

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30995

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

DIEGO ALONZO ALONZO,

Defendant and Appellant.

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

HONORABLE SUSAN M. SABERS
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

All references herein to the Settled Record are referred to as “SR.” The transcript of the Initial Appearance held February 1, 2023 is referred to as “IA.” The transcript of the Arraignment held February 24, 2023 is referred to as “AH.” The transcript of the Bond Hearing held on June 13, 2023 is referred to as “BH.” The transcript of the Motion Hearing held August 25, 2023 is referred to as “MH1.” The transcript of the Motion Hearing held on January 18, 2024, is referred to as “MH2.” The transcript of the Other Hearing held on January 30, 2024 is referred to as “OH.” The transcript of the Suppression Hearing held on May 30, 2024, is referred to as “SH.” The transcript of the Pre-Trial Motions Hearing will be referred to as “PT.” The transcript of the Jury Selection will be referred to as “JS.” The transcripts of the Jury Trial held on September 9-11, 2024,

is referred to as “JT1” and “JT2.” The transcript of the Sentencing Hearing held on January 13, 2025, is referred to as “SENT.” All references to documents will be followed by the appropriate page number. Exhibits are referred to as “Ex.” followed by the exhibit number. Defendant and Appellant, Diego Alonzo Alonzo, will be referred to as “Alonzo.” The children who were named as victims will be referred to as K.J.1 and K.J.2. The State’s Victim Witness Assistant will be referred to as “VWA.” Bree Statton, Child’s Voice interviewer, will be referred to as “Statton.” Amanda Liebl, Forensic Interviewer with Child’s Voice, will be referred to as “Liebl.” Kirsten Persson, Advance Practice Provider with Child’s Voice, will be referred to as “Persson.”

JURISDICTIONAL STATEMENT

Alonzo appeals the Judgment and Sentence entered January 16, 2025, by the Honorable Susan M. Sabers, Circuit Court Judge of the Second Judicial Circuit. SR 392. Alonzo’s Notice of Appeal was filed February 12, 2025. SR 395. This Court has jurisdiction over the appeal pursuant to SDCL 23A-32-2 and SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN DENYING ALONZO ALONZO’S MOTION TO SUPPRESS.

Miranda v. Arizona, 384 U.S. 436 (1966)

Edwards v. Arizona, 451 U.S. 477 (1981)

State v. Blackburn, 2009 S.D. 37, 766 N.W.2d 177

II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ADMITTING CHILD HEARSAY STATEMENTS.

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

State v. Floody, 481 N.W.2d 242 (S.D. 1992)

III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING THE VICTIM WITNESS ASSISTANT TO ACCOMPANY THE TESTIFYING WITNESS.

State v. Alidani, 2000 S.D. 52, 609 N.W.2d 152

SDCL 23A-28C-8

IV. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ALONZO'S FIRST MOTION FOR MISTRIAL BASED ON THE CIRCUIT COURT'S STATEMENTS TO K.J.1.

State v. Stone, 2019 S.D. 18, 925 N.W.2d 488

State v. Richards, 84 S.D. 376, 171 N.W.2d 808 (1969)

V. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ALONZO'S SECOND MOTION FOR MISTRIAL DUE TO THE STATE'S COMMENTS DURING CLOSING ARGUMENT AND OPENING STATEMENT.

State v. Smith, 1999 S.D. 83, 599 N.W.2d 344

State v. Blaine, 427 N.W.2d 113, 116 (S.D. 1988)

STATEMENT OF CASE

On February 15, 2023, a Minnehaha County Grand Jury returned an Indictment charging Alonzo with eight counts of Rape in the First Degree in violation of SDCL 22-22-1(1). SR 12-14. The next day, Alonzo pleaded not guilty at his arraignment. AH 7-8. The circuit court held a hearing on the State's Notice

of Intent to Offer Hearsay Statements and admitted the statements over Alonzo's objection. *See generally* MH1; MH2. Alonzo filed a Motion to Suppress arguing his statements in a custodial interrogation were obtained in violation of his rights under the Fifth Amendment, *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981). SR 133-142. The circuit court held a hearing and denied the motion. *See generally* SH; SR 229-237.

Prior to trial, the State requested the VWA be allowed to sit with the children during testimony and Alonzo objected. PT 3-4. The circuit court allowed the VWA to sit with K.J.1 at the witness stand. JT1 19-20. During K.J.1's testimony, Alonzo renewed his objection after communication between the VWA and K.J.1 caused the circuit court to excuse the jury. JT1 20. The circuit court did not sustain the defense objection, but admonished K.J.1 regarding her testimony and communication with the VWA. JT1 21-22. Alonzo later moved for mistrial based on the nature of the circuit court's admonishment. JT1 93-96. The circuit court denied the motion for mistrial. JT1 97-98. During closing arguments, Alonzo objected to the State referring to him as a "monster" and moved for a mistrial. JT2 74. The circuit court denied the motion. JT2 75-76. The jury convicted Alonzo on all counts. JT3 77-78; SR 314-15.

On January 13, 2025, the circuit court sentenced Alonzo to sixty years in the South Dakota State Penitentiary on each count concurrently. SENT 14-15; SR 392-94. The Judgment and Sentence was filed on January 16, 2025. SR 394.

STATEMENT OF FACTS

On January 26, 2023, a teacher at Whittier Middle School in Sioux Falls notified the School Resource Officer that K.J.1 had disclosed sexual abuse in the home. SR 4. Officer Adam Healy interviewed K.J.1 at the school. *Id.* According to Officer Healy, K.J.1 stated that Alonzo, her stepfather, had been “inappropriately touching” her, and had “sexually assaulted” her younger sister, K.J.2. SR 4-5. Officer Healy then interviewed K.J.2, who also disclosed being “sexually assaulted by the defendant on more than one occasion.” SR 5.

Both K.J.1 and K.J.2 underwent forensic interviews at Child’s Voice on January 30, 2023. SR 5. At the time of the interviews, K.J.1 was 13 years old and K.J.2 was 12 years old. JT1 88. The State filed a Notice of Intent to Offer Hearsay Statements, seeking to admit the recording of K.J.2’s interview and her statements to Officer Healy. SR 16.¹ The State intended to offer the statements pursuant to SDCL 19-19-806.1, SDCL 19-19-803(4), and SDCL 19-19-807. *Id.* On August 25, 2023, the circuit court held a Motions Hearing (Child Hearsay Hearing). *See generally* MH1.² The hearing was bifurcated with a second hearing occurring on January 18, 2024. *See generally* MH2. Alonzo appeared with counsel and “the assistance of an interpreter.” MH1 27.³ At the first hearing, K.J.2 and

¹ Ultimately, Officer Healy did not testify at trial.

² K.J.1’s interview was not offered at trial.

³ Throughout the proceedings, Alonzo appeared with a Spanish interpreter. MH1 3; MH2 3; SH 3; JS 18; JT2 3; SENT 5.

Officer Adam Healy testified. *See generally* MH1. At the second hearing, Kirsten Persson testified. MH2 3.

The circuit court received State's Exhibit 1, a video recording of K.J.2's Child's Voice interview. *Id.* In the interview, K.J.2 stated that Alonzo previously lived in the home but was removed because he "did stuff." Ex. 1 00:10:45 - 00:12:23. K.J.2 described Officer Healy asking whether Alonzo had been "doing stuff," and Statton asked what K.J.2 had stated to Officer Healy. *Id.* at 00:14:00 - 00:14:33. K.J.2 indicated she responded in the affirmative during the disclosure. *Id.* 00:14:33 - 00:14:39. Statton asked "tell me about the stuff that Diego's been doing," to which K.J.2 responded, "touching our private parts." *Id.* at 00:14:43 - 00:15:17. Statton then asked "has [Alonzo] been touching to your private parts one time or more than one time?" and K.J.2. responded "more." *Id.* at 00:15:34- 00:15:42. K.J.2 stated the first time she was 7 years old, and it occurred "when we lived in Rapid." *Id.* 00:15:42-00:16:19; 00:17:00. K.J.2 stated the last time, she was 11 years old. *Id.* at 00:15:52. Statton asked, "Tell me, you said [Alonzo] did touching to your private parts the last time you were eleven," and asked for details. K.J.2 stated it was October of 2021. *Id.* at 00:19:57 - 00:20:16. During this instance, K.J.2 stated Alonzo picked her up from her bed and brought her to the living room and tried to pull her pants down. *Id.* at 00:23:00 - 00:24:45. K.J.2 described Alonzo touching her around her stomach and thighs. *Id.* at 00:30:15 - 00:30:48. Statton then asked, "[y]ou were telling me that [Alonzo] has done touching to your private parts more than one time. What private parts on your

body has [Alonzo] touched?" *Id.* at 00:30:48 – 00:31:15. K.J.2 pointed toward her midsection and stated she calls it her "private part." *Id.* Statton next asked, "[h]as [Alonzo] touched this private part on you one time or more than one time?" *Id.* at 00:31:13 – 00:31:24. K.J.2 responded "more." *Id.* at 00:31:24. Statton asked again about the "first time," and K.J.2 clarified it was the previously mentioned occurrence. *Id.* at 00:31:37 – 00:32:30. K.J.2 stated she had "um, he started like...um... I forgot if he was like touching down there but I know he was like taking off my clothes or something." *Id.* at 00:32:10 – 00:32:33.

Statton then asked K.J.2 to "[t]ell me about a time that you do remember. Like [Alonzo] doing touching to his private part on you." *Id.* at 00:32:30. K.J.2 described an occurrence "when we lived at our old place" where Alonzo "took me into our hallway," removed her pants and put his "private part" inside of her "private part." *Id.* at 00:32:50 – 00:36:00. Statton asked if Alonzo had "put his private part inside your private part other times or other days?" *Id.* at 00:46:52–00:46:59. K.J.2 responded affirmatively and Statton asked "tell me about another time." *Id.* at 00:46:52 – 00:46:59. K.J.2 stated she "forgot." *Id.* at 00:47:30.

Regarding the October 2021 incident, Statton sought to clarify, "you said [Alonzo] put his private part inside your private part that time?" *Id.* at 00:49:15. K.J.2 responded, "the last time? No he didn't." *Id.* at 00:49:40. K.J.2 proceeded to describe the last instance where Alonzo put his private part in hers, stating it had been "on the weekend" when her mother was "passed out," and Alonzo grabbed her from her bed, took her to the living room, put a blanket over them, and "put

his private part in mine.” *Id.* at 00:50:00-00:52:10. She stated she was 11 years old at the time. *Id.* at 00:49:53 – 00:50:01. K.J.2 stated this incident occurred at the family’s “new place” in Sioux Falls. *Id.* at 00:56:47 – 00:57:05. Statton asked whether Alonzo did anything with his mouth, or whether he made K.J.2 do anything with her mouth and she denied this. *Id.* at 00:58:04 – 00:58:13. K.J.2 described speaking with K.J.1 about the abuse. *Id.* at 00:59:58 – 01:00:36. K.J.2 first stated she and K.J.1 had witnessed Alonzo abusing one another, but she also stated she didn’t know if she witnessed K.J.1 suffering abuse or if K.J.1 had told her about it. *Id.* at 01:01:47 – 01:06:06. K.J.2 stated that at one point, K.J.1 had told the children’s mother Alonzo was “being weird,” but K.J.2 denied any sexual abuse when her mother asked. *Id.* at 01:07:46 – 01:09:22. K.J.2 stated Alonzo told her to not tell her mother about the abuse and told her she would be taken away from her mother if she told. *Id.* at 01:09:22 – 01:10:01. K.J.2 said Alonzo would give her gifts. *Id.* at 01:10:01 – 01:11:17.

When K.J.2 testified at the hearing, she admitted in cross-examination she had spoken with K.J.1 about Alonzo prior to speaking to Officer Healy. MH1 24. In resisting the admission of these statements, Alonzo argued that Statton was unfamiliar with K.J.2 and was therefore unaware of her potential susceptibility to suggestion. MH2 32. Alonzo argued admission of the statements was improper. *Id.* at 32-33. Ultimately the circuit court approved the admission of the statements, filing Findings of Fact and Conclusions of Law on January 26, 2024. SR 118-123. Reviewing the factors set forth in *State v. Guthmiller*, 2003 S.D. 83, 667

N.W.2d 295, the circuit court specifically found “no evidence” of motivation to make false allegations, or to show K.J.2 was suggestible. SR 122.

The day after the forensic interview, Detective Ian Branch secured an arrest warrant for Alonzo. SR 229. Detective Branch interviewed Alonzo following his arrest. *See generally* Ex. 5. Branch informed Alonzo he would be transported to jail following the interview. Ex. 5. 00:01:20 - 00:01:25. Detective Branch provided a *Miranda* advisement to Alonzo. *Id.* at 00:1:50 - 00:2:00

Thereafter, the following exchange occurred:

Det. Branch: Do you understand those rights?

Alonzo: No.

Det. Branch: Ok, which part don't you understand at this point?

Alonzo: Uhh, the attorney...whatcha say again?

Det. Branch: The attorney? That portion says you have the continuing right to consult with and have the presence of an attorney, or a lawyer."

Alonzo: Oh, ok.

Det. Branch: If you wish to have a lawyer present before you have a conversation with me that's a right you have.

Alonzo: Ok.

Det. Branch: Are there other questions or anything else you don't understand about?

Alonzo: No, I got it.

Det. Branch: Do you, knowing all of these options available to you, do you wish to waive these rights and talk to me at this time?

Alonzo: I don't know.

Det. Branch: Knowing that you have the right to not speak with me, and that you can stop the questions at any point, knowing that you have the right to have an attorney present before you answer any of my questions, and that you can stop questioning because you want a lawyer to come talk to you, knowing all that do you want to forego doing that and talk to me anyway at this point?

Alonzo: Oh, ok. Probably lawyer.

Det. Branch: You would rather have a lawyer before you speak with me?

Alonzo: I think...I think so, I don't know.

Det. Branch: Well I can't make that decision for you, Diego.

Alonzo: Oh, ok, well I can talk to you I guess.

Det. Branch: You're ok with talking to me at this point?

Alonzo: Yeah.

Det. Branch: If you change your mind at any point and decide you want a lawyer you can do that.

Alonzo: When I can get the lawyer?

Det. Branch: You would have to make arrangements on your own at another time.

Alonzo: Oh, ok. Yeah I can talk to you.

Det. Branch: Again, at any point, you can decide that you want to stop talking to me and request a lawyer, you understand that?

Alonzo: Yeah.

Id. at 00:02:00 – 00:03:54. Branch later provided a *Miranda* advisement in Spanish.

Id. at 00:08:20 – 00:10:35.⁴ Between the two advisements, Alonzo asked Detective Branch to slow down his rate of speaking, stating “when you talk a little fast, some of those other, I didn’t get. I didn’t catch. If you talk a little slow, I’ll catch you.” *Id.* at 00:06:30 – 00:06:40.⁵

Alonzo made admissions during the interrogation. JT2 62. Later at trial Detective Branch testified that Alonzo made admissions, and “did ultimately advise that he attempted to have sex with [K.J.2].” JT2 11.⁶ Alonzo filed a Motion

⁴ Alonzo indicated that he speaks English better than he speaks Spanish. JT2 11. At the hearing on the Motion to Suppress, defense counsel stated in argument, “I think he has a little bit of understanding of both languages.” SH 34.

