IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, *Plaintiff and Appellee,* v. CHADWICK JANES, *Defendant and Appellant.*	No. 30974

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

HONORABLE MARK BARNETT
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The transcripts of the motion hearings will be referred to as follows:

Motion Hearing held on March 7, 2024: MH1

Motion Hearing held on March 13, 2024: MH2

Motion Hearing held on April 3, 2024: MH3

Motion Hearing held on May 6, 2024: MH4

The transcript of the jury trial that began on August 26, 2024, and concluded on August 27, 2024, will be referred to as "JT," followed by the corresponding volume number. The transcript of the sentencing hearing held on December 19, 2024, will be referred to as "ST." The settled record will be referred to as "SR."

All references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Chadwick Janes appeals the Judgment and Sentence entered January 9, 2025, by the Honorable Mark Barnett, Circuit Court Judge, in the Second Judicial Circuit. The Notice of Appeal was filed in this matter on January 21, 2025. This Court has jurisdiction over the appeal pursuant to S.D.C.L. § 23A-32-2.

STATEMENT OF THE CASE

The State charged Defendant and Appellant, Chadwick Janes, by indictment with the following crimes: Count 1 - Aggravated Assault (S.D.C.L. § 22-18-1.1(8)); Count 2 - Abuse or Cruelty to a Minor, Victim Aged 7 or Above (S.D.C.L. § 26-10-1); and Count 3 - Abuse or Cruelty to a Minor, Victim Aged 7 or Above (S.D.C.L. § 26-10-1). SR, 12. Count 1 and Count 3 of the indictment were charged in the alternative. SR, 12.

The Honorable Robin Houwman, Circuit Court Judge, presided over pre-trial motions hearings that were held over four days. *See* MH1; MH2; MH3; MH4. The motions concerned the admissibility of hearsay evidence related to child witness, N.S. (D.O.B. 04/18/2011), and other acts evidence pursuant to S.D.C.L. § 19-19-404(b). *See* MH1; MH2; MH3; MH4. The court ruled that the hearsay statements of N.S. to Child's Voice, her mother, and her grandmother were admissible pursuant to S.D.C.L. § 19-19-806.1. MH4, 39-47. The court categorized the bad acts into four separate instances and held that evidence related to two of the alleged prior bad acts were admissible under S.D.C.L. § 19-19-404(b).

The Honorable Mark Barnett, Circuit Court Judge, presided over the jury trial in this matter, which began on August 26, 2024, and concluded on August 27, 2024. The Deputy State's Attorney dismissed Count 2 of the indictment prior to commencement of the trial. JT1, 4; SR, 401. At the conclusion of the State's evidence the defendant made a Motion for Judgment of Acquittal, which was denied by the trial court. JT3, 43-45. The jury found the defendant not guilty of Count 1, and guilty of Count 3 (reflected as Count 2 on the verdict form). SR, 319; JT3, 104.

The trial court ordered a presentence investigation report. SR, 320, 321, 376, 379. Defendant was sentenced on December 19, 2024. *See generally* ST. Judge Barnett imposed 10 years in the South Dakota State Penitentiary, with 3 years suspended. The trial court also ordered Defendant have no unsupervised contact with his son, J.J. (DOB 02/16/2019), and no contact with B.S. (DOB 03/04/2010), N.S. (04/18/2011), or Tanya Janes. ST, 55-58; SR, 401. Defendant was ordered to pay court costs of $116.50, a domestic violence fee of $25, and restitution in the amount of $2000 plus counseling costs for the children. ST, 55-58; SR, 401.

STATEMENT OF FACTS

In 2019, Chadwick Janes (hereinafter Janes) and Tanya Janes got married and moved to a home they built together in Colton, South Dakota. JT3, 5-6. Their son, J.J. (02/16/2019), also lived in the home along with Tanya's two children from a prior marriage, B.S. (DOB 03/04/2010) and N.S. (04/18/2011). *Id.* Janes' daughters, B.J. and A.J. lived in the home but spent half of their time at their

biological mother's home. *Id.*; JT2, 25.

On April 1, 2023, Tanya moved out of the home in Colton with B.S., N.S., and J.J. to a new home in Brandon, South Dakota. *Id.* at 6. On May 16, 2023, Janes served Tanya with divorce papers. *Id.*; SR, 289. That night N.S. had a concert at her school. JT3, 6-7. Her grandmother drove N.S. to the event. *Id.* On the way to the concert grandmother asked N.S. how she felt about the divorce. JT2, 36-37; JT3, 7. N.S. told grandmother she was glad they moved away from Colton because of the abuse. JT2, 36-37. When grandmother asked what she meant, N.S. told her about a time that Janes asked her brother, B.S., to let the dog out and B.S. did not do as Janes said. JT3, 8. She said that she saw Janes put his hands around B.S.'s neck and B.S. was pale. *Id.* Eventually Janes let go and told B.S. that he needed to take it like a man because he wasn't choking him that hard. *Id.* When grandmother got to the concert, she told Tanya that she needed to call the police about this incident. *Id.* at 9. Unbeknownst to grandmother or N.S., B.S. allegedly told Tanya about the same choking incident in the car on the way to the same concert. SR, 248.

Tanya talked to N.S. after they got home from the concert that night to make sure she was okay. JT2, 38. Tanya called law enforcement to report the alleged abuse the next day. *Id.* at 21. A referral was made to Child's Voice. *Id.* at 22, 68; SR, 247, 248.

B.S. was interviewed at Child's Voice on June 6, 2023. SR, 248. B.S. told the interviewer that when he was between 10 and 13 years old Janes beat him with a

belt more than once on his butt and thighs. SR, 248. He described that Janes would "thrash" back and forth. *Id.* He stated that Janes pushed him into the cupboard, and he hit his head on it. *Id.* After he hit his head on the cupboard Janes choked his neck and he couldn't breathe. *Id.* He told the forensic interviewer that he sometimes thought of killing himself because Janes may be happy if he died. *Id.* At the time of the interview B.S. was 13 years old. *Id.*

N.S. was interviewed at Child's Voice on June 26, 2023. *Id.* She was 12 years old at the time she was interviewed. *Id.* She said that Janes hit her on the lower back with a belt more than once and that he grabbed her and dragged her around by the arm, hand or wrist. *Id.* She said that she saw him spank B.S. with a belt more than one time and it would leave red marks and bruises. *Id.* N.S. said Janes slammed B.S.'s head into the countertops and cabinets. *Id.* She said Janes then put his hands on B.S.'s neck and B.S. looked pale like he was about to pass out. *Id.* She stated that Janes pushed her little brother, J.J., dragged him by his ear, and spanked him. *Id.* She said J.J. had bruises and red marks. *Id.* She also talked about a time that Janes grabbed a child at a party by the ear because he was running around and the child's ear was red. *Id.*

On August 16, 2023, Janes was charged by indictment with one count of Aggravated Assault and two counts of Abuse or Cruelty to a Minor. SR, 12. B.S. was the only alleged victim named in the indictment. *Id.*

The prosecution filed Notice of Intent to Offer Hearsay Statements and Notice of Intent to Offer Other Bad Acts under S.D.C.L. § 19-19-404(b). SR, 18, 21.

Judge Houwman presided over the motion hearings regarding the admissibility of the proposed evidence. MH1; MH2; MH3; MH4. After considering the testimony and arguments of the parties, the trial court held that the statements about the abuse to B.S. made by N.S. to her mother, grandmother, and Child's Voice were admissible under the hearsay exception in S.D.C.L. § 19-19-806.1. MH4, 39-48. Regarding the other acts evidence under S.D.C.L. § 19-19-404(b), the court found that evidence regarding an alleged incident in which Janes threw a football at B.S. when he was 8 or 9 years old and a time that he allegedly poured a can of green beans on B.S. when he was 11 were not admissible. *Id.* at 48-51. However, the court held that the prosecution could use evidence that when B.S. was approximately 10 years old Janes became angry at him for not wearing a coat and struck him with a belt several times. *Id.* It also held that other acts evidence that occurred between 2018 and 2021, when Janes allegedly spanked B.S. with a belt more than one time, and slammed his head into the cabinets and countertops, was admissible. *Id.*

Judge Mark Barnett presided over the jury trial, which was held August 26, 2024, through August 27, 2024. Before the trial began the prosecution dismissed Count 2 of the indictment. JT1, 4. The defense preserved its objections to the hearsay and other acts evidence ruled admissible by Judge Houwman. *Id.* at 2. The defendant's Motion in Limine to exclude evidence of other acts that were not previously noticed or addressed was granted. *Id.* at 15-16.

At trial N.S. testified that she was 7 or 8 years old when she moved to

Colton to live with Janes. JT2, 24. She stated that although she was close with Janes, he would get angry with her and B.S. *Id.* 26. She said that he could be verbally aggressive to his biological daughters, but he was physically aggressive with B.S. and N.S. *Id.* She described that Janes would hit her and B.S. with his belt or hand. *Id.* She said when he hit her and B.S. with the belt it would be more than one time on their back or butt. *Id.* at 26-29. N.S. said that she saw marks on B.S., including red scratches and bruises on his waist or lower back. *Id.* at 28-29. She also described a time when Janes told B.S. to take the dog out and he got angry at him for taking too long. *Id.* at 31-32. N.S. said that Janes was pushing B.S. into things and put his hands around B.S.'s neck while holding him against a cabinet in the kitchen. *Id.* at 32. She said that Janes' hands were around B.S.'s neck so tight that he couldn't breathe, was pale, and was gasping for air. *Id.* at 32-33. After Janes let him go, B.S. went to the basement, and she saw faint marks and little bruises in the days after. *Id.* at 34.

B.S. testified at trial that Janes would take him over the rocking chair and hit him with a belt more than once to discipline him. JT3, 22-23. He said that he was mostly hit on his butt, legs, or lower back and that sometimes it would leave marks. *Id.* However, if he squirmed then he said Janes would hit him on the legs and tell him to stop squirming. *Id.* at 23. He testified that he was hit with the belt if he missed a spot when he was assigned to clean the bathroom. *Id.* at 23. If Janes was having a bad day, then B.S. said that Janes would hit him harder. *Id.* at 24.

B.S. testified about the incident in which he got in trouble for not wearing

a coat and was hit with a belt more than once. *Id.* at 25-26. He also stated that on one occasion he was in the kitchen and said something under his breath that Janes didn't like so he started chasing B.S. around the kitchen. *Id.* at 26. B.S. said that Janes had him against the cabinets and placed his hand around his throat, which made it hard for him to breathe. *Id.* at 26-28. He said that he went downstairs afterward and cried and that Janes called him a "pussy" for crying but later apologized. *Id.* at 28.

Both N.S. and B.S. testified they didn't tell their mom about the alleged abuse until after they moved out of the Colton house. JT2, 35-37, 59; JT3, 40-42. Grandmother testified that N.S. told her about the abuse on the way to the concert on May 16, 2023. JT3, 6-16. Rin Calderon testified about the forensic interview that she conducted with N.S. on June 26, 2023. JT2, 66-93. A video recording of the forensic interview of N.S. at Child's Voice (State's Exhibit 3) and the Child's Voice report related to the evaluation of N.S. (State's Exhibit 2) were entered into evidence. *Id.* at 72-73, 80; SR, 248.

At the conclusion of the State's evidence the defense made a Motion for Judgment of Acquittal, which was denied by the trial court. JT3, 43-45. The defense called one witness from Janes' place of employment and entered business records (Defense Exhibit C) to establish that Janes was working several of the days during the time the alleged abuse had occurred. JT3, 48-53; SR, 283. The case then went to the jury.

The jury found Janes not guilty of Count 1 and guilty of Count 3. JT3, 104-

105; SR, 319. The court ordered a presentence investigation report and sentencing was held on December 19, 2024. *See* ST; SR, 401.

At sentencing the trial court imposed 10 years in the South Dakota State Penitentiary, with 3 years suspended. ST, 55-58; SR, 401. In issuing this sentence, the trial court stated several times that Janes would not serve the entire sentence and referred to the amount of time as "fictional" as it opined it would be shortened by the Department of Corrections. ST, 34-35, 48-53. It also ordered Janes to have no contact with B.S., N.S., or his ex-wife, Tanya Janes. ST, 55-58; SR, 401. Additionally, the court ordered supervised visits only with J.J., unless and until another circuit court approved unsupervised visitation. ST, 55. Janes was also ordered to pay court costs of $116.50, a domestic violence fee of $25, and restitution to Tanya Janes in the amount of $2000 as compensation for her missed time at work, and future counseling costs for N.S., B.S., and J.J., if needed. ST, 55; SR, 401.

STATEMENT OF LEGAL ISSUES

I. WHETHER ADMISSION OF THE CHILD'S VOICE EVIDENCE AMOUNTED TO PLAIN ERROR BECAUSE IT CONTAINED HEARSAY AND OTHER BAD ACTS EVIDENCE THAT WAS INADMISSIBLE, IRRELEVANT, AND UNDULY PREJUDICIAL TO THE DEFENDANT.

