IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 29002

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.
HENRY FRANCIS LITTLE LONG
Defendant and Appellant.

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

THE HONORABLE JON SOGN
Circuit Court Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Henry Francis Little Long ("Long") requests a review of the following: (1) the Circuit Court's allowance of improper evidence at trial; (2) the Circuit Court's Memorandum Decision from February 5, 2019 regarding tolling the 180-day rule; and (3) the sufficiently of evidence to convict Long of Murder in the Second Degree. Long respectfully submits that this Court has jurisdiction pursuant to S.D.C.L. § 15-26A-3(1)[1].

STATEMENT OF LEGAL ISSUES

I. THE TESTIMONY OF MARGARET WALKING EAGLE, AND THE SUBSEQUENT IMPEACHMENT WITNESS, VIOLATED ESTABLISHED RULES OF EVIDENCE AND WAS AN ABUSE OF DISCRETION.

S.D.C.L. § 19-19-803(5)
S.D.C.L. § 19-19-607
S.D.C.L. § 19-19-403
State v. Gage
State v. Ruefener

The Circuit Court abused its discretion under Rule 803(5), 607, and 403 in allowing the State to question and ultimately impeach Walking Eagle in violation of the rules of evidence and settled case law.

II. THE CIRCUIT COURT VIOLATED LONG'S STATUARY RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS UNDER S.D.C.L. § 23A-44-5.1.

S.D.C.L. § 23A-44-5.1

The Circuit Court violated Long's right to trial within 180 days by arbitrarily tolling the time from the first trial date to the second trial date.

[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "JT" designates the Jury Trial transcripts held April 8-16, 2019; (3) "App." designates Appellant's Appendix.

III. EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUSTAIN A SECOND-DEGREE MURDER CONVICTION, AND LONG'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

S.D.C.L. § 22-16-7
State v. Primeaux, 328 N.W.2d 256, 258 (S.D. 1982).

The Circuit Court erred in denying Long's Motion for Judgment of Acquittal because the element of depraved heart was not shown by proof beyond a reasonable doubt.

STATEMENT OF THE CASE

Henry Long ("Long") was arrested on September 20, 2018 in connection with the September 18, 2018 death of Lakendrick Thorton ("Thorton"). A three count Complaint charging Long with Murder in the Second Degree, Manslaughter in the First Degree, and Aggravated Assault was filed on September 20, 2019 in Minnehaha County, South Dakota. CR 1. On October 3, 2018, the Minnehaha County Grand Jury returned a three-count indictment for Murder in the First Degree, Murder in the Second Degree, and Manslaughter in the First Degree. CR 14.

Initially, the Minnehaha County Public Defender's Office was appointed to represent Long, but due to a conflict, withdrew from the case on October 11, 2018. CR 17. That same day, private counsel was court appointed to Long's case, and the case was set for trial to begin the week of December 31, 2018[2]. CR 18-19. On October 24, 2018, Long's counsel filed a Motion for Psychiatric Examination, and the Order granting the motion was

[2] Due to the Minnehaha County Courthouse being closed for the holiday on December 31, 2018, the first trial date given to Long was January 2, 2019.

signed by the Circuit Court that day. CR 24. No hearing on the issue of competency was held.

Long's counsel emailed a request for a motions hearing to Minnehaha Court Administration on November 16, 2018. CR 32. Via email, the hearing was set for an hour on January 29, 2019. CR 33. Along with the scheduling of this hearing, Minnehaha Court Administration sent out a new set of dates for the case, which included a new trial date of April 1, 2019, along with a mandate that counsel "please submit the motion for delay" which would include a written waiver of the 180-day rule under S.D.C.L. § 23A-44-5.1. CR 34. No motion for delay or written waiver of the 180-day rule was ever filed.

On January 10, 2019, Long's counsel withdrew from the case due to a conflict, and new counsel, Long's third attorney, was appointed on January 23, 2019. CR 28. On January 24, 2019, Long's new counsel notified the court via email that Long was not willing to take part in the psychiatric examination, and that there were issues regarding the 180-day rule that needed to be addressed. CR 31. A hearing was held on January 29, 2019, at which Long indicated that though it was not necessary, he would participate in the psychiatric examination provided it would be completed prior to trial and not delay the case.

An evidentiary hearing was held on February 5, 2019 at which time the Circuit Court heard evidence and argument regarding the 180-day rule and what time, if any, should be tolled under S.D.C.L. § 23A-44-5.1. The

Circuit Court ruled by written decision that time between the first scheduled trial on January 2, 2019 through the second scheduled trial on April 1, 2019, shall be tolled. CR 43.

Additional motions hearings were held on February 21, 2019, April 1, 2019, and April 4, 2019, at which time the parties presented various pretrial motions and other issues related to trial. Long's jury trial commenced on April 8, 2019, in Sioux Falls, Minnehaha County, South Dakota. At the close of the State's case-in-chief, Long moved for a judgment of acquittal on all counts. After hearing argument from both parties, the Circuit Court denied Long's motion.

On April 16, 2019, Long was acquitted of First-Degree Murder. However, Long was found guilty of Second-Degree Murder and First-Degree Manslaughter. CR 303. On April 18, 2019, Long was sentenced to life in the South Dakota State Penitentiary. CR. 306.

STATEMENT OF THE FACTS

On September 18, 2018, at approximately 9:30 a.m., Minnehaha County Sheriffs were dispatched to an area near Renner, Minnehaha County, South Dakota. CR 3. When Deputies arrived, they found a deceased man lying in the ditch. The body was identified to be that of Thorton. The Minnehaha County Coroner noted a single gunshot wound to the chest, and later opined that Thorton died due to that single gunshot wound. He also

approximated the time of death to be between midnight and 2:00 a.m. on the morning of September 18, 2018.

Around 12:47 a.m. on the morning of September 18, 2018, the Sioux Falls Police Department responded to a call of a female pounding on a door in a Sioux Falls neighborhood and asking for help. Officers located the female and identified her as Ayom Mangor ("Mangor"). Mangor told the officers about a shooting that occurred. She stated that she was in a car with Thorton and two other individuals. Mangor identified Kelsey Roubideaux ("Roubideaux") as the driver of the car but did not know the front seat passenger. She stated Roubideaux was driving them to a drug deal, but a fight broke out, and the male in the front seat of the car pulled out a gun and shot Thorton. Mangor stated that she opened her door and tried to pull Thorton from the car, but could not, and she fell from the moving car. At trial, Mangor testified, but was still unable to identify Long as the passenger in the car.

Roubideaux was arrested on September 20, 2018 and interviewed. In that interview, she stated that she had been driving the car the night Thorton was shot and confirmed that they were on their way to buy drugs. Roubideaux testified at trial that Long was in the front passenger seat, and that an argument began. She testified that Long shot Thorton. When Roubideaux first sat down to talk to police, she told them that after the shooting she was dropped off and didn't know anything else about what

happened to Thorton's body or the car. However, at trial she testified that she lied in that first interview and now claimed she assisted moving Thorton's body to the ditch and cleaning the car with bleach. Roubideaux was the only eyewitness at trial to identify the shooter as Long.

Margaret Walking Eagle ("Walking Eagle") was also interviewed during the investigation of this case and eventually was called by the State to testify at trial. Two days after Thorton's body was found, Walking Eagle was questioned by Detective Mertes ("Mertes") regarding her interactions with Roubideaux and Long on the morning of September 18, 2018. She stated in that interview, but not at trial, that they had been at her house and made admissions. The contents of that interview were recorded.

Thereafter, Long was apprehended and charged.

STANDARD OF REVIEW

On issues regarding evidentiary rulings, this Court reviews a lower court's rulings for an abuse of discretion. *State v. Abdo*, 2018 S.D. 34, ¶ 14, 911 N.W.2d 738,742. A circuit court abuses its discretion when that discretion is "exercised to an end or purpose not justified by, and clearly against, reason and evidence." *State v. Engelmann,* 541 N.W.2d 96, 100 (S.D.1995).

"A [circuit] court's findings of fact on the issue of the 180-day rule are reviewed using the clearly erroneous rule." *State v. Pellegrino,* 1998 S.D. 39, ¶ 23, 577 N.W.2d 590, 599. "However, this Court reviews the determination

of whether the 180-day period has expired as well as what constitutes good cause for delay under a de novo standard." *Id.* (citation omitted). *State v. Seaboy*, 2007 S.D. 24, ¶ 6, 729 N.W.2d 370, 372.

Sufficiency of the evidence challenges raise questions of law reviewed de novo. *State v. Wheeler,* 2013 S.D. 59, ¶ 7, 835 N.W.2d 871, 873 (citing *State v. Jucht,* 2012 S.D. 66, ¶ 18, 821 N.W.2d 629, 633).

ARGUMENT

I. THE TESTIMONY OF MARGARET WALKING EAGLE, AND THE SUBSEQUENT IMPEACHMENT WITNESS VIOLATED ESTABLISHED RULES OF EVIDENCE, AND WAS AN ABUSE OF DISCRETION.

"The Confrontation Clause of the Sixth Amendment to the United State Constitution, as applied to South Dakota through the Fourteenth Amendment, requires that in all criminal cases, the defendant has the right 'to be confronted with the witnesses against him.'" U.S. Const. amend. VI; *State v. Spaniol*, 2017 S.D. 20, ¶24, 895 N.W.2d 329, 338 (quoting *Crawford v. Washington*, 541 U.S. 36, 124 (2004); *State v. Davis*, 401 N.W.2d 721, 724 (S.D. 1987)). "The Confrontation Clause applies to witnesses testifying at trial and to the admission of hearsay." *Id*. (additional citations omitted). Hearsay statements are inadmissible against a defendant unless such statements fit within one of the well-defined exceptions to the rule. *State v. Frazier*, 2001 S.D. 19, 622 N.W.2d 246.

In this case, Walking Eagle was questioned by the State four times, and in violation of three rules of evidence. First, the Circuit Court erroneously allowed Walking Eagle to review her recorded interview with

Mertes because she stated it would not help refresh her recollection, and she never adopted those statements as truth. Further, although the Circuit Court correctly and continuously denied the State's request to play hearsay statements from Walking Eagle's interview to the jury, the State was erroneously allowed to submit those exact same statements to the jury under Rule 613 as impeachment statements, and in violation of the rules set out in *State v. Gage*. 302 N.W.2d, 793 (S.D. 1981). This abuse of discretion generated a violation of Long's Sixth Amendment Confrontation Right. And finally, under Rule 403, the impeachment questions to Walking Eagle and impeachment testimony elicited from Mertes were so highly prejudicial in comparison to their limited probative value that the Circuit Court abused its discretion in allowing this testimony.

A. RULE 803(5): IMPROPERLY REFRESHING RECOLLECTION

The State called Walking Eagle to the stand in an attempt to introduce evidence in its case-in-chief that was obtained through a prior interview given by Walking Eagle to Mertes. In that interview, which was video and audio recorded two days after Thorton's body was found, Walking Eagle stated Long and Roubideaux came to her house on the morning of September 18, 2018, and made admissions. However, at trial Walking Eagle initially testified as follows:

> State: Ok. I want to specifically turn your attention back to September 18th, the early morning of September 18th. Do you remember that day?

Walking Eagle: No.

State: You don't remember that day?

Walking Eagle: No.

State: Do you remember having Kelsey Roubideaux and Henry Long coming to your home that day?

Walking Eagle: No.

State: Do you recall talking to Detective Mertes about having Kelsey Roubideaux and Henry Long coming to your house that day?