⁵ When Detective Branch testified at trial, the circuit court interjected, stating: “Hold on. He’s a fast talker and he’s used to me telling him to slow down. You are a fast talker and I’m now going to tell you to slow down.” JT2 5.

⁶ Alonzo explained “I make a bunch of mistakes when I’m drunk. Ex. 5 00:55:28 – 00:55:38. Alonzo stated that during one instance, he believed he was “trying to” place his penis in K.J.2’s vagina, but it was between her legs and he was “really drunk.” *Id.* at 00:16:30 – 00:16:53.

to Suppress, arguing the statements were taken in violation of his *Miranda* rights. SR 133-142. Alonzo asserted that Detective Branch did not fully apprise him of his rights, and his decision to undergo the interrogation was not based on a valid waiver of this *Miranda* rights. *Id.* Further, Alonzo argued he invoked his right to an attorney and Detective Branch was required to cease the interrogation. SR 136-140. The circuit court denied the Motion to Suppress, filing Findings of Fact and Conclusions of Law on June 7, 2024. SR 229-237. The State admitted Exhibit 5 at trial. JT2 12.

Prior to trial, the State requested the VWA “be allowed to sit behind, to the rear, of the children as they testify.” PT3. By the time of trial K.J.1 was 15 years old and K.J.2 was 14 years old. JT1 14; JT1 52. Alonzo objected to the VWA’s presence at the witness stand. PT4. Alonzo argued the VWA’s presence at the witness stand would have a prejudicial effect and would not be appropriate. *Id.* The circuit court stated “I’ll decide that later today and get the answer to both sides.” *Id.*

At trial, K.J.1 testified that Alonzo “touched us inappropriately,” beginning when she was in second grade. JT1 18. Shortly after this, defense counsel objected, and a bench conference was held. JT1 19. The circuit court then excused the jury. *Id.* The circuit court explained, “[y]esterday the Court ruled that [VWA] could accompany [K.J.1] to the stand. She was to sit behind [K.J.1], to

not be within eye contact of [K.J.1], and could have no communication with [K.J.1].” *Id.* The circuit court noted Alonzo’s objection during testimony and stated, “I did see a look between [K.J.1] and [VWA], but what I missed was apparently a look where [K.J.1] turned and told [VWA] she needed a break.” JT1 19-20. Defense counsel argued that the VWA’s presence was prejudicial, because K.J.1 had “turned and communicated,” with the VWA. JT1 20. The State responded that K.J.1 had asked for a break, but the VWA did not communicate back in any way. JT1 20-21. The circuit court then addressed K.J.1 with the following statements:

Can you look at me? So one of the things that the lawyers talked to the jury about yesterday was whether any of them would be comfortable getting up and talking about their last sexual encounter. So all of those people on the jury are adults. All of the sexual encounters they were talking about were concentual [sic], meaning agreed upon and there wasn't a single adult in a group of 100 people that said they would be willing to get up and talk about that. So the people you are in front of right now absolutely understand and recognize that what you're doing is hard. You're not being asked to talk about agreed upon adult sex. You're being asked to talk about allegedly not agreed upon and allegedly child sex. So tough, hard, absolutely understand that what you're doing is hard.

JT1 21-22. The circuit court continued:

It's a big deal what we're here to do today because the allegation against Mr. Alonzo Alonzo could put him in prison for not just the remainder of his life, but for multiple life periods. He could go to the penitentiary for forever, so it's important that the jury hear your story. It's also important that the jury not be of the impression that you're getting answers from [VWA] or you're being helped by [VWA]. I've never been in your position where I had to look at a jury and tell them something like this. And again, I understand it is a super tough thing that we are asking of you, but I can't have you

looking at [VWA] as though you're looking for answers. I can't have you asking [VWA] for help or I'm going to end up taking [VWA] away. [VWA] is there to give you a support, to give you a physical presence to make the courtroom a little less scary for you, but her presence is about all I can offer you and if we continue to have eye contact and interaction between you two, I'm worried I will be stuck taking her away and I don't want to do that. Do you understand [K.J.1]

JT1 22. After a break, the State informed the circuit court that the VWA would sit in the “gallery itself, so she’s sitting in the benches with the remainder of the trial observers.” JT1 23-24. After the break and admonishment, K.J.1 ultimately testified that Alonzo put his “private part” inside of her “private part” at the family’s “apartment by Scheels.” JT1 24-26.⁷ K.J.1 stated this happened “almost every weekend,” and occurred in the living room “more than one time” and in her mother’s room “more than one time.” JT1 28-29.

K.J.2 testified at trial and stated that in the “first apartment in Sioux Falls,” Alonzo “put his private into mine,” occurring “more than one time” in the hallway, and “more than one time” on the floor of her bedroom. JT1 55-60. She also testified that once, her mouth did “[l]ike go into his private.” JT1 62. Kirsten Persson testified that K.J.2 disclosed “penial/vaginal penetration” more than one time by [Alonzo].” JT1 90. Defense objected to the admission of these statements before the State elicited it. JT1 89-90. The State offered Exhibit 3, a video recording of K.J.2’s forensic interview and the defense again objected. JT1 92. The

⁷ The State offered Exhibit 1, an anatomical drawing of a girl which K.J.1 circled to indicate where she meant by “private part.” JT1 25; JT1 37.

circuit court noted the objection but overruled it, receiving Exhibit 3. The State published Exhibit 3 during Persson's testimony. JT1 99.

At this time, outside the presence of the jury, defense counsel moved for a mistrial based on the circuit court's prior comments toward K.J.1. JT1 93. Defense counsel noted that K.J.1 initially appeared reluctant to testify. JT1 93-94. Defense counsel explained the motion for mistrial:

During the break the Court addressed the witness and essentially informed the witness that the Court understood she was hesitant and reluctant, but it was important that she -- I think important that she provide her testimony; informed her that Mr. Alonzo Alonzo is facing potential life sentence on each count and for that reason we think that another attorney looking back on this could perhaps think that the Court's comments influenced her or somehow tainted the substance of her testimony potentially. So for that reason we are moving for a mistrial.

JT1 94. Defense counsel acknowledged the comments occurred outside the presence of the jury but argued that the circuit court's comments influenced K.J.1's testimony, because "[s]he felt like she didn't want to say anything in front of the jurors. Then with the Court's comments, she felt pressured to, okay, I better say what I've already said in the past." JT1 95. Further, defense counsel explained that prejudice existed because, "she felt some sort of pressure to testify consistent with what she had said in the past," and this affected "the impartiality of the proceeding." JT1 95-96. The State argued there was no prejudice from the circuit court's comments to K.J.1. JT1 96. The circuit court denied the motion for mistrial, stating Alonzo could not show prejudice because the comments were not intended to influence K.J.1's testimony. JT1 97-99. The circuit court concluded

its reasoning stating that in its comments to K.J.1, it “was trying to explain that we did not cause her this discomfort lightly, but that this was a matter of importance and that she had to put her discomfort aside and give the testimony that she was required to give.” JT1 97-99. The circuit court later stated in further reasoning that Alonzo’s motion for mistrial was not timely, because the defense did not object to the statements contemporaneously, did not cross-examine K.J.1 about the comments, and only brought the motion after two other witnesses had testified. JT1 100. Because of this delay, the circuit court stated, Alonzo “denied the Court any ability to remedy anything that would require a remedy.” *Id.*

The State also called Liebl to testify. JT1 24. The State offered her curriculum vitae as Exhibit 4 and offered her testimony as an expert witness “regarding forensic interviewing.” JT1 128-29. Detective Branch testified and stated Alonzo made admissions in his interview. JT2 11. During closing arguments, the State referred to Alonzo as a “monster,” stating “I submit to you that what he can’t believe is he is the monster.” JT2 56. Defense counsel interjected, asking for a bench conference. JT 56. Later, outside the presence of the jury, the circuit court acknowledged defense counsel’s timely objection. JT2 73. Defense counsel cited to *State v. Smith*, 1999 S.D. 83, 599 N.W.2d 344, for the proposition that referring to a defendant as a “monster,” in addition to the State’s use of “nightmare” during opening statement, required a mistrial. JT2 74. The circuit court denied the motion for mistrial, stating that it was a single instance and was not prejudicial because of “overwhelming evidence of guilt in this

matter.” JT2 75-76.

The jury returned guilty verdicts as to each count. JT3 77-78; SR 314-15.

The circuit court ordered eight concurrent 60-year sentences. SENT 14-15; SR 392-94.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING ALONZO’S MOTION TO SUPPRESS.

A. Standard of Review

Alonzo’s motion to suppress was premised on a violation of his constitutional rights, accordingly, the circuit court’s denial of his motion to suppress presents a question of law to be reviewed de novo. *State v. Willingham*, 2019 S.D. 55, ¶ 21, 933 N.W.2d 619, 625. Likewise, whether Alonzo “knowingly, voluntarily, and intelligently waived *Miranda* rights” is reviewed under the de novo standard. *Id.* ¶ 22, 933 N.W.2d at 625 (quoting *State v. Tuttle*, 2002 S.D. 94, ¶ 6, 650 N.W.2d 20, 25).⁸ Under this standard, this Court reviews the circuit court’s findings of fact for clear error, but conclusions of law are given no deference. *State v. Cummings*, 2021 S.D. 4, ¶ 8, 954 N.W.2d 731, 735.

“The burden is on the State to prove the defendant’s admissions were voluntary by a preponderance of the evidence.” *Willingham*, 2019 S.D. 55, ¶ 21, 933 N.W.2d at 625. (citing *State v. Ralios*, 2010 S.D. 43, ¶ 24, 783 N.W.2d 647, 654). “This requires a showing that: ‘(1) the relinquishment of the defendant’s rights

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

was voluntary and (2) the defendant was fully aware that those rights were being waived and of the consequences of waiving them.” *State v. Strozier*, 2013 S.D. 53, ¶ 15, 834 N.W.2d 857, 862 (quoting *Tuttle*, 2002 S.D. 94, ¶ 9, 650 N.W.2d at 26).

B. Alonzo’s waiver was not knowing, voluntary, and intelligent.

Detective Branch’s answer to Alonzo’s questions regarding when or how he could obtain an attorney rendered Alonzo’s waiver invalid. In a custodial interrogation, *Miranda* requires an officer to give four basic warnings: “[1] the right to remain silent, [2] that anything [she] says can be against [her] in a court of law, [3] that [she] has the right to the presence of an attorney, [4] and that if [she] cannot afford an attorney one will be appointed for [her] prior to any questioning if [she] so desires.” *State v. Angle*, 2021 S.D. 21, ¶ 15, 958 N.W.2d 501, 506 (citing *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)). Detective Branch provided these warnings to Alonzo. Ex. 5 00:01:48 – 00:02:10. But when asked, Alonzo immediately responded that he did not understand his rights. *Id.* at 00:02:10. Detective Branch’s legally incorrect statement negated the knowing, voluntary, and intelligent character of any waiver. He advised, “[y]ou would have to make arrangements on your own at another time.” *Id.* at 00:03:36 – 00:03:42. Branch’s response did not adequately communicate to Alonzo that it was his right to have an attorney present during questioning and appointed by the court prior to any questioning. Put simply, Alonzo did not understand that his simple request for an attorney could terminate the custodial interrogation. Instead, Alonzo was informed that he would have to “make arrangements on

[his] own at another time.” But *making arrangements on his own at another time* does not convey the true nature of Alonzo’s right to request court appointed counsel at the expense of the county and have his court appointed attorney present with him during the custodial interrogation. Branch’s explanation was a blatant mischaracterization of a constitutional right, delivered at precisely the moment Alonzo was asking how to exercise that right. In other words, Alonzo did not understand that exercising his right to counsel was as simple as filling out an application to be approved by the circuit court. Requesting a court-appointed attorney is certainly different than *making arrangements on his own at another time*, and conflating one with the other is inherently misleading.

Even in denying the motion, the circuit court acknowledged Detective Branch’s problematic response, stating, “I have a comment or two because Detective Branch has remained in the courtroom for the decision.” SH 35. In addressing him, the circuit court advised:

Detective Branch, I do not love the one line. I do not love it. "You would have to make arrangements [on] your own at another time." Don't love it. Sabers not loving your statement is not the standard that is to be applied. It really has little to do with anything. It could have been more clear. You could have clarified further, but I agree with Ms. Johnson's record that it is inherently a truthful and accurate statement. He would have to make arrangements because he would have to fill out the court appointment app, and it would happen at another time. It doesn't happen during the interview.

Id. The circuit court further reasoned that by this time, Detective Branch had already stated at least twice that questioning would cease if Alonzo wanted an attorney. SH 35-36. But the circuit court’s reasoning is semantic and technical in

the face of Alonzo's overarching confusion. And Detective Branch's response "actively discouraged" Alonzo from asserting his rights. *States v. Churchill*, 579 F. Supp. 3d 207, 218 (D. Me. 2022).⁹

Other factors, under the totality of the circumstances,¹⁰ demonstrate Alonzo's confusion and the circuit court's error in finding that he voluntarily, knowingly, and intelligently waived his rights. SR 234-35. Reviewing this conclusion of law de novo, this Court should first consider Alonzo's initial statement that he did not understand his rights.¹¹ See *Diaz*, 2014 S.D. 27, ¶¶ 42-43,

⁹ In *Churchill*, the Defendant asked, "I can have a lawyer here?" and the officer responded, "You can ask for a lawyer. It's not practical. They're not going to be able to get here today, right? But we can stop until you get an attorney. That is one of your rights." 579 F. Supp. 3d at 212. The officer had prefaced this statement by advising that an attorney was "not going to be able to get here today." *Id.* at 231. The court found that the officer's "intermingling of conflicting advice" regarding the right to counsel and the impracticality of exercising that right required suppression. *Id.*

¹⁰ The totality of the circumstances inquiry also encompasses the gravity of any misrepresentations used by the interrogating officers. *State v. Diaz*, 2014 S.D. 27, ¶¶ 30-41, 847 N.W.2d 144, 156-159. More generally, for a waiver determination, a court should consider the defendant's age, experience, intelligence and background, including familiarity with the criminal justice system, and physical and mental condition. *State v. Tuttle*, 2002 S.D. 94, ¶ 7, 650 N.W.2d 20, 25; *State v. Two Hearts*, 2019 S.D. 17, ¶ 22, 925 N.W.2d 503, 512.

¹¹ The circuit court, as a conclusion of law, found that Alonzo "appeared to be of reasonable intelligence and did not appear confused about his circumstances or why he was being interviewed. He did not indicate difficulty in understanding Detective Branch's questions or have difficulty responding appropriately." SR 134. Alonzo disagrees and, to the extent this is more appropriately considered a factual finding, it was clearly erroneous. The video recording of the exchange demonstrates Alonzo's obvious confusion.

