IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO: 26987

CHARLES BIRDSHEAD,
Defendant and Appellant.

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

HONORABLE Wally Eklund, Circuit Court Judge

APPELLANT'S BRIEF

Jamy Patterson
Office of the Public Defender
for Pennington County
Pennington County Courthouse
Rapid City, South Dakota 57701

Attorney for Appellant

Mr. Marty J. Jackley
Attorney General
1302 E. Hwy 14 Suite 1
Pierre, South Dakota 57501

and

Mr. Mark A. Vargo
Pennington County State's Attorney
300 Kansas City Street
Rapid City, SD 57701

Notice of Appeal was filed on February 7, 2014.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: PAGES:

IN THE SUPREME COURT

OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
vs. NO. 26987
CHARLES BIRDSHEAD,
Defendant and Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Charles Birdshead, will be referred to as "Birdshead." Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." References to documents in the record herein will be designated as "SR" followed by the appropriate page number. References to the transcript of a motion hearing will be designated as "MH," followed by the date of the motion hearing, and then followed by the appropriate page number. References to the transcript of the Evidentiary hearing of July 15, 2013 will be designated as "EV" followed by the appropriate page number. References to the transcript of the Plea hearing of November 20, 2013 will be designated as "PH" followed by the appropriate page number. References to the seven volumes of the Jury Trial transcripts will be designated as "JT," followed by the volume number, and then followed by the appropriate page number (i.e., volume three of seven will be referenced

as "JT3," and followed by the appropriate page number). References to the Sentencing hearing will be designated as "SN." References to the transcript of the Grand Jury hearing of January 23, 2013 will be designated as "GJ" followed by the appropriate page number. References to Appendix will be designated as "APPX."

JURISDICTIONAL STATEMENT

Birdshead appeals from a final judgment of conviction for Manslaughter in the First Degree and Possession of a Controlled Weapon. The judgment was entered on January 6, 2014 before the Honorable Wally Eklund, Seventh Judicial Circuit Court Judge, Rapid City, Pennington County, South Dakota and filed on January 23, 2014. SR 629. Appeal is by right pursuant to SDCL 23A-32-2. Notice of appeal was filed on February 7, 2014. SR 636.

STATEMENT OF LEGAL ISSUES

IX. WHETHER BIRDSHEAD WAS DENIED DUE PROCESS AND THE SIXTH AMENDMENT REQUIREMENT OF A JURY VERDICT BECAUSE THE JURY WAS INSTRUCTED ON A REDUCED MENS REA OF RECKLESSNESS FOR THE CHARGE OF FIRST DEGREE MANSLAUGHTER?

Birdshead was denied Due Process and the Sixth Amendment requirement of a jury verdict because the jury was instructed on a reduced mens rea of recklessness for first degree manslaughter.
Sullivan v. Louisiana, 508 U.S. 275 (1993).
Sandstrom v. Montana, 442 U.S. 510 (1979).
State v. Waloke, 2013 S.D. 55, 835 N.W.2d 105.

X. WHETHER TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING MISLEADING JURY INSTUCTIONS THAT EMPHASIZED THE ILLEAGILTY OF THE FIREARM?

Trial Court's jury instructions misstated the law and created undue prejudice and an unfair trial for Birdshead.
State v. Jones, 2011 S.D. 60, 804 N.W.2d 409.
SDCL 23A-8-3(3).
SDCL 22-14-14.

XI. WHETHER TRIAL COURT ABUSED ITS DISCRETION IN DENYING BIRDSHEAD'S PROPOSED JURY INSTRUCTIONS UNDER *CONATY*?

Trial Court erred in not instructing the jury it could acquit of the Possession of a Controlled Weapon charge if it found Birdshead was acting in self-defense.
Conaty v. Solem, 422 N.W.2d 102 (S.D. 1988).
S.D. Const. art. VI, § 24.
U.S. Const. amend. II.

XII. WHETHER TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO THE FELONIES BEING COMMITTED UPON BIRDSHEAD?

Trial Court abused its discretion and violated Birdshead's Fifth and Sixth Amendment rights by failing to properly instruct the jury on the felonies being committed upon Birdshead that justified lethal force.
State v. Cottier, 2008 S.D. 79, 755 N.W.2d 120.
State v. Pellegrino, 1998 S.D. 39, 577 N.W.2d 590.
SDCL 22-16-34.

XIII. WHETHER TRIAL COURT VIOLATED BIRDSHEAD'S FIFTH AND SIXTH AMENDMENT RIGHTS BY EXCLUDING CERTAIN EVIDENCE
AND BY LIMITING CONFRONTATION OF KEY WITNESSES?

Trial Court violated Birdshead's Fifth and Sixth Amendment rights by excluding the second jailhouse phone call and Milk's Facebook posting, and by prohibiting impeachment on these issues.

Crane v. Kentucky, 476 U.S. 683 (1986).
State v. Carter, 2009 S.D. 65, 771 N.W.2d 329.
State v. Lamont, 2001 S.D.92, 631 N.W.2d 603.

XIV. WHETHER BIRDSHEAD WAS DENIED HIS RIGHT TO PRESENT THE COMPLETE THEORY OF HIS DEFENSE BECAUSE OF *BRADY* VIOLATIONS?

Birdshead was denied his right to present the complete theory of his defense because of Brady violations.

Strickler v. Greene, 527 U.S. 263 (1999).
Brady v. Maryland, 373 U.S. 83 (1963).
State v. Krebs, 2006 S.D. 43, 714 N.W.2d 91.

XV. WHETHER TRIAL COURT ABUSED ITS DISCRETION AND DENIED BIRDSHEAD A FAIR TRIAL WITH ADMISSION OF IMPERMISSIBLE 404(B) EVIDENCE?

Trial Court abused its discretion and denied Birdshead due process with admission of impermissible 404(b) evidence.
Estelle v. McGuire, 502 U.S. 62 (1991).
State v. Packed, 2007 S.D. 75, 736 N.W.2d 851.
SDCL 19-12-3.

XVI. WHETHER THE CUMALTIVE ERRORS DENIED BIRDSHEAD A FAIR TRIAL?

The cumulative errors in his case denied him due process and a fair trial.

State v. Wright, 2009 SD 51, 786 N.W2d 512.

SDCL 23A-44-14.

U.S. Const. amend. V.

STATEMENT OF CASE

Birdshead was charged by indictment with three alternative counts of Manslaughter in the First Degree, SDCL 22-16-15: Count One, Killing During the Course of the Commission of a Felony, to wit, Distribution of a Controlled Substance; Count Two, Killing by Means of a Dangerous

Weapon; and, Count Three, Unnecessary Killing While Resisting an Attempt by Eustacio Marrufo to Commit a Crime or After Such Attempt Had Failed. Birdshead was also charged with: Count Four, Commission of a Felony with a Firearm, SDCL 22-14-12; Count Five, Possession of a Controlled Weapon, SDCL 22-14-6; Count Six, Distribution of a Controlled Substance to a Minor, SDCL 22-42-2; and, Counts Seven and Eight, Fourth Degree Rape, SDCL 22-22-1(5). Birdshead pled not guilty to all counts. The Honorable Wally Eklund, Circuit Court Judge, presided.

Trial Court severed Counts One through Five from Counts Six through Eight for trial. MH (6/10/13) 3. On July 15, 2013, trial court held an evidentiary hearing on State's 404(b) Notice.

A jury trial was held July 29, 2013, through August 5, 2013, on Counts One through Five. Birdshead moved for a judgment of acquittal after close of State's case and after close of evidence. JT4 678-679; JT6 945. After close of the evidence, Trial Court dismissed Count One due to insufficient evidence of distribution of a controlled substance. JT6 945-946.

On the second day of jury deliberations, and after a note had been sent from the jury that they were unable to make a "unanimous decision," the jury returned guilty verdicts under Count 2, 4, and 5 of the indictment. JT7 1068-69; 1074.

On September 20, 2013, trial court denied Birdshead's Motion for

New Trial. MH (9/30/13) 20. On November 20, 2013, Birdshead pled guilty to Count 6 of the Indictment, and State dismissed the remaining counts. MH (11/20/13) 2-3, 6.

Trial Court sentenced Birdshead to concurrent sentences of 45 years in prison for Count 2, 2 years in prison for Count 5, and 25 years in prison for Count 6. SEN 96. Trial court dismissed Count 4 at sentencing. SEN 90.

Birdshead appeals his convictions for Count 2 and Count 5.

STATEMENT OF FACTS

1. Issue One: reduced mens rea instruction.

When trial court instructed the jury on the mens rea necessary to convict Birdshead for first degree manslaughter, it added two words to the pattern instruction: "or recklessly." JT6 959; APPX—Jury Instruction 27. State had requested this modification of the pattern mens rea instruction based on State v. Mulligan, 2007 S.D. 67, ¶9, 736 N.W.2d 808, 813. JT6 948; APPX—State Proposed Jury Instructions.

Birdshead objected to the "or reckless" language. JT6 948, 959. Birdshead argued it lowered the mens rea necessary to convict him for that crime and denied him due process. JT6 959.

2. Issue Two: jury instructions contrary to statute.

Prior to trial, Birdshead moved for dismissal of either Count 2 or

Count 4 of the indictment, arguing Count 4 was an illegal punitive enhancement under SDCL 22-14-14, as the underlying felony in Count 2 required a "dangerous weapon" as one of its elements. JT1 173. State argued the objection was untimely. JT1 174. At the close of State's case, Birdshead again moved for dismissal of Count 2 or, alternatively, Count 4. JT4 678-79. Trial Court dismissed Count 4, but reversed itself when State argued that Birdshead's motion was untimely. JT4 679-680. Trial Court ultimately ruled that a limiting instruction "striking that portion of [Count 4] referring to Count II" would cure any confusion. JT4 680. Such limiting instruction was never given. At sentencing Trial Court dismissed the verdict on Count 4, stating "I think its been obvious for some time Mr. Birdshead should not be sentenced on that charge." SEN 90.

While settling instructions, Birdshead objected to Instruction 32 as "creating a confusing trial." JT6 958, 960. Instruction 32 States: "[t]he fact that you may find Defendant guilty or not guilty on any one count of the Indictment, must not control or influence your verdict on any other count or counts in the Indictment." The instructions were logically inconsistent due to the punitive enhancement under Count 4 of the indictment, making it impossible for the jury to follow all instructions given.

Birdshead also objected to Instruction 12. That instruction stated that a homicide could not be "excusable" if a dangerous weapon was

used. It also required "lawfulness." Birdshead argued, and State agreed, that "excusable" did not apply in this case. JT6 948. Birdshead noted "a defendant is not entitled to an instruction if there is no evidence to support the theory." JT6 949. Trial Court overruled the objection and instructed on "excusable homicide" in Instruction 12. JT6 947-949.

3. Issue Three: right to bear arms in self-defense.

Birdshead proposed jury instructions under Conaty v. Solem, 422 N.W.2d 102 (S.D. 1988). SR 439, 456; APX—Defendant's Proposed Instructions. Birdshead asked that the jury be instructed that it could acquit on the possession of a controlled weapon charge if it found Birdshead was acting in self-defense. JT6 959, 963. Trial court denied the instructions without explanation. JT6 959, 963.

4. Issue Four: right to lethal force when defending against a violent felony.

Charles "Chuck" Birdshead was lured to the Dakota Rose Motel by people who intended to harm him. JT2 910; JT4 625; JT5 897. Eustacio Marrufo, the decedent, was 6'1" tall, weighed 205 pounds, and was high on methamphetamine at the time he attacked Birdshead. JT2 280; JT4 605; JT2 286 (Defendant's Ex. JJ). Frank Milk, who was on the run from his parole officer at the time of the incident, was known to be violent. JT5 789, 907.

Detective Neavill, the lead agent on the case, concluded that "Birdshead was being assaulted in the blue car…when the shot goes off."

JT4 620-21. Neavill's conclusion was consistent with Birdshead's and Milk's statements that the gun went off as Birdshead was being assaulted in the car by Marrufo. Birdshead described the moments leading up to the fatal shot:

> And . . . two guys . . .opened the door and just started hitting me with something…The big guy… he came over to the passenger door first and he hit me. This smaller dude he was on the driver's side. He opened the driver's door and…I was just getting, you know, I didn't know what to do, I was just like getting dazed every time they hit me…I couldn't think. And, I saw, that big guy came running back over and at that point you know it, all I could think is like fuck . . . I'm gonna get killed this time. . . And so, so I decided to . . .pull that thing out, and I was . . . hoping to just scare 'em away you know, like there was no intentions in, no intentions at all, but they just kept beating me up . . . and I was just like . . if [he] gets this, you know he's inches away from me, I'm done. And I just, I just pulled it as hard as I could and as I pulled it . . . it just happened so fast that I pulled it out of his hand and it just, it fuckin' went off and I can remember seeing that guy just dropping straight back.

JT3 574-575 (State's Ex. 123, pg 7).

It is uncontested that Birdshead was being attacked when the gun fired. JT2 376; JT4 605; JT5 807-809. It is also uncontested that Marrufo "started the fight." JT2 375, 385; JT3 526, 548; JT4 612; JT5 802, 811. Marrufo forced his way into the vehicle by opening the passenger door as J.B. closed it, and went "over J.B" to assault Birdshead. JT2 375, 376, 385; JT3 526; JT5 802. Milk described Marrufo as "whopping on Charles pretty good in the car." JT5 818. According to J.B., Milk was "on Chuck's side of the door" and "trie[d] to satrrt punching" Birdshead. JT2 375. Milk testified that he "restrained" and may have struck Birdshead during the incident. JT5 819-821. Shy

Bettelyoun watched the attack from a nearby vehicle that Milk and Marrufo had exited. JT3 524-525. Shy saw Milk enter the car from the driver's side as if to pull Birdshead from the vehicle. JT3 527, 550.

Pathologist Habbe testified that bruises to Marrufo's right knuckles were "consistent with Marrufo attacking or assaulting Birdshead." JT2 271; 284-285, 309; JT2 286 (Defendant's Ex. JJ). Marruffo's right hand was smeared with blood. JT2 286; JT2 285 (Defendant's Ex. B). Habbe testified that injuries to Marrufo's chest "could be consistent with Marrufo leaning over and reaching in the car when he was shot." JT2 300.

Miranda Brown Bull observed "a lot of blood coming down" Birdshead's neck shortly after the shooting and she described a square injury to the top of his head. JT3 425; 440. Following the attack, Neavill photographed injuries to Birdshead's eye, which he agreed could be from the object Birdshead was struck with. JT4 596-597; JT4 595 (Defendant's Exs. WW, XX, and YY). Neaville did not test the blood evidence in this case because he "accepted as fact that . . . Birdshead bled at the scene of this crime." JT5 929. Keys found next to Marrufo at the crime scene were released the next day and were never tested for Birdshead's DNA. JT5 880, 852.

The jacket Birdshead wore when he was attacked was stained with his blood in nine places, mostly on the right side of the hood. JT4 685-

688, 701. Neavill testified that the blood on the jacket was consistent with injuries to the right side of Birdshead's head. JT5 927-928. Birdshead's right side would have faced Marrufo during the attack. JT4 772. A witness observed blood on J.B.'s left cheek, which would be the side facing Birdshead as J.B. sat trapped in the passenger seat. JT3 445-446. Habbe opined that Birdshead could have sustained serious injury or death during the beating because "a brain is kind of like a sponge in the sense that it can only absorb just so much injury before someone dies as a result of that injury." JT2 300.

At trial, State characterized the crime that occurred against Birdshead as merely a simple assault. JT2 185, 189, 191; JT5 929; JT6 995, 996, 979, 981, 995, 1050, 1054. State further argued:

> The truth is, Chuck Birdshead was not scared of being kidnapped. He was tired of being *punched*. The truth is not every fistfight calls for a shotgun to the chest, and this one did not. The truth is what Frank Milk told you. It's no reason to kill somebody.

JT6 1056.

5. Issue Five: Sixth amendment violations.

State's theory of prosecution was that Marrufo's killing was unjustified. JT6 994-996. State argued that J.B. had set up a drug deal with Birdshead, and that during the drug deal Birdshead was the victim of a simple assault. JT6 1051, 1054. Throughout the trial, State tried to discredit Birdshead's theory that this was set up by Milk and Shy to attack and rob him, and that this attack constituted a violent felony. JT6 1050-1051, 1054.

To present his defense, Birdshead needed to impeach Milk and Shy's credibility and show that they had set him up. A "love triangle" existed between the three. Shy had an unrequited love interest in Birdshead, and Milk was infatuated with Shy. At trial, Shy admitted she and Birdshead had one sexual encounter in the past. JT3 552. One witness testified Shy appeared mad because Birdshead would not sleep with Shy more than once; and that, in anger, Shy declared "he's going to get robbed." JT5 910.

During trial, Milk denied going to the motel to rob and beat Birdshead. JT5 823. Milk denied Shy had power over him. JT5 823. Yet, Milk had posted comments on Facebook describing how he could not bear losing her. JT5 836-837 (Defendant's Ex. ZZZ). Birdshead was not permitted to question Milk regarding these matters. JT5 823-824. Birdshead then made a proffer of the Facebook posting outside the presence of the jury. JT5 836-837. Birdshead argued the evidence was material to his theory of defense because it showed that Milk had a motive to attack Birdshead on Shy's behalf. JT5 837. Trial court adhered to its ruling. JT5 836-837.

State exploited trial court's ruling when, in closing argument, it argued that Birdshead's theory of defense was not supported by the evidence:

> Do you remember when Frank [Milk] was being asked about whether Shy had this mystical power over him? So in love he'll do

> anything for her. He'll beat up Chuck Birdshead. He'll lie, cheat, steal, and again, ladies and gentleman, what was his response? You remember. He laughed. Frank, may have many faults, but being overly attached and under the thumb of his girlfriend does not appear to be one of them.

JT6 982. Because Birdshead had not been able to impeach Milk on this point, he was not able to counter this argument during his closing.