Walking Eagle: No, I don't.

State. You don't recall being interviewed by law enforcement?

Walking Eagle: No.

(JT, Vol. 5, pages 12-13; App. 10-11).

The State, having worded all questions in the form of "do you remember" could not get Walking Eagle to acknowledge or recall anything about September 18th, or even having been questioned by law enforcement at all. The State further attempted to refresh Walking Eagle's recollection as follows:

State: If you were to watch that recorded interview, would that refresh your memory as to what took place on September 20th in your conversation with Detective Mertes?

Walking Eagle: No.

State: Watching a recorded interview with you and Detective Mertes would not refresh your memory as to what you told Detective Mertes?

Walking Eagle: No. Probably not.

(*Id*).

Despite Walking Eagle's statement that reviewing the video would not help her memory, the Circuit Court took recess outside the presence of the jury to discuss the State's request to play the video of Walking Eagle's interview with law enforcement. The Circuit Court heard argument from both sides, and correctly determined that the statements the State was seeking to enter through playing the video were hearsay, and not admissible. (*Id*. at 13-23; App. 11-21). However, the Circuit Court also ruled that Walking Eagle would be allowed to review the video outside the presence of the jury under Rule 803(5), but that the video could not be played to the jury under that hearsay exception. (JT, Vol. 5, page 21; App. 19). Walking Eagle watched the video, and after the video was played, the jury returned to the courtroom. (*Id*. at 23; App. 21).

In front of the jury, the State again, on a second attempt, questioned Walking Eagle about her September 20th interview with Mertes, but she continued to testify that the video did not refresh her memory and that she did not remember. The State continued to ask Walking Eagle questions, ad nauseum, about a recorded recollection for which she had no memory, and never adopted:

> State: Watching yourself be interviewed on September 20th did not refresh your memory as to what you said to him?
>
> Walking Eagle: No.
>
> State: Okay. And the information would have been on September 20th in regards to an incident that took place on September 18th; is that correct?

Walking Eagle: I don't know.

State: Did you watch that interview?

Walking Eagle: Yes, I did.

State: Did you see yourself in that interview?

Walking Eagle: I seen somebody.

State: Okay. Sounded like you?

Walking Eagle: Sounded like me.

State: Looked like you?

Walking Eagle: Pretty high, yeah.

State: Okay. Talking to a police detective in an interview room?

Walking Eagle: About what?

State: You were speaking to a police detective in an interview room at the Law Enforcement Center?

Walking Eagle: I seen it on there, yeah.

State: And you don't recall what you're – you don't recall today what you told him at that time?

Walking Eagle: No, I don't.

State: And that was an audio and visual recording of you being spoken to by the detective; correct?

Walking Eagle: I guess it is.

State: And that, you would agree with me, would reflect your knowledge as of September 20th, of what you knew of the incident?

Walking Eagle: No.

State: That would not have accurately reflected your knowledge?

Walking Eagle: No, I don't remember any of it.

(*Id*. at 29-30; App. 27-28).

The Circuit Court cited to Rule 803(5) in allowing the State this prejudicial latitude over objection from Long. Federal Rule of Evidence 803, codified in S.D.C.L. § 19-19-803 ("Rule 803"), provides exceptions to the rule that hearsay statements are not allowed in court. Rule 803(5) provides:

> (5) Recorded recollection. A record that:
> (A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
> (B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and
> (C) Accurately reflects the witness's knowledge. . .

S.D.C.L. §19-19-803(5).

Rule 803 was violated. Not only did the Circuit Court err in allowing Walking Eagle to review her interview when she stated it would not refresh her recollection, Long was prejudiced by allowing the State to continue questioning Walking Eagle on an interview she did not remember, and for which she herself did not claim knowledge. When Walking Eagle stated she did not remember the interview and that watching it would not refresh her recollection, the questioning should have ended.

Even more egregious, after she reviewed the video and still did not remember nor claim any knowledge of her statements, questioning should have ceased. She never assented to anything regarding the interview, and

accordingly, continued questioning was prohibited by the rules of hearsay, and the Circuit Court abused its discretion in permitting this line of questioning by the State.

B. RULE 607 AND 613: IMPROPERLY IMPEACHING

When the State could not get Walking Eagle to testify the way it wanted, she was excused from the stand. The State's next witness was lead detective, Mertes, who was excused as a witness after testifying. The State then chose to recall Walking Eagle. Upon the State's now third attempt at questioning Walking Eagle, the State changed the format of questions. Walking Eagle stopped answering "I don't remember" and began to give definitive answers in the negative to every question.

State: Do you know Kelsey Roubideaux?

Walking Eagle: No, I don't.

State: You don't know Kelsey Roubideaux?

Walking Eagle: No, I don't.

State: You don't know her at all?

Walking Eagle: No, I don't.

State: Have you ever known Kelsey Roubideaux to be at your home?

Walking Eagle: My home? No.

...

State: On September 18 of 2018 in the early morning hours, did you have a conversation with Henry Long?

Walking Eagle: No.

State: Did Henry Long come to your house?

Walking Eagle: No.

....

State: Did Henry Long tell you that morning that he shot a man?

Walking Eagle: No.

(JT, Vol. 5, pages 102-05; App. 29-32).

Given that Walking Eagle was now testifying "no," the State argued that the jury should get to review the video under Rule 613 as she had now given a statement that was inconsistent with prior statements. Long objected on the basis that it was improper impeachment to play the video, and if the State wanted to impeach, they needed to do so with the specific statement that was inconsistent with her testimony. The Circuit Court ruled that the entire video still could not be played, but that the State could impeach Walking Eagle with her prior inconsistent statements, and the jury would be given a limiting instruction that such testimony may only be used for impeachment purposes. The State indicated that Mertes would be called to impeach Walking Eagle.

However, before calling Mertes for impeachment, the State made a fourth attempt at questioning Walking Eagle. This time the State questioned her knowing that Mertes would be recalled only to impeach her statements. Accordingly, the State switched tactics yet again and asked Walking Eagle short, pointed questions that specifically outlined every statement she gave

in the interview with Mertes. In an obvious stratagem, the State explicitly put Walking Eagle back on the stand for the purpose of eliciting answers inconsistent to her interview so she could be impeached and the jury would get to hear every detail of her interview – details that the Circuit Court already determined were inadmissible hearsay statements. The State proceeded to ask the following detailed questions of Walking Eagle, knowing, and depending on, her answers being "no":

> State: When he [Long] came to your house on the early morning of September 18, did he have a pair of red shoes with him?
>
> Walking Eagle: No.
>
> State: Did he have a wallet?
>
> Walking Eagle: No.
>
> State: Did he have a gun?
>
> Walking Eagle: No.
>
> State: At one point, did he take the gun and put it on the table?
>
> Walking Eagle: No.
>
> . . .
>
> State: Did he tell you: "I fucking killed someone tonight?"
>
> Walking Eagle: No.
>
> . . .
>
> State: Did Henry tell you: "I'm coming for you, Mom, if you tell anybody; I love you, but I'm coming for you."
>
> Walking Eagle: No.

(JT, Vol. 5, pages 114-16; App. 33-35).

After the State finished fashioning this strawman though Walking Eagle, she was excused from the stand, and Mertes was recalled only for the purpose of impeaching the detailed questions that were just asked to Walking Eagle. Over continued hearsay objections from Long, Mertes testified that Walking Eagle did have an interview with him at which she stated Roubideaux and Long were at her house on the morning of September 18, and that Henry told her that he shot a man. Mertes also testified that Walking Eagle told him that Long had with him red shoes, a wallet, and a handgun. He testified that Walking Eagle told him that Long said "I fucking killed someone tonight," and "I love you, mom; if you tell anybody, I'm coming for you." (JT, Vol. 5, pages 117-24; App. 36-43). Though veiled in the court-granted protection of impeachment, Mertes testified regarding every major substantive issue from the interview.

This impeachment was improper as it was a mere subterfuge to get otherwise inadmissible hearsay statements before the jury. The State attempted numerous times to question Walking Eagle and was unsuccessful in getting her interview statements into evidence. So, in a last-ditch effort, the State, knowing Walking Eagle would not give useful evidence, called her only for the purpose of impeaching her and back-dooring this evidence which the Circuit Court already ruled was inadmissible hearsay.

This Court first addressed the same type of unfair trial practice in *State v. Gage*. 302 N.W.2d 793 (S.D. 1981). In *Gage*, the state was unable to call an informant in its case-in-chief to testify that the defendant's girlfriend told the informant that the defendant told the girlfriend he was going to commit a robbery, because the informant's statements were inadmissible hearsay. *Id*. However, during the defense's case-in-chief, the defendant was cross-examined by the state as to whether or not he told his girlfriend that he was going to commit a robbery. *Id*. He denied he ever said that to his girlfriend. *Id*. On rebuttal, the state called the girlfriend and asked her if the defendant ever told her he was going to commit robbery, and if she told that to the informant. *Id*. The girlfriend denied such statements. *Id*. The state then called the informant on the *pretext* of impeaching the girlfriend's statements as a prior inconsistent statement. *Id*.

The *Gage* Court set out four "requirements founded in fundamental fairness (for) the use of prior inconsistent statements for impeachment." *Id*. (citing *United States v. Rogers*, 549 F.2d 490, 495 (8th Cir. 1976)). The four requirements are as follows:

> 1. Inconsistency: The statements must be inconsistent.
> 2. Relevancy: The inconsistency must 'relate to a matter of sufficient relevancy that the prosecution's case will be adversely affected if the inconsistent testimony is allowed to stand.' (citations omitted)
> 3. Compliance with Rule 613 (S.D.C.L. § 19-14-24 and 19-14-25): The prior statement must, on request, be shown or disclosed to opposing counsel, and 'if extrinsic evidence is to be used to prove the

> prior statement, the witness must be afforded an opportunity to explain or deny it, and the opposing party must have an opportunity to interrogate the witness about it.' (citations omitted)
> 4. Limiting instructions: The trial court 'must adequately instruct the jury about the limited purpose for which the prior inconsistent statement is admitted.' (citations omitted).

Id. (quoting *Rogers*, 549 F.2d at 495). The *Gage* Court went on to hold that the statements offered did not meet the relevancy requirement, and that the jury did not get the limiting instruction. As to relevancy, the Court stated "there is nothing in the record that leads us to conclude that the State's case would have been adversely affected if the girlfriend's denials of …[the] conversation with the informant had been allowed to stand." *Id*. 302 N.W.2d at 799. Accordingly, reversible error was found.

The *Gage* Court also opined that the girlfriend was considered a hostile witness, and while it is permissible for the state to impeach their own witness, "impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible." *Id*. (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)). The Court also cited *Whitehurst v. Wrigth* to bolster their holding that this type of impeachment is an obvious subterfuge:

> To use prior inconsistent statements in that manner exceeds the scope of impeachment, and is an attempt to use hearsay evidence for substantive purposes. We do not believe that the rules of evidence espouse such a revolutionary approach to circumvent the traditional principles of hearsay.

Id. (quoting *Whitehurst v. Wright*, 592 F.2d 834, 839-40 (5th Cir. 1979)).

In *State v. Rufener*, this Court went on to further clarify, and noted the specific addition in *Gage* to the four-part requirement. 401 N.W.2d 740 (S.D. 1987). "*Gage* added another requirement when the witness 'was called by the State only to serve as a 'strawman' for the introduction of inadmissible hearsay…'" *Id*. at 743-44 (quoting *Gage*, 302 N.W.2d at 799).