847 N.W.2d at 159 (considering defendant’s first response of “No” when asked of understanding rights within the context of defendant’s “limited English skills”). Further, Alonzo “had no formal education at all.” SH 16. And although Alonzo demonstrated some proficiency in English, this Court must accept that even to Detective Branch, Alonzo’s comprehension was a concern. SH 13.¹² Still, Detective Branch did not genuinely determine Alonzo’s understanding but spoke in general terms to secure an ostensible waiver. *Miranda* requires more, because “the United States Supreme Court created the well-known *Miranda* rule as a prophylaxis, requiring police officers to advise suspects of their rights and to terminate custodial questioning of an individual if he requests the assistance of counsel.” *State v. Uhre*, 2019 S.D. 8, ¶ 34, 922 N.W.2d 789, 799.¹³

C. Alonzo invoked his right to counsel prior to any waiver and Detective Branch responded improperly.

¹² Alonzo even asked Detective Branch to speak slowly because he “didn’t catch” everything he was saying. Ex. 5 00:06:30 – 00:06:40. This occurred while Branch was offering the second *Miranda* advisement in Spanish. *Id.* The circuit court itself took note of Detective Branch’s fast speaking at trial. JT2 5. These circumstances further support a finding that Alonzo’s waiver was not knowing, voluntary, or intelligent.

¹³ In *Uhre*, the Court stated the denial of Uhre’s motion to suppress “potentially implicates his Fifth and Sixth Amendment rights to counsel and his Fifth Amendment right against self-incrimination.” 2019 S.D. 8, ¶ 34, 922 N.W.2d at 799. Uhre contended he requested an attorney during a telephonic interview. *Id.* at ¶ 9, 794. Here, Alonzo asserts the factual circumstances underlying his motion also implicate both his Fifth and Sixth Amendment rights to counsel, as well as his Fifth Amendment right against self-incrimination.

The Supreme Court extended *Miranda*'s protections in *Edwards v. Arizona*, 451 U.S. 477 (1981). Alonzo's question (i.e. "when I can get the lawyer?") expressed a present desire for the attorney referenced in the *Miranda* advisement, and a reasonable officer would understand it as an unambiguous request for counsel requiring all questioning to cease immediately under the "bright-line rule" established in *Edwards*. *State v. Blackburn*, 2009 S.D. 37, ¶ 9, 766 N.W.2d 177, 181. Alonzo asked when he would be able to consult with an attorney. Ex. 5 00:03:36. The circuit court found as a matter of law that "Alonzo mentioned an attorney during the interview, but never unequivocally asked for the assistance of one." SR 235. Courts have recognized that questions can constitute unambiguous invocations of the right to counsel. *See United States v. Lee*, 413 F.3d 622, 624-26 (7th Cir. 2005) (holding "[c]an I have a lawyer?" sufficient to trigger protections under *Miranda* and *Edwards*); *United States v. Hughes*, 921 F. Supp. 656, 657 (D. Ariz. 1996) (holding "[c]an I call my lawyer?" was a statement that "constituted an invocation of the defendant's right to counsel"). In context, Alonzo's question was an invocation.

Prior to this question, Alonzo had attempted to assert his right to an attorney in this portion of the exchange:

Alonzo: Oh, ok. Probably lawyer.

Det. Branch: You would rather have a lawyer before you speak with me?

Alonzo: I think...I think so, I don't know.

Det. Branch: Well I can't make that decision for you, Diego.

Alonzo: Oh, ok, well I can talk to you I guess.

Ex. 5 00:03:12 – 00:03:30. Even if Alonzo’s question and prior statement were ambiguous or equivocal, Detective Branch was required to “clarify the request and/or waiver before proceeding.” *State v. Blackburn*, 2009 S.D. 37, ¶ 9, 766 N.W.2d 177, 181.¹⁴ First, when Alonzo said “[p]robably lawyer,” Detective Branch’s response was not a neutral clarifying question; it reinforced their adversarial positions and placed the burden back on Alonzo to re-assert a right he had already sought to exercise.¹⁵ Then, when Alonzo asked the direct question, rather than clarifying Detective Branch offered an affirmatively misleading statement regarding *when* Alonzo could consult with an attorney. In *United States v. Connell*, a defendant was advised “you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford to pay for a lawyer, one may be appointed to represent you.” 869 F.2d 1349, 1350 (9th Cir. 1989).¹⁶ The Ninth Circuit held these

¹⁴ As *Blackburn* explains, in a pre-waiver context, this Court’s rule is more protective than the rule announced in *Davis*, which was a “post-waiver ambiguous request for a lawyer [that] came after an hour and one-half of police questioning.” 2009 S.D. 37, ¶ 18, 766 N.W.2d at 184-185. (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)).

¹⁵ Although Alonzo’s attempt to invoke his right to an attorney was arguably imperfect, he should not be expected to “speak with the discrimination of an Oxford don.” *Davis v. United States*, 512 U.S. 452, 459 (1994).

¹⁶ In *Connell*, a written warning and waiver form, which the defendant signed, also stated “I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford to pay for a lawyer and want one arrangements will be made for me to obtain a lawyer in accordance with the law.” 869 F.2d 1349, 1350-51.

Miranda warnings to be “confusing,” because they “failed to clearly inform him that if he could not afford an attorney he had the right to have an attorney appointed for him prior to interrogation,” which required suppression. *Id.* at 1353. Alonzo invoked his right to an attorney, and Detective Branch’s response was active interference with his ability to understand and exercise his right to counsel. Detective Branch’s response conveyed inaccurate and misleading messages to Alonzo: (1) that obtaining an attorney was Alonzo’s personal financial responsibility; (2) that Alonzo could not have a lawyer during the present interrogation; and (3) that the matter of counsel is deferred to some unspecified future time.

Both Alonzo’s question and his statement, “probably a lawyer,” were “statement[s] that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.” *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). The circuit court should have granted the Motion to Suppress.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY STATEMENTS.

A. Standard of Review

The circuit court’s decision to admit child hearsay statements under SDCL 19-19-806.1 is reviewed for an abuse of discretion. *State v. Snodgrass*, 2020 S.D. 66, ¶ 38, 951 N.W.2d 792, 805. “An abuse of discretion is discretion exercised to an end or purpose not justified by and clearly against, reason and evidence.” *Id.*

(quoting *State v. Medicine Eagle*, 2013 S.D. 60, ¶ 16, 835 N.W.2d 886, 892).

In assessing “the reliability of a child's hearsay statements[.]” this Court considers the “the circumstances in which they were made” and the nine factors described in *Cates. Id.* ¶ 41, 951 N.W.2d at 805 (citing *State v. Cates*, 2001 S.D. 99, ¶ 11, 632 N.W.2d 28, 34). No single consideration is dispositive, and this Court “must examine the totality of the circumstances surrounding the statement.” *Id.*

The *Cates* factors include:

- 1) the child's age and maturity;
- 2) the nature and duration of the abuse;
- 3) the relationship of the child to the offender;
- 4) the coherence of the statement, bearing in mind that young children may sometimes describe incidents in age appropriate language and in a disorganized manner;
- 5) the child's capacity to observe, retain, and communicate information;
- 6) the nature and character of the statement itself, considering the child's developmental limitations in understanding and describing sexual behavior;
- 7) any motivation of the child to make a false allegation or a false denial;
- 8) the child's susceptibility to suggestion and the integrity of the situation under which the statement was obtained; and
- 9) all the circumstances under which the statement was made.

Cates, 2001 S.D. 99, ¶ 11, 632 N.W.2d at 34.

B. The circuit court abused its discretion in admitting the hearsay statements.

The circuit court’s treatment of *Cates* factor (7) was conclusory and ignored the sibling conversation. SR 122. On this point, the circuit court’s finding was a single conclusory sentence that did not engage with the most significant reliability concern in the record. *Id.* K.J.2 admitted that she and K.J.1 had

discussed disclosure prior to speaking with Officer Healy. MH1 24. Under *Matter of R.S.S.*, when reliability is a close question, a single conclusory sentence may be error, because the circuit court must make a record showing it fully considered each element, including the specific circumstances that raise reliability concerns. 474 N.W.2d 743, 750 (S.D. 1991). The circuit court erred because it did not consider the prior conversation between K.J.1 and K.J.2.

The sibling conversation also destroys spontaneity and implicates *Cates* factor (8). K.J.2's disclosure and the ensuing forensic interview were not spontaneous; she disclosed only after her sister had already disclosed to law enforcement and after speaking with her sister about Alonzo. Furthermore, K.J.2's age (12 years old) and the multi-year temporal delay in disclosure undermine the foundational rationale of factors (1), (4), and (6). Young children are unlikely to fabricate graphic accounts of sexual activity because such activity is beyond their experience. *State v. Floody*, 481 N.W.2d 242, 251 n. 11 (S.D. 1992) (quoting *State v. McCafferty*, 356 N.W.2d 159, 164 (S.D. 1984)). But this principle does not apply with the same force to a 12-year-old in adolescence. K.J.2 was near the upper boundary of the statute's coverage. SDCL 19-19-806.1. *Cates* factors (4) and (6) are premised on the developmental limitations of young children, and these factors do not operate in favor of reliability for a 12-year old declarant in the same way they do for a younger child. The circuit court abused its discretion in weighing the *Cates* factors.

The circuit court's error was not harmless. See *State v. Richmond*, 2019 S.D.

62, ¶ 35, 935 N.W.2d 792, 802 (applying harmless error analysis where admission of child hearsay statements was violative of defendant’s constitutional right to confrontation). K.J.2’s forensic interview was not a brief or peripheral piece of evidence; it was the primary and most detailed account of sexual abuse. The interview was not merely cumulative. The State used the interview to say K.J.1 and K.J.2’s testimony was “corroborated,” a specific prejudice that Alonzo identified at the Motions Hearing. JT2 55; MH2 30.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING THE VICTIM WITNESS ASSISTANT TO ACCOMPANY THE TESTIFYING WITNESS.

A. Standard of Review

Under SDCL 23A-28C-8, a “victim or witness assistant may accompany the victim in any criminal proceeding.” In relation to this statute, “[t]he trial court has broad discretion to determine the mode and manner of witness’ testimony and will be reversed only for abuse of that discretion.” *State v. Alidani*, 2000 S.D. 52, ¶ 17, 609 N.W.2d 152, 157 (citing *State v. Kietzke*, 85 S.D. 502, 186 N.W.2d 551, 554 (1971)). *Alidani* establishes that when a defendant objects to a VWA’s presence at the witness stand, the circuit court’s overruling of the objection is reviewed for abuse of discretion. 2000 S.D. 52, ¶¶ 16-17, 609 N.W.2d at 157.

B. The VWA’s presence at the witness stand resulted in communication between she and K.J.1 and demonstrates the circuit court’s abuse of discretion.

In *Alidani*, this Court found no abuse of discretion where the circuit court allowed a VWA to sit by and hold the hand of a testifying child victim. 2000 S.D.

52, ¶¶ 15-19, 609 N.W.2d at 157-158. However, this Court found “there is no evidence in the record of any influence on victim’s testimony attributable to [VWA]’s presence.” *Id.* at ¶ 19, 158. And the victim was eight years old. *Id.* at ¶ 16, 157. Here, the circuit court itself stated on the record, outside the jury’s presence, that it observed a look between the VWA and K.J.1. JT1 19-20. Similarly, the circuit court found, in its admonishment of K.J.1, that the VWA’s presence had crossed from passive to impermissible communication. *See* JT1 22 (referencing “eye contact and interaction between you two” and stating “I can’t have you looking at [VWA] as though you’re looking for answers. I can’t have you asking [VWA] for help or I’m going to end up taking [VWA] away”).

Furthermore, the circuit court acknowledged the prejudicial effect Alonzo suffered from the communication between K.J.1 and VWA. *See* JT1 23 (stating “when she’s looking -- it looks like she’s looking for answers and so you probably want to chat with her about that as well,” and “I think it’s prejudicial to both sides for very very different reasons”). Even if the State subsequently moved the VWA to the gallery, the circuit court’s initial decision to allow the VWA to sit at the witness stand was an abuse of discretion.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ALONZO’S FIRST MOTION FOR MISTRIAL BASED ON THE CIRCUIT COURT’S STATEMENTS TO K.J.1.

A. Standard of Review

The denial of a motion for mistrial is reviewed under the abuse of discretion standard. *State v. Stone*, 2019 S.D. 18, ¶ 34, 925 N.W.2d 488, 499

(citation modified). This Court will affirm a circuit court's denial of a motion for mistrial unless it finds abuse of discretion "resulting in clear prejudice." *Id.*

B. *The circuit court's admonishment was an abuse of discretion and constituted improper judicial interference with a testifying witness.*

The circuit court's admonishment pressured K.J.1 to testify consistently with her prior statements. The admonishment communicated to K.J.1 that Alonzo could go to prison forever, therefore it was important for the jury to hear her story. This framed the expected outcome of her testimony in terms of Alonzo's permanent imprisonment and pressured her to maintain her prior account. This Court has stated that "[a] trial judge is not a mere moderator, but has the duty to control the conduct of a trial and within proper limits may examine witnesses for the purpose of eliciting facts material to the case and in the interest of justice." *State v. Richards*, 84 S.D. 376, 381-82, 171 N.W.2d 808, 810 (1969). In *Richards*, the Court found no error or abuse of discretion when the trial court questioned a witness, outside the presence of the jury, regarding his prior testimony and whether he "actually remembered what happened," and whether "he testified to the truth at the preliminary hearing." *Id.* But the circuit court's admonishment in *Richards* came after an adult witness claimed lack of memory due to intoxication. *Id.* Here, the admonishment went far beyond neutral judicial management because the circuit court told K.J.1 that Alonzo could go to prison for multiple life periods, and framed this as the reason it was important for the jury to hear her story. Although the admonishment was delivered outside the

jury's presence, its effect on the witness was direct and immediate. The circuit court communicated to K.J.1 that the stakes of the proceeding were Alonzo's permanent imprisonment, and that the jury needed to hear her story. This framing impressed upon K.J.1 the importance of testifying consistently with her prior statements and to discourage any recantation or equivocation.

Alonzo was prejudiced by the circuit court's admonishment because after it, K.J.1 became more definitive in her testimony. This Court has recognized that improper bolstering of a child victim's credibility in a sexual assault case can constitute reversible error. *State v. Buchholtz*, 2013 S.D. 96, ¶ 28, 841 N.W.2d 449, 459; *State v. Raymond*, 540 N.W.2d 407, 410 (S.D. 1995). Here, the admonishment did not bolster the victim's credibility before the jury but, instead, influenced the content and character of her testimony, as evidenced by the observable change in K.J.1's demeanor and definitiveness after the admonishment.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ALONZO'S SECOND MOTION FOR MISTRIAL DUE TO THE STATE'S COMMENTS DURING CLOSING ARGUMENT AND OPENING STATEMENT.

A. Standard of Review

Because defense counsel made a timely objection at trial, the issue of prosecutorial misconduct is properly preserved for appellate review. *State v. Hayes*, 2014 S.D. 72, ¶ 24, 855 N.W.2d 668, 675. When preserved, this Court reviews the issue of prosecutorial misconduct under the abuse of discretion standard. *State v. Hankins*, 2022 S.D. 67, ¶ 31, 982 N.W.2d 21, 32 (quoting *Hayes*, 2014 S.D. 72, ¶ 24, 855 N.W.2d at 675). "This Court will find that prosecutorial

misconduct has occurred if (1) there has been misconduct, and (2) the misconduct prejudiced the party as to the deny the party a fair trial.” *Id.* at ¶ 32, 33 (quoting *Hayes*, 2014 S.D. 72, ¶ 23, 855 N.W.2d at 675).

