

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

No. 30804

LARRY RICHTER,
Defendant and Appellant.

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

HONORABLE JON SOGN
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal Filed on August 21, 2024.

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PRELIMINARY STATEMENT

The transcript of the motion hearing held on July 28, 2023, will be referred to as "MH." The transcript of the jury trial that began on November 13, 2023, and concluded on November 14, 2023, will be referred to as "JT" followed by the corresponding volume number. The transcript of the sentencing hearing held on July 2, 2024, will be referred to as "ST." The settled record will be referred to as "SR." All references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Larry Richter appeals the Judgment and Sentence entered July 30, 2024, by the Honorable Jon Sogn, Circuit Court Judge, Second Judicial Circuit. Richter's

Notice of Appeal was filed August 21, 2024. This Court has jurisdiction over the appeal pursuant to S.D.C.L. § 23A-32-2.

STATEMENT OF THE CASE

The State charged Defendant and Appellant, Larry Richter, by Indictment with three counts of sexual contact with a person incapable of consenting. (S.D.C.L. § 22-22-7.2). SR, 1. A Part II Habitual Information was filed alleging that the defendant was previously convicted of two felonies. *Id.* at 4. Motion hearings were held on January 5, 2023, and July 28, 2023. The jury trial in this matter began on November 13, 2023, and concluded on November 14, 2023. Judge Sogn presided over these proceedings. At the conclusion of the State's evidence the defendant made a Motion for Judgment of Acquittal, which was denied by the trial court. JT3, 26-28. At the close of trial, Defendant renewed his Motion for Judgment of Acquittal, and the request was again denied. *Id.* at 95. The jury found the defendant guilty of all three counts in the Indictment. *Id.* at 127.

The trial court ordered a psychosexual evaluation and presentence investigation. *Id.* at 131. At a status hearing on January 17, 2024, Defendant entered an admission on the Part II Information. Defendant was sentenced on July 2, 2024. *See generally* ST. Judge Sogn imposed the following sentence: Count 1: 15 years in the South Dakota State Penitentiary, with 7 years suspended, credit for 231 days previously served; Count 2: 15 years in the South Dakota State Penitentiary with 8 suspended; Count 3: 10 years in the South Dakota State Penitentiary, with 7 years suspended. ST, 34-40; SR, 229. The trial court ordered

the sentences on each count to be served consecutively to one another, and that Defendant pay \$116.50 in court costs for each of the three counts. ST, 40; SR, 229.

STATEMENT OF FACTS

On July 3, 2021, Larry Richter held his annual 4th of July party for friends and family at his home in Minnehaha County. JT3, 33. His next-door neighbor also had a party on the same day. *Id.* The festivities started in the morning around 10:00 a.m. and went well into the night until approximately 12:00-12:30 a.m. *Id.* at 33, 58. It was estimated that around 25 people attended Richter's party and that between 25-30 people attended the party next door. *Id.* at 33.

Richter provided games, food, beverages and fireworks for his guests. *Id.* at 33-36. Because he was busy with hosting duties, Richter only drank three White Claw alcoholic beverages on the day of the party and was not intoxicated. *Id.*

Luis Gutierrez lives in the house directly behind Richter and was invited to attend the party with his significant other, Tracy, and her children. *Id.* at 34. D.W., is one of Tracy's children. JT2, 17-18, 57. D.W. was 19 years old on July 3, 2021. *Id.* at 57. D.W. was born with cognitive impairment and is developmentally delayed. JT3, 17-20. D.W. is on social security disability because of his cognitive impairment and cannot live independently. JT2, 57-59. D.W.'s mother is his legal guardian. SR, 86 (*Exhibit A*). D.W. has significant issues with both his short and long-term memory and is unable to "retain things mentally." JT2, 75; SR, 86 (*Exhibit A*).

Tracy, D.W., D.W.'s older brother, D.W.'s older brother's girlfriend, and D.W.'s 11-year-old sister came over to the party at Richter's on July 3, 2021, around 10:30-11:00 a.m. JT3, 34. Around 4:00 p.m. D.W. asked different people at the party to take him for a ride on one of the four wheelers that were on the property. *Id.* at 39, 45, 91. Richter agreed to give D.W. a ride and they went out on the four-wheeler for between 10 and 15 minutes. *Id.* at 45. Richter let D.W. drive and Richter held on to the handrails. *Id.* at 43.

D.W. drove the four-wheeler into a field near Richter's home and struck a rut in the ground. *Id.* at 40. Richter was worried the four-wheeler would roll and grabbed D.W.'s hand and pushed the kill switch. *Id.* He put his arm around D.W. and they both jumped off the four-wheeler. *Id.* Shortly after a person driving a truck that had followed them into the field identified himself as the landowner's son. *Id.* Richter talked to him briefly and then he and D.W. rode back to Richter's house. *Id.* 40-45. They arrived back at Richter's house on the four-wheeler between 4:15 and 4:30 p.m. *Id.* at 45.

Richter's next interaction with D.W. was around the time it was getting dark. *Id.* at 50. Tracy approached Richter and briefly spoke with him about the party. *Id.* at 51. When she left D.W. started talking to Richter. *Id.* Richter was sitting on the cover of his hot tub in the backyard. *Id.* D.W. came over and sat about a foot away from him and explained to Richter that his testicle had been removed and asked Richter if he wanted to see it. *Id.* at 52, 53. Richter told him he did not and that it was not appropriate to talk about. *Id.* D.W. then laid back on

the hot tub and told Richter he could grab him. *Id.* at 53. Richter told him no and put his hand on his back and told him to sit up. *Id.* This interaction lasted approximately 7-10 minutes. *Id.* at 54. Steven Woldt, a guest at the party remembered seeing D.W. standing by the hot tub while Richter was sitting on it. *Id.* at 91. A woman and some children, including D.W.'s little sister, came up to them and Richter and D.W. left the hot tub area to walk with them and pick up fireworks. *Id.* at 54. During the entire interaction on the hot tub there were people from the party near them on the deck. *Id.* at 48, 52-53, 92.

The last time Richter saw D.W. at the party that night was when he found him and some kids by a parked trailer on the property. *Id.* at 55. The kids were running up and down the trailer and Richter asked D.W. to help him pull it closed. *Id.* 55-57. After D.W. helped him close the trailer D.W. spent the rest of the night assisting the partygoers with fireworks and went home. *Id.* at 56-59. Richter estimated that the party ended after midnight. *Id.* at 58.

The next day on July 4, 2021, Richter attended a block party near his home. *Id.* at 60. D.W. and his sister were briefly at the same party, but D.W. was never at Richter's home again after the party on July 3. *Id.* 60. On July 5, 2021, Richter went to work. *Id.* at 62.

Richter began getting calls and texts from Tracy on July 5th or July 6th. Tracy accused Richter of touching D.W. inappropriately. *Id.* at 63-67. Richter tried to meet with Tracy in person to discuss the allegations, but she refused. *Id.* at 64. She said that D.W. was alleging that Richter touched him while they were

on the four-wheeler, sitting on the hot tub, and by the trailer. *Id.* at 65. According to Richter, Tracy said that all she wanted was an apology and then she would stop calling him and let it go. *Id.* 65. Tracy lied to Richter and told him that she had a monitoring device on D.W. so she knew D.W. wasn't making it up. *Id.* at 66.

Richter estimated that he received 23 calls and 34 text messages from Tracy. *Id.* at 73. Tracy recorded a phone call between her and Richter in which Richter admits he was drinking that day, states that he "took it too far," and admits his hand was on the crotch outside of D.W.'s pants, and denies his hand was ever down D.W.'s pants. *State's Exhibit 4, State's Exhibit 5.* He also stated that he admits to "those three things." *State's Exhibit 4, State's Exhibit 5.*

The calls and texts from Tracy stopped on July 20 or July 21, when a police officer reached out to Richter regarding the allegations. JT3, at 64. Richter did not make a statement to police. *Id.* at 82. Over a year later, on August 24, 2022, Richter was indicted on three counts of sexual contact with a person incapable of consent. SR, 1.

At a motion hearing on July 28, 2023, the trial court heard Defendant's Motion in Limine seeking to prohibit D.W. from having a stuffed animal with him while testifying during the jury trial. MH, 8-12; SR, 48. The trial court took the issue under advisement. MH, 12. The court sent an email to counsel on July 28, 2023, stating that he was inclined to allow D.W. to have the stuffed animal while testifying, but wanted to visit with him before making his final ruling on

the matter. JT1, 2-3.

The court questioned D.W. about the stuffed animal outside the presence of the jury prior to his testimony. JT2, 13-15. The court noted that it was a stuffed monkey holding a banana that was approximately 18 inches tall. *Id.* at 15. D.W. was 21 years old at the time of trial. *Id.* at 17. D.W. said that his monkey's name was "Ish" and that it keeps him calmed down. *Id.* at 14. The court allowed D.W. to have the stuffed monkey with him while testifying because the court found it would not create an unfair prejudice to the defendant, and it helped D.W. remain calm and helped with his nerves while testifying. *Id.* at 15-16.

When D.W. took the stand to testify in front of the jury the prosecutor asked him what he was holding and he told the jury it was his monkey, Ish. *Id.* at 17. He explained to the jury that he had Ish with him because "it keeps my anxiety calm." *Id.* at 18.

D.W. testified that the first time Richter touched his testicle was over his clothes when they were sitting on the hot tub cover in the afternoon when the sun was out. *Id.* at 20-21, 37. D.W. said he told Richter to stop several times. *Id.* at 20-21. He said his mom walked over to them between 1-5 times to check on them and Richter told him not to tell his mother what was happening. *Id.* at 22-23. D.W. said as soon as his mom would walk away Richter would put his hand back on his testicle. *Id.* at 23. D.W. said no one was on the backyard deck at the time this happened. *Id.* at 40.

D.W. stated that the second time Richter touched him was after the hot

tub when they rode on the four-wheeler. *Id.* at 24. D.W. testified that he rode the four-wheeler in the afternoon with Richter on the day after the party, which was July 4th. *Id.* at 24. D.W. claimed that while he drove the four-wheeler into the field Richter was holding onto him with his hand on his testicle the whole time. *Id.* at 24. D.W. remembered talking to the landowner's son in the field and that they hit a hole, and Richter grabbed him so he didn't fall off. *Id.* at 25-28, 38-39. Then they went back to Richter's garage and parked it. *Id.* at 27-28, 39.

D.W. testified that the third incident at the trailer happened after they got back from riding the four-wheeler. *Id.* at 28-29. He said at the trailer Richter put his hand inside D.W.'s pants and touched his bare skin on his testicle. *Id.* at 29. He said this happened for a long time and doesn't remember how it stopped. *Id.* at 30.

The order of events was different than what D.W. had testified to at Grand Jury. *Id.* at 42-44. At Grand Jury D.W. testified that the four-wheeler happened first, then the hot tub, and then the trailer incident. *Id.* He also testified inconsistently at trial that the trailer and hot tub incidents happened on July 4, 2021, and that the four-wheeler touching happened the next day on July 5. *Id.* at 40.

D.W. stated that he waited three weeks to tell anybody that this happened because Richter told him not to tell anyone. *Id.* at 31-32. But he couldn't hold it in anymore and told Luis Gutierrez, who then told D.W.'s mom. *Id.* at 32-33. Luis testified that D.W. told him Richter touched him while they were in the car on

July 5, 2021, and that Luis told Tracy when they got home that day. *Id.* at 55.

Richter testified that he never touched D.W.'s testicle. JT3, 43, 44, 54, 68-70. Richter stated he only apologized to Tracy because he wanted her to stop bothering him. *Id.* at 65-73. When he said on the recorded phone call that he admitted to "those three things" he was not admitting to touching D.W.'s testicle, but to physically touching him in a non-sexual manner three different times. *Id.* at 68, 71-72. The first time was when he grabbed D.W.'s hip so he didn't fall off the four-wheeler, the next was when he touched him on the side and told him to sit up on the hot tub, and the last was when he hit him on the knee and said "let's go" when they were getting off the hot tub. *Id.* at 71-72.