Child's Voice evidence was admitted at trial that contained hearsay and other bad acts evidence that was inadmissible, irrelevant, and unduly prejudicial to the defendant.

State v. Cates, 2001 S.D. 99
State v. Carothers, 2006 S.D. 61
State v. Shelton, 2021 S.D. 22

Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20

S.D.C.L. § 19-19-404(b)
S.D.C.L. § 19-19-806.1
S.D.C.L. § 23A-44-15

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED DEFENDANT.

The trial court sentenced Defendant to 10 years in prison, with 3 years suspended.

State v. Bruce, 2011 S.D. 14
State v. Deleon, 2022 S.D. 21
State v. Mitchell, 2021 S.D. 46

S.D.C.L. § 23A-27-18.1
S.D.C.L. § 24-15-4.2(10)

III. WHETHER THE COURT ERRED WHEN IT IMPOSED RESTITUTION FOR MOTHER'S LOST WAGES AND FUTURE COUNSELING EXPENSES OF CHILDREN.

The trial court ordered Defendant to pay restitution to Tanya Janes in the amount of $2000 to reimburse her for lost wages and to pay for future counseling services for the children.

In the Interests of K.K., 2010 S.D. 98
State v. Falkenberg, 2021 S.D. 59
State v. Wilson, 2005 S.D. 90

S.D.C.L. § 23A-28-2

IV. WHETHER DEFENDANT WAS DENIED HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant was denied his 6th Amendment right to effective assistance of counsel when counsel failed to object to other bad acts evidence and hearsay evidence at trial.

State v. Chipps, 2016 S.D. 8
State v. Thomas, 2011 S.D. 15

Strickland v. Washington, 466 U.S. 668 (1984)

S.D.C.L. § 19-19-404(b)
S.D. CONST. ARTICLE 6, §7
U.S. CONST. amend. VI

LEGAL ANALYSIS

I. WHETHER ADMISSION OF THE CHILD'S VOICE EVIDENCE AMOUNTED TO PLAIN ERROR BECAUSE IT CONTAINED HEARSAY AND OTHER BAD ACTS EVIDENCE THAT WAS INADMISSIBLE, IRRELEVANT, AND UNDULY PREJUDICIAL TO THE DEFENDANT.

The inadmissible, irrelevant, and prejudicial nature of the hearsay statements and other bad acts evidence entered through the Child's Voice report entered as State's Exhibit 2, and the Child's Voice interview arises to plain error. "Plain error requires the defendant to show '(1) error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *State v. Carothers*, 2006 S.D. 100, ¶ 25, (quoting *State v. Page*, 2006 S.D. 2, ¶ 15); *State v. Bowker*, 2008 S.D. 61, ¶ 45; S.D.C.L. § 23A-44-15. "Error is 'plain' when, at the time of appellate review, it is 'obvious' or 'clear' under current law, even if the law at the time of trial was settled to the contrary." *U.S. v. Baker*, 432 F.3d 1189, 1207 (11th Cir. 2005)(quoting *Johnson v. U.S.*, 520 U.S. 461, 467-68 (1997)).

Prejudice results when evidence is used to "persuade by illegitimate means." *State v: Birdshead*, 2015 S.D. 77, ¶ 63. A reviewing court may evaluate the cumulative effect of plain error when determining whether the prejudice to the defendant "undermined the 'fairness, integrity, or public reputation of judicial

proceedings.'" *State v. Nelson*, 1998 S.D. 124, ¶ 20 (quoting *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936)). Here the cumulative prejudice to the defendant is evident and requires reversal of the conviction.

1. *Hearsay*

In this case the Deputy State's Attorney filed Notice of Intent to Offer Hearsay Statements pertaining to statements made by N.S. to Child's Voice, her grandmother, and her mother. SR, 18. Hearsay is a statement that is made by a declarant outside of trial that is used to prove the truth of the matter asserted. S.D.C.L. § 19-19-801(c). There is an exception to the hearsay rule that allows a prior statement to be admitted as evidence if the statement is made by a child under the age of 13 years old and describes an act of physical abuse to the child or describes abuse the child has observed being perpetrated on another child. S.D.C.L. § 19-19-806.1. The party seeking to introduce the statement must provide advance notice to the opposing party. S.D.C.L. § 19-19-806.1. A court considering the admission of the child's hearsay statement must assess the reliability of the statement using several factors. *State v. Cates*, 2001 S.D. 99, ¶ 11; *State v. Bucholtz*, 2013 S.D. 96, ¶¶ 18-20.

A motions hearing was held in this case and evidence was entered that N.S. was 12 years old at the time of her Child's Voice interview on June 26, 2023. SR, 248. At the conclusion of the motions hearing, Judge Houwman weighed the required factors and found that:

[T]he statements made by N.S. to Child's Voice, as well as the

> statements that she made describing these instances to her mother as well as her grandmother include content and circumstances surrounding the statements. They demonstrate to the Court that there's sufficient indicia of reliability in the statements, and as a result, the witnesses will be permitted to testify as to these matters at trial provided that the child testifies....[T]hat would include the statements that N.S. made to Rin Calderon during her Child's Voice interview as well.

MH4, 47.

At trial Rin Calderon from Child's Voice testified about the statements made by N.S. during her interview on June 26, 2023. JT2, 66-93. The video of N.S.'s Child's Voice interview and the Child's Voice report related to N.S.'s evaluation were admitted as evidence. JT2, 72, 80; SR, 248. The report included a paragraph that provided a detailed account of B.S.'s disclosures of abuse during his forensic interview at Child's Voice that was held on June 6, 2023. SR, 248. This section contained no statements by N.S., and she was not present at B.S.'s interview. *Id.* No notice was provided of the State's intent to offer hearsay statements of B.S., and he was 13 years old at the time that he was forensically interviewed. Therefore, the hearsay was not admissible pursuant to the exception in S.D.C.L. § 19-19-806.1. Although B.S. was subject to cross-examination at trial, the hearsay statements included in the Child's Voice report do not fit the exceptions in S.D.C.L. § 19-19-801(d). *State v. Toohey*, 2012 S.D. 51, ¶ 16. The hearsay was also not admissible as a medical record because the statements made by B.S. were not made for the medical diagnosis or treatment of N.S. S.D.C.L. § 19-19-803(4).

In addition to the impermissible hearsay statements related to the purported abuse of B.S. by Janes, the report also included statements by B.S. that he sometimes thought of killing himself because Janes "might finally be happy if B.S. died." *Id.* In addition to being impermissible hearsay, the inclusion of these statements about B.S. contemplating suicide were irrelevant and overtly prejudicial to Janes. A statement is only relevant if it makes a fact "more or less probable than it would be without the evidence" and "is of consequence in determining the action." S.D.C.L. § 19-19-401; *State v. Shelton*, 2021 S.D. 22, ¶ 17. Even if a fact is deemed relevant it is properly excluded if the probative value is substantially outweighed by prejudice to the defendant. S.D.C.L. § 19-19-403; *Shelton*, 2021 S.D. 22, ¶ 17.

2. *Other Bad Acts*

In addition to the hearsay, plain error also occurred when other bad acts evidence was entered at trial through the Child's Voice interview and the report entered as State's Exhibit 2. SR, 248. "For evidence to be admitted during trial, it first must be found to be relevant. Once the evidence is found to be relevant it is admissible unless it is specifically excluded." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 30 (quoting *Novak v. McEldowney*, 2002 S.D. 162, ¶ 10-11). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." *Id.* In this case the theory of the State's case was that Janes was abusive. The other bad acts evidence entered through the Child's Voice report and interview was

not only irrelevant, it was also improperly used to prove the character of Janes or that he acted in conformity of this type of prior behavior. It was plain error to submit inadmissible bad acts evidence to the jury in this case and resulted in overt prejudice to Janes.

a. Green Bean Incident

In this case the State filed Notice of Intent to Offer Evidence of Prior Bad Acts pursuant to S.D.C.L. § 19-19-404(b). SR, 21. In its Notice, the State specifically sought to introduce evidence that one occasion Janes poured a can of vegetables on B.S.'s head because he would not eat them. *Id.* B.S. testified at the motions hearing that the vegetable was a can of green beans. MH4, 8-9.

At the motions hearing the court considered the evidence and applied the factors for admission of the proposed other bad acts evidence. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶¶ 30-31 (stating the factors to be considered by the court when determining admission of other acts evidence pursuant to S.D.C.L. § 19-19-404(b)). The court ruled that the evidence of the green bean incident was "not relevant to the issues that would be before the Court with respect to the allegations in the indictment." MH4, 49. Despite the court's clear ruling that the evidence was not admissible, the Child's Voice report admitted as State's Exhibit 2 clearly refers to the same event that B.S. testified about at the motion hearing. SR, 248. The Child's Voice report states: "B.S. stated one time B.S. did not eat his green beans and Chad dumped a can of green beans on B.S.'s head." *Id.*

The inclusion of this piece of evidence after it was specifically excluded at the motion hearing amounts to plain error.

b. Prior Incidents Related to Abuse of N.S.

In its Notice of Intent to Offer Other Bad Acts, the State requested the court allow testimony that Janes spanked B.S. with a belt more than once from 2018 to 2021, and that he hit B.S. with the back of his hand, drug B.S. around with his hands, and slammed B.S.'s head into cabinets and countertops. SR, 21. At the conclusion of the motions hearing, Judge Houwman ruled that this evidence would be admitted and noted:

> what particularly supports inclusion of this evidence is the *State v. Phillips* case. There the court addressed domestic relationships stating that prior instances of domestic abuse against the same victim are often relevant in the familial context because they show the nature of the relationship, which explains the interaction of the parties.

MH4, 51 (citing *State v. Phillips*, 2018 S.D. 2).

Although the court allowed these prior bad acts in regard to B.S., the State never notified its intent to use other bad acts evidence regarding alleged abuse of N.S. Despite this lack of notice and the restriction of the court's ruling to acts involving B.S., N.S. testified at trial that she too was hit with a belt by Janes. JT2, 26-29.

In addition to the testimony concerning other bad acts is it pertained to the alleged prior abuse of N.S., the Child's Voice interview and report that were admitted into evidence contain several additional allegations of prior bad acts

perpetrated by Janes in regard to N.S. SR, 248. These included N.S. being pushed by Janes, dragged by her arm, hand or wrist, and being hit by a belt resulting in red marks. *Id.*

Because notice of intent to use this evidence was not properly given by the State or ruled on by the trial court prior to trial, its inclusion was impermissible as evidence against the defendant. It was also precluded by the defense Motion in Limine. Because this evidence was used to show that Janes had a propensity to act in an abusive manner and to prove that "he acted in conformity therewith," it was improperly admitted and amounts to plain error. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶30.

c. Incidents Related to J.J.

The Child's Voice report and interview admitted as exhibits also contained references to Janes dragging J.J. by his hands or his ear more than once. *Id.* It stated that N.S. saw Janes push J.J. and that she saw bruises on him. *Id.* J.J. was only 4 years old at the time that these allegations were made. *Id.* The Child's Voice report also included statements by B.S. and N.S. that they saw J.J. being spanked on the butt by Janes. *Id.* N.S. said she saw red marks after J.J. was spanked by Janes. *Id.*

d. Allegation Regarding Child at Party

The Child's Voice report and interview include another bad act that was not noticed but was provided to the jury through State's Exhibit 2. This act involved a child who was at a party with N.S. and Janes. *Id.* N.S. said the child

was running around the house and Janes grabbed the child by the ear so hard that the ear was red afterward. *Id.* This incident was not relevant in any way to the charges in the indictment and its inclusion resulted in unfair prejudice to the defendant.

II. WHETHER THE COURT ABUSED ITS DISCRETION WHEN IT SENTENCED DEFENDANT.

A sentencing court has broad discretion to determine the punishment imposed. *State v. Deleon*, 2022 S.D. 21, ¶ 17. When determining an appropriate sentence, the trial court must not only review the conduct involved, but the attributes of the defendant. *Id.* at ¶ 18. Factors to be reviewed include the defendant's '"general moral character, mentality, habits social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record' as well as rehabilitation prospects." *State v. Bruce*, 2011 S.D. 14, ¶ 30 (quoting *State v. Bonner*, 1998 S.D. 30, ¶ 22). The court must also consider mitigating and aggravating evidence regarding the severity of the conduct involved and the impact on others. *Deleon*, 2022 S.D. 21, ¶ 18.

"Whether evaluating a defendant's general inclination to commit crimes or the extent of his specific offense, sentencing courts can consider a wide range of information from a variety of sources." *State v. Mitchell*, 2021 S.D. 46, ¶ 31. "Courts may even consider conduct that was uncharged or served as the basis for charges that later resulted in a dismissal or acquittal as long as the State proves the conduct by a preponderance of the evidence." *Id.* In this case the

court abused its discretion when it relied on conjecture and anecdotal information in fashioning Janes' sentence instead of the evidence before the court.

