APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 30074

Plaintiff and Appellee,

v.

SCOTT MARTIN RUDLOFF,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE MICHELLE K. COMER

Circuit Court Judge

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Notice of Appeal Filed July 27, 2022.

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PRELIMINARY STATEMENT

Any references in this brief will be consistent with the page numbers set forth in the settled record. The Jury Trial Volume 1 transcript, held on March 28, 2022, will be referred to as "JT1" followed by the page number. The Jury Trial Volumes 2, 3, and 4 transcripts, held on March 28, 29, 30, 31 and April 1, 2022, will be referred to as "JT2", "JT3", "JT4", "JT5"and "JT6" followed by the page number. Any references to the settled record in this matter will be indicated by "SR" followed by the page number. References to the transcript of other hearings will be indicated by the name of the hearing, followed by the page number. Counsel will attempt to specify any other documents referred to in the record by name in order to provide clarity to the Court. Appellant Scott Rudloff will be referred to as "Rudloff." The State of South Dakota will be referred to as the "State." The alleged victim, a minor, will be referred to as "L.H." and her younger sister, a witness, will be referred to as L.R. References to items included

in the Appendix will be referred to as "Appx" followed by the appropriate letter.

JURISDICTIONAL STATEMENT

On April 15, 2020, Scott Martin Rudloff was charged by Indictment with four offenses: Count 1: Rape 1st Degree – (Child under age thirteen) (SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1)) on or about June, 2015 through November, 2015; Count II: Rape 1st Degree – (Child under age thirteen) (SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1)) on or about June, 2015 through November, 2015; Count III: Rape 1st Degree – (Child under age thirteen) (SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1)); Count IV: Rape 1st Degree – (Child under age thirteen) (SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1)) or in the alternative Count IVA: Sexual Contact with a Minor Under Age 16 (SDCL § 22-22-7) on or about June 2015 through November, 2015. (SR, 4) A part II Habitual Criminal Information was subsequently filed. (SR, 6) Count IV and Alternative Count IVA was subsequently dismissed by the State. (SR, 318) A jury trial was held on March 28-April 1, 2022, before the Honorable Michelle K. Comer, Circuit Court Judge[1]. (JT, 1-6) The jury returned guilty verdicts as to Counts I, II, and III. (SR, 1225) Rudloff admitted to the Amended Part II Habitual Information on June 9, 2022. (Part II transcript) On July 22, 2022, the trial court sentenced Rudloff to be imprisoned in the South Dakota State Penitentiary for thirty (30) years on each count to run consecutively to each other. (Sentencing transcript) The Judgment of Conviction was filed on July 22, 2022 (SR, 3169) Rudloff timely filed his Notice of Appeal on July 27, 2022. (SR, 3177)

1 Appellate counsel was not trial counsel.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING EVIDENTIARY RULINGS?

The trial court overruled Rudloff's objections regarding hearsay, speculation and other objections.

State v. Larson, 512 N.W.2d 732, 742 (S.D. 1994)
State v. Midgett, 2004 SD 57, 680 N.W.2d 288
State v. Buchholtz, 2013 S.D.96, 841 N.W.2d 449
McCafferty v. Solem, 449 N.W.2d 590, 592 (S.D. 1989)

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS?

The trial court determined that Rudloff was properly advised of his rights, that his comments regarding an attorney were equivocal, and denied his motion to suppress.

Miranda v. Arizona, 384 US 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)
State v. Two Hearts, 2019 S.D. 17, 925 N.W.2d 503
State v. Blackburn, 2009 SD 37, 766 N.W.2d 177
State v. Lewandowski, 2019 S.D. 2, 921 N.W.2d 915

III. WHETHER THE TRIAL COURT ERRED BY DISALLOWING OTHER ACTS EVIDENCE OF THE COMPLAINING WITNESSES MOTHER?

The trial court denied Rudloff's other acts motion regarding Hillary Rudloff.

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)
State v. Luna, 378 N.W.2d 229, 233 (S.D. 1985)
State v. Iron Necklace, 430 NW2d 66, 75 (S.D. 1988)
State v. Packed, 2007 S.D. 75, 736 N.W.2d 851

SDCL § 19-19-609
SDCL § 19-19-404

IV. WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT?

Rudloff objected to the prosecutor's rebuttal argument at trial as burden shifting, and the trial court sustained one of Rudloff's objections, denied others, but made no curative comments or instructions to the jury.

State v. Hankins, 2022 S.D. 67, 982 N.W.2d 21
State v. McMillen, 2019 S.D. 40, 931 N.W.2d 725
State v. Smith, 1999 S.D 83, 599 N.W.2d 344
State v. Packed, 2007 S.D. 75, 736 N.W.2d 851

V. WHETHER THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED RUDLOFF OF A FAIR TRIAL?

The trial court did not rule on this issue.

Jenner v. Leapley, 521 N.W.2d 422, 432 (S.D. 1994)
McDowell v. Solem, 447 NW2d 646 (S.D. 1989))
State v. Davi, 504 N.W.2d 844, 857 (S.D. 1993)
State v. Jahnke, 353 N.W.2d 606, 611 (Minn.App. 1984)

STATEMENT OF THE CASE AND FACTS

On April 15, 2020, an Indictment was filed in Lawrence County, South Dakota charging Scott Rudloff with:

Count 1: Rape 1st Degree – Child under age thirteen; SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1) (Class C felony);

Count 2: Rape 1st Degree – Child under age thirteen; SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1) Class C felony;

Count 3: Rape 1st Degree – Child under age thirteen; SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1)(Class C felony);

Count 4: Rape 1st Degree – Child under age thirteen; SDCL § 22-22-1(1) and SDCL § 22-22-1.2(1); or in the alternative;

Count 4A: Sexual Contact with a Minor Under Age 16; SDCL § 22-22-7; (Class 3 felony). (SR, 4)

A part II Habitual Criminal Information was subsequently filed. (SR, 6) Both Rudloff and the State filed many different motions prior to trial. The State's filings

relevant to this appeal included Notice of Intent: To Offer Other Acts Evidence and Notice of Intent to Call Expert Witness (SR, 69, 92) Rudloff's filings relevant to this appeal included a Motion to Suppress, a Notice of Intent to Offer Other Act Evidence and Impeachment Evidence. (SR, 621, 637)

The State alleged that Rudloff raped and/or had sexual contact with L.H. between June and November of 2015 in Lawrence County, South Dakota. (SR, 4) Detective Charles Anderson of the Washington County Sheriff's Office in Beaverton, Oregon was the main investigator on the case. (JT4, 693) He testified about meeting with the mother, Hillary Rudloff, L.H., L.R. and Rudloff at the Rudloff residence on November 11, 2019. (JT4, 693, 695-696, 698-700)

L.H. first talked to Detective Anderson regarding the rape allegations when Detective Anderson arrived at the family residence on November 11, 2019. (JT4, 693) Law enforcement was called out to the Rudloff residence located in Beaverton, Oregon for a family dispute. Id. Earlier that night, L.H. texted her adult brother, Luke Volk, regarding the allegations that Rudloff raped her and had been touching her and her younger sister, L.R. (JT2, 162; State's Exhibit 2) Luke Volk drove over to the Rudloff residence with his friends to confront Rudloff about touching his sisters. (JT2, 168-169) Rudloff denied the allegations and the neighbors called police based on the yelling between those involved. (JT2, 169) Detective Anderson removed Rudloff from the residence and scheduled the two girls for a forensic interview the next day. (JT4, 701)

At the trial, L.H., now 18 years old, testified that Rudloff penetrated her vagina with his penis, made her have oral sex with him, made her watch pornography and that he penetrated her digitally. (JT2, 146-147) She also testified that he did these things to her in

Spearfish, South Dakota located in Lawrence County more than three times and almost every weekend from June of 2015 until sometime in November of 2015. (JT2, 147, 151-154, 157) She was eleven years old and turned twelve years of age when she lived in Spearfish. (JT2, 149) She testified that he touched her digitally on a weekly basis from about the age of five when they lived in Huron, South Dakota and that he also penetrated her with his penis. (JT2, 144, 146) She testified that the abuse continued when the family moved from Spearfish to Billings, Montana. (JT2, 157-158) L.H. testified that she caught him rubbing his penis on L.R.'s vagina while in Billings and told him that if she caught him doing that to her again that she would report him to the police. (JT2, 161) L.H. testified that Rudloff stopped abusing L.H. after she confronted him. (JT2, 161)

L.R., L.H.'s 14-year-old sister, testified about similar acts that Rudloff perpetrated on her, which also started in the Huron/Wolsey, South Dakota area. (JT3, 401-402) The trial court had previously granted the State's motion for this other act evidence as well as L.R.'s other act evidence following a hearing on October 12, 2021, and November 12, 2021. (SR, 271, 319) L.R. said the touching also occurred in Oregon, but not in Spearfish, South Dakota or Billings, Montana[2]. (JT3, 410)

A hearing on the State's Other Acts Evidence was held on October 12, 2021, and November 19, 2021. (SR, 271, 319) The State sought to introduce the other acts of rape and sexual assault on L.H. and L.R. allegedly perpetrated by Rudloff in other jurisdictions. Following this hearing, the trial court entered Findings of Fact/Conclusions of Law and an Order allowing the other acts evidence. (SR, 491) The trial court determined that L.H. and L.R.'s other acts could demonstrate the action occurred at a

2 L.R. had previously said it occurred in both locations.

similar age for each, and over an extended period of time, and that they were a relevant material fact. (SR, 491) The trial court also concluded the other acts showed a common scheme or plan and that the evidence was probative to show an uninterrupted series of events between defendant and his daughters. Id.

Rudloff also sought to introduce other acts evidence concerning Hillary Rudloff, the mother of L.H. and L.R. (SR, 621) A hearing on this motion was held on March 23, 2022, following the suppression hearing. (MH, March 23, 2022, 71-91) Rudloff sought to introduce evidence of other acts which included an incident from 1998-1999 regarding Hillary lying about being raped and kidnapped by an ex-boyfriend. (SR, 621) Additionally, Rudloff sought to introduce Hillary's conviction for False Report from Pennington County stemming from these allegations. Id. Rudloff argued that Hillary's report was similar to what was being put forth by L.H. and L.R. and that it went towards motive, opportunity, plan and knowledge. (MH, March 23, 2022, 71) The trial court denied the other act evidence as it pertained to Hillary's false rape allegation stating it was too old and the court did not believe it was relevant. (MH, March 23, 2022, 71) The trial court went on to rule that the prejudicial effect of Hillary's lies being used against her daughters was a factor weighing in favor of exclusion. Id. at 73

A hearing on Rudloff's Motion to Suppress was held on March 23, 2022. (SR, 3245) Rudloff was interviewed by law enforcement twice: once on November 11, 2019[3] at Rudloff's home in Beaverton, Oregon and again on November 12, 2019 after he had been arrested. (MH, March 23, 2022, 12, 26-27; SR 813, 878) Rudloff spent the night at a

3 The initial interview began in the early morning hours of November 11th and ended on November 12th. (MH, March 23, 2022, 12)

local motel. Id. During his first interaction with Detective Anderson, he was not advised of his Miranda rights, but did make the following comments regarding his right to an attorney after the recording began:

Det. Anderson:	-- wanna talk to me, whether you wanna hire an attorney, whatever you wanna do after that, okay? Ah –
Rudloff:	That's correct.
Rudloff:	Am I better off getting a lawyer to talk to you? Am I under arrest for anything or –
Det. Anderson:	No, you're not under arrest. (MH, March 23, 2022, Exhibit 1, p.2)

A short time later the Detective Anderson brought it up again as follows:

Det. Anderson:	Okay. So here's the deal, ah, you -- you talked about an attorney. Totally your right, okay?
Rudloff:	Yes.
Det. Anderson:	You want to talk to an attorney, you can talk to an attorney.
Rudloff:	Yeah. As soon as anything -- (MH, March 23, 2022, Exhibit 1, p.4)

The discussion regarding a lawyer came up again:

Rudloff:	-- that I shouldn't even be talking to you guys without –
Det. Anderson:	Okay.
Rudloff:	-- a lawyer, but I'm not worried about nothing, so -- (MH, March 23, 2022, Exhibit 1, p.16)
Rudloff:	Well, if you're gonna call me saying that I'm being accused of anything, I'm gonna have to get ahold of a lawyer.
Det. Anderson:	Okay. (MH, March 23, 2022, Exhibit 1, p.26)

Later the topic of an attorney came up one last time in this initial interview:

Det. Anderson: -- wanna talk to me, whether you wanna hire an attorney, whatever you wanna do after that, okay? Ah –

Rudloff: I'm sure I won't be hiring an attorney. (MH, March 23, 2022, Exhibit 1, p.37)

The next day Rudloff was arrested, taken into custody and transported to the Washington County Sheriff's Office (in Beaverton, Oregon) at which time he was finally advised of his Miranda rights. (MH, March 23, 2022, 23; Exhibit 2, p.2) Rudloff said he understood his rights. (MH, March 23, 2022, Exhibit 2, p.2) No follow up question was asked whether he agreed to waive his rights and talk to law enforcement. Id. Detective Anderson admitted at the suppression hearing that Rudloff did not verbally waive his rights and agree to speak with him. (MH, March 23, 2022, 40) Immediately after saying he understood his Miranda rights the following exchange occurred:

Rudloff: Some questions that I'd probably won't want a lawyer with but ...

Det. Anderson: That's alright.

Rudloff: I just want to know . . . (MH, March 23, 2022, Exhibit 2, p. 3)

The questions about an attorney continued to come up and the following exchange took place:

Det. Anderson: Okay. Legal advice or just letting him[4] know where you're at, what's going on?

Rudloff: Legal advice so I can ask him ... Alright. ... to get me an attorney and stuff like that. I don't even know how to go about it out here man.

Det. Anderson: Do you; well you're going to get appointed an attorney tomorrow if ... (MH, March 23, 2022, Exhibit 2, pp. 16-17)

A short time later the following exchange occurred:

4 Discussion about calling Rudloff's brother Gary.

Det. Anderson: Like I'm trying to get a word in edgewise. Okay. So we're at a point where you've said a couple of things. You want to talk to your brother about getting an attorney. Okay.

Rudloff: Yeah I better.

Det. Anderson: At that point--that point it sounds like you're invoking to me. Like you ...

Rudloff: What?

Det. Anderson: That you're asking for an attorney. Okay.

Rudloff: Well what would you do if you're in my state? You'd probably want to get an attorney.

Det. Anderson: I'd probably ask for an attorney myself. Exactly. (MH, March 23, 2022, Exhibit 2, p. 17)

Moments later, Detective Anderson concluded that he would not ask more questions because Rudloff had requested an attorney:

Det. Anderson: Well, you've—you've asked for an attorney so at this point I'm not really good going on here. Okay. (MH, March 23, 2022, Exhibit 2, p. 18)

Detective Anderson continued to talk to Rudloff for another 25 pages in the transcript following this statement by Detective Anderson. (MH, March 23, 2022, Exhibit 2, pp. 18-43)

The trial court entered an Order denying Rudloff's Motion to Suppress. (SR, 948) The trial court determined that Rudloff was properly advised of his Miranda rights, that his comments regarding an attorney were equivocal and that his statements were voluntarily given. (MH, March 23, 2022, 51-53) The trial court also determined that Rudloff was experienced with the criminal justice system based on his arrests and convictions, that he was of at least average intelligence, that he knew his rights and that

there were no indications of drug use by him or coercion on part of Detective Anderson. Id. 52-53.

A jury trial was held on March 28 through April 1, 2022, before the Honorable Michelle K. Comer, Circuit Court Judge. (JT1-6) During the trial, Rudloff objected to Detective Anderson's testimony when asked to give a synopsis of what L.R. had told the forensic interviewer. (JT4, 705) The trial court overruled Rudloff's hearsay objection indicating a synopsis was not hearsay and allowed Detective Anderson to testify about what L.R. had told the forensic interviewer. (JT4, 705-706) The trial court also allowed Detective Anderson to testify about a conversation he had with Dr. Nicole Bishop-Perdue regarding the medical examination of L.R. and her finding that Rudloff's penis caused L.R.'s injury. (JT4, 708) The trial court overruled Rudloff's hearsay objection. Id.

The trial court also overruled Rudloff's objection to the prosecutor's question of Rudloff's private investigator that the girls had no motive to lie. (JT5, 874) Rudloff objected on speculation grounds. Id. Rudloff, on redirect, attempted to follow up on their motive to lie, but was not allowed to as the prosecutor had objected on hearsay grounds, which the trial court sustained. (JT5, 875)

During the trial, Rudloff objected to questions posed by the State during its direct examination of Hillary Rudloff as follows:

Prosecutor:	And then you testified November 19th of 2021?
Hillary Rudloff:	Yes.
Prosecutor:	Remember you said, "I believe my children and I believe my husband"?
Hillary Rudloff:	Yep.

Prosecutor: You said, "I love my husband."

Hillary Rudloff: That's true.

Prosecutor: Would you agree that's not possible in a situation like this?

Hillary Rudloff: I agree with that now, absolutely, 100 percent.