At the conclusion of the State's evidence the defense made a Motion for Judgment of Acquittal, which was denied by the trial court. *Id.* at 26-28. After the defense's presentation of witnesses the defense renewed its Motion for Judgment of Acquittal. *Id.* The request was denied. *Id.* The jury found Richter guilty of all three counts in the Indictment. *Id.* at 127.

At a separate hearing prior to sentencing Richter admitted to having one prior felony conviction and being a habitual offender. At sentencing the court sentenced him to a total of 40 years with 22 of those years suspended. ST, 41; SR, 229. The sentence was as follows: Count 1: 15 years in the South Dakota State Penitentiary, with 7 years suspended, credit for 231 days previously served; Count 2: 15 years in the South Dakota State Penitentiary with 8 suspended; Count 3: 10 years in the South Dakota State Penitentiary, with 7 years suspended.

ST, 34-40; SR, 229. Each count was ordered to be served consecutive and court costs were imposed. ST, 40; SR, 229.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE VICTIM TO HAVE A STUFFED ANIMAL WHILE TESTIFYING.

The trial court found that it was appropriate to allow the alleged victim to have a stuffed animal with him while testifying and that it would not be prejudicial to the defendant.

State v. Abraham-Medved, 2024 S.D. 14

State v. Belt, 2024 S.D. 82

Olson v. Butte County Commission, 2019 S.D. 13

S.D.C.L. § 23A-24-10

S.D.C.L. § 23A-24-11

S.D.C.L. § 26-8A-31.1

II. WHETHER IMPROPER CROSS-EXAMINATION BY THE PROSECUTION WAS PREJUDICIAL TO THE DEFENDANT.

The defendant was subject to undue prejudice when the prosecutor improperly insinuated that Defendant had a duty to produce evidence of his innocence.

Jenner v. Leapley, 521 N.W.2d 422 (S.D. 1994)

State v. Carothers, 2006 S.D. 100

State v. Hankin, 2022 S.D. 67

State v. Rocha, 890 N.W.2d 178 (Neb. 2017)

U.S. CONST. amend. XIV

III. WHETHER DR. FREE'S TESTIMONY THAT THE ALLEGED VICTIM'S DEVELOPMENTAL DISABILITY MADE HIM MORE LIKELY TO BE A VICTIM WAS IRRELEVANT AND PREJUDICIAL.

Dr. Free's testimony that D.W. was more likely to be a victim due to

his developmental disability was irrelevant and prejudicial.

State v. Buchholtz, 2013 S.D. 96

State v. Kvasnicka, 2013 S.D. 25

S.D.C.L. § 19-19-401

S.D.C.L. § 19-19-402

S.D.C.L. § 19-19-702

IV. WHETHER THE TRIAL COURT ERRED IN DENYING
DEFENDANT'S MOTION FOR JUDGMENT OF
ACQUITTAL WHEN THE EVIDENCE WAS
INSUFFICIENT TO SUSTAIN A CONVICTION.

The trial court denied the defendant's Motion for Judgment of Acquittal and found there was sufficient evidence to sustain the conviction.

State v. Ahmed, 2022 S.D. 20

State v. Bordeaux, 2006 S.D. 12

State v. Livingood, 2018 S.D. 83

State v. Plastow, 2015 S.D. 100

LEGAL ANALYSIS

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION
BY ALLOWING THE ALLEGED VICTIM TO HAVE A
STUFFED ANIMAL WHILE TESTIFYING.

In South Dakota, a child who is under the age of 16 may be permitted to have an item that provides them "psychological comfort" while they are testifying in any proceeding about an alleged sexual contact performed on the child. S.D.C.L. § 26-8A-31.1. In this case the alleged victim, D.W., was cognitively impaired and developmentally delayed, however, he was not a child under the age of 16. JT2, 17, 57. At the time of the alleged crime D.W. was 19 years old, and he was 21 years old at the time of trial. *Id.* Despite not qualifying as a child witness, the trial court allowed D.W. to bring the comfort item, an 18-inch stuffed

animal, on the witness stand during his testimony in front of the jury. JT2, 13-15.

There is no authority for the trial court to authorize a comfort item for an adult witness, even an adult witness with developmental disabilities. The South Dakota legislature has clearly acknowledged and defined differences between child witnesses and disabled adults as witnesses. For example, South Dakota law specifically allows for the use of therapeutic dogs by child witnesses and by witnesses with developmental disabilities. S.D.C.L. § 23A-24-10. However, the use of therapeutic dogs by child witnesses is also separately specifically authorized in the same statute that allows children under 16 to have a comfort item while testifying about alleged sexual contact. S.D.C.L. § 26-8A-31.1. This statute became law in 2023 and is entitled "Rights of child witness." *Id.*

In any proceeding in which a child under the age of sixteen is describing any act of sexual contact or rape performed with or on the child by another, any act of physical abuse or neglect of the child by another, any act of physical abuse or neglect of another child, any act of human trafficking of the child by another, or any act constituting a crime of violence as defined in § 22-1-2 committed against the child or another child, the court may, on its own motion or by motion of an attorney in the proceeding, provide any of the following accommodations to the child:

- (1) To be addressed, asked questions, and read the oath or affirmation to testify truthfully in an age-appropriate manner;
- (2) To be free of nuisance or harassing tactics in the proceeding;
- (3) To have a person who would contribute to the well-being of the child present, clearly visible, and in close proximity, if the person is not a witness in the proceeding;
- (4) To have sufficient breaks in the proceedings to allow for the comfort of the child; or
- (5) To have a certified therapeutic dog as defined in § 23A-24-10, an item used to provide psychological comfort, or both, present in the room with the child.

S.D.C.L. § 26-8A-31.1.

Statutory interpretation requires that words be given plain meaning and effect. *Olson v. Butte County Commission*, 2019 S.D. 13, ¶ 5. It is clear from the plain meaning of this statute that individuals with developmental disabilities are separate and distinct from child witnesses. If the legislature intended for developmentally disabled adults to be included in the protections afforded to child witnesses, it would have added specific language as it did in the statute which allows children and developmentally disabled adults to have therapeutic dogs while testifying. S.D.C.L. § 23A-24-10.

It is noteworthy that pursuant to the statute regarding therapeutic dogs, the party requesting that the developmentally disabled individual or child have the dog present must make a motion to the court “outside the presence of the jury.” S.D.C.L. § 23A-24-11. This is clearly an acknowledgement of the prejudicial effect to the defendant if a therapeutic dog were to be allowed to appear with a witness without first meeting the requisite factors. To safeguard from that prejudice the law requires that in that motion the moving party must provide the credentials of the dog and the dog’s handler, show that the witness and dog have a basic relationship that has been established in anticipation of the testimony, and show that the dog may reduce the anxiety of the witness while testifying. *Id.* This requires the proponent of the therapy dog to provide notice of its intent to have the witness testify with the therapy dog and sets a clear burden of factors that must be met. *Id.*

Here the State never made a motion to the court for the stuffed animal to be allowed or made any showing as to why it would be necessary. The defense had to introduce a motion in limine based on a presumption that because D.W. brought the stuffed animal to the Child's Voice interview he may attempt to bring it on the stand. The trial court very briefly questioned D.W. about the stuffed animal and D.W. said it "keeps me calmed down." JT2, 13-14. When the court inquired as to whether D.W. was nervous to testify he replied, "kind of." *Id.* at 14. After this brief exchange the trial court allowed the stuffed animal with no legal basis or authority to do so. *Id.* at 15.

"An abuse of discretion is defined as a 'fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration is arbitrary or unreasonable.'" *State v. Belt*, 2024 S.D. 82, ¶ 20 (quoting *State v. Krueger*, 2020 S.D. 57, ¶ 29). If the resulting error from an abuse of discretion is shown to be prejudicial the conviction must be overturned. *State v. Abraham-Medved*, 2024 S.D. 14, ¶ 24. Error is prejudicial if in all probability the error affected the final result of the proceedings. *Belt*, at ¶ 21. An error that sufficiently undermines confidence in the outcome of the trial is prejudicial. *Id.*

By allowing the alleged victim in this case to bring a stuffed animal on the stand with him to testify, the inference to the jury was that D.W. was so traumatized by the crime he was alleging that he could not testify without the stuffed animal. This lends undue credibility to his accusation that the crime occurred. This inference was bolstered further by Dr. Free's testimony that D.W.

also brought the same stuffed animal to his Child's Voice interview. JT3, 20. She stated that his reliance on the stuffed animal when he is anxious was childlike behavior that "was a very visible sign that he needed the support that we were able to provide at Child's Voice." *Id.*

The jury was left to conclude that it was probable that if D.W. had not been traumatized by this crime there would have been no reason for him to be anxious or to need the stuffed animal with him while he testified. Therefore, the trial court's decision to allow D.W. to have his stuffed animal was an abuse of discretion that resulted in prejudicial error to the defendant.

II. WHETHER IMPROPER CROSS-EXAMINATION BY THE PROSECUTION WAS PREJUDICIAL TO THE DEFENDANT.

Pursuant to the Due Process Clause of the 14th Amendment to the United States Constitution, the burden is always on the State to prove every element of a criminal offense beyond a reasonable doubt. U.S. CONST. amend. XIV. That burden may not be shifted to the defendant. *State v. Robinson*, 1999 SD 141, ¶¶ 12-18, 602 N.W. 2d 730, 733-35; *State v. Rocha*, 890 N.W.2d 178, 208 (Neb. 2017).

A prosecutor is prohibited from attempting to persuade a jury by inappropriate means. *State v. Hankin*, 2022 S.D. 67, ¶ 37. This includes injecting prejudicial inuendo in an attempt to improperly sway a jury. *Id.*

During the cross-examination of Richter, the prosecutor improperly implied that Richter's assertion of his 5th Amendment right to remain silent was probative of his guilt. JT3, 82. The prosecutor also insinuated Richter had a duty

to provide evidence to the police to exonerate himself if he did not commit a crime. *Id.*

The prosecutor had the following exchange with Richter:

Q: You knew that when law enforcement called you that there was some allegations. Right?

A: Yes

Q: But you didn't tell law enforcement that you made this false confession to keep Tracy Wentzel to stop bothering you?

A: No. I didn't talk to the officer at all. I said I would meet with him, and I called my lawyer.

Q: It would probably be in your best interests to share that information so you wouldn't get arrested if it truly was a false confession?

A: I don't know nothing about that.

Q: You also said you had phone records, text message records, and those weren't gone by July 21st, when law enforcement called you.

A: Yes, they were - no. They wouldn't have been back then, no.

Q: You could have shared those and you didn't?

A: I didn't talk to the police.

Q: So you would have us believe that you were accused of serious crimes and arrested and you didn't bother to say this was a false confession?

A: I was accused. I wasn't arrested until, like, a year and a half later.

Q: But you never told anybody?

A: I told my lawyer.

Q: Not law enforcement or somebody that could have changed that, if it were true?

A: What are you saying? I don't know what you are asking.

Id. at 82-83.

This line of questioning resulted in the jury being left with the impression that the defendant had an obligation to put forth evidence of his innocence at trial. *Hayes v. State*, 660 So.2d 257 (Fla. 1995) (holding that it was improper burden shifting when the prosecutor elicited evidence that the defendant did not get blood stains tested at a laboratory); *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009) (holding that it was reversible error when a prosecutor's questioning implied that the defendant should have produced medical reports or photographs to refute an element of the crime); *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004) (finding that the prosecutor's questioning of a witness insinuated that the defendant had a duty to produce photographic evidence). In *State v. Rocha*, the Nebraska Supreme Court held that it was inappropriate burden shifting for the prosecution to "allude to the fact that [defendant] had not done his own independent testing of the evidence to show that his fingerprints and DNA were not on the items containing methamphetamine." 890 N.W.2d 178, 208 (Neb. 2017) (the court in *Rocha* did not find reversible error, only because the trial court gave the jury a curative instruction upon the defense counsel's objection and told the jury to disregard the testimony in its entirety).