First, the court abused its discretion when it relied on the circumstances of an unrelated case in determining that jail time would not be appropriate. The court referenced a prior case in which the court sentenced a man from White River to the penitentiary, and this man was released by the Department of Corrections in under 90 days on house arrest. ST, 32-35. It is not clear from the record what the circumstances of that case were or if it was similar in any way to the defendant's case. The record does not reflect that the parties had knowledge of the case referenced by the court or an opportunity to refute or differentiate that case from the current facts. Based on this prior experience, the court stated:

> I don't trust the penitentiary sentence system. And so what judges do, this is the lunacy of how we've been doing business until recently. A judge wanted a guy to sit up for a year, he'd give him seven. If he wanted him to sit for five years, he'd give him 20 because he knew they're just going to hack it and shove him out the back door because they need the bed space.

Id. at 33.

The court then inquired as to whether the defendant would be subject to parole or if it would be a "true sit." *Id.* The prosecutor replied that the crime occurred in 2022. *Id.* South Dakota law removed parole eligibility for those convicted of felony child abuse on July 1, 2023. S.D.C.L. § 24-15-4.2(10). The court then demonstrated unfamiliarity with the probation sentence the defense was

requesting. The court asked the attorneys several questions related to how jail time would be administered. ST, 21-23, 30-36. Defense counsel explained how electronic monitoring and the trustee system work at the Minnehaha County jail. *Id.* The court asked how much time he could sentence the defendant to jail and recalled that the court used to be able to sentence a defendant to a year in jail. *Id.* The prosector told the court that he could only sentence the defendant to up to 180 days in jail. *Id.* at 21. This was an incorrect statement of the law.

South Dakota law allows a court to suspend a penitentiary sentence and place a defendant in jail for up to 180 days if the court places the defendant on conditions, including supervised probation. S.D.C.L. § 23A-27-18.1. However, it is also within the court's discretion to sentence a defendant to 365 days in the county jail without an additional period of probation. *Id.* After receiving the misinformation regarding the length of jail time available to the court, the court stated it "was giving a fictional sentence, but I am going to sentence him to the penitentiary because I don't really trust the jail." *Id.* at 53.

In addition to the demonstrated lack of familiarity with the punishments available and reliance on anecdotal experience from an unrelated matter to determine that penitentiary time was required, the court also opined that the children would likely suffer from post-traumatic distress syndrome (PTSD). *Id.* at 47. There was no evidence entered at sentencing that any of the children suffered from PTSD. The judge stated that he had PTSD and based on his own experience with the disorder you keep reliving the trauma over and over. *ST*, 54. The court

did not have the requisite expertise to determine that the children would potentially suffer from this mental health diagnosis and its consideration as a part of the sentencing decision was an abuse of discretion.

The cumulative effect of the court's reliance on inappropriate factors and circumstances not in evidence amounts to an abuse of discretion and requires the defendant's sentence be vacated.

III. WHETHER THE COURT ERRED WHEN IT IMPOSED RESTITUTION FOR MOTHER'S LOST WAGES AND FUTURE COUNSELING EXPENSES OF CHILDREN.

A circuit court in a criminal case has broad discretion to impose restitution. *State v. Falkenberg*, 2021 S.D. 59, ¶55. "However, whether the sentencing court complied with statutory standards relating to restitution involves issues of law which [the appellate court] reviews de novo." *Id.* In criminal sentencings a defendant has the right to due process if there is a request for restitution. *Id.* at 57. If a defendant objects to the amount requested, the State has the burden of producing evidence that establishes that restitution is proper. *Id.* The court must be "reasonably satisfied" that the restitution the State is requesting is appropriate. *Id.* (quoting *State v. Martin*, 2006 S.D. 104, ¶ 5).

In this case the victim's mother, Tanya Janes, requested restitution in the amount of $6514.96 for 31 days of unpaid leave that for work that she missed due to "meetings related to the case" and "kids' anxious days when unable to go to school." SR, 321, 382. She also stated on the request form that B.S. and N.S. have both expressed interest in therapy but have been unable to afford to attend any

counseling. *Id.*

When the court asked the State at sentencing what its position was on restitution, the prosecutor replied, "Typically what I see in restitution type situations is not something for missed work. It's usually more for counseling and things of that nature. I don't know the extent of the counseling that these children have done." ST, 50. She referred the court to the restitution request form provided by mother in the presentence investigation. *Id.*

Janes objected to the requested restitution based on the lack of information regarding what specific counseling services were being requested and what the cost of those services would be. *Id.* 50-51. Janes also objected to any reimbursement to Tanya for the days that she alleged to have missed work related to the case because of the absence of documentation and the lack of causal connection between the purported lost wages and the crime Janes was found guilty of committing. *Id.*

Over Defendant's objection, the sentencing court ordered restitution of $2000 to Tanya "for missed work." *Id.* at 55. The court also stated it was ordering restitution for future counseling for N.S., B.S., and J.J. *Id.* The court stated it didn't know if J.J. was "even old enough to take counseling, but if he is, and if you find a program that works, I will hold Mr. Janes responsible for those costs." *Id.* The court gave no amount for the future costs of counseling. *Id.*

Although a court may order restitution that does not identify the exact amount of restitution for a victim's counseling, the costs must be ascertainable.

State v. Falkenberg, 2021 S.D. 59, ¶ 62. A court may not arbitrarily impose restitution without identifying "timeframes or mechanisms by which specific amounts to be reimbursed...could be ascertained." *Id.* Because the restitution for future counseling expenses for B.S., N.S., and J.J. were arbitrarily imposed and unascertainable in amount or scope, the restitution order must be vacated.

Additionally, the State failed to establish a causal connection between Tanya's damages and the defendant's crime. A causal connection must be proven for restitution to be ordered. *In re K.K.*, 2010 S.D. 98, ¶¶ 9-10; *State v. Wilson*, 2005 S.D. 90, ¶¶ 10-13. Here, the State told the court it did not believe that restitution for Tanya's missed days of work was appropriate and did not make a specific restitution request outside of the form completed by Tanya that was included with the presentence investigation. ST, 50.

Because the $2000 restitution ordered to Tanya Janes was not supported by documentary evidence and had no established causal connection to the crime the defendant was convicted of it must be vacated. The open award of restitution for future counseling costs to B.S., N.S., and J.J. must also be vacated because it is not supported by documentary evidence, is arbitrary, and unascertainable.

IV. WHETHER DEFENDANT WAS DENIED HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In this case counsel for the defendant was deficient which resulted in prejudice to the defendant. "In all criminal prosecutions, the accused shall enjoy the right..to have the assistance of counsel for his defense." U.S. CONST. amend.

VI.; S.D. CONST. ARTICLE 6, §7. The Sixth Amendment right to counsel exists, and is necessary, to protect the fundamental right of all citizens to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685. The right to counsel is the right to effective assistance of counsel. *Id.* at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). When counsel is ineffective to the extent that the result of the adversarial process cannot be relied upon as just, a defendant's conviction or sentence must be reversed. *Strickland*, 466 U.S. at 687.

South Dakota adheres to the *Strickland* test when determining whether a defendant has received effective assistance of counsel as guaranteed by our state constitution. *Bradley v. Weber*, 595 N.W.2d 615 (S.D. 1999) (citing S.D. Const. Art. 6 §7); *Jenner v. Dooley*, 1999 S.D. 20; *Grooms v. State*, 320 N.W.2d 149 (S.D. 1982). According to *Strickland*, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

In order to bring a successful claim of ineffective assistance of counsel, a convicted defendant must first show that counsel's performance or non-performance was deficient. *Id.* at 687. This requires a showing that counsel made serious errors or omissions to the extent that counsel was not functioning

as "counsel" as guaranteed by the Sixth Amendment of the Constitution. *Id.* In addition, the defendant must show that counsel's deficiencies prejudiced the defense. *Id.* This requires showing that counsel's errors were serious enough to deprive defendant of a fair trial. *Id.*

Once a defendant makes out a claim of ineffective assistance and identifies acts or omissions of counsel which are alleged to constitute unreasonable professional judgment, then the court must determine whether, in light of all the circumstances, those identified acts or omissions were outside the range of professional competent assistance. *Id.* at 690. The court must keep in mind that counsel's function is to make the adversarial testing process work. *Id.* In considering whether prejudice exists, actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. *Id.* at 692.

The proper standard for attorney performance is that of reasonably effective assistance. *Id.* at 687. Defense counsel has a duty to bring skill and knowledge that will render the trial a reliable adversarial testing process. *Id.* at 688. "From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause, and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in [the] course of the prosecution." *Id.* Counsel is guaranteed in criminal cases because there is no presumption that a defendant has knowledge of their rights and the ability to assert them. *Id.*

1. Deficient Performance

In determining whether counsel's performance was deficient, "[t]he question is whether counsel's representation 'amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.'" *State v. Thomas*, 2011 S.D. 15, ¶ 21. The Sixth Amendment relies "on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland*, 466 U.S. at 688. "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." *Id.* Mere perfunctory and casual representation by counsel does not satisfy the Sixth Amendment guarantee of adequate and effective representation at every critical stage of criminal proceeding. *Loop v. Solem*, 398 N.W.2d 140, 141 (S.D. 1986); *Jenner v. Dooley*, 590 N.W.2d 463 (S.D. 1999); *Grooms v. State*, 320 N.W.2d 149 (S.D. 1982).

Ineffective assistance of counsel claims are not typically considered on direct appeal because there is no opportunity for the attorney to explain or defend the strategy used at trial. *State v. Thomas*, 2011 S.D. 15, ¶ 23. However, the South Dakota Supreme Court will consider the matter on direct appeal when trial counsel's performance has resulted in a "manifest usurpation of [the defendant's] constitutional rights." *Id.* (citations omitted); *State v. Chipps*, 2016 S.D. 8, ¶ 17. In this case, review is appropriate because it is apparent from the record that the defendant was deprived of his constitutional right to a fair trial

because of numerous instances in which his attorney failed to object.

In this case counsel was ineffective at trial when he failed to object to the hearsay of B.S. entered through N.S.'s Child's Voice report, and to other acts evidence that was not properly noticed or was previously ruled inadmissible. The decision of whether to object to evidence is generally within trial counsel's discretion. *Foote v. Young*, 2024 S.D. 41, ¶ 29. However, failure to object can be ineffective assistance of counsel if the decision is not reasonably related to a strategic decision and does not conform with the action competent counsel would take in similar circumstances. *Id.* (quoting *Sprik v. Class*, 1997 S.D. 134, ¶ 45).

"Because the errors alleged here are failures to object, this showing necessarily requires an analysis of whether the absent objection would have been sustained if raised." *State v. Chipps*, 2016 S.D. 8, ¶ 19. In this case it is clear that the objections would have been sustained because there is no hearsay exception to allow the content of B.S.'s statements to Child's Voice into evidence. Further, Judge Houwman explicitly held that the other acts evidence involving the green bean incident was not admissible. It is also probable that objections to the other acts evidence that were not properly noticed by the State would have been sustained based on the language of S.D.C.L. § 19-19-404(b), S.D.C.L. § 19-19-403, and Defendant's Motion in Limine prohibiting evidence of other bad acts.

2. Prejudice

To raise a successful claim of ineffective assistance of counsel, a convicted

defendant must also show that he was prejudiced by counsel's performance. *Strickland*, 466 U.S. at 687. This requires a showing that counsel's errors were serious enough to deprive defendant of a fair trial. *Id.* The presumption that counsel's assistance is essential requires reviewing courts to conclude that the trial is unfair if the accused is denied counsel at a critical stage. *McBride v. Weber*, 2009 S.D. 14, ¶ 7. If counsel is denied at a critical stage, no specific showing of prejudice is required, because the adversarial process itself is presumptively unreliable. *Id.* Prejudice under these circumstances is presumed. *Id.*

Here, defense counsel's failure to object to overtly prejudicial evidence denied Janes the right to a fair trial.

CONCLUSION

In this case, the admission of hearsay and other bad acts evidence at the jury trial amounted to plain error. The sentencing court abused its discretion when it imposed 10 years in the penitentiary with 3 years suspended, and unlawfully entered a restitution order that was arbitrary, and not causally related to the defendant's crime. Additionally, Defendant was overtly prejudiced by ineffective assistance of counsel and denied his right to a fair trial. Based on these facts, the defendant's conviction must be vacated.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted this 18th day of June 2025.

Respectfully submitted this 18th day of June 2025.

Nicole J. Laughlin
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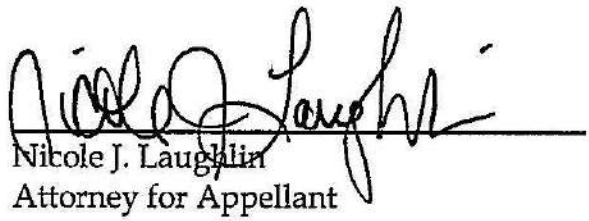
CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in S.D.C.L. 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 7,064 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Office 365.