During trial, Trial Court refused admission of the second of two jailhouse calls recording a conversation between inmate Ralph Larvie and his wife, Amber Larvie. JT5 842 (Defendant's Ex. AAAA). Shy and Milk were with Amber on January 7, 2012, before and after the shooting. JT3 535, 555; JT5 791. The recording contains statements that Milk and Shy were fighting on January 7 before the shooting because Shy saw text messages on Milk's phone detailing his sexual encounter with another woman. JT3 838-839. This crucial piece of evidence supplied a motive for Milk attacking Birdshead on January 7. Milk's Facebook posts showed his preoccupation with Shy and with her leaving him. When Shy discovered his infidelity, Milk would do whatever it took to appease her, including robbing Birdshead as she had previously wanted. JT5 910. At trial, Shy and Milk denied the existence of these text messages. JT3 534, 536, 539; JT5 792, 793. However, in the jailhouse call, Amber said that Shy had seen messages on Milk's phone describing a sexual encounter, and that Shy confronted him about this before the shooting. JT5 842 (Defendant's Ex. AAAA); APPX—Transcription of Second Call. Trial Court would not allow Birdshead to impeach Milk and Shy's testimony with

this recording. JT3 534-536; JT5 792, 793. This prejudicial impeachment of Milk and Shy's testimony was essential to Birdshead's defense. Birdshead also attempted to question Ralph Larvie regarding the content of the second phone call, but trial court also prohibited this form of impleachment. JT5 835. [1]

During closing, State argued that Shy, J.B., and Milk were "telling the truth" at trial. JT6 980, 981,1056. Birdshead could not argue that these witnesses were not truthful because he had not been permitted to impeach them with the jailhouse call.

6. Issue Six: Brady violations resulted in prejudicial error.

Prior to trial J.B. consistently maintained that Shy had lured Birdshead to the Dakota Rose Motel. EV 57-58. J.B. testified before the grand jury that Shy used her Facebook account to set up a drug deal with Birdshead on January 7. 1/23/13 GJ Tr. 6, 11; PH 9, 10 (6/26/13 Transcript of J.B.'s interview, pg 13, attached to October 18, 2013 letter brief); State's Ex.135. J.B. repeatedly denied texting Birdshead from any phone, including Milk's, in her interviews with law enforcement. PH 9, 10 (6/26/13 Transcript of J.B.'s interview, pgs 13-14, attached to October 18, 2013 letter brief).

Prior to trial, Birdshead had no indication that J.B. would recant

[1] Trial court already ruled it would not allow Birdshead to play the second call when Amber testified. JT5 840.

her grand jury testimony and her statements to law enforcement. Just a few weeks before trial, Neavill testified J.B. told him that Shy had posed as J.B. on Facebook to lure Birdshead to the Dakota Rose Motel. EV 57-58.

At trial, J.B. radically changed her story. She testified that she used Facebook to lure Birdshead to the motel. JT2 368-371 (State's Ex. 135). J.B. testified that she used Milk's cellphone to text Birdshead on January 7 minutes before the fatal shot. JT2 370, 372; JT4 591 (State's Ex. 170-183). J.B.'s trial testimony contradicted every previous statement she had made on these issues. 1/23/13 Grand Jury Transcript 6, 11; PH (11/20/14) 9, 10 (6/26/13 Transcript of J.B.'s interview, pg 13, attached to October 18, 2013 letter brief).

J.B.'s trial testimony also contradicted the Dakota Rose video, which never showed J.B. using Milk's cellphone, but depicted Milk using a cellphone at times texts were being sent and received. JT2 240, 241 (State's Ex. 25 at 6:59-7:07); JT2 249, 251; JT4 591 (State's Ex. 170-183.)

Birdshead moved for dismissal based on State's failure to disclose this radical change to J.B.'s version of events. JT2 398. State argued it was not required to disclose the changes because it was not exculpatory and the State discovered it during development of work product. JT3 401. Trial court denied Birdshead's motion to dismiss. JT3 404.

State relied heavily upon J.B.'s new version of events in closing argument. It was the only part of her testimony State mentioned both in its closing, JT6 980, and then in its rebuttal. JT6 1051.

7. Issue Seven: impermissible 404(b) evidence.

Prior to trial, State filed Notice of Intent to Use Other Acts of Defendant per SDCL 19-12-5. Birdshead objected to the admission of the evidence at a pretrial hearing "under a 403 analysis. "[2] MH (7/12/13) 3-4.

At an evidentiary hearing, Trial Court ruled that State would be allowed to introduce evidence of Birdshead's prior use of firearms because it was relevant to whether this shooting was accidental. EV 77. However, Trial Court never conducted a balancing test to determine whether the probative value was substantially outweighed by the danger of unfair prejudice. EV 77.

Trial Court also denied Birdshead's motion for a court trial. EV 88. Birdshead believed that State would attempt to portray him as a "drug dealer," and that he would not receive a fair jury trial as a result. SR 131; APPX—Affidavit of Birdshead. Trial Court denied his motion but acknowledged the probable prejudicial effect of the other acts evidence by granting Birdshead's motion in limine, prohibiting reference to him as a "drug dealer." EV 93.

At trial, trial court allowed the admission of prejudicial other acts evidence relating to Birdshead's prior drug use and gun activity, JT3 502, 503, 505, 566-570; JT4 556-562, 656-666, 664-676, over Birdshead's objections. JT3 502, 505, 566-572; JT4 660, 666, 672, 675. Trial Court did not analyze the factual or legal relevance of the evidence nor did it conduct the necessary balancing test. JT3 502, 505, 566-567; JT4 659-666.

Birdshead objected to State's witness, Officer Childs, who testified that in July 2012, he found Birdshead "passed out or sleeping in a vehicle." JT4 665-667. When Childs "woke" up Birdshead, Birdshead gave a false name. A subsequent search of Birdshead's person revealed two syringes and aluminum foil, and a search of the car revealed a 10 mm handgun and a semi-automatic AK 47. JT4 668-676. The guns were received into evidence over defense objection. JT4 675-676 (State's Ex. 163 and 164). At some point during the incident, Birdshead allegedly ran from the scene.

State was also allowed to introduce drug-related evidence that was not part of its other acts notice. Neavill was permitted to testify over objection, JT3 566-567, that a syringe and glass tube with burnt residue were found in a trash can in a hotel room after the shooting[3]. JT3 570.

---

[2] Federal Rule 403 is codified in SDCL 19-12-3.

[3] While State suggested Birdshead stayed at the room after the shooting, Rod Hickey testified otherwise. JT6 940.

Photographs of these items were admitted into evidence over objection. JT3 568 (State's Exs. 74-87). And, evidence was admitted, over defense objection, that the smoke detector in the room had been altered, which Neavill testified is done by "people cooking methamphetamine." JT3 569 (State's Exs 75-76).

Over Birdshead's objection, JT3 503, 505, photos of drug-related items found in Sabrina Martin's house, where Birdshead voluntarily surrendered himself, were admitted into evidence. JT3 502 (State's Ex. 108-114), 505 (State's Ex 100-107). Over Birdshead's objection, Richard Wold testified that items found in a bag at Brown Bull's residence tested positive for methamphetamine or Alpha-PVP. JT4 660 (State's Exs. 31-33), 661.

Moreover, State was permitted to refer to Birdshead as a "drug dealer" throughout the trial, contrary to Trial Court's prior ruling on this matter. EV 93; JT2 191; JT6 996, 1053. Trial court denied Birdshead's motion for mistrial on this point. JT2 238.

ARGUMENT

I. THE JURY WAS INSTRUCTED ON A REDUCED MENS REA OF RECKLESSNESS FOR THE CHARGE OF FIRST DEGREE MANSLAUGHTER, RESULTING IN A DENIAL OF DUE PROCESS AND THE SIXTH AMENDMENT REQUIREMENT OF A JURY VERDICT.

1. Preservation of Objection/Standard of Appellate Review

Whether trial court properly instructed on the mens rea for first degree manslaughter is a "question of law," which this Court reviews de novo. State v. Giroux, 2004 S.D. 24, ¶ 4, 676 N.W.2d 139, 140-141.

During settling of instructions, Birdshead objected to trial court instructing on the mens rea of recklessness for first degree manslaughter. JT6 948, 959. Trial court overruled the objection. JT6 959.

2. Analysis

Trial Court instructed the jury that it could convict Birdshead on a mens rea that was insufficient to support a conviction for first degree manslaughter. This denied Birdshead the "Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict." Sullivan v. Louisiana, 508 U.S. 275, 278 (1993).

Trial court instructed the jury that it could convict Birdshead of First Degree Manslaughter if it found that he acted either intentionally or recklessly.

> In the crime of Manslaughter in the First Degree, the defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally *or recklessly* does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know that the conduct is unlawful.

APPX—Jury Instruction 27 (emphasis added).

Recklessness is the mens rea for the lesser offense of second

degree manslaughter. It is not the mens rea for the greater offense of first degree manslaughter. State v. Waloke, 2013 S.D. 55, ¶ 32, 835 N.W.2d 105, 114 (upholding a first degree manslaughter conviction and the lower's court's refusal to instruct on second degree manslaughter because there was "no evidence that Waloke acted recklessly" when she stabbed the victim with the knife, which would be factually and logically impossible if recklessness was the mens rea for first degree manslaughter); State v. Stetter 513 N.W.2d 87 (S.D. 1994), and State v. Seidschlaw, 304 N.W.2d 102 (S.D. 1981) (finding that if the death caused by the intoxicated driver constituted only reckless conduct, then defendant could only be convicted of second degree manslaughter, not first degree manslaughter).

A jury cannot be instructed that the lesser mens reas of recklessness is sufficient to prove a crime requiring a higher mens rea of intentionality:

> If the proper mens rea . . . is knowledge, and *if the jury instructions as a whole* either equate recklessness with knowledge or *substitute recklessness for knowledge*, then Sandstrom v. Montana compels the conclusion that the charge is erroneous. Sandstrom found error in a charge under which the requisite mens rea was merely presumed. *Here there was more than a presumption; the charge actually equated the lesser recklessness mens rea with the higher mens rea of knowledge.*

United States v. Adamson, 700 F.2d 953, 956 (5th Cir. 1983)(citing Sandstrom v. Montana, 442 U.S. 510 (1979)) (emphasis added).

Our criminal code culpability hierarchy, in descending order,

includes: “malice, maliciously;” “intent, intentionally;” “knowledge, knowingly;” “reckless, recklessly;” and “negligent, negligently.” SDCL 22-1-2(1)(a) – (e). State v. Schouten, 2005 S.D. 122, ¶ 14, 707 N.W.2d 820, 824. A greater mens rea encompasses each lesser mens rea, but proof of a lesser mens rea is insufficient to prove the greater level mens rea. SDCL 22-1-2(1)(f).

Jury instructions should “adequately advise the jury of the essential elements of the offenses charged and the burden of proof required of the government.” United States v. Fast Horse, 747 F.3d 1040, 1042 (8th Cir. 2014) (citations omitted). “While we review a court’s wording and arrangement of jury instructions for an abuse of discretion, ‘a court has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error.’ ” State v. Jones, 2011 S.D. 60, n. 1, 804 N.W.2d 409, 411 (citations omitted).

Trial Court’s instructions failed to adequately define for the jury the term “intentionally” as it applied to the First Degree Manslaughter count. Instruction 29 defined general criminal intent under the pattern jury instruction. APPX – Jury Instruction 29. But, the jury was expressly told that Instruction 29 only applied to the crimes of Commission of a Felony with a Firearm and Possession of a Controlled Substance. APPX – Jury Instruction 29. Instruction 25 instructed on the mens rea of “knowledge” because that is a term used in the charge of

Possession of a Controlled Weapon in Instruction 23. Instruction 28 defined "recklessness." The jury was told that it could convict Birdshead of First Degree Manslaughter if he was reckless, and the jury was provided a separate instruction to define that term for them. These instructions as a whole led to the understanding that "recklessness" was sufficient to convict for first degree manslaughter.

State capitalized on this error in the instructions and the lessening of its burden. During closing arguments, State argued that "recklessness" only applied to first degree manslaughter, whereas the charges of Possession of Controlled Weapon (Count 4) and Commission of a Felony with a Firearm (Count 5) required proof of the higher mens rea of "intentionality."

> The last two charges contain slightly separate elements. Both of them require criminal intent, although for each of Counts IV and V, the criminal intent has to be intentionally. There is no *reckless* element to the possession of a controlled weapon or the use of a firearm in the commission of a felony.

JT6 974.

State relied on Mulligan, 2007 S.D. at ¶9, 736 N.W.2d at 813, for inclusion of the reckless language to the pattern jury instruction. JT6 948; APPX—State Proposed Jury Instructions. However, the issue in Mulligan was sufficiency of the evidence—not whether the language in a jury instruction correctly stated the law. Id. at ¶8, 736 N.W.2d at 812. U.S. v. Adamson, 665 F.2d 649, 654, n 12 (5th Cir. 1982) ("In this regard, a distinction must be drawn between cases where the issue on appeal is

the sufficiency of the evidence and where it is the correctness of the jury instructions."). In fact, the jury instruction in Mulligan properly instructed on the mens rea of "intentionality" for first degree manslaughter by following the pattern instruction for general intent crimes. Id. at ¶19, 816-817. The Mulligan instruction did not include language pertaining to recklessness.

In Birdshead's case, the conjunction "or" in Instruction 27 allowed the jury to convict on a lesser finding of "recklessness," which is the mens rea for the lesser offense of second degree manslaughter, and not the mes rea for the greater offense of first degree manslaughter. When jury instructions deprive a defendant of requiring the prosecution to prove an essential element beyond a reasonable doubt, "structural error" results necessarily "invalidat[ing] the conviction." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). The "harmless-error analysis does not apply" because there was no "actual jury finding of guilty." Id. at 280.

As such, if this Court finds the error in Instructions 27 and 28 were structural, the other arguments raised by Birdshead as they relate to first degree manslaughter become moot because there has been no jury verdict.[4] Even under a harmless-error analysis, however, reversal is required.

In Chapman v. California, 386 U.S. 18 (1967), the Supreme Court

[4] At most, the jury convicted Birdshead of second degree manslaughter.

set forth the "harmless- constitutional-error rule," which South Dakota recognizes in SDCL 23A-44-14.[5] In Chapman, the Supreme Court found:

> We have no do doubt that the error in these cases was not harmless to the petitioners. To reach this conclusion one need only glance at the prosecutorial comments . . . Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to the petitioner's conviction.

Chapman at U.S. 828.

In Birdshead's case, the theme of the State's case became the "recklessness" of Birdshead. In addition to the quote above, JT6 974, State referenced the term *twenty more times* throughout it closing argument, fully quoted in the Appendix. JT6 968-1000.

Jury instruction 27 impermissibly lowered the State's burden in proving each element charged beyond a reasonable doubt. This instruction constitutes reversible error: "the essential 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* of the jury's findings." Sullivan v. Louisiana, 508 U.S. 275, 281(1993); see also Sandstrom v. Montana, 442 U.S. 510 (1979); In re Winship, 397 U.S. 358(1970).[6]

---

[5] "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." SDCL 23A-44-14.

[6] "Where a defendant has been denied 'his Sixth Amendment right to a jury determination of an important element of the crime, the integrity of the judicial proceeding is jeopardized.'" United States v. Fast Horse, 747

II. TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING MISLEADING JURY INSTRUCTIONS THAT EMPHASIZED THE ILLEGALITY OF THE FIREARM.

1. Preservation of Objection/ Standard of Appellate Review

Whether jury instructions correctly state the law and inform the jury is reviewed de novo. State v. Waloke, 2013 S.D. 55, ¶ 28, 835 N.W.2d 105, 113.

During trial and the settling of instructions, Birdshead objected to Count 4 of the Indictment, JT1 173, JT4 678-679, and to Instructions 20, 21, 26, 29, and 32. JT6 957, 958, 959. Trial court overruled the objections. JT6 958, 959, 960.

2. Analysis

A trial court "has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error." State v. Jones, 2011 S.D. 60, ¶ 5 n 1, 804 N.W.2d 409, 411, n 1. Trial court created undue prejudice by requiring Birdshead to stand trial on counts that were impermissibly charged and contrary to the law. The law prohibited a conviction under Count 2 and Count 4, and yet these counts were the counts the jury convicted.

F.3d 1040, 1043 (8th Cir. 2014)(citations omitted). It is important to note that even though Fast Horse analyzed the error in the mens rea jury instruction under the "plain error" standard, Fast Horse still reversed the conviction because of the "omission of a clear, accurate mens rea jury instruction." Id.

No court has jurisdiction over illegal charges. SDCL 23A-8-3(3) states that where an indictment "fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings." Counts 2 and 4 were precluded by law from co-existing in an indictment. SDCL 22-14-14. The Court did not have jurisdiction over these illegally charged counts and, *sua sponte* or upon notice by a party, was obligated to correct the indictment "at any time." State v. Medicine Eagle, 2013 S.D. 60, ¶ 38, 835 N.W.2d 886, 900 ("Jurisdiction can be raised at any time and determination of jurisdiction is appropriate.")

It is important to note the one count the jury did not convict under, Count 3, did not include "dangerous weapon" as one of its elements. On day two of jury deliberations, the jury sent a note back asking for the definition of "unnecessarily," an element under Count 3 (a death caused "unnecessarily"). JT7 1062. The jury could not find the killing was unnecessary because they returned a verdict of guilty under Count 2 (killing with a dangerous weapon). This is significant because it shows the taint of Count 4 that emphasized the illegality of the use of the firearm, which could reasonably preclude any finding of "lawful self-defense" in Instruction 13 for justifiable homicide.[7] Jury Instruction 32's

[7] The same logic applies to why an instruction under Conaty was required. A finding that Birdshead used a controlled weapon could preclude a finding of "lawful self-defense" as required for justifiable

admonishment that "[t]he fact that you may find Defendant guilty or not guilty on any one count of the Indictment, must not control or influence your verdict on any other count or counts in the Indictment," could not be followed given the co-existence of Count 2 and 4.[8] Thus, the prejudice of Count 4 was not cured simply by dismissing it at sentencing. State v. Jensen, 1998 S.D. 52, ¶ 68, 579 N.W.2d 613, 625.

A finding that any homicide was accidental, and hence, "excusable," was also precluded by statute because a dangerous weapon was used "upon sudden combat." SDCL 22-16-31. Birdshead objected to Instruction 12. JT6 947. Trial court overruled Birdshead's objections. JT6 949. State used Instruction 12 to confuse the issues in this case, JT6 998, arguing the "unlawfulness" of Birdshead's behavior. JT6 997.

For all the above reasons, trial court abused its discretion and gave "incorrect and misleading instructions ...prejudicially constitut[ing] reversible error." Jones at ¶ 5 n 1, 804 N.W.2d at 411, n 1.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING BIRDSHEAD'S PROPOSED JURY INSTRUCTIONS UNDER *CONATY*.

1. Preservation of Objection/ Standard of Appellate Review

---

homicide.

[8] Instruction 1 stated that under Count 4, the jury must find Bridshead "committed or attempted to commit a felony, to wit, Manslaughter in the First Degree as charged in Count 2 and 3."