In this case, the jury was given the impression that the defendant had a

duty to prove his innocence. The statements of the prosecutor in this case prejudiced the defendant and amount to plain error. *State v. Carothers*, 2006 S.D. 100, ¶ 25, 692 N.W.2d 544 (quoting *State v. Page*, 2006 S.D. 2, ¶ 15, 709 N.W.2d 739); *State v. Bowker*, 2008 S.D. 61, ¶ 45, 754 N.W.2d 56, 69; SDCL § 23A-44-15.

If prosecutorial misconduct has occurred and the misconduct resulted in prejudice which denied the defendant a fair trial, then the conviction must be reversed. *State v. Hankin*, 2022 S.D. 67, ¶ 32. The individual facts of each case must be evaluated to determine the prejudicial impact of the misconduct. *Id.* at ¶ 33 (quoting *State v. McMillan*, 2019 S.D. 40, ¶ 27). Inappropriate comments by a prosecutor alone may not justify the reversal of a criminal conviction if the proceedings were otherwise fair. *Jenner v. Leapley*, 521 N.W.2d 422, 428 (S.D. 1994) (citing in *U.S. v. Young*, 470 U.S. 1, 11-12 (1985)). However, “the remarks must be examined within the context of the trial to determine whether the prosecutor’s behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor’s response would have on the jury’s ability to judge the evidence fairly.” *Id.*

In this case, the prosecutor’s insinuation that Richter would have talked to police and presented evidence of his innocence if the allegations were false was a blatant attempt to shift the State’s burden to Richter. Richter’s right to due process was violated and the resulting prejudice unfairly gave the jury the impression that it was Richter’s duty to prove himself innocent instead of the State’s job to prove each and every element of the crimes alleged beyond a

reasonable doubt.

III. WHETHER DR. FREE'S TESTIMONY THAT THE ALLEGED VICTIM'S DEVELOPMENTAL DISABILITY MADE HIM MORE LIKELY TO BE A VICTIM WAS IRRELEVANT AND PREJUDICIAL.

Dr. Free was called to testify about the medical evaluation of D.W. at Child's Voice. JT3, 12-26. Dr. Free testified to her credentials as a board-certified pediatrician and her role in providing training to law enforcement and child protection workers about child abuse. *Id.* at 13-15; S.R., 70 (*Exhibit 7*). She explained to the jury that Child's Voice evaluates children who may potentially be victims of abuse or neglect and that developmentally delayed adults can also be referred to the clinic. JT3, 15. Dr. Free stated that she had been employed by Child's Voice since 2004. *Id.* at 16. The prosecutor inquired if in her nearly 20 years at Child's Voice she has had "the opportunity to study and determine individuals that might be most susceptible to being abused?" *Id.* Dr. Free answered that in her research and education she has found "[t]hat individuals with disabilities have an increased vulnerability to all types of maltreatment, including abuse and neglect, physical abuse, sexual abuse, emotional abuse, all types of neglect." *Id.* at 16-17. Dr. Free did not expound upon what specific research or data was relied upon to formulate this opinion.

Dr. Free testified that D.W. clearly had cognitive delays. *Id.* at 18-19. She found that D.W. processes information more slowly than his peers without disabilities and has some difficulty with speech and language. *Id.* at 19. She also

stated that D.W. had an obvious cognitive developmental delay and displayed some childlike behavior. *Id.* at 20.

Dr. Free's opinion that people with disabilities like D.W. are more likely to be the victim of sexual abuse was inadmissible because it was not relevant to the jury's consideration as to whether D.W. was the victim of sexual contact in this case. S.D.C.L. § 19-19-402. For evidence to be relevant it must have "a tendency to make a fact more or less probable" and be "of consequence in determining the action." S.D.C.L. § 19-19-401.

As an expert witness, Dr. Free's testimony carried an "aura of reliability and trustworthiness." *State v. Kvasnicka*, 2013 S.D. 25, ¶ 35 (quoting *State v. Werner*, 482 N.W.2d 286, 291-92 (S.D. 1992)). In this case the State had to prove that D.W. was the victim of sexual contact and that he was incapable of consenting to that sexual contact due to his mental incapacity. S.D.C.L. § 22-22-7.2. Dr. Free was allowed to improperly assert to the jury that because he was developmentally delayed, D.W. was more likely than the average person to be the victim of sexual abuse.

An expert witness may not render an opinion that invades the province of the jury as fact finder. In *State v. Buchholtz*, the South Dakota Supreme Court reversed and remanded on the issue of improper vouching of the victim's credibility by a doctor who gave a diagnosis of "child sexual abuse." 2013 S.D. 69, ¶ 18. In its opinion the Court stated that "[a]n expert's role is to 'assist the trier of fact to understand the evidence or to determine a fact in issue.' That role

is not to tell the trier of fact what to decide, shifting responsibility from the decision maker to the expert.” *Id.* (quoting S.D.C.L. § 19-15-2 (Rule 702), transferred to S.D.C.L. § 19-19-702).

In the present case, Dr. Free’s testimony was inappropriate and prejudicial to the defendant because it improperly asserted that D.W. was more likely to be the victim of sexual abuse due to his disability.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING
DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL
WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A
CONVICTION.

The sufficiency of the evidence in criminal convictions is reviewed de novo. *State v. Ahmed*, 2022 S.D. 20, ¶ 14. “In determining the sufficiency of the evidence on appeal in a criminal case, the issue before this Court is whether there is evidence in the record which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt.” *State v. Bordeaux*, 2006 S.D. 12, ¶ 6, 710 N.W.2d 169. The Court will not usurp the function of the jury. *State v. Swan*, 2008 S.D. 58, ¶ 9, 753 N.W.2d 418.

Accordingly, the Court will not review the credibility of the witnesses or resolve conflicts in evidence. *State v. Livingood*, 2018 S.D. 83, ¶ 16. “A guilty verdict will not be set aside if the state’s evidence and all favorable inferences that can be drawn there-from support a rational theory of guilt.” *State v. Motzko*, 2006 S.D. 13, ¶ 6, 710 N.W.2d 433. Therefore, the evidence will be considered in “a light most favorable to the verdict.” *State v. Amundson*, 2007 S.D. 99, ¶ 17, 738

N.W.2d 919.

In this case there was no physical evidence of the alleged crime. The State's case was entirely dependent on D.W.'s description of the alleged criminal activity. Although the State argued that the phone call between Richter and Tracy Wentzel was proof that the alleged crimes occurred, it was not dispositive evidence. Further, Richter explained how that phone call was misconstrued and not actually an admission of guilt. JT3, 65-73. "[I]n sufficiency of the evidence cases, a defendant may not be convicted unless the defendant's corroborated confession or admission, independent evidence of the crime, or a combination thereof establishes all elements of the crime beyond a reasonable doubt." *State v. Plastow*, 2015 S.D. 100, ¶ 20.

In this case the combination of the evidence failed to establish that the alleged sexual contact occurred beyond a reasonable doubt. D.W. had documented memory problems and issues with processing information. JT2, 58-60, 74-75; JT3, 17-20; S.R., 86 (*Exhibit A*). D.W. was the only one who could establish that the touching had occurred, but he was not able to give a consistent or credible account of how it allegedly happened.

D.W. testified that Richter told him to tell no one about what happened, so he waited three weeks to tell Luis Gutierrez about the touching. JT2, 31-32. He said he finally told Luis because he "could not hold it in any longer." *Id.* at 32. However, it was clearly established that D.W. told Luis Gutierrez about the alleged touching in a car ride that occurred just a day or two after the alleged

incidents occurred. *Id.* at 54

In addition to being unable to accurately describe when he reported the alleged crime, D.W. was unable to give a consistent sequence of how these events allegedly took place. He testified the first time Richter touched his testicle was on the hot tub when they were alone. JT2, p. 20-21. He said that his mom came over while this touching was happening and the Richter stopped when Tracy was there and then started again when she walked away. *Id.* at 22-23. But Tracy testified that she could see Richter's backyard from her vantage point on Luis's back patio and that when she saw D.W. sitting on the hot tub with Richter she walked over to check on him. *Id.* at 62-63. After checking in on D.W. on the hot tub she felt things were okay and walked back to Luis's home. *Id.*

Richter testified that when he was sitting on the hot tub with D.W. there were several people on the deck in view of the hot tub. JT3, 52-53. Steven Woldt confirmed Richter's account that several people were on the deck only 10-15 feet away from the hot tub when he saw D.W. and Richter sitting on the cover it. *Id.* at 91-92. D.W. stated that he sat with Richter on the hot tub in the afternoon. JT2, 37.

D.W. said the next day he was at Richter's and it was Richter's idea for D.W. to ride the four-wheeler and that was when Richter touched him for the second time. *Id.* at 24, 38. But Steven Woldt testified that D.W. asked for a ride at the party on July 3 and that Richter agreed to give him one and that he saw them on the hot tub cover later that same night. JT3, 91-92.

D.W. testified that the third time Richter touched him was at Richter's trailer after the four-wheeler ride. JT2, 27-30. D.W. said it was dark out when the touching at the trailer occurred. *Id.* at 37.

He then stated that the trailer and hot tub incidents happened on July 4, 2021, and that the four-wheeler touching happened on July 5. *Id.* at 40. This was not only inconsistent with his own testimony at trial, but also with his grand jury testimony. D.W. previously testified at grand jury that the four-wheeler incident happened first, then the hot tub, and then the trailer incident. *Id.* 42.

It is probable that D.W. was confusing July 3 (the day of the party) with July 4. However, that discrepancy does not account for the impossible sequence of events he testified to. Even if D.W. was off by a day and the first incident happened on July 3 when the party occurred at Richter's house, the alleged touching incidents still could not have happened as D.W. testified because Richter was at a neighbor's party all day on July 4, 2021. JT3, 59-63, 93. And Richter went to work on July 5, 2021, because it was a Monday. *Id.* at 62. It was on or about July 5, 2021, that D.W. told Luis of the alleged sexual contact. Therefore, D.W.'s account that these events occurred over two days and that he was at Richter's home on either July 4, 2021, or July 5, 2021 cannot be true. *Id.*

Because there is insufficient evidence to support a verdict of guilty in this case, the conviction must be overturned.

CONCLUSION

In this case, Richter was prejudiced by errors of the trial court, the

prosecution's insinuation that he had a duty to present evidence of his innocence, and by Dr. Free's testimony that the alleged victim was more likely to be the victim of sexual abuse because of his developmental disability. The cumulative effect of this prejudice is overwhelming. In addition to the prejudicial nature of these proceedings, the record also reflects that there is insufficient evidence to find that each element of the indicted crimes could be proven beyond a reasonable doubt, even when viewed in the light most favorable to the State. Because Richter has been denied his right to a fair trial and there is insufficient evidence to sustain the conviction the conviction must be vacated.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted this 25th day of February 2025.



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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in S.D.C.L. 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 6,335 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Office 365.

Dated this 25th day of February 2025.


Nicole J. Laughlin
Attorney for Appellant

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

SO 21-01918

STATE OF SOUTH DAKOTA,
 Plaintiff,

+

49CRI22005752

vs.

+

JUDGMENT & SENTENCE

LARRY GENE RICHTER,
 Defendant.

+

An Indictment was returned by the Minnehaha County Grand Jury on August 24, 2022, charging the defendant with the crimes of Count 1 Sexual Contact With Person Incapable of Consenting on or about July 3, 2021; Count 2 Sexual Contact With Person Incapable of Consenting on or about July 3, 2021; Count 3 Sexual Contact With Person Incapable of Consenting on or about July 4, 2021 and a Part II Habitual Criminal Offender Information was filed.