Dated this 18th day of June 2025.



Nicole J. Laughlin
Attorney for Appellant

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. CHADWICK A JANES, Defendant.	49CRI23-004529 (SO23-01445) JUDGMENT & SENTENCE

An Indictment was returned by the Minnehaha County Grand Jury on August 16, 2023, charging the Defendant with the crimes of Count 1 Aggravated Assault on or between March 5, 2023 and March 31, 2023, Count 2 Abuse or Cruelty to Minor - Victim Age 7 or Above on or between December 1, 2022 and February 28, 2023, and Count 3 Abuse or Cruelty to Minor - Victim Age 7 or Above on or between March 4, 2023 and March 31, 2023. The Defendant was arraigned on the Indictment on September 6, 2023, Ryan Kolbeck appeared as counsel for Defendant; and, at the arraignment the Defendant entered his plea of not guilty of the charges in the Indictment. The case was regularly brought on for trial, Deputy State's Attorney Jennifer Hynek appeared for the prosecution and Ryan Kolbeck appeared as counsel for the Defendant. The State dismissed Count 2 of the Indictment on August 26, 2024, prior to a Jury being impaneled and sworn. A Jury was then impaneled and sworn on August 26, 2024 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the Defendant on August 26, 2024 and August 27, 2024, returned to open court in the presence of the Defendant, and returned its verdict: "We the Jury, find the defendant, Chadwick A. Janes, guilty as charged as to Count 3 Abuse or Cruelty to Minor - Victim Age 7 or Above (SDCL 26-10-1)." The Sentencing was continued to December 19, 2024, after completion of a presentence report.

Thereupon on December 19, 2024, the Defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 3 ABUSE OR CRUELTY TO MINOR - VICTIM AGE 7 OR ABOVE : CHADWICK A JANES shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, Minnehaha County, State of South Dakota for ten (10) years, with three (3) years suspended. The defendant shall pay $116.50 court costs and $25.00 domestic violence fee to Minnehaha County, and $2,000.00 in restitution to Tanya Janes, to be collected by the Board of Pardons and Paroles. The defendant shall have no contact with B.S. (DOB 03/04/2010), N.S. (DOB 04/18/2011), or Tanya Janes (unless third party authorized) for ten (10) years and supervised visits with J.J. (DOB 02/16/2019) until otherwise ordered by a Circuit Judge. The defendant shall sign and abide by the terms and conditions of a parole agreement and obey all laws for ten (10) years.

It is ordered that Count 1 charging CHADWICK A JANES with Aggravated Assault be and hereby is dismissed.

BY THE COURT:

Electronically Signed: *Mark Barnett*

JUDGE MARK BARNETT
Circuit Court Judge

Attest:
Folk, Suzanne
Clerk/Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30974

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHADWICK ALAN JANES,

Defendant and Appellant.

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

THE HONORABLE MARK BARNETT
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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AND APPELLANT

Notice of Appeal filed January 21, 2025.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30974

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHADWICK ALAN JANES,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Chadwick Janes, is referred to as "Appellant" or "Janes." Plaintiff and Appellee, the State of South Dakota, is referred to as "State." The victim is referred to by his initials, B.S. Other juveniles are referred to by their initials, including N.S. and J.J. All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Minnehaha Co. File 49CRI23-4529)..... SR

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JURISDICTIONAL STATEMENT

Janes appeals the Judgment & Sentence entered by the Honorable Mark Barnett, Circuit Court Judge, Second Judicial Circuit, Minnehaha County. The Judgment & Sentence was filed on January 9, 2025. SR 401-02. Janes filed a Notice of Appeal on January 21, 2025. SR 405. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER JANES PRESERVED THE ISSUE RELATED TO ADMISSION OF THE CHILD'S VOICE EVIDENCE, OR IN THE ALTERNATIVE, WHETHER JANES ESTABLISHED PLAIN ERROR?

The circuit court did not rule on this issue as Janes did not object to the admission of the Child's Voice evidence contained in Exhibit 2 and Exhibit 3.

State v. Babcock, 2020 S.D. 71, 952 N.W.2d 750

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[1] Jury Trial Volume I includes pretrial motions and jury selection. This is a confidential document and any citations to Jury Trial Volume I in this brief will solely relate to pretrial matters.

State v. Bryant, 2020 S.D. 49, 948 N.W.2d 333

State v. Jones, 2012 S.D. 7, 810 N.W.2d 202

State v. Nelson, 1998 S.D. 124, 587 N.W.2d 439

II

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION BY SENTENCING JANES TO TEN YEARS IN THE STATE PENITENTIARY WITH THREE YEARS SUSPENDED?

The circuit court sentenced Janes to ten years in the state penitentiary with three years suspended.

State v. Banks, 2023 S.D. 39, 994 N.W.2d 230

State v. Rice, 2016 S.D. 18, 877 N.W.2d 75

State v. Whitfield, 2015 S.D. 17, 826 N.W.2d 133

III

WHETHER THE CIRCUIT COURT ERRED IN IMPOSING RESTITUTION FOR TANYA JANES' LOST WAGES AND FUTURE COUNSELING EXPENSES FOR THE CHILDREN?

The circuit court ordered restitution in the amount of $2,000.00 to Tanya Janes for lost wages, It also imposed restitution for counseling costs in an undetermined amount for B.S., N.S., and J.J.

State v. Falkenberg, 2021 S.D. 59, 965 N.W.2d 580

State v. Martin, 2006 S.D. 104, 724 N.W.2d 872

State v. Tuttle, 460 N.W.2d 157 (S.D. 1990)

SDCL 23A-28-1

IV

WHETHER JANES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL?

This issue was not raised in the circuit court.

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

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

STATEMENT OF THE CASE AND FACTS[2]

Janes married Tanya Janes in 2019. SR 734-35; JT3 19-20. Tanya had two children, B.S. and N.S., from a prior marriage. SR 644, 735, JT2 24; JT3 20. Janes and Tanya also had a child, J.J., in 2019. SR 721; JT3 6. They all lived together in a house in Colton, Minnehaha County, South Dakota, along with Janes' two daughters from his prior marriage. SR 641, 644-45, 720-21, 735; JT2 21, 24-25; JT3 5-6, 20.

Janes and Tanya began contemplating divorce and on April 1, 2023, Tanya moved to Brandon, South Dakota, with B.S., N.S. and J.J. SR 660, 681, 728; JT2 40, 61; JT3 13. Janes served Tanya with divorce papers on May 16, 2023. SR 289, 768-69; JT3 53-54; Exhibit E. That same day, N.S. reported to her grandmother, Julie Rosa, that Janes abused her and B.S. when they lived in Colton. SR 656, 660-62, 720, 722-23, 728; JT2 36, 40-42; JT3 5, 7-8, 13. Tanya later questioned N.S.

[2] The Statement of the Case and the Facts are combined for brevity and clarity.

about the abuse disclosures.[3] SR 739-40, 744-45, 751-52; JT3 24-25, 29-30, 36-37.

Tanya contacted the Brandon Police Department on May 17, 2023, to report the abuse. SR 346 (sealed). Detective Phillip Leidholt of the Minnehaha County Sheriff's Office received the report for investigation. SR 641; JT2 21. Detective Leidholt scheduled forensic interviews for both B.S. and N.S. at Child's Voice. SR 642; JT2 22.

B.S. had his forensic interview on June 6, 2023. SR 348 (sealed). He was 13 years old at the time. SR 348 (sealed), 733; JT3 18. B.S. disclosed Janes spanked him with a belt multiple times, causing red marks. SR 349 (sealed). He described an incident where Janes pushed B.S. into a kitchen cabinet and choked him to the point where B.S. could not breathe. SR 349 (sealed). B.S. stated that after being choked, he went downstairs to cry and Janes called him a "little pussy." SR 349 (sealed). He mentioned another incident when Janes poured a can of green beans over his head after B.S. did not eat the green beans. SR 349 (sealed). B.S. reported that his siblings and step-siblings were sometimes present during these incidents, but that Tanya was not around "95% of the time." SR 349 (sealed). B.S. stated he was scared to

[3] There were some inconsistencies as to when B.S. reported the abuse to Tanya. B.S. testified that he told Tanya one time after being spanked, but did not report any further abuse to her after Janes threatened him. SR 739-40, 751-52; JT3 24-25, 36-37. He also testified that he told Tanya about the abuse as they were moving to the Brandon residence. SR 755-56; SR 40-41. Tanya did not testify at trial, but testified at one of the motions hearings that B.S. disclosed to her on May 16, 2023, the same day as N.S. SR 66; MH3 28.

tell Tanya about these incidents because he did not know what Janes would have done. SR 349 (sealed). Finally, he mentioned having suicidal thoughts. SR 349 (sealed).

N.S. had her forensic interview on June 26, 2023. SR 248 (confidential), 688; JT2 68; Exhibit 2. She was 12 years old at the time. SR 248 (confidential), 688; JT2 68; Exhibit 2. She told the forensic interviewer that she saw Janes hit B.S. with his hand, drag B.S. by his hands or ear, and spank B.S. with the belt on multiple occasions, causing red marks, bruising, or tiny scars. SR 250 (confidential); Exhibit 2. She also talked about the choking incident where Janes slammed B.S.'s head into a cabinet and shoved his forearm against B.S.'s neck to the point where B.S. looked pale as if he was going to pass out. SR 250 (confidential); Exhibit 2. She stated that Janes hit her lower back with a belt more than one time, causing little red spots, and that he would push her or grab her arm, hand, or wrist to drag her around. SR 250 (confidential); Exhibit 2. Finally, she disclosed possible abuse by Janes on J.J., as well as a separate incident involving another child at a party. SR 250 (confidential); Exhibit 2.

On August 16, 2023, the Minnehaha County Grand Jury indicted Janes on the following charges:

- Count 1: Aggravated Assault. in violation of SDCL 22-18-1.1(8), a Class 3 felony;
- Count 2: Child Abuse. in violation of SDCL 26-10-1, a Class 4 felony; and

- Count 3: Child Abuse in violation of SDCL 26-10-1, a Class 4 felony.[4]

SR 12-13. Janes was arraigned on the charges on September 6, 2023. SR 439, 444; ARR 1, 6.

The State filed a Notice of Intent to Offer Hearsay Statements pursuant to SDCL 19-19-806.1, SDCL 19-19-803(4), and SDCL 19-19-807, specifically regarding statements made by N.S. to Tanya Janes, Julie Rosa, and the forensic interviewer from Child's Voice.[5] SR 18-19. The State also filed a Notice of Intent to Offer Other Bad Acts under SDCL 19-19-404(b), indicating its intent to offer the following:

1. Testimony that on or about 2018 to 2019, when the victim B.S. (DOB 03/04/10) was around 8-9 years old, the Defendant became angry with the victim when they were playing catch football and threw the ball at the victim in order to cause pain.

2. Testimony that on or about 2020, when B.S. was around 10 years old, the Defendant became angry with the victim for not having a coat on and struck him with the belt multiple times.

3. Testimony that on or about 2021, when B.S. was around 11 years old, the Defendant became angry with the victim for not eating his vegetables and poured a can of them over the victim's head.

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[4] The State dismissed Count 2 the morning of trial and indicated that Counts 1 and 3 were charged in the alternative. SR 509; JT1 4 (sealed). Count 3 was renumbered to become Count 2 for purposes of the trial, and the jury was properly instructed as to the two alternative charges. SR 292, 305. The basis of the two charges was the choking incident involving B.S. SR 509; JT1 4 (sealed).

[5] The State's notice listed the forensic interviewer as Amanda Liebl, but the individual who actually conducted the forensic interview of N.S. was Karen "Rin" Calderon. SR 18, 688, 887; MH1 59; JT2 68. Ms. Calderon testified at both the motions hearings and trial regarding the forensic interview of N.S. *See generally* SR 686-713; 887-98, 903-17; MH1 59-70; MH2 3-17; JT2 66-93.

4. Testimony that from 2018 to 2021, the Defendant spanked B.S. with the belt more than one time, leaving red marks, bruising, or tiny scars. The Defendant hit B.S. with the back of his hand, pushed and dragged B.S. around with his hands, and slammed B.S.'s head into countertops and cabinets.

SR 21. The State contended that such evidence "is admissible to show motive, opportunity, intent, plan, knowledge, identity, absence of mistake or lack of accident." SR 22.

Due to the circuit court's schedule and availability of witnesses, the circuit court held a series of motions hearings on the State's two notices. SR 39, 102, 829, 901; MH1 1; MH2 1; MH3 1; MH4 1. N.S., Rin Calderon, Tanya, Julie, and B.S. all testified at the motions hearings. SR 40, 103, 830, 902; MH1 2; MH2 2; MH3 2; MH4 2. The circuit court also admitted into evidence the Child's Voice medical evaluation of N.S. from June 26, 2023, as well as the DVD of N.S.'s forensic interview. SR 30, 32-38 (confidential), 890, 897-98; MH1 62, 69-70; MH1 Exhibit 2 (confidential); MH1 Exhibit 3.