Prosecutor: Because --

Hillary Rudloff: Because of everything.

Prosecutor: -- if he didn't sexually assault them, then they made up a story?

Hillary Rudloff: Right. Exactly. But they didn't make up a story.

Prosecutor: Okay. And if they didn't make up a story, that means your husband's guilty?

Hillary Rudloff: Right. (JT3, 497-498)

Rudloff objected to this questioning on the ground that it invaded the province of the jury, but the trial court overruled that objection and told the jury that "You'll be instructed as to the law, which will be provided to you, but the facts are up to you to decide." Id.

Rudloff also called Hillary Rudloff to testify during the defense case. On cross-examination by the prosecutor, Hillary Rudloff testified about how she felt differently and stated the following:

> I received the documentation from Oregon stating everything that Lyrik and Lillie have said, and I never seen that before, and everything that they've said, right down to the penny, their story has not changed. When we went to Oregon and they sat with the lawyer and Detective Anderson, and I sat down and talked with him as well, they -- it just clicked in my head that everything they have been telling me this whole time is the truth.

(JT5, 1002) Rudloff did not object. The prosecutor followed up her narrative with the following questions:

Prosecutor:	So how does that make you feel – and please use the microphone – when you haven't been supportive?
Hillary Rudloff:	It makes me feel like a terrible parent, a terrible mom. I have terrible guilt because I didn't protect them and didn't believe in them at the time.
Prosecutor:	You believe everything they say now?
Hillary Rudloff:	Absolutely. Id.

Rudloff did not object to these questions.

During closing argument, the prosecutor made the following comments:

- "When you deliberate, search for the truth, not for doubt." Rudloff objected that the prosecutor was burden shifting and the court overruled his objection. (JT6, 1050)

- "It's no wonder she has nightmares and she's depressed." Rudloff objected indicating the prosecutor was seeking sympathy, but the court overruled his objection. (JT6, 1060)

- "That you'll render justice for L.H. and that you'll render justice for the defendant in this case, and guilty verdict on behalf of L.H." Id.

Rudloff objected as to burden shifting and the trial court sustained the objection, but allowed the follow-up comment of the prosecutor:

- "A guilty verdict is not going to erase what's happened here. It's not going to make everything perfect for everybody who's been impacted by the actions of this

Defendant in this court, but a verdict will substitute justice for injustice that have been suffered."

Rudloff objected on burden shifting grounds, but was overruled. Id. The following comments were made:

- "She's suffered abandonment, insensitivity from the mother who gave her birth, but she's been empowered to come here and stand up, face the person who sexually abused her as a child, and so your verdict can validate her courage . . ." Id. at 1060-1061.

Rudloff did not object to this comment.

The jury returned guilty verdicts as to Counts 1-3. (SR, 1225) On July 22, 2022, the trial court sentenced Rudloff to be imprisoned in the South Dakota State Penitentiary for thirty (30) years on each count to run consecutively to each other. (SR, 3169) Rudloff timely filed his Notice of Appeal on July 27, 2022. (SR, 3177)

ARGUMENT

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING EVIDENTIARY RULINGS?

A. Standard of Review

The standard of review on evidentiary rulings "requires a two-step process: first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was a prejudicial error that in all probability affected the jury's conclusion.'" (quoting *State v. Thoman*, 2021 S.D. 10, ¶ 41, 955 N.W.2d 759, 772 and *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, ¶ 27, 946 N.W.2d 1, 8). "Prejudicial error is when 'in all probability [the error] produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'" (quoting

State v. Hankins, 2022 S.D. 67, ¶ 21; 982 N.W.2d 21, 27 and *State v. Reeves*, 2021 S.D. 64, ¶ 11, 967 N.W.2d 144, 147).

Additionally, when counsel fails to object at trial this Court's review "is limited to whether the trial court committed plain error." (quoting *State v. Wilson*, 2020 S.D. 41, ¶ 17, 947 N.W.2d 131, 136 and *State v. Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d 56, 69) "Plain error merits reversal only when there is an '(1) error, (2) that is plain, (3) affecting substantial rights; and only then may we exercise our discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" (quoting *Wilson* at ¶ 17, 947 N.W.2d 136 and *State v. Nelson*, 1998 S.D. 124, ¶ 8, 587 N.W.2d 439, 443).

B. Argument

Detective Anderson testimony

The trial court allowed Detective Anderson to testify about what L.R. had said to the forensic interviewer in Oregon. (JT4, 705) The trial court determined that a "synopsis" was not hearsay. Id. While L.R. testified at trial, the forensic interviewer did not.

"This Court has long held that the credibility of a witness — whether a witness is telling the truth — is a question for the jury." *State v. Larson*, 512 N.W.2d 732, 742 (S.D. 1994) (citing *State v. Wooley*, 461 N.W.2d 117 (S.D. 1990)). This Court has warned trial courts about allowing law enforcement to comment on the credibility of the alleged victim. See *State v. Midgett*, 2004 SD 57, 680 N.W.2d 288. Federal Rule of Evidence 801(d)(1)(B)) "allows the admission of out-of-court statements as nonhearsay, if the statements are consistent with the declarant's in-court statements and are offered to rebut

an express or implied charge of recent fabrication or improper motive." (quoting *State v. Thompson*, 379 N.W.2d 295, 296 (SD 1985). Prior to allowing these types of statements the trial court must consider a number of factors:

> Before a prior consistent statement will qualify as nonhearsay under the rule, the proponent must demonstrate three things. First, [the proponent] must show the prior consistent statement is consistent with the [witness's] in-court testimony. Second, [the proponent] must establish that the statement is being used to rebut an express or implied charge against the witness of recent fabrication or improper motive or influence. Finally, the proponent must demonstrate that the prior consistent statement was made prior to the time the supposed motive to falsify arose."
>
> *Id.* (citing *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978)).

The proponent of this statement, the State, did not demonstrate or satisfy these three prongs. Additionally, the trial court did not consider this test prior to ruling on this objection. By allowing this testimony, the trial court allowed Detective Anderson to improperly vouch for the credibility of L.R. "When a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion." (quoting *State v. Guthrie*, 2001 SD 61, ¶30, 627 N.W.2d 401, 415 citing *Koon v. United States*, 518 U.S. 81, 100, 116, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392 (1996)).

The trial court clearly abused its discretion in allowing Detective Anderson to testify about the details of what L.R. told the forensic interviewer thereby satisfying the first prong of the analysis. The second prong of prejudice is also established because the credibility of L.R. was crucial to the allegations she was making as well as those made by L.H. This improper bolstering of L.R. denied Rudloff his right to a fair trial.

The trial court also allowed Detective Anderson to testify about a conversation he had with Dr. Nicole Bishop-Perdue regarding the medical examination of L.R. and her finding that Rudloff's penis caused L.R.'s injury. (JT4, 708) Detective Anderson testified to the following: "(a)nd she said that's where his penis touched and she said it was on the inside of the vagina." Id. By allowing Dr. Bishop-Perdue's statement through Detective Anderson, the trial court again allowed Detective Anderson to vouch for the credibility of a State witness. In essence, the trial court allowed a medical diagnosis through Detective Anderson, which was not elicited through Dr. Bishop-Perdue. On the direct examination of Dr. Bishop-Perdue she testified that the notch on L.R.'s hymen was consistent with penetrating trauma. (JT3, 372) This testimony is allowed by courts. See *State v. Buchholtz*, 2013 S.D.96, 841 N.W.2d 449, *United States v. Whitted*, 11 F.3d 785 (8th Cir. 1993). Detective Anderson took it a step further when he shared Dr. Bishop-Perdue's conclusion of "that's where his penis touched and she said it was on the inside of the vagina." (JT4, 708) This was Detective Anderson way to say what Dr. Bishop-Perdue could not. This Court has discussed witnesses not being able to give a medical opinion on the ultimate issue in *State v. Buchholtz,* 2013 S.D.96, 841 N.W.2d 449. In *Buchholtz*, this Court ruled that it was reversible error under Federal Rule of Evidence 704 (SDCL § 19-15-4[5]) to admit the doctor's outright medical diagnosis of sexual abuse. *Id.* at ¶¶'s 29-30, 841 N.W.2d at 459. Detective Anderson's hearsay statement from Dr. Bishop-Perdue was akin to him giving the jury her medical diagnosis for her. This also vouched for the credibility of Dr. Bishop-Perdue, who, as an expert, already has an "aura of reliability and trustworthiness." (quoting *State v. Kvasnicka*, 2013 S.D. 25, ¶ 35, 829 N.W.2d 23, 131)

5 This rule of evidence was transferred to SDCL § 19-19-704

Hillary Rudloff's testimony

"The general rule . . . is that one witness may not testify [on the credibility of another witness] . . . because such testimony would invade the exclusive province of the jury to determine the credibility of a witness." (quoting *McCafferty v. Solem*, 449 N.W.2d 590, 592 (S.D. 1989) This Court has long held that introducing testimony to bolster the credibility of the victim denied the defendant a fair trial. See *State v. Raymond*, 540 N.W.2d 407 (S.D. 1995), (social worker's opinion on truthfulness of child's statements bolstered credibility of the child), *State v. Logue*, 372 N.W.2d 151 (S.D. 1985) (social worker not allowed to testify that child obtained knowledge of sexual matters from defendant) *State v. Jenkins*, 260 N.W.2d 509 (S.D. 1977) (psychologist not allowed to testify about whether defendant was truthful in his claim that a killing had been forced)

The trial court allowed Hillary Rudloff to not only vouch for the credibility of her daughters on multiple occasions, but also to comment on Rudloff's guilt. (JT3, 497-498, JT5, 1002) Both of these comments clearly invade the province of the jury. The first comments during the direct examination of Hillary Rudloff were properly objected to as Rudloff argued the comments on the daughter's truthfulness and defendant's guilt invaded the province of the jury. (JT3, 498) Rudloff's objections to each were proper and the trial court overruled them. After overruling Rudloff's objection, the trial court did make the following comment to the jury: "You'll be instructed as to the law, which will be provided to you, but the facts are up to you to decide." (JT5, 498) The trial court's comment was an incorrect statement of the law as these comments by Hillary Rudloff clearly invade the exclusive province of the jury to determine witness credibility. If anything, this comment by the trial court bolstered the testimony that had just been given.

The comments on the daughter's truthfulness during cross examination by the State were not objected to by Rudloff and are subject to plain error review. (JT5, 1002) Hillary Rudloff testified that "everything they have been telling me this whole time is the truth." (JT5, 1002) After that comment, the prosecutor had the following exchange:

Prosecutor: You believe everything they say now.

Hillary Rudloff: Absolutely.

This was followed up, again without objection, how about how Hillary Rudloff felt guilty and that she was a terrible mom for not believe her daughters. Id. This question and answer was clearly done to seek sympathy and to bolster the credibility of each of the girls.

The first two prongs of plain error review are met as Hillary Rudloff's comments on the credibility of her daughters was clearly error and it was set forth plainly in the record. It also affects Rudloff's substantial right by invading the province of the jury to determine credibility and lastly it affected his due process right to a fair trial.

Private Investigator

The trial court also overruled Rudloff's objection to the prosecutor's question of Rudloff's private investigator that the girls had no motive to lie. (JT5, 874) Rudloff objected on speculation grounds. Id. Rudloff, on redirect, attempted to follow up on the grils' motive to lie, but he was not allowed to as the prosecutor objected on hearsay grounds. (JT5, 875) Applying the two-step process, the trial court abused its discretion in allowing the prosecutor to ask a question about their motive to lie, but compounded it by not allowing Rudloff to answer the motive question when the prosecutor had clearly opened the door. This error was prejudicial error as it denied Rudloff the opportunity to

present a defense on why these girls may have been motivated to fabricate their testimony.

The State's witnesses should not have been allowed to bolster the credibility of the State's witnesses and victims. The questions were improper, and the answers invaded the province of the jury. On this issue alone, Rudloff was denied his right to a fair trial.

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS?

A. Standard of Review

"[W]e review *de novo* a [circuit] court's ruling on the question whether a defendant knowingly, intelligently, and voluntarily waived *Miranda* rights." (quoting *State v. Two Hearts*, 2019 S.D. 17, ¶ 21, 925 N.W.2d 503, 512 and *State v. Tuttle*, 2002 S.D. 94, ¶ 6, 650 N.W.2d 20, 25)

B. Argument

Rudloff asserts the trial court erred in determining that his request for an attorney was equivocal and that he validly waived his right to remain silent. The trial court determined that Rudloff was properly advised of his Miranda rights, that his comments regarding an attorney were equivocal and that his statements were voluntarily given. (MH, March 23, 2022, 51-53)

"In a custodial interrogation, the government must prove that the accused knowingly and intelligently waived the right to counsel and the privilege against self-incrimination." (quoting *State v. Blackburn*, 2009 SD 37, ¶ 9, 766 N.W.2d 177, 181 citing *Miranda v. Arizona*, 384 US 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). When determining whether a valid waiver occurred, the court is to look at the totality of

the circumstances and is to consider the factors of "a defendant's age, experience, intelligence, and background, including familiarity with the criminal justice system, as well as physical and mental condition." (quoting *State v. Lewandowski*, 2019 S.D. 2, ¶ 21, 921 N.W.2d 915, 921). The waiver may be inferred from a "defendant's understanding of the rights coupled with 'a course of conduct reflecting a desire to give up those rights.'" (quoting *State v. Two Hearts*, 2019 S.D. 17, ¶ 22, 925 N.W.2d 503, 512 and *State v. Diaz*, 2014 S.D. 27, ¶ 47, 847 N.W.2d 144, 160. Additionally, the State must show that "(1) the relinquishment of the defendant's rights was voluntary and (2) the defendant was fully aware that those rights were being waived and of the consequences of waiving them." (quoting *State v. Tuttle*, 2002 S.D. 94, ¶ 9, 650 N.W.2d 20, 26) "The State must prove the validity of the waiver by a preponderance of the evidence." (quoting *Two Hearts*, ¶ 21, 925 N.W.2d at 512) Lastly, if the request for an attorney is "ambiguous or equivocal at the time Miranda rights are given, the officers must clarify the request and/or waiver before proceeding. (quoting *Blackburn* at ¶ 9, 766 N.W.2d at 181) (citations omitted)

It is clear in reviewing Rudloff's interviews with Detective Anderson that there was no clarification with Rudloff on whether he had waived his rights and agreed to speak to him. Rudloff had made comments in his first interview about getting an attorney, but law enforcement did not clarify during his custodial interview whether he waived his rights. Detective Anderson confirmed this on cross-examination when the following exchange occurred:

Counsel:	Okay. Did you ever receive a verbal confirmation that he was waiving his rights? Did he say, "I waive my rights to an attorney. I would like to speak with you"?

Det. Anderson: I don't believe he did. (MH, March 23, 2022, 40)

The trial court agreed that the "invocation of the right to counsel if it's ambiguous, must be clarified before . . .should be clarified before proceeding . . ." Id. at 52. Rudloff concedes that his discussion during the first interview about wanting an attorney are ambiguous. It is clear from the transcript of the custodial interview that Detective Anderson did not follow up after Rudloff said "Some questions that I'd probably won't want a lawyer with but . . ." (MH, March 23, 2022, Exhibit 2, p. 3) Detective Anderson had the opportunity at this point to ask him if he waived and agreed to speak with him, but his answer was "that's alright". Id. In *Blackburn*, this Court reviewed the trial court's determination of whether his statement requesting an attorney was ambiguous and determined that the trial court was correct in finding and that Blackburn's statement was in need of clarification before continuing with the questioning. *Blackburn* at ¶ 16, 766 N.W.2d at 184

The questioning in *Blackburn* is similar to the questioning of Rudloff in this case. Rudloff, like *Blackburn*, expressed both a desire to have an attorney and to get information from Detective Anderson. Like *Blackburn*, the officer had a duty to clarify Rudloff's comments to determine if he wanted an attorney.

Once Rudloff made it clear that he wanted an attorney, the discussion should have stopped. Detective Anderson concedes in the transcript of his interview with Rudloff that he had invoked, but the discussion continued for another 25 pages of transcript. (MH, March 23, 2022, Exhibit 2, p. 18)

For the reasons set forth above the trial court erred in not granting the Motion to Suppress.

III. WHETHER THE TRIAL COURT ERRED BY DISALLOWING OTHER ACTS EVIDENCE OF THE COMPLAINING WITNESSES MOTHER?

A. Standard of Review

"A trial court's determination to admit other acts evidence will not be overruled absent an abuse of discretion." (quoting *State v. Eagle*, 2013 S.D. 60, ¶16, 835N.W.2d 886, 892 and *State v. Anderson*, 2000 S.D. 45, ¶ 93, 608 N.W.2d 644, 670).