> In *Gage*, we specifically recognized and adopted the rule of *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) which states: "Despite the fact that impeachment of one's own witnesses may be permitted, this does not go so far as to permit the use of the rule as a subterfuge to get to the jury evidence otherwise inadmissible.

Id. The *Rufener* Court highlighted important language from the *Morlang* Court which specifically laid out the principal theory behind this rule:

> Rule 607 of the Federal Rules of Evidence provides: 'The credibility of a witness may be attacked by any party, including the party calling him.' But it would be an abuse of the rule, in a criminal case, for the prosecution to call a witness that it knew would not give useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence – or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize. We thus agree that 'impeachment by prior inconsistent statements may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible.'

Id.; (quoting *Morlang*, 531 F.2d at 190).

In the present case, the State engaged in this exact subterfuge with Walking Eagle's testimony. Walking Eagle was a subpoenaed State's witness. Despite her repeatedly saying she didn't remember, the State tried three times to get her to testify about what she said in her prior interview but was prohibited. Finally, in its fourth and final attempt at questioning Walking Eagle, the State questioned her with the express purpose of impeaching her. Impeachment is to attack credibility. Had the State actually wanted to attack Walking Eagle's credibility, it could have done so with the questions that had already been asked. Instead, the State went back to question Walking Eagle a fourth time, knowing she would deny her prior statements, and elicited an answer for every single statement the State wanted into evidence, *i.e.* the wallet, the shoes, the gun, Long's admissions, and his alleged threat to Walking Eagle – every hearsay statement the State wanted, but now cloaked in impeachment.

This was not an attack on Walking Eagle's credibility, this was blatantly back-dooring inadmissible evidence. Walking Eagle was called and questioned on this fourth attempt merely as a strawman to get her statements in through Mertes, in the hopes that the jury would either miss or ignore the narrow distinction between impeachment and substantive evidence. The rules of impeachment do not contemplate or authorize this type of trial practice, and this is exactly what the *Gage* and *Rufener* Court prohibited as an unfair tactic.

While the *Rufener* Court was not prepared to say that type of impeachment is always barred, it noted that the lower court "must exercise extreme caution when the impeaching evidence goes beyond simply proving that the witnesses was incredible and begins to persuade by illegitimate means." *Rufener*, 401 N.W.2d at 744. That extreme caution was not used here. The State was not intending to use these specific statements from Walking Eagle to attack her credibility, but instead to get the substantive statements before the jury, and to persuade them illegitimately and in violation of the rules of hearsay.

Unlike *Gage*, the Circuit Court here did provide a limiting instruction to the jury prior to the impeachment testimony. However, according to *Rufener*, it is important to evaluate the curative effect of the limiting instruction given to the jury. In *Rufener*, the Court examined both the instruction read by the judge to the jury before the impeachment testimony, and also the jury instruction submitted to the jury for deliberation, both of which were similar to the instructions received in this case. The *Rufener* Court found that the "curative instructions [did not] atone for the overreaching of the prosecutor." *Id*.

> The prosecution knew before the testimony was offered to the jury that [the witness] was going to deny having the conversation with [the impeachment witness]. . . The prosecutor in this case knew full well what [the witness] was going to say and in fact depended on her denial to gain admittance of the inadmissible hearsay through [the impeachment witness].

Id.

The same is true in this case. The State knew that Walking Eagle was going to deny these statements, and in fact, relied on her denial in order for Mertes to testify about the specific statements, and back-door the hearsay evidence. These statements were not elicited for the purpose of impeaching Walking Eagle, and the curative instruction cannot atone for the overreaching of the State in this case. Accordingly, the State's questioning of Walking Eagle and Mertes violated the rules set out in *Gage* and *Rufener*, and the Circuit Court abused its discretion in allowing this testimony.

While evidentiary rulings are reviewed for an abuse of discretion, the abuse on this issue was so erroneous that it prohibited Long from confronting the witness against him in violation of the Sixth Amendment. Based on the argument above, the jury was allowed to hear substantive details of Walking Eagle's interview through Mertes, and Long had no ability to confront this evidence. Walking Eagle did not have any memory and never adopted these statements, which rendered her unable to be cross-examined on the interview. Also, Long could not cross-examine Mertes on the veracity of these details because he did not have knowledge of them.

Consequently, when the State back-doored this hearsay evidence as impeachment, Long was left without the ability to confront the accusations. The *Gage* Court and the *Rufener* Court did not allow this type of trial tactic

because it is not simply about small, inconsequential evidentiary rulings. This is about the very essence of a criminal trial – the right to confront your accusers. When the State was allowed to subvert the rules of evidence, Long lost this right. The Circuit Court's abuse of discretion deprived Long of his right to confront, and created reversible error.

C. RULE 403: IMPROPERLY BALANCING PROBATIVE V. PREJUDICIAL

Even if this Court finds that this evidence was admissible for impeachment purposes, such evidence is still prohibited by S.D.C.L. § 19-19-403 ("Rule 403"). This rule states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id*. "Unfair prejudice means 'evidence that has the capacity to persuade by illegitimate means.'" *Abdo*, 2018 S.D. at ¶ 27, 911 N.W.2d at 745 (see *State v. Knecht*, 19917 S.D. 53, ¶ 12, 563 N.W.2d 413 (quoting *State v. Brings Plenty*, 459 N.W.2d 390, 399 (S.D. 1990)).

The Circuit Court did acknowledge this balancing test upon objection from Long, but determined that these impeachment statements were not so unfairly prejudicial as to outweigh their probative value. (JT, Vol. 5, pages 110; 126). However, the Circuit Court did not pronounce any rational as to its ruling, and it also did not note the limited purpose for which this evidence was being received at the time.

These statements were being offered for the impeachment of Walking Eagle, *i.e.* for the purposes of attacking her credibility only, and not for substantive value. The probative value being whether Walking Eagle was credible. However, the statements that were admitted as impeachment consisted of Long's purported admission to the murder of Thorton, which is the highest level of prejudice any evidence could have in this trial. These "impeachment statements" are statements so inflammatory as to persuade the jury by illegitimate means. Statements not just unfairly prejudicial, but statements containing the most prejudice conceivable versus the only possible probative value being to call Walking Eagle a liar.

Moreover, at this point in trial, Walking Eagle had not testified to anything of substantive value. Her testimony up to this point had mostly been that she didn't remember anything. Essentially, there was no evidence that Walking Eagle provided for which the State needed to attack her credibility short of whether or not an interview occurred. The State could have stopped questioning Walking Eagle after she denied the interview, and called Mertes to impeach her on the issue of the interview. Had that have happened, Rule 403 would have been satisfied. However, when the evidence being heard by the jury are prejudicial details of Walking Eagle's interview with Mertes, the Rule 403 balancing test should have drastically tipped in favor of more prejudicial than probative, and this testimony should have been excluded.

If the State intended only to point out to the jury that their own witness was a liar, they would have been able to do so without soliciting every detail that Walking Eagle said in her interview that linked Long to the crime. The probative value of these statements, that Walking Eagle was not credible, did not outweigh the extreme prejudice caused by these statements being heard by the jury, and accordingly, the Circuit Court abused its discretion by admitting these statements.

II. THE CIRCUIT COURT VIOLATED LONG'S STATUARY RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS UNDER S.D.C.L. § 23A-44-5.1.

"'The 180-day rule requires a defendant to be brought to trial within 180-days of his first appearance before a judicial officer on an indictment, information or complaint.'" *State v. Seaboy*, 2007 S.D. 24, ¶ 6, 729 N.W.2d 370, 372 (quoting *State v. Cottrill*, 2003 S.D. 38, ¶ 5, 660 N.W.2d 624, 627 (additional citations omitted)). This rule is not a constitutional mandate, but is a creature of statute, and is codified in S.D.C.L. § 23A-44-5.1 as follows, in pertinent part:

> (1) Every person indicted, informed or complained against for any offense shall be brought to trial within one hundred eighty days, and such time shall be computed as provided in this section.
> (2) Such one hundred eighty-day period shall commence to run from the date the defendant has first appeared before the judicial officer on an indictment, information or complaint.
> . . .
> (4) The following periods shall be excluded in computing the time for trial:
> a. The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; *the time from*

filing until final disposition of pretrial motions of the defendant,

. . .

b. The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel *provided it is approved by the court and a written order is filed*

. . .

g. Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. A motion for good cause need not be made within the one hundred eighty-day period.

(Emphasis added).

Long does not dispute the Circuit Court's Findings of Facts as incorporated in the Decision Regarding Issues Relating To 180-day Rule (App. 3-8), but does dispute that the Circuit Court correctly applied the law to those facts. In this case, the Circuit Court tolled the time period between when the trial was first scheduled to start, January 2, 2019, to April 2, 2019, the date the trial was rescheduled to after defense requested a motions hearing[3]. This arbitrary delay between the two trial dates is not supported by S.D.C.L. § 23A-44-5.1.

The Circuit Court determined that the 180-days should be tolled under § 23A-44-5.1(4)(a), (b) and (g) from January 2, 2019 through April 1, 2019. First, under subsection (a), the delay occurs due to "other proceedings concerning the defendant." Here, the Circuit Court cited the defense's October 24, 2018 motion for a psychiatric examination and a November 16,

[3] The trial actually began on April 8, 2019, which was 199 days after Long made his initial appearance.

2018 defense request for a motions hearing as reasons to toll the 180-days. However, the Circuit Court did not commence the tolling from either of these dates, but tolled the time starting January 2, 2019, evincing an error in the logic that these two events were sufficient to toll the time.

Even more, the events on these two dates were not adequate to toll the 180-days. First, as to the competency evaluation, Long clearly indicated that he did not want an evaluation and was competent to stand trial. No hearing on competency was held in this case, but Long did agree to participate in the evaluation on January 29, 2019. Second, the November 16, 2018 request by Long's attorney for a motions hearing did not toll the time either. The statute states that the time is tolled "from filing until final disposition." The times does not toll until the motions are filed, and the Circuit Court found that Long's attorney never filed his motions (FOF 22). Accordingly, the time did not toll and continued to run from September 21, 2018 through January 29, 2019, and the Circuit Court's conclusions of law number 36 and 38 are erroneous.

Further, under subsection (b), the time is tolled upon consent by defendant or counsel and "a written order filed…" In this case, a written order was never filed by Long's counsel (FOF 32). Regardless of the apparent error by Long's first counsel, subsection (b) is explicit by incorporating the requirement that a written order must be filed. Accordingly, Conclusion of Law 36 is violative of subsection (b).

Finally, the Circuit Court erred in Conclusion of Law 39, the good cause provision, by arbitrarily tolling the time from one trial date to the next. The 180-day rule sets out specific reasons to toll time, *i.e.*, for hearings or motions. These do not give the court "carte blanche" authority to arbitrarily delay the defendant's case from one trial date to the other. Here, the Circuit Court tolled the time period between January 2, 2019 and April 1, 2019, a period of 89 days, or almost half again the time in which the State is allowed complete the entire case. This long and excessive delay was without good cause. It is not from one hearing to another, or one motion to another motion. The Circuit Court randomly tolled 89 days from one trial date to another trial date without good cause. Thus, the Circuit Court erred in its February 5, 2109 decision.

III. EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUSTAIN A SECOND-DEGREE MURDER CONVICTION, AND LONG'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

"In measuring the sufficiency of the evidence, [this Court asks] 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact court have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Brimm*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83 (quoting *State v. Klaudt*, 2009 S.D. 71, ¶ 14, 772 N.W.2d 117, 122).