At the conclusion of the final motions hearing, the circuit court issued an oral decision on the State's notices. Regarding the hearsay notice, the circuit court held that:

> [T]he statements made by [N.S.] to Child's Voice, as well as the statements that she made describing these instances to her mother as well as her grandmother include content and circumstances surrounding the statements. They demonstrate to the court that there's sufficient indicia of reliability in the statements, and as a result, the witnesses will be permitted to testify as to these matters at trial provided that the child testifies, which I believe she will. If... And that would include the statements that [N.S.] made to Rin Calderon during her Child's Voice interview as well.

SR 148, MH4 47. The circuit court also specifically referenced four separate incidents set out in N.S.'s statements in its decision: (1) choking of B.S., (2) hitting of B.S. with a belt, (3) spankings of N.S., and (4) bruising on J.J. SR 143-46; MH4 42-45.

As for the four incidents set out in the 404(b) notice, the circuit court held that the evidence that B.S. was spanked with a belt for not wearing a coat and that B.S. was spanked with a belt on more than one occasion was relevant "to indicate motive, opportunity, plan, and absence of mistake." SR 150-51; MH4 49-50. In addition, the circuit court held that "admission of this evidence is appropriate under 404(b), and that although there is potential prejudicial value to this evidence, it does not substantially outweigh its probative value." SR 151; MH4 50. However, the circuit court held that evidence of the incidents related to the football and the can of vegetables was not relevant and could not be offered at trial.[6] SR 150; MH4 49.

A two-day jury trial was held on August 26-27, 2024. SR 621, 716; JT2 1; JT3 1. At trial, B.S. and N.S. testified consistently with the disclosures made in their respective forensic interviews.

B.S. testified that Janes often spanked him with a belt. SR 737-38; JT3 22-23. He talked about the spankings causing marks depending

[6] The circuit court told the parties that they could submit proposed written findings of facts and conclusions of law for its order on the State's hearsay notice or the State's 404(b) notice. SR 148, 152; MH4 47, 51. However, it appears that neither party sought written findings of fact and conclusions of law as none are included in the settled record.

on how hard Janes hit him with the belt. SR 738-39; JT3 23-24. He testified about Janes once spanking him for not wearing a coat. SR 740-41; JT3 25-26. B.S. said that he did tell Tanya about the spankings after they had gone on for 2-3 years. SR 739; JT3 24. However, after Tanya talked to Janes about spanking B.S., Janes took B.S. into the bathroom and threatened him so B.S. was afraid to report any other abuse to Tanya. SR 739-40, 751-52; JT3 24-25, 36-37. Finally, B.S. testified about the incident where Janes pushed him up against a cabinet, put his hand around B.S.'s neck, and choked him until he could not breathe very well. SR 741-43; JT3 26-28.

N.S. testified about Janes hitting her and B.S. with his hand or a belt and causing marks. SR 646-49; JT2 26-29. She described the choking incident where Janes put his hands around B.S.'s neck and held him up against a cupboard, while B.S. got really pale and was gasping for air. SR 651-53, 669; JT2 31-33, 49.

Julie Rosa and Rin Calderon also testified about N.S.'s statements.[7] SR 688, 722-23; JT2 68; JT3 7-8. The State also offered and the circuit court received the same exhibits received at the motions hearings – Exhibit 2 (Child's Voice medical evaluation of N.S. from June 26, 2023) and Exhibit 3 (DVD of N.S.'s forensic interview) – with no objection by Janes. SR 692-93, 700-01; JT2 72-73, 80-81. Exhibit 3 was played for the jury during the trial. SR 693; JT2 73.

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[7] Tanya did not testify at trial.

After the State rested, Janes made a motion for judgment of acquittal, which was denied by circuit court. SR 758-60; JT3 43-45. The jury found Janes guilty of Count 2, Abuse or Cruelty to a Minor. SR 319, 819; JT3 104. The circuit court ordered the preparation of a full pre-sentence investigation report (PSI). SR 320.

On December 19, 2024, the circuit court sentenced Janes to ten years in the state penitentiary with three years suspended. SR 501; SENT 55. The circuit court also ordered restitution in the amount of $2,000.00 for Tanya's lost wages, as well as restitution for counseling costs for B.S., N.S., and J.J. SR 501; SENT 55. The circuit court filed its Judgment & Sentence on January 9, 2025. SR 401-02. Janes filed a Notice of Appeal on January 21, 2025. SR 405.

ARGUMENTS

I

JANES FAILED TO PRESERVE THE ISSUE RELATED TO ADMISSION OF THE CHILD'S VOICE EVIDENCE, OR IN THE ALTERNATIVE, FAILED TO SHOW THAT ADMISSION OF SUCH EVIDENCE CONSTITUTED PLAIN ERROR.

A. Standard of Review.

Janes did not object to the admission the Child's Voice evidence (Exhibit 2 and Exhibit 3) at trial. SR 692-93, 701; JT2 72-73, 81. Therefore, he has not preserved this issue for appeal. "To preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, giving their reasons." *State v. Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d 439, 443

(citing SDCL 23A-44-13). "Issues not advanced at trial cannot ordinarily be raised for the first time on appeal." *Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d at 443 (citing *State v. Henjum*, 1996 S.D. 7, ¶ 13, 542 N.W.2d 760, 763).

"[W]hen 'an issue has not been preserved by objection at trial,' this Court *may* conduct a limited review to consider 'whether the circuit court committed plain error.'" *State v. Bryant*, 2020 S.D. 49, ¶ 19, 948 N.W.2d 333, 338 (quoting *State v. Buchhold*, 2007 S.D. 15, ¶ 17, 727 N.W.2d 816, 821) (emphasis added). However, this Court invokes its discretion under the plain error rule "cautiously and only in 'exceptional circumstances.'" *Nelson*, 1998 S.D. 124, ¶ 8, 587 N.W.2d at 443 (citing *Henjum*, 1996 S.D. 7, ¶ 14, 542 N.W.2d at 763; *State v. Davi*, 504 N.W.2d 844, 855 (S.D. 1993)).

Janes recognizes in his brief that this Court is limited to plain error review on this issue. AB 11. To establish plain error, Janes must show that there was "'(1) error, (2) that is plain, (3) affecting substantial rights; and only then may [this Court] exercise [its] discretion to notice the error if (4) it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *State v. Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d 202, 206 (citing *State v. Beck*, 2010 S.D. 51, ¶ 11, 785 N.W.2d 288, 293).

Janes must also show prejudice under the third prong as "[w]ithout prejudice, the error does not 'affect substantial rights' under

the third prong of plain error review and '[an appellate court] ha[s] no authority to correct it.'" *Jones*, 2012 S.D. 7, ¶ 17, 810 N.W.2d at 206 (citing *United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 1781 (1993)). "'Prejudice' in the context of plain error requires a showing of a 'reasonable probability' that, but for the error, the result of the proceeding would have been different." *State v. Babcock*, 2020 S.D. 71, ¶ 45, 952 N.W.2d 750, 763 (quoting *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 33, 785 N.W.2d 272, 283). In other words, to show prejudicial error, Janes "'must establish affirmatively *from the record* that under the evidence the jury might and *probably would have returned a different verdict* if the alleged error had not occurred.'" *State v. Fischer*, 2016 S.D. 1, ¶ 15, 873 N.W.2d 681, 687-88 (quoting *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 58, 764 N.W.2d 474, 491) (emphasis in original.))

B. Legal Analysis

As set out above, several motions hearings took place prior to trial to address the State's hearsay notice and 404(b) notice. At the end of the final motions hearing, the circuit court held that Tanya, Julie, and Rin Calderon could testify to N.S.'s hearsay statements, including those made during the Child's Voice interview. SR 148; MH4 47. The circuit court also held that the State could offer evidence that Janes spanked B.S. with a belt for not wearing a coat and that B.S. was spanked by Janes with a belt on more than one occasion. SR 150-51; MH4 49-50.

Janes does not challenge these rulings by the circuit court. Rather, Janes argues that additional evidence came in through N.S.'s medical evaluation report from Child's Voice (Exhibit 2) and the DVD of her forensic interview (Exhibit 3), which was inadmissible, irrelevant, and unduly prejudicial. AB 11. Specifically, Janes alleges that Exhibit 2 contained hearsay statements of B.S., and that both Exhibit 2 and Exhibit 3 contained statements related to other bad acts, including the vegetable incident, abuse of N.S., incidents related to J.J, and an allegation regarding another child at a party. AB 13-18. However, Janes has failed to show prejudice or that the admission of Exhibit 2 and Exhibit 3, even with the additional evidence that he alleges to be inadmissible, was plain error.

a. Plain Error

This Court recently addressed the application of plain error to evidentiary rulings:

> When a reviewing court assesses plain error in the context of an evidentiary decision, 'the question before us is *not* whether the trial court erred in admitting the [evidence], because the court was not given the opportunity to make that decision. Instead, the precise question before us is whether the trial court's failure to sua sponte strike the [evidence] or provide a cautionary instruction constituted plain error.'

State v. Rudloff, 2024 S.D. 73, ¶ 42, 15 N.W.3d 468, 483 (quoting *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001)) (emphasis in original). Therefore, the question before this Court is not whether the challenged statements were improperly admitted. Rather, this Court must

determine whether the circuit court should have sua sponte declined to receive evidence when Janes did not object to its admission, and whether the failure to do so constitutes plain error. The answer to both questions is no.

"An error is 'plain' when it is clear or obvious." *State v. McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d 725, 732 (citing *United States v. Roy*, 408 F.3d 484, 495 (8th Cir. 2005)). "'[Plain error]'s requirement that an error be 'plain' means that lower court decisions that are questionable but not *plainly* wrong (at time of trial or at time of appeal) fall outside the Rule's scope.'" *McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d at 732 (quoting *Henderson v. United States*, 568 U.S. 266, 278, 133 S.Ct. 1121, 1130 (2013)) (emphasis in original).

In *State v. Wilson*, 2020 S.D. 41, 947 N.W.2d 131, one of the issues on appeal was whether the circuit court "committed plain error when it allowed allegedly inadmissible evidence at trial." *Id.* ¶ 16, 947 N.W.2d at 136. In its plain error analysis, this Court noted that "reasonable arguments for admission of this evidence exist under well-established evidentiary principles, and had there been a timely objection, the circuit court could have considered the applicability of these accepted rules in the context of the entire case." *Id.* ¶ 20, 947 N.W.2d at 137. However, "[w]hen an issue has been forfeited, [this Court's] review is focused upon initially determining the existence of plain error that unquestionably required the court to act on its own." *Id.* ¶ 21, 947 N.W.2d at 137. But

"[t]he fact that the circuit court did not act sua sponte to exclude the evidence does not . . . establish plain error." *Id.* ¶ 20, 947 N.W.2d at 137.

This case is like *Wilson*. Janes now claims that the additional statements contained in Exhibit 2 and Exhibit 3 were inadmissible. However, by not raising any objection to the admission of Exhibit 2 and Exhibit 3, Janes did not give the circuit court the opportunity to consider their admissibility, or at least the admissibility of the challenged statements contained therein, under the rules of evidence. And as held by this Court in *Wilson*, the fact that the circuit court did not sua sponte exclude Exhibit 2 and Exhibit 3, does not establish plain error.

b. Prejudice

Even if this Court determines that the circuit court's failure to exclude Exhibit 2 and Exhibit 3 is plain error, Janes fails to meet the third prong of the plain error analysis – that the error was prejudicial and affecting substantial rights. The jury did watch Exhibit 3 during trial and there is no indication in the record that the jury did not have both Exhibit 2 and Exhibit 3 with them during deliberations. However, Janes has failed to show how the jury's verdict would have been different had the challenged statements in Exhibit 2 and Exhibit 3 been excluded.

Janes separates the challenged statements into two categories: hearsay and other bad acts. The State will address each below.

i. Hearsay

Janes alleges that the summary of disclosures made by B.S. during his forensic interview, which is contained in Exhibit 2, is inadmissible hearsay. AB 13. Hearsay is defined as a statement that "[t]he declarant does not make while testifying at the current trial or hearing" and "[a] party offers in evidence to prove the truth of the matter asserted in the statement." SDCL 19-19-801(c). Hearsay is not admissible unless it falls within one of the exceptions set out in South Dakota Law, and Janes alleges that no such exceptions are applicable to B.S.'s statements. AB 13. *See* SDCL 19-19-802.