A trial court's decision to deny a proposed instruction is reviewed for abuse of discretion. State v. Waloke, 2013 S.D. 55, ¶ 28, 835 N.W.2d 105, 113. Whether jury instructions correctly state the law and inform the jury is reviewed de novo. Id.

During the settling of instructions, Birdshead requested jury instructions under the South Dakota Supreme Court case of Conaty v. Solem, 422 N.W.2d 102 (SD 1988) for the possession of a controlled weapon charge, which trial court refused. JT6 959, 963; SR 439, 456.

2. Analysis

Conaty holds that a person can be acquitted of an illegal gun possession charge when reasonably using the gun for self-defense. This Court found the fundamental right to defend one's life and the constitutional right to bear arms trumped a statute prohibiting possession of a firearm because of their status as a felon. Id. at 104 (citing S.D. Const. art. VI, § 24.); U.S. Const. amend. II. In its 2014 Report to the State Bar of South Dakota, the Criminal Pattern Jury Instruction Committee cites Satter v. Solem, 422 N.W.2d 425 (S.D. 1988) for the proposition that "a defendant can have a defense to [the crime of Possession of a Firearm by a Felon] if the defendant possesses the firearm for the purpose of self-defense." APPX—2014 Proposed Changes to Pattern Criminal Instructions.

In Birdshead's case, the allegation was not that he was a felon in

possession of a firearm, but that he possessed a controlled weapon. However, the same logic applies. One cannot lose their fundamental right to life and to defend themselves based on the length of the gun.

IV. TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO THE FELONIES BEING COMMITTED UPON BIRDSHEAD.

1. Preservation of Objection/ Standard of Appellate Review

A trial court's decision to deny a proposed instruction is reviewed for abuse of discretion. State v. Waloke, 2013 S.D. 55, ¶ 28, 835 N.W.2d 105, 113. Whether jury instructions correctly state the law and inform the jury is reviewed de novo. Id.

Birdshead proposed pattern instructions for Kidnapping, Burglary, Aggravated Criminal Entry of a Motor Vehicle, Aggravated Assault, and Attempted Robbery. JT6 954, 962-963; APPX—Defendant's Proposed Jury Instructions (refused). These instructions were proposed so that the jury could determine whether Birdshead was the victim of a violent felony or merely simple assault. Birdshead also objected to the justifiable homicide instruction in Instruction 13. JT6 953, 955. Birdshead further proposed an alternative pattern jury instruction for justifiable homicide. JT6 953-954; APPX—Defendant's Proposed Instruction 19 (South Dakota Pattern Jury Instruction 3-24-38). Trial court denied Birdshead's proposed jury instructions, over-ruled his objection to the justifiable homicide instruction, and rejected his

proposed alternative pattern instructions. JT6 954, 963.

2. Analysis

It is well-settled law that the State has the burden to prove beyond a reasonable doubt that a defendant did not act in self-defense. State v. Burtzlaff, 493 N.W.2d 1 (S.D. 1992); State v. Schmidt, 104 N.W. 259 (S.D. 1905). This burden never shifts to the defendant. State v. Reddington, 125 N.W.2d 58, 61 (S.D. 1964). When Trial Court refused Birdshead's proposed instructions, Birdshead was denied "the ability to respond to the State's case against him" and was denied "'his fundamental constitutional right to a fair opportunity to present a defense.' " State v. Lamont, 2001 S.D. 92, ¶ 16, 631 N.W.2d 603, 608-09 (quoting Crane v. Kentucky, 476 U.S. 683, 687 (1986)).

A person may defend himself using lethal force if a violent felony is being committed upon him. SDCL 22-16-34 ("Homicide is justified if committed by any person resisting any attempt to murder such person, *or to commit any felony upon him or her . . .*"). State v. Pellegrino, 1998 SD 39, 577 N.W.2d 590.

"Upon proper request, defendants are entitled to instructions on their defense theories if evidence supports them." Pellegrino at ¶ 9, 577 N.W.2d at 594. "We have also stated that an accused must be afforded a meaningful opportunity to present a complete defense. When a defendant's theory is supported by the law and … has some foundation

in the evidence, however tenuous, the defendant has a right to present it." Waloke at ¶ 28, 835 N.W.2d at 113. "To warrant reversal, defendants must show the refusal to grant an instruction was prejudicial, meaning 'the jury probably would have returned a different verdict if [the] requested instruction had been given.' " Pellegrino at ¶ 9, 577 N.W.2d at 594.

Trial Court committed prejudicial error by denying Birdshead's request for instructions on the violent felonies that the facts suggested were being committed upon him by Marrufo and Milk. Pellegrino at ¶ 12, 577 N.W.2d at 595 (affirming that term "any felony" in the justifiable homicide instruction could include aggravated assault and kidnapping) (holding burglary instruction appropriate if decedent "had violence in mind when he arrived at the home."). It is uncontested that Marrufo had violence in mind when he forced entry into Birdshead's car. JT2 376, 385; JT3 526, 548; JT3 574-575 (State's Ex. 123, pg 7); JT5 802.

The instructions proposed by Birdshead were supported by the facts. The violent felony of Aggravated Entry of a Motor Vehicle requires: "Any person who forcibly enters a motor vehicle with intent to commit any crime therein is guilty of aggravated entry of a motor vehicle." JT6 962-963; APPX—Defendant's Proposed Instruction 14 (South Dakota Pattern Jury Instruction 3-16-12); SDCL 22-32-19. It is uncontroverted in this case that Marrufo forced his way into the vehicle occupied by

Birdshead with the intent to assault Birdshead, and that he started the fight. JT2 376, 385; JT3 526, 548; JT3 574-575 (State's Ex. 123, pg 7); JT5 802.

Birdshead requested an instruction for Second Degree Kidnapping. JT6 962-963; APPX—Defendant's Proposed Instruction 7 (South Dakota Pattern Jury Instruction 3-1-1.5). SDCL 22-19-1.1 defines Second Degree Kidnapping as: "Any person who unlawfully holds or retains another person…to inflict bodily injury on or to terrorize the victim or another…is guilty of the crime of kidnapping in the second degree." The evidence supported giving this instruction. Milk, by his own admission, "restrained" Birdshead. He grabbed at him as if to pull him from the vehicle, JT5 819-821, and entered the vehicle on the driver's side while Marrufo was attacking Birdshead from the passenger side. JT2 375, JT3 527, JT5 819-821. J.B. testified that she saw Milk hitting Birdshead in the vehicle. JT2 375. This was enough evidence to warrant an instruction on Second Degree Kidnapping because any evidence, however tenuous, is sufficient. Waloke at ¶ 28, 835 N.W.2d at 113.

Birdshead also requested an instruction for Aggravated Assault. APPX—Defendant's Proposed Instruction 15 (South Dakota Pattern Jury Instruction 3-23-3). SDCL 22-18-1.1 defines aggravated assault as, "Any person who attempts to cause, or knowingly causes, bodily injury to

another with a dangerous weapon. . . is guilty of the crime" of aggravated assault." The evidence supported giving this instruction. State v. Cottier, 2008 S.D. 79, ¶ 5, ¶ 8, ¶11 , 755 N.W2d 120, 124-128 (trial court instructed jury under SDCL 22-16-34, and that the "felony" being committed upon the defendant was an "aggravated assault" because Cottier had testified that the victim had "hit him repeatedly, choked him, pulled him around by the hair, and slammed his head against a brick wall."). Birdshead told Neavill that he felt like Marrufo was "hitting me with something," JT3 574-575 (State's Ex. 123, pg 7). The blood evidence, JT5 927-929, and injuries to Birdshead's eye, could be consistent with being struck by an object. JT4 596-597; JT4 595 (Defendant's Exs. WW, XX, and YY).

Trial court's error in refusing these instructions was compounded by its refusal to allow Birdshead to question Neavill on potentially felonious conduct by Marrufo and Milk. JT4 609-610, 624-625; JT5 923. The jury was left without any guidance as to whether Marrufo's and/or Milk's conduct constituted a violent felony justifying lethal force. To refuse to instruct the jury on any number of violent felonies supported by the evidence, and to prevent Birdshead from confronting the lead detective on this issue, violated Birdshead's Fifth, Sixth, and Fourteenth Amendment rights.

V. TRIAL COURT VIOLATED BIRDSHEAD'S FIFTH AND SIXTH AMENDMENT RIGHTS BY EXCLUDING CERTAIN EVIDENCE AND BY LIMITING CONFRONTATION OF KEY WITNESSES.

1. Preservation of Objection/Standard of Appellate Review

A trial court's evidentiary rulings, including a trial court's ruling on limiting cross-examination, are reviewed under the abuse of discretion standard. State v. Koepsell, 508 N.W.2d 591, 595 (S.D.1993). Birdshead preserved this issue for appeal through his argument to the court and his offer of proof. JT5 823-824, 836-842 (Defendant's Exs. AAAA and ZZZ).

2. Analysis

Birdshead's Fifth Amendment right to present his theory of defense and his Sixth Amendment right to confrontation were violated when Birdshead was prohibited from cross-examining Milk on his Facebook posting and from playing and questioning witnesses regarding the contents of second jailhouse call. Crane v. Kentucky, 476 U.S. 683, 690-691, 106 S.Ct. 2142, 2147 (1986).

"A criminally accused right to proffer a defense is fundamental." State v. Huber, 2010 S.D. 63, ¶ 37, 789 N.W.2d 283, 294. "When a defendant is denied the ability to respond to the State's case against him, he is deprived of 'his fundamental constitutional right to a fair opportunity to present his defense.'" State v. Lamont, 2001 S.D. 92, ¶

16, 631 N.W.2d 603, 608-609. "The Sixth Amendment guarantees a defendant an opportunity for effective cross-examination of witnesses, including inquiry into motivation and bias." United State v. Warfield, 97 F.3d 1014, 1024 (8th Cir. 1996); U.S. v. Beckman, 222 F.3d 512, 524-525 (8th Cir. 2000) (refusal of cross examination regarding witness's sexual interest in defendant's wife violated confrontation clause). Confrontation Clause errors are subject to the harmless error test. State v. Carter, 2009 S.D. 65, ¶ 32, 771 N.W.2d 329, 339.

The excluded evidence was important to Birdshead's theory of defense and was valuable impeachment of two significant witnesses. Milk's Facebook postings to Shy showed the power Shy had over him because of his preoccupation with losing her. JT5 823-824; 836-837 (Defendant's Ex. ZZZ). The jail house recording explained the circumstances leading up to the shooting—that Milk had been caught cheating on Shy. JT3 839; JT5 842 (Defendant's Ex. AAAA). Not wanting to lose her, Milk would do the one thing she had been asking others to do—violently ambush Birdshead. It would also have supported Defense's set-up theory, that Shy and Milk had put into play the series of events that led to Marrufo's death.

The contents of the second jail house phone call and Milk's Facebook postings were not cumulative because Birdshead "was not able to elicit the same testimony" from any other witness at trial. Carter 2009

S.D. at ¶ 37, 771 N.W.2d at 340. Shy and Milk denied setting Birdshead up. JT3 520, 539; JT5 799, 823. State specifically attacked the idea that Shy had any "magical spell" over Milk, JT6 982, and argued the only setup was a "setup" between Birdshead and J.B. for J.B. to buy drugs from him. JT6 1051. State called Shy in their case-in-chief, JT3 511, and vouched for Milk's credibility throughout State's closing. JT6 981(Milk "was willing to get up here and tell you the truth."), 991, 1050. State even ended their closing by saying, "[t]he truth is what Frank Milk told you.[9]" JT6 1056.

Shy and Milk's testimony were crucial to the prosecution's case. The State's whole theory rested on the premise that Marrufo's killing was unjustified because it occurred in the context of a simple assault after J.B. had "set-up" a drug-deal, not that the killing occurred during the course of a kidnapping or other violent felony set-up by Shy and Milk. JT6 1050-1051, 1054 ("Mr. Birdshead wasn't deceived. He was punched.") Hence, the inability to confront any of the witnesses on the contents of the second jail house phone call, or to confront Milk with his Facebook posting, was not harmless error.

[9] The importance of Milk's testimony was further demonstrated by the jury asking for a "copy of Frank Milk's testimony" during jury deliberations. JT6 1057.

VI. BIRDSHEAD WAS DENIED HIS RIGHT TO PRESENT THE COMPLETE THEORY OF HIS DEFENSE BECAUSE OF *BRADY*[10] VIOLATIONS.

1. Preservation of Objection/Standard of Appellate Review

A trial court's evidentiary rulings, including motions to dismiss an indictment, are reviewed under the abuse of discretion standard. State v. Hannemann, 2012 S.D. 79, ¶ 19, 823 N.W.2d 357, 362; State v. Carothers, 2006 S.D. 100, ¶ 8, 724 N.W.2d 610, 615–16.

Defense moved to dismiss the case with prejudice, and in the alternative, for a mistrial, after J.B.'s material change in testimony. JT2 398. Trial court denied the motions. JT3 404.

2. Analysis

Birdshead was denied due process when State called J.B. in their case-in-chief without any notice of the material changes to her testimony, namely that it was she who was communicating with Birdshead on both Facebook and Milk's cell phone on January 7, 2013. State v. Iron Necklace, 430 N.W.2d 66, 76 (S.D. 1988); State v. Piper, 2006 S.D.1, ¶ 19, 709 N.W.2d 783, 795-796.

State argued it was not required to notice the anticipated change to J.B.'s testimony because it was work product and because Brady doesn't apply to *inculpatory* evidence and testimony. JT3 401. The U.S. Supreme Court rejected such an argument more than a decade ago. Strickler v.

[10] Brady v. Maryland, 373 U.S. 83 (1963).

Greene, 527 U.S. 263, 282 n. 21 (1999).

> We reject [the government's]'s contention that these documents do not fall under Brady because they were "inculpatory." Our cases make clear that Brady's disclosure requirements extend to material that, whatever their other characteristics, may be used to impeach a witness.

The law in South Dakota is in harmony with the federal law on the matter:

> A *Brady* violation occurs when (1) "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the "evidence [has] been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice [has] ensued."

Thompson v. Weber, 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 11.

J.B.'s changed testimony was "impeaching." It was impeaching because her changed testimony contradicted her prior grand jury testimony and her statements to police. The evidence was suppressed, i.e., State knew prior to trial that J.B. had changed her story, and State knew this was important. JT3 401; JT6 980, 1051. During State's direct of J.B., State acknowledged J.B. had made contrary statements to law enforcement, and bolstered her testimony by suggesting she was telling the truth at trial. JT2 385-387. Iron Necklace, 430 N.W.2d at 76 ("It is a little difficult to imagine a prosecutor approaching within two or three days of a trial date without having interviewed or received a written report on the expected testimony of any key witness.").

J.B.'s changed testimony also violated Defendant's First Motion for Discovery, which was granted by trial court. SR 26, 66; MH

(3/18/13)15-19. State's argument that J.B.'s changed statements were "work product" is without merit. JT3 401; see e.g., Mincey v. Head, 206 F.3d 1106, n. 63 (11th Cir. 2000) (work product exemption yields to constitutional disclosure requirement); Dickson v. Quarterman, 462 F.3d 470, 480, n. 6 (5th Cir. 2006); Waldrip v. Head, 620 S.E.2d 829, 832 (GA 2005) ("[W]ere the work product doctrine and the constitutional right to exculpatory evidence to be in conflict, the former obviously would have to yield to the latter."); 2 Wright, Fed. Practice & Procedure § 254.2 (3rd ed. 2000) (Brady requirement trumps work doctrine principle).

This Court reversed a defendant's murder conviction because the State withheld inculpatory evidence from defense that "materially undercut" the theory of defense, disclosing it for the first time at trial through one of its witnesses. State v. Krebs, 2006 S.D. 43, ¶¶ 21-23 714 N.W.2d 91, 98-100. The facts in Krebs are similar to Birdshead's case. In both cases, the State withheld evidence in violation of the trial court's discovery order by claiming it was protected under the work product doctrine. In each case, the trial court denied the defendant's motion for a mistrial. In its reversal of the conviction, this Court affirmed the importance of complying with the rules of discovery ("[d]iscovery statutes exist to eliminate trial by ambush . . Yet an ambush is exactly what occurred here.") Krebs at ¶ 23, 714 N.W.2d at 100.

The change in J.B.'s trial testimony constituted prejudicial error

because "[t]he testimonial evidence was not only inculpatory, it completely undercut [Birdshead's] defense." Krebs at ¶ 21, 714 N.W.2d at 99. Birdshead had relied upon J.B.'s sworn testimony and prior statements to establish that Birdshead had been "lured" to the motel by Shy to be beat, robbed, and/or kidnapped by Milk and Marrufo. JT5 798, 799. J.B. was the *only witness* who could counter Shy's and Milk's trial testimony that it had been J.B. both on Facebook and Milk's cellphone communicating with Birdshead. JT2 368-371 (State's Ex. 135); JT3 520; JT4 591 (State's Ex. 170-183); JT3 539, 799. Birdshead "claims without knowledge of the incriminating nature of testimony, he was unable to prepare countering evidence. " Krebs at ¶ 18, 714 N.W.2d at 98.

State acknowledged the "materiality" of J.B.'s changed statement: it was the only portion of her trial testimony referenced by the State during closing arguments, first in its final arguments, and then a second time, in its rebuttal. JT6 980, 1051. "The probability of the effect of the testimony upon the jury is, in part, evidenced by its prominence in the State's final argument.....and then in its rebuttal. . . The State's attorney considered the persuasiveness of the testimony to be of such importance that he mentioned it twice in his final argument." Krebs at ¶ 23, 714 N.W. 2d at 100. "The failure to disclose the inculpatory testimony materially prejudiced [Birdshead's] defense and constitutes reversible

error." Id.

b. The in-camera documents that were ordered by the trial court have never been identified or disclosed to defense, violating *Brady*.

Trial Court granted Birdshead's discovery request for a number of documents, which were ordered for in-camera review. MH (3/18/13) 14, 25-26. Trial Court prohibited Birdshead from inspecting these documents and never disclosed why these documents were not discoverable under Brady. MH (6/10/13) 4-5. Before sentencing, Birdshead asked Trial Court again to identify what had been disclosed for in-camera review for the appellate record, and why it had denied Birdshead the ability to review them, which Trial Court indicated it would do. MH (9/30/13) 25; APPX—9/10/13 letter. To Birdshead's knowledge, Trial Court never did this.