> Homicide is murder in the second degree if perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any

> premeditated design to effect the death of any particular person, including an unborn child.

S.D.C.L. § 22-16-7. "The 'depraved mind' requirement is a genuine additional element which must be established in order to prosecute for second degree murder." *State v. Primeaux,* 328 N.W.2d 256, 258 (S.D. 1982). "[T]he mens rea requirement of depraved mind as a less culpable means rea contained within the greater offense's requirement of premeditation – 'evincing a depraved mind, regardless of human life, although without any premeditated design to effect death is a lesser mental state than premeditation.'" *State v. McCahren*, 2016 S.D. 34, ¶ 10, 878 N.W.2d 586, 592 (quoting Tim Dallas Tucker, *State v. Black: Confusion in South Dakota's Determination of Lesser Included Offenses in Homicide Cases*, 42 S.D. L. Rev. 465, 496 (1996)).

In this case, the State's theory was that Long committed Murder in the First Degree in that he acted with premediated design to effect the death of Thorton. From Opening Statements to Closing Arguments, the State repeatedly stated that this was premeditated, and that such premeditation can be formed in an instant.

> Your next question is how do you know it was a premeditated design to effect death? Because he pulled that gun a second time. Because he was questioned how tough he was. That's how we know it's a premeditated design. There is no time limit. When he pulled that gun a second time and he turned around and he shot LaKendrick Thorton in the chest, he knew exactly what he was intending to do . . . That is your premeditation. It can be formed in an instant, and it was. The moment he was questioned, the moment they thought maybe

> he wasn't Mr. Tough Guy, that's the point that premeditation was formed.

(JT, Vol. 6, pages 22-23; App. 45-46).

However, the jury found Long not guilty of First-Degree Murder, meaning that the State did not prove premeditation. However, if the jury believed that Long pulled a gun directly on Thorton and pulled the trigger while only pointing directly at Thorton, and yet determined that was not premeditated murder, then this was Manslaughter in the First Degree, not Murder in the Second Degree.

> Homicide is manslaughter in the first degree if perpetrated:
> . . .
> (3) Without any design to effect death, including an unborn child, by means of a dangerous weapon . . .

S.D.C.L. § 22-16-15. Accordingly, if the jury found the element of premeditation was not met, then Long would be guilty of Manslaughter in the First Degree, which is effecting death without design by means of a dangerous weapon. When the State does not prove premeditation by proof beyond a reasonable doubt, the default is not Murder in the Second Degree, it is Manslaughter in the First Degree. Murder in the Second Degree requires proof beyond a reasonable doubt of a different mens rea, that being of having a "depraved heart." That additional element for Murder in the Second Degree was not present here.

Many courts have established what facts amount to a depraved heart, including, but not limited to, opening fire into a crowd, *State v. Brooks*, 962

So.2d 1220 (La.App.2 Cir. 2007), repeated abuse of a child resulting in the child's death, *South Dakota v. Miller*, 2014 S.D. 49, 851 N.W.2d 703, swinging a golf club at someone without intent to kill, but with intent to hit, *Kansas v. Robinson*, 934 P.2d 38 (Kan. 1997); and firing shots to stop a vehicle known to be occupied, *South Dakota v. Lyerla*, 424 N.W.2d 908 (S.D. 1988). These are cases in which the actions by the defendant were intentional and so random, repeated, or reckless as to amount to a depravity of mind.

The same is not true of this case. There was no evidence at trial that Long was intentionally waiving the gun around randomly or discharging it randomly. The testimony at trial, as presented by lay witnesses, was that Long took out the gun, pointed it directly at one person, and shot that one person. That is either intentional, premeditated First-Degree Murder, or it is First-Degree Manslaughter with a deadly weapon.

The element of "depraved mind" requires a mens rea, or thought, in the mind of the defendant. Here, the jury acquitted on premeditation, showing they did not believe a lot of thought went into this action. Webster defines "depraved" as "morally corrupt", "malign", "debased", "marked by corruption or evil", "perverted." Marriam-Webster's New Collegiate Dictionary (Copyright 1981). These are gruesome words, and show that depravity of mind is an entirely different classification. Depravity is, and should be, reserved for the cases that are so corrupt, evil, and perverted that they truly are in a category of their own – like excessive and repeated child

abuse, or randomly firing into a crowd of people. A depraved mens rea is not pointing a gun and pulling the trigger, and if it is, the separate and distinct category of Murder in the Second Degree, depraved heart murder, is meaningless. Pointing a gun and pulling a trigger is either First-Degree Murder, if the jury finds premeditation, or it is First-Degree Manslaughter. Depravity of mind requires more than the evidence shown in this case.

Because the jury acquitted on First Degree Murder, and there was no evidence of a depraved heart, Long's Motion for Judgment of Acquittal on Second Degree Murder should have been granted. The verdict on Murder in the Second Degree should be vacated, and this matter should be remanded for a pronouncement of sentence on First-Degree Manslaughter.

CONCLUSION

The Circuit Court abused its discretion in allowing the testimony and impeachment of Walking Eagle under Rules of Evidence 803(5), 607, 613, and 403. The Circuit Court further erred in tolling the 180-days under S.D.C.L. § 23A-44-5.1. And finally, the Circuit Court erred in not granting Long's Motion for Judgment of Acquittal on Second-Degree Murder because the required element of depravity of mind by proof beyond a reasonable doubt was not present. Accordingly, Long respectfully requests this Court reverse the Circuit Court and remand this case for further proceedings.

Dated this 12th day of November 2019.

Respectfully submitted,
DAKOTA LAW FIRM, PROF. L.L.C.
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CERTIFICATE OF COMPLIANCE

1. I certify that appellant's brief is within the typeface and volume limitations provided for in S.D.C.L. § 15-26A-66(b) using Century Schoolbook typeface in proportional 12-point type. Appellant's brief contains 7,498 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Kristi Jones
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of November, 2019 a true and correct copy of the foregoing brief was served on the Attorney General's Office via email to atgservice@state.sd.us

Kristi Jones
Attorney for Appellant

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1CCJCIO
Pen

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)		IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
		SFPD 201834350
STATE OF SOUTH DAKOTA, Plaintiff,	+	49CRI18007264
vs.	+	JUDGMENT & SENTENCE
HENRY FRANCIS LITTLE LONG, Defendant.	+	

An Indictment was returned by the Minnehaha County Grand Jury on October 3, 2018, charging the defendant with the crimes of Count 1 Murder in First Degree-Premeditated Murder on or about September 18, 2018, Count 2 Murder in Second Degree-Depraved Mind on or about September 18, 2018, Count 3 Manslaughter First Degree-Dangerous Weapon on or about September 18, 2018. The defendant was arraigned upon the Indictment on October 11, 2018, Mike Miller 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, Crystal Johnson and Brooke Goodale, Deputy State's Attorneys appeared for the prosecution and, Michael Hanson, appeared as counsel for the defendant. A Jury was impaneled and sworn on April 10, 2019 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 April 16, 2019 returned into open court in the presence of the defendant, returned its verdict: "We the Jury, find the defendant, HENRY FRANCIS LITTLE LONG, guilty as charged as to Count 2 Murder in Second Degree-Depraved Mind (SDCL 22-16-7) and guilty as charged as to Count 3 Manslaughter First Degree-Dangerous Weapon (SDCL 22-16-15(3))." The defendant was acquitted on Count 1 Murder in First Degree-Premeditated Murder. The Sentence was continued to April 18, 2019.

Thereupon on April 18, 2019, 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 2 MURDER IN SECOND DEGREE-DEPRAVED MIND : HENRY FRANCIS LITTLE LONG shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for life, with no parole (SDCL 22-6-1). The defendant shall pay $106.50 court costs. Attorney fees shall be converted to a civil lien in favor of Minnehaha County.

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.

AS TO COUNT 3 MANSLAUGHTER FIRST DEGREE-DANGEROUS WEAPON: No sentence was pronounced by the Court.

The defendant was remanded into custody of the Minnehaha County Sheriff for transport to the South Dakota State Penitentiary, there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 25 day of April, 2019.

BY THE COURT:

JUDGE JON SOGN
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____ Deputy

FILED
APR 25 2019
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

State of South Dakota, Plaintiff v. Henry Long Defendant	CRI 18-7264 DECISION REGARDING ISSUES RELATING TO 180 DAY RULE

Issues have arisen in this case regarding the 180-day rule under SDCL 23A-44-5.1. For purposes of the trial currently scheduled to start April 8, 2019, the State has requested a ruling as to whether the Court determines any days are to be excluded in computing the time for trial.

After reviewing and considering the files, argument and evidence, for the reasons set forth below, I rule that the time period of January 2, 2019, to April 1, 2019, is excluded in computing the time for trial.

Facts

1. On September 21, 2018, Defendant Henry Long was arrested and charged with criminal offenses.

2. Mr. Long's initial appearance on the charges was before Magistrate Judge Eric Johnson that same day, September 21, 2018. At the initial appearance, Mr. Long requested court appointed counsel. Judge Johnson granted the request and appointed the Minnehaha County Public Defender's Office to represent Mr. Long.

3. On October 3, 2018, a Minnehaha County Grand Jury returned an indictment against Mr. Long.

4. On October 11, 2018, Mr. Long was arraigned on the criminal offenses charged in the indictment. At the arraignment, a scheduling order was also issued.

5. The October 11, 2018, scheduling order included a motions deadline of November 21, 2018, and the jury trial to begin the week of December 31, 2018.

6. As the Minnehaha County Courthouse was scheduled to be closed for the New Year's holiday on December 31, 2018, and January 1, 2019, the jury trial was set to begin on January 2, 2019.

7. Also on October 11, 2018, the Minnehaha County Public Defender's Office filed a motion to withdraw as counsel for Mr. Long, due to a conflict of interest within its office.

8. The Minnehaha County Office of Public Advocates also had a conflict in representing Mr. Long, so on October 11, 2018, attorney Manuel de Castro, an attorney in private practice, was appointed to represent Mr. Long.

9. On October 24, 2018, attorney de Castro filed a motion for a psychiatric examination of Mr. Long, for the purpose of determining whether Mr. Long was competent to stand trial and whether he was capable of knowing the wrongfulness of the alleged criminal acts.

10. On October 24, 2018, the Court entered an order authorizing the psychiatric examination.

11. Staff members in the Minnehaha County Court Administration Office (hereinafter "Court Administration") assist the Minnehaha County judges on scheduling matters.

12. Requests by attorneys relating to scheduling issues on criminal cases are often handled by electronic mail ("email") between the attorneys and Court Administration.

13. In this matter, on November 16, 2018, attorney de Castro sent an email to Court Administration requesting a hearing on "preliminary motions." The email did not specify what motions those would be. Minnehaha County Deputy State's Attorney Crystal Johnson was included on the email.

14. Through a series of follow-up emails on November 16, 2018, among Court Administration, attorney de Castro and attorney Johnson, a motions hearing was set for January 29, 2019.

15. Because of the motions hearing requested by the defense, it was necessary to modify the scheduling deadlines and jury trial date. By email on November 16,

2018, from Court Administration to attorney de Castro and attorney Johnson, the new motions deadline was set as February 8, 2019, with the jury trial to begin April 1, 2019.

16. In the November 16, 2018, emails, Attorney de Castro and attorney Johnson consented to the January 29, 2019, motions hearing date. Further, while neither attorney confirmed by email their consent to the new motions deadline and trial date, the attorneys did not object to the new motions deadline and trial date.