B. Argument

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) and *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). "[D]ue process is in essence the right of a fair opportunity to defend against the accusations. State evidentiary rules may not be applied mechanistically to defeat the ends of justice." (quoting *State v. Luna*, 378 N.W.2d 229, 233 (SD 1985) (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)) An accused must "be afforded a meaningful opportunity to present a complete defense." *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988) (citation omitted); see also *State v. Mixon,* 27 Kan. App. 2d 49, 998 P.2d 519, 523 (Kan.Ct.App 2000)

It is paramount in any he said/she said case for the defense to explain the alleged victim's motive to lie. Rudloff was not allowed to present his defense that mother put the daughters up to making these false allegations. As such, the trial court precluded Rudloff

from presenting a complete defense. Rudloff had wanted to run the defense that mother had experience in making false rape allegations and that she used that experience to educate her daughters on what to say for the allegations in this case. (MH, March 23, 2022, 73) "When a defendant's theory 'is supported by law and . . . has some foundation in the evidence, however, tenuous[,]' the defendant has a right to present it." (quoting *State v. Packed*, 2007 S.D. 75, ¶25, 736 N.W.2d 851, 860 and *United States v. Grimes,* 413 F2d 1376, 1378 (7th Cir. 1969)

The trial court determined the other act of Hillary Rudloff's rape allegation was too old (22 years old), that it was not relevant and that the prejudicial effect of Hillary's lies being used against her daughters was a factor. (MH, March 23, 2022, 71-72) The trial court's focus was primarily on SDCL § 19-19-609(b), which discusses impeachment by evidence of a criminal conviction and has a general limitation of 10 years. The exception is that the court is to weigh the probative value of admitting the evidence versus the prejudicial effect. In this case, the prejudicial effect was minimal because this witness was not the accuser. Additionally, the trial court questioned Hillary Rudloff's credibility when it said "(s)he's not a credible witness in my opinion either way", which should have weighed in favor of allowing this testimony. (MH, March 23, 2022, 73) The trial court's focus was on SDCL § 19-19-609, but not another act under SDCL § 19-19-404. Rudloff argued that she was offering the other act to prove "motive, and opportunity and planning and knowledge." (MH, March 23, 2022, 71)

As this Court held in *Packed*, "Evidence tending to establish a motive of [minor child] to fabricate the allegations against defendant was certainly relevant and probative, as it casts doubt on the State's evidence that defendant committed the crimes." *Packed* at

¶26, 736 N.W.2d at 860. The other acts evidence was sought to establish motive of why L.H. and L.R. would fabricate the allegations against Rudloff. Like *Packed*, this evidence was relevant and probative. The trial court abused its discretion in not allowing Rudloff to use the other act to establish that Hillary Rudloff was influencing the girls to fabricate these allegations. The other act evidence sought to be introduced is very similar to the allegations in this case. Rudloff should have been allowed to present his complete defense. This abuse of discretion prejudiced Rudloff to the extent that he was not able to present his theory of the case.

IV. WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING DIRECT EXAMINATION AND DURING CLOSING ARGUMENT?

A. Standard of Review

We review prosecutorial misconduct claims for an abuse of discretion. *State v. Stanley*, 2017 S.D. 32, ¶ 32, 896 N.W.2d 669, 680 (citing *State v. Bariteau*, 2016 S.D. 57, ¶ 23, 884 N.W.2d 169, 177). When counsel fails to object at trial this Court's review "is limited to whether the trial court committed plain error." (quoting *State v. Wilson*, 2020 S.D. 41, ¶ 17, 947 N.W.2d 131, 136 and *State v. Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d 56, 69) "Plain error merits reversal only when there is an '(1) error, (2) that is plain, (3) affecting substantial rights; and only then may we exercise our discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" (quoting *Wilson* at ¶ 17, 947 N.W.2d 136 and *State v. Nelson*, 1998 S.D. 124, ¶ 8, 587 N.W.2d 439, 443).

B. Argument

Rudloff asserts the prosecutor in the case at bar committed misconduct during the direct and cross examination of Hillary Rudloff and the initial portion of his closing argument, denying Rudloff the right to a fair trial. Rudloff further asserts the trial court's failure to give any curative measures was insufficient and erroneous, entitling him to a new trial.

This Court recently discussed the issue of prosecutorial misconduct in *State v. Hankins*[6], 2022 S.D. 67, 982 N.W.2d 21 and in *State v. McMillen*, 2019 S.D. 40, 931 N.W.2d 725. "We have held prosecutorial misconduct to be a 'dishonest act or an attempt to persuade the jury by the use of deception or by reprehensible methods.'" (quoting *McMillen* at ¶ 27, 931 N.W.2d at 733, *State v. Janis*, 2016 S.D. 43, ¶ 22, 880 N.W.2d 76, 82) and *State v. Hayes*, 2014 S.D. 72, ¶ 23, 855 N.W.2d at 675). "[N]o hard and fast rules exist which state with certainty when prosecutorial misconduct reaches a level of prejudicial error which demands reversal of the conviction and a new trial; each case must be decided on its own facts." *Id.* (quoting *State v. Stetter*, 513 N.W.2d 87, 90 (S.D. 1994) and *State v. Kidd*, 286 N.W.2d 120, 121-22 (S.D. 1979)). "'A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone,' but, if the prosecutor's conduct affects the fairness of the trial when viewed in context of the entire proceeding, reversal can be warranted.'" *Id.* (quoting *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1 (1985)).

This case is similar to *State v. Smith,* 1999 S.D 83, ¶38, 599 N.W.2d 344, where this Court examined whether the prosecutor committed misconduct in closing arguments.

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6 The prosecutor in *State v. Hankins , 2022 S.D. 67, 982 N.W.2d 21* and *State v. Smith,* 1999 S.D 83, 599

In that case, *Smith* claimed that in closing arguments the prosecutor deliberately inflamed the passions of the jurors. *Id.* at ¶40. After counsel for the defendant repeatedly objected to the prosecutor's inflammatory statements, the trial court sustained the objections and instructed the jury to disregard the prosecutor's comments. *Id.*

On review, this Court stated, "It is well established ... that the prosecutor and the defense have considerable latitude in closing arguments, for neither is required to make a colorless argument." *Id.* at ¶41. (quoting *State v. Smith*, 541 N.W.2d 584, 589 (Minn 1996). "Counsel has a right to discuss the evidence and inferences and deductions generated from the evidence presented". (quoting *State v. Reynolds*, 816 P.2d 1002, 1006 (Idaho App. 1991). "However, our cases have held fast to the idea that '[t]he prosecutor has an overriding obligation, which is shared with the court, to see that the defendant receives a fair trial.'" *Id.* (quoting *State v. Blaine*, 427 N.W.2d 113, 115 (S.D. 1988) citing *State v. Brandenburg*, 344 N.W.2d 702 (S.D. 1984)). A prosecutor may affect the fairness of a trial if he or she vouches for the credibility of witnesses or seeks a guilty verdict based on sympathy for the victim. See *Hanson v. Sherrod*, 797 F.3d 810, 841 (10th Cir. 2015) ("We do not condone prosecutorial remarks encouraging the jury to allow sympathy to influence its decision.") Id. (quoting *Wilson v. Simmons*, 536 F.3d 1064, 1120 (10th Cir. 2008) "A prosecutor cannot "inject[ ] 'unfounded or prejudicial innuendo into the proceedings . . . [or appeal] to the prejudices of the jury.'" (quoting *Hankins* at ¶ 37, 982 N.W.2d at 34, *Smith*, 1999 S.D. 83, ¶ 46, 599 N.W.2d at 354 and *State v. Blaine*, 427 N.W.2d 113, 115 (S.D. 1988)).

N.W.2d 344 was the prosecutor in this case.

In South Dakota, "we approach prosecutorial misconduct using a two-prong analysis." *Id.* at ¶43. First, we must determine that the misconduct occurred." *Id.* (quoting *State v. Hofman*, 1997 S.D. 51, ¶13, 562 N.W.2d at 902 (citing *State v. Robbins*, 1996 S.D. 84, ¶6, 550 N.W.2d at 425). "If misconduct did occur, we will reverse the conviction only if the misconduct has prejudiced the party as to deny him or her a fair trial." *Id.* The Court in *Smith* found "The prosecutor may cross the line when he or she injects "unfounded or prejudicial innuendo into the proceedings ... [or appeals] to the prejudices of the jury." *Id.* at ¶46. (quoting *Blaine*, 427 N.W.2d at 115 (citation omitted).

As set forth in the facts above, the prosecutor elicited questions from Hillary Rudloff that vouched for the credibility of her daughters and commented on the guilt of the defendant. (JT3, 497-498, JT5, 1002) "It is the function of the jury to resolve evidentiary conflicts, **determine the credibility of witnesses**, and weigh the evidence." (quoting *State v. Packed*, 2007 S.D. 75, ¶ 34, 736 N.W.2d 851, 862 (emphasis added)) Additional misconduct occurred when the prosecutor asked Detective Anderson about what L.R. had told the forensic interviewer. (JT4, 706) Further misconduct ensued when Detective Anderson was asked about a conversation he had with Dr. Nicole Bishop-Perdue regarding the medical examination of L.R. and Dr. Bishop-Perdue's finding that Rudloff's penis caused L.R.'s injury. (JT4, 708) Applying the two prong test, it is clear that the prosecutor committed misconduct in asking these questions, but the trial court's failure to sustain these objections opened the door for the State to allow these additional witnesses to vouch for the credibility of L.R. This gross misconduct by the State prejudiced Rudloff significantly and prevented him from receiving a fair trial.

"Closing arguments are not evidence." *Smith* at ¶48. "The argument should be no more than an accurate summary of the state of the evidence." *Id.* (quoting *State v. Nachtigall*, 296 N.W.2d 530, 531-2 (S.D. 1980) (citing *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). "Juries are presumed to follow the trial court's instruction that the attorneys' final arguments do not constitute evidence. However, unfair closing arguments invite a jury decision by emotion rather than by evidence. This improper type of argument cuts to the heart of juror independence." *Id.*

The Court in *Smith* found "The prosecutor's penchant for making statements meant to inflame the passion of the jury and go outside the realm of admissible evidence, is an example of the unprofessional, "win-at-all costs" attitude that scars the judicial system." *Smith* at 49. Although the prosecutor "may prosecute with earnestness and vigor. ... [and] he may strike hard blows; he is not at liberty to strike foul ones." *Id.* (quoting *Blaine*, 427 N.W.2d at 116 (citing *Viereck v. United States*, 318 U.S. 236, 248, 63 S.Ct. 561, 566-67, 87 L.Ed. 734, 741 (1943)). The court found that calling *Smith* a "monster" or a "pervert" was a foul blow, abhorrent and misconduct. *Id.*

During the prosecutor's closing argument, he made numerous comments set forth in the facts above that attempted to garner sympathy from the jury. Specifically, he commented on L.H.'s nightmares and depression, that the jury needed to render her justice, that a guilty verdict would validate her courage and that she suffered abandonment from the mother who gave her birth. (JT6, 1050-1060)

Rudloff objected to the statements in closing as hearsay, and the trial court sustained one objection when the State asked for a guilty verdict on behalf of L.H. (JT6, 1060) Unfortunately, the trial court allowed the State to make the same comment in

another way when the prosecutor said: "a verdict will substitute justice for injustices that have been suffered . . ." Id.

Applying the two-prong test in the present case, misconduct clearly occurred. The prosecutor's statements played on the sympathy of the jury and asked the jury to feel sympathy for the L.H. These statements served only to inflame the passions of the jury, and invited the jury to make a decision based on an emotional plea from the prosecutor, rather than on the evidence. See *Smith* at ¶48. Unlike *Smith*, Rudloff's counsel had not yet had the opportunity to give argument to the jury.

The next prong of the test is whether the misconduct is prejudicial. *Smith* at 52. "[P]rosecutorial misconduct reaches the level of a federal constitutional violation only if the argument "so infect[s] the trial with unfairness as to make the resulting convictions a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In *Smith,* the Court found no prejudicial error, reasoning that "In all probability it is very unlikely the prosecutor's inflammatory statements altered the jury's verdict." *Id.* at 53. "This is particularly true when considering the overwhelming evidence that *Smith* committed the crimes of which he was charged." *Id.*

The case at hand differs greatly in this regard. Unlike *Smith*, the prosecutorial misconduct in the case at bar was sufficiently prejudicial to affect the overall fairness of Rudloff's trial. First, the evidence was not overwhelming; it was circumstantial at best as the main evidence was the testimony of L.H. and L.R. The prosecutor clearly made his comments to further his likelihood of winning. Second, the trial court failed to "curtail any improper inference the jury may have taken" from the prosecutor's rebuttal argument. See *Smith* at ¶40 (finding "the trial court sustained the objections and

instructed the jury to disregard the prosecutor's comments."); see also *Stanley* at ¶31 (finding that in addition to sustaining the objection, the trial court "interrupted the State's argument, and when closing arguments ended, advised the jury to reread the jury instruction on comments made by the attorneys.) See also *State v. Lee*, 599 N.W.2d 630 (stating "we agree with the trial court and find that the court's admonitions prevented the jury from taking any improper inference from the prosecutor's comments"). Although the trial court here sustained one of Rudloff's objections, the court overruled the other comments he made to the jury. No curative comments were made by the trial court to mitigate the prejudicial effect of the prosecutor's statements.

The prosecutor's statements regarding the alleged victim's courage, the fact that she's depressed and having nightmares, and to render justice for L.H. are not harmless, and constitute a significant error. Given the scant amount of direct physical evidence against Rudloff, the sympathy likely invoked in the jury, and the failure of the trial court to make any curative statements regarding the misconduct, the cumulative effects of the prosecutor's misconduct prejudiced Rudloff and denied him the right to a fair trial.

The prosecutor made these statements calculated to inflame, prejudice, and mislead the jury during closing argument by impermissibly attempting to appeal to the jury's sympathy and passions for L.H. The effect of these improper comments was magnified when the proof in this case was limited to the testimony of the sisters. The prosecutorial misconduct in this case was both severe and pervasive denying Rudloff the right to a fair trial.

V. WHETHER THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED RUDLOFF OF A FAIR TRIAL?

The cumulative effects of the trial court's errors and their resulting prejudice affected the fairness of Rudloff's trial. This Court has previously held that "the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." *State v. Davi*, 504 N.W.2d 844, 857 (SD 1993) (quoting *McDowell v. Solem*, 447 NW2d 646 (S.D. 1989)). See also *State v. Dokken*, 385 N.W.2d 493 (S.D. 1986); *State v. Bennis*, 457 N.W.2d 843 (S.D. 1990)). "The question we must decide is whether, on a review of the entire record, [the defendant] was provided a fair trial." Id. "As we have said numerous times, the defendant is not entitled to a perfect trial but rather a fair one." Id. (quoting *State v. Smith*, 477 N.W.2d 27, 35 (S.D. 1991)).

This Court has also recognized that "a 'snowball effect' of the errors at trial may deprive a defendant of a fair trial."' *Jenner v. Leapley*, 521 N.W.2d 422, 432 (SD 1994). The cumulative effects of the errors which occurred during Rudloff's trial denied him the right to a fair trial. See *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn.App. 1984) (reversing Jahnke's conviction and remanding for a new trial based on prosecutorial misconduct). As Justice Sabers stated in his dissent in *State v. Frazier*, 2001 SD 10, ¶ 65, 262 N.W.2d 246, 264, "Viewing the errors at Frazier's trial in isolation may lead some to conclude that they were not sufficiently prejudicial, yet that is not the consideration. "Our system of criminal justice is founded on the twin cornerstones of fairness and proof beyond a reasonable doubt."" Id. at ¶ 65.

Significant errors stand out in this case. The denial of the Motion to Suppress despite a Miranda violation, the errors in allowing improper vouching of witnesses, commenting on the guilt of defendant, denying Rudloff's ability to put forth a complete defense, and the prosecutorial misconduct during the examination of witnesses and in closing argument all support reversal in this matter. The combination of these significant errors, when considered together as a whole, undermined Rudloff's constitutional right to a fair trial.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Rudloff respectfully submits that his convictions must be reversed, and the case should be remanded for new trial.

Respectfully submitted this 16th day of March, 2023.

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APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA	)	CRI 20-341
Plaintiff,	)	
VS.	)	**JUDGMENT OF CONVICTION**
	)	
SCOTT MARTIN RUDLOFF,	)	
Defendant.	)	

An Indictment was filed with this Court on the 15th day of April, 2020 charging the Defendant with the crime of Count I through III: Rape First Degree (SDCL 22-22-1(1) and 22-22-1.2(1)) and a Part II Information was filed with this Court on the 16th day of April, 2020.

On the 18th day of June, 2020, the Defendant, the Defendant's Attorney, Staci Reindl, and John H. Fitzgerald as prosecuting attorney appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant entered a plea of not guilty and requested a Jury Trial on the charges contained in the Indictment.

A Jury Trial commenced on the charges on the 28th, 29th, 30th, 31st day of March, 2022 and 1st day of April, 2022, in Deadwood, South Dakota. On the 1st day of April, 2022, the Jury returned a verdict of guilty to the charges of Count I through III: Rape First Degree (SDCL 22-22-1(1) and 22-22-1.2(1)).