Birdshead asks this Court to "review the sealed records to ensure that the trial court did not err in its review." State v. Ball, 2004 S.D. 9, ¶ 9, 675 N.W.2d 192, 196. Birdshead argues that Trial Court did not "perform a 'Ritchie' in-camera" review of the "sealed records." State v. Christopherson, 482 N.W2d 298, 303-304 (S.D. 1992) (citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987)). Birdshead further asks this Court to determine whether the sealed documents should have been disclosed pursuant to Brady. State v. Layton, 337 N.W.2d 809, 814 (S.D. 1983).

VII. TRIAL COURT ABUSED ITS DISCRETION AND DENIED BIRDSHEAD A FAIR TRIAL WITH ADMISSION OF IMPERMISSIBLE 404(B) EVIDENCE.

1. Preservation of Objection/ Standard of Appellate Review

"Our review of a trial court's decision to admit other act evidence under SDCL 19-12-5 (Rule 404(b)) is for an abuse of discretion." State v. Boe, 2014 S.D. 29, ¶ 20, _N.W.2d_. "However, we apply a de novo standard of review to claims of constitutional violations." State v. Tiegen, 2008 S.D. 6, ¶14, 744 N.W.2d 578, 585.

Birdshead objected to State's Notice of Intent to Use Other Acts of Defendant. MH (7/12/13) 3-4; EV 74. Throughout State's case-in-chief, Birdshead objected the admission of various 404(b) evidence. JT3 502, 503, 505, 566-572; JT4 660, 665-666, 672, 675.

2. Analysis

Trial court abused its discretion and denied Birdshead due process when it admitted the 404(b) evidence in this case. Estelle v. McGuire, 502 U.S. 62, 69 (1991). The error in admitting the 404(b) evidence was not harmless. Chapman v. California, 386 U.S. 18 (1967).

First, trial court never performed the requisite balancing test on-the-record for any of the offered 404(b) evidence. State v. Scott, 2013 S.D. 31, ¶28, 829 N.W2d 458, 468 ("Our precedent requires only on-the-record balancing analysis for 'other acts evidence.' "); State v. Andrews,

2001 S.D. 31, ¶ 9, 623 N.W.2d 78 (finding this balancing test "must be performed on the record."). Before admitting other act evidence, a trial court must ascertain whether the evidence is relevant to an issue other than character, and whether the probative value is substantially outweighed by the danger of unfair prejudice. Boe at ¶ 12.

"When a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion." State v. Packed, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859. Because the requisite on-the-record 403 analysis was never performed for *any* of the other acts evidence, trial court abused its discretion as a matter of law.

The erroneously admitted 404(b) evidence also deprived Birdshead of due process. Spencer v. Texas, 385 U.S. 554, 563-564 (1967)("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.) "The prosecutor has an overriding obligation, which is shared with the court, to see that the defendant receives a fair trial." State v. Smith, 1999 S.D. 83, ¶ 42, 599 N.W.2d 344, 353.

It was fundamentally unfair for trial court to have permitted State to violate its order and refer to Birdshead as a "drug dealer." EV 93. This type of argument was "meant to inflame the passion of the jury to go outside the realm of admissible evidence," and "is an example of the

unprofessional, 'win-at-all-costs' attitude that scars the judicial system." Smith at ¶ 49, 599 N.W.2d at 354-355.

When Birdshead moved for a mistrial because State violated the pretrial order and argued impermissible 404(b) evidence during its opening statement, JT2 191, 236, trial court denied Birdshead's motions. JT2 238. State then continued to disregard the pretrial order, arguing in closing that Birdshead could not act in self-defense because he saw the situation as a "reasonable drug dealer," not a "reasonable person." JT6 996. Later State said: "there is in fact a double standard here and Charles Birdshead is begging you to grant him the battered drug dealers syndrome." JT6 1053.

Birdshead was also denied due process because Trial Court failed to delay admission of other acts evidence until after defense had rested. State v. Steichen, 1998 S.D. 126, ¶ 19, 588 N.W2d 870, 875. "The question is whether the prior bad act relates to a point genuinely in issue." State v. Fisher, 2010 S.D. 44, ¶ 24, 783 N.W.2d 664, 672. The United States Supreme Court has acknowledged that "evidence that is not relevant," but that is "received in a criminal trial," can violate "the due process guaranteed by the Fourteenth Amendment." McGuire at 70.

The other acts evidence was never genuinely at issue. That count was the only count before the jury that expressly referenced drug-related activity. Trial court granted the motion after the close of the defense

case. JT6 946. Had the State's other acts evidence been held until after the defense case as previously suggested by trial court, EV 78, 79, the other acts evidence would have been excluded. JT4 666.

Further, the one theory trial court permitted the firearms evidence under—absence of accident—became moot with Instruction 12 because the jury could not find an accidental killing if a dangerous weapon was used. Even if trial court had not given Instruction 12, possessing an AK 47 or a 10 mm handgun in July 2012 was irrelevant to proving whether the gun fired accidently on January 7.

Any relevancy of the 404(b) evidence was substantially outweighed by the danger for unfair prejudice. The 404(b) evidence was introduced for the illegitimate purpose to prove propensity as a "drug dealer." State v. Moeller, 1996 S.D. 60, ¶ 12, 548 N.W.2d 465, 471. For instance, State argued that possessing a gun on January 7, 2013 "during a drug transaction" had become a "pattern" for Birdshead because he had "guns at a drug transaction" two times prior to January 7.

> I submit to you, ladies and gentleman, that by the time your behavior matches up with your description, it is no longer a mask. It has started to be part of who you are. It has started to be what you do, and the mask is really easy because you've just become that person.

JT6 988-989.

"The prosecution made this highly prejudicial evidence an integral part of its case." Fisher at ¶ 31, 783 N.W.2d at 674. "Admission of this evidence was 'inconsistent with substantial justice.' " Id. (citing SDCL

15–6–61). The inflammatory accusations began in State's opening arguments. JT2 191. They continued throughout the trial. JT3 502, 503, 505, 566-570, JT4 556-562, 656-662, 664-676. State ended their case with the July incident, JT4-674-675, and highlighted the AK-47 in its closing. JT6 984.

Birdshead urges this Court for a reversal for the reasons stated herein.

VIII. THE CUMALTIVE ERRORS DENIED BIRDSHEAD A FAIR TRIAL.

Birdshead argues the cumulative effect of the error in his case denied him due process and a fair trial under state law, and under the Fifth and Fourteenth Amendment of the United States Constitution. SDCL 23A-44-14; State v. Wright, 2009 SD 51, ¶ 69, 786 N.W2d 512, 534.

CONCLUSION

Birdshead asks that this Court reverse his conviction on the First Degree Manslaughter and Possession of a Controlled Weapon charges. He is not asking for a reversal on the Distribution of a Controlled Substance to a Minor conviction to which he pled.

REQUEST FOR ORAL ARGUMENT

Birdshead requests to present oral arguments on these issues.

Dated this 11th day of June, 2014.

Respectfully submitted,
/s/Jamy Patterson
Jamy Patterson

Office of the Public Defender
for Pennington County
Pennington County Courthouse
Rapid City, South Dakota 57701

CERTIFICATE OF SERVICE

1. I certify that the Appellant's Brief is within the limitation provided for in SCDL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Brief contains 9987 words.

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

Dated this 11th day of June, 2014.

/s/Jamy Patterson
Jamy Patterson
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of June, 2014, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. Charles Birdshead* was served by electronic mail on Craig Eichstadt at Craig.Eichstadt@state.sd.us.

/s/Jamy Patterson
Jamy Patterson
Attorney for Appellant

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26987

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHARLES BIRDSHEAD,

Defendant and Appellant.

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

THE HONORABLE WALLY EKLUND
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Craig M. Eichstadt
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Jamy Patterson
Office of the Public Defender
315 St. Joseph St. #B8
Rapid City, SD 57701
Telephone: (605) 394-2181
jamyp@co.pennington.sd.us

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed February 7, 2014

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

OTHER REFERENCES:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26987

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHARLES BIRDSHEAD,

Defendant and Appellant.

PRELIMINARY STATEMENT

Here, the State calls the Defendant and Appellant, Charles Birdshead "Defendant," and refers to itself, Appellee, as "the State." The record consist of Pennington County Clerk of Courts File No. CR 13-229, which is called "SR" in this brief. The record contains numerous transcripts. The State designates these as follows:

Transcript of Jury Trial, held July 29, 2013 through August 6, 2013 .....JT1 - JT7
(the numeral indicating volume of the transcript)

Transcript of Motion Hearing, June 10, 2013..... MH3

Transcript of Motion Hearing, July 15, 2013..... MH5

Transcript of Motion Hearing, September 30, 2013..... MH6

Transcript of Change of Plea, November 20, 2013..... CP

Transcript of Sentencing, January 6, 2014..... ST

State references Exhibits by Exhibit Number or Letter, and page number of the exhibit.

JURISDICTIONAL STATEMENT

In this criminal case, Defendant appeals from the trial court's Judgment dated, signed, attested and filed January 23, 2014. SR 631. Defendant filed his Notice of Appeal February 7, 2014, SR 636. The Court has jurisdiction over this appeal under SDCL § 23A-32-15.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

DID THE TRIAL COURT PROPERLY INSTRUCT THE JURY THAT "RECKLESSNESS" IS AN APPROPRIATE STATE OF MIND FOR GENERAL CRIMINAL INTENT NECESSARY TO FIRST DEGREE MANSLAUGHTER?

The trial court instructed that recklessness is sufficient for first degree manslaughter with a dangerous weapon.

State v. Walton, 1999 S.D. 80, 600 N.W.2d 524

State v. Pellegrino, 1998 S.D. 39, 577 N.W.2d 590

State v. Waloke, 2013 S.D. 55, 835 N.W.2d 105

State v. Janklow, 2005 S.D. 25, 693 N.W.2d 685

II

DID THE TRIAL COURT APPROPRIATELY INSTRUCT THE JURY WHEN IT REFERRED TO THE ILLEGALITY OF THE SAWED-OFF SHOTGUN?

The trial court instructed the jury about the legality of the shotgun.

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

State v. Simmons, 313 N.W.2d 465 (S.D. 1981)

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808

III

DID THE TRIAL COURT PROPERLY REFUSE TO INSTRUCT THAT A CONTRABAND SAWED-OFF SHOTGUN CAN BE LEGALLY POSSESSED FOR SELF-DEFENSE PURPOSES?

The trial court did not give an instruction on legally possessing a short shotgun.

Conaty v. Solem, 422 N.W.2d 102 (S.D. 1988)

Moss v. Guttormson, 1996 S.D. 76, 551 N.W.2d 14

United States v. Panter, 688 F.2d 268 (1982)

SDCL 21-1-2(8)

SDCL 22-14-6

IV

WAS THE TRIAL COURT REQUIRED TO INSTRUCT THE JURY AS TO THE SPECIFIC NAMES AND ELEMENTS OF FELONIES DEFENDANT BELIEVED WERE COMMITTED AGAINST HIM?

The trial court did not instruct on specific names and elements of felonies Defendant believed were committed against him.

State v. Pellegrino, 1998 S.D. 39, 577 N.W.2d 590

State v. Walton, 1999 S.D. 80, 600 N.W.2d 524

State v. Holloway, 482 N.W.2d 306 (S.D. 1992)

People v. Jones, 191 Cal. App. 2d 478,
12 Cal. Rptr. 777 (1961)

V

DID THE TRIAL COURT APPROPRIATELY REFUSE ADMISSION OF CERTAIN EVIDENCE IT FOUND IRRELEVANT?

The trial court found certain evidence to be irrelevant and hearsay and excluded it.

State v. Carter, 2009 S.D. 65, 771 N.W.2d 329

Klutman v. Sioux Falls Storm, 2009 S.D. 55, 769 N.W.2d 440

State v. Thomas, 381 N.W.2d 232 (S.D. 1986)

VI

DID THE TRIAL COURT PROPERLY REFUSE TO FIND PREJUDICIAL REFUSAL BY THE STATE TO TURN OVER ITS EVIDENCE TO DEFENDANT?

The trial court found no discovery violation nor any violation of *Brady v. Maryland*.

Brady v. Maryland, 373 U.S. 83 (1963)

State v. Muhm, 2009 S.D. 100, 775 N.W.2d 508

State v. Reay, 2009 S.D. 10, 762 N.W.2d 356

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

VII

DID THE COURT IMPROPERLY AND PREJUDICIALLY ADMIT EVIDENCE OF OTHER ACTS?

The trial court admitted certain items of evidence.

Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, 764 N.W.2d 474

State v. Steichen, 1998 S.D. 126, 588 N.W.2d 870

State v. Johnson, 2009 S.D. 67, 771 N.W.2d 360

VIII

DID CUMULATIVE ERROR DENY DEFENDANT A FAIR TRIAL?

The trial court committed no cumulative error.

State v. Steichen, 1998 S.D. 126, 588 N.W.2d 870

State v. Janklow, 2005 S.D. 25, 693 N.W.2d 685

STATEMENT OF THE CASE

The Pennington County Grand Jury charged Defendant in an eight count Indictment. Three counts were in the alternative, Count I, Felony Manslaughter; Count II, Manslaughter by Means of a Dangerous Weapon; and Count III, Manslaughter While Unnecessarily Resisting an Attempt to Commit a Crime. Count IV charged Commission of Felony With a Firearm; Count V charged Possession of a Short Shotgun; Count VI charged Distribution of a Controlled Substance to a Minor; Count VII charged Fourth Degree Rape in Sexually Penetrating a Person Between 13 and 16 Years of Age; Count VIII charged another instance of Fourth Degree Rape. SR 6-7. Defendant pleaded not guilty to each of the counts. The Honorable Wally Eklund, Circuit Court Judge, Seventh Judicial Circuit, Pennington County, South Dakota, presided over the trial and other proceedings. JT *generally.* The trial court ordered that Counts I through V be tried separately from Counts VI through VIII.

The court and the parties tried the case before a Pennington County jury on July 29, 2013 through August 6, 2013. JT *generally*. The trial court dismissed the first count for insufficient evidence. JT6 945-46.

The jury found Defendant guilty of Counts II, IV, and V. JT7 1068-69, 1074. The court eliminated Count III, because it was dependent on dismissed Count I. Defendant pleaded guilty to Count VI, Distribution of Controlled Substance to a Minor, and the State dismissed Counts VII and VIII, the rape counts. CP 2-3, 6.

The court imposed forty-five years in prison for Count II, two years for Count V, and twenty-five years for Count VI, ST 96. All sentences run concurrently. *Id.* The trial court dismissed Count IV. ST 90. Defendant appeals the jury verdicts on Counts II and V. Defendant's Brief (DB) 6.

STATEMENT OF FACTS

On the date of this crime, Defendant was twenty-nine years old, EXH 1, and J.B. was a fifteen-year-old girl. JT2 362. J.B. testified that she had a close relationship with Defendant, texting and talking to him frequently. JT2 363. J.B. was at the home of Amber Ross, also known as Amber Larvie, JT2 364-65. Present were Frank Milk, JT2 364, and J.B.'s aunt, Shy Bettelyoun. JT2 364. Also at Amber Ross' house was

Eustacio Marrufo. JT2 366. J.B. stated that she sent Facebook messages to Defendant[1] asking him to get her drugs. JT2 370-71.

J.B., Frank Milk, and Eustacio "Junior" Marrufo left Ross' house for the Dakota Rose Motel. They were in a van driven by Shy Bettelyoun. JT2 371-72. The van arrived at the Dakota Rose Motel approximately forty minutes before Defendant. JT2 372.[2] Then the three went back to the van. JT5 799-800. Defendant drove up behind the van. J.B. left and got in the car with Defendant. JT2 374-75; JT5 801-02.

Milk and Marrufo then jumped out of the van and ran towards Defendant's car, attacking Defendant with fists. JT2 375-76; JT5 801-02; Exhibit 123 at 6. Defendant believed that Milk and Marrufo were using an object to hit him because he bled from his head. *Id.* Defendant admitted pulling a short shotgun out of a bag. Exhibit 123 at 7. Milk and Defendant struggled over the gun. JT2 375-76; JT5

---

[1] Defendant states that J.B. testified previously that she had not sent the Facebook messages to Defendant. The record confirms this. Grand Jury transcript (GJ) 6, 10-12; Interview of Police with J.B. at 12-14. Defendant does not contest the fact that he received the messages; that the messages asked him to deliver drugs to J.B.; and that he responded to the messages by going to the Dakota Rose Motel. DB 9. Rather, Defendant cites to the record for the proposition that Frank Milk and Shy Bettelyoun "lured him to the Dakota Rose Motel" and "intended to harm him." DB 9. It is undisputed that Defendant went to the Dakota Rose Motel after receiving messages that appeared to be from J.B., asking him to deliver methamphetamine to the fifteen-year-old J.B.

[2] The evidence shows that Frank Milk, J.B., and Eustacio Marrufo went into the Dakota Rose Motel building at this time. JT5 799.

803. Milk testified that during the struggle, J.B. kicked him, and Milk let go of the gun. JT5 803. Milk said Defendant then raised the gun, Marrufo "stepped in" and Milk heard a pop and saw feathers. Then Marrufo said he'd been shot. JT5 803. Defendant claimed that he pulled the gun from Milk and it went off. Exhibit 123 at 7. The autopsy showed that Marrufo died from a nearly pointblank shotgun blast to the chest. JT2 278-80, 283. The State presented testimony from Detective Duane Baker that the gun involved in the shooting was a .410 gauge shotgun, JT3 488, which needed to be cocked before it would fire. JT 3 486. The hammer must be pulled back, and then it can be fired by pulling the trigger. JT3 487, 490-91. When the gun is cocked, a transfer bar will rise, but if not cocked, the transfer bar prevents firing. Pulling the trigger after cocking the gun causes the hammer to come down and hit the transfer bar, engaging the firing pin. JT3 490-91. The gun was an illegally short shotgun, about sixteen inches overall length, with a twelve inch barrel. JT3 483. SDCL 22-1-2(8); 22-14-6.

Defendant left after the shooting. Exhibit 123 at 7. Defendant told investigating officers that he had thrown the shotgun away. Exhibit 123 at 8-9, actually he took it to a friend's house, JT3 428, and gave it to her. *Id.* The friend hid the gun at her aunt's house and eventually gave the gun to the police, JT3 430, 433.

Defendant took the shotgun to the drug transaction because, Exhibit 123 at 16, "I can't, I, I can't, I can't go around without, being able to prot, protect myself you know."

ARGUMENTS

I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE MANSLAUGHTER WITH A DANGEROUS WEAPON.