17. In the November 16, 2018, emails, attorney Johnson asked attorney de Castro what motions he intended to file. The Court is not aware if attorney de Castro responded to that question.

18. In the November 16, 2018, email setting the new motions deadline and trial date, Court administration included a request to attorney de Castro to "Please submit the motion for delay."

19. The time period from the initial appearance on September 21, 2018, to January 2, 2019, is 103 days.

20. The length of time from January 2, 2019, to April 1, 2019, is 89 days.

21. The length of time from the initial appearance on September 21, 2018, to April 1, 2019, is 192 days.

22. Attorney de Castro had drafted a number of motions he intended to file, which were to be addressed at the January 29, 2019, hearing. Before filing those motions, however, he discovered he had a conflict of interest prohibiting him from continuing to represent Mr. Long.

23. Because of the conflict of interest, on January 10, 2019, attorney de Castro signed a motion requesting an order discharging him as attorney of record for Mr. Long.

24. On January 23, 2019, the Court entered an order discharging attorney de Castro and appointing Michael Hanson as attorney for Mr. Long.

25. A status hearing was held on January 29, 2019. At the hearing, because of scheduling issues of attorney Hanson and at least one of the State's witnesses, it was agreed that the April 1, 2019, trial date would be continued to April 8, 2019.

26. At the January 29, 2019, hearing, because both the trial scheduled for April 1, 2019, and the rescheduled trial date of April 8, 2019, are more than 180 days after

Mr. Long's initial appearance, the parties raised the issue of how many days, if any, should be excluded from the 180-day rule.

27. At the January 29, 2019, hearing, the Court was informed that Mr. Long had been refusing to cooperate with the evaluator regarding the psychiatric examination. As a result, the examination had not been completed. After further discussion, Mr. Long agreed at the hearing to cooperate in the examination, with the goal of having it completed prior to the April 8, 2019, trial date.

28. An evidentiary hearing was held February 5, 2019, on the issues regarding the 180-day rule.

29. A copy of the above-referenced November 16, 2018, emails was admitted as Exhibit 2 at the February 5, 2019, evidentiary hearing.

30. An affidavit signed by attorney de Castro was admitted as Exhibit 1 at the evidentiary hearing.

31. In the affidavit, attorney de Castro confirmed "I was aware that the December trial date set at the Arraignment was being continued to accommodate scheduling the hearing."

32. In the affidavit, attorney de Castro further confirmed "It does not appear I emailed a Delay Motion to court administration."

33. At the time of the February 5, 2019, evidentiary hearing, no written motion to delay had been filed by the defense regarding the rescheduling of the January 2, 2019, trial date, nor had any written order been entered by the Court approving the delay.

Conclusions of Law

34. SDCL 23A-44-5.1 states in applicable part:

> (1) Every person indicted, informed or complained against for any offense shall be brought to trial within one hundred eighty days, and such time shall be computed as provided in this section.
>
> (2) Such one hundred eighty day period shall commence to run from the date the defendant has first appeared before a judicial officer on an indictment, information or complaint....

> (4) The following periods shall be excluded in computing the time for trial:
>
> > (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, ...
> >
> > (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed...
> >
> > (g) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. A motion for good cause need not be made within the one hundred eighty day period.
>
> (5) If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, prejudice to the defendant is presumed. Unless the prosecuting attorney rebuts the presumption of prejudice, the defendant shall be entitled to a dismissal with prejudice of the offense charged and any other offense required by law to be joined with the offense charged.

35. SDCL 23A-44-5.1 is a rule of court, not a constitutional requirement, standing on separate legal footing than constitutional claims and requiring separate and distinct analysis. *State v. Erickson*, 525 N.W.2d 703, 711 (S.D. 1994). Violation of the "180-day rule" is not synonymous with violation of a constitutional right to a speedy trial. *Id.*

36. The delay of trial from January 2, 2019, to April 1, 2019, was necessary due to the request by Mr. Long's attorney for a motions hearing, which by consent of the parties was scheduled for January 29, 2019. This constitutes a request by Mr. Long's counsel for a continuance of the trial date, or at a minimum consent by Mr. Long's counsel to a continuance of the trial date. Accordingly, the time period of January 2, 2019, to April 1, 2019, is excluded in computing the time for trial under SDCL 23A-44-5.1(4)(b).

37. No written order approving the continuance has been entered yet by the Court as required by SDCL 23A-44-5.1(4)(b), but the primary reason no order has yet been entered is because attorney de Castro did not submit a written motion for delay as was requested of him in the November 16, 2018, emails. Further, SDCL 23A-44-

5.1(4)(b) does not state when the written order must be entered. Accordingly, I hereby approve and order the continuance of the trial from January 2, 2019, to April 1, 2019, as set forth in the November 16, 2018, emails.

38. The competency evaluation of Mr. Long, as requested by his counsel and ordered by the Court, was not completed and was still pending on January 2, 2019, due primarily to Mr. Long's prior refusal to cooperate with the evaluation. The examination still has not been completed. Accordingly, even if the trial date had not been continued at the request of or with the consent of Mr. Long's attorney per the November 16, 2018, emails, the trial could not have taken place on January 2, 2019. Thus, under SDCL 23A-44-5.1(4)(a), the time period of January 2, 2019, until the examination is completed, is a "period of delay" excluded in computing the time for trial under SDCL 23A-44-5.1(4)(a).

39. Finally, in the alternative, even if the period of time from January 2, 2019, to April 1, 2019, is not excluded in computing the time for trial per SDCL 23A-44-5.1(4)(a) and/or SDCL 23A-44-5.1(4)(b) as set forth above, I find under the circumstances set forth above in Findings of Fact 13-18, 22, 27 and 31-32, there is good cause for the period of delay from January 2, 2019, to April 1, 2019.

Conclusion

40. Any findings of fact herein incorrectly identified as a conclusion of law, or vice-versa, shall be considered as having the correct characterization.

41. For the reasons set forth above, the period of time from January 2, 2019, to April 1, 2019, is excluded in computing whether the offenses charged against Mr. Long are brought to trial within 180 days as required by SDCL 23A-44-5.1(1).

Dated this 5 day of February, 2019.

BY THE COURT:

Jon Sogn – Circuit Court Judge

ATTEST:
Clerk of Courts
ANGELIA M. GRIES
BY: _____
Deputy
(SEAL)

FILED
FEB 06 2019
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL DISTRICT

* *

STATE OF SOUTH DAKOTA,

Plaintiff, 49 CRI18-7264

vs. **JURY TRIAL**
VOLUME 5 OF 6

HENRY FRANCIS LITTLE LONG,

Defendant.

* *

BEFORE: The Honorable Jon Sogn,
Circuit Court Judge in and for the Second Judicial Circuit, State of South Dakota, Sioux Falls, South Dakota.

APPEARANCES: Crystal Nesheim Johnson and
Brooke Marie Goodale
Assistant Minnehaha County State's Attorneys
415 North Dakota Avenue
Sioux Falls, South Dakota 57104

for the Plaintiff;

Michael W. Hanson, Esquire
505 W. 9th Street, Suite 100
Sioux Falls, South Dakota 57104

for the Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 8:30 a.m. on the 15th day of April, 2019, in Courtroom 6B at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

back.
Q Do you recall on September 20th being interviewed by Detective Mertes at the Law Enforcement Center?
A No, I don't.
Q You don't?
A No.
Q You don't recall Detective -- talking to Detective Mertes about Henry Long telling you he killed a man?
A No.
Q That doesn't stand out in your memory?
A No, it don't.
Q That was a recorded interview. Did you know that?
A No.
Q If you were to watch that recorded interview, would that refresh your memory as to what took place on September 20th in your conversation with Detective Mertes?
A No.
Q Watching a recorded interview with you and Detective Mertes would not refresh your memory as to what you told Detective Mertes?
A No. Probably not.
MS. JOHNSON: Can we approach, Your Honor?
THE COURT: You may.
(Proceedings were had at the bench off the record out of the hearing of the jury.)

THE COURT: I know we've only been at it for 15 minutes, but I have a little bit of work that I need to do at this point. I need to look at a couple of things. And so what I'm going to do is we'll take a break. Probably won't be terribly long, but I bet it will be 10 minutes at least. So I'm going to ask the jury to step out.

(The Court admonished the jury and the jury exited the courtroom at 8:47 a.m.)

THE COURT: We're outside of the presence of the jury. Counsel and Mr. Long continue to be present.

We had a bench conference on some issues, and I thought we probably should put that on the record at this time, and I'm going to take a little bit of time to research a particular issue. But let's start with the state.

MS. GOODALE: Your Honor, as Ms. Walking Eagle is stating that she doesn't remember, the state would intend to impeach her testimony today with a prior interview recorded with Detective Mertes. It's the state's contention that under 19-19-613(B) extrinsic evidence of a prior inconsistent statement is admissible in court to impeach the witness once she has been given an opportunity to admit or deny the statement.

Furthermore, we do not believe that *Crawford* applies here, as she is subject to cross-examination, and

Mr. Hanson is aware of the interview and has a copy of it.

THE COURT: Thank you.

Mr. Hanson.

MR. HANSON: Your Honor, I think this is the classic *Crawford* case. What we've got is a hearsay statement. That's a statement that was made outside the presence of the jury, which under the general hearsay rule would be inadmissible, then you have to -- which would be under 801. Then you go to 803, which contains some exceptions to the hearsay rule, but then it talks about availability of a witness. And then you go to 804, which talks about hearsay exceptions where the declarant is unavailable. And under 804A(3) -- it's not 804(3). It's under -- unavailability as a witness includes situations in which the declarant, and then under 804A(4), is unable to testify or be present at the hearing because -- no, excuse me. It's under (3), subdivision 3, testifies to a lack of memory of the subject matter of his statement. In this case the witness has said she has no recollection of the interview. She has no recollection of the event which the supposed interview was about. That makes her unavailable as a witness. Under *Crawford* the confrontation clause of the Sixth Amendment requires that testimonial statements of a witness who did not appear at

trial, unless he was unavailable to testify, which this witness here is unavailable because it's under the definition of "unavailability," and the defendant did not have a prior opportunity to cross-examine. In this case we have not had a prior opportunity to cross-examine this witness. It is not previous testimony under oath. She is not a party to this case. Therefore, it's inadmissible.

And if you go under *Davis*, they're talking about what is testimonial -- what statements are testimonial. And *Davis* clearly says statements which were prepared for use at trial. In this case there's a videotape which they set up to videotape her, obviously to be used at trial. It's an out-of-court statement made to be used at trial. She's unavailable as a witness. We have no opportunity to cross-examine her. It's inadmissible.

And I think you also have to keep in mind in this statement, if the tape is played, it's essentially a statement of Mertes as to what this witness would have said. It is not what Mr. Long said. It's what Mr. Mertes says that Mrs. Walking Eagle told her outside the presence of the courtroom. In that case there's no exception because Mertes is talking about hearsay that he heard. And the video would be the same as Mertes testifying.

THE COURT: Anything else from the state?
MS. GOODALE: Your Honor, just a few things. I certainly think when Mr. Hanson is talking about it being hearsay, Mr. Long's statements are disqualified as a statement of a party-opponent. Furthermore, if Ms. Walking Eagle would be found as an unavailable witness, I think this would qualify as an exception as a statement against interest. She testified that she views Henry as her son. She obviously has a interest in protecting him. So we certainly feel like if she would be considered unavailable, this would qualify under 19-19-804(B)(3).