On the 9th day of June, 2022, the Defendant, Defendant's Attorney, Erin Schoenbeck Byre, and Jeffrey Erlandson, Deputy State's Attorney attended the Hearing. The Defendant admitted to the Amended Part II Information that he had a prior conviction for Attempted Possession Of One-Half Pound But Less Than One Pound of Marijuana, Class 5 Felony, County of Aurora, State of South Dakota, First Judicial Circuit.

IT IS THEREFORE the Judgment of the Court that the Defendant is guilty of Count I through III: Rape First Degree (SDCL 22-22-1(1) and 22-22-1.2(1)).

S E N T E N C E

On the 22nd day of July, 2022, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

COUNT I: RAPE FIRST DEGREE

IT IS HEREBY ORDERED that the Defendant shall serve thirty (30) years in the South Dakota State Penitentiary. The Defendant shall receive credit for time served of 122. All fine and costs are waived.

COUNT II: RAPE FIRST DEGREE

IT IS HEREBY ORDERED that the Defendant shall serve thirty (30) years in the South Dakota State Penitentiary. The Defendant shall receive credit for time served of 122. All fine and costs are waived. This Sentence shall run consecutive to the sentence in Count I.

COUNT III: RAPE THIRD DEGREE

IT IS HEREBY ORDERED that the Defendant shall serve thirty (30) years in the South Dakota State Penitentiary. The Defendant shall receive credit for time served of 122. All fine and costs are waived. This Sentence shall run consecutive to the sentence in Count I and Count II.

IT IS FURTHER ORDERED that all bonds posted herein be exonerated.

7/22/2022 11:07:57 AM

Attest: CAROL LATUSECK,CLERK
Mund, Tonisha
Clerk/Deputy

BY THE COURT:

Michelle Comer

Hon. Michelle Comer
Circuit Court Judge

DATE OF OFFENSE: THAT ON OR ABOU AND DURING JUNE 2015 THROUGH NOVEMBER, 2015

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30074

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SCOTT MARTIN RUDLOFF,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed July 27, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30074

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SCOTT MARTIN RUDLOFF,

Defendant and Appellant.

PRELIMINARY STATEMENT

Scott Rudloff raped his stepdaughter in South Dakota and Montana. His trial strategy was to attack his stepdaughter's credibility. The jury believed his stepdaughter and found Rudloff guilty of three counts of rape. Rudloff now appeals, challenging the circuit court's evidentiary rulings and the prosecutor's actions.

In this brief the State of South Dakota is referred to as "the State." The victim and her family members are referred to by their initials to protect the victim's identity. All other individuals are referenced by name. Documents are referenced as follows:

Settled Record (Lawrence County Criminal File No. 20-341) .....SR

Evidentiary Motions Hearing (November 19, 2021).....MH1

Motions Hearing (March 23, 2022).....MH2

Jury Trial Transcripts (March 28-April 1, 2022)..... JT

Rudloff's Appellant's Brief..... AB

All document designations are followed by the appropriate page numbers. All relevant motions hearing exhibits are referred to as "HEx." followed by the appropriate identifiers.

JURISDICTIONAL STATEMENT

On July 22, 2022, the Honorable Michelle K. Comer, Lawrence County Circuit Court Judge, filed a Judgment of Conviction ordering Scott Rudloff to serve ninety years in prison. SR:3169-71. Rudloff filed his Notice of Appeal on July 27, 2022. SR:3177-80. *See* SDCL 23A-32-15. This Court has jurisdiction to hear this appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN MAKING ITS VARIOUS EVIDENTIARY RULINGS?[1]

The circuit court allowed Detective Charles Anderson to testify about what he learned during a forensic interview and medical examination. The court overruled Rudloff's objection to the victim's mother's testimony. The court prohibited Rudloff from using the mother's conviction for false reporting to impeach the victim. And the court allowed the prosecutor to ask Rudloff's private investigator about the victim's lack of motive to lie.

State v. v. Caylor, 434 N.W.2d 582 (S.D. 1989)

State v. Dickerson, 2022 S.D. 23, 973 N.W.2d 249

[1] Issues One and Three in Rudloff's brief are combined for the sake of brevity, clarity, and to comply with SDCL 15-26A-60(6).

State v. Kihega, 2017 S.D. 58, 902 N.W.2d 517

State v. Miller, 2014 S.D. 49, 851 N.W.2d 703

SDCL 15-26A-60(6)

SDCL 19-19-401

SDCL 19-19-403

SDCL 19-19-404(b)

SDCL 19-19-609

II

WHETHER THE CIRCUIT COURT PROPERLY DENIED RUDLOFF'S MOTION TO SUPPRESS HIS LAW ENFORCEMENT INTERVIEW?

The circuit court determined that Rudloff's references to an attorney were equivocal and ambiguous, and he validly waived his right to an attorney.

Berghuis v. Thompkins, 560 U.S. 370 (2010)

Davis v. United States, 512 U.S. 452 (1994)

State v. Larson, 2022 S.D. 58, 980 N.W.2d 922

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

SDCL 23A-44-14

III

WHETHER PROSECUTORIAL MISCONDUCT OCCURRED, DENYING RUDLOFF A FAIR TRIAL?

This issue is being raised for the first time on appeal.

State v. Hankins, 2022 S.D. 67, 982 N.W.2d 21

State v. Miller, 2014 S.D. 49, 851 N.W.2d 703

State v. Seidel, 2020 S.D. 73, 953 N.W.2d 301

State v. Snodgrass, 2020 S.D. 66, 951 N.W.2d 792

IV

WHETHER CUMULATIVE ERROR DENIED RUDLOFF A FAIR TRIAL?

This issue is being raised for the first time on appeal.

State v. Davi, 504 N.W.2d 844 (S.D. 1993)

STATEMENT OF THE CASE

A Lawrence County Grand Jury charged Rudloff with:

- Counts 1 through 4: First-Degree Rape in violation of SDCL 22-22-1(1), a Class C felony; and
- Count 4A: Sexual Contact with a Minor in violation of SDCL 22-22-7, a Class 3 felony.

SR:4-5. The victim in Counts 1 through 3 is L.H., Rudloff's stepdaughter. SR:4; JT:137-38. The victim in Counts 4 and 4A is L.R., Rudloff's adopted daughter. SR:5; JT:135. The State ultimately dismissed Counts 4 and 4A.[2] SR:318. An Amended Part II Information eventually followed, alleging Rudloff was convicted of attempted possession of marijuana. SR:1279.

[2] The circuit court allowed the State to present evidence of the abuses L.H. and L.R. suffered outside of Lawrence County as Rule 404(b) evidence to show Rudloff's "plan, intent[,] and scheme to achieve sexual gratification with non-consenting young female family members." SR:499. It also determined the Rule 404(b) evidence would "allow the jury to realistically evaluate the charged event[s] in light of the entire history of alleged sexual abuse committed against L.H." SR:500.

Rudloff moved to suppress his interview with law enforcement. SR:637-38. He claimed it violated his Fifth and Sixth Amendment rights. SR:637. The circuit court held a hearing on that motion, receiving testimony from Detective Charles Anderson and video and audio recordings, as well as transcripts of Rudloff's contact with officers. MH2:3-54; HEx.1 and 2.

The court denied the motion to suppress. MH2:51-54; SR:948. It determined that Rudloff's references to an attorney were ambiguous and equivocal. MH2:51-53. The court also determined the statements were voluntary because Rudloff did most of the talking and regularly interrupted Detective Anderson. MH2:53. Likewise, the court determined his statements were voluntary because Rudloff was a forty-one-year-old man that was educated and of average intelligence, and he was not sleep-deprived or under the influence of drugs or alcohol. MH2:52-53. Nor was he made any promises or pressured into speaking with Detective Anderson. MH2:53-54.

Rudloff also moved to introduce potential Rule 404(b) and Rule 609 evidence against H.R., his then-wife and the girls' mother. SR:621-27. Rudloff wanted to introduce evidence that H.R. was convicted of falsely reporting sexual abuse and kidnapping in the late 1990s. SR:623. Rudloff's proposed purpose for using that evidence was to use H.R.'s conviction to attack L.H.'s credibility because he believed H.R. coached L.H. in making her allegations. MH2:71-72.

The circuit court determined that H.R.'s conviction was too remote to be used because it was almost twenty-three years old. MH2:71. It determined that using H.R.'s past lies to attack L.H.'s credibility would be unduly prejudicial. MH2:72. Likewise, that evidence would confuse the jury "as to who's on trial . . . ." MH2:73. And it rejected any claimed use to show H.R. coached her daughters because she testified at prior hearings that she didn't believe the allegations against Rudloff and had kept supportive family members away from L.R. because of that disbelief. MH2:73.

After a five-day trial, the jury found Rudloff guilty of the three counts of rape. JT:1074. Rudloff also admitted the allegations in the State's Amended Part II Information. SR:3170.

The circuit court sentenced Rudloff to thirty years in prison on each conviction, with credit for 122 days served in jail. SR:3170-71. It ordered Rudloff to serve those sentences consecutively. *Id.*

STATEMENT OF FACTS

Rudloff came into L.H.'s life when she was five years old. JT:138. Rudloff started sexually abusing L.H. that same year when the family lived in Huron. JT:143. The abuse continued when the family moved to Spearfish and Billings, Montana. *See* Section A, *infra.* L.H. did not disclose Rudloff's abuse until the family had moved to Beaverton, Oregon. JT:165-66.

A. L.H. discloses Rudloff's sexual abuse.

Rudloff, his then-wife H.R., and her three children: L.V., L.H., and L.R., moved to Beaverton, Oregon in 2017. JT:134, 691-92. On November 11, 2019, sixteen-year-old L.H. revealed that she and twelve-year-old L.R. were sexually abused by Rudloff when the family lived in Huron, Spearfish, Billings, and Beaverton. JT:165-66.

L.H. testified that Rudloff's abuse in Huron started with him drawing stick figures in sexual poses. JT:143-44. It progressed to Rudloff touching L.H.'s "boobs" and vagina with his hands. JT:144. By the time L.H. was in fifth grade, Rudloff started penetrating her vagina with his penis. JT:145-46. L.H. was always worried that she was pregnant after watching a video in health class about pregnancy. JT:145.

L.R. testified that Rudloff sexually abused her in Huron, too. JT:401. It started when she was four or five and Rudloff used his penis and fingers to touch her vagina. JT:401-02. But the most common abuse was using his fingers to penetrate her vagina. JT:409. L.R. said that she also used her hands to touch Rudloff's penis. JT:408. And Rudloff would show her pornography on his phone. JT:408-09. L.R. also had concerns about getting pregnant because of the abuse. JT:417.

L.H. said that Rudloff's sexual abuse in Huron happened weekly. JT:144. The family moved to Spearfish in May or June 2015, a month or two before L.H. turned twelve. JT:140

After the family moved to Spearfish, Rudloff's sexual abuse picked up where it left off. JT:146-47. He showed L.H. pornography on his phone of adults role playing as a young girl and an older parent. JT:147. Rudloff touched L.H.'s "boobs" with his hands and mouth. JT:147. Rudloff also touched L.H.'s vagina with his hands and fingers. JT:147. And Rudloff made L.H. masturbate him while he played pornography on his phone. JT:153-54.

Rudloff penetrated L.H.'s vagina using his fingers and his penis. JT:148. L.H. had her first period right after the family moved to Spearfish, so Rudloff started using condoms; but he didn't use them every time. JT:149. Rudloff also performed oral sex on L.H. and tried to get her to perform oral sex on him by putting his penis in her mouth. JT:151-52.

L.H. tried to fight off Rudloff by kicking him and punching him. But she was so much smaller than Rudloff and "it seemed kind of like if I resisted, he liked it more." JT:154. Eventually, L.H. stopped resisting because it didn't stop the abuse anyway. JT:155.

These abuses happened "every weekend or every time that [Rudloff] was free, so when mom wasn't around, when we were

sleeping, stuff like that." JT:154. The abuse in Spearfish happened until the family moved to Billings, Montana in late 2015. JT:157.

In Billings, Rudloff continued to penetrate L.H.'s vagina with his penis, sometimes using a condom. JT:158-59. While living in Billings, L.H. found out that Rudloff was also abusing L.R. when they lived there. JT:159-60. One morning, L.H. went to see if L.R. was ready to go to school. JT:159-60. When L.H. opened the bathroom door, she saw a naked L.R. on top of Rudloff and "he was rubbing his dick on her vagina." JT:160.

Rudloff followed L.H. to school and told her she didn't know what she saw. JT:161. L.H. threatened Rudloff, telling him if he abused L.R. again, she would call the police and tell H.R. what had happened. JT:161. After this confrontation, Rudloff stopped abusing L.H.; but he kept abusing L.R. JT:161.

Rudloff's abuse of L.R. in Oregon followed the same pattern it did in Huron. JT:413. He touched and penetrated L.R.'s vagina with his fingers. JT:414. He penetrated her vagina with his penis. JT:414. And he showed her pornography on his phone before and while abusing her. JT:414. Rudloff also tried to put his penis in her mouth. JT:415.

On November 9, 2019, L.H. saw Rudloff standing in L.R.'s room. JT:162-63. He was masturbating over L.R., who had a comforter

pulled over her head. JT:163. After seeing this, L.H. carried through on her promise in Montana to tell H.R. about the abuse. JT:164-65.

B. L.H. and L.R. delay disclosing the abuse.

L.H. and L.R. delayed disclosing the abuses they suffered because they both thought no one would believe them. JT:416. L.R. thought H.R. wouldn't believe her or she would take Rudloff's side. JT:415-16, 419.

The girls also didn't realize what was happening was wrong until their fifth-grade health classes. JT:145-46, 417. And they testified that Rudloff told them if they told, no one would believe them and it would breakup their family. JT:415.

Tifani Petro testified as an expert on child sexual abuse and confirmed that L.H. and L.R.'s delayed disclosures track children who have suffered prolonged sexual abuse. JT:809-17. Petro testified that children often delay disclosing abuse out of fear that they will not be believed and fear of the consequences their disclosures will have on their family. JT:815, 823-26.

C. Rudloff's initial contact with law enforcement.

When Rudloff's abuse surfaced, L.H. told her brother, L.V., what happened. JT:167-68. Shortly after that, L.V. confronted Rudloff. JT:168-69. This devolved into a shouting match in a quiet cul-de-sac, causing neighbors to call the police. JT:169; MH2:7-8. Deputies from the Washington County Sheriff's Office responded, including

Detective Charles Anderson. MH2:7-8. That night, Detective Anderson's job was to develop a safety plan for the family, given that there were allegations of sexual abuse. MH2:8-9; JT:700. Forensic interviews were scheduled for the girls, and Rudloff agreed to stay in a hotel for the night. MH2:16; JT:700. Detective Anderson told Rudloff that after the forensic interviews, he would reach out to see if Rudloff wanted "to talk further or not." MH2:16-17.

D. L.H.'s and L.R.'s forensic interviews and medical exams.

Just hours after police responded to their house, L.H. and L.R. participated in forensic interviews and medical exams at the Child Abuse Response and Evaluation System (CARES) clinic in Portland. JT:362. Dr. Nichole Bishop-Perdue, a specialist in internal medicine and pediatrics, performed the medical exam on both girls. JT:360-61, 363. Detective Anderson watched the forensic interviews through a one-way mirror and listened to the medical exams through an audio feed. JT:703-04.

L.H.'s exam was normal. JT:368, 390. Even though she disclosed that she was vaginally raped, it's common for child rape victims to show no physical signs of abuse. JT:367.

L.R. had a "deep notch" in part of her hymen, meaning part of the hymen was missing. JT:370. Finding that notch is "very rare" and it points to "penetrating trauma," which is consistent with the

disclosure of sexual abuse. JT:372, 392. But Dr. Bishop-Perdue couldn't say what caused that trauma. JT:388.

E. Rudloff's interview with Detective Anderson.

After watching the forensic interviews, Detective Anderson decided to arrest Rudloff "as soon as possible." MH2:22; JT:708. Multiple detectives went looking for Rudloff—some went to his workplace, others drove around town, checking hotel parking lots. MH2:22; JT:708-09. They found Rudloff at a Comfort Inn. MH2:22. Officers arrested Rudloff in the hotel parking lot and a deputy drove him to the Sheriff's Office for an interview. MH2:22-23, 47; JT:709.

Once at the Sheriff's Office, Detective Anderson interviewed Rudloff, while Detective Mark Povolny, and Deputy Stephanie Dick remained in the room. MH2:23. That interview took place in a "soft interview room," which is "a living room-type setting," with "a couch, carpet, some drapes, artwork, stuff hanging on the walls." MH2:23.

At the beginning of the interview, Detective Anderson read Rudloff his *Miranda* warning from a card. MH2:24; JT:709. Rudloff acknowledged he understood his rights then said: "Some questions that I probably won't want a lawyer with but I just want to know." MH2:27. Rudloff also made statements that Detective Anderson believed might have been a request for a lawyer so he tried to clarify that with Rudloff. MH2:28-29. But because Rudloff constantly interrupted, talked over Detective Anderson, and tried to clarify other

things, Detective Anderson struggled to get "a word in edgewise." MH2:28.