The defendant was arraigned upon the Indictment and Information on August 30, 2022, Richard Johnson appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Indictment.

The case was regularly brought on for trial, Colleen Moran, Deputy State's Attorney appeared for the prosecution and, Richard Johnson, appeared as counsel for the defendant. A Jury was impaneled and sworn on November 13, 2023 to try the case. The Jury, after having heard the evidence produced on behalf of the State of South Dakota and on behalf of the defendant on November 14, 2023 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, LARRY GENE RICHTER, guilty as charged as to Count 1 Sexual Contact With Person Incapable of Consenting (SDCL 22-22-7.2); Count 2 Sexual Contact With Person Incapable of Consenting (SDCL 22-22-7.2) and guilty to Count 3 Sexual Contact With Person Incapable of Consenting (SDCL 22-22-7.2)," with sentencing continued to address the Part II Information.

Thereafter, on February 13, 2024, the defendant appeared with counsel, Richard Johnson and the State was represented by Deputy State's Attorney, Colleen Moran; at which time the defendant admitted to the 1st conviction in the Part II Habitual Information and the 2nd conviction was struck (SDCL 22-7-7) and sentencing was delayed until after the completion of a presentence report.

Thereupon, on July 2, 2024, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

SENTENCE

AS TO COUNT 1 SEXUAL CONTACT WITH A PERSON INCAPABLE OF CONSENTING / HABITUAL OFFENDER : LARRY GENE RICHTER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years with credit for two hundred thirty-one (231) days served and with seven (7) years of the sentence suspended on the conditions that the defendant enter into and comply with all terms of Parole Agreement and that the defendant pay \$116.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

AS TO COUNT 2 SEXUAL CONTACT WITH A PERSON INCAPABLE OF CONSENTING / HABITUAL OFFENDER : LARRY GENE RICHTER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for fifteen (15) years with eight (8) years of the sentence suspended (consecutive to Count 1) on the conditions that the defendant enter into and comply with all terms of Parole Agreement and that the defendant pay \$116.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.


AS TO COUNT 3 SEXUAL CONTACT WITH A PERSON INCAPABLE OF CONSENTING / HABITUAL OFFENDER : LARRY GENE RICHTER shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for ten (10) years with seven (7) years of the sentence suspended (consecutive to Count 2) on the conditions that the defendant enter into and comply with all terms of Parole Agreement and that the defendant pay \$116.50 court costs through the Minnehaha County Clerk of Courts; which shall be collected by the Board of Pardons and Parole.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary or the Minnehaha County Jail, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

The defendant shall be returned to the Minnehaha County Jail following Court on the date hereof; to then be transported to the South Dakota State Penitentiary, there to be kept, fed and clothed according to the rules and discipline governing the Penitentiary.

7/30/2024 4:39:05 PM

BY THE COURT:


JUDGE JON C. SOGN
Circuit Court Judge

Attest:
Schuelke, Austin
Clerk/Deputy



LARRY GENE RICHTER, 49CRI 22-005752
Page 2 of 2

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30804

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LARRY GENE RICHTER,

Defendant and Appellant.

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

THE HONORABLE JON C. SOGN
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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Notice of Appeal filed August 21, 2024.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30804

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

LARRY GENE RICHTER,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Larry Richter, is referred to as “Appellant” or “Richter.” Plaintiff and Appellee, the State of South Dakota, is referred to as “State.” The victim is referred to by his initials, D.W. All other individuals are referred to by name. References to documents are designated as follows:

Settled Record (Minnehaha Co. File 49CRI22-5752)..... SR
Motions Hearing (July 28, 2023)..... MH
Jury Trial Volume I¹ (November 13, 2023)JT1
Jury Trial Volume II (November 13, 2023).....JT2
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Status Hearing (January 17, 2024).....SH
Sentencing Hearing (July 2, 2024).....SENT

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

Appellant's Brief.....AB

All document designations are followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Richter appeals the Judgment & Sentence entered by the Honorable Jon C. Sogn, Circuit Court Judge, Second Judicial Circuit, Minnehaha County. SR 229-30. The Judgment & Sentence was filed on July 30, 2024. SR 230. Richter filed a Notice of Appeal on August 21, 2024. SR 233. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING D.W. TO HAVE A STUFFED ANIMAL WHILE TESTIFYING?

The trial court allowed D.W. to have a stuffed animal while testifying, determining that it would not present a danger of unfair prejudice to Richter.

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

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

State v. Otohhiale, 2022 S.D. 35, 976 N.W.2d 759

II

WHETHER RICHTER PRESERVED THE ISSUE RELATED TO THE PROSECUTOR'S CROSS-EXAMINATION OF RICHTER, OR IN THE ALTERNATIVE, WHETHER RICHTER ESTABLISHED PLAIN ERROR?

The trial court did not rule on this issue as Richter did not object to the now-challenged cross-examination at trial.

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

State v. Dufault, 2001 S.D. 66, 628 N.W.2d 755

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

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

III

WHETHER RICHTER PRESERVED THE ISSUE RELATED TO DR. FREE'S TESTIMONY THAT D.W.'S DEVELOPMENTAL DISABILITY MADE HIM MORE LIKELY TO BE A VICTIM, OR IN THE ALTERNATIVE, WHETHER RICHTER ESTABLISHED PLAIN ERROR?

The trial court did not rule on this issue as Richter did not object to the now-challenged testimony at trial.

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

State v. Dufault, 2001 S.D. 66, 628 N.W.2d 755

State v. Johnson, 2015 S.D. 7, 860 N.W.2d 235

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

IV

WHETHER THE TRIAL COURT ERRED IN DENYING RICHTER'S MOTIONS FOR JUDGMENT OF ACQUITTAL?

The trial court denied each of Richter's three motions for judgment of acquittal.

State v. Morgan, 2012 S.D. 87, 824 N.W.2d 98.

State v. Uhing, 2016 S.D. 93, 888 N.W.2d 550.

State v. Wolf, 2020 S.D. 15, 941 N.W.2d 216.

SDCL 22-22-7.2

STATEMENT OF THE CASE

The Minnehaha County Grand Jury indicted Richter on August 24, 2022, for three counts of Sexual Contact with Person Incapable of Consenting, contrary to SDCL 22-22-7.2, each a Class 4 felony. SR 1-2. The State filed a Part II Information on August 24, 2022, alleging two prior felony convictions.² SR 3.

After a two-day jury trial on November 13 and 14, 2023, the jury found Richter guilty of all three counts. SR 90, 657; JT3 127. The trial court addressed the Part II Information at a hearing on January 17, 2024, and Richter admitted to one prior felony conviction for witness tampering.³ SR 289; SH 8. On July 2, 2024, the trial court sentenced Richter as follows:

- Count 1: Fifteen years in the state penitentiary with seven years suspended and credit for 231 days served;
- Count 2: Fifteen years in the state penitentiary with eight years suspended;
- Count 3: Ten years in the state penitentiary with seven years suspended.

SR 230, 337-38; SENT 40-41. All three sentences were ordered to run consecutive. SR 230, 338; SENT 41. The trial court filed its Judgment & Sentence on July 30, 2024. SR 229-30. Richter filed a Notice of Appeal on August 21, 2024. SR 233.

² A second, but essentially identical, Part II Information was also filed by the State on August 25, 2022. SR 4.

³ The trial court took the admission from the August 24, 2022 Part II Information. SR 286-87; SH 5-6.

STATEMENT OF FACTS⁴

D.W. (who was 19 years old at the time of the incidents giving rise to these charges) is developmentally disabled and functions intellectually at the level of a seven-year-old. SR 473, 497; JT2 57, 81. He has had cognitive disabilities from a young age, with delays in sitting up, crawling, walking, and speech. SR 474; JT2 58. He attended school, but received a certificate of completion instead of a high school diploma. SR 474; JT2 58. He can only read a few sight words, and his writing ability is that of a kindergartner in that he does not spell words correctly. SR 475; JT2 59. He is not able to live on his own, obtain a driver's license, or hold a job except through vocational rehab for those with special needs. SR 474-75; JT2 58-59. D.W.'s mother, Tracy Wentzel, is his court-appointed guardian and conservator. SR 510; JT2 94; Exhibit A.

D.W. met Richter in July 2021. SR 435; JT2 19. Richter's house (located at 1521 East Beverly Street, Sioux Falls, Minnehaha County) sits behind the house where D.W. lives with his sister, Tracy, and Tracy's significant other, Luis Gutierrez. SR 434-35, 468-69, 473, 517, 561; JT2 18-19, 52-53, 57, 101; JT3 31. Richter invited D.W.'s family to a block party at Richter's house for the 4th of July. SR 435, 564-65; JT2 19; JT3 34-35. The block party began on July 3, 2021, and lasted until July

⁴ Richter's testimony at trial relating to the incidents at issue differed from the testimony given by D.W. Therefore, the State will "restate the facts in a light most favorable to the jury's verdict." *State v. Huber*, 2010 S.D. 63, ¶ 2, 789 N.W.2d 283, 286.

4. SR 440, 563; JT2 24; JT3 33. D.W. attended the block party with Tracy and his sister, brother, and brother's girlfriend. SR 436; JT2 20. Tracy had warned Richter that D.W. was like a child and asked that he keep an eye on him at the party to make sure he was not given any alcoholic beverages. SR 485; JT2 69. Richter indicated his understanding of D.W.'s disabilities. SR 485; JT2 70.

On July 5, 2021, D.W. told Luis about three incidents of sexual contact involving Richter that occurred during the 4th of July party. SR 447-48, 471; JT2 31-32, 55. D.W. later told Tracy about the incidents as well. SR 481-82; JT2 65-66. One incident took place during the afternoon of July 3, 2021, on a four-wheeler in a field near Richter's house. SR 439-40, 453, 534-35; JT2 23-24, 37; JT3 4-5. D.W. was driving the four-wheeler, while Richter was sitting behind him. SR 440; JT2 24. Richter put one hand around D.W. and the other hand on D.W.'s "ball" over his clothing. SR 440, 443-44, 447, 466; JT2 24, 27-28, 31, 50; Exhibit 2. Richter told D.W. that he had to put his hand right on that spot. SR 441; JT2 25. D.W. told Richter to stop, but he did not. SR 441; JT2 25.

Another incident occurred during the afternoon of July 3, 2021 on Richter's hot tub in his backyard. SR 436, 453, 534-35; JT2 20, 37; JT3 4-5. D.W. and Richter were sitting on top of the closed hot tub. SR 436; JT2 20. Richter reached over and touched D.W. on his "private part" or "ball" over his clothing. SR 436-38, 447, 466; JT2 20-22, 31, 50; Exhibit

1. D.W. told Richter to stop several times, but Richter kept touching D.W. SR 437; JT2 21. It was only when Tracy approached the pair that Richter stopped, but he continued to touch D.W. after Tracy walked away. SR 438-39; JT2 22-23. Tracy never saw any of the sexual contact, but only saw Richter's hand on D.W.'s leg when they were together on the hot tub. SR 496; JT2 80.

The third incident occurred during the nighttime behind a trailer on Richter's property. SR 444-45, 453, 534-35; JT2 28-29, 37; JT3 4-5. Richter touched D.W. on his "ball" underneath his pants. SR 445, 446-47, 466; JT2 29, 30-31, 50; Exhibit 3. D.W. told Richter to stop, but Richter continued to touch D.W. SR 445-46, 447; JT2 29-30, 31. Richter told D.W. to not tell anybody about the touching. SR 438, 447; JT2 22, 31.

After Tracy was informed of these three incidents, she texted Richter about the allegations. SR 482; JT2 66. They called and texted each other several times. SR 494; JT2 78. They agreed to talk on the telephone, and Tracy recorded the conversation. SR 483-85; JT 67-69, Exhibits 4 and 5.⁵ Richter admitted in the phone conversation to the three incidents of inappropriate touching of D.W. SR 486, 510-11; JT2 70, 94-95.