B. Misconduct

In *State v. Smith*, the prosecutor referred to the defendant as a “monster...something scarier than anybody dressed up on Halloween,” as well as a “sexual predator,” a “pervert,” and “child molester.” 1999 S.D. 83, ¶ 41, 599 N.W.2d 344, 353. This Court held that “[c]alling Smith a ‘monster’ or a ‘pervert’ was a foul blow, abhorrent and misconduct.” *Smith*, 1999 S.D. 83, ¶ 49, 599 N.W.2d at 355. The same reasoning applies here. And the circuit court’s characterization of the misconduct as a single instance is factually and legally erroneous. The State’s use of the words “monster,” “nightmare,” and “haunted house” was not a single isolated comment but a deliberate thematic strategy spanning voir dire, opening statement, and closing argument. During voir dire, the State introduced the “haunted house” theme, using it to imply that a witness can be believed about being in a haunted house even without remembering every detail. JS 75-79; JS 168-173. During opening statement, the State said “the Defendant was a living nightmare for these girls for years.” JT1 7. Finally, during closing argument, the State said “[t]his man was the source of a nightmare,” “[t]hat is her haunted house,” and called Alonzo a “monster.” JT2 49-56. At the culmination of this rhetoric, defense objected.

C. Prejudice

This Court has previously found that this type of thematic and multi-stage inflammatory conduct goes beyond permissible advocacy and is prejudicial. *See State v. Blaine*, 427 N.W.2d 113, 116 (S.D. 1988) (finding reversible error where prosecutor comments during cross-examination and closing argument elicited consideration of public safety risks associated with impaired driving at DUI trial). In a case that turns on the credibility of child victims, inflammatory rhetoric that characterizes the defendant as a “monster,” and frames the victims’ experiences as a “nightmare” in a “haunted house” is not merely commentary on the evidence. It is an appeal to the jury’s passions and prejudices that directly targets the central issue in the case: whether the jury believes the victims. The haunted house, nightmare, and monster theme invited the jury to convict based on emotional revulsion of a child’s fear rather than dispassionate evaluation of the evidence. Alonzo suffered prejudice because of this misconduct.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court to remand the case to the circuit court with an order directing the court to reverse the order denying Alonzo’s motion to suppress. Similarly, Alonzo requests this Court order reversal of the circuit court’s decision to admit the child hearsay statements. Finally, Alonzo requests this Court remand the case with an order directing the circuit court to reverse the the Judgment and Sentence and schedule a new trial.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted this 22nd day of June, 2026.

/s/ Derek D. Friese

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type.
Appellant's Brief contains 9,128 words
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 22nd day of June, 2026.

/s/ Derek D. Friese
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Brief were electronically served upon:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30995

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DIEGO ALONZO ALONZO,

Defendant and Appellant.

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

THE HONORABLE SUSAN M. SABERS
Circuit Court Judge

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Jurisdictional Statement

Diego Alonzo Alonzo appeals his judgment and sentence filed on January 16, 2025. R:392.¹ Alonzo filed his notice of appeal on February 12, 2025. R:395. This Court has jurisdiction under SDCL 23A-32-2.

Statement of Legal Issues and Authorities

1. Whether the circuit court erred in denying Alonzo's motion to suppress his police interview.

The court denied the motion, concluding that Alonzo waived, rather than invoked, his right to counsel.

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

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

Oregon v. Elstad, 470 U.S. 298 (1985)

State v. Blackburn, 2009 S.D. 37, 766 N.W.2d 177

2. Whether the circuit court erred in admitting child hearsay statements.

The court admitted the hearsay statements, concluding they were reliable.

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

SDCL 19-19-806.1

3. Whether the circuit court erred in permitting a victim-witness assistant to accompany a child during her testimony.

The court permitted the victim-witness assistant to sit behind the child, outside the child's normal field of vision, with instructions not to communicate with the child.

¹ "R:" refers to the Record; "B:" to the Appellant's brief; and "Ex.5" to trial exhibit five.

State v. Alidani, 2000 S.D. 52, 609 N.W.2d 152

SDCL 23A-28C-8

4. Whether the circuit court erred in denying Alonzo's first motion for mistrial, which was based on comments the court made to a witness.

The court denied the motion, concluding that Alonzo did not preserve the issue and that the comments did not influence the witness's testimony.

Rush v. Smith, 56 F.3d 918 (8th Cir. 1995)

State v. Drapeau, 45 S.D. 507, 189 N.W. 305 (1922)

State v. Ortiz-Martinez, 2023 S.D. 46, 995 N.W.2d 239

State v. Wilson, 2020 S.D. 41, 947 N.W.2d 131

5. Whether the circuit court erred in denying Alonzo's second motion for mistrial, which was based on alleged prosecutor misconduct.

The court denied the motion, concluding there was no prejudicial misconduct.

State v. Smith, 1999 S.D. 83, 599 N.W.2d 344

Statement of the Case

This case was tried by the Honorable Susan M. Sabers, Circuit Court Judge for the Second Judicial Circuit, Minnehaha County. On January 31, 2023, the State filed a complaint against Diego Alonzo Alonzo alleging eight counts of first-degree rape for repeated assaults on his two minor stepdaughters, K.J.1 and K.J.2. R:1. A grand-jury indictment followed on February 15, 2023. R:13. A trial was held September 9 through 11, 2024. R:392. The jury returned a verdict of guilty on all eight counts. R:314. Judgment and sentence were entered

on January 16, 2025. R:392. Alonzo received concurrent, sixty-year sentences on each count. *Id.*

Statement of Facts

On January 26, 2023, thirteen-year-old K.J.1 disclosed to a teacher that her stepfather, Alonzo, had been sexually assaulting her and her twelve-year-old sister, K.J.2, beginning when K.J.1 was seven years old. R:4. The teacher notified the school resource officer, Adam Healy, who then interviewed both girls. *Id.* He spoke to K.J.1 first, who said Alonzo had repeatedly, inappropriately touched her. She also heard Alonzo sexually assault K.J.2 in the girls' shared bedroom, which K.J.2 confirmed. R:5. Police removed Alonzo from the home. *Id.*

On January 30, K.J.1 and K.J.2 underwent forensic interviews at Child's Voice. Detective Ian Branch viewed the interviews remotely from another room. *Id.* According to Branch, K.J.1 said that Alonzo repeatedly assaulted her from the age of seven or eight until eleven. *Id.* She described Alonzo selecting her or K.J.2 to assault, carrying her to another room, turning off the lights and Wi-Fi, removing her and his pants and underwear, and inserting his penis into her vagina to have sex with her. *Id.* Alonzo would offer bribes not to disclose the rapes. *Id.* K.J.1 attempted to resist, and by age eleven, she became strong enough to fight him off. R:6. She also saw Alonzo rape K.J.2. *Id.*

According to Branch, K.J.2 also said that Alonzo repeatedly assaulted her from the age of seven until eleven. *Id.* She began to cry as

she described the assaults. *Id.* She described Alonzo taking her from her bed, threatening to choke her if she woke anyone else up, carrying her to the living room, removing her and his pants and underwear, and inserting his penis into her vagina to have sex with her. *Id.* She believed one such event occurred in October 2021, when she was eleven. *Id.* It appeared to Branch that K.J.2 had been assaulted many more times than the instances she was able to recount. *Id.* After a hearing, the circuit court authorized the State to introduce a recording of K.J.2's forensic interview as admissible child hearsay. R:1084 (sealed).

On January 31, Alonzo was arrested, and Branch interviewed him. R:229-30. A recording of that interview was introduced at trial as exhibit five. Prior to asking any substantive questions, Branch fully advised Alonzo of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Ex.5 1:49. When asked, Alonzo indicated he did not understand the right to an "attorney." Branch clarified that "attorney" means "lawyer," and Alonzo said: "Oh, okay." He indicated that he did not have any other questions and that there was nothing else he did not understand. *Id.* 2:09-2:35. Branch asked if Alonzo would waive his rights and answer questions, and Alonzo replied, with rising inflection: "Probably a ... lawyer?" The conversation continued as follows:

Branch: You would rather have a lawyer before you
 speak with me?

Alonzo: I think ... I think so. I don't know.

Branch: Well I can't make that decision for you, Diego.

Alonzo: Oh, okay. Well I can talk to you I guess.

Branch: You're okay with talking to me at this point?

Alonzo: Yeah.

Branch: If you change your mind at any point and decide you want a lawyer, you can do that.

Alonzo: When I can get the lawyer?

Branch: You would have to make arrangements on your own at another time.

Alonzo: Oh, okay. Alright. Yeah, I can talk to you.

Branch: Again, at any point, you can decide that you want to stop talking to me and request a lawyer. You understand that?

Alonzo: Yeah.

Id. 2:37-3:55. After this, Branch provided a second full *Miranda* warning, an interpreter provided a third *Miranda* warning in Spanish, and Alonzo again expressly waived his rights. *Id.* 9:10-10:40.

During the interview, Alonzo said that K.J.1 and K.J.2 were always honest with him and their mother, *id.* 30:40, that they do not make up stories about things that happen to them, *id.* 31:06, that he did not think they were lying when they told police that Alonzo has sex with them when he's drunk, *id.* 32:28, and that they are always honest kids, *id.* 36:50. Alonzo eventually acknowledged that he had sex with them, but he did not "think it happened that much." *Id.* 37:33. He remembered one instance where he "probably tried" to have sex with one of them, when their mother found him naked in the girls' room with a condom in his hand. *Id.* 46:40. He admitted that he thought he had sex with K.J.2. *Id.* 56:10. And he recalled a time when he grabbed K.J.2, laid next to her,

pulled down her pants, and tried to insert his penis into her vagina. *Id.* 1:06:19.

On February 15, a grand jury indicted Alonzo on eight counts of first-degree rape. Prior to trial, the defense moved to suppress Alonzo's interview, arguing he invoked his right to counsel. R:133. The circuit court denied the motion. R:229.

A jury trial commenced on September 9, 2024, running three days. K.J.1 testified that Alonzo's "private part" would "go ... inside" her, that he would "make movements back and forth," that when he was done, there would be "gooey stuff" "down there," and that this happened almost every weekend. R:558-59, 563. She also testified to witnessing Alonzo raping K.J.2. R:565. She said Alonzo would try to bribe them with money and gift cards to get them to comply or punish them by shutting off the Wi-Fi if they refused. R:566-67. He also threatened that their mother would be in trouble if they told anyone what was happening. R:567.

K.J.2 testified to experiences like her sister's. She said that Alonzo would pull her from her bed, take her to the hall or living room, and pull down her pants; that he would "put his private in [hers]"; that "he would move ... back and forth"; and that he would leave "white stuff" from "his private" "down there." R:588-90. She said this happened more than once. R:592. She also testified that Alonzo's "private" touched her mouth, that he made her mouth "[l]ike go into his private." R:595. Alonzo threatened K.J.2 that if she told anybody, he and her mother would go to prison,

and she and her sister would be separated. R:597. He also attempted to bribe her. *Id.*

Toward the beginning of K.J.1's testimony, the defense objected when she looked at and spoke to the victim-witness assistant (VWA) who had been permitted (over the defense's objection) to sit behind her.

R:552. The VWA did not respond. R:553. Outside the presence of the jury, the circuit court explained to K.J.1 that she was not permitted to interact with the VWA and that if she continued, the VWA would be removed. R:555. The court sympathized that K.J.1 was being asked to testify regarding sensitive matters but assured her that she was not asked to do so lightly. R:554-55. The court explained what was at stake for Alonzo and the need for the jury to clearly hear K.J.1's testimony and trust that her testimony was her own. R:555, 631. The State opted to move the VWA to the gallery. R:556. The defense did not object to the court's comments at the time but eventually moved for mistrial, which the court denied. R:626-33.

The defense again moved for mistrial during the State's closing argument when the prosecutor referred to Alonzo as a "monster." R:746. The defense mentioned other instances of the prosecutor's use of the word "nightmare" and similar terms but dismissed them as "borderline." R:764. The defense did not object to any word but "monster." The court denied the motion. R:766.

The jury convicted Alonzo on all eight counts. R:314. The circuit court sentenced him to concurrent, sixty-year sentences on each. R:392.

Argument

On appeal, Alonzo argues the circuit court should have suppressed his interview with Branch because Alonzo invoked his right to counsel prior to waiving his rights and because his waiver was not voluntary, knowing, and intelligent. B:16-23. He argues the court should have excluded K.J.2's forensic interview from evidence. B:23-26. He argues the court should not have permitted the VWA to sit behind K.J.1 during her testimony. B:26-27. He argues the court should have declared a mistrial because of statements the court made to K.J.1. B:27-29. Finally, he argues the court should have declared a mistrial because of statements made by the State during its opening and closing remarks. B:29-31. But the court's rulings were correct, and his sentences should be affirmed.

1. The circuit court correctly denied Alonzo's motion to suppress.

Alonzo first argues the circuit court should have granted his motion to suppress his interview with Branch. According to Alonzo, he invoked his right to have counsel present during questioning, so the interview should have terminated prior to his waiver of rights and incriminating statements. He also disputes that his subsequent waiver was voluntary, knowing, and intelligent. But the record and controlling authority demonstrate that Branch satisfied all constitutional requirements and that Alonzo's waiver was valid.

a. Alonzo did not invoke his right to have counsel present during questioning.

Alonzo asserts that he unambiguously requested counsel prior to waiving his rights under *Miranda*. B:20. Alternatively, relying on *State v. Blackburn*, 2009 S.D. 37, 766 N.W.2d 177, he contends that even if his request were ambiguous, subsequent questioning could not go beyond clarifying the request. B:22.

The circuit court correctly denied the motion to suppress. A suspect “must be warned prior to any questioning ... that he has the right to the presence of an attorney[] and that if he cannot afford an attorney[,] one will be appointed for him prior to any questioning if he so desires.” *Miranda*, 384 U.S. at 479. If the suspect “expresse[s] his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him[.]” *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). But “[i]f the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him.” *Davis v. United States*, 512 U.S. 452, 458 (1994). Moreover, “after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights.” *Berghuis v. Thompkins*, 560 U.S. 370, 388 (2010).

Branch advised Alonzo of his rights under *Miranda*. Alonzo’s subsequent references to counsel were ambiguous. Under *Berghuis v. Thompkins*, 560 U.S. 370 (2010), nothing more was required for Branch

to begin the interview. Even so, Branch sought clarification, and Alonzo confirmed he was willing to speak with Branch without counsel present. Alonzo explicitly and implicitly waived his right to an attorney.

i. Alonzo did not unambiguously invoke his right to counsel.

Alonzo argues that he requested counsel twice in his interview with Branch. Alonzo claims that by asking, “When I can get the lawyer?” he “expressed a present desire for the attorney referenced in the *Miranda* advisement, and a reasonable officer would understand it as an unambiguous request for counsel[.]” B:21. He also contends he “attempted to assert his right to an attorney” when he said, “Oh, okay. Probably ... lawyer?” B:21-22.