Eventually the interview ended when Rudloff said he wanted to talk to his brother. MH2:30, 52. He had mentioned maybe wanting to talk to his brother at other points in the interview, but Detective Anderson was never able to determine whether it was about legal representation or not. MH2:30-31. But "out of an abundance of caution," Detective Anderson turned off the recording equipment and left the room while Rudloff called his brother. MH2:30-31. Ultimately, in both of his interactions with Detective Anderson, Rudloff denied the allegations of abuse. MH2:49-50.

F. Rudloff's trial strategy was to discredit L.H.

This case came down to whether the jury believed L.H. *See* JT:1050. There was no physical evidence because the abuse occurred years before L.H. disclosed it. *See* JT:727-28. So Rudloff's main line of defense was to attack L.H.'s credibility. *See* JT:1061-66.

He attacked L.H.'s credibility through several avenues, but the main one was to point out the delay in her disclosures. *See generally* JT:190-305, 332-58. He criticized L.H. for not disclosing the abuse when family or friends visited. *See* JT:225-30. He criticized her for not disclosing details of the abuse to her counselors or teachers. JT:240, 245, 339. He tried to paint L.H.'s disclosures as a fabrication because they seemed to follow the plot of a romance novel she read.

JT:232-34. Rudloff tried to further this fabrication angle by pointing out that before trial L.H. did not disclose that Rudloff tried to put his penis in her mouth. JT:301. He also tried to exploit the fact that L.H. didn't let law enforcement search her phone or social media accounts. JT:237.

Rudloff's secondary defense was attacking the adequacy of the investigation. JT:1063-67 He tried to sow doubt by pointing out that officers did not collect physical evidence, like DNA, condoms, or bedding. JT:1063-64. He also criticized the fact that most of the police work happened in Oregon and that South Dakota law enforcement had little involvement in the case. JT:1064-67.

STANDARDS OF REVIEW

A circuit court's evidentiary rulings and properly preserved prosecutorial misconduct claims are reviewed for an abuse of discretion. *State v. Malcolm*, 2023 S.D. 6, ¶31, 985 N.W.2d 732, 740(evidentiary rulings); *State v. Hankins*, 2022 S.D. 67, ¶31, 982 N.W.2d 21, 32-33(prosecutorial misconduct claims). "An abuse of discretion is 'a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *State v. Falkenberg*, 2021 S.D. 59, ¶41, 965 N.W.2d 580, 592 (quoting *State v. Kvasnicka*, 2013 S.D. 25, ¶17, 829 N.W.2d 123, 127-28).

But if evidentiary errors or claims of prosecutorial misconduct are not preserved with a timely objection, they can be reviewed only for plain error. SDCL 23A-44-15; *State v. Wilson*, 2020 S.D. 41, ¶17, 947 N.W.2d 131, 136; *State v. Janis*, 2016 S.D. 43, ¶21, 880 N.W.2d 76, 81. "'Plain error merits reversal only when there is an (1) error, (2) that is plain, (3) affecting substantial rights; and only then may [this Court] exercise [its] discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Wilson*, 2020 S.D. 41, ¶17 (quoting *Janis*, 2016 S.D. 43, ¶21).

The denial of a motion to suppress and a ruling on "'whether a defendant knowingly, intelligently, and voluntarily waived *Miranda* rights'" are reviewed de novo. *State v. Willingham*, 2019 S.D. 55, ¶¶21-22, 933 N.W.2d 619, 625 (quoting *State v. Tuttle*, 2002 S.D. 94, ¶6, 650 N.W.2d 20, 25). But the circuit court's factual findings on those issues are reviewed "'for clear error.'" *Willingham*, 2019 S.D. 55, ¶21 (quoting *State v. Rolfe*, 2018 S.D. 86, ¶10, 921 N.W.2d 706, 709-10).

ARGUMENTS

I

THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN MAKING ITS VARIOUS EVIDENTIARY RULINGS.

Rudloff raises four evidentiary claims. First, he claims Detective Anderson was impermissibly allowed to testify to hearsay

from L.R.'s forensic interview, which bolstered her credibility with the jury. AB:15-17. Second, he claims H.R. was allowed to "vouch for the credibility of her daughters . . . [and] comment on Rudloff's guilt." AB:18. Third, he claims the circuit court wrongly prohibited him from using H.R.'s conviction for false reporting to impeach L.H. AB:23-25. Finally, he claims the court impermissibly allowed the prosecutor to ask Rudloff's private investigator about whether L.H. and L.R. had a motive to lie. AB:19-20.

This Court first asks "'whether the trial court abused its discretion in making an evidentiary ruling[.]'" *Hankins*, 2022 S.D. 67, ¶20 (quoting *State v. Thoman*, 2021 S.D. 10, ¶41, 955 N.W.2d 759, 772). In this context, "'an abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence.'" *State v. Stone*, 2019 S.D. 18, ¶22, 925 N.W.2d 488, 497 (quoting *State v. Asmussen*, 2006 S.D. 37, ¶13, 713 N.W.2d 580, 586).

If the circuit court did not abuse its discretion, the analysis ends. But if it abused its discretion, this Court considers whether that error "'was a prejudicial error that in all probability affected the jury's conclusion.'" *Hankins*, 2022 S.D. 67, ¶20 (quoting *Thoman*, 2021 S.D. 10, ¶41).

This Court presumes the evidentiary rulings are correct. *Hankins*, 2022 S.D. 67, ¶20.

A. The circuit court properly allowed Detective Anderson to testify about what he learned during L.R.'s forensic interview and medical exam.

Detective Anderson was asked to provide a "synopsis" of what he learned during L.R.'s forensic interview. JT:705. He answered:

> She talked about a number of instances of sexual abuse, including penile/vaginal penetration; digital penetration, putting his finger inside her vagina. That that had occurred in several locations starting in Huron, South Dakota; Billings, Montana; and in Washington County, Oregon, in the house where she was currently living, and that it happened in the two bedrooms that she had there, both the bedroom she was currently in and the bedroom she had previously before [L.V.] moved out. She said that it happened before and after her 12th birthday, which would have been a little bit less – about six weeks prior.

JT:706.

Detective Anderson also testified that during the medical exam, he understood that Dr. Bishop-Perdue used a Q-tip to examine L.R.'s vagina, so he followed up on that with Dr. Bishop-Perdue. JT:708. He testified that Dr. Bishop-Perdue said, "that's where his penis touched and she said it was on the inside of the vagina." *Id.*

Because Rudloff objected to Detective Anderson's "synopsis," that issue is reviewed under the abuse of discretion and prejudice two-step analysis. *Hankins*, 2022 S.D. 67, ¶20; JT:705. But he did not object to Detective Anderson's follow-up with Dr. Bishop-Perdue, so that claim must be reviewed under the plain-error analysis. *Wilson*, 2020 S.D. 41, ¶17; JT:707-08.

1. Detective Anderson's synopsis of L.R.'s forensic interview and his follow-up with Dr. Bishop-Perdue are not hearsay.

"Hearsay" is "an out-of-court statement used 'to prove the truth of the matter asserted in the statement.'" *State v. Wills*, 2018 S.D. 21, ¶12, 908 N.W.2d 757, 762 (quoting SDCL 19-19-801(c)).

Rudloff claims that Detective Anderson's synopsis of L.R.'s forensic interview is inadmissible hearsay because it does not meet the requirements of a prior consistent statement under SDCL 19-19-801(d)(1)(B). AB:16.

Rudloff is correct that a statement is not hearsay if it satisfies one of the requirements of SDCL 19-19-801(d). But he ignores that those are not the only ways that a statement does not amount to hearsay.

A statement is not hearsay when it "'provid[es] context for other admissible statements . . . .'" *State v. Kihega*, 2017 S.D. 58, ¶29, 902 N.W.2d 517, 526. After Detective Anderson provided his synopsis of L.R.'s forensic interview, he testified about how officers decided to arrest and interview Rudloff. JT:708. The close connection between these portions of his testimony shows the synopsis wasn't used to prove the truth of what L.R. said in her forensic interview. It provided context of why the investigation focused on Rudloff and why they decided to arrest and interview him. This has been a permissible non-hearsay use of an out-of-court statement for years. *United States v. Davis*, 449 F.3d 842, 847 (8th Cir. 2006)("a statement is not hearsay 'if

it is offered for the limited purpose of explaining why a police investigation was undertaken.'" (quoting *United States v. Watson*, 952 F.2d 982, 987 (8th Cir. 1991))); *United States v. Barraza-Cazares*, 465 F.3d 327, 332 (8th Cir. 2006)(statements offered "to show context for the continued investigation" are admissible).

The investigative decisions needed to be put into context because officers let Rudloff leave the house after they responded to the noise complaint that was the genesis of this case. In the age of crime shows like CSI and Law & Order, jurors can mistakenly believe that cases can be reported and solved in a short timeframe. But the realities of police work belie that belief. Investigations can take days, weeks, months, or even years, depending on their complexity. Indeed, in this case the police got lucky with how fast the investigation moved because it can take weeks to get a child in for a forensic interview at CARES. JT:701-02.

This is like *United States v. Velazquez-Rivera*, 366 F.3d 661, 666 (8th Cir. 2004). The police received a tip about a soon-to-happen drug delivery at a specific address in Minneapolis. *Id.* Officers testified that after receiving the tip they surveilled that address. *Id.* The Eighth Circuit determined the testimony about the tip was not hearsay because it explained why officers watched that specific address. *Id.* *See also State v. Addison*, 920 So.2d 884, 892 (La. Ct. App. 2005)(an

officer can testify about information provided by another "if offered to explain . . . the steps leading to the defendant's arrest.").

Detective Anderson's synopsis of L.R.'s forensic interview and his follow-up with Dr. Bishop-Perdue also provided a backdrop for his conversation with Rudloff during his interview. *See* JT:676. Without them, the jury could have assumed he was fishing for information or raising random issues. *See* JT:713. By giving the short description of what he learned about L.R.'s disclosures, it put Detective Anderson's actions into context and explained why he interviewed Rudloff as he did. *United States v. Brown*, 560 F.3d 754, 764 (8th Cir. 2009)("An out of court statement is not hearsay when offered to explain why an officer conducted an investigation in a certain way.").

Because there was a non-hearsay purpose behind Detective Anderson's challenged testimony, there is no need to analyze the statement under SDCL 19-19-801(d)(1)(B).

2. If the circuit court abused its discretion in allowing the testimony, it did not prejudice Rudloff.

If this Court determines the circuit court abused its discretion in allowing Detective Anderson to testify as he did, Rudloff was not prejudiced. Thus, relief is still not warranted.

There is no probability that the jury would have returned different verdicts had Detective Anderson's challenged statements been excluded. There is no prejudice because Detective Anderson's testimony on those topics is cumulative of L.R.'s, L.H.'s, and

Dr. Bishop-Perdue's testimonies. *State v. Rodriguez*, 2020 S.D. 68, ¶36, 952 N.W.2d 244, 254. L.R. specifically testified that Rudloff vaginally raped her with his penis. JT:401-02, 414. L.H. testified that she saw Rudloff rape L.R. when they lived in Montana. JT:160. Dr. Bishop-Perdue testified that L.R.'s transected hymen tracked L.R.'s disclosure of penial-vaginal penetration. JT:372, 392.

More importantly, Detective Anderson's challenged testimony only dealt with disclosures made by L.R., not L.H. L.R.'s testimony was used under Rule 404(b) and the jury was given the proper limiting instructions on how it could consider that evidence. SR:1206-07. We presume the jury followed these instructions, which also negates any possible prejudice. *Stone*, 2019 S.D. 18, ¶20.

B. Allowing H.R. to testify that she believed the girls' allegations of abuse was not an abuse of discretion.

At a pretrial evidentiary hearing, H.R. testified that she believed both the girls' allegations and Rudloff's denials. MH1:100-01. At trial, the prosecutor asked H.R. about that contradictory position:

> [Prosecutor]: Remember you said, "I believe my children and I believe my husband?"
> [H.R.]: Yep.
> [Prosecutor]: You said, "I love my husband."
> [H.R.]: That's true.
> [Prosecutor]: Would you agree that's not possible in a situation like this?
> [H.R.]: I agree with that now, absolutely, 100 percent.
> [Prosecutor]: Because - -
> [H.R.]: Because of everything.
> [Prosecutor]: - - if he didn't sexually assault them, then they made up a story?
> [H.R.]: Right. Exactly. But they didn't make up a story.

[Prosecutor]: Okay. And if they didn't make up a story, that means your husband is guilty?
[H.R.]: Right.

JT:497-98.

The following exchange also happened:

[Prosecutor]: Ma'am, you indicated that you feel differently now than you did in the past?
[H.R.]: Yes.
[Prosecutor]: What is it that caused you to change your mind?
[H.R.]: I received the documentation from Oregon stating everything that [L.R.] and [L.H.] have said, and I never seen that before, and everything that they've said, right down to the penny, their story has not changed. When we went to Oregon and they sat with the lawyer and Detective Anderson, and I sat down and talked with him as well, they - - it just clicked in my head that everything they have been telling me this whole time is the truth.
[Prosecutor]: So how does that make you feel . . . when you haven't been supportive?
[H.R.]: It makes me feel like a terrible parent, a terrible mom. I have terrible mom guilt because I didn't protect them and didn't believe them at the time.
[Prosecutor]: You believe everything they say now?
[H.R.]: Absolutely.

JT:1002.

Rudloff now challenges both lines of questioning. AB:18-19. He objected to the first exchange, which was overruled. JT:498. He did not object to the second exchange. JT:1002.

1. H.R.'s testimony went to her credibility, not the girls' credibility.

Generally, "'one witness may not testify as to another witness's credibility or truth-telling capacity because such testimony would invade the exclusive province of the jury to determine the credibility of

a witness.'" *State v. Packed*, 2007 S.D. 75, ¶37, 736 N.W.2d 851, 862 (quoting *State v. McKinney*, 2005 S.D. 73, ¶32, 699 N.W.2d 471, 481). Nor may witnesses testify about the ultimate issue in the case: the defendant's guilt or innocence. *State v. Buchholtz*, 2013 S.D. 96, ¶23, 841 N.W.2d 449, 457.

At first blush it might seem like H.R.'s testimony was a comment on her daughters' credibility and Rudloff's guilt, which would violate *Packed* and *Buchholtz*. But when her answers are viewed in context, the exchanges dealt with H.R.'s credibility and allowed the jury to evaluate her testimony.

H.R.'s role at trial was to be a credibility witness because she did not witness any of the abuse. On one hand, the State used her to try to build up the girls' credibility. It used H.R.'s disbelief of their disclosures and her actions of cutting off supportive family members' contact with L.R. to help explain the girls' delayed disclosures, and how the reactions of family members can factor into when a child discloses sexual abuse. JT:809-26.

On the other hand, the defense used H.R. to try to tear down the girls' credibility. For example, through H.R., the defense keyed in on how the girls acted normally around Rudloff, how they called him dad, and gave him Father's Day cards. *See* JT:550, 553, 562-63. Rudloff used this to try to plant a seed of skepticism in the jurors' minds. JT:1062-69.

H.R. gave conflicting testimony. Some helped the State but hurt Rudloff, and vice-versa. By putting her conflicting positions before the jury, including her incompatible position of believing the girls and Rudloff, the jury was able to fulfill its role of "sort[ing] out the truth." *State v. Miller*, 2014 S.D. 49, ¶27, 851 N.W.2d 703, 709 (citing *State v. Swan*, 2008 S.D. 58, ¶9, 753 N.W.2d 418, 420). Also, substantively the exchanges between H.R. and the prosecutor were no different than when the parties tried to impeach other witnesses with prior testimony, prior statements, or documents. *See* JT:391, 411, 430. They were just different in the form of how that evidence got in front of the jury so it could evaluate H.R.'s credibility.

Finally, H.R.'s testimony did not vouch for the girls' credibility. That occurs when the prosecutor "'invites the jury to rely on the government's assessment that the witness is testifying truthfully.'" *State v. Snodgrass*, 2020 S.D. 66, ¶45, 951 N.W.2d 792, 806 (quoting *State v. Goodroad*, 455 N.W.2d 591, 594 (S.D. 1990)). It also occurs when the government "'tell[s] the jury that it had confirmed a witness's credibility before using the witness.'" *Snodgrass*, 2020 S.D. 66, ¶45 (quoting *Goodroad*, 455 N.W.2d at 594).

Because H.R.'s testimony followed L.H. and L.R.'s testimony, the second vouching situation from *Snodgrass* couldn't happen. Nor did the first situation. None of the prosecutor's questions to H.R. told the jury that the State believed that L.H. and L.R. were telling the truth.

Rather, they allowed the jury to evaluate H.R.'s testimony by focusing on what she knew at the time of the disclosures and after. And they allowed the jury to weigh the girls' testimony about their delayed disclosures alongside the evidence the defense presented that attacked the truthfulness of the disclosures.

2. If the circuit court abused its discretion in allowing H.R.'s testimony, it did not prejudice Rudloff.

If this Court determines the circuit court abused its discretion by allowing H.R.'s answers to stand in the first exchange and that an error occurred in the second exchange, they were harmless. Thus, Rudloff is not entitled to relief under either the normal evidentiary analysis or plain-error analysis.

