then I'll explain the whole process of what's of what's going on and I'll answer those questions as the interview progresses." DVD 00:03:53-00:04:08. Schulz directed Defendant to read the noncustodial statement and Schulz said to Defendant, "do you understand . . . just put down yes or no." DVD 00:04:38. Defendant wrote his initials "JJ" by the question "Do you understand what I just explained to you?" State's Exhibit 9, June 11, 2013. Defendant wrote "No" by the question "Do you have any questions?" State's Exhibit 9, June 11, 2013.

Schulz's interview with Defendant lasted about 2 hours and 45 minutes. JT 481. During the first hour of the interview, Defendant denied any sexual activity with K.J. DVD, *generally*. At approximately one hour and four minutes into the interview, Defendant admitted to "trying to show her you know what what it's like . . ." DVD 1:18:10. When Schulz asked Defendant how he tried to teach her how to masturbate, Defendant answered that he rubbed her "g spot" with his fingers. DVD 1:22:31. Defendant stated that K.J. pulled down her underwear and Defendant "showed her where where exactly to touch."

DVD 1:30:28.[1] Defendant told Schulz this occurred in the summer of 2010. JT 496. Schulz further asked Defendant to tell him about K.J. touching Defendant's penis. DVD 1:26:12. Defendant replied ". . . she kept asking I wanna see what it looks like and I was very nervous and said fine I'll go ahead and show you and she felt it. And my heart was just pounding I thought I was going to pass out." DVD 1:26:59. Defendant said K.J. touched his penis in December 2011. JT 496. When Schulz asked Defendant about showing K.J. pornography, Defendant asserted that was an accident, and he did not realize K.J. saw the videos. DVD 1:24:25. Additionally, Defendant asserted that K.J. accidentally saw photographs of Defendant's penis and Defendant and Davis having sexual intercourse without Defendant's knowledge. DVD 1:45:52.

A warrant for Defendant's arrest was issued on February 10, 2012, four days after Defendant's interview with Schulz. SR 2. Defendant was arrested that same day. MH1 17.

[1] There is a discrepancy between the video and the written transcript. At approximately 1:30:28, Defendant states "no clothes, like she just pulled down her underwear and I showed her where where exactly to touch . . ." DVD 1:30:28. The transcript reads "No clothes just like on her underwear and I showed her where where exactly to touch . . ." Exhibit EE 6/6/13, 18.

ARGUMENTS

I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS TO INVESTIGATOR SCHULZ BECAUSE DEFENDANT'S INTERVIEW WAS NONCUSTODIAL AND DEFENDANT'S STATEMENTS WERE VOLUNTARY.

A. Standard of Review.

The trial court's findings of fact on a motion to suppress are reviewed under the clearly erroneous standard; once the facts are determined, the application of the legal standard to the facts is a question of law reviewed de novo. *State v. Wright*, 2009 S.D. 51, ¶ 18, 768 N.W.2d 512, 519. Denial of a motion to suppress based on an alleged violation of constitutional rights is reviewed de novo. *State v. Johnson*, 2007 S.D. 86, ¶ 21, 739 N.W.2d 1, 8-9; *State v. Blackburn*, 2009 S.D. 37, ¶ 6, 766 N.W.2d 177, 180.

B. Miranda Warnings Are Not Required When There Is Not A Custodial Interrogation.

Police officers are not required to give *Miranda* warnings to everyone they question. *Miranda* warnings are only required when there is a custodial interrogation. *State v. Aesoph*, 2002 S.D. 71, ¶ 17, 647 N.W.2d 743, 751. Warnings are not necessary in a noncustodial interrogation because:

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a

> crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warning to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'

State v. Thompson, 1997 S.D. 15, ¶ 23, 560 N.W.2d 535, 540. The two-part test for determining whether a person is in custody is (1) "what were the circumstances surrounding the interrogation; and" (2) "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Wright*, 2009 S.D. 51, ¶ 19, 768 N.W.2d at 520. Then "the Court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* Determination of whether Defendant was in custody depends on the objective circumstances, not on Defendant's subjective views. *Id.* at ¶ 20.

1. The Circumstances Surrounding the February 6, 2012 Interview were Not Custodial.

The circumstances surrounding the interview of Defendant at the Public Safety Building clearly indicate he was not in custody or deprived of his freedom so as to necessitate *Miranda* warnings. Defendant's voluntary acceptance of an invitation to come to the Public Safety Building and choosing to speak with Investigator Schulz, while not restrained in any way, did not constitute a custodial interrogation. *State*

v. Myhre, 2001 S.D. 109, ¶ 17, 633 N.W.2d 186, 190; *State v. Anderson*, 2000 S.D. 45, ¶ 77, 608 N.W.2d 644, 666.

Defendant's interview occurred at the Rapid City Public Safety Building. JT 479. Peterson, a Level III interpreter certified in transliteration, was present during the duration of the interview. JT 564. Schulz told Peterson where to sit so that the camera could record her interpretations. JT 480.

In the interview room, Investigator Schulz began the interview by informing Defendant that the interview was noncustodial. JT 482. Schulz read Defendant the noncustodial statement, provided a prepared written noncustodial statement for Defendant to read, and had Peterson sign the noncustodial statement to Defendant. DVD 00:03:08. After Investigator Schulz read the noncustodial statement to Defendant, Defendant initialed the statement. DVD 00:04:38. He wrote "no" where it inquired whether Defendant had any questions. DVD 00:04:38. Although the door was closed, Defendant was advised that the door was unlocked. DVD 00:03:08; *State v. Carother*s, 2006 S.D. 100, ¶ 22, 724 N.W.2d 610, 619. Investigator Schulz assured Defendant he would not be arrested that day. DVD 00:03:08. The interview was cordial, and nowhere did Defendant express concern about being interviewed by Schulz. DVD, *generally.* At the conclusion of the interview and after execution of the search warrant on Defendant's cell phone, Defendant was allowed to leave the Public Safety Building of his own free will.