Whether Alonzo’s statements were ambiguous “is an objective inquiry.” *Davis*, 512 U.S. at 459. A request for counsel is ambiguous or equivocal if “a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel[.]” *Id.* For example, a request for counsel is equivocal if it “expresses both a desire for counsel and a desire to continue the interview without counsel.” *Blackburn*, 2009 S.D. 37, ¶ 9, 766 N.W.2d at 181 (quoting *State v. Copeland*, 949 P.2d 458, 462 (Wash. Ct. App. 1998)).

Alonzo’s statements were ambiguous. “Probably ... lawyer?” necessarily implies “maybe not lawyer,” suggesting uncertainty and exemplifying the duality identified as ambiguous in *Blackburn. Id.* The

word “probably” alone is sufficient to render an otherwise definite answer ambiguous. If police directly asked a suspect whether he wished to speak with counsel, the suspect’s response, “Yeah,” would be clear and unequivocal. Yet the response, “‘Yeah. Probably,’ ... [is] not [a] ‘clear and unequivocal’ request[] for an attorney[.]” *United States v. Cloud*, 594 F.3d 1042, 1046 (8th Cir. 2010). And Alonzo’s rising inflection at the end of his sentence reinforces the uncertainty. *United States v. Cedano-Medina*, 366 F.3d 682, 686 (8th Cir. 2004).

Alonzo’s “Probably ... lawyer?” did not express a definite, present desire for counsel like statements held to be unambiguous in other cases. *See Smith v. Illinois*, 469 U.S. 91, 97 (1984) (holding request for counsel unambiguous when suspect said, “I’d like to do that’ upon learning that he had the right to his counsel’s presence”); *Edwards*, 451 U.S. at 479 (“I want an attorney before making a deal.”). Instead, his statement is like others that have been held to be ambiguous. *See Davis*, 512 U.S. at 462 (“Maybe I should talk to a lawyer.”); *Cloud*, 594 F.3d at 1046 (“Yeah. Probably.”); *United States v. Sierra-Estrada*, 248 F. App’x 973, 981 (10th Cir. 2007) (“I might want to talk to an attorney,” “I think I need a lawyer,” “I think I want a lawyer,” “Do you think I need a lawyer?”).

Neither was the question, “When I can get the lawyer?” a clear and unequivocal request for counsel. Alonzo had just given a definite, affirmative answer to the question whether he wished to proceed with the

interview without counsel present. The first time Branch asked, Alonzo replied: “Probably ... lawyer?” Branch asked a second time to clarify the ambiguous response, and Alonzo replied: “I think ... I think so. I don’t know.” The third time, he replied: “I can talk to you, I guess.” And the fourth time, he responded simply: “Yeah.” Branch then assured Alonzo: “If you change your mind at any point and decide you want a lawyer you can do that.” Alonzo replied: “When I can get the lawyer?” Ex.5 3:05-3:37.

The only reasonable interpretation of Alonzo’s response is that he was asking a procedural question about the timing of obtaining the counsel Branch referenced. Construing Alonzo’s response as a present invocation of his right to counsel requires ignoring the discussion’s context as well as believing that Alonzo intended to recant his own immediately preceding statement, which was an express waiver of his right to counsel. Branch’s interpretation was apparently correct because Alonzo accepted Branch’s response as sufficient. Procedural questions like this relating to *how* or *when* counsel will be appointed are not unambiguous invocations of that right. *See Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir. 2002) (holding that suspect’s question “how long it would take to have an attorney appointed” was not a “clear invocation of the right to counsel”); *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999) (holding that question, “what time will I see a lawyer,” asked prior to *Miranda* advisement, was not a clear request); *United States v. Lux*,

905 F.2d 1379, 1382 (10th Cir. 1990) (holding that question “how long it would take” to get a lawyer was not “a request for an attorney”).

Alonzo’s question, “Probably ... lawyer?” was inherently ambiguous. *Cloud*, 594 F.3d at 1046; *Davis*, 512 U.S. at 462. His question, “When I can get the lawyer?” was one of procedure. *Soffar*, 300 F.3d at 595. Neither was a clear and unequivocal invocation of the right to counsel.

ii. Detective Branch was not required to clarify Alonzo’s ambiguous references to counsel.

Relying on *Blackburn*, Alonzo argues that “[e]ven if [his] question and prior statement were ambiguous or equivocal, Branch was required to ‘clarify the request and/or waiver before proceeding.’” B:22 (quoting *Blackburn*, 2009 S.D. 37, ¶ 9, 766 N.W.2d at 181). *Blackburn* acknowledged that in *Davis v. United States*, 512 U.S. 452 (1994), the U.S. Supreme Court held that “after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.” *Blackburn*, 2009 S.D. 37, ¶ 11, 766 N.W.2d at 182 (quoting *Davis*, 512 U.S. at 461). Consequently, “[i]f the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.” *Davis*, 512 U.S. at 461-62. However, this Court joined others distinguishing *pre*-waiver ambiguity from *post*-waiver ambiguity: “*Davis* addressed what the suspect must do to *restore* his *Miranda* rights after having already knowingly and voluntarily waived them. It did not

address what the police must obtain, in the *initial waiver* context, to begin questioning.” *Blackburn*, 2009 S.D. 37, ¶ 12, 766 N.W.2d at 183 (quoting *United States v. Rodriguez*, 518 F.3d 1072, 1079 (9th Cir. 2008)).

One year after *Blackburn*, in *Berghuis v. Thompson*, 560 U.S. 370 (2010), the U.S. Supreme Court *did* address what police must obtain, in the initial waiver context, to begin questioning: nothing, provided the suspect has been informed of his *Miranda* rights. *Id.* at 388. Thompson was arrested and advised of his *Miranda* rights. *Id.* at 374-75. He remained “largely silent” for nearly three hours but “did not say that he wanted to remain silent or that he did not want to talk with the police,” and he eventually made incriminating statements. *Id.* at 375, 380-82. He argued that “he ‘invoked his privilege’ to remain silent by not saying anything for a sufficient period of time, so the interrogation should have ‘ceased’ before he made his inculpatory statements.” *Id.* at 380-81.

The Supreme Court rejected Thompson’s argument. Applying *Davis*, the Court determined that his attempt to invoke the right to remain silent was ambiguous and therefore ineffective. *Id.* at 381-82. The Court went on to hold that his incriminating statements constituted an implied waiver of his rights. *Id.* at 385-87. So although the ambiguous invocation of a *Miranda* right occurred *before* any waiver, the Court still applied *Davis*, thereby rejecting the view that *Davis* applies only *after* a suspect has knowingly and voluntarily waived *Miranda* rights.

Moreover, by applying *Davis* to pre-waiver ambiguity, the *Thompkins* majority rejected the line of cases that includes *Blackburn*. In dissent, Justice Sotomayor argued that “*Davis*’ holding is explicitly predicated on” the fact that “the suspect’s equivocal reference to a lawyer ... occurred only *after* he had given express oral and written waivers of his rights.” *Id.* at 407 (Sotomayor, J., dissenting). She further argued that “numerous federal and state courts” had declined to apply *Davis* in the pre-waiver context, expressly identifying this Court as one of them. *Id.* at 407-08 & n.7 (Sotomayor, J., dissenting) (citing *State v. Tuttle*, 2002 S.D. 94, ¶ 14, 650 N.W.2d 20, 28). The majority rejected her argument, thereby rejecting the distinction between pre-waiver and post-waiver ambiguity that *Tuttle* adopted and *Blackburn* affirmed. *Blackburn*, 2009 S.D. 37, ¶¶ 9, 12-13, 17, 766 N.W.2d at 182-84 (citing and quoting *Tuttle*, 2002 S.D. 94, ¶ 14, 650 N.W.2d at 28).

Blackburn’s rule cannot be reconciled with *Thompkins*. *Blackburn* holds that an ambiguous reference to a *Miranda* right occurring before waiver requires the cessation of questioning, obligating police to either terminate the interview or obtain an express waiver, because police must “determine if the suspect is willing to waive [*Miranda*] rights and answer questions.” *Blackburn*, 2009 S.D. 37, ¶ 13, 766 N.W.2d at 183 (quoting *Tuttle*, 2002 S.D. 94, ¶ 14, 650 N.W.2d at 28). *Thompkins*, by contrast, holds that the same ambiguous reference does not require the cessation of questioning because “police [are] not required to obtain a waiver of [a

suspect's] *Miranda* rights before commencing the interrogation.” 560 U.S. at 388. Accordingly, if a suspect ambiguously mentions a lawyer before waiver and police continue questioning without clarifying, the interview would not survive a motion to suppress under *Blackburn* but would survive under *Thompkins*.

Branch informed Alonzo of his rights under *Miranda*. Alonzo did not unambiguously request counsel. Nothing further was required to begin the interview. *Thompkins*, 560 U.S. at 388.² Therefore, any ambiguous statements Alonzo made regarding counsel should be considered only as one part of determining whether “from the whole course of questioning, an express or implied waiver has been established.” *Id.*

b. Alonzo voluntarily, knowingly, and intelligently waived his right to counsel.

Alonzo asserts that he did not voluntarily, knowingly, and intelligently waive his rights under *Miranda*. B:17-20. A suspect can waive his right to have counsel present during questioning after being informed of that right. *Miranda*, 384 U.S. at 444-45. An effective waiver “must be ‘voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,’ and ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’”

² And even if Branch were required to clarify Alonzo’s intent to waive his rights before beginning the interview, Branch did so.

Thompkins, 560 U.S. at 382-83 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Waiver can be express or implied. *See id.* at 384. “If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him.” *Davis*, 512 U.S. at 458.

Alonzo does not dispute that his waiver was voluntary;³ he argues only that it was not knowing and intelligent. That claim is premised on Branch’s response to Alonzo’s question, “When I can get the lawyer?” Branch replied: “You would have to make arrangements on your own at another time.” Alonzo thinks this statement was “legally incorrect” and “a blatant mischaracterization of a constitutional right.” B:17-18. In his view, “Branch’s response did not adequately communicate to Alonzo that it was his right to have an attorney present during questioning and appointed by the court prior to any questioning. Put simply, Alonzo did not understand that his simple request for an attorney could terminate the custodial interrogation.” B:17.

Alonzo’s assertion that he did not understand that his request for counsel could terminate the interview is unreasonable. Nothing Branch said was incorrect. As the circuit court noted, his answer “is inherently a truthful and accurate statement. [Alonzo] would have to make

³ At the suppression hearing, Alonzo’s counsel acknowledged: “My concern is not coercive tactics.... My concern here is related to the requisite level of understanding of the rights of the *Miranda* advising.” R:1167.

arrangements because he would have to fill out the court appointment app, and it would happen at another time. It doesn't happen during the interview." R:1171. The only way to characterize Branch's response as "legally incorrect" or a "blatant mischaracterization of a constitutional right" is to imagine he said more than he actually did: e.g., "You would have to make arrangements on your own at another time. [But you can't do it until after you answer my questions, and you'll have to pay for the attorney yourself]." The record does not support this.

Alonzo's view is also inconsistent with the conversation's context. Branch had already advised Alonzo of his *Miranda* rights, and the statement at issue was given in response to his specific question about timing. After Branch's response, Alonzo replied: "Oh, okay. Yeah, I can talk to you." The next words out of Branch's mouth were: "Again, at any point, you can decide that you want to stop talking to me and request a lawyer, you understand that?" Alonzo replied: "Yeah." In total, he was advised nine times that he had the right to have counsel present before answering questions or that he could stop the interview at any point to request counsel, and at least three times that if he could not afford counsel, one would be appointed for him. "He was thus aware ... that police would have to honor his right ... to counsel during the whole course of interrogation." *Thompkins*, 560 U.S. at 386.

Even if Branch's statement were incorrect, he cured any deficiency with subsequent warnings. "A subsequent administration of *Miranda*

warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.” *Oregon v. Elstad*, 470 U.S. 298, 314 (1985). After Branch’s statement, he administered another *Miranda* warning, including: “If you cannot afford an attorney, an attorney will be appointed for you.” Ex.5 at 0:32:19-23. This full warning was given a third time, in Spanish, by an interpreter. *Id.* at 0:32:25-30.

Regardless, whether waiver is knowing and intelligent is determined by examining the “totality of the circumstances surrounding the interrogation”—not a single, out-of-context remark. *Burbine*, 475 U.S. at 421 (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). The Court considers “a defendant’s age, experience, intelligence, and background, including familiarity with the criminal justice system, as well as physical and mental condition.” *State v. Larson*, 2022 S.D. 58, ¶ 27, 980 N.W.2d 922, 930 (quoting *State v. Two Hearts*, 2019 S.D. 17, ¶ 22, 925 N.W.2d 503, 512).

The circuit court found that “Alonzo was 33 years old,” that “[h]e appeared to be of reasonable intelligence and did not appear confused about his circumstances or why he was being interviewed[,]” and that “[h]e did not indicate difficulty in understanding Detective Branch’s questions or have difficulty responding appropriately.” R:234. The court also observed Alonzo in person, which entitles its observations about him to deference. *See State v. Edwards*, 1997 S.D. 130, ¶¶15-16, 572 N.W.2d

113, 117-18. Alonzo's request for clarification early in the interview demonstrated his ability to ask questions when he did not understand something. The recording itself does not indicate any apparent physical or mental conditions. Ex.5. And he has significant experience with the criminal-justice system, having been arrested in Minnehaha County five times prior. R:321 (sealed).

Under the totality of the circumstances, Alonzo's waiver was voluntary, knowing, and intelligent. He received three full *Miranda* warnings and six additional reminders of his right to counsel. His personal qualities suggest he understood his rights. He did not unambiguously invoke his right to counsel. When Branch clarified Alonzo's ambiguous references to counsel, Alonzo unambiguously waived his rights by clearly stating he would answer questions without counsel present. Alonzo then made incriminating statements. "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Thompkins*, 560 U.S. at 385. Therefore, Alonzo waived his rights, and the circuit court correctly denied his motion to suppress.

2. The circuit court did not abuse its discretion by admitting child hearsay.

Alonzo next argues the circuit court should have excluded from evidence K.J.2's forensic interview and her statements made to Officer

Healy. In South Dakota, “[a] statement made by a child under the age of thirteen ... describing any act of sexual contact or rape performed with or on the child by another, ... not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant” if a “court finds, in a hearing conducted outside the presence of the jury, ... sufficient indicia of reliability” and the child either testifies at that proceeding or is unavailable as a witness. SDCL 19-19-806.1. To determine whether a child’s statement is sufficiently reliable, a court considers:

- (1) the child’s age and maturity;
- (2) the nature and duration of the abuse;
- (3) the relationship of the child to the offender;
- (4) the coherence of the statement, bearing in mind that young children may sometimes describe incidents in age appropriate language and in a disorganized manner;
- (5) the child’s capacity to observe, retain, and communicate information;
- (6) the nature and character of the statement itself, considering the child’s developmental limitations in understanding and describing sexual behavior;
- (7) any motivation of the child to make a false allegation or a false denial;
- (8) the child’s susceptibility to suggestion and the integrity of the situation under which the statement was obtained; and
- (9) all the circumstances under which the statement was made.

State v. Buchholtz, 2013 S.D. 96, ¶ 19, 841 N.W.2d 449, 456 (citing *State v. Cates*, 2001 S.D. 99, ¶ 11, 632 N.W.2d 28, 34). None of these are dispositive; the court looks at the “totality of the circumstances.” *Id.* The

court “is vested with wide discretion in determining competency and, on appeal, its ruling is entitled to great weight, as it has had the opportunity to see and hear the child.” *Id.* ¶ 20 (quoting *State v. Guthmiller*, 2003 S.D. 83, ¶ 12, 667 N.W.2d 295, 301).