Tracy contacted law enforcement and met with Detective Lammer of the Minnehaha County Sheriff's Office, providing him with the

⁵ Exhibit 5 is an enhanced version of the telephone call. SR 540; JT3 10.

telephone recording. SR 483-84, 512; JT2 67-68, 96. Due to D.W.'s developmental disability, Detective Lammer referred him for a forensic interview at Child's Voice.⁶ SR 518; JT2 102. Dr. Nancy Free, a pediatrician and medical director at Child's Voice, evaluated D.W. and observed his forensic interview. SR 542, 545, 551; JT3 12, 15, 21. Dr. Free noted that D.W. was referred to Child's Voice due to his cognitive disability. SR 547; JT3 17. She had the opportunity to review D.W.'s medical records and noted that D.W. clearly had some cognitive delays, speech and language difficulties, slower processing of information, and difficulty with problem solving. SR 548-50; JT3 18-20.

At trial, Richter denied inappropriately touching D.W. SR 573-74, 584, 586, 589; JT3 43-44, 54, 56, 59. He claimed that when he was on the four-wheeler with D.W., he was holding onto some rails and only put his arm around D.W. after they hit a rut and he thought he could then throw D.W. off if they rolled. SR 570, 573; JT3 40, 43. With regard to the hot tub incident, Richter first accused D.W. of starting a conversation about D.W.'s testicle being removed and telling Richter that he could "grab" him. SR 581-83; JT3 51-53. Richter then said he only put his hand on D.W.'s side to get him to sit up when he laid back on the hot tub. SR 584; JT3 54. Finally, as for the trailer incident, Richter asserted that he and D.W. merely closed the trailer door together. SR 585; JT3 55.

⁶ Child's Voice is a hospital-based child advocacy center where children who may be victims of abuse or neglect are evaluated. SR 545; JT3 15.

Richter said that Tracy called and texted him numerous times starting July 5 or 6, 2021, and that she told Richter what D.W. had reported to her about the three incidents of touching. SR 593, 595; JT3 63, 65. In an attempt to explain away the admissions he made on the recording, Richter claimed that Tracy wanted him to repeat what *she* said he did to D.W., and she kept cutting him off and would not let him explain so what he said happened was misunderstood. SR 595-98, 608; JT3 65-68, 78. He also claimed that his statement on the recording of “I admit those three things” meant hanging onto D.W. on the four-wheeler, putting his hand on D.W.’s hip on the hot tub, and hitting D.W. on the knee when they got off the top of the hot tub. SR 601-02; JT3 71-72. Richter acknowledged that it was “probably not” a good idea to make admissions if he did not actually touch D.W., but explained that Tracy kept calling and annoying him, so he just gave up trying to tell his version of the story to get her to quit calling. SR 602-03, 611; JT3 72-73, 81.

Law enforcement contacted Richter about the allegations around July 21, 2021. SR 611; JT3 81. He was not arrested until a Warrant of Arrest was issued on August 25, 2022, following the filing of the indictment. SR 5.

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING D.W. TO HAVE A STUFFED ANIMAL WHILE TESTIFYING.

Prior to trial, Richter filed a motion in limine, seeking an order prohibiting D.W. from having a stuffed animal with him on the witness stand. SR 48. The motion was addressed at a hearing on July 28, 2023, with the trial court taking the motion under advisement.⁷ SR 678, 685-89; MH 1, 8-12.

At trial, prior to D.W.'s direct examination by the State, the trial court questioned D.W. about the stuffed animal (a monkey named "Ish") outside the presence of the jury. D.W. stated that he got Ish when he was little, and that Ish keeps him "calmed down" because he was nervous about testifying. SR 429-30; JT2 13-14. The trial court found that it would be appropriate for D.W. to have the stuffed animal with him while testifying, and that it would not present a danger of unfair prejudice to Richter. SR 431-32; JT2 15-16.

A. *Standard of Review.*

This Court reviews a trial court's ruling on a motion in limine for abuse of discretion. *State v. Otobhiale*, 2022 S.D. 35, ¶ 15, 976 N.W.2d

⁷ The trial court emailed the parties on July 28, 2023, indicating that it was inclined to allow D.W. to have the stuffed animal while testifying, but wanted to talk to D.W. outside the presence of the jury before making a final decision. The email is not part of the Settled Record, but was referenced by the trial court when discussing the motion in limine prior to the start of the trial. SR 354-55; JT1 2-3.

759, 766. “An abuse of discretion is ‘a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’” *State v. Falkenberg*, 2021 S.D. 59, ¶ 41, 965 N.W.2d 580, 592 (citing *State v. Kvasnicka*, 2013 S.D. 25, ¶ 17, 829 N.W.2d 123, 127-28).

“Under the abuse of discretion standard, not only must error be demonstrated, but it must also be shown to be prejudicial.” *Falkenberg*, 2021 S.D. 59, ¶ 41, 965 N.W.2d at 592 (citing *State v. Harruff*, 2020 S.D. 4, ¶ 14, 939 N.W.2d 20, 25). “Prejudicial error is error which in all probability had an effect upon the jury’s verdict and is harmful to the substantial rights of the party assigning the error.” *Falkenberg*, 2021 S.D. 59, ¶ 41, 965 N.W.2d at 592 (citing *Loen v. Anderson*, 2005 S.D. 9, ¶ 5, 692 N.W.2d 194, 196).

B. Legal Analysis

Richter argues that there is no authority for a trial court to authorize a comfort item for an adult witness with developmental disabilities. AB 12. He cites to SDCL 26-8A-31.1, which states that a trial court may, on its own motion or by motion of an attorney in the proceeding, allow for certain accommodations for *child* witnesses in specified types of cases. These accommodations include allowing an item used to provide psychological comfort to be present in the room with the child. SDCL 26-8A-31.1(5). Richter argues that under the plain

meaning of this statute, “individuals with developmental disabilities are separate and distinct from child witnesses.” AB 13.

The State agrees that SDCL 26-8A-31.1 does not include adult witnesses with developmental disabilities. However, the State asserts that even if SDCL 26-8A-31.1 does not apply in this case, the trial court is not prohibited by law from allowing an adult witness with developmental disabilities to have a comfort item like a stuffed animal. In fact, “[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.

In *Alidani*, the trial court permitted a victim-witness assistant to sit beside a child victim and hold her hand while the victim was testifying. *Id.* ¶ 16, 609 N.W.2d at 157. This Court found no abuse of discretion, noting that numerous courts examining this issue have found no reversible error in permitting a support person to accompany a child victim during testimony. *Id.* ¶ 17, 609 N.W.2d at 157 (citing Carol A. Crocca, *Propriety and Prejudicial Effect of Third Party Accompanying or Rendering Support to Witness During Testimony*, 82 A.L.R.4th 1038, 1041-51 (1990)). “A balancing test has often been applied in which the State’s interest in protecting the witness and hearing the testimony is weighed against the possible prejudice to the defendant.” *Alidani*, 2000 S.D. 52, ¶ 17, 609 N.W.2d at 157.

[T]he common thread running through the[se] holdings is that when 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. (citing *State v. Rowray*, 18 Kan.App.2d 772, 860 P.2d 40, 44 (1993)).

The trial court in *Alidani* “balanced the defendant’s objections against the court’s desire to make testifying ‘the least frightening situation’ for the minor victim.” *Id.* ¶ 18, 609 N.W.2d at 157. This Court noted that the victim testified in a straightforward manner, which “may also show that the trial court was successful in making the courtroom as comfortable an environment as possible for the minor victim so that she could testify freely.” *Id.* ¶ 19, 609 N.W.2d at 158. In addition, this Court found no evidence of influence by the victim-witness assistant on the victim, stating that she “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.” *Id.*

Although the present case involves an adult witness with a developmental disability instead of a child witness, and a stuffed animal instead of a support person, the reasoning underlying this Court’s decision in *Alidani* similarly applies here. D.W. was twenty-one years old at the time of trial, but due to his developmental disabilities, he functions at the level of a seven-year-old. SR 433, 473, 497; JT2 17, 57, 81. The trial court questioned D.W. about the stuffed animal outside the presence of the jury, and D.W. indicated that the stuffed animal keeps

him calm. SR 429-30; JT2 13-14. The trial court balanced Richter's objections to the stuffed animal against D.W.'s interest in remaining calm while testifying and found that there was no danger of unfair prejudice to Richter in allowing D.W. to hold the stuffed animal. SR 431-32; JT2 15-16.

As in *Alidani*, D.W. was able to testify regarding the incidents of sexual contact perpetrated on him. Certainly, the presence of an inanimate object like a stuffed animal, which cannot speak, had little to no influence on D.W.'s testimony, other than allowing him to be comfortable. The presence of his stuffed animal during his testimony did not improperly bolster his testimony or lend undue credibility to it.

The prosecutor did ask D.W. about the stuffed animal at the beginning of his direct examination, and D.W. testified that it keeps his anxiety calm. SR 433-34; JT2 17-18. Richter did not object to this questioning. In fact, during cross-examination of D.W., Richter's attorney questioned D.W. about the stuffed animal as well. SR 452; JT2 36. Richter cannot now claim that the presence of the stuffed animal was prejudicial when he did not object to the prosecutor's brief questioning about the stuffed animal and then questioned D.W. himself about it.

Finally, other states have upheld trial courts' decisions to allow a witness to hold a stuffed animal while testifying, noting a trial court's considerable discretion in matters regarding examinations of witnesses

and balancing of the witnesses' and defendants' interests. *See e.g., State v. Cliff*, 116 Idaho 921, 924, 782 P.2d 44, 47 (1989)(trial court heard evidence that a doll had a calming effect on eight-year-old witness and concluded that "the benefit of having coherent testimony from the witness outweighed any possible prejudice to the defendant"); *State v. Powell*, 318 S.W.3d 297, 303-04 (Mo. Ct. App. 2010)(trial court "had the opportunity to observe the [eleven-year-old and sixteen-year-old] child witnesses and fully consider the usefulness of the teddy bears against the possibility of any prejudice" and "properly weighed the impact of the teddy bears on the witnesses and the jury, and did not abuse its discretion in overruling [the defendant's] objections"); *State v. Dickson*, 337 S.W.3d 733, 743-44 (Mo. Ct. App. 2011)(no abuse of discretion by trial court who balanced the benefit a teddy bear would provide to an eight-year-old victim against any potential prejudice it may cause the defendant); *State v. Marquez*, 1998-NMCA-010, 124 N.M. 409, 413, 951 P.2d 1070, 1074 (1997)(trial court "questioned [twelve-year-old victim], observed her demeanor, and made a finding that she would be more comfortable with the teddy bear during difficult testimony" and "properly balanced the prejudicial effect of the teddy bear against the necessity of the teddy bear's calming effect"); *State v. Hakimi*, 124 Wash.App. 15, 21, 98 P.3d 809, 812 (2004)("trial judge weighed the interests of [the defendant's] two [nine-year-old] victims and any potential prejudice to [the defendant] in allowing the girls to testify while holding a doll").

The court in *Cliff* said it best: “In cases, such as this, where it is necessary to receive testimony from young children, the court must strike a balance between the defendant’s right to a fair trial and the witness’s need for an environment in which he or she will not be intimidated into silence or to tear.” *Cliff*, 116 Idaho at 924, 782 P.2d at 47. It is no different for a developmentally disabled adult, who functions at the level of a child, testifying to matter of sexual abuse.

Richter has failed to show that the presence of the stuffed animal was prejudicial or had an effect on the jury’s verdict. Therefore, the trial court did not abuse its discretion in allowing D.W. to have a stuffed animal while testifying.