DVD, *generally*; *Johnson*, 2007 S.D. 86, ¶ 28, 739 N.W.2d at 8; *Anderson*, 2000 S.D. 45, ¶ 77, 608 N.W.2d at 666.

During the course of the interview, there was a free-flowing manner of communication. DVD, *generally*. Further, Investigator Schulz was not abusive, overly coercive, or overly aggressive in his questions during the interview with Defendant. DVD, *generally.*

Defendant asserts that Peterson was not properly certified to interpret a police interrogation, resulting in interpretation errors and confusion for Defendant. DB 14. To interpret in a criminal proceeding, South Dakota requires that an interpreter be

> Registered and certified in South Dakota and holding a level IV or V South Dakota certificate, level IV or V NAD certificate, NIC advanced or master level, RID certificate of interpretation or certificate of transliteration, RID combined certificate of interpretation and transliteration, or RID special certificate…

ARSD § 46:31:06:02. Peterson is a Level III interpreter certified in transliteration (CT). JT 564. The certificate in transliteration enables Peterson to provide interpreting services in

> any criminal proceeding, any interrogation by law enforcement which could result in a criminal charge, any arrest or booking at a police station, any meeting with a probation or parole officer, any meeting with an attorney relating to a potential criminal charge or proceeding, any deposition relating to a potential criminal charge or proceeding, and any grand jury proceeding[.]

ARSD § 46:31:06:02(1). Peterson has interpreted in several court proceedings in South Dakota, including Butte, Meade, and Pennington Counties. MH1 43. Additionally, Peterson has worked with Defendant

for approximately three years on several different occasions, including employment, counseling, and courtroom settings. JT 570. Peterson and Defendant are familiar with each other and have conversed frequently. JT 570. Because Peterson and Defendant have worked together for the past three years, Peterson understands Defendant's conversational preferences. JT 574.

Defendant argues that he strictly converses through American Sign Language (ASL) and not English Sign Language. DB 15. Because Peterson used a mixture of both languages, Defendant claims he did not fully understand his rights. DB 15. In support of his claim, Defendant produced a report by expert witness, Ms. Witter-Merithew, who opined in her report that Peterson's interpretation did not accurately communicate to Defendant the noncustodial statement. MH1 90.

Defendant was provided the noncustodial statement both in sign language and on a written document. DVD 00:03:08. Defendant never stated he was confused during the interview, or that he did not understand Peterson. DVD, *generally*. In fact, Peterson testified that when interpreting for Defendant, she had grown accustomed to using a blend of ASL and signed English with him for the past three years, to which Defendant has never expressed confusion. JT 574. The trial court correctly determined that the February 6, 2012 interview was not custodial. SR 126.

2. A Reasonable Person would Have Felt he was at Liberty to Terminate the Interrogation and Leave.

This Court has held many times that "subjective thoughts are not a proper basis for the determination of whether [Defendant] was in custody." *Myhre*, 2001 S.D. 109, ¶ 18, 633 N.W.2d 186, 190 (citing *State v. Herting*, 2000 S.D. 12, ¶ 13, 604 N.W.2d 863, 866 (citations omitted)). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogation officers or the person being questioned." *Herting*, 2000 S.D. 12, ¶ 9, 604 N.W.2d at 865. Based upon the objective circumstances, Defendant was not "in custody" for purposes of *Miranda* during his interview.

Investigator Schulz diligently informed Defendant of his rights. First, Peterson signed his rights to Defendant. Second, Defendant read his rights. DVD 00:03:08. The rights read to Defendant are as followed:

> This will be a noncustodial interview you're not under arrest and you're not being detained. You don't have to talk to me if you don't want to. The door is shut for privacy purposes and unlocked. At any time you feel that you don't want to talk anymore you can leave. No matter what you tell me I am not arresting you today. Do you understand what I just explained to you? Do you have any questions?

DVD 00:03:08. Defendant was told he was free to leave. DVD 00:03:08.

After Schulz read the noncustodial statement, Defendant asked "I guess I don't know what the point like when we're finished, then what happens?" to which Schulz replied "[w]hen we're finished then I'll explain the whole process of what's of what's [sic] going on and I'll answer those

questions as the interview progresses." DVD 00:03:53-00:04:08. Defendant relies on his expert witness, Witter-Merithew, to argue that Defendant actually signed, "If we finish, then what?" Witter-Merithew's Report 16. Witter-Merithew suggests, by examining Peterson's interpretations, that Defendant requested to terminate the interview, but the request was misconstrued by Peterson's interpretation. Witter-Merithew's Report 16. However, Witter-Merithew concedes in her report that this inquiry "If we finish, then what?" could be understood several different ways. Witter-Merithew's Report 16. The trial court correctly held that "[g]iven the circumstances surrounding the interview that occurred on February 6, 2012, a reasonable person in the Defendant's position would have felt that he was at liberty to terminate the interrogation and leave. SR 126.

Additionally, while Schulz was executing the search warrant on Defendant's phone, Schulz asked Defendant to wait in the lobby of the Public Safety Building, where Defendant had easy access to exit the building and the interview. JT 512. Schulz told Defendant that he was not under arrest or being detained, and drove Defendant back to his hotel when he completed the interview. JT 498. Defendant did not request to leave during the interview. DVD, *generally*. Based on the totality of the objective circumstances, Defendant was not in custody for purposes of *Miranda* during his interview, and a reasonable person

would have understood he was at liberty to terminate the interrogation and leave.