However, erroneous admission of hearsay statements does not necessitate reversal, if there is no prejudice. *State v. Loeschke*, 2022 S.D. 56, ¶ 46, 980 N.W.2d 266, 281. And Janes has not shown any prejudice by the inclusion of B.S.'s statements from his forensic interview in Exhibit 2. B.S. testified at trial about being spanked and choked by Janes, and he was subject to cross-examination. SR 737-39, 741-43; JT3 22-24, 26-28. B.S.'s statements of abuse contained in Exhibit 2 were merely cumulative to his testimony, so any argument that those statements were prejudicial fails as the evidence of abuse came in directly from B.S. "'Where inadmissible evidence admitted at trial is cumulative only and other admissible evidence supports the result, the cumulative evidence, though inadmissible, is nonprejudicial'." *State v.*

Shepard, 2009 S.D 50, ¶ 16, 768 N.W.2d 162, 167 (quoting *State v. Tribitt*, 327 N.W.2d 132, 135 (S.D. 1982)).

Janes also challenges B.S.'s statement in Exhibit 2 regarding killing himself. AB 14. This statement differs from B.S.'s statements about Janes' abuse in that B.S. was never questioned about this statement at trial and neither party brought it to the jury's attention. As a result, Janes cannot show that this statement had any effect on the jury or their verdict. Therefore, Janes has failed to show any prejudice related to B.S.'s alleged hearsay statements in Exhibit 2.

ii. Other Bad Acts

Janes argues that four incidents included in Exhibit 2 and Exhibit 3 were inadmissible "other bad acts," including the green bean incident, prior incidents of abuse of N.S., alleged abuse of J.J., and the allegation related to another child at a party. AB 14-18.

> [E]vidence of other crimes, wrongs, or acts not otherwise admissible 'to show that on a particular occasion the person acted in accordance with the character' may, nevertheless, 'be admissible for another purpose such as providing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

State v. Ortiz-Martinez, 2023 S.D. 46, ¶ 32, 995 N.W.2d 239, 246 (citing SDCL 19-19-404(b)). However, "the plain fact that the trial record contains references to uncharged allegations of [other bad acts] does not, as a matter of course, create error or actual prejudice." *Ortiz-Martinez*, 2023 S.D. 46, ¶ 31, 995 N.W.2d at 246.

First, any statements contained in Exhibit 2 and Exhibit 3 were allowed in by the circuit court in its order on the State's hearsay notice. In its ruling, the circuit court stated "the statements that [N.S.] made to Rin Calderon during her Child's Voice interview" were admissible. SR 148; MH4 47. In addition, the circuit court specifically referenced statements that N.S. made about being spanked by Janes and bruising on J.J. in issuing its order. SR 145-46; MH4 44-45. N.S. testified at trial that Janes spanked her with his hand or a belt. SR 646-49; JT2 26-29. However, because this evidence was included in the circuit court's order on the State's hearsay notice, it was admissible and thus there was no prejudice in allowing N.S. to testify about it.

In addition, this Court has found no prejudice where "[t]he references to uncharged conduct were largely general in nature and not otherwise factually developed." *Ortiz-Martinez*, 2023 S.D. 46, ¶30, 995 N.W.2d at 245. That is the case here. With the exception of the statements regarding abuse of N.S., none of the references in Exhibit 2 and Exhibit 3 to other bad acts were factually developed at trial and therefore, have not been shown to be prejudicial.

The circuit court excluded evidence of the green bean incident in its ruling on the State's notice of 404(b). SR 150; MH4 49. However, although referenced in Exhibit 2, there was no testimony at trial about this incident. Neither party questioned any of the witnesses about the green bean incident and it was not specifically brought to the attention of

the jury. Its incidental inclusion in Exhibit 2 is not sufficient to show prejudice.

Similarly, the State did not elicit any testimony at trial from its witnesses regarding the incidents involving J.J. or the child at the party. The only mention of any alleged abuse against J.J. was N.S.'s statements made during her forensic interview and this brief exchange during Janes' cross-examination of Rin Calderon:

> Q. . . . There's a little bit of discussion during the Child's Voice about [J.J.]. Do you remember that?
>
> A. Yes.

SR 707; JT2 87. Nothing further was elicited by either party regarding alleged abuse of J.J.

Janes did ask Rin Calderon about the party incident during cross-examination:

> Q. And, basically, she said that they were in the middle of a party. He grabbed [the child]'s ear and drug him across the room?
>
> A. Correct.
>
> Q. She was the only one that saw that?
>
> A. That's what she told me. Correct.
>
> Q. During the middle of a birthday party with bouncy houses?
>
> A. Yes.

SR 707-08; JT2 87-88. Janes cannot now complain that evidence of the party incident was prejudicial when he elicited testimony about it.

Janes could possibly have shown prejudice if the State took unfair advantage of the inclusion of these other acts in Exhibit 2 and Exhibit 3, improperly developing them to support a propensity argument to the jury. The State did not do so in this case. In addition to not questioning any witnesses about these other acts, the State's closing argument focused on the choking incident, with a brief mention of the belt spankings on B.S. and N.S. *See generally* SR 786-95; JT3 71-80. And the State did not argue that Janes had a propensity for abuse or that he acted in conformity with an abusive character.

In conclusion, Janes has failed to show how the admission of any of the above evidence affected the outcome of the trial or that the jury's verdict would have been different had this evidence not been admitted. Rather, he just makes the assertion that "the cumulative prejudice to the defendant is evident" without any showing of such prejudice. AB 12. Janes' conclusory statement is not enough to show prejudice. *See generally State v. O'Brien*, 2024 S.D. 52, ¶ 32, 11 N.W.3d 881, 890-91 (holding that the defendant's "conclusory argument[s] [are] insufficient to meet [his] burden . . ." (quotation omitted)). There was substantial evidence of the choking incident, provided through the testimony of B.S. and N.S., to support the jury's verdict on the charge of child abuse, and inclusion of the challenged statements from Exhibit 2 and Exhibit 3 have not been shown to be prejudicial. Therefore, there was no plain error in the admission of the Child's Voice evidence without objection.

II

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED JANES TO TEN YEARS IN THE STATE PENITENTIARY WITH THREE YEARS SUSPENDED.

A. Standard of Review.

"'[T]he trial courts of this state exercise broad discretion when deciding the extent and kind of punishment to be imposed.'" *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83 (quoting *State v. Grosh*, 387 N.W.2d 503, 508 (S.D. 1986)). Therefore, this Court will "generally review a circuit court's decision regarding sentencing for abuse of discretion." *State v. Toavs*, 2017 S.D. 93, ¶ 6, 906 N.W.2d 354, 356.

"An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration, is arbitrary or unreasonable." *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109 (citing *Thurman v. CUNA Mut. Ins. Soc'y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616). Consequently, "'a sentence within the statutory maximum [generally] will not be disturbed on appeal.'" *Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d at 83 (quoting *State v. Bruce*, 2011 S.D. 14, ¶ 28, 796 N.W.2d 397, 406). Also, "'[a]bsent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Toavs*, 2017 S.D. 93, ¶ 14, 906 N.W.2d at 359 (citing *State v. Blair*, 2006 S.D. 75, ¶ 20, 721 N.W.2d 55, 61).

B. Legal Analysis.

In making sentencing decisions, a circuit court should be guided by the traditional sentencing factors of retribution, deterrence (both individual and general), rehabilitation, and incapacitation. *State v. Banks*, 2023 S.D. 39, ¶ 18, 994 N.W.2d 230, 235. These factors are to be weighed "'on a case-by-case-basis' depending on the circumstances of the particular case." *State v. Klinetobe*, 2021 S.D. 24, ¶ 28, 958 N.W.2d 734, 741. "The sentencing court bears primary responsibility for determining priority to be given applicable sentencing goals." *State v. Anderson*, 1996 S.D. 46, ¶ 31, 546 N.W.2d 395, 402. "The primary criterion in sentencing is good order and protection of the public and society, and all other factors must be subservient to that end." *Id.* ¶ 31, 546 N.W.2d at 403.

In addition, the circuit court should "acquire a thorough acquaintance with the character and history" of the defendant, which includes an examination of the defendant's "general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record." *State v. Whitfield*, 2015 S.D. 17, ¶ 23, 826 N.W.2d 133, 140 (citing *State v. Lemley*, 1996 S.D. 91, ¶ 12, 552 N.W.2d 409, 412). "[I]t is settled that the range of evidence that may be considered at sentencing is extremely broad" and "even includes inquiry into 'uncharged conduct or even conduct that was acquitted.'" *State v.*

Arabie, 2003 S.D. 57, ¶ 21, 663 N.W.2d 250, 257 (citing *United States v. Schaefer*, 291 F.3d 932, 944 (7th Cir. 2002)).

A review of the settled record shows that the circuit court did not abuse its discretion in its sentencing decision. The circuit court became acquainted with Janes' character and history by ordering a PSI. SR 320. The PSI contained information such as Janes' statements regarding the offense, prior criminal history, family and marital history, education, employment, financial situation, substance use, medical history, law enforcement reports, parenting class certificate, anger assessment, reference letters, and victim impact statements. *See generally* SR 321-75; 379-98 (sealed). The circuit court was also familiar with the facts of the case, having presided over the jury trial, and specifically stated that it believed B.S. and N.S. and found them to be credible. SR 459, 468, 489; SENT 13, 22, 43.

In addition, the circuit court recognized the factors that it was to consider in its sentencing decision:

> The statute requires in sentencing you that I look at moral character. Mentality. Habits. Environment. Age. Family. Occupation. Recidivism-recidivism, aversion to crime, inclination to crime, honesty, risk, deterrence, punishment, and protection. So, when I announce my sentence, I'll explain all that, and when I explain my sentence, it's not my wish to give you a beat down in court, but if you take me up to the Supreme Court, which you are certainly able and, and rightly do, the Supreme Court is going to say, well, did Barnett offer any expl-explanation of why he did what he did? Did he follow these criteria? So that's my job. I don't get to make up what the criteria are. I got to follow their, the Legislature and the Supreme Court's directions.

SR 451; SENT 5.

The circuit court asked questions and discussed several issues with both Janes' counsel and the prosecutor throughout the sentencing hearing. The circuit court and counsel discussed inconsistencies between Janes' assertion in the PSI that there were only two belt incidents and the children's assertions that the belt spankings happened frequently, the reasonableness of discipline with a belt, that Janes' own children were not disciplined with a belt like B.S. and N.S., and the impact of Janes' actions on B.S. and N.S. SR 454-55, 456-57, 463-64, 488-89, 492-93; SENT 8-9, 10-11, 17-18, 42-43, 46-47. The circuit court also questioned Janes' argument that he and Tanya mutually agreed to spank B.S. as punishment as no other disciplinary actions had any effect, and that he was the one to spank B.S. because Tanya was unable to hit B.S. hard enough.[8] SR 322-23 (sealed), 454-55, 464-65, 490; SENT 8-9, 18-19, 44. However, the circuit court did not accept this argument and even said it was "troublesome" if true as it showed Janes was willing to apply additional force to B.S. SR 464-65, 490; SENT 18-19, 44. This dialogue between the circuit court and the attorneys shows that the court was taking all information before it into consideration when sentencing Janes.

Janes argues that the circuit court "relied on conjecture and anecdotal information in fashioning Janes' sentence instead of the

[8] Tanya denied any such agreement to punish B.S. in this manner. SR 457-58; SENT 11-12.

evidence before the court." AB 19. The circuit court did make statements about the penitentiary system and inmates not serving full sentences given by courts, mentioning a case in which an individual that was sentenced to seven years in the penitentiary was out in less than ninety days on penitentiary-approved house arrest. SR 478-79; SENT 32-33. The circuit court also inquired about how long Janes could be expected to serve if the court ordered a jail sentence, with trustee status or the ability to work time off the end. SR 480-83, 494-95; SENT 34-37, 48-49.

However, despite the circuit court's seeming frustration with the penitentiary system and characterization of a penitentiary sentence as a "fiction," the record is clear that was not the basis for the sentence imposed. SR 480; SENT 34. The circuit court told Janes outright that he was going to be remanded that day, indicating that the court intended to impose some sort of confinement even before fully hearing the arguments of the parties. SR 483; SENT 37. And, upon issuing its sentence, the circuit court specifically stated that the seven actual years of penitentiary time came from B.S.'s request in his victim statement, citing one of the worst fears of a victim that "[n]o one will do anything about it." SR 501-02; SENT 55-56.

Janes also argues that the circuit court improperly opined that the children "would likely suffer from post-traumatic distress syndrome [sic] (PTSD)." AB 20. However, that is not what the record shows. Rather, in

response to the State's argument about how B.S. and N.S. have been affected in this case, the circuit court merely said "I would be surprised if they don't have PTSD." SR 493; SENT 47. Nothing in that statement indicates that the circuit court improperly diagnosed the children with PTSD or based its sentence on that. However, the impact of Janes' actions on B.S. and N.S. is a proper consideration as it relates to deterrence and rehabilitation. As stated by the prosecutor, "it's easy for an abuser to move on, right? They're not the ones who are subjected to their own behavior. These children, while I hope they don't have to, well, they'll always have to live with what happened." SR 493; SENT 47.