Mr. Hanson talks about Ms. Walking Eagle not being subject to cross-examination during that prior statement. There's no requirement that impeachable evidence be subject to cross-examination when it's made if offered solely to impeach. So that's the state's position.
THE COURT: Okay.
MR. HANSON: Your Honor, they're not talking about impeaching something which she said in court. She's saying "I do not remember." She's not saying "I didn't make the statement"; "I lied while I made the statement." She is not making a statement in court that can be impeached. At most, what the state can do here is show her the statement, ask her if it refreshes her memory. If it refreshes her memory, then she can

testify. If it doesn't refresh her memory, then she can't.

THE COURT: Well, we're going to take a break. I need to go look at this and sort this out. So we'll be in recess for a few minutes.

(Recess from 8:54 a.m. to 9:18 a.m.)

THE COURT: We're back on the record outside the presence of the jury. I had to take some time to research a question that includes the hearsay rule and exemptions to the hearsay rule.

Under 801, a statement means a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion. Hearsay is defined as a statement that a declarant does not make while testifying at the current trial, and the party offers it in evidence to prove the truth of the matter asserted.

One of the arguments here is whether it is admissible under 804, which are exceptions to the hearsay rule when the declarant is unavailable as a witness. 804A states a declarant is considered to be unavailable as a witness if the declarant testifies to not remembering the subject matter, which Ms. Walking Eagle has done in this particular matter. There is an exception under (B)(3), a statement against interest. It requires that the statement be made -- excuse me, that a

statement that a reasonable person in the declarant's position would have made only if the person believed it to be true, but then it goes on to state that it's required that it, when made, was so contrary to the declarant's proprietary or pecuniary interest. Now "proprietary" means ownership interest. "Pecuniary" means monetary interest. I don't think Ms. Walking Eagle's lack of memory would fit that exception because, again, it's not contrary to the declarant's proprietary or pecuniary interest.

Then it goes on to state "or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability." And I don't think either of those exceptions apply. So I don't think that it's admissible under 804B(3) because it doesn't meet that criteria set forth in there.

But I want to ask the parties about the exception under 803(5). That's a recorded recollection. So 803(5) says that statements described in this section are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness. And subpart 5 goes to recorded recollection, and that is a record that is on a matter the witness once knew about but now cannot recall well enough to testify accurately

and fully, was made or adopted by the witness when the matter was fresh in the witness's memory, and accurately reflects the witness' knowledge. If admitted, the record may be read into evidence but may be -- excuse me. The record may be read into evidence, but may be received as an exhibit only if offered by the adverse party.

So I'd ask the parties for input as to their thoughts on 803(5), beginning with the state.

MS. JOHNSON: Well, Your Honor, what the state has is the recorded interview that would have been made on September 20th of 2018, two days after the incident took place. Under 803(5) it is a matter that she once knew about, now is saying she can't recall, is now saying that even watching the interview would not help her remember what it was. And she clearly is not testifying fully or accurately. It was made. Although not adopted by the witness, it would have been a true copy of what was said. It isn't a recording that Detective Mertes took down and rewrote what she said. It is an actual recording that was made at the time reflecting her statements as they're coming out of her mouth and his statements back to her, and it accurately reflects the witness' knowledge, or at least what she purports to be her knowledge, at or near the time of the incident that took place.

THE COURT: Mr. Hanson.

MR. HANSON: Well, it was never -- you go back to the other parts of the rules, it talks about past recorded statement that the client, you know, at the time acknowledged or anything, which there's nothing here; but it still runs into the *Crawford* in that it's obvious she's unavailable. It's a hearsay statement from a past interview. And there's no -- if she has no recollection, there's no cross-examination. And I looked at -- but on the thing that you're pointing about, it's on a matter the witness once knew, and she says she can't remember. So we have nothing here that she once knew about the matter. And I think the way I read it, it's only if the witness will say that "I made this for purposes of preserving my testimony," which she did not do.

THE COURT: How long is the video?

MS. JOHNSON: 21 minutes.

THE COURT: Well, I certainly hate to keep the jury out any longer than necessary. How much of the video would the state intend to play? And are there things that need to be edited out if we play the video?

MS. JOHNSON: There has been an edited copy that removes the -- I guess what would be probably overly prejudicial comments, but her pertinent statements in regards to what the defendant told her he did are approximately 20 -- it's about 21 minutes.

THE COURT: Well, I do think under 803(5) it fits the requirements of that. It talks about the record may be read into evidence but received as an exhibit only if offered by the adverse party. So I think that portion of the video can be shown under that as it is an exception to the rule against hearsay. She is here subject to cross-examination, although she's indicated that she doesn't remember it; but I think from a foundational standpoint, the best way to handle it is she probably needs to review that video, and the state can ask if that refreshes her recollection. If not, then the video can be played under 803(5) to the jury but not received as an exhibit. But I don't know if there are other things in the video that would be played that the defense is going to object to as being overly prejudicial, other than the current argument.

MS. JOHNSON: I guess what the state had redacted, there are some comments made about the defendant's view towards black people in general. Those have been cut out. The fact that he'd previously been in prison or how Ms. Walking Eagle is associated with him had been redacted from it. And any hearsay statements that would have been made by Kelsey Roubideaux would have been redacted out of there since she was not a party against interest at the time.

THE COURT: Well, I think we need to have Ms. Walking Eagle watch the video, see if that refreshes her recollection. I'm not going to have her do that in front of the jury. We're not going to play it to the jury unless and until she indicates that she continues to have no memory on it. Then we play it under 803(5). So it's going to take another 20 to 25 minutes for her to watch that video, but I think that's just something that's necessary to be done in this matter.

This is an issue that I would have appreciated being brought up earlier so I could have thought about it so we could have addressed it as opposed to letting the jury sit back there for an hour, but so be it. I think that's where we're at and what we need to do.

MS. JOHNSON: I apologize, Your Honor. I was not aware of what Ms. Walking Eagle would testify to beyond her statements that she had previously made.

THE COURT: Okay. What's the easiest way to have Ms. Walking Eagle review that tape?

MS. JOHNSON: We have our laptop here. I don't know if the Court wants it in court or if you want us to go back. I think it needs to probably be in court where she needs to say that she reviewed it, but we can play it on the television here.

THE COURT: Let's bring Ms. Walking Eagle back in, and in

the meantime get that set up so we can play it.

(The witness was brought into the courtroom.)

THE COURT: Ms. Walking Eagle, we're going to play a video of your interview at the Law Enforcement Center. We want you to be able to watch that to see if it refreshes your memory as to what was said at the time. I want you to be able to get a good view of it and to listen to it. If you want to swing your chair around on the other side so you can watch the TV better, you can certainly do so.

(Video begins playing.)

THE COURT: For the record, we paused it so that we can do a better job of hooking up the sound system.

(Video continued playing.)

THE COURT: For the record, we've now watched the portion of the video that the state is intending to introduce in this particular matter.

Additional thoughts for the record prior to proceeding any further? State?

MS. JOHNSON: Nothing from the state.

THE COURT: Mr. Hanson?

MR. HANSON: I would ask that if they are going to -- if the Court is going to play it, that any reference to -- I think towards about the 19-minute mark, which is getting to be repetitive, my client was using the "N" word. Said

I killed -- he referred to the "N" word. And did he say -- I think the cop, police officer, even then went back and said, "Did he say nigger?" And she came back, "Yes, he used the word 'nigger'." I think that is extremely inflammatory and prejudicial to the jury.

I object, for the record, to the playing of the tape. It's hearsay. Under *Crawford*, it's testimonial. The witness is unavailable. I ask that the tape not be played as evidence in this court and not be played as an exhibit in this court. If it is played, that those redactions be made.

THE COURT: State.

MS. JOHNSON: Your Honor, we believe, in regards to the "N" word, that was a statement that was given to Detective Mertes that the defendant had told Margaret Walking Eagle. And he even clarified "Is that, in fact, the word he used?" It is an inflammatory word, but it is the truth of what it was and what happened. Everything isn't sunshine and rainbows, but that's the defendant's statement that he made to Margaret Walking Eagle that -- of what he did that night. And I believe it is -- while prejudicial, the probative value greatly outweighs any prejudicial effect. Because again, it is his statement to Margaret Walking Eagle.

And I guess in regards to the playing of it, if my

understanding is correct, if Ms. Walking Eagle, if that refreshed her memory, that it does not, in fact, become an exhibit. Only if it, in fact, doesn't refresh her memory.

THE COURT: And that's accurate, that last statement that you made.

I am going to find, under these circumstances, because it's being played in the video, I am going to find that the probative value of that language is substantially outweighed by the danger of unfair prejudice. So I do restrict the state from playing that portion that talks about the "N" word being used in there. That hasn't been introduced as an issue in this particular case, and I am going to find that that's more prejudicial -- or substantially outweighed by the danger of unfair prejudice in this matter under these circumstances in this particular video.

Now, I understand that requires the state to do some additional editing or agreeing to only play a portion of the tape, but that's where we're at.

And again, if Ms. Walking Eagle testifies that the playing of the video refreshes her memory, then that video does not come into evidence, is not shown to the jury.

How does the state intend to proceed, based upon

that ruling?

MS. JOHNSON: We will -- I am not sure if we can just go through and cut that or if they have to make a completely redacted -- a whole new video redacted, or if they can just go through.

I guess, first, we would like to proceed with how Ms. Walking Eagle testifies. If it's redacted, perhaps we could do it over the lunch hour, unless the Court expects us -- although I guess the Court anticipates this being played during Ms. Walking Eagle's testimony.

THE COURT: Correct. Because I want the defense to have an opportunity to cross-examine on it. So we could take your other witness. You could establish whether it refreshes her recollection. If it does not, then we could break in this witness and finish her after lunch while you take other witnesses.

MS. JOHNSON: And if -- I guess if my understanding of the reading is correct that the video would be played but would not be admitted.

THE COURT: Would not be an exhibit that goes back to the jury. I'd still mark it for purposes of the record, but it would not be received as an exhibit that would go back to the jury room.

MS. JOHNSON: We could, I guess at this point, to proceed in a timely manner, we could stop playing at the point --

I think there's one sentence right before it that talks about referring to two people in the house. That we could stop playing it at that point. That would be what is then presented to the jury, and then the following remarks would not be admitted --

THE COURT: Would not be played.

MS. JOHNSON: I'm just trying to quickly think what was said after that statement.

And I guess just for clarification, the one direct quote is the "Mother F-ing N" word.

THE COURT: Yeah. I think that word is used a couple of times in there.

MS. JOHNSON: I guess for clarification, I think it's used earlier, but I'm not for sure where it was said earlier in the video.

THE COURT: And I don't recall hearing it earlier in the video. I certainly could have just missed that.

MR. HANSON: I thought it was played earlier, but I was distracted. I didn't get a time on it.

MS. JOHNSON: And so would the Court ask that we remove it both times or just in reference to the time where he is making the statement to Ms. Walking Eagle in regards to --

THE COURT: I think we have to redact it both times to make it consistent.

MS. JOHNSON: Then that will change how we proceed, but we will get it handled and hopefully get it edited here in a short time.

THE COURT: Then I also want to mention that under 803(5) that I indicated earlier, the state is going to have to lay the foundation to meet those criteria as part of the testimony.

Are we ready to bring the jury back in?

MS. JOHNSON: If we could have just one more minute for Ms. Goodale.

THE COURT: Is she going to run back to the office?

MS. JOHNSON: She was just going to make a quick phone call.