Witter-Merithew also opined that Defendant did not understand his rights to a noncustodial interview, he felt pressured in the interview, and Peterson's interpretation affected Defendant's ability to resist the additional pressure. DB 15. However, Defendant also had the opportunity to read the noncustodial interview. DVD 00:03:08. Defendant did not appear confused and did not state that he did not understand his rights at any time during the interview. DVD, *generally*.

Dr. Manlove, one of Defendant's expert witnesses, opined that Defendant had the capability to read and also understand his rights. MH2 10. Dr. Manlove, a forensic psychiatrist, also opined that Defendant has an average full IQ and a low average verbal IQ. MH2 33. The trial court ruled that Defendant understood his rights to a noncustodial interview, and demonstrated the ability to resist pressure. SR 127.

Based on the totality of the circumstances, the trial court properly held that Defendant had the capacity to understand his rights and feel free to terminate the interview and leave. SR 126. Because the interview was not custodial and was properly understood, the trial court properly denied Defendant's motion to suppress his statements.

C. The Statements Made By Defendant Were Voluntary.

Defendant also claims that under the totality of the circumstances his statements to Schulz should be considered involuntary in light of his disability. However, Defendant voluntarily and willingly participated in the interview with Schulz.

When analyzing the voluntariness of a confession, this Court "perform[s] a de novo review of the record; however, [it] give[s] 'deference to the trial court's factual findings.'" *State v. Cottier*, 2008 S.D. 79, ¶ 19, 755 N.W.2d 120, 128 (citing *Johnson*, 2007 S.D. 86, ¶ 29, 739 N.W.2d at 11).

> Ultimately, '[t]he voluntariness of a confession depends on the absence of police overreaching. *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S.Ct. 515, 523, 93 L.Ed.2d 473, 55 USLW 4043 (1986). Confessions are not deemed voluntary if, in the light of the totality of the circumstances, law enforcement officers have overborne the defendant's will.'

Id. (citing *State v. Tuttle*, 2002 S.D. 94, ¶ 20, 650 N.W.2d 20, 30). The State must establish the voluntariness of a confessant's admission by a preponderance of the evidence. *Id.*

In order to make this determination, the Court first looks to the questioning Officer's conduct. *State v. Owen*, 2007 S.D. 21, ¶ 21, 729 N.W.2d 356, 364 (citing *State v. Wright*, 2004 S.D. 50, ¶ 7, 679 N.W.2d 466, 468). "Next, [this Court] look[s] at the defendant's capacity to resist pressure created by law enforcement officers." *Id.* When analyzing

allegations of police coercion, this Court looks at a variety of factors including:

> (1)The conduct of law enforcement officials in creating pressure and (2) the suspect's capacity to resist that pressure. On the latter factor, we examine such concerns as the defendant's age, level of education and intelligence; the presence or absence of any advice to the defendant on constitutional rights; the length of detention, the repeated and prolonged nature of the questioning; the use of psychological pressure or physical punishment, such as deprivation of food or sleep; and the defendant's prior experience with law enforcement officers and the courts. Finally, [d]eception or misrepresentation by the officer receiving the statement may also be factors for the trial court to consider; however, the police may use some psychological tactics in interrogating a suspect.

Cottier, 2008 S.D. 79, ¶ 19, 755 N.W.2d at 128 (emphasis omitted) (citing *Tuttle*, 2002 S.D. 94, ¶ 22, 650 N.W.2d at 31); *Owen*, 2007 S.D. 21, ¶ 21, 729 N.W.2d at 364 (citing *State v. Holman*, 2006 S.D. 82, ¶ 15, 721 N.W.2d 452, 457).

When reviewing the totality of the circumstances, it is clear that the interview was not of a coercive nature. Throughout the interview, Investigator Schulz remained calm and cordial. Schulz was not abusive, coercive, or overly assertive during the interview. Defendant had the capacity to resist pressure as demonstrated by his numerous denials to the allegations. Additionally, Defendant was 32 years old at the time of the interview, and is deemed to be of average intelligence, average reading skill, and competent to understand. MH2 10. Additionally, Defendant has a criminal history: DUIs in 1999, 2007, and 2011, and was twice arrested for domestic violence in 2011. MH1 9. Defendant

was read and signed his rights of a noncustodial interview. Defendant interviewed for approximately two hours and forty-five minutes, and was allowed to leave the station at the conclusion of the interview. Schulz did not deceive Defendant in any way. Defendant's will was not overborn.

Based on the totality of the circumstances, the trial court correctly concluded that Defendant was not in custody, his will was not overborne, and he freely and voluntarily answered Investigator Schulz's questions.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE TESTIMONY OF DR. LESLIE FIFERMAN

A. Standard of Review.

Trial courts in South Dakota have broad discretion concerning the qualifications of expert witness and the admission of expert testimony. *State v. Koepsell*, 508 N.W.2d 591, 593 (S.D. 1993). The admission of expert testimony will not be reversed on appeal without a clear showing that the trial court abused its discretion. *Id.*

B. Argument.

The trial court properly allowed Dr. Fiferman to testify regarding general characteristics of sexually abused children. Dr. Fiferman is a licensed psychologist in Rapid City, South Dakota, and received his PH.D. in clinical psychology at USD in 1990. EH 47. Upon graduation, Dr. Fiferman joined the United States Army where he obtained clinical supervision experience. EH 47. Dr. Fiferman was also a staff psychologist at the William Beaumont Army Medical Center in El Paso,

Texas. EH 47. Dr. Fiferman gives lectures related to psychology, and holds a professional membership with the American Society of Treatment for Sexual Abusers. EH 47. Dr. Fiferman works with victims of sexual abuse, and sexual abuse offenders every day. EH 48. He estimates that he dedicates approximately 80% of his practice to sex abuse victims and offenders. EH 48. Dr. Fiferman has testified in court as an expert witness fifteen to twenty times in South Dakota. JT 318.