H.R.'s conflicting testimony didn't favor either party over the other. Indeed, her lack of credibility caused the circuit court to comment, the week before trial, that "[s]he's not credible in my opinion either way." MH2:73. The jury could easily have concluded the same and rejected her testimony. Because of that, there is no reasonable probability that her testimony affected the jury's verdicts. *Hankins*, 2022 S.D. 67, ¶20.

The jurors were correctly and repeatedly instructed that it was solely their decision on whether to believe a witness's testimony and what weight to give it. SR:1208-11, 1213-15, 1217. We must presume the jury followed these instructions. Thus, they negate any claimed prejudice from H.R.'s challenged testimony. *Janis*, 2016 S.D.

43, ¶25. These instructions also negate Rudloff's claim that the court's response to his province of the jury objection compounded the alleged prejudice from H.R.'s testimony. *See* AB:18.

C. *The circuit court properly excluded H.R.'s conviction for false reporting.*

Rudloff wanted to introduce H.R.'s conviction for false reporting under SDCL 19-19-609 and SDCL 19-19-404(b) to impeach L.H.'s credibility. MH2:71-73. He now claims the court's prohibition of this evidence violated his right to present a defense, its analysis was erroneous under Rule 609, and it failed to analyze it under Rule 404(b).

1. *H.R.'s conviction was too remote to be used under SDCL 19-19-609.*

Parties can impeach witnesses with prior felony convictions or convictions involving dishonest acts or false statements. SDCL 19-19-609(a). But the remoteness of a prior conviction is a key concern. *State v. Caylor*, 434 N.W.2d 582, 584 (S.D. 1989). A remote conviction "is stale and inadmissible as a matter of law . . . ." *Id.* The circuit court determined Rudloff could not use H.R.'s conviction because it was too remote in time; it was almost twenty-three years old. MH2:71-72.

This Court should affirm the circuit court's decision because it affirmed the exclusion of a fifteen-year-old conviction as being too stale. *Caylor*, 434 N.W.2d at 584. If fifteen years is too remote, so is

twenty-three years. *See United States v. Cavender*, 578 F.2d 528, 534-35 (4th Cir. 1978)(admission of twenty-five-year-old conviction was reversible error); *United States v. Sims*, 588 F.2d 1145, 1150 (6th Cir. 1978)(excluding twenty-one-year-old and twelve-year-old convictions); *State v. Black*, 732 S.E.2d 880, 887-89 (S.C. 2012)(twenty-year-old convictions were inadmissible); *State v. Nardini*, 447 A.2d 396, 404 (Conn. 1982)(error to admit twenty-year-old convictions for impeachment).

2. The circuit court's Rule 609 analysis equally applies to the Rule 404(b) question.

Rudloff faults the circuit court for not explicitly engaging in a Rule 404(b) analysis when denying his request to use H.R.'s prior conviction. AB:24. But that argument reads the settled record too literally and too narrowly.

When considering the admissibility of Rule 404(b) evidence a circuit court uses a two-part test. *State v. Otobhiale*, 2022 S.D. 35, ¶24, 976 N.W.2d 759, 769. "The court must first determine that the 'other-act evidence is relevant to some material issue in the case other than character (factual relevancy). Second, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice (logical relevancy).'" *Id.* (quoting *State v. Birdshead*, 2015 S.D. 77, ¶57, 871 N.W.2d 62, 81).

While the circuit court didn't explicitly say it was conducting the factual relevancy analysis, it did consider the relevance of H.R.'s conviction. MH2:71. It specifically said "I don't see how its relevant to this case at all. She's not the accusing party . . . ." MH2:71. The court also conducted the logical relevancy analysis by weighing the prejudicial effect of H.R.'s conviction against its probative value. MH2:71-73.

It does not matter that the court's relevance and prejudice analysis was done explicitly under SDCL 19-19-609(b), not SDCL 19-19-404(b). That analysis has the same effect under each statute. The factual relevancy analysis is ultimately a SDCL 19-19-401 analysis; both ask whether the evidence goes toward a material issue in the case. *Compare* SDCL 19-19-401, *with Birdshead*, 2015 S.D. 77, ¶57. And the logical relevancy analysis is ultimately a SDCL 19-19-403 analysis; both allow the exclusion of evidence when its "probative value is substantially outweighed by a danger of . . . unfair prejudice." *Compare* SDCL 19-19-403, *with Birdshead*, 2015 S.D. 77, ¶57 and SDCL 19-19-609(b)(1).

The circuit court's remoteness analysis under SDCL 19-19-609 applies with equal force to any Rule 404(b) analysis because remoteness of the other act is a factor that must be considered. *State v. Evans*, 2021 S.D. 12, ¶34, 956 N.W.2d 68, 82.

Next, the circuit court properly determined that unfair prejudice would result from allowing Rudloff to use H.R.'s conviction to impeach L.H. MH2:72. H.R.'s twenty-three-year-old conviction does not affect her eighteen-year-old daughter's credibility about the abuse she suffered. Additionally, the plain language of SDCL 19-19-609 requires that the witness being impeached be the one that has the prior conviction. It would be nonsensical to allow one witness to be impeached by another's conviction.

The court also properly determined it would be unfairly prejudicial to allow Rudloff to use H.R.'s prior conviction to claim she coached L.H. into lying about the abuse. MH2:73. Before trial H.R. said she believed Rudloff's denials, and she admitted as much to the jury. MH1:100-01; JT:497. Then H.R. testified that once the trial came around, she believed her daughters' disclosures. So for almost thirty months after the initial disclosures, H.R. refused to believe them, even thinking the girls were just telling a story. *See* JT:990, 992, 997. According to her, it wasn't until going back to Oregon, for Rudloff's trial there, that she believed her daughters because she saw corroborating evidence. JT:1002. If H.R. did not believe the girls, it would be unfair to conclude she coached them into fabricating their disclosures.

3. Rudloff was not denied his right to present a defense.

Rudloff has a constitutional right to present a complete defense. *See* AB:23. But that right does not encompass the ability to present whatever defense he wishes. It must be supported by the law and the evidence. *Birdshead*, 2015 S.D. 77, ¶27.

A defendant has a right to probe a witness's motives for testifying. *See State v. Dickerson*, 2022 S.D. 23, ¶35, 973 N.W.2d 249, 261. So the law portion of the *Birdshead* analysis is met.

But no evidence supported Rudloff's claim that H.R. coached the girls. *See* AB:23; MH2:73. The circuit court pointed this out by referencing H.R.'s testimony from the motions hearing where she "denied that these events have even happened to her daughters . . . ." MH2:73; MH1:100-01, 122. The court also rejected any claim of coaching because H.R. "tried to . . . keep family members from having contact with the children because she, in fact, doesn't believe this happened." MH2:73.

Perhaps the best way to see why there is no constitutional violation is to compare Rudloff's case to two recent decisions. In *Dickerson* this Court determined the defendants had "a constitutional right to probe into the possible motives influencing [the victim's] testimony . . . ." 2022 S.D. 23, ¶35. But that right was violated because the trial court prohibited them from cross-examining the victim about his immigration status. *Id.* ¶39.

Unlike the defendants in *Dickerson*, Rudloff was not prevented from revealing any potential unsavory motives L.H. may have had for testifying. Indeed, he suggested L.H. fabricated the allegations after reading a book about a young girl, who had issues with her mom, being in a relationship with a mechanic. JT:233-34.[3] He pointed out that L.H. disclosed alleged abuse by another man, before Rudloff was even in the picture, but those allegations were unfounded. JT:530-31. Rudloff also floated the idea that L.H. had a motive to fabricate allegations against him because she was mad that the family's plans to leave Beaverton and buy her a car fell through. JT:876-77, 994.

Rudloff's case is closer to *State v. Krouse*, where despite the alleged bias of an insurance investigator, Krouse wasn't denied her right to present a defense. 2022 S.D. 54, ¶48, 980 N.W.2d 237, 251. Krouse pointed out the investigator's potential bias to the trial court, who was the fact finder. *Id.* So too here. Rudloff was still able to attack L.H.'s credibility and plant seeds in the jurors' minds that she made up the allegations.[4]

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[3] Rudloff was a mechanic. JT:138.

[4] That Rudloff was still able to point out potential motives behind L.H.'s testimony and allegations, and attack her credibility, also warrants a harmless error determination should this Court determine he was denied the right to present a defense. *See State v. Guzman*, 2022 S.D. 70, ¶38, 982 N.W.2d 875, 889.

D. No evidentiary error occurred when the circuit court allowed the prosecutor to ask Rudloff's private investigator if the girls had a motive to lie.

During his cross-examination of Kali Lefebvre, Rudloff's private investigator, the prosecutor asked: "Would you agree that these children have no motive to make up a story?" JT:874. Rudloff objected on speculation grounds, which the court overruled. *Id.* He now claims that was an abuse of discretion that prejudiced him. AB:19-20.

1. Rudloff's claim is waived because he cites no supporting authorities.

Rudloff's argument on this issue cites no authority to support his claim. *Id.* He only makes a general reference to the two-step analysis for reviewing evidentiary rulings. *Id.* Rudloff's failure to cite authority for this argument violates SDCL 15-26A-60(6) and waives the issue. *State v. Patterson*, 2017 S.D. 64, ¶31, 904 N.W.2d 43, 52.

2. Lefebvre did not agree with the prosecutor's question.

Even if the court abused its discretion in overruling Rudloff's objection, there is no probability that the jury would have returned different verdicts had the question not been asked. *Hankins*, 2022 S.D. 67, ¶20. Lefebvre didn't agree with the question. She testified that "[b]ased on the information that I gathered, I guess I couldn't say that." JT:874. The jury was also correctly instructed that the

prosecutor's questions are not evidence. SR:1190. We must presume the jury followed this instruction. *Janis*, 2016 S.D. 43, ¶25.

II

THE CIRCUIT COURT PROPERLY DENIED RUDLOFF'S MOTION TO SUPPRESS HIS INTERVIEW WITH DETECTIVE ANDERSON.

Rudloff claims the circuit court erred when it denied his motion to suppress. AB:20-23. He claims the court had to grant his motion because "Rudloff made it clear that he wanted an attorney, [so] the discussion should have stopped." AB:22.

But a review of the suppression hearing transcript and Rudloff's interview shows his statements about an attorney were ambiguous and equivocal. Thus, questioning didn't have to stop. Rudloff's conduct during the interview also shows he voluntarily waived his *Miranda* rights, so suppression wasn't appropriate or necessary.

A. Rudloff's actions during his interview show he waived his Miranda rights and that waiver was voluntary.

Reading *Miranda* rights to a suspect is a "'procedural safeguard[] . . . to ensure that the right against compulsory self-incrimination [is] protected.'" *Davis v. United States*, 512 U.S. 452, 457 (1994) (quoting *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974)). But those warnings are required only when a suspect is "in custody." *State v. Angle*, 2021 S.D. 21, ¶22, 958 N.W.2d 501, 508.

The State must show "by a preponderance of the evidence" that a defendant's waiver of his *Miranda* rights, and any resulting admissions or statements, are voluntary. *State v. Larson*, 2022 S.D. 58, ¶¶25-26, 980 N.W.2d 922, 930. That determination is based on "'the totality of the circumstances . . . [including] a defendant's age, experience, intelligence, and background, including familiarity with the criminal justice system, as well as [his] physical and mental condition.'" *Id.* ¶27 (quoting *State v. Two Hearts*, 2019 S.D. 17, ¶22, 925 N.W.2d 503, 512).

Waiver doesn't have to be explicit. *Larson*, 2022 S.D. 58, ¶26. It can be "'inferred from the defendant's understanding of the rights coupled with a course of conduct reflecting a desire to give up those rights.'" *Id.* ¶27 (quoting *Two Hearts*, 2019 S.D. 17, ¶22).

Rudloff claims he did not voluntarily waive his right to an attorney because he did not explicitly waive that right. AB:21-22. He also claims he did not voluntarily waive his right to an attorney because Detective Anderson did not try to clarify Rudloff's ambiguous and equivocal statements about attorneys during the interview. AB:21-23. He ignores the law and record.

1. Rudloff's initial contact with Detective Anderson was not a custodial interview, so Miranda does not apply.

The police don't have to read *Miranda* warnings to everyone they talk to or question. *State v. Wright*, 2009 S.D. 51, ¶19, 768 N.W.2d

512, 520. A warning is necessary only when the person they are questioning is in custody. *Id.* Whether a person is in custody comes down to if a reasonable person would feel they could end the contact and leave. *Id.* (quoting *State v. Johnson*, 2007 S.D. 86, ¶22, 739 N.W.2d 1, 9). Simply put, a person is in custody if there was "'a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.*

When Detective Anderson first spoke to Rudloff at the house, there was no restraint of his movement, let alone a restraint that amounted to an arrest. Officers talked to Rudloff inside his house, but they didn't confine him to a certain space. They let him wander around, collecting the things he needed to go to a hotel for the night. MH2:17. Rudloff then left in his own vehicle and went to a hotel of his choice. *Id.*

Not only was the custody requirement for *Miranda* not met during that first contact, but Rudloff was not interviewed with the eye toward incrimination. Detective Anderson's job that night was to develop a safety plan while they waited for the results of the girls' forensic interviews. MH2:16.

Because Rudloff was not in custody during his first contact with Detective Anderson, it doesn't matter that he concedes he made ambiguous references to an attorney. AB:22.

2. Rudloff's references to an attorney during his in-custody interview were ambiguous and equivocal, which Detective Anderson tried to clarify.

Defendants must have "'actually invoked [their] right to counsel'" before law enforcement must stop questioning them. *Davis*, 512 U.S. at 458 (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam)). That means "the suspect must unambiguously request counsel" because "'a statement either is such an assertion of the right to counsel or it is not.'" *Davis*, 512 U.S. at 459 (quoting *Smith*, 469 U.S. at 97-98). This is objective: a defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459. If it doesn't meet this level of clarity, an officer does not have to stop questioning. *Id.* And while "it will often be good police practice . . . to clarify" ambiguous or equivocal references to an attorney, officers need not ask clarifying questions or stop questioning altogether. *Id.* at 461-62.

This Court adopted most of the framework from *Davis*, but it expanded *Miranda* protections by requiring officers to clarify ambiguous or equivocal requests for an attorney when the requests are made before a valid waiver. *State v. Blackburn*, 2009 S.D. 37, ¶13, 766 N.W.2d 177, 181.

Perhaps it's time to reconsider *Blackburn's* clarification requirement for two reasons. First, continued adherence to the

distinction is not in line with this Court's decisions that a defendant can waive their *Miranda* rights through a course of conduct. *See Larson*, 2022 S.D. 58, ¶27. Adherence to *Blackburn's* distinction also contradicts this Court's determination that a *Miranda* waiver doesn't have to be explicit. *See id.* ¶26.

Second, *Blackburn's* distinction puts police in the impossible position of trying to decide whether a defendant waived their rights when, like Rudloff, they refuse to answer clarifying questions about invoking their rights. It forces officers "to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Davis*, 512 U.S. at 461. The *Blackburn* distinction adds only "'marginally to *Miranda's* goal of dispelling the compulsion inherent in custodial interrogation[,]" but places "a significant burden on society's interest in prosecuting criminal activity." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 425 (1986)).

Whether this Court continues to follow *Blackburn* or reverts to *Davis*, Rudloff's rights were not violated.

After Rudloff said he understood his *Miranda* rights, but before Detective Anderson could ask if he wanted to waive them, Rudloff said: "Some questions that I probably won't want a lawyer with but I just want to know." HEx.2:2-3. This is an ambiguous and equivocal

reference to an attorney. *See Davis*, 512 U.S. at 462("Maybe I should talk to a lawyer" was not an unambiguous request for counsel that required the interview to end).

Before Detective Anderson could clarify whether Rudloff wanted a lawyer, Rudloff immediately said DNA would prove his innocence. HEx.2:3. Rudloff also wanted to know what was going on, so Detective Anderson tried to explain the charges Rudloff faced and what police learned from the girls' forensic interviews. HEx.2:4-5.

Detective Anderson then told Rudloff "if you want to talk, we can talk. If you don't want to talk, you don't have to talk. If you want to call someone, you can call someone. Whatever." HEx.2:5. Rudloff responded by saying he wanted to call his brother. *Id.* But then immediately said: "Shoot man I really want to hear what's going on." HEx.2:6. So Detective Anderson again tried to explain what they had learned. HEx.2:6-13.

Shortly after that exchange, Detective Anderson asked Rudloff about calling his brother. HEx.2:13. When Detective Anderson asked Rudloff if his brother was an attorney, he didn't answer. *Id.* Instead, he expressed disbelief that parents could be arrested when a child discloses sexual abuse. *Id.*

When Detective Anderson asked Rudloff again whether he wanted to call his brother for legal advice, he said he just wanted to "let him know where I'm at and what's up . . . ." HEx.2:14. A little bit

later, Rudloff said he wanted to call his brother for legal advice, but then flip-flopped and said he wanted to call his brother so that his brother could get him an attorney. HEx.2:16.