THE COURT: Do the parties need a break?

MS. JOHNSON: No, Your Honor.

THE COURT: Mr. Long, you need a break?

(No audible response)

(Discussion off the record. The jury entered the courtroom at 10:09 a.m.)

THE COURT: Jurors, that obviously was more than 10 minutes. I assure you, we very much respect your time. We appreciate your patience. We are in here working on matters while you're back there, and so we appreciate your patience.

We're back in the presence of the jury and counsel

and Mr. Long.

State may proceed.

Q (BY MS. JOHNSON) Now Ms. Walking Eagle, you just had an opportunity to review your interview from September 20, 2018, with Detective Mertes. Did that refresh your memory as to what you had talked to Detective Mertes about?

A No, it hasn't.

Q That did not refresh your memory at all?

A No.

Q Watching yourself be interviewed on September 20th did not refresh your memory as to what you said to him?

A No.

Q Okay. And the information would have been on September 20th in regards to an incident that took place on September 18th; is that correct?

A I don't know.

Q Did you watch that interview?

A Yes, I did.

Q Did you see yourself in that interview?

A I seen somebody.

Q Okay. Sounded like you?

A Sounded like me.

Q Looked like you?

A Pretty high, yeah.

Q Okay. Talking to a police detective in an interview room?
A About what?
Q You were speaking to a police detective in an interview room at the Law Enforcement Center?
A I seen it on there, yeah.
Q And you don't recall what you're -- you don't recall today what you told him at that time?
A No, I don't.
Q And that was an audio and a visual recording of you being spoken to by the detective; correct?
A I guess it is.
Q And that, you would agree with me, would reflect your knowledge as of September 20th of what you knew of the incident?
A No.
Q That would not have accurately reflected your knowledge?
A No, I don't remember any of it.
MS. JOHNSON: Your Honor, at this point, with some edits being made, the state is going to mark that video as Exhibit 83.
Can we approach?
THE COURT: You may.
(Proceedings were had at the bench off the record

hall? There might be someone waiting.

(The jury entered the courtroom at 1:19 p.m.)

THE COURT: We're back after our lunch break. All 14 jurors are present in the courtroom along with counsel and Mr. Long. State may proceed.

MS. JOHNSON: State is recalling Margaret Walking Eagle.

THE COURT: While we're waiting, can counsel please approach.

(Proceedings were had at the bench off the record out of the hearing of the jury.)

(Margaret Walking Eagle retook the witness stand.)

THE COURT: Ms. Walking Eagle is back on the witness stand. I'll remind you that you are under oath.

State may proceed.

MS. JOHNSON: Thank you.

FURTHER DIRECT EXAMINATION

Q (BY MS. JOHNSON) Ms. Walking Eagle, previously you had testified that you knew Henry Long and identified him as your son; is that correct?

A Yes.

Q Do you know Kelsey Roubideaux?

A No, I don't.

Q You don't know Kelsey Roubideaux?

A No, I don't.

Q You don't know her at all?
A No, I don't.
Q Have you ever known Kelsey Roubideaux to be at your home?
A My home? No.
Q Okay. You don't know who Kelsey Roubideaux is?
A No, I don't know.
Q Okay. Turning your attention back to September of 2018, where did you live?
A Up here by Mercato.
Q What was your address?
A I can't remember the address.
Q Who did you live with?
A Myself and my daughter and my grandkids.
Q Did you -- who is Sean?
A Which one?
Q A Sean who you would have been staying at his girlfriend's house maybe at the time?
A Talking about Sean Long?
Q Sean Long. Who is Sean Long?
A A kid I took off the streets.
Q Okay. And back in September, did you reside in a home that he stayed at sometimes?
A No.
Q Okay. Who is Hussein?

A I don't know.
Q You don't know anybody by the name of Hussein?
A No.
Q Hussein Dahir?
A No.
Q Okay. How about a Bog Da Don? Do you know somebody by the name of Bog Da Don?
A No.
Q You don't know anybody by that name?
A No, I don't.
Q Who is Katie Coyle?
A I have no clue who that is.
Q You have no knowledge who Katie Coyle is?
A No, I don't.
Q In September, on September 18 of 2018, did you receive a Facebook message from Katie Coyle?
A I don't recall, no.
Q Okay. You didn't know Katie Coyle to be the significant other of Henry Long?
A No.
Q Who you identify as your son?
A I know that's my son, but I don't know who she is.
Q You don't know Katie Coyle?
A No, I don't.
Q Do you remember talking to law enforcement on September

20th of 2018?
A No.
Q You don't recall speaking to law enforcement?
A No, I don't.
Q On September 18 of 2018 in the early morning hours, did you have a conversation with Henry Long?
A No.
Q Did Henry Long come to your house?
A No.
Q So you're telling me now that Henry Long was not at your home on the early morning hours of September 18th of 2018?
A No.
Q He was not?
A (Shaking head)
Q Did Kelsey Roubideaux come to your home in the early morning hours of September 18th, 2018?
A No.
Q Did Henry Long tell you that morning that he had shot a man?
A No.
MS. JOHNSON: Your Honor, may we approach?
THE COURT: You may.
(Proceedings were had at the bench off the record out of the hearing of the jury.)

(The jury entered the courtroom at 1:47 p.m.)

THE COURT: All 14 jurors are present along with counsel and Mr. Long.

Again, we very much appreciate the jurors' patience as we work through some of these issues.

State may continue.

MS. JOHNSON: Thank you.

Q (BY MS. JOHNSON) Ms. Walking Eagle, did you ask Henry Long, on the early morning of September 18th, why he had shot a man?

A No.

Q You did not ask him that question?

A No.

Q Did he tell you because Kelsey and this man got into an argument?

A No.

Q And did he tell you then he just shot him?

A (Unintelligible)

(Reporter clarification)

THE WITNESS: No.

Q (BY MS. JOHNSON) So Henry Long did not tell you those things?

A No, he did not.

Q When he came to your house on the early morning of September 18th, did he have a pair of red shoes with

him?
A No.
Q Did he have a wallet?
A No.
Q Did he have a gun?
A No.
Q At one point did he take out the gun and put it on the table?
A No.
Q Did you speak to Henry Long at all about why he had a gun?
A No, I haven't.
Q So you had no conversations with him about that?
A No.
Q Did you ask Henry: "What did you do?"
A No.
Q Did you -- did he tell you: "I fucking killed someone tonight"?
A No.
Q Was Kelsey Roubideaux in your house that early morning?
A No.
Q Was she just sitting on the couch staring off into space?
MR. HANSON: Objection. Argumentative and leading.
THE COURT: Sustained.
Q (BY MS. JOHNSON) Did Henry tell you: "I'm coming for

you, Mom, if you tell anybody; I love you, but I'm coming for you"?
A No.
Q He didn't tell you that?
A No. I don't remember him saying anything to me. I don't remember him talking to me.
Q You what?
A I don't remember even talking to him.
Q Okay. You said he wasn't at your house that morning?
A No.
Q Did he take you back into the bedroom and talk to you there about this?
A No.
Q And did Hussein leave with the shoes that he brought in with him, that Henry brought to the house with him?
A No.
Q But you don't know who Hussein is?
A Hussein, no.
Q You don't know Hussein?
A No.
Q And you don't know Kelsey Roubideaux?
A I don't know who she is.
Q You don't know a man named Bog?
A No.
Q And you don't know Katie Coyle?

A No, I don't.
Q Did you receive messages from Katie Coyle at about 6:40 in the morning wanting to know where her husband, or Henry, was?
A No.
MS. JOHNSON: Nothing further.
THE COURT: Any cross-examination at this time?
MR. HANSON: Not at this time, Your Honor, but I'd ask to be able to recall this witness.
THE COURT: Okay. The witness may be recalled so we want to keep her around.
THE DEPUTY: Yes, Your Honor.
THE COURT: State.
MS. JOHNSON: The state would recall Detective Mertes.
(Detective Mertes was recalled to the witness stand.)
THE COURT: Detective, you continue to be under oath. You may proceed.

DIRECT EXAMINATION

Q (BY MS. JOHNSON) Detective Mertes, did you have a conversation with Margaret Walking Eagle Beaner?
A I did.
Q When did you have that conversation with her?
A Would have been around about 8:00 on the night of the 20th of September.

Q And that would have been the same day you'd interviewed Kelsey Roubideaux, and subsequently Henry Long was arrested that same night?
A Yes.
Q What was the nature? Why was Margaret Walking Eagle interviewed?
A Developments had come up during our investigation that Kelsey had been at 321 North Grange Avenue, which is where Margaret Walking Eagle was staying, and she agreed to come down for an interview from there.
Q And so did you interview Margaret Walking Eagle in an interview room?
A Yes.
Q Are those interview rooms recorded?
A Yes, they are.
Q Now, did you ask Ms. Walking Eagle if she knew a Kelsey Roubideaux?
A I did.
Q What did she tell you?
THE COURT: Okay. Before you answer that question, I want to instruct the jury on something.
Sometimes evidence is received for a very limited purpose, and that's what's going to happen with the answer to this question and some of the questions to follow. It's received for a limited purpose. And let me

try to explain that a little bit more. So the credibility of Margaret Walking Eagle may be attacked by introducing evidence that on some former occasion Ms. Walking Eagle made a statement on a matter of fact or acted in a manner inconsistent with her testimony in this case on a material -- excuse me, on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of Margaret Walking Eagle. But you must not consider any such prior statement as establishing the truth of any fact contained in that statement.

So again, I want to read that last line. You must not consider any such prior statement as establishing the truth of any fact contained in that statement.

Do you recall the question?

THE WITNESS: No. Could I get it again, please.

Q (BY MS. JOHNSON) Did she indicate whether she knew Kelsey Roubideaux?

A Yes.

MR. HANSON: Your Honor, objection. And I object to this line of questioning based on the objections and arguments which were made earlier on *Crawford* hearsay.

THE COURT: Thank you. Those are overruled, and I'll

give you a standing objection on that.
Q (BY MS. JOHNSON) Did she indicate she knew Kelsey Roubideaux?
A Yes, she did.
Q And what did she indicate that she had -- how she'd known Kelsey Roubideaux?
A She knew Kelsey through drug transactions.
Q Now, did you ask her -- well, first, what was Margret's demeanor like during her interview with you?
A At points she was calm. But talking about the events that occurred on September 18, she became very emotional.
Q Now, did you ask her about the events that occurred on September 18 of 2018?
A I did.
Q Did she indicate whether Kelsey Roubideaux and Henry Long had come to her home that early morning?
A She did.
Q Was she able to give you a time that they came to her home?
A I know it was in the early morning hours. I don't recall an exact time, but I do remember it was in the very early morning hours, like 3:00, 4:00, 5:00-ish, in there.
Q Was she able to tell you who was at her home at the time?

A Yes, she was.
Q Did she talk to you about a Hussein?
A Yes, she did.
Q Did she indicate that she knew somebody named Hussein?
A Yes.
Q Did she also talk about a Bog being at her house?
A Yes.
Q Did she indicate to you she knew someone named Bog?
A Yes.
Q Specifically in regards to Henry Long, did she tell you about any conversation she had with Henry Long that morning?
A She did.
Q What did she tell you?
A She stated that Mr. Long had asked her back into her bedroom and then began to make statements about what had taken place earlier.
Q And what did she tell you he had told her?
A He said that he'd shot a man.
Q Did she tell you what led up to him shooting the man or what the defendant told her had led up to the shooting?
A That there was an argument taking place in the vehicle, and that basically he and Mr. Thornton --
MR. HANSON: Objection. There's been no prior testimony about that.