Dr. Fiferman testified, inter alia, that offenders of sexual abuse may groom their victims in order to manipulate them. JT 319. Dr. Fiferman testified that in his experience, it is common for an offender to "use pornography in an attempt to normalize sexual images and stimuli for the child so that the child will be less resistant to sexual behaviors that he or she may impose on the victim." JT 320. Dr. Fiferman also testified that delayed disclosure of sexual abuse is common in children, that children often will disclose only a small part of what may have occurred, and that children will often recall additional details after they make the initial disclosure. JT 325. Additionally, Dr. Fiferman testified on the psychological effects, trauma, and behavior of sexually abused children. JT 325. Dr. Fiferman explained to the jury the general characteristics of sexually abused children, but did not offer an opinion on the facts of this case. JT 325.

"Expert testimony explaining the general characteristics of sexually abused children is admissible when relevant." *State v. Cates*, 2001 S.D.

99, ¶ 19, 632 N.W.2d 28, 36; s*ee State v. Edelman*, 1999 SD 52, ¶ 15, 593 N.W.2d 419, 422. *See also State v. Spaans*, 455 N.W.2d 596, 598–99 (S.D.1990). "Expert testimony is allowed in child sex abuse cases to assist the jury in understanding matters that normally would not lie within a layman's knowledge." *Id.* The determining factor for the admission of expert testimony is whether it will assist the jury in resolving the factual issues before it. *Id.*

The trial court properly overruled Defendant's objection and allowed Dr. Fiferman to testify. The trial court cited SDCL 19-12-1 when it concluded that Dr. Fiferman's testimony was admissible and relevant. SR 158. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1; SR 158. Dr. Fiferman testified about the general characteristics of a sexually abused child, *e.g.,* grooming, delayed disclosure, and ability to recall additional details after initial disclosure (JT 325), matters "that normally would not lie within a layman's knowledge." *Koepsell*, 508 N.W.2d at 593. Further, the fundamental test for the admission of expert testimony is whether it will assist the jury in resolving the factual issues before it. *Id.* "A fundamental baseline for reliability is that experts are limited to offering opinions within their expertise." *State v. Fisher*, 2011 S.D. 74, ¶ 41, 805 N.W.2d 571, 580. The testimony of Dr. Fiferman assisted the jury in

understanding the general characteristics of sexually abused children; therefore, his testimony assisted the jury in resolving the factual issues before it. Dr. Fiferman has extensive knowledge as a clinical psychologist working with child sex assault victims, and has testified in South Dakota courts as an expert witness approximately fifteen to twenty times. JT 318.

This Court has been cautious of expert witnesses' opinion testimony, especially when it is in regard to whether sexual abuse occurred. In *State v. Buchholz*, the expert witness testified that her medical diagnosis was that the child was sexually abused. *Buchholz*, 2013 S.D. 96, ¶ 21, 841 N.W.2d 449, 457. The Court held that the expert witness testimony was inadmissible because she based her diagnosis on statements of the victim. *Id.*, 2013 S.D. 96, ¶ 25, 841 N.W.2d at 458. *Buchholz* recognized that while experts can "express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse . . . jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse." *Id.*, 2013 S.D. 96, ¶ 29, 841 N.W.2d at 459. In the present case, Dr. Fiferman was careful not to testify to a medical diagnosis based on the credibility of the witnesses.

The trial court, therefore, properly overruled Defendant's objection and allowed Dr. Fiferman to testify regarding general characteristics of sexually abused children.

III

THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO DECLARE THE COUNTS IN THE ALTERNATIVE IS NOT A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE.

A. Standard of Review.

Reviewing double jeopardy claims on appeal are questions of law and are reviewable de novo. *State v. Beck*, 1996 S.D. 30, ¶ 6, 545 N.W.2d 811, 812 (citing *Poppen v. Walker,* 520 N.W.2d 238, 241 (S.D.1994). "Accordingly, [the Court gives] no deference to the conclusions of the trial court." *Id.*

B. Argument.

The Double Jeopardy Clause of the Fifth Amendment declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The South Dakota Constitution provides that "no person shall . . . be twice put in jeopardy for the same offense." S.D. Const. art. VI, § 9. "These provisions shield criminal defendants from both multiple prosecutions and multiple punishments for the same criminal offense if the Legislature did not intend to authorize multiple punishments in the same prosecution." *Wright*, 2009 S.D. 51, ¶ 67, 768 N.W.2d at 533 (quoting *State v. Dillon*, 2001 S.D. 97, ¶ 13, 632 N.W.2d 37, 43).

Defendant's double jeopardy argument hinges on the assumption that because Defendant committed one act of penetration, Defendant cannot be able to be convicted of both First Degree Rape and Aggravated

Incest.[2] However, when determining whether Defendant's convictions violate the double jeopardy clause, the Court administers the *Blockburger* test: "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Dillon*, 2001 S.D. 97, ¶ 18, 632 N.W.2d at 45 (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)); *see also State v. Augustine,* 2000 SD 93, ¶ 13, 614 N.W.2d 796, 798 (citations omitted). "Whether conduct constitutes more than one offense is to be found by examining only the statutory elements comprising the offenses without regard to how the offenses were charged, how the jury was instructed, or how the underlying proof for the necessary elements was established." *Dillon*, 2001 S.D. 97, ¶ 18, 632 N.W.2d at 45. *See Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182, 76 L.Ed. 306; *Roberts v. State,* 712 N.E.2d 23, 30 (Ind.Ct.App.1999). First Degree Rape is "an act of sexual penetration accomplished with any person under any of the following circumstances: (1) If the victim is less than thirteen years of age." SDCL 22-22-1(1). Aggravated Incest reads "[a]ny person who knowingly engaged in an act of sexual penetration with a person who is less than eighteen years of age and is either: (1) The

[2] Defendant's double jeopardy argument does not include Defendant's conviction of SDCL 22-22-7, Sexual Contact with Child under Thirteen. The Sexual Contact With Child Under Thirteen conviction occurred in December 2011 when K.J. touched Defendant's penis. DVD 01:26:59.

child of the perpetrator or the child of a spouse or former spouse of the perpetrator." SDCL 22-22A-3(1).