In making its sentence determination, the circuit court reviewed and considered the information in the PSI, the testimony and evidence at trial, and the arguments of counsel in light of well-recognized sentencing factors and penological goals. Janes was convicted of one count of Child Abuse, a Class 4 felony, with a maximum sentence of ten years in the state penitentiary and/or a $20,000.00 fine. SDCL 22-6-1(7); SDCL 26-10-1. The circuit court imposed a penitentiary sentence of ten years with three years suspended. SR 501; SENT 55. The sentence imposed is within the range of permissible choices and below the statutory maximum faced by Janes. "Generally, we will not disturb a sentence that is within the statutory maximum." *State v. Yeager*, 2019 S.D. 12, ¶ 16, 925 N.W.2d 105, 111.

As stated by the circuit court, "what we're sentencing here is three or five years of bullying these kids. That's, that's how I see it. I find these witnesses to be credible and that's how my sentence is going to look." SR 472-73; SENT 26-27. The circuit court did not abuse its discretion in sentencing Janes and the sentence imposed should be upheld.

III

THE CIRCUIT COURT'S ORDER IMPOSING RESTITUTION FOR TANYA JANES' LOST WAGES SHOULD BE AFFIRMED. RESTITUTION FOR FUTURE COUNSELING EXPENSES FOR THE CHILDREN SHOULD BE REMANDED FOR FURTHER HEARING TO DETERMINE CAPS AND TIMEFRAMES.

A. Standard of Review.

"[A] trial court has broad discretion in imposing restitution." *State v. Martin*, 2006 S.D. 104, ¶ 5, 724 N.W.2d 872, 874 (citing *State v. Thayer*, 2006 S.D. 40, ¶ 16, 713 N.W.2d 608, 613). "[T]he 'reasonably satisfied' standard of proof applies in determining restitution." *Martin*, 2006 S.D. 104, ¶ 5, 724 N.W.2d at 874 (quoting *State v. Tuttle*, 460 N.W.2d 157, 160 (S.D. 1990)). "However, questions of law are reviewed under a de novo standard with no deference given to the trial court's conclusions." *Martin*, 2006 S.D. 104, ¶ 5, 724 N.W.2d at 874 (citing *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 9, 607 N.W.2d 22, 25).

B. Legal Analysis.

"It is the policy of this state that restitution shall be made by each violator of the criminal laws to the victims of the violator's criminal

activities to the extent that the violator is reasonably able to do so." SDCL 23A-28-1. In addition, under the South Dakota Constitution, a victim has "[t]he right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal conduct . . ." S.D. Const. art. VI, § 29.

"Restitution" is the "full or partial payment of pecuniary damages to a victim." SDCL 23A-28-2(4). "Pecuniary damages" are "all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium." SDCL 23A-28-2(3).

"Victim" is "any person . . . who has suffered pecuniary damages as a result of the defendant's criminal activities . . ." SDCL 23A-28-2(5). The South Dakota Constitution also defines victim as "a person against whom a crime or delinquent act is committed" and if the victim is a minor, "the term also includes any spouse, *parent*, child, *sibling*, or as designated by the court, grandparent, grandchild, or guardian." S.D. Const. art. VI, § 29 (emphasis added). In addition, "[a]nyone convicted under . . . § 26-10-1 shall be *required* as part of the sentence imposed by the court to pay all or part of the cost of any necessary medical, psychological, or psychiatric treatment . . . of the minor resulting from the acts or acts for which the defendant is convicted." SDCL 23A-28-12 (emphasis added).

"Defendants have a right to due process in criminal sentencings involving restitution," which generally includes the right to "'confront the victim's claims for pecuniary loss and also an opportunity to be heard.'" *State v. Falkenberg*, 2021 S.D. 59, ¶ 57, 965 N.W.2d 580, 596 (quoting *Tuttle*, 460 N.W.2d at 159). "When a defendant contests the amounts requested, the State must produce evidence that allows the court to be 'reasonably satisfied' that such restitution is proper." *Falkenberg*, 2021 S.D. 59, ¶ 57, 965 N.W.2d at 596-97. In addition, the restitution statutes "require establishment of a 'causal connection between a defendant's crime and a victim's damages' to support an award of restitution." *State v. Willson*, 2005 S.D. 90, ¶ 10, 702 N.W.2d 828, 831 (quoting *State v. Joyce*, 2004 S.D. 73, ¶ 16, 681 N.W.2d 468, 471).

Tanya submitted a victim statement that was included in the PSI. SR 364-65 (sealed). The victim statement included a restitution request in the amount of $6,514.95 for Tanya's lost wages "for meetings related to case and kids' anxious days when unable to go to school." SR 364 (sealed). The victim statement also said "[B.S.] and [N.S.] have both expressed interest in counseling services outside of their school counselor, however have been unable to do so due to financial strains, even with sliding scale fees." SR 364 (sealed).

As to Tanya's request for lost wages, Janes objected to the restitution request in the middle of the sentencing hearing. SR 476-78; SENT 30-32. When sentence was being imposed, the prosecutor said "if

the court has concerns about restitution that Tanya is asking for, the court can certainly inquire with her" and acknowledged not typically seeing restitution requests for lost wages. SR 496; SENT 50. The circuit court responded, "So, I haven't seen this. If it's in the PSI, I might have missed it. Is this something that got filed later?" SR 496; SENT 50. Janes' counsel offered, "It was. No, it was towards the back of the (unintelligible) document." SR 496; SENT 50. The prosecutor confirmed this understanding. The State presumes counsel were referring to Defense Exhibits A and C, which detail Tanya's complete employment records including income, raises, time sheets showing when she clocked in and out of work, and personnel records showing when she was not at work. The court confirmed, "I did read through this, but it's been a while." SR 497; SENT 51. Janes' counsel then offered, "May I approach, Judge, I have it." SR 497; SENT 51. The court said it would be helpful and received the document. SR 497; SENT 51. The prosecutor then asked the court to "take everything as a whole into consideration when fashioning its sentence." SR 497; SENT 51. The circuit court ordered restitution of $2000.00 for "missed work." SR 501; SENT 55.

While reimbursement for lost wages is not required as for medical and psychological expenses under SDCL 23A-28-12, Tanya is a victim under South Dakota law as the parent of children who were victims of Janes' crime and because Tanya "suffered pecuniary damages as a result of the defendant's criminal activities . . ." SDCL 23A-28-2(5). *See also*

S.D. Const. art. VI, § 29. And because the circuit court read the entirety of Exhibits A and C, it could have found a necessary causal connection between Janes' crime and $2,000.00 worth of Tanya's lost wages, though it did not explicitly say so.

Janes said he was unsatisfied with the lack of causal connection between his crime and the request for lost wages, but he did not request a restitution hearing. SR 477; SENT 31. The circuit court responded that Janes was "in a poor position to argue that a collateral victim of his crime can't be trusted on restitution." SR 477; SENT 31. At the conclusion of the sentencing hearing, Janes provided the court with the evidence supporting Tanya's work absences. This Court can assume the circuit court found an adequate causal connection by imposing restitution as it did, despite Janes' objection. But if this Court is not satisfied that the circuit court explicitly found a causal connection with the information before it, the appropriate remedy is a remand to the sentencing court to make that determination, as discussed below.

As to the restitution order for counseling costs, the circuit court said at sentencing:

> I'm going to order restitution in the form of counseling for these two kids. I don't know if [J.J.] is even old enough to take counseling, but if he is, and if you find a program that works, I will hold Mr. Janes responsible for those counseling costs.

SR 501; SENT 55. As Janes' counsel stated, "there are no actual expenses for counseling, but they have expressed an interest in it . . . but

they haven't done the counseling [because] they have been unable to do so." SR 476; SENT 30. The circuit court did not impose a specific or projected amount for counseling costs based upon evidence submitted to the court, nor did it offer language setting forth the parameters or contingencies that must be met so that such amounts can be ascertained by a definitive point in time. Similar to this Court's direction in *Falkenberg*, the appropriate remedy is a remand to the circuit court for an evidentiary hearing on restitution. A restitution hearing will allow the State to submit evidence on the restitution expenses not only for the past expenses incurred (such as Tanya's lost wages), but also any ascertainable future counseling costs.[9]

A remand will also allow the circuit court to enter written findings of fact following a restitution hearing to support its restitution order. "[I]t is appropriate that the trial court enter written findings of fact in support of any order of restitution." *Tuttle*, 460 N.W.2d at 159. As it relates to the award for counseling costs, this Court has held that:

> [W]hen a sentencing court orders restitution for future costs which have not yet been incurred, the restitution order should either include a projected amount based upon evidence submitted to the court, or language setting forth the parameters or contingencies that must be met so that such amounts can be ascertained by a definitive point in time.

Falkenberg, 2021 S.D. 59, ¶ 63 n.20, 965 N.W.2d at 598 n.20.

[9] *See Falkenberg*, 2021 S.D. 59, ¶ 62, 965 N.W.2d 580, 598 ("A sentencing court may enter a restitution order at the time of sentencing that does not identify the specific amount of restitution owed for a victim's counseling, so long as such costs are ascertainable.")

Finally, the circuit court's written judgment should be amended to adhere to its oral judgment. The written judgment in this case does not reference restitution for counseling costs, so it conflicts with the circuit court's oral sentence.[10] SR 401-02. As it stands now, the written judgment conflicts with SDCL 23A-28-3 because "[i]f the sentencing court orders the defendant to a state correctional facility and does not suspend the sentence, the court shall set forth in the judgment the names and specific amount of restitution owed each victim." Although the written judgment states that restitution of $2,000.00 is to be made to Tanya, it does not mention counseling costs or amounts for B.S., N.S., or J.J. SR 401-02.

For the reasons set forth above, to the extent this Court deems necessary, the State requests that the oral restitution orders be affirmed and remand any dispositional inaccuracies and lack of ascertainable details to the circuit court for further proceedings.

IV

JANES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT APPROPRIATE FOR REVIEW ON DIRECT APPEAL.

A. Standard of Review.

"'Ineffective-assistance-of counsel claims are generally not considered on direct appeal. Rather, such claims are best made by filing

[10] "It is settled law in this state that the oral sentence is the only sentence and the written sentence must conform to it." *State v. Cady*, 422 N.W.2d 828, 830 (S.D. 1988) (citing *State v. Ford*, 328 N.W.2d 263, 267 (S.D. 1982)).

a petition for a writ of habeas corpus which, if granted, will result in an evidentiary hearing.'" *State v. Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d 113, 120 (quoting *State v. Hauge*, 2019 S.D. 45, ¶ 18, 932 N.W.2d 165, 171). "This is because the record on direct appeal typically does not afford a basis to review the performance of trial counsel." *Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d at 120. This Court has previously said it will not address a claim of ineffective assistance of counsel unless there are "exceptional circumstances." *Id.* A claim of ineffective assistance of counsel is heard on direct appeal "only when trial counsel was so ineffective and counsel's representation so casual as to represent a manifest usurpation of the defendant's constitutional rights." *Id.*, ¶ 30, 952 N.W.2d at 121.

B. Legal Analysis

The basis for Janes' ineffective assistance of counsel claim is trial counsel's failure to object to the Child's Voice evidence discussed in Issue I, above.[11] AB 27. He argues that "failure to object can be ineffective assistance of counsel if the decision is not reasonably related to a strategic decision and does not conform with the action competent counsel would take in similar circumstances." AB 27 (citing *Foote v. Young*, 2024 S.D. 41, ¶ 29, 10 N.W.3d 202, 210). However, Janes' argument actually supports this Court's prior holdings that ineffective assistance of counsel claims are not appropriate for direct appeal

[11] Appellate counsel was not trial counsel.

because the underlying record here does not explain why Janes' trial counsel did not object and whether there was a strategic decision in doing so. Addressing the ineffective assistance of counsel claim through a habeas corpus proceeding with an evidentiary hearing will allow trial counsel to explain or defend his actions for "a more complete picture of what occurred." *State v. Dillon*, 2001 S.D. 97, ¶ 28, 632 N.W.2d 37, 48.

In addition, as set out in the State's argument to Issue I, above, Janes has failed to show prejudice in the admission of the Child's Voice evidence. Therefore, Janes cannot show that trial counsel's actions related to the admission of the Child's Voice evidence rise to the level of a "manifest usurpation of [his] constitutional rights." *Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d at 121. Janes' ineffective assistance of counsel claim should not be heard on direct appeal.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Judgment & Sentence be affirmed, with the exception of a limited remand for a restitution hearing, if necessary, and to amend the final judgment regarding restitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 8,619 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 365.

Dated this 4th day of August, 2025.

/s/ Angela R. Shute
Angela R. Shute
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of August, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Chadwick Alan Janes* was served via electronic mail upon Nicole J. Laughlin at nicole@nicolelaughlinlaw.com.