The circuit court held a hearsay hearing on August 25, 2023, at which K.J.2 testified. Based on direct observations, the court found that K.J.2 “clearly understands the difference between a truth and a lie. That understanding allows her to understand the consequences of telling the truth, and that when people tell lies they can get in trouble.” R:118. The court also found that K.J.2 had “sufficient capacity to observe, recollect and communicate, a moral sense of responsibility, the ability to understand right from wrong, and the capability to understand the oath she was provided.” R:121. And the court found “no evidence to show that [K.J.2] had any motivation to make a false allegation” or “to show that [K.J.2] was suggestible.” R:122. The court considered the nine factors listed above in its verbal ruling at the conclusion of the hearing, R:1080-84 (sealed), and in findings of fact and conclusions of law, R:118-23.

Alonzo disagrees. First, he asserts that K.J.1 and K.J.2 “discussed disclosure prior to speaking with Officer Healy.” B:25. According to Alonzo, this alleged conversation undermines the court’s analysis of factors (7) and (8). He also argues that K.J.2’s age undermines factors (1), (4), and (6). But his claim that the girls “discussed disclosure”

is not supported by the record. And K.J.2's age was within statutory requirements for admissibility.

- a. K.J.1 and K.J.2 did not “discuss disclosure,” and there is no evidence that K.J.2 had motive to lie or was suggestible.**

Alonzo argues the “circuit court’s treatment of ... factor (7) was conclusory and ignored the sibling conversation.” B:24. According to him, “the most significant reliability concern in the record” is that “K.J.2 admitted that she and K.J.1 had discussed disclosure prior to speaking with Officer Healy.” B:24-25 (citing R:1006 (sealed)). Alonzo never specifies the purported danger of “discussing disclosure,” but considering that factor (7) involves motivation to lie, and factor (8) involves susceptibility to suggestion, his argument suggests that K.J.1 and K.J.2 colluded to concoct false allegations.

Alonzo overstates the record. To support his assertion that K.J.1 and K.J.2 “discussed disclosure” prior to K.J.2 speaking with Healy, Alonzo cites only page twenty-four of the August 25, 2023 motion hearing, B:25, where K.J.2 testified as follows:

Defense: Did you speak with your sister about [Alonzo] at all before you spoke with [Healy]?
K.J.2: Um, yeah.
Defense: Yes?
K.J.2: Yeah.
Defense: Do you remember when that was?
K.J.2: No.
Defense: Okay. Do you remember was it a lot of times that you spoke with your sister about [Alonzo]?

K.J.2: Yeah.
Defense: Okay. Do you know when the first time you spoke with your sister about [Alonzo] was?
K.J.2: No.
Defense: You don't remember?
K.J.2: No.
Defense: And if you don't know, that's fine. It's okay to not know. Would it have been when you were seven, do you think?
K.J.2: Yeah.

R:1006 (sealed). This testimony establishes only that K.J.2 spoke to K.J.1 "at all" about Alonzo several times since K.J.2 had been seven. It is hardly surprising that two sisters, close in age, sometimes spoke about their stepfather, who repeatedly raped them over several years. Contrary to Alonzo's suggestion otherwise, this testimony does not establish that K.J.1 and K.J.2 colluded to create a shared narrative in preparation for speaking with Healy.

Regardless, the assertion that the circuit court did not consider conversations between K.J.1 and K.J.2 is baseless. During the August 25, 2023 hearsay hearing, defense counsel questioned K.J.2 about speaking with K.J.1. R:1006 (sealed). And at the continuation of the hearsay hearing on January 18, 2024, the defense asked a physician assistant employed by Child's Voice about K.J.2's conversations with K.J.1. R:1070 (sealed). Counsel raised the issue again during closing argument. R:1078 (sealed). This Court "presume[s] the evidentiary rulings made by a trial court are correct[.]" *State v. Jensen*, 2007 S.D. 76,

¶ 7, 737 N.W.2d 285, 288 (quoting *State v. Krebs*, 2006 S.D. 43, ¶ 19, 714 N.W.2d 91, 99). It necessarily follows that this Court presumes that in making evidentiary decisions, a court listens to the testimony of witnesses and argument of counsel. The court’s finding that there was “no evidence” that K.J.2 had motive to lie or was susceptible to suggestion, R:122, is not evidence that the court “ignored the sibling conversation,” B:24. The court simply rejected Alonzo’s argument, which the court had discretion to do.

b. K.J.2’s age met the statutory requirements for admission of her hearsay statements.

Alonzo argues that “K.J.2’s age (12 years old) and the multi-year temporal delay in disclosure undermine the foundational rationale of factors (1), (4), and (6).” B:25. He points out that “K.J.2 was near the upper boundary of [SDCL 19-19-806.1’s] coverage.” B:25. In his view, “*Cates* factors (4) and (6) are premised on the developmental limitations of young children, and these factors do not operate in favor of reliability for a 12-year old declarant in the same way they do for a younger child.” B:25. Therefore, he concludes that the circuit court abused its discretion. B:25.

Aside from noting K.J.2’s age, Alonzo offers no analysis or authorities showing that K.J.2 is unreliable or untruthful. While he argues that older children are subjectively more likely to “fabricate graphic accounts of sexual activity” than younger children, B:25, he stops short of claiming that a twelve-year old is objectively likely to

fabricate such a story. Indeed, such a claim would contradict Alonzo's repeated statements to Branch that K.J.1 and K.J.2 are always truthful.

Likewise, while Alonzo argues that the time between his offenses and K.J.2's statements "undermine" factors (1), (4), and (6), B:25, he does not argue that the time between militates against a finding of reliability. Even if he had, his factual claim is untrue. Although he first raped K.J.2 when she was only seven years old, he continued to rape her up until she was eleven—only one year prior to her interview with police. This case does not involve a single event that happened four years before disclosure; it involves a years-long series of events that concluded at most one year prior to K.J.2's statements.

Alonzo's criticism of K.J.2's age is misplaced. He acknowledges that SDCL 19-19-806.1 applies to statements made by children "under the age of thirteen." K.J.2 was interviewed when she was twelve. If Alonzo thinks the statement of a twelve-year old cannot have sufficient indicia of reliability, he should take that up with the South Dakota Legislature. The circuit court did not abuse its discretion by admitting hearsay statements of a child within the age range defined by the Legislature, and this Court should decline Alonzo's invitation to amend SDCL 19-19-806.1 by holding that it is an abuse of discretion for a court to admit hearsay statements of a twelve-year old.

Under the totality of the circumstances, the circuit court did not abuse its discretion. The court followed the requirements of SDCL 19-19-

806.1 by conducting “a hearing ... outside the presence of the jury” to consider hearsay of a child “under the age of thirteen[.]” The court saw and heard K.J.2 testify and found that K.J.2 was competent, had a moral sense of responsibility, understood right from wrong, and understood the oath of truthfulness. R:121. The court applied the indicia of reliability required by SDCL 19-19-806.1 and outlined by this Court in *State v. Buchholtz*, 2013 S.D. 96, 841 N.W.2d 449. After doing so, the court concluded there was no evidence that K.J.2 had motive to lie or was susceptible to suggestion. R:122. The court did not ignore Alonzo’s argument to the contrary; the court rejected it. The court’s ruling is entitled to great weight, and it did not abuse its discretion. *Buchholtz*, 2013 S.D. 96, ¶ 20, 841 N.W.2d at 456.

3. The circuit court did not abuse its discretion by allowing the victim-witness assistant to accompany the victim.

Alonzo next argues the circuit court abused its discretion by permitting the VWA to sit behind K.J.1 during the beginning of her testimony. B:26-27. Under SDCL 23A-28C-8, “[t]he victim or witness assistant may accompany the victim in any criminal proceeding.” The court “has broad discretion to determine the mode and manner of witness’ testimony and will be reversed only for abuse of that discretion.” *State v. Alidani*, 2000 S.D. 52, ¶ 17, 609 N.W.2d 152, 157. This broad discretion extends to a court’s decision to accommodate a victim and her VWA. *Id.* ¶¶15-19, 609 N.W.2d at 157-58.

Alonzo argues that “the circuit court’s *initial decision* to allow the VWA to sit at the witness stand was an abuse of discretion.” B:27 (emphasis added). But his argument is premised on a single event that occurred *after* the initial decision to allow the VWA had already been made. Early in K.J.1’s testimony, she looked back at her VWA, who did not respond. So Alonzo suggests that this one-way communication was so impermissible and prejudicial that it made the initial decision an abuse of discretion. B:27. In other words, he argues that the mere possibility that a victim will look at her VWA is sufficient to establish an abuse of discretion under SDCL 23A-28C-8.

Because Alonzo alleges that the circuit court’s initial decision to permit the VWA was an abuse of discretion—and not the court’s subsequent handling of K.J.1’s glance at the VWA—this argument is foreclosed by the one case Alonzo cites on this issue: *State v. Alidani*, 2000 S.D. 52, 609 N.W.2d 152. In that case, “[t]he trial court permitted the [VWA] ... to sit beside the victim and hold her hand during victim’s testimony.” *Id.* ¶ 16, 609 N.W.2d at 157. The VWA did not communicate with the victim, and this Court held that the trial court did not abuse its discretion. *Id.* ¶ 19, 609 N.W.2d at 158. If the initial decision to permit a VWA to sit next to a victim and hold her hand is not an abuse of discretion, then permitting a VWA to sit behind the victim with no physical contact cannot be an abuse of discretion.

Even looking past the initial decision, the circuit court did not abuse its discretion. *Alidani* focused not on the behavior of the testifying child but instead on the actions of the VWA. 2000 S.D. 52, ¶¶ 17-19, 609 N.W.2d at 157-58. “[W]hen the accompanying party does not speak, prompt the witness, or in any manner attempt to disrupt or influence the trial, the trial judge’s discretion is not abused in permitting an adult support person to be in close proximity to a minor while the minor testifies.” *Id.* ¶ 17, 609 N.W.2d at 157 (quoting *State v. Rowray*, 860 P.2d 40, 44 (Kan. Ct. App. 1993)). It is true that in *Alidani*, the appellant did “not claim any hesitation by victim or glances at [VWA] for confirmation during her testimony.” *Id.* ¶ 19, 609 N.W.2d at 158. However, this remark came after the statement of the legal rule, which looks solely to the conduct of the VWA, and was preceded and followed by comments about the VWA’s conduct:

[T]here is no evidence in the record of any influence on victim’s testimony attributable to [VWA’s] presence. Alidani does not claim any hesitation by victim or glances at [VWA] for confirmation during her testimony. It appears from this record that [VWA] acted properly in solely being present in the courtroom as support for the victim and did not act or speak in a suggestive manner in any way. As no abuse of discretion has been shown, we affirm.

Id. (citation omitted).

In the present case, as in *Alidani*, “there is no evidence in the record of any influence on [K.J.1’s] testimony attributable to [VWA’s] presence.” *Id.* During her testimony, K.J.1 turned around and told her VWA that she needed a break. R:552-53. The VWA did not respond or

otherwise communicate to K.J.1. *Id.* As in *Alidani*, “[i]t appears from this record that [VWA] acted properly in solely being present in the courtroom as support for the victim and did not act or speak in a suggestive manner in any way.” 2000 S.D. 52, ¶ 19, 609 N.W.2d at 158.

Finally, Alonzo’s focus on what K.J.1 or the VWA did is misplaced. Abuse-of-discretion review is directed to a circuit court’s exercise of discretion. The court had no control over [K.J.1’s] conduct in the moment. The question is whether the court’s response to her conduct fell outside the range of permissible choices. The court permitted the VWA’s presence and instructed her “to sit behind [K.J.1], to not be within eye contact of [K.J.1], and [to] have no communication with [K.J.1].” R:552. The VWA complied, but when K.J.1 looked at and spoke to the VWA, the defense objected. *Id.* The court admonished K.J.1 not to interact with the VWA and advised the State “to chat with her about that as well.” R:556. The State decided to move the VWA to the gallery for the remainder of the trial. *Id.* The court’s response was not an abuse of discretion.

The circuit court did not err by allowing the VWA to accompany K.J.1. The presence of the VWA is authorized by SDCL 23A-28C-8. The court’s initial decision permitted the VWA under conditions more restrictive than those in *Alidani*, which was not an abuse of discretion. 2000 S.D. 52, ¶ 19, 609 N.W.2d at 158. And when K.J.1—not the VWA—attempted to initiate contact, the court admonished her and the State. Neither the court’s initial decision to permit the VWA, nor the court’s

reaction to K.J.1's attempt to communicate with the VWA, was an abuse of discretion.

4. The circuit court did not err by denying Alonzo's first motion for mistrial.

Alonzo next argues the circuit court's comments to K.J.1 about looking at and speaking to the VWA improperly interfered with K.J.1's testimony. B:27-29. Specifically, he points to the court's statement:

It's a big deal what we're here to do today because the allegation against Mr. Alonzo Alonzo could put him in prison for not just the remainder of his life, but for multiple life periods. He could go to the penitentiary for forever, so it's important that the jury hear your story. It's also important that the jury not be of the impression that you're getting answers from [VWA] or you're being helped by [VWA]. I've never been in your position where I had to look at a jury and tell them something like this. And again, I understand it is a super tough thing that we are asking of you, but I can't have you looking at [VWA] as though you're looking for answers. I can't have you asking [VWA] for help or I'm going to end up taking [VWA] away. [VWA] is there to give you a support, to give you a physical presence to make the courtroom a little less scary for you, but her presence is about all I can offer you and if we continue to have eye contact and interaction between you two, I'm worried I will be stuck taking her away and I don't want to do that. Do you understand that, [K.J.1]?

R:555. The defense did not object or cross-examine K.J.1 on whether she changed her testimony because of the court's comments. Instead, the defense waited until both K.J.1's and K.J.2's testimonies were complete, and a third witness's testimony underway, to request a mistrial. R:626.

Now Alonzo appeals the circuit court's denial of his motion for mistrial. He argues:

The circuit court's admonishment pressured K.J.1 to testify consistently with her prior statements. The admonishment

communicated to K.J.1 that Alonzo could go to prison forever, therefore it was important for the jury to hear her story. This framed the expected outcome of her testimony in terms of Alonzo's permanent imprisonment and pressured her to maintain her prior account.

B:28. He concludes that the court abused its discretion by denying his motion.

Alonzo applies the wrong standard of review. Because he did not object to the admonition, it can be reviewed only for plain error, and under that standard, any error is not reversible.

a. The applicable standard of review is plain error.