A. Introduction and Standard of Review.

The jury found Defendant guilty on Count II of the Indictment, First Degree Manslaughter by means of a dangerous weapon, SDCL 22-16-15(3). JT7 1074; SR 6, 520. Defendant's brief argues that the trial court instructed improperly by including recklessness as a sufficient state of mind for first degree manslaughter.

Statutory interpretation and application are questions of law reviewed de novo. *State v. Schouten,* 2005 S.D. 122, ¶ 9, 707 N.W.2d 820, 822-23.

This Court reviews the trial court's refusal of proposed instructions under an abuse of discretion standard. *State v. Janklow,* 2005 S.D. 25, ¶ 25, 693 N.W.2d 685, 695 (citing *State v. Martin,* 2004 S.D. 82, ¶ 21, 683 N.W.2d 399, 406 (quoting *State v. Webster,* 2001 S.D. 141, ¶ 7, 637 N.W.2d 392, 394)); *State v. Walton,* 1999 S.D. 80, ¶ 12, 600 N.W.2d 524, 528 (citing *State v. Pellegrino,* 1998 S.D. 39, ¶ 9, 577 N.W.2d 590, 594). It is the trial court's duty to instruct the jury on

the law applicable to the case, *Walton,* (citing *State v. Eagle Star,* 1996 S.D. 143, ¶ 15, 558 N.W.2d 70, 73). Defendants are entitled upon proper request to instructions on their defense theories if the evidence supports them, *Walton,* ¶ 12, 600 N.W.2d at 528. Instructions are adequate if they give a full and correct statement of the law applicable to the case. *Walton,* citing *State v. Rhines,* 1996 S.D. 55, ¶ 111, 548 N.W.2d 415, 443, *cert. denied*, 519 U.S. 1013 (1996). Instructions are not reversed unless Defendant is able to show prejudice. There is prejudice only when the jury might and probably would have returned a different verdict if instructed differently. *Walton,* ¶ 12, 600 N.W.2d at 528 (quoting *State v. Bartlett,* 411 N.W.2d 411, 415 (S.D. 1987)).

B. The Trial Court's Instructions Were Correct and Complete.

Defendant alleges the trial court's instructions, by including a mental state of recklessness for first degree manslaughter with a dangerous weapon, were erroneous. The definition of an offense against State law is a matter of State law, and does not involve a defendant's constitutional rights. *Jackson v. Virginia,* 443 U.S. 307, 324 n.16 (1979). The South Dakota statute permits a conviction of first degree manslaughter with a dangerous weapon where Defendant acted recklessly, as well as intentionally.

Defendant cites no case law supporting the argument that recklessness is never enough to convict of first degree manslaughter. *State v. Waloke,* 2013 S.D. 55, 835 N.W.2d 105, the centerpiece of

Defendant's argument, considers the very different issue of whether second degree manslaughter was an inappropriate lesser included offense instruction under the circumstances of that case. The Court held only that where there was **no** evidence that Waloke acted recklessly, there was no basis for a second degree manslaughter instruction. *Waloke,* ¶ 32, 835 N.W.2d at 114. The Court did not decide the question of whether recklessness could support a conviction for first degree manslaughter. The Court's analysis in quoting the second degree manslaughter statute supports the opposite conclusion. The definition of second degree manslaughter, *Waloke,* ¶ 31, 835 N.W.2d at 115, states (SDCL 22-16-20) "any reckless killing of one human being . . . which, under the provisions of this chapter is neither murder nor manslaughter in the first degree" is second degree manslaughter.

The statute does not say that any reckless killing is second degree manslaughter, but rather that any reckless killing that is neither murder nor manslaughter in the first degree is manslaughter in the second degree.

This Court has held that evidence of recklessness is sufficient mental state to support this crime. *State v. Mulligan,* 2007 S.D. 67, ¶ 9, 736 N.W.2d 808, 813: "There must have been sufficient evidence to find that she [Mulligan] intended to fire the gun or that she was reckless with respect to the shooting." *Id.* Thus, the case holds that

where sufficient evidence shows recklessness of a criminal homicide, and a dangerous weapon is used, the evidence will support a conviction for first degree manslaughter.

This dovetails with the further holding of *Mulligan* that first degree manslaughter is a general intent crime. *Mulligan,* ¶ 9, 736 N.W.2d at 813. Mulligan quotes *Schouten,* 2005 S.D. 122 at ¶ 13, 707 N.W.2d at 824 as stating that general intent means an intent to do the physical act—or, perhaps recklessly doing the physical act—that the crime requires. Thus, general intent crimes, such as first degree manslaughter, can, unless otherwise defined by statute, include a mental element of recklessness, as well as that of intent to do the physical act constituting the crime. *See also State v. Taecker,* 2003 S.D. 43, ¶ 25, 661 N.W.2d 712, 718 (quoting *State v. Barrientos,* 444 N.W.2d 374, 376 (S.D. 1989)).

Defendant cites to *State v. Stetter,* 513 N.W.2d 87, 92 (S.D. 1994) and *State v. Seidschlaw,* 304 N.W.2d 102, 105-06 (S.D. 1981) for the proposition that recklessness is not enough to support first degree manslaughter. The cases turn on the "dangerous weapon" element of the offense. They hold that a car is not, in itself, a dangerous weapon for first degree manslaughter. It is a dangerous weapon when the manner in which it is used makes it so. A car must be used in a manner making it probable that it will produce death or serious bodily injury. If used with that probability, then a car is a dangerous weapon;

if used merely negligently, carelessly, or perhaps even recklessly, it is not. Here, there is no need to show that a firearm has been used in a manner likely to produce death or serious bodily injury, as a firearm is a dangerous weapon as a matter of law under SDCL 22-1-2(10).

II

THE TRIAL COURT'S INSTRUCTIONS ABOUT ILLEGALITY OF THE FIREARM WERE NEITHER INCORRECT NOR PREJUDICIAL.

A. Introduction and Standard of Review.

Defendant's second issue is a mixed bag. First, he purports to argue that the instructions were misleading and second that Counts III and IV cannot coexist.

The standard for reviewing instructions is abuse of discretion, as set out in the immediately preceding issue.

B. The Instructions Were Neither Misleading, nor Incorrect, nor Prejudicial.

1. Propriety of charging both Counts II and IV in the Indictment.

First, Defendant waived this argument as he did not raise the objection to the Indictment before trial. SDCL 23A-8-3(3). Defendant's objection under SDCL 22-14-14 is not jurisdictional under this Court's decision in *State v. Medicine Eagle,* 2013 S.D. 60, ¶ 50, 835 N.W.2d 886, 903 (Konenkamp, J.), ¶ 63 n.22, 835 N.W.2d at 906 (Salter, Circuit Judge), and ¶ 66, 835 N.W.2d at 907 (Zinter, J.). The three members of the Court held that even the failure to have a habitual offender information on file is not jurisdictional. This Court in *State v.*

Simmons, 313 N.W.2d 465, 468 (S.D. 1981) holds that the statute prohibiting use of a firearm in commission of a felony is an enhancement provision. Thus, like *Medicine Eagle,* there is no jurisdictional defect. SDCL 23A-8-3(3) requires that a defendant raise defects in the indictment prior to trial. Raising the defect only after the jury was sworn, JT1 173-74, is a waiver. The State raised waiver below. JT1 174.

Second, the charge in the Indictment was not improper on the face of the Indictment. As the State said, JT2 174, if the jury convicted on Count III, which did not include as an element the use of a firearm, then enhancement under SDCL 22-14-12 would have been appropriate. *Simmons,* 313 N.W.2d at 468.

Third, it is not improper to charge in separate counts commission of the same offense in different ways in order to meet the evidence at trial. *State v. Chavez,* 2002 S.D. 84, ¶ 18 n.4, 649 N.W.2d 586, 593 n.4 (citing *State v. Teutsch,* 80 S.D. 462, 468, 126 N.W.2d 112, 115 (1964)). If there is a conviction for more than one crime, where only one crime was committed, *Chavez* requires that the inappropriate conviction be vacated. The trial court did that here. ST 96. The State admitted, MH6 13, that the conviction on Count IV may need to be vacated, in accordance with *Chavez.* Had the jury chosen Count III, Count IV could have been used as an enhancement.

2. The presence of both Counts II and IV in the Indictment did not cause any "confusion" in the jury instructions.

Defendant next argues that confusion resulted from the existence of both Counts II and IV in the Indictment, because Count IV authorized the State to argue the illegality of use of the firearm. It was equally unlawful for Defendant to use the firearm to kill as it was to use the firearm in commission of another felony. And even if Defendant's argument that the Counts II and IV could not coexist in the Indictment were correct, the State could still argue at trial that the use of the weapon was unlawful, under Count IV, because he used it to commit manslaughter in the fashion set out in Count III.

The "confusion" allegedly resulting from argument of "unlawfulness" arises as much from Count V as it does from Count IV. The State could certainly argue that use of the firearm, as well as its possession, were illegal or unlawful.

Defendant also speculates that since the jury ultimately found Defendant not guilty on Count III, based on a note it sent back, then Count IV must have influenced its decision on Count I. But even if the Count IV conviction must be vacated under *Chavez,* that does not render the use of a firearm to perpetrate a killing anything other than illegal. Moreover, Defendant may not use acquittal on one count, together with speculation about jury questions, as a grounds of arguing that the jury must have found, or rejected, a particular element. *Mulligan,* 2007 S.D. 67 at ¶ 11, 736 N.W.2d at 814. Juries are not held

to any rules of logic nor are they required to explain their decisions. The only question is whether the evidence permits the verdict of guilty. *Mulligan,* ¶ 12, 736 N.W.2d at 814-15 (citing *United States v. Powell,* 469 U.S. 57, 66, 105 S.Ct. 471 (1984)).

3. Excusable Homicide Instruction.

Defendant also argues the court should not have given an excusable homicide instruction under SDCL 22-16-31. Defendant said, however, both in his statement, Exhibit 123 at 7, as well as at trial that the shooting was accidental. Whether the excusable homicide instruction was appropriate or not, *see* SDCL 22-16-31 and *State v. Esslinger,* 357 N.W.2d 525, 532 (S.D. 1984), Defendant can hardly claim prejudice from an instruction setting out defense to which he is not entitled. Moreover, the only prejudice Defendant claims is that the State was permitted to argue that his conduct with the gun was illegal. But so long as there was evidence before the jury that Defendant committed any of the crimes set forth in the first five counts of the Indictment, the State could tell the jury that his conduct in using a gun was illegal.

III

THE CIRCUMSTANCES OF THIS CASE DO NOT SHOW LEGAL POSSESSION OF A FIREARM.

A. Introduction and Standard of Review.

In his third issue, Defendant argues that the case of *Conaty v. Solem,* 422 N.W.2d 102, 104 (S.D. 1988) allows him to possess a

controlled weapon if possessed for purposes of self-defense. The same abuse of discretion standard applies as that applied to the first two issues.

B. Defendant Was Not Entitled to an Additional Instruction About Self-Defense as a Specific Defense to Possession of a Controlled Weapon.

Defendant believes that *Conaty* provides a complete defense to any accusation related to possession of a firearm. The case is not that broad. *Conaty,* 422 N.W.2d at 104 says that a defendant may have a defense to a statute prohibiting a felon in possession of a firearm where he comes into control of a firearm for purposes of self-defense. This is not an appropriate setting for that defense.

The statute prohibiting possession of a short shotgun, SDCL 22-14-6, SDCL 21-1-2(8) effectively renders the short shotgun contraband. SDCL 22-14-6(4) provides a defense to the possession of guns <u>other</u> than a machine gun or a short shotgun if the circumstances "negate any purpose or likelihood that the weapon would be used unlawfully." This statute is not applicable a short shotgun, indicating the legislature's intent to prohibit possession even where the weapon would be used for self-defense. Unlike the statute prohibiting a felon from possessing <u>any</u> firearm, the statute Defendant violated only prohibited him from possessing certain limited, particularly dangerous weapons. It leaves open to Defendant, and others, possession of less deadly weapons for self-defense. This is consistent with the manifest

intent of the legislation. *See Moss v. Guttormson,* 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17.

But even if the possession of a short shotgun is subject to a self-defense argument, it does not arise under the facts of this case. In *Conaty,* the criminal defendant was threatened with imminent harm, and he acquired an otherwise legal firearm from another person in the vicinity solely to protect himself if his assailant returned. *Conaty,* 422 N.W.2d at 103. Defendant here, on the other hand, acquired an illegal weapon the day before this altercation, while he was under no imminent threat. He possessed this contraband weapon, by his own statement, to facilitate drug transactions. Exhibit 123 at 16. The Dakota Rose incident was separate from an earlier drug transaction where he had been attacked. Exhibit 123 at 15-16. Defendant took the shotgun from Rod Hickey and possessed it a day before the emails setting up the drug transaction at Dakota Rose. *Id.* at 16. These facts are distinguished from those in *Conaty* where the defendant acquired the gun in order to defend himself from an ongoing threat. The Court cited other cases in *Conaty*. In *United States v. Panter,* 688 F.2d 268, 269 (5th Cir. 1982) defendant contended he did not know that the gun he used to defend himself was in the place where he found it. During the course of a fight, he reached for a club, but his hand touched the gun instead, and he used it to defend himself. *Id. United States v. Noland,* 700 F.2d 479, 484, *cert. denied,* 462 U.S. 1123 (1983) collects

the cases decided prior to 1983. The court held that the defendant in *Noland* could not claim a defense of necessity or self-defense because he had prolonged and renewed the confrontation when he pursued the victim. *United States v. Gant,* 691 F.2d 1159 (5th Cir. 1982) likewise held that there is no defense for prosecution for possession of a firearm by a convicted felon unless the defendant was under present threat that induced apprehension of death or serious bodily injury. He could not claim the defense if he recklessly placed himself in a situation where it was probable he would have to choose criminal conduct. In that case, defendant felt threatened because two men (whom he did not know were undercover police officers) were offering to sell him a machine gun. Defendant had been previously subjected to a robbery attempt, believed the officers may be perpetrating another, and so defendant took a pistol back to the encounter with the undercover officers. *Id.* at 1162. Defendant failed to show that there was a lack of alternatives to his illegal conduct of possessing a gun. In citing *United States v. Bailey*, 444 U.S. 394 (1980), the Court said that when there is a reasonable alternative to violating the law, the defense will fail. *Gant,* 691 F.2d at 1163-64. Here, Defendant went to what he believed was a dangerous drug transaction. Had he avoided illegal drug transactions, there was no need for him to possess a gun.

Other circuits have made similar holdings. *United States v. Woffard,* 122 F.3d 787 (9th Cir. 1997) was a case where a defendant

had been threatened over the course of several years, the last time being five months before he began to carry a gun. *Id.* at 790. In *United States v. Rice,* 214 F.3d 1295, 1297 (11th Cir. 2000), the court held that the defense was reserved for extraordinary circumstances, and the first prong requires nothing less than an immediate emergency.

IV

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY ON THE NAMES AND ELEMENTS OF FELONIES DEFENDANT ALLEGES WERE COMMITTED OR ATTEMPTED AGAINST HIM.

A. Introduction and Standard of Review.

In his fourth issue, Defendant argues that it is reversible error for the court to have refused his version of self-defense and justifiable homicide instructions. Defendant bases this argument on the theory that any time a person is committing a felony (or possibly a violent felony) on a defendant, that defendant is justified in using deadly force to kill his assailant.

The same standard of review that governs Issues 1, 2, and 3 applies here.

B. The Trial Court's Instructions Adequately Set Out the Law Applicable to the Case.

The trial court instructed the jury on self-defense at Instructions 8-11, SR 468-71, and on justifiable homicide at Instruction 13, SR 473. At Instruction 15, SR 475, the court instructed that the State was required to prove beyond a reasonable doubt that the killing was not

justifiable. Defendant is incorrect when argues at his page 30 and following that homicide is justifiable if someone is committing a felony against him. *Pellegrino* and *Walton* both hold that human life is of supreme value, and taking it will be excused or justified only in cases of apparent absolute necessity. *Pellegrino,* ¶ 14, 577 N.W.2d at 596. This principle is illustrated in *Walton,* ¶ 14, 600 N.W.2d at 528, on a set of facts on all fours with those in the present case. The person killed in *Walton* entered a vehicle in which Walton was sitting, and a fight ensued. Walton testified that he was acting in self-defense when he stabbed and killed his attacker. *Id.* Just as in this case, the trial court refused instructions defining offenses Walton believed the person killed was committing against him. *Id.* at ¶ 11, 600 N.W.2d at 528. The Court stated that giving a justifiable homicide or a self-defense instruction is sufficient under *State v. Holloway,* 482 N.W.2d 306, 310 (S.D. 1992). *Walton,* ¶ 14, 600 N.W.2d at 528. There, as here, the trial court gave the burden of disproving self-defense to the State. *Walton,* ¶ 14, 600 N.W.2d at 528; Instruction 15, SR 475.

Moreover, the court instructed the jury more favorably to Defendant than may have been justified by the law. The court's Instruction 8 stated that it was lawful for a Defendant to attempt or offer to use force or violence where he was preventing or attempting to prevent an offense against the person of any family or household member or was preventing or attempting to prevent an illegal attempt

by force to take or injure property in a person's lawful possession. This instruction may have allowed deadly force whenever attempting to prevent an offense, not just a felony, as in the instructions Defendant proposed. The court instructed that force used may not be more than sufficient to prevent the offense, Instruction 8, SR 468, but then followed with an instruction stating that Defendant was not required to retreat. Both Instructions 9 and 10 stated that the force used must be that which would appear to a reasonable person to be necessary in the situation. SR 469-70. These instructions, together with justifiable homicide Instruction 13, SR 473, fully set out the law. *Pellegrino; Walton* (and cases they cite). *People v. Jones,* 191 Cal. App. 2d 478, 12 Cal. Rptr. 777, 780 (1961) and *People v. Ceballos,* 12 Cal. 3d 470, 116 Cal. Rptr. 233, 237, 536 P.2d 241, 244-45 (1974) state that human life is of supreme value. Life may be taken only when absolutely necessary. Thus, justifiable homicide under statutes nearly identical to SDCL 22-16-34 has an implied element of necessity. *Pellegrino,* ¶ 15, 577 N.W.2d at 596. *See* cases cited. In *Russell v. State,* 61 Fla. 50, 54 So. 360 (1911) the court understood a statute with the same wording as § 22-16-34 to mean that one assaulted, even in his own house, would not be justified in killing the aggressor unless he had a reasonable ground to believe it was necessary. *Pellegrino,* ¶ 15, 577 N.W.2d at 596. In the present case, the trial court instructed the jury that it needed to find, beyond a reasonable doubt, that Defendant was not

engaged in self-defense. Instruction 9; SR 468. The instructions also required the State to prove that Defendant did not have reasonable conviction of necessity and a good faith belief that the decedent intended to kill or seriously injure him. Instruction 13, SR 473. Thus, under the trial court's instructions, the jury had to find that Defendant could not reasonably believe that the force he used was necessary. Under the cases cited, he could take a life only if it was absolutely necessary. *Pellegrino,* ¶¶ 14-15, 577 N.W.2d at 596; *Walton,* ¶ 12, 600 N.W.2d at 528.