/s/ Angela R. Shute
Angela R. Shute
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, *Plaintiff and Appellee,* v. CHADWICK JANES, *Defendant and Appellant.*	No. 30974

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

HONORABLE MARK BARNETT
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal Filed on January 21, 2025.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 30974

vs.

CHADWICK JANES,

Defendant and Appellant.

PRELIMINARY STATEMENT

To avoid repetitive arguments, Appellant will limit discussion in this brief to the issues that need further development or argument. Any matter raised in Appellant's initial brief but not specifically mentioned herein is not intended to be waived. Appellant will attempt to avoid revisiting matters adequately addressed in the initial brief.

The transcript of day four of the pre-trail motion hearing held on May 6, 2024, will be referred to as "MH4." The transcript of the sentencing hearing held on December 19, 2024, will be referred to as "ST." The settled record will be

referred to as "SR." Appellee's brief submitted in this matter on August 4, 2025, will be referred to as "Appellee." All references will be followed by the appropriate page number.

Appellant relies upon the Jurisdictional Statement, Statement of the Case, and Statement of Facts presented in the Appellant's Brief that was filed with the court on June 18, 2025.

STATEMENT OF LEGAL ISSUES

I. WHETHER ADMISSION OF THE CHILD'S VOICE EVIDENCE AMOUNTED TO PLAIN ERROR BECAUSE IT CONTAINED HEARSAY AND OTHER BAD ACTS EVIDENCE THAT WAS INADMISSIBLE, IRRELEVANT, AND UNDULY PREJUDICIAL TO THE DEFENDANT.

Child's Voice evidence was admitted at trial that contained hearsay and other bad acts evidence that was inadmissible, irrelevant, and unduly prejudicial to the defendant.

State v. Nelson, 1998 S.D. 124, 587 N.W.2d 439
Supreme Pork, Inc. v. Master Blaster, Inc., 2009 SD 20, 764 N.W.2d 474
U.S. v. Baker, 432 F.3d 1189 (11th Cir. 2005)

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED DEFENDANT.

The trial court sentenced Defendant to 10 years in prison, with 3 years suspended.

State v. Deleon, 2022 S.D. 21, 973 N.W.2d 241
State v. Klinetobe, 2021 S.D. 24, 958 N.W.2d 734

III. WHETHER THE COURT ERRED WHEN IT IMPOSED RESTITUTION FOR MOTHER'S LOST WAGES AND FUTURE COUNSELING EXPENSES OF CHILDREN.

The trial court ordered Defendant to pay restitution to Tanya Janes in the amount of $2000 to reimburse her for lost wages and to pay for future counseling

services for the children.

In the Interests of K.K., 2010 S.D. 98, 793 N.W.2d 24

S.D.C.L. § 23A-28-2(5)
S.D.C.L. § 23A-28-3

IV. WHETHER DEFENDANT WAS DENIED HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant was denied his 6th Amendment right to effective assistance of counsel when counsel failed to object to other bad acts evidence and hearsay evidence at trial.

State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706
State v. Vortherms, 2020 S.D. 67, 952 N.W.2d 113

LEGAL ANALYSIS

I. WHETHER ADMISSION OF THE CHILD'S VOICE EVIDENCE AMOUNTED TO PLAIN ERROR BECAUSE IT CONTAINED HEARSAY AND OTHER BAD ACTS EVIDENCE THAT WAS INADMISSIBLE, IRRELEVANT, AND UNDULY PREJUDICIAL TO THE DEFENDANT.

Appellee argues that the question to be considered by this Court is not whether the evidence was admitted improperly, but whether the trial court should have sua sponte refused its admission. Appellee, 14-15. Appellant agrees that normally the Court's review of plain error does not involve an objection by trial counsel, and this Court is usually tasked with considering whether the trial court erred in admitting the evidence despite a lack of objection by trial counsel. *Id.* (citing *State v. Rudloff*, 2024 S.D. 73, ¶ 42, 15 N.W.3d 468, 483). However, the evidence at issue in this matter contained in Exhibit 2 and Exhibit 3, was not only objected to, but was ruled inadmissible at the Motions Hearing. MH4, 39-53.

Because the inadmissibility had already been determined prior to jury trial it was clearly plain error for the trial court to admit it.

The error in this case is both obvious and clear and requires reversal. *U.S. v. Baker*, 432 F.3d 1189, 1207 (11th Cir. 2005) (*quoting Johnson v. U.S.*, 520 461, 467-68 (1997)). The prejudice that resulted is also obvious and clear. Evidentiary errors are to be viewed cumulatively. *Baker*, 432 F.3d at 1203. Therefore, even if the prejudicial effect of each individual error is harmless, the cumulative prejudice of all evidentiary errors must be viewed in the aggregate to determine whether Defendant was deprived of his right to a fair trial. *Id.*

The evidence that was erroneously admitted in this case was related to Janes having abusive, mean, and negative interactions with B.S. and other children. It was absolutely introduced to show that he had a propensity for being abusive toward B.S. and other children to prove he was guilty of the specific allegation of abuse against B.S. charged in the indictment. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 17, 764 N.W.2d 474, 484. The admission of this irrelevant and prejudicial evidence clearly rises to "exceptional circumstances" in which reversal is appropriate. *State v. Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d 439, 443.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED DEFENDANT.

Although a trial court has broad discretion in determining an appropriate sentence for a defendant in a criminal case, it may not impose a sentence

arbitrarily. The trial court's sentence must be based on the particular circumstances of the case and characteristics of the defendant before the court. *State v. Deleon*, 2022 S.D. 21, ¶ 17, 973 N.W.2d 241, 246; *State v. Klinetobe*, 2021 S.D. 24, ¶ 28, 958 N.W.2d 734, 741. In this case, the record demonstrates the court did not base its sentence on the crime and offender before the court. Instead, the sentencing court relied on speculation and conjecture which prevented it from fashioning an appropriate sentence to fit both the crime and offender.

Appellee asserts that the trial court's characterization of the penitentiary sentence being fictional was clearly not the basis for the length of the sentence it imposed. Appellee, 26. However, that is not supported by the record. The record contains numerous instances of the trial court directly stating it was imposing the sentence based on its belief the sentence would not be fully served by Janes. The trial court explained to Janes that he would not actually serve the full sentence that the court was imposing. ST, 53. The court clearly stated it was sentencing him to a longer period of time because of the trial court's personal belief that the Department of Corrections would shorten the sentence.

The court repeatedly stated it was relying on its experience with a totally unrelated case involving a defendant in White River in fashioning Janes' sentence. In imposing Janes' sentence the court stated:

> [A]nything I give to this young man is not what I'm giving him because the rest of the system says no, we don't think so. We're going to put a bracelet on him, or we're going to kick him back out to White River in three months. And so if you think the sentence is long, take heart in the fact that you'll never do that sentence.

Id. at 52. The court also said, "I'm giving a fictional sentence, but I am going to sentence him to the penitentiary because I don't really trust the jail." One of the last things the court stated at sentencing was "I thought about saying five years because five is how long he bullied him, but again, the Pen's gonna turn five into one, so I gotta go to seven." *Id.* at 58. These statements by the court clearly illustrate that the judge's distrust and frustration with the Department of Corrections led it to rely on improper conjecture when determining the length of Defendant's sentence in this case.

Appellee also contends that in its sentencing decision the trial court did not rely on improper speculation regarding the possible future mental health diagnoses the children would suffer. Appellee, 26-27. Appellee argues that the court's statement that it "would be surprised if they don't have PTSD" was merely in response to the State's argument and was not a basis for the sentence. *Id.* at 27. However, the record reflects that the court absolutely relied on his belief that the children would likely suffer from PTSD in imposing the sentence in this case. The court stated that while the defendant could go about his business the kids had been scarred for the rest of their lives. The court then immediately discussed its personal experience with PTSD and stated that "part of what PTSD is you keep reliving, you can't stop relieving it over and over." ST, 54. However, there was no evidence presented at sentencing that the children in this case were

diagnosed or likely to be diagnosed with PTSD.[1] Further evidence of the court's reliance on a possible future PTSD diagnosis in fashioning its sentence is the restitution ordered for future counseling for all three of the children if they needed it. Because there was no evidence the children suffered from or would suffer from PTSD in the future, it was improper speculation and an abuse of discretion for the court to consider it for sentencing purposes.

III. WHETHER THE COURT ERRED WHEN IT IMPOSED RESTITUTION FOR MOTHER'S LOST WAGES AND FUTURE COUNSELING EXPENSES OF CHILDREN.

Appellee concedes that the trial court's order of restitution for future counseling costs must be remanded to determine an ascertainable amount. Appellee, 32-34. Appellee also acknowledges that the oral judgment of the trial court conflicts with the written judgment because it does not reference the restitution for counseling costs or name the victims the restitution must be paid to in violation of S.D.C.L. § 23A-28-3. *Id.* at 34.

Regarding the $2000 of restitution ordered for Tanya's lost wages, Appellee requests this Court find the trial court "*could* have found a necessary causal connection between Janes' crime...." *Id.* at 32 (emphasis added). An inference by this Court that the trial court "could" have found this necessary connection is insufficient to fulfill this statutory requirement. South Dakota law

[1] The Child's Voice report admitted at trial as State's Exhibit 2 states that N.S. had no mental health or psychiatric diagnosis and a mental health screening noted a mild risk for depression. SR, 248.

requires a causal connection between the crime and a victim's damages. *In the Interests of K.K.*, 2010 S.D. 98, ¶¶ 9-10, 793 N.W.2d 24, 27. Restitution is only available to a victim that has incurred financial damages as a result of the crime committed by a defendant. *Id.* at ¶ 10 (*quoting* S.D.C.L. § 23A-28-2(5)). The record before this Court does not contain sufficient information to uphold the trial court's award of lost wages as restitution because no causal connection was established on the record. Therefore, the restitution ordered for Tanya's restitution must be vacated and remanded.

IV. WHETHER DEFENDANT WAS DENIED HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Appellee argues that the issue of ineffective assistance of counsel is not proper for direct review by this Court and should be heard in habeas corpus proceedings. Appellee, 34-36. Appellee states that habeas corpus is appropriate because it would allow an evidentiary hearing for trial counsel to explain the rationale and trial strategy behind failure to object to the hearsay and other acts evidence entered at trial. *Id.* However, further proceedings are not necessary in this case because the facts of the case give rise to the exceptional circumstances in which the "manifest usurpation of defendant's constitutional rights" is readily apparent. *State v. Vortherms*, 2020 S.D. 67, ¶ 30, 952 N.W.2d 113, 121.

In this case, because there is no reasonable strategy that could account for failing to object to evidence the defense had already fought to exclude, review on direct appeal is appropriate. In *State v. Thomas*, the Court found that direct

review of whether trial counsel was ineffective was appropriate when counsel failed to request a cautionary jury instruction regarding accomplice testimony. 2011 S.D. 15, ¶¶ 22-26, 796 N.W.2d 706, 714. In that case the Court found trial counsel was ineffective on direct appeal when no legitimate trial strategy could be ascertained to excuse the omission. *Id.* at ¶ 25, 714. No further evidentiary proceedings were required because no possible advantage could be envisioned for counsel's failure to request the instruction. *Id.*

Similarly, the record in the present case also clearly shows that trial counsel's failure to object to inadmissible evidence could not have been within the bounds of a reasonable trial strategy. Defendant was on trial for an alleged act of child abuse. Trial counsel demonstrated understanding that the information contained in Exhibits 2 and 3 contained hearsay and other acts evidence that were detrimental to the defendant's case. Trial counsel objected to the evidence at the motions hearing and filed a Motion in Limine to exclude any 404(B) evidence at trial that was not noticed by the prosecution. These actions establish the only reasonable and logical trial strategy that the evidence supports, which was to keep out evidence that Janes had a history that could be interpreted as abusive or mean toward children. It was ineffective assistance of counsel to fail to object to the admission of this evidence at trial.

The introduction of this inadmissible evidence was extremely prejudicial to the defendant because it improperly portrayed that he had a propensity for abusive behavior toward children and inferred that he acted in conformity

therewith in the present case. This resulted in prejudice that denied Defendant his right to receive a fair trial. Therefore, his conviction must be reversed and remanded.

CONCLUSION

In this case, inadmissible evidence was introduced at Defendant's trial that was overwhelmingly prejudicial and deprived him of his right to a fair trial. This error was exacerbated by trial counsel's failure to object to its admission, which resulted in Defendant also being deprived of his right to effective assistance of counsel. Further, the trial court relied on improper and arbitrary information in determining Defendant's sentence and imposed restitution without finding a causal relationship. The restitution ordered was also deficient because the amount ordered is not ascertainable and it is inconsistent with the written judgment of the court. Therefore, Defendant requests the Court vacate his conviction and remand to the trial court for further proceedings.

Respectfully submitted this 1st day of October 2025.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in S.D.C.L. 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 2,137 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Office 365.

Dated this 1st day of October 2025.

Nicole J. Laughlin
Attorney for Appellant