II

RICHTER FAILED TO PRESERVE THE ISSUE RELATED TO THE PROSECUTOR’S CROSS-EXAMINATION OF RICHTER, OR IN THE ALTERNATIVE, FAILED TO SHOW THAT SUCH CROSS-EXAMINATION CONSTITUTED PLAIN ERROR.

Richter testified at trial and was subject to cross-examination. He denied inappropriately touching D.W. SR 573-74, 584, 586, 589; JT3 43-44, 54, 56, 59. And in response to questions about the admissions he made in the telephone call with Tracy, Richter claimed that he only made those statements because Tracy wanted him to repeat what she told him that he did to D.W. and that she would not let him explain. SR 595-98, 608; JT3 65-68, 78. He also claimed that he made the

statements because Tracy was “getting annoying” and he wanted her to quit calling. SR 602-03, 611; JT3 72-73, 81.

During cross-examination, the prosecutor questioned Richter on his testimony that his admissions to Tracy were essentially false:

Q. You knew that when law enforcement called you that there was [sic] some allegations. Right?

A. Yes.

Q. But you didn't tell law enforcement that you made this false confession to keep Tracy Wentzel to stop bothering you?

A. No. I didn't talk to the officer at all. I said I would meet with him, and I called my lawyer.

Q. It would probably be in your best interests to share that information so you wouldn't get arrested if it truly was a false confession?

A. I don't know nothing about that.

Q. You also said you had phone records, text message records, and those weren't gone by July 21st, when law enforcement called you.

A. Yes, they were -- no. They wouldn't have been back then, no.

Q. You could have shared those and you didn't?

A. I didn't talk to the police.

Q. So you would have us believe that you were accused of serious crimes and arrested and you didn't bother to say this was a false confession?

A. I was accused. I wasn't arrested until, like, a year and a half later.

Q. But you never told anybody?

A. I told my lawyer.

SR 612-13; JT2 82-83. Richter now claims that this line of questioning was improper and prejudicial, as it gave the jury the impression that Richter had an obligation to prove his innocence, thereby shifting the burden of proof to him instead of the State. AB 15-19.

A. *Standard of Review.*

Richter did not object to the prosecutor's questioning during trial. SR 612-13; JT2 82-83. As a result, he has not preserved this issue for appeal. "To preserve issues for appellate review litigants must make known to trial courts that actions they seek to achieve or object to the actions of the court, giving their reasons." *State v. Dufault*, 2001 S.D. 66, ¶ 7, 628 N.W.2d 755, 757 (citing *State v. Nelson*, 1998 S.D. 124, ¶ 7, 587 N.W.2d 439, 443; SDCL 23A-44-13). "Issues not advanced at trial cannot ordinarily be raised for the first time on appeal." *Dufault*, 2001 S.D. 66, ¶ 7, 628 N.W.2d at 757 (citing *State v. Henjum*, 1996 S.D. 7, ¶ 13, 542 N.W.2d 760, 763).

"[W]hen 'an issue has not been preserved by objection at trial,' this Court *may* conduct a limited review to consider 'whether the circuit court committed plain error.'" *State v. Bryant*, 2020 S.D. 49, ¶ 19, 948 N.W.2d 333, 338 (quoting *State v. Buchhold*, 2007 S.D. 15, ¶ 17, 727 N.W.2d 816, 821) (emphasis added). To establish plain error, Richter must show that there was "(1) error, (2) that is plain, (3) affecting substantial rights; and only then may [this Court] exercise [its] discretion to notice the error

if (4) it seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.” *State v. Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d 202, 206 (citing *State v. Beck*, 2010 S.D. 52, ¶ 11, 785 N.W.2d 288, 293). In addition, Richter must show prejudice under the third prong. “Without prejudice, the error does not ‘affect substantial rights’ under the third prong of plain error review and ‘[an appellate court] ha[s] no authority to correct it.” *Jones*, 2012 S.D. 7, ¶ 17, 810 N.W.2d at 206 (citing *United States v. Olano*, 507 U.S. 725, 741, 113 S.Ct. 1770, 1781 (1993)). Finally, this Court invokes its discretion under the plain error rule “cautiously and only in ‘exceptional circumstances.” *Jones*, 2012 S.D. 7, ¶ 14, 810 N.W.2d at 205 (citing *State v. Bowker*, 2008 S.D. 61, ¶ 46, 754 N.W.2d 56, 70).

B. Legal Analysis

Richter has failed to show plain error in the prosecutor’s questioning on cross-examination. By testifying and waiving his right against self-incrimination, Richter opened himself up to cross-examination by the prosecutor. This included cross-examination on his testimony regarding the admissions he made to Tracy. The prosecutor’s questions were not improper or prejudicial; rather, they were asked in an attempt to attack Richter’s credibility.⁸ In fact, the questioning came after the prosecutor extensively cross-examined Richter about his

⁸ “Any party, including the party that called the witness, may attack the witness’s credibility.” SDCL 19-19-607.

admissions to Tracy and his claim that he only said what she wanted him to say so that she would quit bugging him. Therefore, this line of questioning was proper impeachment and there was no error by the trial court in allowing it.

In addition, the prosecutor's questioning was appropriate and did not constitute prosecutorial misconduct. "Prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods." *State v. Smith*, 1999 S.D. 83, ¶ 40, 599 N.W.2d 344, 353 (citing *State v. Davi*, 504 N.W.2d 844, 855 (S.D. 1993)). Prosecutorial misconduct occurs when "(1) there has been misconduct, and (2) the misconduct prejudiced the party as to deny the party a fair trial." *State v. Hayes*, 2014 S.D. 72, ¶ 23, 855 N.W.2d 668, 675 (citing *Smith*, 1999 S.D. 83, ¶ 43, 599 N.W.2d at 354).

"Prosecutorial misconduct is prejudicial when it 'so infect[s] the trial with unfairness as to make the resulting convictions a denial of due process.'" *State v. Hankins*, 2022 S.D. 67, ¶ 33, 982 N.W.2d 21, 33 (citing *Smith*, 1999 S.D. 83, ¶ 52, 599 N.W.2d at 355). This Court looks at whether the prosecutor's conduct "affect[ed] the fairness of the trial when viewed in context of the entire proceeding." *Hankins*, 2022 S.D. 67, ¶ 33, 982 N.W.2d at 33 (citing *State v. McMillen*, 2019 S.D. 40, ¶ 27, 931 N.W.2d 725, 733).

There was no misconduct by the prosecutor in her cross-examination of Richter. The cross-examination was proper impeachment

of Richter's testimony regarding his admissions to Tracy. The prosecutor did not engage in any deceptive or dishonest actions in cross-examining Richter, and did not try to persuade the jury that the burden had shifted to Richter to prove his innocence. In fact, the prosecutor only referred to Richter's testimony in her closing argument as it related to his credibility:

The defendant spoke to you today and would like you to believe that he admitted to these things so Tracy would quit bothering him.

And so when you think about those statements, he wants you to think he did it so Tracy would quit bugging him, or else if you aren't going to believe that, he wants you to believe that my words were misunderstood.

As jurors, you determine the credibility of the witnesses. You determine who you think was up here, who was telling you the truth. And it says: If you believe somebody has lied, has been untruthful about any material fact, you can ignore all of the testimony.

SR 639-40; JT3 109-10. It was not improper, prejudicial, or unfair for the prosecutor to question Richter about his statements and argue to the jury that his testimony was uncredible.

Finally, Richter has failed to show that the prosecutor's questioning led the jury to improperly shift the burden to Richter to prove his innocence. The jury was instructed as to the State's burden of proof.⁹ Instruction No. 14 stated "[t]he state has the burden of proving every element of the offense charged beyond a reasonable doubt. The

⁹ The original signed jury instructions from the trial were misplaced before they could be filed. The parties agreed that the trial court could file copies. SR 131-32.

burden of proof *never shifts to the defendant*, but rests upon the state throughout the trial . . .” SR 107. (Emphasis added). And in Instruction No. 15, the jury was instructed that “[i]n criminal cases, the state’s proof . . . must be beyond a reasonable doubt . . .” SR 108). “Juries are presumed to follow the instructions of the trial court.” *State v. Eagle Star*, 1996 S.D. 143, ¶ 22, 558 N.W.2d 70, 75.

Because Richter failed to establish error, or that he was unfairly prejudiced by the prosecutor’s questioning on cross-examination, this claim must be rejected.

III

RICHTER FAILED TO PRESERVE THE ISSUE RELATED TO DR. FREE’S TESTIMONY THAT D.W.’S DEVELOPMENTAL DISABILITY MADE HIM MORE LIKELY TO BE A VICTIM, OR IN THE ALTERNATIVE, FAILED TO SHOW THAT SUCH TESTIMONY CONSTITUTED PLAIN ERROR.

Richter argues that certain testimony from Dr. Free was inappropriate and prejudicial. AB 21. This testimony includes the following exchange:

- Q. And being with Child’s Voice, have you had the opportunity to study and determine individuals that might be most susceptible to being abused?
- A. Yes. So some people are more vulnerable versus other people to different types of abuse and neglect, physical, sexual, emotional.
- Q. What has your research, your study, your education told you about individuals with disabilities?
- A. That individuals with disabilities have an increased vulnerability to all types of maltreatment, including abuse

and neglect, physical abuse, sexual abuse, emotional abuse, all types of neglect.

SR 546-47; JT3 16-17.

A. Standard of Review.

Richter did not object to Dr. Free's testimony at trial and preserve this issue for appeal. Therefore, this Court's review, should it choose to review this issue, is limited to plain error, as set out in Section II above.

B. Legal Analysis

Initially, it should be noted that there is no notice contained in the Settled Record identifying Dr. Free as an expert witness. And although the State questioned Dr. Free on her background, education, and qualifications, and entered her curriculum vitae as an exhibit at trial, the State did not ask the trial court to recognize her as an expert. SR 542-45; JT3 12-15; Exhibit 7. Nonetheless, the State acknowledges that due to Dr. Free's background, she was likely considered to be an expert witness by the parties and the trial court.

A trial court has "broad discretion concerning the qualification of experts and the admission of expert testimony." *Kvasnicka*, 2013 S.D. 25, ¶ 18, 829 N.W.2d at 128 (citing *State v. Running Bird*, 2002 S.D. 86, ¶ 38, 649 N.W.2d 609, 617). "[P]erhaps the most important consideration in determining the admissibility of expert testimony is whether the testimony is helpful to the jury in resolving issues of fact." *State v. Johnson*, 2015 S.D. 7, ¶ 33, 860 N.W.2d 235, 248 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-92, 113 S.Ct.

2786, 2795-96 (1993)). “To that end, an expert’s testimony may be admissible even if the expert’s sole function is ‘to educate the factfinder about general principles, without ever attempting to apply [those] principles to the specific facts of the case.’” *Johnson*, 2015 S.D. 7, ¶ 33, 860 N.W.2d at 248 (citing *State v. Salazar-Mercado*, 234 Ariz. 590, 325 P.3d 996, 999 (2014)). “For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony addresses a subject matter on which the factfinder can be assisted by the expert; (3) the testimony be reliable; and (4) the testimony ‘fit’ the facts of the case.” *Johnson*, 2015 S.D. 7, ¶ 33, 860 N.W.2d at 248 (citing Fed.R.Evid. 702 advisory committee notes, 2000 amend.).

In this case, the majority of Dr. Free’s testimony dealt with her observations of D.W. and review of his medical records showing his developmental disabilities. SR 548-50; JT3 18-20. The testimony now challenged by Richter is more like the generalized testimony referred to in *Johnson* that is meant to educate the jury without an attempt to apply it to this particular case. Dr. Free was qualified to provide that testimony, based on her education and experience with both children and developmentally delayed adults as a pediatrician and medical director at Child’s Voice. SR 542-45; JT3 12-15; Exhibit 7. The testimony was also reliable (based on Dr. Free’s work at Child’s Voice), fit the facts of this case involving a developmentally disabled adult, and addressed a subject matter on which Dr. Free could assist the jury.