First Degree Rape requires proof of sexual penetration with any person under the age of thirteen, whereas Aggravated Incest requires proof that a person knowingly engaged in an act of sexual penetration with a person under the age of eighteen. The Aggravated Incest statute includes an element that is not present in the First Degree Rape statute: the requirement that the victim of the act be the child of the perpetrator or the child of a spouse or former spouse of the perpetrator. In this case, each of the two statutes at issue requires proof of an additional fact which the other does not. The trial court held that there was substantial evidence to warrant submission of all three counts, and denied Defendant's motion for Count 1 and Count 3 to be in the alternative. JT 591. First Degree Rape and Aggravated Incest each have different elements, and the trial court correctly denied Defendant's motion to declare the counts in the alternative.

IV

THE TRIAL COURT PROPERLY DENIED DEFENSE'S MOTION FOR JUDGMENT OF ACQUITTAL

A. Standard of Review.

The Court reviews the denial of motion for judgment of acquittal de novo. *State v. Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d 149, 149 (citing *State v. Jucht*, 2012 S.D. 66, ¶ 18, 821 N.W.2d 629, 633). The Court determines whether the "evidence was sufficient to sustain the

conviction[]." *Id.* (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 16, 693 N.W.2d 685, 693 (citations omitted)). "Claims of insufficient evidence are 'viewed in the light most favorable to the verdict.'" *Id.* (quoting *State v. Morgan*, 2012 S.D. 87, ¶ 10, 824 N.W.2d 98, 100 (citations omitted)). The issue is whether the evidence provided is "sufficient to sustain a finding of guilt beyond a reasonable doubt." *State v. Jensen*, 2007 S.D. 76, ¶ 7, 737 N.W.2d 285, 288 (quoting *State v. Lewis*, 2005 S.D. 111, ¶ 8, 706 N.W.2d 252, 255). "[T]his Court does not resolve conflicts in the evidence, or pass on the credibility of witnesses, or weigh the evidence." *Id.* This Court will not set aside a jury's verdict if the evidence presented, including the favorable inferences drawn from it, provides a rational theory that supports the jury's verdict. *State v. Mozko*, 2006 S.D. 13, ¶ 6, 710 N.W.2d 433, 437.

B. The State's Evidence was Sufficient.

Defendant maintains the trial court erred in denying his motions for judgment of acquittal and that the evidence was insufficient to support the jury's verdict. He premises this claim on the notions that the State failed to prove any of the three counts of which Defendant was convicted, and that the State provided no physical evidence of penetration. DB 34.

Defendant's argument should be rejected as the State's evidence proved the elements of the crimes of which he was convicted. First Degree Rape is defined as follows:

> Rape is an act of sexual penetration accomplished with any person under any of the following circumstances:
>
> (1) If the victim is less than thirteen years of age.

22-22-1(1).

Sexual Contact with Child Under Thirteen is defined as follows:

> Any person, sixteen years of age or older, who knowingly engages in sexual contact with another person . . . is guilty of a Class 3 felony.

22-22-7.

Aggravated Incest is defined as follows:

> Any person who knowingly engages in an act of sexual penetration with a person who is less than eighteen years of age and is either:
>
> (1) The child of the perpetrator or the child of a spouse or former spouse of the perpetrator.

22-22A-3(1).

Turning first to the question of whether Defendant's acts constituted first degree rape, the State's evidence established that Defendant sexually penetrated his seven year old stepdaughter. DVD 1:30:28. Defendant admitted that he penetrated K.J. to Schulz. DVD 1:30:28. Defendant's admission was corroborated with K.J.'s statement to both her mother and Child Advocacy Counselor Strand. DVD approximately 1:30:28; FI 00:13:45. Defendant admitted to Schulz that K.J. pulled down her underwear, and he rubbed on K.J.'s "g spot" to teach her how to masturbate. DVD 1:30:28. Defendant described the

"g spot" as being located at the top of the vagina, and not inside the vagina. DVD approximately 1:30:28. K.J. recalled to Strand that Defendant touched K.J. under her dress, "kinda digged in there and kinda got my bone," and that it hurt. FI 00:13:45. K.J. showed Strand where Defendant rubbed by circling the area on a picture of a naked girl. State's Exhibit 3.

Sexual penetration is defined as "an act, however slight, of sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the body or any object into the genital and anal openings of another person's body." SDCL 22-22-2. In the present case, Defendant admitted to rubbing K.J.'s "g spot," and K.J. described his actions as digging in to her bone and hurting her. DVD approximately 1:30:28; FI 00:13:45. The trial court did not abuse its discretion in denying Defendant's motion of acquittal based on his claim that the State did not provide sufficient evidence to convict Defendant of First Degree Rape.