Alonzo asserts this issue should be reviewed for abuse of discretion. B:27-28. But that standard applies to a motion for mistrial when there has been a contemporaneous objection. *See State v. Stone*, 2019 S.D. 18, ¶¶ 12, 34, 925 N.W.2d 488, 494, 499-500. “[W]here a defendant’s motion for a mistrial is based upon an allegation of judicial error[,] ... a mistrial motion cannot be used as a means to review the underlying unpreserved claim of error, at least not in the same way the issue could be reviewed with a contemporaneous objection.” *State v. Ortiz-Martinez*, 2023 S.D. 46, ¶ 28, 995 N.W.2d 239, 245; *State v. Lynn*, 284 S.E.2d 786, 789 (S.C. 1981) (“Failure to contemporaneously object ... cannot be later bootstrapped by a motion for a mistrial.”). Consequently, “[w]hen the complaining party has failed to object to the court’s statements at trial, [appellate] review is for plain error only.” *Rush v. Smith*, 56 F.3d 918, 922 (8th Cir. 1995).

Although *State v. Ortiz-Martinez*, 2023 S.D. 46, 995 N.W.2d 239, correctly held that a motion for mistrial based on an unpreserved claim of judicial error is not reviewed for abuse of discretion, the Court did not identify the applicable standard, noting only that “some type of merits review” would apply. *Id.* ¶ 29, 995 N.W.2d at 245. Applying a standard less deferential to the lower court would reward the defendant for not objecting at the appropriate time. Therefore, as the only merits review more deferential than abuse of discretion, the applicable standard must be plain error, which aligns with the Eighth Circuit. *Rush*, 56 F.3d at 922.

Moreover, the analysis must be bifurcated. The motion for mistrial was premised solely on the circuit court’s comments to K.J.1, and the court’s denial of the motion was necessarily premised on its conclusion that its comments were proper. R:627-33. Therefore, this Court would need to consider first whether the circuit court’s statements are reversible error. Because Alonzo did not object to the statements, that issue is unpreserved, and so review is limited to plain error. *State v. Wilson*, 2020 S.D. 41, ¶ 17, 947 N.W.2d 131, 136. Then if the Court determines that the statements were not plain error, the sole basis for the motion evaporates, and the circuit court necessarily did not abuse its discretion in denying the motion. Otherwise, the Court can proceed to consider whether the court abused its discretion.

b. The circuit court's statements to K.J.1 are not plain error.

“Plain error merits reversal only when there is an (1) error, (2) that is plain, (3) affecting substantial rights; and only then may [the Court] exercise [its] discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quoting *State v. Janis*, 2016 S.D. 43, ¶ 21, 880 N.W.2d 76, 82). Alonzo “has the burden of showing that the plain error resulted in prejudice.” *Janis*, 2016 S.D. 43, ¶ 21, 880 N.W.2d at 82.

Alonzo cannot show plain error. This Court views the first two elements “in demanding terms.” *Wilson*, 2020 S.D. 41, ¶ 18, 947 N.W.2d at 136. “An error is plain when it is clear or obvious. This means that lower court decisions that are questionable but not *plainly* wrong (at time of trial or at time of appeal) fall outside the Rule’s scope.” *Id.* (citation modified) (quoting *State v. McMillen*, 2019 S.D. 40, ¶ 23, 931 N.W.2d 725, 732).

The circuit court’s comments were not error—let alone a clear or obvious one. A court “has the duty to control the conduct of a trial[.]” *State v. Richards*, 84 S.D. 376, 381, 171 N.W.2d 808, 810 (S.D. 1969); SDCL 19-19-611. Consequently, courts have broad discretion in managing witnesses and testimony. A court may call and examine witnesses, SDCL 19-19-614, and compel (by contempt) a reluctant witness to testify, SDCL 19-5-7. A court can admonish that “it [is] the duty of the witness to testify truthfully and frankly” and to “tell the story

just as it occurred.” *State v. Drapeau*, 45 S.D. 507, 189 N.W. 305, 307 (1922). And a court “may take reasonable measures to insure [sic] that the evidence is intelligibly presented to the jury.” *State v. Lien*, 305 N.W.2d 388, 389 (S.D. 1981) (quoting *State v. Cuevas*, 288 N.W.2d 525, 533 (Iowa 1980)).

The comments did not go beyond encouraging a reluctant child to testify truthfully and intelligibly. The circuit court asked K.J.1 to uncover her face to be heard clearly. R:551. The court referenced the potential sentence to assure K.J.1 that she was not asked to testify about sensitive, embarrassing matters needlessly and to impress on her the need to be truthful. R:554-55. The court emphasized the jury’s need to know K.J.1’s words were her own and not the VWA’s. R:555. The court encouraged K.J.1 to speak intelligibly, but it did not tell her what to say. Alonzo may imagine that the court’s words “pressured” K.J.1, but there is no objective evidence either that the court intended to or actually did. The court’s comments were not plain error.

Moreover, Alonzo cannot show prejudice. “To establish that an error has affected substantial rights, ‘the error must have been prejudicial: It must have affected the outcome of the circuit court proceedings.’” *State v. Schrempp*, 2016 S.D. 79, ¶ 13, 887 N.W.2d 744, 748 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). Alonzo claims that after the circuit court’s comments, “K.J.1 became more definitive in her testimony.” B:29.

This is a purely subjective claim with no support in the record. K.J.1's testimony spans thirty-eight pages of the trial transcript. R:547-84. She got through only five before the defense objected to her glance at the VWA. R:552. The first four pages addressed preliminary matters, asking K.J.1 about herself, school, family, and home. At the point at which the defense objected and the circuit court admonished K.J.1, she had given about one page of substantive testimony as the State eased her into discussing sensitive matters. If her answers became more specific, it was because the State's questions became more specific as the examination naturally progressed, which would have happened regardless of the court's comments. Therefore, the comments did not affect the outcome, and there is no prejudice.

The circuit court's comments are not reversible error. The applicable standard of review is plain error. Under that standard, the circuit court's comments were not plainly wrong and did not prejudice Alonzo. Therefore, the court properly denied his motion for mistrial.

5. The circuit court did not abuse its discretion by denying Alonzo's second motion for mistrial.

Finally, Alonzo argues the circuit court abused its discretion by denying his second motion for mistrial, which was premised on the prosecutor using the word "monster" in referring to Alonzo. The court denied the motion, reasoning that a single instance did not amount to misconduct and that there was no prejudice. R:766. Alonzo thinks "the circuit court's characterization of the misconduct as a single instance is

factually and legally erroneous.” B:30. He contends: “The State’s use of the words ‘monster,’ ‘nightmare,’ and ‘haunted house’ was not a single isolated comment but a deliberate thematic strategy spanning voir dire, opening statement, and closing argument.” *Id.*

“The denial of a motion for mistrial will not be overturned unless there is an abuse of discretion.” *Ortiz-Martinez*, 2023 S.D. 46, ¶ 26, 995 N.W.2d at 244 (quoting *State v. Red Cloud*, 2022 S.D. 17, ¶ 39, 972 N.W.2d 517, 530). This Court has “principally described the mistrial standard in terms of effect—actual prejudice.” *Id.* ¶ 26, 995 N.W.2d at 245. “Prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods.’ We will reverse only if the violation has prejudiced the party or denied the party a fair trial.” *State v. Smith*, 1999 S.D. 83, ¶ 40, 599 N.W.2d 344, 353 (quoting *State v. Davi*, 504 N.W.2d 844, 855 (S.D. 1993)).

Alonzo did not object to the State’s use of the words *nightmare* or *haunted house*; his only objection came during the State’s closing argument, when the State said: “Repeatedly [Alonzo] says he just can’t believe it. And I submit to you that what he can’t believe is he is the monster.” R:746. In arguing for mistrial, the defense described words like “nightmare” as “borderline” but specified that the motion was prompted by the word “monster” because of its specific mention in *State v. Smith*, 1999 S.D. 83, ¶ 41, 599 N.W.2d 344, 353. R:763-64. So not only did Alonzo not object to “nightmare” and “haunted house,” he also did not

include them in the basis for his motion. He can hardly criticize the circuit court for concluding his motion was based on a single instance of “monster.”

This case is not comparable to *Smith*. In that case, the prosecutor repeatedly called the defendant a “monster,” “sexual predator,” “tyrant,” “not human,” “pervert,” and “child molester.” *Id.* In this case, being called a “monster” once did not “so infect[] the trial with unfairness as to make the resulting convictions a denial of due process.” *Id.* ¶ 52, 599 N.W.2d at 355 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Regardless, Alonzo cannot demonstrate prejudice. “Error is prejudicial when, ‘in all probability it produced some effect upon the final result and affected rights of the party assigning it.’” *Id.* ¶ 39, 599 N.W.2d at 353 (quoting *State v. Spiry*, 1996 SD 14, ¶ 11, 543 N.W.2d 260, 263). Even in *Smith*, despite the numerous invectives aimed at the defendant, this Court concluded “it [was] very unlikely the prosecutor’s inflammatory statements altered the jury’s verdict ... considering the overwhelming evidence that Smith committed the crimes of which he was charged.” *Id.* ¶ 53, 599 N.W.2d at 355. The same is true here. Whatever emotional reaction one inflammatory remark might have had on the jury was eclipsed by the weight of witness testimony and Alonzo’s recorded confession.

The circuit court did not abuse its discretion by denying Alonzo’s motion for mistrial. He based the motion solely on being called a

“monster” once. He did not object to—or premise his motion on—any of the State’s other statements. That one instance is not misconduct, and even if it were, it did not affect the outcome of the trial.

Conclusion

Respectfully, this Court should affirm. Alonzo did not unambiguously request counsel, so under *Thompkins*, police were not required to cease questioning. Instead, he voluntarily, knowingly, and intelligently waived his *Miranda* rights. The court did not abuse its discretion in admitting child hearsay. The court considered all indicia of reliability, and the hearsay met the statutory requirements. The court did not abuse its discretion by permitting the VWA to sit behind K.J.1. The initial decision was authorized by statute and case law, and the VWA moved to the gallery after the defense’s objection. The court’s comments to K.J.1 about testifying were not plain error, and so the court’s denial of the first motion for mistrial was not an abuse of discretion. And the State’s referring to Alonzo as a “monster” once in closing is not misconduct or prejudicial, so the court’s denial of the second motion for mistrial is not an abuse of discretion either.

[Signature on following page]

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Certificate of Compliance

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,380 words.

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

Dated this 6th day of August 2026.

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Certificate of Service

The undersigned hereby certifies that on this 6th day of August 2026, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Diego Alonzo Alonzo* was served via Odyssey File and Serve upon Derek Friese at derek.friese@state.sd.us.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

NO. 30995

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

DIEGO ALONZO ALONZO,

Defendant and Appellant.

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

HONORABLE SUSAN M. SABERS
Circuit Court Judge

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

No. 30995

DIEGO ALONZO ALONZO,

Defendant and Appellant.

PRELIMINARY STATEMENT

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

The brief of Plaintiff and Appellee, the State of South Dakota, is referred to as "SB." Appellant is referred to as "Alonzo." All citations will be followed by the appropriate page number. Alonzo relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in his initial brief, filed with the Court on June 22, 2026.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING ALONZO'S MOTION TO SUPPRESS.

Although Detective Branch provided *Miranda* advisements to Alonzo, his responses to Alonzo's questions were misleading by omission. *Miranda v. Arizona*, 384 U.S. 436 (1966). The responses negated a specific component of the *Miranda* advisement – the immediacy of the right to counsel. The circuit court erred in finding, as a matter of law, that Alonzo voluntarily, knowingly, and intelligently waived his right to remain silent and his right to counsel. SR 234-35. Additionally, Branch did not clarify but obfuscated Alonzo's understanding of the right to counsel. Branch's responses misled Alonzo and secured the waiver. The circuit court erred in finding that Branch sufficiently clarified Alonzo's invocation or understanding of his right to counsel. SR 232-35.

A. Alonzo's waiver was not knowing, voluntary, and intelligent.

When Alonzo asked, "when I can get the lawyer?" Branch's reply was ommissive. Branch did not accurately convey the immediacy of the right to counsel. The State, like the circuit court, points out that Branch's statement, "you would have to make arrangements on your own at another time" was technically true. SB 17-18. The circuit court explained the veracity of Branch's statement. *See* SH 35 (stating "[h]e would have to make arrangements because he would have to fill out the court appointment app, and it would happen at another time. It doesn't happen during the interview"). Certainly, judges, attorneys, and law

enforcement in Minnehaha County may be able to retroactively explain the reality of Branch's statement with an understanding of local practices. But Branch's response did not explain those administrative logistics. His response specifically omits an integral component of the *Miranda* advisement – the immediacy of the right to counsel. *See State v. Angle*, 2021 S.D. 21, ¶ 15, 958 N.W.2d 501, 506 (explaining “that if [he] cannot afford an attorney one will be appointed for [him] *prior to any questioning*”) (citing *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)). This omission occurred at the time Alonzo was actively inquiring about the right to counsel. Branch's response negated Alonzo's full knowledge of waiving his rights.

The totality of the circumstances weighs against the finding of a knowing, voluntary, and intelligent waiver. The State references “the conversation's context” and argues Alonzo was repeatedly advised of his rights. SB 18. But the recording itself demonstrates Alonzo's imprecise understanding of his rights. Ex. 5 00:02:00 – 00:03:54. Branch himself questioned Alonzo's understanding, prompting him to provide a *Miranda* advisement in Spanish.¹ And the State ignores the context of Alonzo's long pauses and repeated, halting responses – “probably lawyer?”, “I think . . . I think so, I don't know”, “I can talk to you I guess”, “When I can get the lawyer?” – all of which came before finally saying

¹ Detective Branch's advisements, in English and as provided to the Spanish interpreter, stated “you have the continuing right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney will be appointed for you.” Ex. 5 00:02:00 – 00:02:10; 00:09:40 – 00:10:05.

“Yeah.” The State claims Alonzo “has significant experience with the criminal-justice system, having been arrested in Minnehaha County five times prior.” SB 19. But again, the State ignores Alonzo’s initial statement that he did not understand his rights. *See* Ex. 5 00:02:00 (asking “Do you understand those rights?” and Alonzo’s response: “No”). *See also State v. Diaz*, 2014 S.D. 27, ¶¶ 42-43, 847 N.W.2d 144, 159 (considering defendant’s first response of “No” when asked of understanding rights within the context of defendant’s “limited English skills”). And the State does not identify evidence in the record that Alonzo had previously undergone custodial interrogation. Alonzo’s confusion is apparent in the recording. His waiver was not knowing, voluntary, and intelligent because he did not understand his rights.

B. *Alonzo invoked his right to counsel prior to any waiver and Detective Branch responded improperly.*

The State argues that Alonzo’s statement “probably lawyer” was ambiguous and “did not express a definite, present desire for counsel.” SB 11. But a reasonable officer would understand this to be a request for counsel. And Branch *did* interpret the statement this way, because he then asked, “you would rather have a lawyer before you speak with me?” Ex. 5 00:03:12 – 00:03:30. Alonzo responded, “I think... I think so, I don’t know.” *Id.* Branch replied dismissively, stating, “well I can’t make that decision for you.” *Id.* Branch’s own acknowledgements in this exchange demonstrate that a reasonable officer would understand these statements to be an invocation. *See Bradley v. Commonwealth*,

327 S.W.3d 512, 517 (Ky. 2010) (reasoning “[t]aken in full context, Detective[]’s recognition that Bradley had a right to counsel is subject to no other reasonable interpretation other than [Detective] subjectively recognizing that Bradley had attempted to invoke his right to counsel”). *See also Snowden v. State*, 419 So. 3d 1263, 1271 (Fla. Dist. Ct. App. 2025) (concluding “[a] reasonable officer in similar circumstances would understand ‘That’s why I need a lawyer or something’ to be a clear request for an attorney given the context”); *People v. Hernandez*, 174 A.D.3d 1352, 1354, 105 N.Y.S.3d 763, 765 (2019) (concluding “defendant unequivocally invoked his right to counsel by stating ‘I think I will take the lawyer’ or ‘I think I need a lawyer’”); *State v. Dorff*, 468 N.J. Super. 633, 649-54, 260 A.3d 904, 914-17 (App. Div. 2021) (holding “[t]hat’s why I feel I might need a lawyer” as an invocation and finding officer’s “problematic statement” in response “impermissibly burdened the assertion of the defendant’s right to counsel and thus tainted her ensuing decision to proceed with the interrogation”).