Dr. Free did not testify that D.W. himself was more vulnerable to being sexually abused or that he was in fact sexually abused by Richter. Rather, Dr. Free's testimony merely educated the jury as to the vulnerability of those with disabilities. It was up to the jury to look at the entirety of the evidence, including D.W.'s testimony that the three incidents occurred when he was alone with Richter and Richter's knowledge of D.W.'s developmental disabilities, in order to judge D.W.'s and Richter's credibility and determine whether the elements of the offenses were established beyond a reasonable doubt.

Dr. Free's testimony was relevant and admissible under the parameters set by *Johnson*. Richter has failed to establish error or prejudice in allowing this testimony by Dr. Free, and therefore, this claim must also be rejected.

IV

THE TRIAL COURT DID NOT ERR WHEN IT DENIED RICHTER'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

Richter moved for a judgment of acquittal three times: (1) at the end of the State's case-in-chief, (2) at the end of Richter's case-in-chief, and (3) after the jury verdict was returned. SR 556, 625; JT3 26, 95. The trial court denied each of Richter's three motions for judgment of acquittal. SR 558, 625, 655; JT3 28, 95, 125.

A. *Standard of Review.*

"[A] motion for judgment of acquittal attacks the sufficiency of the evidence, which is a question of law whether the motion is considered

before or after the jury’s verdict.” *State v. Wolf*, 2020 S.D. 15, ¶ 12, 941 N.W.2d 216, 220. “The standard of review for denial of a motion for judgment of acquittal is de novo.” *State v. Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d 550, 553 (citing *State v. Doap Deng Chuol*, 2014 S.D. 33, ¶ 36, 849 N.W.2d 255, 264).

When reviewing the sufficiency of evidence this Court determines “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d at 554 (citing *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 765). “Claims of insufficient evidence are ‘viewed in the light most favorable to the verdict.’” *State v. Morgan*, 2012 S.D. 87, ¶ 10, 824 N.W.2d 98, 100 (citing *Beck*, 2010 S.D. 52, ¶ 7, 785 N.W.2d at 292). “If the evidence, including circumstantial evidence and reasonable inferences drawn therefrom sustains a reasonable theory of guilt, a guilty verdict will not be set aside.” *Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d at 554 (citing *State v. Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d 145, 149). Finally, this Court “will not ‘resolve conflicts in the evidence, assess the credibility of witnesses, or reevaluate the weight of the evidence.’” *Morgan*, 2012 S.D. 87, ¶ 10, 824 N.W.2d at 101 (citing *Beck*, 2010 S.D. 52, ¶ 7, 785 N.W.2d at 292).

B. Legal Analysis

Richter was charged with three counts of Sexual Contact with

Person Incapable of Consenting under SDCL 22-22-7.2. To obtain a conviction for any of the three counts, the State had the burden to prove the following elements: (1) Richter knowingly engaged in sexual contact with D.W.; (2) Richter was fifteen years of age or older; (3) D.W. was sixteen years of age or older; and (4) D.W. was incapable of consenting because of a physical or mental incapacity. SDCL 22-22-7.2; SR 110. The State also had to show that Richter's actions constituted "sexual contact," which is defined as "any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party." SDCL 22-22-7.1; SR 111. Reviewing the evidence in the light most favorable to the State and fairly drawing all inferences therefrom to support the jury's verdict, the State met its burden of proof beyond a reasonable doubt.

Testimony at trial established both Richter's and D.W.'s ages in July 2021. Detective Lammer testified that Richter's date of birth was December 19, 1966, making him 54 years old at the time of these incidents. SR 517; JT2 101. Tracy testified that D.W.'s date of birth was March 12, 2002, making him 19 years old at the time of these incidents. SR 473; JT2 57. Therefore, there was sufficient evidence for the jury to find that the State met its burden of proof as to the two age elements of each offense.

There was also sufficient evidence presented related to D.W.'s developmental disability. D.W.'s mother, Tracy, is his court-appointed guardian and conservator. SR 510; JT2 94; Exhibit A. She testified that D.W. functions intellectually at the level of a seven-year-old and has been cognitively delayed from a young age. SR 474, 497; JT2 58, 81. D.W. cannot live independently, drive, or hold employment except through vocational rehab. SR 474-75; JT2 58-59. He is limited in his reading and writing abilities, and while he attended school, he received a certificate of completion instead of a high school diploma. SR 474-75; JT2 58-59.

In addition, Dr. Nancy Free testified to D.W.'s cognitive disabilities. She was able to review D.W.'s medical records and observe him at Child's Voice, testifying that D.W. had cognitive delays, speech and language difficulties, slower information processing, and problem-solving difficulties. SR 548-50; JT3 18-20. The jury also had the opportunity to observe D.W. during his testimony and make its conclusion as to his ability to consent to the sexual contact or not. The State presented sufficient evidence of D.W.'s developmental delays to support the jury's finding that he was incapable of consenting to the sexual contact due to mental incapacity.

Finally, the evidence presented at trial was sufficient to establish three separate incidents of sexual contact perpetrated by Richter on D.W. D.W. testified that Richter put his hand on D.W.'s "ball" over his clothing

while riding behind D.W. on a four-wheeler in a field near Richter's house. SR 439-40, 443-44, 447 453, 466, 534-35; JT2 23-24, 27-28, 31, 37, 50; JT3 4-5. D.W. testified that Richter also touched him on his "private part" or "ball" over his clothing while they were sitting on top of the hot tub in Richter's backyard. SR 436-38, 447, 453, 466, 534-35; JT2 20-22, 31, 37, 50; JT3 4-5. Finally, D.W. testified that Richter touched D.W.'s "ball" underneath his pants while they were behind a trailer on Richter's property. SR 444-45, 446-47, 453, 466, 534-35; JT2 28-29, 30-31, 37, 50; JT3 4-5. D.W. also drew on a diagram presented to him indicating where Richter touched him during each incident. Exhibits 1, 2, and 3.

Richter argues that D.W. was not able to give a consistent or credible account of the incidents. AB 22. Specifically, Richter attacks D.W.'s testimony on the sequence of the incidents, the dates they occurred, and when he told Luis. AB 22-23. However, D.W.'s testimony about the three incidents of sexual contact, and his description of what Richter actually did to him and where, was clear and consistent with his prior statements. SR 460; JT2 44. And it was consistent with what D.W. told Tracy, as well as Richter's admissions when he was confronted by Tracy with D.W.'s allegations.

Richter also argues that D.W. had "documented memory problems and issues with processing information." AB 22. However, Tracy testified that D.W. does not suffer from memory loss; rather, he has

difficulty processing information short-term to long-term, but once the information gets to his long-term memory, he remembers and actually obsesses about it. SR 490; JT2 74. This is consistent with D.W.'s testimony that he told Luis about the sexual contact because "[i]f I keep, like, something in my brain, it takes over me" and he "could not hold it in any longer." SR 447-48; JT2 31-32.

The jury also was presented with the audio recording of the telephone call between Richter and Tracy, in which Richter admitted to the three incidents of sexual contact. Specifically, Richter's admissions included the following:

Richter - "That's when I actually touched him there, and I never even got my hand down his pants and touched his testicles."

Richter - "I did back there two times." Tracy - "Okay, you did admit then, you did touch it a couple times." Richter - "Yes, back there on the thing." Tracy - "On the four-wheeler." Richter - "No, not. No, on the four-wheeler on the outside, yes. I had my hands around his crotch."

Richter - "I said does this bother you and he says no . . . and I reached my hand down, but that was on the outside."

Richter - "Yeah, I did once, twice . . . once I touched him, then the other time he said something about his testicle."

Tracy - "Behind the trailer is when you put your hand down his pants." Richter - "Oh, yeah, that, uh, well I tried, I started reaching down towards him. I was going to . . ."

Richter - "Well I was talking to him and I was just getting to know him and . . ." Tracy - "What does that have to do with getting to know somebody?" Richter - "No, I, I, I, I took it too far."

Tracy - "So I'm trying to figure out what in the world you were thinking if somebody's telling you no, and you know they're mentally disabled and they're on a child level, and if you didn't

know I told you, before you, before you did it again.” Richter - “Well, I wasn’t, I wasn’t trying to have sex with him or nothing . . .” Tracy - “Fondling or molesting him isn’t no better.” Richter - “Yeah, I know that.”

Richter - “I know I took it too far, I was drinking.”

Richter - “I admit to those three things.” Tracy - “Well, yeah, you admit to doing exactly what you did which was a sexual assault.” Richter - “Well, I’m sorry. I mean, I don’t know how to make it right. I mean, I didn’t mean to hurt him. I didn’t mean to scare him. I didn’t, I mean, I don’t, I wouldn’t do that. I was drinking . . . and having a happy time, you know, enjoying himself.” Tracy - “Well, he wasn’t enjoying you doing that to him.” Richter - “Well, I don’t think, I don’t think he was now either.”

SR 607-11; JT3 77-81; Exhibits 4 and 5.

“[A] defendant may not be convicted unless the defendant’s corroborated confession or admission, independent evidence of the crime, or a combination thereof establishes all elements of the crime beyond a reasonable doubt.” *State v. Plastow*, 2015 S.D. 100, ¶ 20, 873 N.W.2d 222, 229 (citing *Smith v. United States*, 348 U.S. 147, 156, 75 S.Ct. 194, 199 (1954)). Richter’s admissions in the telephone call were corroborated by D.W.’s testimony about the three incidents of sexual contact.

At trial, Richter denied inappropriately touching D.W. SR 573-74, 584, 586, 589; JT3 43-33, 54, 56, 59. He also claimed that he only made the admissions to Tracy because he was repeating what she said he did and he was misunderstood because she would not let him explain. SR 595-98, 608; JT3 65-68, 78.

Despite Richter's denials and excuses, the jury found that the State proved beyond a reasonable doubt that Richter knowingly engaged in sexual contact with D.W. The touching of D.W.'s genitals, both over and under his clothing, meet the definition of sexual contact. There was also sufficient evidence for the jury to determine that Richter engaged in the sexual contact to arouse or gratify the sexual desire of either party. This was not accidental touching, as shown by D.W.'s testimony that he told Richter to stop each time, but Richter refused. SR 437-39, 440-41, 445-46, 447; JT2 21-23, 24-25, 29-30, 31. Richter also told D.W. to not tell anyone about the touching. SR 438, 447; JT2 22, 31. Finally, Richter's own admissions to Tracy were that he did not mean to hurt or scare D.W. and thought he was "enjoying himself." Exhibits 4 and 5.

"It is the jury's role to decide whether the elements of an offense have been met." *State v. Lybarger*, 497 N.W.2d 102, 105 (S.D. 1993). In reaching a verdict of guilty on all three sexual contact counts, the jury decided that based on the evidence presented, the elements of each offense were met. The jury found D.W.'s testimony to be credible, while also finding Richter's excuses to be unbelievable. This Court should not reassess the witnesses' credibility or reevaluate the weight of the evidence. As there was sufficient evidence to support the jury's verdict, the convictions should be affirmed.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Judgment & Sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 7,651 words.

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

Dated this 10th day of April, 2025.

/s/ Angela R. Shute

Angela R. Shute

Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of April, 2025, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Larry Gene Richter* was served electronically through Odyssey File and Serve upon Nicole J. Laughlin at nicole@nicolelaughlinlaw.com.

/s/ Angela R. Shute

Angela R. Shute

Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

No. 30804

LARRY RICHTER,
Defendant and Appellant.

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

HONORABLE JON SOGN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal Filed on August 21, 2024.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

No. 30804

vs.

LARRY RICHTER,

Defendant and Appellant.