It is clear that Defendant's acts constituted sexual contact with a child under the age of thirteen. Sexual contact is defined as "any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party." SDCL 22-22-7.1. The Defendant claimed to Schulz that K.J. was curious and wanted to see Defendant's penis. DVD 1:26:59. Defendant

showed K.J. his penis, and K.J. touched it. DVD 1:26:59. Additionally, Defendant admitted that he touched her vagina to teach her about sex and how to masturbate. DVD approximately 1:30:28. The facts provided establish that Defendant attempted to teach K.J. to arouse or gratify herself. DVD approximately 1:30:28. The evidence also established that while K.J. told Strand that she touched Defendant's penis, she demonstrated an up and down motion. FI 00:15:08. The trial court did not abuse its discretion in denying Defendant's motion of acquittal that argued that the State did not provide sufficient evidence to convict Defendant of Sexual Contact with a child under the age of thirteen.

Lastly, the State established that Defendant's acts constituted aggravated incest through K.J.'s statements and Defendant's admission. Through Defendant's own admission, the State has provided sufficient evidence that Defendant penetrated K.J. with his fingers, when K.J. was seven years old. DVD approximately 1:30:28. K.J. is Defendant's stepdaughter. JT 410. Because all elements for aggravated incest have been met, the trial court correctly denied defendant's motion for judgment of acquittal.

The State provided sufficient evidence to the jury of each element of all charges. The trial court correctly denied Defendant's motion for judgment of acquittal.

V

DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BASED ON THE STATE'S FAILURE TO DISCLOSE EVIDENCE.

A. Standard of Review.

A denial of a motion for a new trial is reviewed under the abuse of discretion standard. *State v. Corean*, 2010 S.D. 85, ¶ 18, 791 N.W.2d 44, 52. "New trial motions based on newly discovered evidence request extraordinary relief; they should be granted only in exceptional circumstances and then only if the requirements are strictly met." *Corean*, 2010 S.D. 85, ¶ 18, 791 N.W.2d at 51-52 (quoting *State v. Gehm*, 1999 S.D. 82, ¶ 15, 600 N.W.2d 535, 540).

B. Argument

Defense argues that the State's failure to disclose a medical examination conducted on K.J. resulted in a *Brady* violation. DB 37. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

> In *Brady*, the United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *See State v. Leisinger*, 2003 S.D. 118, ¶ 14, 670 N.W.2d 371, 374. Undisclosed evidence is 'material' when 'there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 114 L.Ed.2d 286 (1999). A *Brady* violation occurs when (1) '[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching;' (2) the 'evidence [has] been suppressed by the State, either willfully or inadvertently;' and (3) 'prejudice [has] ensued.'

Thompson v. Weber, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 12 (quoting *Strickler*, 527 U.S. at 281-82, 119 S.Ct. at 1948).

After K.J.'s forensic interview with Strand, K.J. was examined by a physician. There was no physical evidence of abuse. MH4, 2. Defendant argues that the State's failure to disclose the sexual assault medical examination is exculpatory evidence that prejudiced Defendant. DB 38.

The Court must first determine whether the "evidence [has] been suppressed by the State." *Thompson*, 2013 S.D. 87, ¶ 38, 841 N.W.2d at 12 (quoting *Strickler*, 527 U.S. at 281-82, 119 S.Ct. at 1948). Then, in order to determine whether a *Brady* violation occurred, this Court must determine whether "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching." *Thompson*, 2013 S.D. 87, ¶ 38, 841 N.W.2d at 12 (quoting *Strickler*, 527 U.S. at 281-82, 119 S.Ct. at 1948). In this case, it appears from the record that Defendant never received a copy of K.J.'s medical examination report and only learned of its existence when he saw an invoice after sentencing. MH4 2. Because the evidence is neither exculpatory nor impeaching, Defendant was not prejudiced.

When a *Brady* discovery violation has occurred, the Court must examine whether prejudice ensued. Defendant argues he is prejudiced by not receiving K.J.'s medical examination, showing no evidence of

sexual abuse. *Thompson*, 2013 S.D. 87, ¶ 38, 841 N.W.2d at 12 (quoting *Strickler*, 527 U.S. at 281-82, 119 S.Ct. at 1948). Here, no prejudice occurred to Defendant because the evidence was not exculpatory in light of Defendant's admission to penetrating K.J. The Defendant "must establish that there is a reasonable probability that the results of the proceeding would have been different if the suppressed evidence had been disclosed." *Id.*, 2013 S.D. 87, ¶ 48, 841 N.W.2d at 15. In this case, the results of the medical examination determining that K.J. had no physical evidence of penetration did not make a stronger case for Defendant in light of Defendant's own admission. Defendant admitted to "trying to show her you know what what it's like . . ." DVD 1:18:10. When Schulz asked Defendant how he tried to teach her how to masturbate, Defendant answered that he rubbed her "g spot" with his fingers. DVD 1:22:31. Defendant stated that K.J. pulled down her underwear and Defendant "showed her where where exactly to touch." FI 1:30:28. When explaining to Schulz about K.J. touching his penis, Defendant said ". . . she kept asking I wanna see what it looks like and I was very nervous and said fine I'll go ahead and show you and she felt it. And my heart was just pounding I thought I was going to pass out." DVD 1:26:59.

The State did not need to prove by a medical report K.J. had any physical evidence of penetration. K.J. testified in court, in detail, of the abuse, and Defendant corroborated K.J.'s testimony with his admissions

to Schulz. DVD approximately 1:30:28. "Penetration can be inferred from circumstantial evidence and need not be proved by medical evidence." *State v. Toohey*, 2012 S.D. 51, ¶ 22, 816 N.W.2d 120, 129 (citing *Spurlock v. State*, 675 N.E.2d 312, 315 (Ind. 1996) (citations omitted)).

The totality of the circumstances suggests that no prejudice to Defendant occurred by not receiving the medical report.

The Defendant did not prove with reasonable probability that with the disclosure of the medical examination, the results of his trial would have been different. The Defendant was not prejudiced by the lack of disclosure of K.J.'s medical examination.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 7,755 words.

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

Dated this 2nd day of July, 2014.