The State also claims Alonzo’s question, “when I can get the lawyer?” was “a procedural question about the timing of obtaining the counsel Branch referenced.” SB 12. The State argues “[p]rocedural questions like this relating to *how* or *when* counsel will be appointed are not unambiguous invocations of that right.” SB 12-13 (citing *Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir. 2002); *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999); *United States v. Lux*, 905 F.2d 1379, 1382 (10th Cir. 1990)). But these cases do not have the import the State

suggests. Each involved a defendant's question about either "how long" or "what time" they would be able to speak with an attorney. SB 12-13. Alonzo's question reflected a present desire for counsel. *See State v. Dahlen*, 209 Or. App. 110, 118-19, 146 P.3d 359, 364, *opinion modified on reconsideration*, 210 Or. App. 362, 149 P.3d 1234 (2006) (concluding "'[w]hen can I,'" in contrast, expresses a present desire to do the thing asked about" and holding "defendant's request, 'When can I call an attorney?' cannot reasonably be said to be equivocal either the first time he said it or the second time he said it less than an hour later"). Furthermore, this Court should consider the contextual accumulation of Alonzo's references to counsel. A reasonable officer should have understood that Alonzo's three references to counsel were an attempt to invoke his right. Ex. 5 00:02:00 – 00:03:54 ("Probably lawyer," "I think...I think so, I don't know," and "When I can get the lawyer?"). *See United States v. Hernandez-Ledezma*, 812 F. Supp. 3d 684, 692 (W.D. Tex. 2025) (concluding "even if the second reference was ambiguous, the cumulative effect of all of Hernandez-Ledezma's statements would have operated to trigger *Miranda* upon his third reference to an attorney").

Even if equivocal, Branch was required to clarify Alonzo's references to obtaining counsel. *State v. Blackburn*, 2009 S.D. 37, ¶ 9, 766 N.W.2d 177, 181. Instead, Branch discouraged Alonzo's attempt to invoke his right to counsel with dismissive and omissive responses. *See* Ex. 5 00:02:00 – 00:03:54 (Branch responding "I can't make that decision for you, Diego" when Alonzo stated "I think so, I don't know" regarding invocation of the right to counsel, and Branch's

response “You would have to make arrangements on your own at another time”). These responses were not clarifying, but they had the intended effect of securing Alonzo’s eventual waiver. Branch impermissibly burdened and deflected Alonzo’s assertion of his right to counsel. *See State v. Gonzalez*, 249 N.J. 612, 631-32, 268 A.3d 329, 340 (2022) (holding ambiguous invocation of right to counsel required clarification where “the detective responded to defendant's remark ‘[b]ut what do I do about an attorney and everything,’ by saying, ‘I can't give you an opinion about anything,’ rather than seeking clarification”).

Branch was deceptive by omission in his responses. The circuit court clearly erred in its factual finding that Branch did not use “deception” during the interview. SR 232. The circuit court also found, as a matter of law, that “Branch clarified [Alonzo]’s *Miranda* rights multiple times, in both English and Spanish.” SR 235. But the circuit court contradicted its factual findings and conclusions of law in admonishing Branch. *See* SH 35 (explaining to Branch, “[i]t could have been more clear. You could have clarified further”). Branch’s responses were misleading, not clarifying. The circuit court’s factual findings were clearly erroneous, and its related legal determination was error.

The State does not ask this Court to overturn *Blackburn*, but argues “*Blackburn*’s rule cannot be reconciled with” *Berghuis v. Thompson*, 560 U.S. 370 (2010). SB 15. However, the *Blackburn* rule remains controlling. After *Thompson*, this Court has cited the *Blackburn* rule with approval, identifying the pre-waiver and post-waiver context as determinant. *See State v. Lewandowski*, 2019 S.D. 2, ¶

29, 921 N.W.2d 915, 923 (stating “[i]f the accused's request for a lawyer is ambiguous or equivocal at the time *Miranda* rights are given, the officers must clarify the request and/or waiver before proceeding”) (quoting *Blackburn*, 2009 S.D. 37, ¶ 9, 766 N.W.2d at 181); *State v. Rudloff*, 2024 S.D. 73, ¶ 29 n. 11, 15 N.W.3d 468, 480 n. 11 (stating “[c]ompare the rule for *post*-waiver ambiguous or equivocal invocations of the right to counsel and right to remain silent with the rule for *pre*-waiver ambiguous or equivocal invocations of the same rights. We have held ‘that in a pre-waiver situation where the accused has *not yet validly waived* the *Miranda* rights, the officers must clarify the waiver before proceeding with the interview’”) (quoting *Blackburn*, 2009 S.D. 37, ¶ 12, 766 N.W.2d at 182).

The State overstates the scope of the *Thompkins* holding and misapplies it. The Supreme Court’s holding in *Thompkins* focused on the ambiguity of the invocation of *the right to remain silent*. 560 U.S. 370, 380-89.² *Thompkins* did not go as far as *Blackburn* in deciding whether an officer must clarify ambiguous invocations of *the right to counsel*. See *Blackburn*, 2009 S.D. 37, ¶ 10, 766 N.W.2d at 182 (stating “[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together”) (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984)). And as Justice Sotomayor explained, the majority’s holding in

² In *Thompkins*, the defendant was “largely silent during the interrogation, which lasted about three hours.” 560 U.S. at 375. (citation modified). He argued that he invoked his right to remain silent “by not saying anything for a sufficient period of time.” 560 U.S. at 381.

Thompkins “ignores” the dimension of *pre-waiver* ambiguous invocations. See *Thompkins*, 560 U.S. 370, 407-08 (Sotomayor, J., dissenting). Alonzo’s invocation of the right to counsel occurred during the *Miranda* advisement. The State’s reliance on *Thompkins* is unavailing. Branch’s responses did not clarify Alonzo’s intent, but improperly burdened and deflected Alonzo’s attempt to invoke his right to counsel. The circuit court erred in denying the motion to suppress.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY STATEMENTS.

Alonzo maintains that the circuit court erred because it did not properly consider the prior conversation between K.J.1 and K.J.2 when admitting the child hearsay statements. SR 122. The State mischaracterizes Alonzo’s argument regarding *Cates* factors (1), (4), and (6). *State v. Cates*, 2001 S.D. 99, ¶ 11, 632 N.W.2d 28, 34. With regard to Alonzo’s argument about K.J.1’s age being a factor the circuit court misapplied, the State encourages Alonzo to “take that up with the South Dakota Legislature.” SB 26. The State misses the point. Young children are unlikely to fabricate accounts of sexual activity because such activity is beyond their experience. *State v. Floody*, 481 N.W.2d 242, 251 n. 11 (S.D. 1992) (quoting *State v. McCafferty*, 356 N.W.2d 159, 164 (S.D. 1984)). But this reasoning is not as persuasive for a 12-year-old, at the upper boundary of the statute. SDCL 19-19-806.1. The circuit court misapplied the *Cates*-factor analysis and abused its discretion in admitting the hearsay statements.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING THE VICTIM WITNESS ASSISTANT TO ACCOMPANY THE TESTIFYING WITNESS.

The State characterizes Alonzo's argument as asserting "the mere possibility that a victim will look at her VWA is sufficient to establish an abuse of discretion under SDCL 23A-28C-8." SB 28. Alonzo's argument is not so abstract. The actual occurrence of K.J.1 communicating with the VWA during testimony demonstrates the initial placement of the VWA with her created the foreseeable risk of this interaction. The circuit court's decision was flawed in its implementation. The State acknowledges that *Alidani* is distinguishable, because "the appellant did 'not claim any hesitation by victim or glances at [VWA] for confirmation during her testimony.'" SB 29 (quoting *State v. Alidani*, 2000 S.D. 52, ¶ 19, 609 N.W.2d 152, 157). Here, because of the circuit court's allowance for the proximity between K.J.1 and the VWA, the witness *did* communicate with the VWA. The absence of any such interaction in *Alidani* was part of the basis for the Court's holding that no abuse of discretion occurred. *Alidani*, 2000 S.D. 52, ¶ 19, 609 N.W.2d at 158. K.J.1 sought support from the VWA and the jury observed their interaction, which could have bolstered the credibility of her testimony as a demonstration of her distress and need for support. This interaction prejudiced Alonzo by garnering sympathy for K.J.1. The circuit court acknowledged prejudice to "both sides." JT1 23. This goes beyond the narrow question of whether the VWA spoke. *Alidani*'s broader language about examining "*any influence* on victim's testimony attributable to [VWA]'s presence" encompasses

this concern. 2000 S.D. 52, ¶ 19, 609 N.W.2d at 158. The circuit court's remedial measure of removing the VWA from the witness stand did not retroactively cure the prejudice already created by K.J.1's interaction with the VWA. While SDCL 23A-28C-8 authorizes a VWA to accompany a victim, the circuit court's decision foreseeably compromised the integrity of the testimony. The circuit court abused its discretion in allowing the VWA to sit with K.J.1 during testimony.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ALONZO'S FIRST MOTION FOR MISTRIAL BASED ON THE CIRCUIT COURT'S STATEMENTS TO K.J.1.

A. Abuse of Discretion

The State argues this Court should review Alonzo's first motion for mistrial under the plain error standard. SB 32-33. The State faults Alonzo for not objecting contemporaneously during the circuit court's admonishment to K.J.1. SB 32. Alonzo disagrees and reasserts that this issue should be reviewed for abuse of discretion. The impact of the circuit court's comments on K.J.1's testimony was not fully developed until she completed her testimony. A mistrial motion is an appropriate means to raise prejudice that only becomes apparent through the course of testimony. Alonzo objected after K.J.1 and K.J.2 completed their testimony and the effect of the circuit court's comments was discernible. Alonzo argues he preserved this issue by moving for mistrial at the time the prejudice became apparent.

The circuit court abused its discretion in admonishing K.J.1 because the court's reference to permanent imprisonment framed the expected outcome of

her testimony. Additionally, the circuit court's statement that it was "important" for the jury to hear her testimony gestured to K.J.1 a judicial endorsement of the prosecution's case. This went further than encouraging truthful testimony. With unnecessarily strong and outcome-oriented language, the admonishment placed pressure on K.J.1 to testify consistent with her previous statements.

B. Plain Error

Alonzo does not waive the arguments in his initial brief but responds here to the State's plain error analysis. The circuit court has broad authority to control the conduct of trial under SDCL 19-19-611. But the circuit court erred in exceeding that authority because it framed K.J.1's testimony in terms of Alonzo's permanent imprisonment. The error is plain because the admonishment was clearly improper under established principles of judicial impartiality.³ The admonishment affected Alonzo's substantial rights because the right to a fair trial before an impartial judge is fundamental, and the circuit court's comments to K.J.1 negated the impartiality of the court. *See State v. Hauge*, 2013 S.D. 26, ¶ 28, 829 N.W.2d 145, 153 (stating "a fair trial before a fair judge is indispensable to due process," and "judicial fairness requires the appearance as well as the existence of impartiality") (citation modified). The circuit court violated this principle of judicial impartiality because its comments pressured K.J.1 toward a particular outcome. This "seriously affect[ed] the fairness, integrity, or public

³ Alonzo identified prejudice to "the impartiality of the proceeding" as supportive of his oral motion for mistrial. JT1 95-96.

reputation of the judicial proceedings.” *State v. Guzman*, 2022 S.D. 70, ¶ 54, 982 N.W.2d 875, 893 (quoting *State v. Guziak*, 2021 S.D. 68, ¶ 10, 968 N.W.2d 196, 200).

The State’s claim that K.J.1’s added detail resulted naturally from more substantive questioning ignores the coercive impact of the circuit court’s remarks linking her testimony to Alonzo spending his life in prison. The State argues K.J.1’s testimony would have become more specific “regardless of the court’s comments.” SB 36. It is incorrect to argue the circuit court’s comments could have no effect on K.J.1’s testimony. And prejudice does not require showing what the testimony would have been. Rather, to result in prejudice, the circuit court’s comments must affect the outcome. *State v. Schrempp*, 2016 S.D. 79, ¶ 13, 887 N.W.2d 744, 748. Here, K.J.1 became more definitive and consistent in her testimony at the circuit court’s suggestion. The effect on K.J.1 was discernible, and it affected the outcome of K.J.1’s testimony and the ultimate verdict. The circuit court should have granted the motion for mistrial.

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ALONZO’S SECOND MOTION FOR MISTRIAL DUE TO THE STATE’S COMMENTS DURING CLOSING ARGUMENT AND OPENING STATEMENT.

Contrary to the State’s argument, Alonzo’s second motion for mistrial *did* encompass the entire thematic scheme the State employed in rhetoric spanning the entire trial. In explaining the motion, defense counsel referenced the State’s “nightmare” characterization in opening statements, and other “borderline” statements throughout trial. JT2 74. Alonzo disagrees with the State’s argument

that “[h]e based the motion solely on being called a ‘monster’ once.” SB 38-39. Defense counsel’s argument included the State’s broader theme of labeling Alonzo as a “monster,” and portraying him as the nightmare in the victims’ haunted house. Alonzo asserted the motion for mistrial when the accumulation of this rhetoric culminated in the State branding Alonzo a monster. Similar prosecutorial comments, stated repeatedly, have been viewed as misconduct. *See State v. Smith*, 1999 S.D. 83, ¶ 41, 599 N.W.2d 344, 353 (finding prosecutorial misconduct where “[d]uring closing arguments, the prosecutor called Smith a “monster ... something scarier than anybody dressed up on Halloween” in addition to other comments). The accumulation of thematic and multi-stage inflammatory conduct may be prejudicial. *See State v. Blaine*, 427 N.W.2d 113, 116 (S.D. 1988) (finding reversible error where prosecutor comments during cross-examination and closing argument elicited consideration of public safety risks associated with impaired driving at DUI trial). Here, the circuit court abused its discretion in denying Alonzo’s motion for mistrial.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Appellant respectfully requests this Court to remand the case to the circuit court with an order directing the court to reverse the order denying Alonzo’s motion to suppress. Similarly, Alonzo requests this Court order reversal of the circuit court’s decision to admit the child hearsay statements. Finally, Alonzo requests this Court remand the case with an order directing the

circuit court to reverse the Judgment and Sentence and schedule a new trial.

Respectfully submitted this 8th day of September, 2026.

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Reply Brief contains 3,531 words
2. I certify that the word processing software used to prepare this brief is Microsoft Word.

Dated this 8th day of September, 2026.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Appellant's Reply Brief were electronically served upon:

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