Detective Anderson told Rudloff it seemed like he was invoking his right to an attorney. HEx.2:17. But Rudloff did not confirm that; he said: "I am innocent. That's why I will talk . . . " and "fill me in man, I'm all ears." HEx.2:18.

Eventually, Rudloff seemed to put to rest any notion that he wanted to call his brother for legal advice when he said his brother "owns a towing company/body shop back in Huron." HEx.2:31. But then he asked if he could call his brother "and get some attorney advice?" HEx.2:41-42. It was at this point the interview ended. HEx.2:42-43.

Detective Anderson tried to clarify Rudloff's ambiguous and equivocal references to an attorney. Despite Detective Anderson's best efforts, Rudloff changed topics or did not give straight answers to simple questions. Now Rudloff wants to fault Detective Anderson for his own inability to articulate whether he wanted to talk to an attorney or not. Neither Detective Anderson nor the State should be penalized for Rudloff's non-responsive statements.

3. Rudloff waived his right to an attorney through his conduct during his interview with Detective Anderson.

It's undisputed that Rudloff didn't explicitly waive his right to an attorney. *See* MH2:40. So the question becomes: Can a waiver be

inferred from Rudloff's actions? *State v. Rhines*, 1996 S.D. 55, ¶35, 548 N.W.2d 415, 429.

Rudloff makes no claim that he did not understand his rights. *See generally* MH2:1-54; AB:20-23. And he explicitly told Detective Anderson he understood his rights. HEx.2:2-3. Thus, the understanding his rights aspect of the inferred waiver analysis is satisfied. *Larson*, 2022 S.D. 58, ¶27.

The course of conduct analysis also shows Rudloff wished to waive his right to counsel and talk with officers. For example, Rudloff said "Some questions that I probably won't want a lawyer with but I just want to know." HEx.2:3. This is like the statement by Charles Rhines, which this Court concluded supported a finding that Rhines waived his right to remain silent, where he said: "I'll answer any questions I like." *Rhines*, 1996 S.D. 55, ¶¶8, 36. *See United States v. Adams*, 820 F.3d 317, 323 (8th Cir. 2016)("I don't want to talk, man," immediately followed by continuing to engage with the interviewing officer was part of a course of conduct supporting an inferred waiver); *United States v. House*, 939 F.2d 659, 662 (8th Cir. 1991)(House refused to sign a waiver form, but his waiver could be "inferred from the fact that . . . [he] responded to questions posed by the interviewer after being advised of his rights.").

Rudloff's waiver can also be inferred because he asked the questions. He questioned Detective Anderson about the girls' forensic

interviews. *See generally* HEx.2. He spontaneously, consistently, and repeatedly professed his innocence. *Id.* He even disputed the girls' disclosures. For example, he said L.H. hugging him "the other day," didn't match up with what she was alleging. HEx.2:8. He also said that L.R.'s disclosure that the abuse happened when L.H. wasn't home couldn't be true because L.H. "was always home." HEx.2:10. And that L.H. is only saying these things "because her head[']s all mixed up." *Id.*

By continually engaging with detectives, Rudloff showed his desire to waive his *Miranda* rights. *Larson*, 2022 S.D. 58, ¶30(Larson showed his "desire to waive his *Miranda* rights" by being "fully engaged during the interview and provided detailed answers to Detective Pelle's questions . . . ."); *State v. Diaz*, 2014 S.D. 27, ¶49, 847 N.W.2d 144, 161(answering questions showed Diaz's desire to waive her *Miranda* rights); *State v. Ralios*, 2010 S.D. 43, ¶34, 783 N.W.2d 647, 657-58(same); *Rhines*, 1996 S.D. 55, ¶36(Rhines's "articulate and detailed" answers to questions showed a waiver of his *Miranda* rights).

In short, because Rudloff knew his rights and conducted himself in a way that showed he wanted to speak with detectives, the circuit court properly denied his motion to suppress.

B. If the circuit court erred in denying Rudloff's motion to suppress, it was a harmless error.

Even if this Court agrees with Rudloff that he did not voluntarily and validly waive his right to an attorney, he is still not entitled to relief. SDCL 23A-44-14 mandates that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." This is the harmless error rule. And it applies to alleged *Miranda* violations. *State v. Rogers*, 2016 S.D. 83, ¶¶18-19, 887 N.W.2d 720, 725.

Rudloff made no admissions during his interview. In fact, he denied any wrongdoing and Detective Anderson recognized Rudloff was steadfast in that position throughout the interview. JT:725. Rudloff's interview also supported his claim of innocence and showed the jury that he held that belief since the case began.

III

THE STATE'S ATTORNEY DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

The analysis for prosecutorial misconduct follows a two-prong test. "'[P]rosecutorial misconduct has occurred if (1) there has been misconduct, and (2) the misconduct prejudiced the [defendant] as to deny the [defendant] a fair trial.'" *Hankins*, 2022 S.D. 67, ¶32 (quoting *State v. Hayes*, 2014 S.D. 72, ¶23, 855 N.W.2d 668, 675). That analysis must review the issue "in the context of the entire

proceeding[.]'" *Hankins*, 2022 S.D. 67, ¶33 (quoting *State v. McMillen*, 2019 S.D. 40, ¶27, 931 N.W.2d 725, 733).

For misconduct to occur, the prosecutor must commit "'a dishonest act or . . . attempt to persuade the jury by use of deception or by reprehensible methods.'" *Hankins*, 2022 S.D. 67, ¶32 (quoting *Hayes*, 2014 S.D. 72, ¶22). If misconduct occurs, there are "'[n]o hard and fast rules . . . when [that] misconduct reaches a level of prejudicial error . . . ; each case must be decided on its own facts.'" *Hankins*, 2022 S.D. 67, ¶33 (quoting *McMillen*, 2019 S.D. 40, ¶27). Prejudice occurs if the prosecutor's actions "'so infects the trial with unfairness as to making the resulting convictions a denial of due process.'" *Hankins*, 2022 S.D. 67, ¶33 (quoting *State v. Smith*, 1999 S.D. 83, ¶52, 599 N.W.2d 344, 355). But "'[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone[;]'" those comments must "'affect[] the fairness of the trial'" as a whole. *Hankins*, 2022 S.D. 67, ¶33 (quoting *McMillen*, 2019 S.D. 40, ¶27).

A. The prosecutor did not commit misconduct while questioning witnesses.

Rudloff claims the prosecutor committed misconduct while questioning Detective Anderson and H.R. AB:28. The questions he challenges regarding Detective Anderson are addressed in Argument I.A. The questions he challenges regarding H.R. are addressed in

Argument I.B. He claims these exchanges amounted to misconduct because they vouched for the credibility of other witnesses. AB:28.

The State agrees that a prosecutor vouching for a witness's credibility is impermissible. But that is not what happened here. Again, vouching happens when the prosecutor "'invites the jury to rely on the government's assessment that the witness is testifying truthfully'" or "'tell[s] the jury that it had confirmed a witness's credibility before using the witness.'" *Snodgrass*, 2020 S.D. 66, ¶45 (quoting *Goodroad*, 455 N.W.2d at 594).

No vouching occurred with Detective Anderson because the challenged exchange provided context to how the investigation progressed and why Detective Anderson interviewed Rudloff the way he did. *See* Argument I.A.

As for the exchanges with H.R., those questions did not vouch for L.H. and L.R.'s credibility. They gave the jury the full picture of H.R.'s vacillating reactions to the girls' disclosures. *See* Argument I.B. At first she denied the allegations happened, saying she believed Rudloff's denials, even though she also said she believed her children. JT:497-98. Then she switched positions, almost thirty months after the disclosures, believing the girls and rejecting Rudloff's denials. JT:1002. Her challenged exchanges with the prosecutor did not vouch for the girls' credibility. They gave the jury the necessary information

to weigh *H.R.'s credibility* and sort out the truth of her involvement in the case. *Miller*, 2014 S.D. 49, ¶27.

In sum, the prosecutor's exchanges with Detective Anderson and H.R. dealt with permissible topics and did not vouch for the girls' credibility. Thus, Rudloff's misconduct claim on this score fails.

B. The prosecutor did not commit misconduct during closing argument.

Rudloff challenges these comments made during the prosecutor's closing argument:

- "When you deliberate, search for the truth, not for doubt." (JT:1050);
- "It's no wonder she has nightmares and she's depressed." (JT:1059);
- "That you'll render justice for [L.H.] and that you'll render justice for the defendant in this case, and guilty verdict on behalf of [L.H.]." (JT:1060);
- "A guilty verdict is not going to erase what's happened here. It's not going to make everything perfect for everybody who's been impacted by the actions of this Defendant in this court, but a verdict will substitute justice for injustice that have been suffered . . . ." (JT:1060);
- "She's suffered abandonment, insensitivity from the mother who gave her birth, but she's been empowered to come here and stand up, face the person who sexually abused her as a child, and so your verdict can validate her courage . . . ." (JT:1060-61).

Rudloff objected to the first, third, and fourth comments because he believed they shifted the burden of proof. JT:1050, 1060. The circuit court overruled his objections to the first and fourth comments, and sustained his objection to the third comment. JT:1050, 1060. He now raises the same burden shifting argument on appeal. AB:29-31.

He objected to the second comment as trying to seek sympathy for L.R.; the circuit court overruled that objection. JT:1059. He makes the same argument on appeal. AB:29-31. He did not object to the last comment. JT:1060-61.

1. The prosecutor did not shift the burden of proof and the jury was correctly instructed on the State's burden.

When the prosecutor told the jury to "search for the truth, not for doubt" he did not commit misconduct. JT:1050. This was a correct statement of the law because the jury's role in a case is to sort out the truth of what happened. *Miller*, 2014 S.D. 49, ¶27. Likewise, telling the jury to look for the truth, not doubt, tracks with the State's burden of proving guilt *beyond a reasonable doubt*. SR:1197-98. And it's unsurprising that the prosecutor believed L.H.'s testimony was the truth because he brought charges against Rudloff based on her disclosures.

Similarly, the comment that a guilty verdict cannot undo what happened is just a statement of reality, not some attempt to "'inject unfounded or prejudicial innuendo . . . .'" *Hankins*, 2022 S.D. 67, ¶37 (quoting *Smith*, 1999 S.D. 83, ¶46). The same goes for the injustice comment. Every crime victim has suffered an injustice, regardless of the severity of the crime. They have endured conduct that is socially prohibited, and they must live with the consequences for the rest of their lives.

Even if this Court determines these challenged comments amounted to misconduct, they did not deny Rudloff a fair trial. The circuit court properly instructed the jury on the State's burden of proof, including an explicit instruction that Rudloff carried no burden in the case. SR:1197-98. The court also properly instructed the jury that the arguments of counsel are not evidence. SR:1190, 1216. This Court has determined that these correct instructions and the presumption that the jury followed them cuts against a finding of prejudice. *Hankins*, 2022 S.D. 67, ¶39 (citing *State v. Eagle Star*, 1996 S.D. 143, ¶22, 558 N.W.2d 70, 75).

Also, the circuit court's sustaining of the objection to one of the alleged burden-shifting comments also cuts against a finding of prejudice. By sustaining that burden shifting objection, the court "delineated the impropriety of the prosecutor's comments to the jury." *Hankins*, 2022 S.D. 67, ¶39.

2. The prosecutor did not seek sympathy for L.R.

Rudloff claims it was misconduct for the prosecutor to mention that L.R. suffered nightmares and was depressed because it tried to build sympathy for her. AB:31. But it was a direct comment on the evidence because both girls testified they have had nightmares and flashbacks because of the abuse they suffered. JT:324, 412.

The prosecutor's comment about this bit of evidence was appropriate because "'counsel has a right to discuss the evidence and

inferences and deductions generated from the evidence presented.'" *State v. Seidel*, 2020 S.D. 73, ¶25, 953 N.W.2d 301, 311 (quoting *Smith*, 1999 S.D. 83, ¶42).

Likewise, the prosecutor's comment about L.R.'s nightmares and depression wasn't "'a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods.'" *Seidel*, 2020 S.D. 73, ¶25 (quoting *State v. Bariteau*, 2016 S.D. 57, ¶23, 884 N.W.2d 169, 177). It was a proper comment on the evidence presented and a proper response to Rudloff's challenges to the girls' credibility and theory that they fabricated the abuse. *State v. Krueger*, 2020 S.D. 57, ¶53, 950 N.W.2d 664, 678; *Patterson*, 2017 S.D. 64, ¶20.

The prosecutor's comments about L.H. being abandoned and her courage also fall under the same umbrella of permissible comments. They were drawn from L.H.'s testimony about how she was kicked out of the house by H.R. and cut off from contacting L.R. JT:172-73. These comments also contradicted Rudloff's theory that L.H. was an incredible witness.

Simply put, no misconduct occurred with the challenged comments. They did not editorialize Rudloff's conduct or use inflammatory labels to describe him. *Smith*, 1999 S.D. 83, ¶49(the prosecutor "[c]alling Smith a 'monster' or a 'pervert' was a foul blow, abhorrent misconduct."). Nor did they attack Rudloff for exercising his right to a trial. *Hankins*, 2022 S.D. 67, ¶36.

Rudloff also claims he was prejudiced by the comments because of the "scant" physical evidence and the "proof in this case was limited to the testimony of the sisters." AB:31. But that claim ignores the realities of child rape cases. Detective Anderson, Detective De Neui, and Dr. Bishop-Perdue testified it's common for no physical evidence to exist because of delayed disclosures and the common lack of physical injuries noted during medical exams. JT:367, 729, 765, 792-93. Rudloff's argument also ignores that the law does not require physical evidence for the State to prove a rape case. *State v. McDermott*, 2022 S.D. 69, ¶22, 982 N.W.2d 409, 414. Testimony is enough and is often the only evidence available. *Id.*

Finally, the circuit court instructed the jury that it could not base its verdicts on prejudice against, or sympathy for, Rudloff or the girls. SR:1218, 1222. We must presume these instructions were followed. Thus, even if the prosecutor's statements did garner sympathy for L.H., there is no prejudice to Rudloff. *See Hankins*, 2022 S.D. 67, ¶39.

IV

RUDLOFF WAS NOT DENIED A FAIR TRIAL BECAUSE OF ALLEGED CUMULATIVE ERROR.

"[T]he cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." *State v. Davi*, 504 N.W.2d 844, 857 (S.D. 1993). Yet

this is tempered by the fact that a "defendant is not entitled to a perfect trial but a *fair one*." *Id.* (emphasis added). When reviewing a claim of cumulative error, the question to be decided is "whether, on a review of the entire record, [Rudloff] was provided a fair trial." *Id.*

Here, a review of the entire record shows that effect of any alleged errors did not prejudice Rudloff. The errors he alleges did not occur; if this Court disagrees, they were harmless. Thus, Rudloff was given the fair trial he is constitutionally guaranteed, and his cumulative error claim fails.

CONCLUSION

Based on the above arguments and authorities, the State asks this Court to affirm Rudloff's First-Degree Rape convictions and corresponding prison sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in this Court's May 4, 2023, Order Granting Motion for Additional Words in Appellee's Brief using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 10,611 words.

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

Dated this 12th day of May 2023.

/s/ Matthew W. Templar
Matthew W. Templar
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 12, 2023, a true and correct copy of Appellee's brief in the matter of *State of South Dakota v. Scott Martin Rudloff* was served electronically through Odyssey File and Serve on Jason R. Adams at jason@tschetteradams.com.

/s/ Matthew W. Templar
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Assistant Attorney General

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 30074

Plaintiff and Appellee,

v.

SCOTT MARTIN RUDLOFF,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

HONORABLE MICHELLE K. COMER

Circuit Court Judge

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Notice of Appeal Filed July 27, 2022.

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STATE OF SOUTH DAKOTA,

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Plaintiff and Appellee,

v. **APPELLANT'S REPLY BRIEF**

SCOTT MARTIN RUDLOFF,

Defendant and Appellant.

PRELIMINARY STATEMENT

To avoid repetitive arguments, Appellant limits his discussion in the Reply Brief to portions of the issues which need further development or argument. Appellant does not waive any matter raised earlier in Appellant's Brief, but not specifically mentioned in the Reply Brief. Appellant will attempt to avoid revisiting matters adequately addressed in the initial briefs of the parties. Appellant's brief will be referred to as "AB" followed by the appropriate page number. Appellee's/State's brief will be referred to as "SB" followed by the appropriate page number. The Settled Record will be referred to as "SR" followed by the appropriate page number.

Counsel relies on the Preliminary Statement, Jurisdictional Statement, Statement of Facts Statement of the Case, and Standards of Review as set forth in his initial brief.

ARGUMENT

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING EVIDENTIARY RULINGS?