There can be no reversal unless Defendant has established that had the jury been instructed as he proposed, it would have reached different verdict. *Walton,* ¶ 14, 600 N.W.2d at 528-29. The jury was required to make a finding that the State had disproved such reasonable necessity beyond a reasonable doubt. Instructions 13, SR 473 and 15, SR 475.

Defendant also argues at page 33 of his brief that the trial court committed prejudicial error when it did not allow a law enforcement officer to testify about what constituted a possible felony. Defendant failed to cite any authority for this argument. This violates of SDCL 15-26A-60(6) and the issue is waived. *Pellegrino,* ¶ 22, 577 N.W.2d at 599.

Expert testimony on points of the law is largely inadmissible because it is not helpful under Rule of Evidence 702. *Zens v. Harrison,*

538 N.W.2d 794, 795-96 (S.D. 1995) (citing Mueller and Kirkpatrick, Federal Evidence § 352 (2d Edition 1994)). A ruling on admission of evidence is only reversible if there is clear abuse of discretion. *State v. Jolley,* 2003 S.D. 5, ¶ 5, 656 N.W.2d 305, 307.

V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE AND LIMITING CROSS-EXAMINATION.

A. Introduction.

In his fifth issue, Defendant contends that the trial court prejudicially erred by refusing to admit two exhibits, Exhibit ZZZ, eight pages of supposed Facebook electronic conversations between Shy Bettelyoun and Frank Milk and Exhibit AAAA, a telephone conversation between Amber Larvie and her husband Ralph Larvie.

B. Standard of Review.

When a criminal defendant challenges the trial court's evidentiary rulings, they are presumed correct and are reviewed under an abuse of discretion standard. *State v. Carter*, 2009 S.D. 65, ¶ 31, 771 N.W.2d 329, 338. The trial court's rulings on limiting cross-examination are reversed on appeal only when there is a clear abuse of discretion and a showing of prejudice. *Id.* (citing *State v. Koepsell*, 508 N.W.2d 591, 595 (S.D. 1993)). Prejudice occurs when a reasonable jury probably would have a significantly different impression if the cross-examination had it been permitted. *Carter*, 2009 S.D. 65 at ¶ 31, 771 N.W.2d at 338-39

(citing *State v. Johnson*, 2007 S.D. 86, ¶ 35, 739 N.W.2d 1, 13). The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements. *Carter*, 2009 S.D. 65 at ¶ 31, 771 N.W.2d at 339 (citing *State v. Shaw*, 2005 S.D. 105, ¶ 36, 705 N.W.2d 620, 631). The right to confront and cross-examine witnesses is satisfied when the defense is given an opportunity to expose the witness's infirmities through cross-examination. *Carter*, 2009 S.D. 65 at ¶ 32, 771 N.W.2d at 339. Confrontation clause errors are subject to harmless error analysis. *Id.*

C. Improper Item in the Appendix.

The State objects to inclusion in Defendant's Appendix of pages 5.1-5.9. The transcription is not a part of the record on appeal. This Court reviews only the record, and not extraneous matter that might be appended to a brief. *Klutman v. Sioux Falls Storm,* 2009 S.D. 55, ¶ 37, 769 N.W.2d 440, 454. The ultimate responsibility for presenting an adequate record falls on the appellant. *Strong v. Gant*, 2014 S.D. 8, ¶ 23, 843 N.W.2d 357, 363. Matter included in an appellant's appendix not contained in the settle record is appropriately stricken. *Spenner v. City of Sioux Falls*, 1998 S.D. 56, ¶ 9, 580 N.W.2d 606, 609-10. The State requests that part five of Defendant's Appendix be stricken.

D. The Trial Court Properly Excluded Exhibits.

Moreover, the trial court did not abuse its discretion. The material in these exhibits is irrelevant to determination of the case. Defendant argues that the Facebook electronic messages (Exhibit ZZZ) show that Frank Milk was obsessed with Shy Bettelyoun and that he would, for her sake, attack Defendant. Defendant believes Exhibit AAAA is substantively relevant to show that Milk has been unfaithful to Bettelyoun, and Defendant speculates that Milk would do anything to win her back.

The statement of what Defendant hopes to show through the exhibits shows their tenuous relationship to the case. Determinations of relevance are committed to the sound discretion of the trial court, for which this Court will not substitute its own judgment. *State v. Wilcox*, 441 N.W.2d 209, 212 (S.D. 1989). Here the main issue the parties tried was whether defendant was justified in using deadly force to defend himself against Milk and Marrufo. All circumstances of the attack are in evidence. It was undisputed that Milk and Marrufo were the aggressors. Why they attacked is admissible, but the fact that one of the attackers wrote love poems to a person who disliked Defendant is a step removed from their motive and thus tangential. The chief issue was whether Defendant reasonably used deadly force to defend himself against the attack. The evidence of the reason for the original attack does not indicate whether Defendant's response was reasonable. It had

nothing to do with Defendant's intent or state of mind. *See Pellegrino,* ¶¶ 14-16, 577 N.W.2d at 596-97.

Other than as substantive evidence, however, Defendant sought to have these items admitted for impeachment. That effort was misdirected. Milk agreed that he wrote poems about loving Shy Bettelyoun and that he could not see living without her. JT5 787. Since Milk admitted he wrote the messages, and admitted their nature and content, they do not contradict his testimony. *See State v. Thomas,* 381 N.W.2d 232, 238 (S.D. 1986). Milk never testified that he did not have a romantic relationship with Shy Bettelyoun at the time the posts were written. The messages merely serve to bolster the otherwise truthful testimony that he had a romantic relationship with Bettleyoun. The relationship, according to Milk, was over by the trial in July and August 2013. The messages all occurred at least two months before the crime. They did not contradict Milk's testimony.

Likewise, the second jailhouse conversation between Ralph and Amber Larvie has little relevance. It may not be used as impeachment of any witness. The conversation constitutes a statement of Amber Larvie. Ms. Larvie testified that she had no memory of the conversation, or even that she talked to her husband a second time on January 7, 2013. JT5 845-46. In the conversation, Amber Larvie says Shy Bettelyoun told her Frank Milk had exchanged text messages with another woman, showing him unfaithful to Shy. Just like the witness

in *Johnson*, *Carter*, 2009 S.D. 65, ¶¶ 33-34, Amber Larvie testified she did not remember the conversation. The substance of the conversation does not contradict her testimony, and cannot, therefore, be used to impeach her. 771 N.W.2d at 339-40. It cannot be used to impeach Shy Bettelyoun, because it is not her statement. It is a hearsay report of her statement offered to show the truth of the matter asserted. Amber Larvie has no personal knowledge of the existence of the Milk messages and she cannot, therefore, testify to it. SDCL 19-14-2.

Even if one or the other of these items might have been admitted on some theory, Defendant would be required to show prejudice on appeal. To show prejudice, Defendant must show a reasonable probability the jury would have a significantly different impression if otherwise appropriate cross-examination had been permitted. *Carter*, ¶ 31, 771 N.W.2d 338-39. Defendant cannot make this showing, because the only value of these two items is a tenuous proposition that Frank Milk loved Shy Bettelyoun, he had been unfaithful to her, and, so he would do anything to be back in her good graces. He might, therefore, have attacked Defendant to please Shy Bettelyoun. This is speculative. It is difficult to see how the jury could have had a significantly different impression if given more evidence that showed Milk's motivation for the attack. Whatever Milk's motivation may have been, it is undisputed that he and the deceased started the fight. The main issue at trial was whether Defendant's <u>response</u> to the attack was

that of a reasonable person, or whether it was excessive. *See Carter*, ¶ 32, 771 N.W.2d at 339.

VI

THE STATE DID NOT FAIL TO GIVE MATERIAL EVIDENCE TO DEFENDANT.

A. Introduction and Standard of Review.

In his sixth issue, Defendant contends that there was a violation of the State's obligation to turn over evidence to Defendant because the minor, J.B., testified at trial that she was the one who sent electronic messages to Defendant to induce him to come to the Dakota Rose Hotel. Earlier, in both grand jury testimony (hereinafter "GJ") and in statements to law enforcement (hereinafter "JBI"), J.B. said that she did not send a Facebook message, nor did she use Milk's cellphone to contact Defendant. (The JBI is in a sealed documents envelope. It was neither offered nor admitted at trial.) *See* JBI 12-14; GJ 6, 10-12. Defendant also complains that he was not given access to certain confidential materials that the trial court examined in camera.

Defendant claims a discovery order violation and, as a result, a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This Court reviews an alleged *Brady* violation, or violation of discovery order, with the same abuse of discretion standard of review it applies to mistrial motions and evidentiary issues. *State v. Muhm*, 2009 S.D. 100, ¶ 37, 775 N.W.2d 508, 521 (citing *State v. Reay*, 2009 S.D. 10, ¶ 39, 762

N.W.2d 356, 363-68). The Court presumes that the evidentiary rulings made by the trial court are correct. *Muhm*, ¶ 37, 775 N.W.2d at 521 (citing *State v. Krebs*, 2006 S.D. 43, ¶ 19, 714 N.W.2d 91, 99). If a discovery order is violated, the question is "whether defendant suffered any material prejudice as a result." *Id.* (citing *Reay*, ¶ 39, 762 N.W.2d at 368).

B. Defendant Has Not Shown an Abuse of Discretion, n*or any Material Prejudice.*

There is no evidence in this record that the State failed to disclose any known change in J.B.'s testimony. The change was that J.B. admitted at trial that she was the one who sent an electronic Facebook message to Defendant. She also said that she had borrowed Frank Milk's cellphone to send text messages to Defendant. The messages asked Defendant to meet her and sell her drugs. She denied sending any such messages before the grand jury and in statements to law enforcement. The record does not show that the State knew of and failed to disclose this information. At JT3 400-01 the State's Attorney that "a witness might contradict themselves in any number of different ways", that the defense chose not to cross-examine J.B. on these conflicts in the testimony, also "there is no requirement that we provide moment to moment transcripts at every discussion we have with a witness." This fails to show what, if any, statements J.B. may have made to the State. Unlike *Krebs,* 2006 S.D. 43 at ¶¶ 17-18, 714

N.W.2d at 98, where the State's Attorney set out the exact nature of the statements made to him, and when they were made, there is nothing in this record that indicates that the State knew about the changed testimony. Defendant makes an assumption the State knew, and thus asks the State to be a guarantor that none of its witnesses will change their testimony. As the State's Attorney pointed out, the Defendant had knowledge of the conflict in the testimony, and chose not to cross-examine J.B. MH3 400.

The trial court denied a motion for mistrial and for dismissal with prejudice. JT3-404. The trial court's ruling was correct, even if the State did know of changes in J.B.'s testimony. *Muhm,* ¶ 37, 775 N.W.2d at 521; *Krebs,* ¶ 19, 714 N.W.2d at 98-99. The discovery order incorporated Defendant's motion for discovery. The only provisions of the motion that would apply here are paragraphs seven and ten. SR 26-27. Paragraph seven, as modified by paragraph eight, asks for statements that are discoverable under SDCL 23A-13-10. The statute requires disclosure of written statements, stenographic, mechanical, electrical or other recordings or transcription thereof, which is a substantially verbatim recital of an oral statement; statement made to a grand jury; or a summary of an oral declaration made by someone other than the witness that has been reduced to writing. Paragraph ten, SR 27, calls for all statements, whether reduced to writing or not, that the prosecution considers to be relevant to the alleged crimes and

that would tend to incriminate or exculpate the Defendant. While this request is broad, the statement involved is of little relevance. It does not prove Defendant's knowledge or state of mind. Regardless of who lured him, it is undisputed that Defendant was initially attacked. What matters is how he responded to the attack.

In order to show a *Brady* violation, Defendant must show that there was evidence undisclosed to him, which would be favorable to him because it would either be exculpatory or impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. Because Defendant was undisputedly attacked, *Thompson v. Weber,* 2013 S.D. 87, ¶ 38, 841 N.W.2d 3, 11-12, it makes little difference whether he was "lured" by Shy and Milk or was "invited" by J.B. In either event, he did not expect the attack that was levied upon him. But it would not change either his subjective or objective state of mind for purposes of determining self-defense, no matter who invited him to come to the Dakota Rose. It does not completely undercut his defense, as did the withheld evidence in *Krebs*. In *Krebs,* the State presented testimony from a witness who testified that Krebs and some friends had demonstrated self-injury to the witness. Krebs had some injuries, which he claimed were caused to him during a fight where he had killed another. In that case, the undisclosed evidence tended to show that Krebs might have injured himself, rather than being injured in the

course of the fight resulting in a death. This completely undercut the defense. Here, however, the allegedly undisclosed evidence relates only to events occurring before the fight, and Defendant would not have had a defense to the crime based on it. Defendant was undisputedly attacked, he undisputedly had a right of self-defense against the attack, and the issue was whether he exceeded that quantity of self-defense that was allowed under the circumstances. *See Walton* and *Pellegrino.*

Defendant also claims the evidence provided impeachment of J.B., which is correct in that it likely gave rise to a prior inconsistent statement. *See State v. Jensen,* 2007 S.D. 76, ¶ 16, 737 N.W.2d 285, 290. But Defendant had access to the inconsistent statements and chose not to use them for impeachment. He has not shown prejudice. Where the only value for impeachment, the risk of prejudice is greatly reduced. *Id.*

Defendant also claims that it is a *Brady* violation that the trial court did not give him access to certain confidential items. This has no merit because the State did not refuse to disclose any of these items to the defense. The trial court examined these items and determined that they should not be disclosed. MH6 25. The trial court determined that this material should not be disclosed, either to the defense or to the State. Thus, the trial court could not discuss the nature of the materials as that would constitute disclosing them. The

State believes that it is appropriate for this Court to review the materials, all of which are part of the record in sealed document envelopes. *See Pennsylvania v. Richie*, 480 U.S. 39 (1987); *State v. Kristopherson*, 482 N.W.2d 298, 303-04 (S.D. 1992). The State has no objection to this Court reviewing the records. *State v. Ball*, 2004 S.D. 9, ¶ 9, 675 N.W.2d 192, 196.

VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CERTAIN SPECIFIC ITEMS OF EVIDENCE.

A. Introduction and Standard of Review.

Defendant contends in his seventh issue that the admission of acts other than the crime at issue was prohibited by SDCL 19-12-5, Rule 404(b).

In *Supreme Pork, Inc. v. Master Blaster, Inc.,* 2009 SD 20, ¶ 30, 764 N.W.2d 474, 484, the Court stated that if evidence is relevant, then it is admissible unless specifically excluded. Furthermore, SDCL 19-12-5 is a rule of inclusion, meaning that evidence is admissible, if relevant for any legitimate purpose other than to prove the character of the defendant. *Id.* SDCL 19-12-3 then acts as a type of safeguard, allowing evidence of other acts to be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. Under *State v. Steichen,* 1998 S.D. 126, ¶ 27, 588 N.W.2d 870, 876 the prejudice must be unfair. This is the capacity of the evidence to

persuade by illegitimate means. Evidence will only be excluded if the prejudice is unfair in this sense. Under *Novak v. McEldowney,* 2002 S.D. 162, ¶¶ 10-11, 655 N.W.2d 909, 913, judicial power to exclude such evidence should be used sparingly. If prior bad acts evidence was introduced for any proper purpose, its use is sustainable on appeal. *State v. Mattson,* 2005 S.D. 71, ¶¶ 20-21, 698 N.W.2d 538, 546. Defendant also argues that the trial court should have delayed admission of this evidence until after his case in chief. The Court has sometimes stated that is preferable, s*ee Steichen,* ¶ 19, 588 N.W.2d at 875. But at the same time this Court, citing *United States v. Estabrook,* 774 F.2d 284, 289 (8th Cir. 1985), held that other acts evidence may also be properly admitted during the State's case in chief. *See also Janklow,* 2005 S.D. 25 at ¶ 38, 693 N.W.2d at 698. In *United States v. Edouard,* 485 F.3d 1324, 1345 (11th Cir. 2007), the eleventh circuit held that where the defendant pleaded not guilty, putting his intent into issue, Rule 404(b) evidence was admissible.

B. The Trial Court Did Not Abuse its Discretion in Admitting Other Act Evidence; Some of the Evidence of Which Defendant Complains is Not Other Act Evidence.

It is first necessary to determine which evidence Defendant challenges under Rule 404(b). Defendant alludes, at page 42 of his brief on appeal, to objections he made at the time of trial, including JT3 502-03, 505, 566-72, as well as JT4 660, 665-66, 672, 675. At trial

much of the evidence considered during the evidentiary hearing was not offered. *See* MH5. Defendant objected to four items:

1. Items from a backpack found at Sabrina Martin's house (testimony of Sheriff's Investigator Jeromy Smith). These items came from the location of Defendant's arrest. TT 501. Martin said the items did not belong to her. TT 502. Defendant did not object to any of this property based upon a theory that it was evidence of prior bad acts under SDCL 19-12-5, but solely on grounds of relevancy. TT 502; JT3 502, 505. The items were State's Exhibits 108-114, which were photographs of the backpack and contents, and State's Exhibits 100-107, which were the items themselves. It contained items of women's clothing, hypodermic needles, other general items, and a list of names and phone numbers. JT3 503-04.

Those items showed Defendant's drug activity on and before January 7, 2013. They show Defendant's intent and motive to sell drugs, and they show the circumstances of the offense. It is also relevant to Defendant's knowledge of the drug trade and his intent and state of mind at the time of the crime, as well as a common plan. *Novak,* 2002 S.D. 162 at ¶ 16, 655 N.W.2d at 915. Throughout the trial, Defendant continued to suggest that the gun fired accidentally. Defendant's scheme to engage in the drug trade and use of guns to facilitate it were part of the State's case. The State was required to prove Defendant's identity and his intent. *See* Court's Instruction 15,

22; SR 487. This evidence corroborated the statements Defendant made, but also statements of J.B., who testified she lured Defendant to the Dakota Rose for purposes of a drug deal. The items were closely associated with Defendant at or near the time of his arrest. JT3 502.