PRELIMINARY STATEMENT

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

The transcript of the jury trial that began on November 13, 2023, and concluded on November 14, 2023, will be referred to as "JT" followed by the corresponding volume number. Appellee's brief submitted in this matter on April 10, 2025, will be referred to as "Appellee." All references will be followed by the appropriate page number.

Appellant relies upon the Jurisdictional Statement, Statement of the Case, and Statement of Facts presented in the Appellant's Brief that was filed with the court on February 25, 2025.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE VICTIM TO HAVE A STUFFED ANIMAL WHILE TESTIFYING.

The trial court found that it was appropriate to allow the alleged victim to have a stuffed animal with him while testifying and that it would not be prejudicial to the defendant.

State v. Alidani, 2000 S.D. 52

In the Interest of Z.B., 2008 S.D. 108

In the Matter of Petition of Famous Brands, Inc., 347 N.W.2d 882 (S.D. 1984)

S.D.C.L. § 23A-24-10

S.D.C.L. § 26-8A-31.1

II. WHETHER IMPROPER CROSS-EXAMINATION BY THE PROSECUTION WAS PREJUDICIAL TO THE DEFENDANT.

The defendant was subject to undue prejudice when the prosecutor improperly insinuated that Defendant had a duty to produce evidence of his innocence.

State v. Ball, 2004 S.D. 9

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

U.S. CONST. amend. V

III. WHETHER DR. FREE'S TESTIMONY THAT THE ALLEGED VICTIM'S DEVELOPMENTAL DISABILITY MADE HIM MORE LIKELY TO BE A VICTIM WAS IRRELEVANT AND PREJUDICIAL.

Dr. Free's testimony that D.W. was more likely to be a victim due to his developmental disability was irrelevant and prejudicial.

State v. Johnson, 2015 S.D. 7

IV. WHETHER THE TRIAL COURT ERRED IN DENYING
DEFENDANT'S MOTION FOR JUDGMENT OF
ACQUITTAL WHEN THE EVIDENCE WAS
INSUFFICIENT TO SUSTAIN A CONVICTION.

The trial court denied the defendant's Motion for Judgment of Acquittal and found there was sufficient evidence to sustain the conviction.

State v. Amundson, 2007 S.D. 99

State v. Plastow, 2015 S.D. 100

LEGAL ANALYSIS

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION
BY ALLOWING THE ALLEGED VICTIM TO HAVE A
STUFFED ANIMAL WHILE TESTIFYING.

Appellant's argument that the trial court had no authority to allow the developmentally disabled adult in this case to testify with the use of a comfort object is predicated on the fact that children and developmentally disabled adults are different. The legislature has specifically authorized the use of comfort items, such as a stuffed animal, for a child victim and has not included developmentally disabled adults in the statute. S.D.C.L. § 26-8A-31.1. The South Dakota Codified Laws include a myriad of other provisions that are exclusive to children that also do not apply to developmentally disabled adults. *In the Interest of Z.B.*, 2008 S.D. 108, ¶ 34 (Sabers, J., dissenting) (noting that several South Dakota laws reflect that juveniles deserve special protection because juveniles are different than adults). Conversely, the legislature has specifically included developmentally disabled adults in some protective provisions, such as S.D.C.L. § 23A-24-10,

which provides a procedure for a developmentally disabled adult to testify with a support animal.

Although Appellee acknowledges that S.D.C.L. § 26-8A-31.1 does not include adult witnesses with developmental disabilities, it urges this Court to disregard the plain meaning of the statute and include developmentally disabled adults despite the clear legislative intent. *Appellee*, 12. Appellee argues that because the trial court has broad discretion in determining the mode and manner of witness testimony that the trial court had the discretion to allow the comfort item for the developmentally disabled adult in this case. *Id.* However, in support of this proposition, Appellee relies exclusively upon authority involving child witnesses. *Id.* at 12-16. Appellee further conflates the issue by asserting the accommodation was necessary because there is no difference between a child and “a developmentally disabled adult, who functions at the level of a child, testifying to a matter of sexual abuse.” *Id.* at 16.

Allowing a trial court to include developmentally disabled adults in the provisions exclusively afforded to children under S.D.C.L. § 26-8A-31.1 would open the door to a host of other special considerations that are not statutorily authorized. For example, if a child and developmentally disabled adult are considered indistinguishable for purposes of a comfort item, then it follows that there would be authority for providing a support person to sit next to them during trial and hold their hand. *State v. Alidani*, 2000 S.D. 52.

The Court has “no legislative authority, and should avoid judicial

legislation, a usurpation of legislative powers, or any entry into the legislative field." *In the Matter of Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 884 (S.D. 1984). Appellee is improperly urging this Court to expand an existing law to include individuals the legislature has not authorized.

II. WHETHER IMPROPER CROSS-EXAMINATION BY THE PROSECUTION WAS PREJUDICIAL TO THE DEFENDANT.

Appellee argues this issue is waived because it was not preserved by objection of trial counsel. *Appellee*, 18. However, Appellee acknowledges the Court is permitted to review for plain error in instances of prosecutorial misconduct, as requested by Appellant. *Id.* Appellant maintains that review of the burden-shifting comments made by the prosecutor relating to Richter's failure to produce evidence of his innocence should be reviewed under the standard of plain error.

In regard to the prosecution's insinuation that Appellant had an affirmative duty to tell police he was innocent this Court should utilize the de novo standard of review because it is a question involving a constitutional violation. A question involving an alleged constitutional violation is a question of law to be reviewed de novo. *State v. Ball*, 2004 S.D. 9, ¶¶ 18-21. The United States Supreme Court has held that a prosecutor is forbidden from commenting on a criminal defendant's silence. *Id.* at ¶ 17. It is reversible error for the prosecution to bring a defendant's failure to testify to the attention of the jury. *Id.* Richter exercised his right to testify in this case, but the right of an accused

person to remain silent also exists prior to trial during the investigatory phase of the case. *Miranda v. Arizona*, 384 U.S. 436 (1966); U.S. CONST. amend. V. Here, the prosecutor insinuated that Richter's failure to communicate his innocence to police when they attempted to talk to him about this case was indicative of his guilt. JT3, 82. Richter had no duty to explain himself to police or to inform them of his innocence prior to trial based on his 5th Amendment right to remain silent in the investigatory phase of a case. The prosecutor's attempt to conflate his assertion of this basic right into evidence of his guilt was in violation of his constitutional rights.

Appellee asserts that all of the questions asked by the prosecutor related to Richter's failure to produce evidence of his innocence and right to remain silent were permissible because Richter availed himself to cross-examination when he chose to testify. *Appellee*, at 19. However, the questions posed by the prosecutor did not merely seek to attack the credibility of the witness. The questions improperly implied that Richter had an affirmative duty to assert his innocence by speaking to the police during the investigatory phase and to provide evidence of his innocence at trial.

III. WHETHER DR. FREE'S TESTIMONY THAT THE ALLEGED VICTIM'S DEVELOPMENTAL DISABILITY MADE HIM MORE LIKELY TO BE A VICTIM WAS IRRELEVANT AND PREJUDICIAL.

Appellee concedes that Dr. Free was an expert witness and asserts that her testimony was admissible because it was intended to educate the factfinder

about general principles. *Appellee*, p. 23-24. Appellee compares the testimony of Dr. Free in this case to that offered by the expert in *State v. Johnson*, 2015 S.D. 7. *Id.* However, in that case the issue was whether an expert could testify about general information to educate the jury without that expert having knowledge of the specific facts and allegations of the case. *Id.* at ¶¶ 31-34. The court further noted that expert testimony regarding the general characteristics of sexually abused children may be admissible when relevant. *Id.* at ¶ 34.

Here, Dr. Free testified both about general information regarding victims of sexual abuse and the specific facts of this case. Her testimony was that developmentally disabled people are more likely to be victims of sexual abuse and that D.W. was developmentally disabled. JT3, 16-19. This was different than testimony about the general characteristics displayed by child victims of sexual abuse. This testimony crossed the boundary and invaded the province of the jury because it asserted that this crime was more likely to have happened based on the mental status of the alleged victim.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING
DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL
WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A
CONVICTION.

There is insufficient evidence to support the verdict in this case. Even when viewing the facts of this case in the light most favorable to the verdict, D.W.'s version of events cannot be reconciled with known evidence to the contrary. *State v. Amundson*, 2007 S.D. 99, ¶ 17. As argued in Appellant's brief,

D.W.'s account of the alleged instances of sexual contact were inconsistent in timeline and sequence of events. D.W. gave different dates of the alleged offenses, testified that the offenses occurred over two separate days, and changed the order in which the alleged events occurred. JT2, 20-30.

The uncontested evidence in this case is that there were an estimated 50 people at the party hosted by Richter and his neighbor. JT3, 33. D.W.'s mother, Tracy, had a clear view of Richter's backyard from the back patio of her boyfriend's home. JT2, 62. D.W.'s siblings were at the party. *Id.* No one from the party testified that they ever saw Richter touch D.W. in an inappropriate manner. Steve Woldt, who was at the party, testified he saw Richter and D.W. near the hot tub and did not witness anything unusual about this interaction. JT3, 91-92. Woldt testified there were several other people on a deck nearby who would have also been able to see the hot tub area. *Id.* Not one witness was produced to independently corroborate D.W.'s version of events.

Appellee argues that despite documented issues with his memory and ability to process information, D.W. was able to remember key facts that were imprinted in his long-term memory. *Appellee*, 29-30. Appellee relies on the testimony that D.W. told Luis about the sexual contact because he couldn't keep it in any longer because it was imprinted in his brain as evidence of his ability to retain important information. *Id.* However, Appellee's analysis fails to account for D.W.'s incorrect assertion at trial that this conversation with Luis happened three weeks after the alleged sexual contact. JT2, 31-32. The testimony of Luis

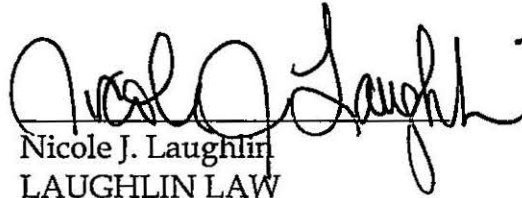
and Tracy, in addition to the recorded timeline of Tracy's phone calls to Richter and the police prove that D.W.'s testimony cannot be true.

Appellee asserts that Richter's statements on the telephone call between him and D.W.'s mother are enough to corroborate D.W.'s allegations. *Appellee*, 31. However, at trial Richter explained the statements he made had been taken out of context and did not equate to a confession. JT3, 65-73. Without corroboration or independent evidence of the most crucial element of this crime, D.W.'s allegation that Richter touched him "in an attempt to arouse or gratify the sexual desire of either party," cannot be proven beyond a reasonable doubt. S.D.C.L. § 22-22-7.1. Without sufficient evidence to support that element Richter's convictions for sexual contact should be vacated. *State v. Plastow*, 2015 S.D. 100, ¶ 20.

CONCLUSION

There is insufficient evidence to support the verdict in this case. Additionally, Richter did not receive a fair trial and was prejudiced when the alleged victim was allowed to testify with a comfort item. He was further prejudiced by the improper cross-examination by the prosecution which inferred he had a duty to present evidence of his innocence and Dr. Free's testimony that D.W. was more likely to be a victim of sexual abuse. Therefore, Appellant respectfully requests that this Court vacate the convictions and remand for further proceedings.

Respectfully submitted this 9th day of May 2025.



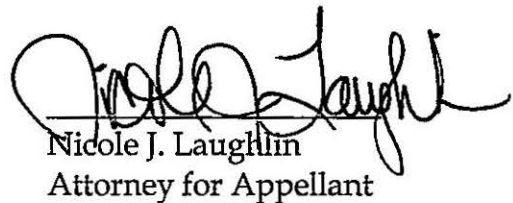
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CERTIFICATE OF COMPLIANCE

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 1,844 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 365.

Dated this 9th day of May 2025.



Nicole J. Laughlin
Attorney for Appellant