Detective Anderson testimony

The State argues that Detective Anderson's testimony was not hearsay because it provided context on why he decided to arrest and interview Rudloff. (SB, 18) The State claims this case is analogous to *United States v. Velazquez-Rivera*, 366 F.3d 661 (8th Cir. 2004) *Id.* In *Velazquez-Rivera*, officers were allowed to testify about a drug tip they received, which explained why they were watching an address that did not specifically name the defendant. *Id.* at 666 This case is distinguishable because Detective Anderson was not just giving information on why he decided to arrest and question Rudloff. He was allowed to testify about details regarding L.R.'s disclosures specifically saying:

> "She talked about a number of instances of sexual abuse, including penile/vaginal penetration; digital penetration, putting his finger inside of her vagina. That that had occurred in several locations starting in Huron, South Dakota; Billings, Montana; and in Washington County, Oregon, in the house where she was currently living, and that it happened in the two bedrooms that she had there, both the bedroom she was currently in and the bedroom she had previously before Luke moved out. She said that it happened before and after her 12th birthday, which would have been a little bit less -- about six weeks prior." (JT4, 705)

This testimony greatly exceeded any context on why he decided to arrest and interview Rudloff. Detective Anderson was allowed to testify about multiple allegations of sex abuse and the city and state of where it allegedly occurred. He simply could have said "based on what I observed I decided to arrest and question Rudloff." This would have explained the decision to arrest and question Rudloff without the improper bolstering and hearsay evidence. Law enforcement knew from day one who the suspect

was based on the allegations made against Rudloff. This detailed context was not needed to establish who the suspect was or what he was alleged to have done.

Additionally, the State's contention that this "synopsis" was only used to give an explanation of why Detective Anderson decided to arrest and interview Rudloff fails. (SB, 18) The subsequent testimony of Detective Anderson establishes that he had already decided to send detectives to arrest Rudloff. The following exchange took place between the prosecutor and Detective Anderson:

Prosecutor:	Okay. Was a decision reached, then, for a plan of action after listening to the interviews and talking to the doctor?
Det. Anderson:	It had been made a little bit before that, but it was confirmed at that point, yeah.
Prosecutor:	Okay. What was the plan of action?
Det. Anderson:	I had already requested a couple other detectives to go to Mr. Rudloff's place of business to try and take him into custody at that point. (JT4, 708)

It is clear from the record that the prosecutors and Detective Anderson's exchange was not utilized to give context, but to bolster the credibility of L.R. Further, the trial court's determination that a "synopsis" is not hearsay is false. Other than the observations of Detective Anderson, most of this synopsis was based on hearsay.

The State claims that defense counsel failed to object to Detective Anderson's discussion with Dr. Bishop-Perdue. (SB, 17) This is not supported by the record as defense counsel specifically objected on hearsay, and narrative response grounds, when Detective Anderson began talking about his conversation with Dr. Bishop-Perdue. (JT4, 708) The Court allowed the testimony to explain why he acted as he did. *Id.* The trial

court erred in relying on the prosecutor's statement because, as established above, Detective Anderson had already made the decision to arrest Rudloff. This testimony should have been struck once Detective Anderson testified that he had already decided to arrest Rudloff.[1]

Regarding the conversation Detective Anderson had with Dr. Bishop-Perdue, the State ignores the fact that this very detailed testimony from Detective Anderson was a back door technique to get in an impermissible conclusion that Dr. Bishop-Perdue did not give during her testimony. The State dubiously claims that this "short description . . . put Detective Anderson's actions into context". (SB, 20) This highly prejudicial testimony was a medical conclusion that Rudloff's penis caused the notch to L.R.'s hymen. This testimony was never elicited through Dr. Bishop-Perdue, but Detective Anderson was allowed to do it in her stead? To suggest that this "provided a backdrop for his conversation with Rudloff during the interview" is grossly misleading and has no bearing on Detective Anderson's actions.[2]

Allowing Detective Anderson to testify that Dr. Bishop-Perdue told him that Rudloff's penis caused the notch on L.R.'s hymen was the State's way of eliciting a medical opinion on the ultimate issue in the case, which this Court has specifically prohibited. See *State v. Bucholz*, 2013 S.D. 96, 841 N.W.2d 449; AB's 17.

Hillary Rudloff's testimony

The State again attempts to argue context by setting forth that "H.R.'s testimony was not a comment on her daughters' credibility and Rudloff's guilt" but the questions

1 Defense counsel did not request this remedy after Detective Anderson testified that he had already made the decision to arrest Rudloff.

2 The State cites to page 713 of the transcript, which has nothing to do with this issue.

dealt with Hillary Rudloff's own credibility. (SB, 23) The State cites to no jury instruction making it clear to the jury that they were not to give any weight to her comments on her daughter's truthfulness or Rudloff's guilt. The State assumes the jury is to know the difference between this testimony being elicited for context versus the ultimate issue. Any reasonable review of the record establishes the fact that Hillary Rudloff bolstered the credibility of her daughters by telling the jury they were telling the truth.

Interestingly, the State's next comment is that Hillary Rudloff's role at trial was to be a credibility witness. The case law is clear: "one witness may not testify as to another witness's credibility or truth telling capacity because such testimony would invade the province of the jury . . ." *State v. Packed*, 2007 S.D. 75, ¶37, 736 N.W.2d 851, 862 (quoting *State v. McKinney*, 2005 S.D. 73, ¶32, 699 N.W.2d 471, 481). If her role was to be a credibility witness then why was she called at all? Further, if the State's argument is to be considered, what relevance does Hillary's credibility have to do with this case?

The State next attempts to argue that Hillary Rudloff's testimony did not vouch for the credibility of the girls. (SB, 24) The record is very clear on this issue. Hillary was asked multiple times whether she believed what her girls were saying and she answered yes each time. She was also asked by the prosecutor whether she believed Rudloff was guilty – to which she also answered yes. The State also argues that none of the prosecutor's questions told the jury that the State believed L.H. and L.R. (SB, 24) Questions do not normally draw conclusions. Additionally, the State's entire theory of the case was based on L.H. telling the truth and was argued as such extensively in the closing

argument. This entire line of questioning was highly prejudicial and invaded the province of the jury on both the credibility of the girls and as to Rudloff's guilt or innocence.

Private Investigator

The State attempts to argue that any issue with the questioning of the private investigator is waived due to a failure to cite to any legal authority. (SB, 32) At the beginning of this section of AB's brief, counsel correctly pointed out the criteria for the standard of review on evidentiary rulings. (AB, 14) Counsel cited to *State v. Thoman*, 2021 S.D. 10, 955 N.W.2d 759 and *Johnson v. United Parcel Serv. Inc.*, 2020 S.D. 39, 946 N.W.2d 1. Additionally, this subheading was clearly within Issue I of AB's brief. (AB, 14-20)

The two-pronged analysis argued in AB's initial brief was referring to the standard of review on evidentiary rulings. (AB, 14) The first prong is whether the trial court abused their discretion and the second prong is whether it was prejudicial error that in all probability affected the jury's conclusion. See *State v. Thoman*, 2021 S.D. 10 ¶ 41, 955 N.W.2d 759, 772.

The trial court erred by overruling Rudloff's objection to the prosecutor's question of Rudloff's private investigator that the girls had no motive to lie and by preventing defense counsel to follow up on their motive to lie once the door had been opened. The State appears to concede this prong in their brief as it relies solely on the second prong requiring prejudice. (SB, 32-33) The State failed to respond to Rudloff's argument that the trial court's rulings denied Rudloff the opportunity to present a defense on why these girls may have been motivated to fabricate their testimony. *Id.*

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS?

Regarding Rudloff's second interview with law enforcement, the State claims that Detective Anderson tried to clarify Rudloff's request for an attorney and that he used his best efforts in doing so, but Rudloff would not give straight answers. (SB, 39) The record is clear that Detective Anderson did not follow up on whether Rudloff waived Miranda or used his best efforts in getting an answer to the simple question of whether Rudloff wanted an attorney. Specifically, Detective Anderson decided not to follow up, but ignored Rudloff's question, after Rudloff said "Some questions that I'd probably won't want a lawyer with but . . ." (MH, March 23, 2022, Exhibit 2, p. 3) Detective Anderson had the opportunity at this point to ask him if he waived and agreed to speak with him, but Detective Anderson interrupted him and said "that's alright". *Id.* Additionally, there was no waiver of his rights and no immediate follow-up on whether he wanted an attorney. Rudloff appears to want an attorney for some questions, but not others. *Id.* Detective Anderson does not bring up an attorney again until 10 pages later in the transcript when he asks Rudloff if his brother is an attorney. *Id.* at p. 13 Detective Anderson then states "At that point it sounds like you're invoking to me." *Id.* at p. 17 A short time later Detective Anderson again admits that Rudloff had invoked when he said "you've asked for an attorney so at this point I'm not really good going on here." *Id.* at p. 18 The State's witness conceded to Rudloff that he had invoked, but the State ignores this exchange in their brief. (SB, 38-39) The interview went on for another 25 pages. The State claims that Rudloff wants to default to Detective Anderson for his inability to articulate whether he wanted an attorney. *Id.* at p. 39 There were three detectives in that

interview room with Rudloff. *Id.* p. 2 Only law enforcement in that interview room has received training and education on how to ask questions. Only law enforcement in that interview room has received education on the law as it pertains to waiver of Miranda rights. At least one person in that interview room knew whether Rudloff had requested an attorney and that person was Detective Anderson. The reality is that Detective Anderson admitted that Rudloff had invoked on page 18 of the transcript, but he illegally continued the interview.

The State acknowledges this is an issue because of the request for this Court to reconsider *State v. Blackburn, 2009 S.D. 37, 766 N.W.2d 177,* and return to a standard as set forth in *Davis v. United States*, 512 U.S. 452 (1994). (SB, 36-37) The State argues that it puts the police in an impossible position of determining whether a defendant waived his rights. SB, 37 Law enforcement knows how to interrupt a defendant that is not answering a question and ask the exact question that needs to be answered. They refuse to do so because they prefer the defendant to continue to talk in the hope that he or she will say something incriminating. Like the officer in *Blackburn*, Detective Anderson had a duty to clarify Rudloff's comments to determine if he wanted an attorney.

As this Court set forth in *State v. Tuttle*, 2002 S.D. 94, ¶ 14, 650 N.W.2d 20, 28: "Waiver of Miranda rights is viewed in light of the totality of the circumstances." The record is clear that Rudloff did not waive his rights and that he wanted an attorney. Rudloff, like the defendant in *Blackburn*, also wanted information. Detective Anderson ignored Rudloff's ambiguity and intentionally did not follow up to get answers on a waiver or his invocation of rights because Detective Anderson wanted Rudloff to made admissions.

The State cites to *State v. Rhines*, 1996 S.D. 55, 548 N.W.2d 415 in arguing that Rudloff's actions infer a waiver. (SB, 40) This case is distinguishable from *Rhines* as there is no indication that Rhines ever made a comment about wanting an attorney. As set forth above, Rudloff mentioned it multiple times. The State's attempt to compare Rudloff's statement about wanting an attorney for some questions to Rhines' comment about answering any questions he liked is distinguishable because Rhines' statement did not include a request for counsel. Additionally, Rudloff's statement was made after being asked whether he understood his rights as he was never asked if he agreed to waive them. Rhines was asked if he was willing to answer questions after his rights had been advised. *Id.* at ¶33, N.W.2d 429.

This was also not harmless error as the State was still using Rudloff's statements, and behavior during the interview, against him. While he did not make admissions, the State obviously saw value in playing the video because of their belief that he did not come across as credible. The State admitted the video of the interview into evidence because they believed it strengthened their case and portrayed Rudloff in a negative light. Lastly, the State specifically referred to comments Rudloff made during the interview in its closing argument. (JT6, pp. 1053-1055) It is impossible to predict what weight the jury gave to his interrogation. With credibility of the witnesses as the main issue in this case, it cannot be said that Rudloff's admitted statements were harmless.

For the reasons set forth above the trial court erred in not granting the Motion to Suppress.

III. WHETHER THE TRIAL COURT ERRED BY DISALLOWING OTHER ACTS EVIDENCE OF THE COMPLAINING WITNESSES MOTHER?

The State suggests that the circuit court's Rule 609 analysis equally applies to the Rule 404(b) question. (SB, 27) The State cites no authority to support this position. The State sets forth the proper test for a 404(b) analysis, but glosses over the fact that the trial court did not address 404(b). *Id.* Contrary to the State's suggestion, this Court has specifically refused to adopt "an inflexible rule on remoteness" *State v. Wright*, 1999 S.D. 50, ¶24, 593 N.W.2d 792, 802 when considering 404(b). Remoteness is to be "considered with similarity." *State v. Most,* 2012 S.D. 46, ¶ 17, 815 N.W.2d 560, 565. The trial court clearly erred by not considering the similarity of the allegations to the date of Hillary Rudloff's allegation.

In *State v. Dickerson*, 2022 S.D. 23, 973 N.W.2d 249, this Court held that defendants have a constitutional right to probe into motives of an individual's testimony. *Id.* at ¶35 Rudloff wanted to run the defense that the other acts surrounding Hillary Rudloff's conviction were similar to the allegations in this case. The State argues that there was no evidence that Hillary had coached the girls. (SB, 30) It is very difficult to establish coaching unless it is recorded or someone admits that it occurred. Rudloff should have been allowed to probe into whether this coaching occurred by comparing Hillary's allegations to the allegations in this case. The jury should have been allowed to compare the two sets of allegations and giving it the proper consideration in determining their verdict. In sex abuse cases, juries always want to know about a child victim's motive to lie. Rudloff was prevented in answering that question by being precluded from introducing this evidence.

This abuse of discretion prejudiced Rudloff to the extent that he was not able to present his theory of the case.

IV. WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING DIRECT EXAMINATION AND DURING CLOSING ARGUMENT?

The State suggests that the prosecutor did not engage in prosecutorial misconduct because his questions of Hillary Rudloff were to give the full picture of "H.R.'s vacillating reactions to the girls' disclosures." (SB, 44) The prosecutor did not just ask Hillary whether she believed the girls, but what changed her mind. (JT5, 1002) Hillary was allowed to explain that the evidence she saw from Oregon convinced her they were telling the truth. *Id.* If the prosecutor was truly asking Hillary these questions for the jury to weigh her credibility then the prosecutor would not have asked why she changed her mind. It is very clear from the record that the prosecutor asked these questions to bolster the credibility of the girls. Rarely do we see this blatant of an attempt by a prosecutor to do so. The State's attempt to explain these questions is disingenuous.

Regarding Detective Anderson's vouching, as explained thoroughly above, his testimony went far beyond giving context or to explain what actions he took next. His testimony was clearly used to show the jury that L.R.'s injury was caused by Rudloff, which is not permissible as that invades the province of the jury.

The State cites to *State v. Snodgrass*, 2020 S.D. 66, 951 N.W.2d 792 to support its position that no vouching occurred. (SB, 44) The State ignores the fact that bolstering and improper vouching occur in more ways than what occurred in *Snodgrass*. *Snodgrass* dealt with an expert introducing evidence to explain how the victim's behavior was consistent

or inconsistent with her allegations of sexual abuse. *Id.* at ¶ 47 The State failed to address any of the cases cited in Rudloff's initial brief that specifically discuss cases where this Court has held improper bolstering has denied a defendant of a fair trial. (AB, 18) See *State v. Raymond*, 540 N.W.2d 407 (S.D. 1995), *State v. Logue*, 372 N.W.2d 151 (S.D. 1985) and *State v. Jenkins*, 260 N.W.2d 509 (S.D. 1977).

Regarding the prosecutor's comments during closing argument on burden shifting, the State argues that each of his comments did not shift the burden. SB, 46-47 When the prosecutor told the jury to search for "truth and not for doubt" and "not any other burden but belief of that one witness" (JT6, 1050) he was misinforming the jury as to the burden of proof. By telling the jury to believe in that one witness he was telling them not to judge the credibility of L.H. and to disregard the evidence from the other witnesses.

The State also argued that the prosecutor did not seek sympathy for L.R. (SB, 47-48) The record is clear that the prosecutor's comment "it's no wonder that she has nightmares and she's depressed" was made to invite the jury to make a decision based on emotion rather than evidence. (JT6, 1059) Likewise, the prosecutor's comments that a guilty verdict would validate L.H.'s courage and that she suffered abandonment from the mother who gave her birth. (*Id.* at 1058, 1060-1061) This comment was also made for the jury to feel sorry for her. The trial court further erred in allowing the State to say, "a verdict will substitute justice for injustices that have been suffered . . ." *Id.* at 1060 This comment was made to inflame the passions of the jury.

The prosecutor clearly made these comments to further his likelihood of winning, which prejudiced Rudloff and denied him the right to a fair trial. This prosecutor's win at

all costs style inflamed the emotions of the jury and interfered with their ability to render a verdict based on emotion rather than evidence.

V. WHETHER THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED RUDLOFF OF A FAIR TRIAL?

It is clear based on the multitude of issues set forth in this brief, and Rudloff's initial brief, that Rudloff did not receive a fair trial. The cumulative effects of the prosecutorial misconduct, the trial court's errors and their resulting prejudice, clearly affected the fairness of Rudloff's trial.

CONCLUSION

For the aforementioned reasons, authorities cited, previous brief submitted and upon the settled record, Rudloff respectfully submits that his convictions must be reversed, and the case should be remanded for new trial.

Respectfully submitted this 12th day of June, 2023.

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