2. At JT3 566-72, Defendant objected to some items found in the room of Rod Hickey, a friend of Defendant, and Defendant's apparent source of the shotgun. JT6 941-43. The items consisted of photographs of items found in Hickey's room, Exhibits 74-87, as well as two items, half of a white pistol grip handle, and a red .410 shotgun shell, Exhibits 70-71. JT3 571. Defendant acknowledged that he had taken the short shotgun from Hickey's room and that he had been in Hickey's room. JT3 568-69. Defendant specifically objected to the pictures and the two physical exhibits under Rules 403 and 404(b). JT 567.

The State contends that these items are not evidence of some other act, but rather are specific evidence of the weapon Defendant used to kill Marrufo, and his motive and intent on January 7, 2013. In his statements, Defendant acknowledged that he had been present in Hickey's room the day before the crime, JT3 568, and he also acknowledged that he had obtained the shotgun from there. JT3 569. The items found in Hickey's room are evidence of the crime being charged. They are not evidence of other crimes, wrongs, or acts pursuant to Rule 404(b). The drug related items found in Hickey's

room are closely associated with the weapon used in the killing. The drug related items also corroborate Defendant's drug use and sale, and are closely related to the crime as it shows his intent, motive, and plan for January 7, 2013. These are "intricately related to the facts of the case and, as such, admissible without reference to SDCL 19-12-5 or SDCL 19-12-4." *Walton,* 1999 S.D. 80 at ¶ 20, 600 N.W.2d at 524. Even if analyzed under Rule 404(b), the items' close relationship to the crime makes them non-prejudicial.

3. Defendant suggests that exhibits 31, 32, 33, were improper Rule 404(b) evidence. Exhibit 31 consisted of ten jeweler's baggies with residue, Exhibit 32 was a digital scale, and 33 was a syringe in a plastic bag. These were admitted in evidence during testimony from Sheriff's Investigator Mitzel. Defendant did not object, JT3 460-61. Later, during testimony from Richard Wold, Defendant objected on relevance alone. JT4 660. Defendant did not object to these items based upon Rule 403 or 404, but merely questioned whether they could be associated with Defendant. *Id.* These items were found inside a black bag at the home of Miranda Brown Bull. JT3 640-61. Ms. Brown Bull testified that the black bag containing those items belonged to Defendant and that she gave it to him a couple of days before the crime. JT3 429. The black bag was empty when she gave it to him. JT3 430.

Defendant stipulated these items into evidence first, and then failed to object on the basis of Rule 403(b). Even if the objection had not been waived, Defendant's possession of three drug related items, including a digital scale containing drug residue, shows his knowledge of the drug trade; his intent when going to the scene of the crime; his state of mind and mens rea at the time he committed the crime; and his plan to commit a crime of drug distribution. It confirms the testimony of J.B., as well as Defendant's statements to the police. *See Mattson,* 2005 S.D. 71 at ¶ 19, 698 N.W.2d at 546.

4. The final items to which Defendant objected, JT4 665-75, related to an incident on July 18, 2012. It was reported to law enforcement that Defendant was sleeping in a car. The officers came to investigate. When Officer Childs awakened him, he gave them two false names, and then ran away from the scene. The officers were unable to catch him. JT4 669-70. Upon searching the car, the officers found drugs, a 10 mm handgun, an AK 47 assault rifle, and drug paraphernalia. JT4 671. The objects admitted from this incident included photographs of the car and its contents, the AK 47 rifle, Exhibit 163, and a 10 mm handgun, Exhibit 164. Defendant specifically objected to the incident and the items found based on Rule 404(b). He argued that the evidence should not be admitted until after his case in chief. JT4 666.

The items Officer Childs took from the car were relevant because they showed Defendant's common scheme, knowledge, and plan to carry and use guns in the course of illegal drug transactions. It was thus not a coincidence that Defendant had a gun with him during the attempted drug transaction on January 7, 2013. The evidence also shows Defendant's knowledge about drugs and his plan and scheme to distribute them. It corroborates the testimony of J.B., who said she had sent messages to Defendant that she wanted him to bring her drugs. Thus, whether or not Defendant was convicted of drug distribution, this evidence enlightens the transaction leading to the killing. Both involved the use and distribution of drugs and Defendant's common scheme or plan of carrying a gun in the course of drug transactions. It also proves his knowledge of firearms. The evidence is not offered to show Defendant's character. That it might incidentally do so is not grounds for exclusion. *Supreme Pork,* 2009 S.D. 20 at ¶ 30, 764 N.W.2d at 484.

C. Preservation.

The trial court did not resolve the issue of admissibility at the MH5 motion hearing. While the court did state a likelihood that the items would be admitted, MH5 77, the court left a final ruling for trial. MH5 78-79. In order for the motion in limine to preserve appellate error, Defendant needed to obtain a "definitive ruling" on the record admitting or excluding the evidence. SDCL 19-9-3, *State v. Johnson,*

2009 S.D. 67, ¶ 14, 771 N.W.2d 360, 366. *Johnson* defined "definitive" as "determining finally; decisive . . . authoritative and complete." (citing *The New American Heritage Dictionary*, 375 (2d Edition 1991)). The trial court's ruling was not final, authoritative, and complete, and therefore, in order to preserve the objections, they needed to be renewed at trial. Defendant did not renew two of the 404(b) objections at trial, and only one of his objections was specific to the order of proof. Thus, the 404(b) objections to everything except the items from Sabrina Martin's house and the July 2012 incident were waived, and can only be asserted under the plain error rule. *See State v. Asmussen,* 2006 S.D. 37, ¶ 37, 713 N.W.2d 580, 591-92.

D. Miscellaneous Arguments.

Defendant argues that the trial court never considered the probative value and the danger of unfair prejudice so as to determine whether that danger outweighed the probative value of the evidence. The judicial power to exclude such evidence must be used sparingly, *Supreme Pork,* 2009 S.D. 20 at ¶ 30, 764 N.W.2d at 484, and if the prior bad acts evidence was introduced for any proper purpose its use is sustainable on appeal. *Id.* (citing *Mattson,* 2005 S.D. 71 at ¶¶ 20-21, 698 N.W.2d at 546). The trial court summed up its ruling at MH5 77. The State contends that the trial court inherently engaged in balancing the high probative value of the evidence against the danger of unfair prejudice. *See Supreme Pork,* 2009 S.D. 20 at ¶ 49 n.17, 764 N.W.2d at

488-89 n.17. The State admits that the trial court did not use the words probative value and potential prejudice. If the Court finds that there was not sufficient balancing, the State asks that the matter be remanded to the trial to complete the record. *See State v. Spronk,* 379 N.W.2d 312, 313 (S.D. 1985); *State v. McCafferty,* 356 N.W.2d 159, 165 (S.D. 1984).

On page 43 of his brief, Defendant raises an argument that admission of this evidence violated due process. The test requires this Court to assess the overall fairness of the trial. Defendant's burden for reversal is high. He must show, under the totality of the circumstances, that this error is so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford Defendant the fundamental fairness which is the essence of due process. *Steichen v. Weber,* 2009 S.D. 4, ¶ 9, 760 N.W.2d 381, 387-88 (citing *Loop v. Class,* 1996 S.D. 107, ¶ 23, 554 N.W.2d 189, 193 (further citations omitted)).

Defendant also argues that he is prejudiced by three isolated references to "drug dealer" after the trial court had said that the State could not refer to him as a drug dealer. The isolated references that Defendant cites at his page 44 do not argue that Defendant should be convicted because he is a drug dealer. Rather, that State argued Defendant ought not to be given more latitude in self-defense because he was a drug dealer. The State had a right to refute Defendant's

suggestions that his actions were reasonable in the context of a drug transaction. Statements in the State's Attorney's arguments were well within the facts. Defendant admitted the course of his drug dealings during his statement to police. Exhibit 123 18-20. The state's attorney's argument, therefore, constituted reasonable comment on the facts. *See State v. Smith,* 1999 S.D. 83, ¶ 46, 599 N.W.2d 344, 354. *Smith,* ¶ 52, 599 N.W.2d at 355 requires that prejudice be shown to the extent that the argument must "so infect the trial with unfairness as to make the resulting convictions a denial of due process."

VIII

DEFENDANT HAS NOT SHOWN CUMULATIVE ERROR FOR REVERSAL.

Defendant's final argument is that he was denied a fair trial because of cumulative error. This is a generalized due process argument, and Defendant must show that he was denied fundamental fairness. Under the totality of the circumstances, the error alleged must be so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford Defendant the fundamental fairness which is the essence of due process. *Steichen,* 2009 S.D. 4 at ¶ 8, 760 N.W.2d at 387-88. Under *Janklow,* 2005 S.D. 25 at ¶ 50, 693 N.W.2d at 701, the argument applies only when the defendant is denied due process and right to a fair trial as a result of several errors, none of which would singly cause reversal. The unstated premise, however, is that only errors that are individually

erroneous can be added for purposes of cumulative errror. The State argues that there can be no cumulative error where Defendant has shown no error at all, *Steurer v. Crews*, 2013 WL 4096120, at *27 n.15 (N.D. Fla.) (citing *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996)). Since Defendant has alleged nothing erroneous, there are no errors to accumulate. In any event, were the Court to find some error, even when added together, there is insufficient error to meet the stringent due process standard.

CONCLUSION

The State requests that Defendant's conviction be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Craig M. Eichstadt
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

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 9,770 words.

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

Dated this 2nd day of September, 2014.

Craig M. Eichstadt
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of September, 2014, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Charles Birdshead* was served via electronic mail upon Jamy Patterson at jamyp@co.pennington.sd.us.

Craig M. Eichstadt
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO: 26987

CHARLES BIRDSHEAD,
Defendant and Appellant.

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

HONORABLE Wally Eklund, Circuit Court Judge

APPELLANT'S REPLY BRIEF

Jamy Patterson
Office of the Public Defender
for Pennington County
Pennington County Courthouse
Rapid City, South Dakota 57701

Attorney for Appellant

Mr. Marty J. Jackley
Attorney General
1302 E. Hwy 14 Suite 1
Pierre, South Dakota 57501

and

Mr. Mark A. Vargo
Pennington County State's Attorney
300 Kansas City Street
Rapid City, SD 57701

Notice of Appeal was filed on February 7, 2014.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: PAGES:

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. NO. 26987

CHARLES BIRDSHEAD,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Appellee's Brief is cited in this Reply as "AB" followed by appropriate page number. Appellant intends that all arguments contained in his earlier brief be incorporated herein.

I. RECKLESSNESS IS THE MENS REA FOR SECOND DEGREE MANSLAUGHTER, AND IS NOT THE MENS REA FOR FIRST DEGREE MANSLAUGHTER.

The State argues that recklessness is the mens rea for "first degree manslaughter with a dangerous weapon." AB 10. The State, however,

cannot cite to any authority where a South Dakota jury has been instructed that recklessness is the appropriate mens rea for first degree manslaughter. The State continues to confuse the issue of sufficiency of the evidence with the appropriate mens rea standard in a jury instruction. U.S. v. Adamson, 665 F2d at 654, fn 12 (5th Cir. 1982).

Mulligan does not hold that recklessness is the correct mens rea for first degree manslaughter with a dangerous weapon as the State argues. AB 11-12. The issue in Mulligan was sufficiency of the evidence—not whether the language in a jury instruction correctly stated the law. Mulligan, 2007 S.D 67, ¶9, 736 N.W.2d at 813 ("To convict Mulligan of *manslaughter*, there must have been *sufficient evidence* to find that she intended to fire the gun or that she was reckless with respect to the shooting.")

One of the most important facts in the Mulligan decision, which the State ignores in its brief, is the fact that the Mulligan jury was properly instructed that first degree manslaughter requires a mens rea of "intentionality." 2007 S.D. 67, ¶19, 736 N.W.2d 808, 816-817 (finding the pattern jury instruction for the general intent crime for first degree manslaughter instructed on "intentionally doing an act," and therefore allowed the jury to correctly determine "that Mulligan must have *intentionally*" shot the victim).

What Mulligan suggests is that reckless conduct may be used as

circumstantial evidence of intentionality to determine the sufficiency of the evidence. 2007 S.D. 67, ¶9, 736 N.W.2d at 814; see also State v. Boe, 2014 S.D. 29, ¶28, 847 N.W.2d 315, 323. However, it does not hold that the jury may be instructed that recklessness is a substitute mens rea for first degree manslaughter. This distinction is well articulated in U.S. v. Adamson, 665 F.2d 649 (5th Cir. 1982):

> In this regard, a distinction must be drawn between cases where the issue on appeal is the sufficiency of the evidence and where it is the correctness of the jury instructions. Where the sufficiency of the evidence is at issue, a finding that the defendant acted recklessly may be enough to sustain a jury verdict because from this finding the jury may infer the requisite mental state of purpose or knowledge. The courts, in this context, have not held that recklessness is the requisite mens rea nor is it a substitute for this mens rea; rather, these decisions treat recklessness as a fact or circumstance from which a jury may infer the requisite element of knowledge or purpose.

U.S. v. Adamson, 665 F.2d 649, 654, fn 12 (5th Cir. 1982).

However, while "[t]h trier of fact may *infer* the required intent, i.e., knowledge, from the defendant's reckless[ness]," "if the proper mens rea . . . is knowledge, and *if the jury instructions as a whole* either equate recklessness with knowledge or *substitute recklessness for knowledge*, then Sandstrom v. Montana, 442 U.S. 510 (1979), compels the conclusion that the charge is erroneous." United States v. Adamson, 700 F.2d 962, 956, 965 (5th Cir. 1983) (emphasis added).

Thus, evidence that includes reckless conduct may be enough to uphold a conviction for first degree manslaughter where the sufficiency of

the evidence is challenged on appeal. However, a jury cannot be instructed that a lowered mens rea than what the crime requires is sufficient to prove that offense beyond a reasonable doubt. To do so violates the Fifth Amendment Due Process Clause and Sixth Amendment requirement of a jury verdict for the offense charged. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993); Sandstrom v. Montana, 442 U.S. 510 (1979).

The State has taken selected language from Mulligan without placing it in its proper context within the decision. The sentence relied upon by the State from Mulligan referred to "manslaughter" offenses generally, which includes both first and second degree manslaughter. AB 11. These are both "general intent crimes." 2007 S.D. 67, ¶9, 736 N.W.2d at 813. As such, depending on the specific charged offense, they could encompass "intentionality" (the mens rea for first degree manslaughter) down to "recklessness" (the mens rea for second degree manslaughter). This distinction was succinctly articulated in State v. Danielson, 2012 S.D. 36, ¶20, 814 N.W.2d 401, 408:

> The use of the terms 'intentionally' 'or 'knowingly' [in the general intent crime of perjury] merely designate that the culpability required is something more than negligence or recklessness.

Another fact not addressed by the State is that the killing in Mulligan occurred in 2002, before the 2005 statutory changes that made

second degree manslaughter a necessarily lesser included offense of first degree manslaughter under the mens rea elements test. SDCL 22–16–20.1. Waloke discussed the reasons for this codification:

> The history of this Court's treatment of lesser included offense instructions in murder and manslaughter cases is traced in State v. Black (Black I), 494 N.W.2d 377 (S.D.1993) and State v. Black (Black II), 506 N.W.2d 738 (S.D.1993). See also Tim Dallas Tucker, State v. Black: Confusion in South Dakota's Determination of Lesser Included Offenses in Homicide Cases, 41 S.D. L. Rev. 464 (1996). In his article discussing South Dakota's approach to lesser included offenses in homicide cases, Judge Tucker opined that "[t]he *elements test* is difficult to use under South Dakota's current homicide statutory scheme, but it is workable if different *intent or state of mind elements are accepted as lesser elements."* 41 S.D. L. Rev. at 496. . . .

State v. Waloke, 2013 S.D. 55, ¶29, 835 N.W.2d 105, 113-114.

Prior to 2005, South Dakota case-law seemed to say that if a killing occurred with a per se dangerous weapon, then the killing under SDCL 22-16-15(3) (killing by "means of a dangerous weapon") was necessarily first degree manslaughter, and therefore, could not be second degree manslaughter. SDCL 22-16-20 ("*Any reckless* killing of one human being . . that is neither murder nor manslaughter in the first degree . . . is manslaughter in the second degree.") A defendant was therefore not entitled to the lesser included offense of second degree manslaughter when a person was killed with a dangerous weapon, even if there may have been facts suggesting the killing was done in a reckless manner. State v. Andrews, 2001 S.D. 31, ¶ 24, 623 N.W2d 79, 84; State v. Gregg II, 405 N.W2d 49, 51 (S.D. 1987).

It is important to note that these cases did not allow the State to argue, nor permit the jury to be instructed, that recklessness was a sufficient mens rea for first degree manslaughter. The argument the State is thus advancing in their brief reflects the confusion that the 2005 statutory changes were meant to eliminate.

Manslaughter in the first degree has to have a higher mens rea than recklessness, or a reckless killing would always be first degree manslaughter. This would invalidate the plain language of the 2005 statutory changes and render SDCL 22-16-20.1 moot.

> [W]e adhere to two primary rules of statutory construction. The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction."

Goetz v. State, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681.

The law is now clear that under SDCL 22-16-20.1, "Manslaughter in the second degree is a lesser included offense of ...manslaughter in the first degree" under the mens rea element test for lesser included offenses. "It necessarily follows that a lesser included offense has a lesser degree of culpability, i.e., intent." State v. Giroux, 2004 S.D. 24, ¶ 10, 676 N.W.2d 139, 143. The mens rea of recklessness in second degree manslaughter is necessarily less than the mens rea of intentionality in first degree manslaughter. Id. at ¶ 10, 676 N.W.2d at 144 ("Reckless is a

lesser degree of culpability or mental state than intentional.").

> In State v. Giroux, we concluded "that when determining whether a crime is a lesser-included-offense, the degrees of intent, that is, the degrees of culpability should be considered." . . In 2005, the Legislature validated this approach and simplified *the application of the elements test in homicide cases by codifying the possible lesser included offenses for various degrees of murder and manslaughter*. SDCL 22–16–20.1. The Legislature also codified the requirement that *a trial court conduct a factual* analysis before a lesser included offense instruction is given to the jury. SDCL 22–16–20.2.

Waloke, at ¶29, 835 N.W.2d at 113-114.