_____

Caroline Srstka
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of July, 2014, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Jesse Johnson* were served upon Alecia E. Fuller, Pennington County Public Defender at aleciaf@co.pennington.sd.us.

_____

Caroline Srstka
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO: 26803

JESSE JOHNSON,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE Janine M. Kern, Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal was filed on August 29, 2013.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 26803

JESSE JOHNSON
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Appellant's Brief in this matter was properly filed with this Court on May 15, 2014. The Appellee's Brief was properly filed with this Court on July 2, 2014. Appellant intends that all arguments abbreviations, and references contained in its earlier brief be incorporated herein by reference. Any reference to the brief filed by the State will be designated as "SB," followed by the appropriate page number.

REPLY ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT DETERMINED JOHNSON WAS NOT IN CUSTODY AND HIS STATEMENTS WERE VOLUNTARY AT THE TIME OF HIS FEBRUARY 6, 2012 INTERROGATION AND DENIED DEFENDANT'S MOTION TO

SUPPRESS.

To support its assertion the February 6, 2012 interview was non-custodial the State relies heavily on the statement read by Investigator Schulz and Katie Peterson's certification and experience.

The State erroneously asserts that Johnson argues Peterson was not "properly certified to interpret a police interrogation, resulting in interpretation errors and confusion for Defendant." (SB 15). Johnson's assertion is Peterson was not qualified and certified to interpret for someone whose language is ASL. Johnson asserts Peterson made significant errors that resulted in Johnson not understanding he was free to leave. These errors, and Johnson's lack of understanding, were a result of Peterson's transliteration on February 6, 2012, regardless of her certification.

The State ignores Johnson's written answer of "No" after he is signed "Do you understand… just put down yes or no". Instead, the State suggests that he wrote "no" to answer the written question whether Defendant had any questions. (SB 14). An objective review of the video reflects his written answer was a response to a signed question. (DVD 15:31:45). He wrote he did not understand the document Schulz read to him or the document Johnson read. He did not understand he was free to leave, therefore

he was not.

The State ignores Katie Peterson's errors in interpretation. The errors were undisputed. In fact, Peterson acknowledged she misinterpreted Johnson's inquiring into what would happen if the interview was ended. (MH1 75-76). This error is a violation of the Code of Conduct for Interpreters Cannon 1, in that she did not render a complete and accurate interpretation. (Supreme Court Rule 13-05, SDCL 16-2 Appx. B.) The Code of Conduct was a Supreme Court Rule which was codified in 2013. It is acknowledged Johnson's interrogation was prior to the Code of Conduct being formalized. However, it is illustrative of the issues the Court and Legislature saw with meaningful access to the Justice System for individuals who do not speak or understand English.

Katie Peterson was hired by the State to assist in the interrogation of Johnson. After the interrogation and after charges were filed, Peterson and Lisa Fowler, submitted to the Court a Memorandum. (SR 9). This memorandum stated "Ms. Peterson has had prior contact with the plaintiff and defendant in other interpreting instances and does not believe this will impact her ability to act in a fair an impartial manner as a court interpreter during this trial." (SR 9). Knowledge of Peterson's role in the interrogation would clearly suggest this statement is not accurate, as the

interrogation can't be construed as "other interpreting instances". Further, it is in violation of the Code of Conduct for Interpreters Cannon 3, specifically the interpreter should disclose any real or perceived conflict of interest. (Supreme Court Rule 13-05, SDCL 16-2 Appx. B.) It is a real conflict of interest to act as a State agent in interrogating a suspect and then to present yourself to the Court as an interpreter for the criminal court proceedings that are a result of the interrogation.

Katie Peterson also misrepresented her qualifications in a Motion Hearing which is a violation of Canon 2 of the Code of Conduct for Interpreters. (Supreme Court Rule 13-05, SDCL 16-2 Appx. B.). Upon direct examination she stated she was qualified to interpret ASL, but upon cross-examination acknowledged that she was only certified in Transliteration and not certified to interpret ASL. (MH1 23 and 40). All Peterson's misrepresentations are evidence of her lack of qualifications, her proficiency, and lack of credibility on all issues.

The State provides no evidence or authority to contradict Witter-Merithew's expert opinion that Peterson's transliteration did not accurately communicate to Defendant his right to leave.

The State suggests that a factor supporting Johnson's ability to terminate the interview was that Johnson did not

leave when he was in the lobby waiting for his cell phone to be searched. (SB 18). This assertion, that Johnson would have felt he was able to leave, completely ignores the reality that to a Deaf person a cell phone and text messaging is sometimes the only communication with the hearing world. Johnson was not free to leave without his cell phone that was in Law Enforcement's possession.

The State asserts in its argument that Investigator Schulz's conduct did not create a coercive environment and in support of this, it states "Schulz did not deceive Defendant in any way." (SB 22). The testimony of Schulz suggests otherwise. When Johnson inquired as to consequences, Schulz told Johnson "you don't need to worry about that". (MH1 21). Schulz also informed Johnson that Johnson would probably receive probation. (MH1 21). These statements are deceptive.

Johnson was in custody at the time of his February 6, 2012 interrogation and his statements to Investigator Schulz as interpreted by Katie Peterson were not voluntary. Therefore, all Johnson's statements, gestures and demonstrations as voiced by Katie Peterson on February 6, 2012 should be suppressed, the convictions reversed and the matter remanded for a new trial without the evidence of Johnson's February 6, 2012 interrogation.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE TESTIMONY OF DR. LELSIE FIFERMAN.