In Waloke, this Court determined the defendant was not entitled to the lesser included offense of second degree manslaughter under the *factual analysis* test under SDCL 22-16-20.2. 2013 S.D. 55, ¶ 32, 835 N.W.2d at 114 (finding "no evidence that Waloke acted recklessly," when she killed the victim with a knife). This Court's affirmance of the lower court's refusal to instruct on the mens rea of recklessness demonstrates how recklessness is the mens rea of second degree manslaughter and not of first degree manslaughter. Since there was "no evidence that Waloke acted recklessly," the lower court properly prohibited an instruction on an offense requiring recklessness. If there had been facts supporting a reckless killing, an instruction on second degree manslaughter was required. Waloke thus reflects the understanding that there will be cases where facts suggest a reckless killing with a dangerous weapon, thereby entitling the defendant to the lesser included offense of second degree

manslaughter. [1]

If recklessness is the mens rea for first degree manslaughter, then another legal impossibility results in cases involving killings by drunk drivers. In State v. Stetter 513 N.W.2d 87 (S.D. 1994) and State v. Seidschlaw, 304 N.W.2d 102 (S.D. 1981), the defendants were charged with first degree manslaughter, and the defendants sought an instruction on the lesser included offense of second degree manslaughter. This Court determined that the conduct which would satisfy the statutory definition of "dangerous weapon" under SDCL 22-1-2(10) required more than "recklessness" to constitute a manslaughter in the first degree under SDCL 22-16-15(3)(a killing by a dangerous weapon). Stetter at 94; Seidschlaw at 106. If the death caused by the intoxicated driver constituted only reckless conduct, then the defendant could only be convicted of second degree manslaughter.

If the jury has to determine whether the instrument used is a dangerous weapon, then only a mens rea higher than recklessness suffices. In Stetter, this Court found that "obviously the jury believed Stetter's driving was more than reckless" and upheld the conviction for first degree manslaughter. 513 N.W.2d at 94. In Seidschlaw, this Court

[1] Even if Waloke stands for the proposition that killing with a per se dangerous weapon precludes any factual finding that the killing was done recklessly, then recklessness could not be the mens rea for first degree manslaughter with a dangerous weapon.

upheld the jury returning a guilty verdict for first degree manslaughter, as opposed to second degree manslaughter: "While the *reckless* use of an automobile may certainly present *a possibility* of death or serious bodily harm, the first-degree manslaughter statute requires proof that the use of the automobile was of such a nature that death or serious bodily harm was a *probable result*." 304 N.W.2d at 106. (emphasis added).

There has to be a higher mens rea than "recklessness" for first degree manslaughter, or else a "reckless" killing with a dangerous weapon would always constitute both the offenses of first and second degree manslaughter. This is prohibited by SDCL 23A-26-7 ("Whenever a crime is distinguished by degrees, a jury, if it convicts an accused, shall find the degree of the crime of which he is guilty and include that finding in its verdict. When there is a reasonable ground of doubt as to which of two or more degrees an accused is guilty, he can be convicted of only the lowest degree.).

In Birdshead's case, the State, *at best*, prosecuted and secured a second degree manslaughter conviction with first degree manslaughter penalties (that is, if it is determined other errors did not occur in Birdshead's case). "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally imprisoned as a burglar." Jackson v. Virginia, 443 U.S. 307, 323-324 (1979). "Where a defendant has been denied 'his Sixth Amendment right to a jury

determination of an important element of the crime, the integrity of the judicial proceeding is jeopardized.'" U.S. v. Fast Horse, 747 F.3d 1040, 1043 (8th Cir. 2014). Reversal of Birdshead's conviction for first degree manslaughter is required on this basis alone.

II. THE JURY INSTRUCTIONS IN BIRDSHEAD'S CASE WERE CONFUSING, MISLEADING, AND PREJUDICED BIRDSHEAD.

The State argues that Birdsheads' jury instructions were "neither misleading, nor incorrect, nor prejudicial." AB 13. The State's argument fails for several reasons.

First, the State never addressed the argument on page 27 of Birdshead's brief that the jury was instructed to follow a jury instruction that could not be followed. Instruction 32 stated:

> "[t]he fact that you may find Defendant guilty or not guilty on any one count of the Indictment, must not control or influence your verdict on any other count or counts in the Indictment."

The jury convicted Birdshead under Counts 2 (killing with a dangerous weapon) and 4 (commission of felony while armed with a firearm). However, in order to find Birdshead guilty of the enhanced offense under Count 4, the jury first had to find Birdshead guilty of the principal felony of first degree manslaughter under either Count 2 or 3. See Instruction 1. Therefore, it was impossible for the jury to follow Instruction 32 when the jury returned a verdict of guilty under Counts 2 and 4. JT7 1074.

The State argues that Birdshead waived "the propriety of the State charging Counts 2 and 4 in the indictment," AB 13, despite the law prohibiting them from coexisting. SDCL 22-14-14. While the State argues the defect was not jurisdictional, citing State v. Medicine Eagle, 2013 S.D. 60, 835 N.W.2d 886, AB 13-14, the majority of this Court reversed the conviction in that case, finding the error was jurisdictional. Id. at ¶ 44, 835 N.W.2d at 902. Jurisdiction is defined as "whether there was power to enter upon the inquiry. . . " Id. at ¶ 40, 835 N.W.2d at 900.

Birdshead raised the jurisdictional defect and the failure to correct the defect was prejudicial error. The jury did not convict Birdshead under Counts 3 and 4. In order to convict Birdshead of manslaughter in the first degree under Count 3, the jury had to find the killing was "unnecessary." The fact that the jury sent a note back asking what "unnecessarily" meant is significant because if they could not find the killing was "unnecessary," it means they could have found the killing was "justifiable" if they had been properly instructed.

The jury could reasonably have misunderstood that although the killing was "necessary," they could not find it was "justifiable," as Instruction 13 for justifiable homicide required the defense be done "lawfully." The first sentence in Instruction 13 says, "A homicide is justifiable if committed by any person in the *lawful* defense of such

person." Count 4 stressed the killing was not "lawful" because it instructed it was a crime to commit the felony of manslaughter while armed with a firearm. This is not a case where the defendant is arguing that acquittal on one count shows there was insufficient evidence as to a material element to convict on the lesser count, as the State essentially argues in its brief when citing to State v. Mulligan, 2007 S.D. 67 at ¶ 11, 736 N.W.2d at 114. AB 15.

The State argues that Birdshead "can hardly claim prejudice from an instruction setting out [sic] defense to which he is not entitled," when claiming there was no prejudice in Instruction 12 (excusable homicide). AB 16. With Instruction 12, the jury was told they could not find the killing was "accidental," which rendered moot the one theory under which the Trial Court permitted the firearm 404(b) evidence in this case (i.e., to rebut any claim the killing was accidental). EV 77. This instruction further stressed the "unlawfulness" of the firearm in this case. Instruction 12 was prejudicial.

Indeed, affidavits from two jurors, attached to Defendant's Brief in Support of Motion for New Trial, show the prejudice that resulted from the confusing jury instructions.[2] SR 550. The affidavit of juror Karl

[2] While SDCL 19-14-7stands for authority that this Court cannot consider juror affidavits, SDCL 19-14-7 begins by stating "except as otherwise provided by statute." SDCL 19-9-3 says "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

Martin shows that the jury was indeed confused by Jury Instruction 12. Martin found the killing could not be "excusable" since a dangerous weapon was used; and he therefore did not even consider whether the killing was "justifiable." The affidavit of juror Trevor Rossknecht shows he would have never changed his vote to guilty had he been instructed that one could still be acting in "lawful" self-defense, even if they possessed a controlled weapon.

While it is true that the State could still argue it was illegal to possess a sawed-off shot gun because of the existence of Count 5 (Possession of a Controlled Weapon), the State mischaracterizes the facts in Conaty v. Solem, 422 N.W.2d 102 (S.D. 1988). In Conaty, the defendant, who was a convicted felon, went to a neighbor's house and then possessed a gun for some period of time while he waited in his apartment for the man he *believed* would harm him to return. Id. at 103. This Court found ineffective assistance of counsel where defense counsel did not seek an instruction that the defendant could still be acquitted if the jury found he was reasonably acting in self-defense.

The case law cited in the State's brief allows a person to illegally possess a firearm if there is a reasonable belief of imminent threat. AB 18-20. In Birdshead's case, the State repeatedly conceded that Milk and Marruffo were the first aggressors, that they attacked Birdshead, that Birdshead believed he was being attacked with a weapon, and that

Birdshead bled from his head as a result of this violent ambush while trapped inside his car. AB 7, 26, 28, 33. Birdshead was therefore entitled to his requested instruction that he could be acquitted of possessing a controlled weapon if the jury believed he reasonably used it to defend against an imminent threat by multiple accusers, possibly armed with a weapon, while he was trapped in a car.

III. THE TRIAL COURT'S RULING DENIED BIRDSHEAD HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

The remainder of the State's arguments fail to acknowledge the extent to which Birdshead was denied his Fifth Amendment right to present the complete theory of his defense, and his Sixth Amendment right to confront the State's case. State v. Lamont, 2001 S.D. 92, ¶ 16, 631 N.W.2d 603, 608-09 (citing Crane v. Kentucky, 476 U.S. 683, 687 (1986)).

The State argues that Birdshead "is incorrect when [he] argues at his page 30 and following that homicide is justifiable if someone is committing a felony against him." AB 21. Yet, this is exactly what the plain language of the statute authorizes. SDCL 22-16-34 ("Homicide is justifiable if committed by any person while resisting any attempt to murder such person, or to commit any felony upon him . . .).

The State then cites to State v. Walton, 1999 S.D. 80, 600 N.W.2d 524, for authority that a jury does not need to be instructed on the actual felony that is supported by some evidence. AB 21. Walton is not, however, "a set of

facts on all fours with those in the present case" because in Walton, "conflicting testimony exist[ed] as to . . . who instigated this and other confrontations." 1999 S.D. 80, ¶2, 600 N.W.2d 524, 527 fn 1.

There is no dispute that "Milk and Marrufo were the aggressors" and that they "started" the fight with Birdshead. AB 7, 26, 28. "Defendant was undisputedly attacked [and] he undisputedly had a right of self-defense against the attack." AB 33. However, the State was able to argue that what occurred when the gun fired was merely "punching," or a "simple assault." This prevented Birdshead from effectively confronting "whether he exceeded that quantity of self-defense that was allowed under the circumstances." AB 33. Without the jury being instructed how the same evidence could be any number of violent felonies that the law allowed to be met with lethal force, Birdshead was denied his Sixth Amendment right of confrontation and his Fifth Amendment right to present the complete theory of his defense.

The State argues Birdshead waived any argument concerning prejudice in not being able to question the lead detective on the possible felonies that were being committed upon Birdshead. AB 23. However, Birdshead cited to the transcript of where he was prevented from cross-examining the lead detective on this key issue. Further, Birdshead made this argument in a paragraph arguing the error deprived Birdshead of his Fifth and Sixth Amendment rights. Therefore, Birdshead did not waive

this issue.

The State also argues there was no error in excluding the second jail house call and the Facebook exchange[3] between Milk and Shy because "the evidence of the reason for the original attack does not indicate whether Defendant's response was reasonable." AB 26. Yet, these pieces of evidence were material in establishing Milk's and Shy's motive in setting-up Birdshead, and therefore, in showing how Birdshead

[3] The State argues the transcript of the second jail house phone call should be stricken from the record. However, the second jail house phone call is a part of the settled record. JT5 842 (Defendant's Ex. AAAA). The transcript was provided for easy reference to its contents, so that this Court would not have to play it to review whether error occurred in its exclusion.

was defending against being kidnapped when the gun fired.[4]

For the same reason, failure to disclose the change in J.B.'s testimony also denied Birdshead due process. The record is devoid of any assertion by the State that it was *un*aware of the radical change in J.B.'s testimony. State v. Iron Necklace, 430 N.W.2d 66, 76 (S.D. 1988) ("It is a little difficult to imagine a prosecutor approaching within two or three days of a trial date without having interviewed or received a written report on the expected testimony of any key witness.").

The State argues "it makes little difference whether [Birdshead] was 'lured' by Shy and Milk or was 'invited' by J.B." AB 32. However, showing that Milk and Shy lured Birdshead to the motel to kidnap, and possibly rob him, was material to Birdhead's claim of justifiable homicide. If the jury had been properly instructed that the actions Birdshead defended against were felonies, i.e., the attack and ambush met the elements of Second Degree Kidnapping, then the law allowed lethal force. SDCL 22-16-34. Thus, J.B.'s grand jury testimony and pretrial statements to police were central to Birdshead's defense strategy.

---

[4] The State further argues that the second jail house call could not be used to impeach Shy because it was not her statement, it was Amber Larvie's statement; and Larvie denied having any memory of making it. AB 27-28. However, Amber's Larvie's statement was clearly recorded, and she discussed Frank's text messages only hours before the shooting detailing a sexual encounter with another woman, that she said Shy read, but which Shy testified did not occur. Milk also denied the content

IV. THE 404(b) EVIDENCE DENIED BIRDSHEAD DUE PROCESS.

The State argues that Trial Court did not abuse its discretion in admitting the 404(b) evidence in this case. AB 34.

Birdshead specifically objected to the introduction of the testimony and evidence concerning Rod Hickey's motel room and the July 2013 incident as inadmissible under rules 403 and 404(b). JT3 566-567; JT4 665. The Trial Court never articulated why the evidence was admissible under these rules.

Before admitting other act evidence, a trial court must ascertain whether the evidence is relevant to an issue other than character, and whether the probative value is substantially outweighed by the danger of unfair prejudice. State v. Boe, 2014 S.D. 29 ¶ 21. Admission of other acts/404(b) evidence must be performed *on the record.* State v. Scott, 2013 S.D. 31, ¶28, 829 N.W2d 458, 468.

In State v. Dubois, this Court held "To determine if the court conducted the two-part test [for admission of 404(b) evidence], we consider the court's analysis at both the pre-trial motion hearing and during trial." 2008 S.D. 15, ¶ 25, 746 N.W.2d 197, 206. Neither the pretrial motion hearings transcripts, the jury trial transcripts, nor the documentary record shows any 403 analysis by Trial Court, except regarding severance of a drug charge. MH (6/10/13) 3.

---

of these text messages.

The failure of Trial Court to make this on-the-record determination is a *per se* abuse of discretion, which the State cannot refute. State v. Packed, 2007 S.D. 75, ¶ 24, 736 N.W.2d 851, 859.

At the motions hearing where the Trial Court granted Birdshead's motion to sever the drug count and statutory rape charges from the manslaughter and weapons charges, the Trial Court acknowledged the unfair prejudice stemming from the drug related accusations against Birdshead. MH (6/10/13) 3. During trial, the State acknowledged that the 404(b) drug evidence was not relevant. When Birsdhead objected to Officer Child's testifying to the July incident, State said "I am not actually intending to call Officer Holmquist who was--who talked to Mr. Birdshead in March of 2012 just related to drugs." JT4 665-666.

In its brief, the State tries to argue that this gun and drug evidence was relevant in establishing Birdshead's intent and mens rea at the time the alleged crime occurred, i.e., that his response to the attack was unreasonable and "reckless." The State also argued this during its closing. JT6 976-977. However, this Court has already ruled against the State's position that the defendant "placed his intent at issue by contending his actions were done in self-defense." State v. Carlson, 305 N.W. 2d 675, 676 (S.D. 1981).

The one finding the Trial Court made concerning the other acts evidence—that the firearms evidence was relevant to the issue of whether

the killing was accidental—became moot with Jury Instruction 12. EV 77. Jury Instruction 12 stated, in part, "A homicide is excusable if committed by accident . . . However, to be excusable, no dangerous weapon may be used." This made the firearm evidence irrelevant because the jury was instructed that they could not find the killing was accidental because a dangerous weapon had been used.

The prejudice to Birdshead given admission of the 404(b) evidence was enormous because the evidence cast Birdshead as an armed drug dealer who possessed stolen weapons with multiple kinds of ammunition. The State specifically highlighted the July 2013 incident, ending both their case with it, and arguing it during its closing. JT6 984. The Trial Court allowed the jury to hear that the 10mm handgun found in the car Birdshead allegedly drove "was stolen," and that the ammunition located in the vehicle "didn't match the 10 mm or AK-47." JT 673-674. The State then admitted the AK-47 and 10mm handgun into evidence over defense counsel's objection. JT4 675 (State's Ex. 163 and 164). State further had Officer Child's stand in front of the jury and show it the AK-47 and the 10mm handgun. JT4 674-675. The admission of this evidence allowed the State to parade before the jury guns and ammunition that had no factual or legal connection to this case.

Finally, the State tries to argue in its brief that there was no

prejudice in the Trial Court allowing the State to violate its own pre-trial order prohibiting the State referencing Birdshead as "drug dealer." It is a not a "reasonable comment on the facts" for the State to argue that Birdshead was begging the jury "to grant him the battered drug dealer's syndrome." JT6 1053, AB 43. This is not harmless error, and even if it were, this Court has stated, "We, however, are of the opinion that the harmless error rule ought never to be used to justify unfairness at trial." State v. Webb, 251 N.W.2d 687, 689 (S.D. 1977). This Court has further stated:

> *No matter how vile or despicable a person may appear to be, he or she is entitled to a fair trial.* Constitutional provisions clearly provide that individuals may only be convicted for the crimes with which they are charged; *they may not be subject to criminal conviction merely because they have a detestable or abhorrent background.* Our entire system of justice would deteriorate if we did not jealously protect these constitutional safeguards for all citizens.

Moeller, 1996 S.D. 60 at ¶ 6, 548 N.W.2d at 466. (emphasis added)

CONCLUSION

For all the reasons discussed herein and in Appellant's earlier brief, Birdshead renews his prayer that this Court reverse his convictions on the first degree manslaughter and possession of a controlled weapon charges.

Dated this 22nd day of September, 2014.

Respectfully submitted,

/s/Jamy D. Patterson

Jamy D. Patterson
Office of the Public Defender
for Pennington County
Pennington County Courthouse
Rapid City, South Dakota 57701

(605) 394-2181

Attorney for Appellant

CERTIFICATE OF SERVICE

1. I certify that the Appellant's Brief is within the limitation provided for in SCDL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Reply Brief contains 4,999 words.

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

Dated this 22th day of September, 2014.

/s/Jamy D. Patterson
Jamy D. Patterson
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of September, 2014, a true and correct copy of Appellant's Reply Brief in the matter of *State of South Dakota v. Charles Birdshead* was served by electronic mail on Craig Eichstadt at Craig.Eichstadt@state.sd.us.

/s/Jamy D. Patterson
Jamy D. Patterson
Attorney for Appellant