The State, by ignoring SDCL 19-15-2 in its brief, appears to suggest the South Dakota statute which controls the admissibility of expert testimony does not apply to expert testimony in this case. Instead, the State relies heavily upon cases, including State v. Cates, 2001 S.D. 99, 632 N.W.2d 28, and State v. Edelman, 1999 S.D. 52, 593 N.W.2d 419, which were decided prior to the modification of SDCL 19-15-2 in 2011 and relied upon the old statute that did not require the expert to apply the "principles and methods reliably to the facts of the case" as now required by SDCL 19-15-2.

The State also relies upon State v. Fisher, 2011 S.D. 74, 805 N.W.2d 571, to support its argument that Dr. Fiferman's testimony was properly admitted. In Fisher, the defendant argued an expert was not qualified to testify as an expert, not that the expert failed to apply the area of expertise to the facts of the case. The expert in Fisher had knowledge of the facts of the case. Therefore, it is not applicable to the facts of this appeal, defendant's argument, or the issue before the Court.

The State also relies upon State v. Buchholz, 2013 S.D. 96, 841 N.W.2d 449, to suggest that because Dr. Fiferman did not testify as to the ultimate issue based on the credibility of the witnesses, it was not error to allow

him to testify. In Buchholz, the expert witness had knowledge of the facts of the case and apparently had the qualifications of an expert, but the Court reversed the decision of trial court and found the trial court abused its discretion in allowing the expert's opinion of sexual abuse. Id at ¶29. Again, this case is distinguishable and not controlling as to the issue before the Court.

Johnson would request the Court consider the plain meaning of SDCL 19-15-2 and find the trial court erred in allowing the testimony of Dr. Fiferman. Such error was an abuse of discretion and denied Johnson a fair trial. Johnson requests the Court reverse the trial court's decision permitting Dr. Fiferman to testify and remand for a new trial.

III.

THE TRIAL COURT'S DENIAL OF DFENDANT'S MOTION TO DECLARE THE COUNTS AS ALTERNATIVE IS A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT TO THE UNITED STATE'S CONSTITUTION.

The State asserts that First Degree Rape and Aggravated Incest each require "proof of an additional fact which the other does not" in attempting to apply the Blockburger v. United States test. 284 U.S. 299, 52 S.Ct. 180 (1932). However, the State asserts the element that First Degree Rape requires that is distinct from the Aggravated Incest is the age requirement. (SB 28). The issue of age element is addressed in State v. Dillon, where

the Court held that the "age element in first degree rape is hardly so distinct from the victim age element in criminal pedophilia as to demonstrate manifest legislative intent to authorize multiple punishment." 2001 S.D. 97, ¶21, 632 N.W.2d 37, 46. As the First Degree Rape statute does not include an element distinct from the Aggravated Incest statute, then it becomes an "included offense under double jeopardy analysis." Dillon at ¶19. The rape subsections in SDCL 22-22-1 have some age distinctions, those subsections are, under State v. Lafferty, 2006 S.D. 50, 716 N.W.2d 782 all the same offense (one statute that can be committed multiple ways). In this case, as in Dillon, the offenses are not so distinct as to have validly been charged in the conjunctive (and), so should have been charged in the disjunctive (or).

Johnson would repeat his request to vacate both the conviction and sentence on the lesser offense and remand for resentencing.

IV.

THE TRIAL COURT IMPROPERLY DENIED DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL.

The State relies heavily upon the DVD of Johnson's interrogation by Investigator Schulz and Katie Peterson. The entirety of the DVD is suspect considering the interpretation errors. As the State relies almost entirely upon the DVD to support its conclusion there was sufficient

evidence to support all charges, it suggests that absent the improperly admitted DVD the State's case would have failed to meet the burden of sufficient evidence.

Johnson submits the authority and factual analysis in his original brief to support his claim that the trial court erred by not granting the judgment of acquittal and the convictions should be vacated.

V.

THE FAILURE OF THE STATE TO PROVIDE EXCULPATORY DISCOVERY SHOULD RESULT IN A DISMISSAL OR REMAND FOR A NEW TRIAL.

It is important to note that the issue is not whether a motion for a new trial was denied. It is clear by the record that the trial court determined it did not have jurisdiction to hear the issue as the case was already on appeal and the issue did not arise until after Johnson was sentenced.

The State's brief fails to address whether SDCL 23A-13-17 allows the Court to dismiss the charges. Johnson would submit the circumstances in this case warrant the application of SDCL 23A-13-17 and a dismissal. Johnson still has not received the evidence, and it is unclear whether the State has reviewed it. Never-the-less, the State makes conclusory statements that the evidence is neither exculpatory nor impeaching without providing support

to this argument. Common sense would support the conclusion that had the evidence been inculpatory or helpful to the State, the State would have offered it in its case-in-chief. The State's either willful or reckless disregard to the rights of the defendant under Brady v. Maryland, 373 US 83, 83 S.Ct. 1194 (1963), and the Order for discovery warrants a dismissal of all counts.

In its brief, the State appears to assert that because Johnson made statements to Investigator Schulz through Katie Petersen, a sexual assault exam and any statements made by the alleged victim, during the course of the exam that were never disclosed, are not exculpatory nor was Johnson prejudiced by the non-disclosure. (SB 35). Johnson's statements are not relevant to the nature of the evidence that was not disclosed by the State. As the evidence at issue still has not been disclosed, the State's argument that the "totality of the circumstances suggest that no prejudice to Defendant occurred by not receiving the medical report" is speculative at best. (SB 36). If the Court does not grant Johnson's request for dismissal, Johnson would request the convictions be vacated and the matter remanded for the trial court to determine an appropriate remedy to include dismissal or a new trial.

CONCLUSION

Jesse Johnson respectfully requests this Court reverse

his convictions, reverse the ruling on the Suppression of Statements and remand the case to the trial court for further proceedings consistent with the Supreme Court's rulings.

Dated this 17th day of July, 2014.

Respectfully submitted,

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