THE COURT: Sustained.
Q (BY MS. JOHNSON) She'd indicated that an argument had taken place?
MR. HANSON: Objection, no prior testimony by Ms. Walking Eagle on that subject, that an argument took place. It's improper impeachment.
THE COURT: Overruled.
THE WITNESS: Could I get the question again.
Q (BY MS. JOHNSON) That there was an argument that took place in the car?
A Yes.
Q Did she tell you the items that Henry had brought over to her house or had brought with him at the time?
A Yes, she did.
Q What did she tell you he had brought?
MR. HANSON: Objection. Wasn't asked that question on direct.
THE COURT: I'm going to sustain that and ask the state be more specific.
Q (BY MS. JOHNSON) Did Ms. Walking Eagle indicate that the defendant had brought a pair of red shoes with him?
A Yes.
Q Did she say that Hussein took the red shoes?
A Yes.
Q Did she indicate to you that the defendant also brought a

wallet with her?
A Yes.
Q Or I'm sorry, with him?
A Yes.
Q Did she also indicate to you that he had brought a handgun?
A Yes.
Q And what did she say he did with the handgun?
A He took it with him.
Q Did Ms. Walking Eagle indicate on more than one occasion what the defendant had told her he had done that night?
MR. HANSON: Objection. She wasn't asked that specific question.
THE COURT: Sustained.
Q (BY MS. JOHNSON) Did Ms. Walking Eagle indicate to you that Henry had told her "I fucking killed someone tonight"?
MR. HANSON: Objection. It's been asked and answered.
THE COURT: Overruled.
THE WITNESS: Yes.
Q (BY MS. JOHNSON) Did he also indicate to her that "I love you, Mom; if you tell anybody, I'm coming for you"?
A Yes.
Q Did she indicate she knew who Katie Coyle was?

A Yes.
Q And how did she know Katie Coyle?
A She had received a message from Katie via Facebook, I want to say approximately 6:40 in the morning on the 18th, looking for Mr. Long.
Q And what was -- and so Katie Coyle messaged Margaret Walking Eagle looking for Henry Long?
A Yes.
MR. HANSON: I object to that as leading.
THE COURT: Sustained.
Q (BY MS. JOHNSON) What was Katie Coyle doing when she sent that text message to Margaret?
MR. HANSON: Objection. Witness has no -- nothing asked about Katie Coyle's state of mind.
THE COURT: Sustained.
Q (BY MS. JOHNSON) What did Margaret tell you about that text message?
A She showed me the messages exchanged between her and Katie Coyle and that it was -- Katie was looking for Mr. Long.
Q And when did you interview Margaret Walking Eagle?
A It was the evening of the 20th of September. I believe it was around 8:00 at night.
Q And she was relaying events that had happened at her home when?

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL DISTRICT

* *

STATE OF SOUTH DAKOTA,

Plaintiff, 49 CRI18-7264

vs. **JURY TRIAL**
VOLUME 6 OF 6

HENRY FRANCIS LITTLE LONG,

Defendant.

* *

BEFORE: The Honorable Jon Sogn,
Circuit Court Judge in and for the Second Judicial Circuit, State of South Dakota, Sioux Falls, South Dakota.

APPEARANCES: Crystal Nesheim Johnson and
Brooke Marie Goodale
Assistant Minnehaha County State's Attorneys
415 North Dakota Avenue
Sioux Falls, South Dakota 57104

for the Plaintiff;

Michael W. Hanson, Esquire
505 W. 9th Street, Suite 100
Sioux Falls, South Dakota 57104

for the Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 9:00 a.m. on the 16th day of April, 2019, in Courtroom 6B at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

and shooting him in the chest.

So how do we know the defendant caused the death of LaKendrick Thornton? All of the evidence in the case.

Your next question is how do you know it was a premeditated design to effect death? Because he pulled that gun a second time. Because he was questioned how tough he was. That's how we know it's a premeditated design. There is no time limit. When he pulled that gun the second time and he turned around and he shot LaKendrick Thornton in the chest, he knew exactly what he was intending to do. He shot him from the front seat to the back seat. There is only one result that will happen if you shoot somebody from the front seat to the back seat in the chest. And he knew what that was, and he knew when he pulled the gun, he knew exactly what was going to happen. That is a premeditated design. Did he plan it out when they picked him up that night? Probably not. But Kelsey and LaKendrick were getting into an argument. And then when LaKendrick dared question him, "You're not man enough to pull the trigger." He showed him he was, and he killed him. And then they drug their body -- drug his body into a ditch and left him. That is your premeditation. It can be formed in an instant, and it was. The moment he was questioned, the moment they thought maybe he wasn't

Mr. Tough Guy, that's the point that premeditation was formed. And when you consider all that, that is how you reach a verdict of guilty for Count 1.

Now the Court -- there's two other counts, and they're charged in the alternative. Because the state law -- our state law has decided that one act can fit more than one definition of a crime. So your second count is Murder in the 2nd Degree. And Murder in the 2nd Degree is that the defendant caused the death of the victim. He did so in an act imminently dangerous to others and evincing a depraved mind without regard for human life. Imminently dangerous, pulling a gun in a car and pointing it at somebody; and evincing a depraved mind without regard to human life, pulling that trigger. Without design to effect death.

Manslaughter in the 1st Degree, again, caused the death of LaKendrick Thornton. All the evidence supports that this defendant caused the death of LaKendrick Thornton. There is no other evidence. By means of a dangerous weapon, a gun. And again, we know it's a gun because we have a gunshot wound to the chest. Without design to effect death.

So when you look at the evidence in this case and you consider it as a whole, because the Court tells you you need to consider the evidence as a whole, and when

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29002

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

HENRY FRANCIS LITTLE LONG,

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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AND APPELLANT

Notice of Appeal filed May 20, 2019

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29002

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

HENRY FRANCIS LITTLE LONG,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant Henry Francis Little Long, will be referred to as "Defendant" or "Long." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." Documents cited are as follows:

- The settled record in the underlying criminal case, *State of South Dakota v. Henry Francis Little Long,* Minnehaha County Criminal File No. 49CRI18-007264 .. SR
- Exhibits for State Motion for Tolling of the 180-Day Requirement .....Exhibit
- Defendant's Brief .....DB

JURISDICTIONAL STATEMENT

On October 3, 2018, the Minnehaha County grand jury indicted Long for Count 1: Murder – First Degree; Count 2: Murder – Second Degree; Count 3: Manslaughter – First Degree – Dangerous Weapon.

SR 14-15. This appeal originates from Long's jury trial convictions for Count 2: Murder – Second Degree; Count 3: Manslaughter. SR 310-11. On April 18, 2019, Defendant was then sentenced to life imprisonment in the South Dakota State Penitentiary. SR 646, 656. The court filed the Judgment of Conviction on April 25, 2019. SR 310-311. Defendant filed his Notice of Appeal in a timely manner on May 20, 2019. SR 323. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TESTIMONY OF MARGARET WALKING EAGLE, AND THE SUBSEQUENT IMPEACHMENT WITNESS WAS BOTH A VIOLATION OF THE RULES OF EVIDENCE AND AN ABUSE OF DISCRETION BY THE TRIAL COURT?

The trial court correctly admitted the testimony.

State v. Mattson, 2005 S.D. 71, 698 N.W.2d 538

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

State v. Brings Plenty, 459 N.W.2d 390 (S.D. 1990)

SDCL 19-19-613(b)

SDCL 19-19-803(5)

II

WHETHER THE CIRCUIT COURT VIOLATED DEFENDANT'S RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS?

The trial court correctly tolled a period of time, which resulted in Defendant being tried within 180 days.

State v. Webb, 539 N.W.2d 92 (S.D. 1995)

State v. Two Hearts, 2019 S.D. 17, 925 N.W.2d 503

State v. Cottrill, 2003 S.D. 38, 660 N.W.2d 624

SDCL 23A-44-5.1(4)(a)

III

WHETHER THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND FOR THE JURY TO FIND DEFENDANT GUILTY OF SECOND-DEGREE MURDER?

The trial court correctly denied Defendant's Judgment of Acquittal.

State v. Quist, 2018 S.D. 30, 910 N.W.2d 900

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

STATEMENT OF THE CASE

A Complaint against Long involving the death of Lakendrick Thornton a/k/a Key Key was signed on September 20, 2018 and filed the next day. SR 1-2. Long was arrested on September 21, 2018. SR 9. On that same day, he made his initial appearance before Magistrate Judge Eric Johnson. SR 10. On October 3, 2018, the Minnehaha County grand jury indicted Long for Count 1: Murder – First Degree; Count 2: Murder – Second Degree; Count 3: Manslaughter – First Degree – Dangerous Weapon. SR 14-15.

On October 11, 2018, the Minnehaha County Public Defender's Office filed a Motion to Withdraw due to a conflict in representing Long. SR 17-18. An Order was then entered appointing Manny de Castro as Long's attorney. SR 18. Long appeared at his arraignment hearing,

along with de Castro, on October 11, 2018. SR 659-65. Also, on October 11, 2018, a Scheduling Order was entered by Judge Sabers which set motions deadline for November 21, 2018, and the jury trial set to begin on December 31, 2018. SR 19. The trial date was a mistake in that the Minnehaha Courthouse was closed for the New Year's holiday on December 31, 2018 through January 1, 2019.

On October 24, 2018, defense counsel filed a Motion for Psychiatric Examination to determine Long's competence to stand trial and his ability to know the wrongfulness of the charged criminal acts. SR 22-23. An Order granting the motion was entered the same day. SR 24-26.

The Minnehaha Court Administration Office (herein after referred to as Administration) assisted the trial judge in scheduling matters in this case. On October 16, 2018, attorney de Castro emailed the Administration requesting a hearing "to start handling some preliminary motions." SR 35. The email communication also included the State. The communication between the parties, including Judge Sogn, concluded with a scheduled motion hearing set for January 29, 2019. SR 31-32.

The trial court stated that due to the "motions hearing requested by the defense, it was necessary to modify the scheduling deadlines and jury trial date." SR 44 (#15). On November 16, 2018, an email from Administrator set out a new motion's deadline as February 8, 2019, with

a new jury trial date of April 1, 2019. SR 34. The trial court stated that "the attorneys did not object to the new motions deadline and trial date." SR 45 (#16). The November 16, 2018 email correspondences, included Administrator reminding "attorney de Castro to 'Please submit the motion for delay.'" SR 45 (#18).

On January 10, 2019, attorney de Castro filed a Motion to Withdraw due to a conflict within his law office resulting from the representation of Long. SR 28. On January 23, 2019, an Order was signed by Judge Sogn discharging de Castro and appointing Michael Hanson. SR 28-29.

On January 29, 2019, a hearing was held. During the hearing, defense counsel raised some scheduling problems. This resulted in it being agreed to change the trial date from April 1, 2019 to April 8, 2019. SR 681, SR 45 (#26). Also, at the hearing, the judge was informed that Long "had been refusing to cooperate with the evaluator regarding the psychiatric examination. As a result, the examination had not been completed." SR 46 (#27), 684-86. After additional discussions, Long agreed to cooperate with the examination so that the April 8, 2019 trial date could be maintained. *Id.*

On February 5, 2019, a motion hearing was held regarding Defendant's 180-day rule motion. SR 340. State's Exhibit 2 was admitted at the hearing. This exhibit included the email communication that took place between Administrator, Judge Sogn, the State and

defense counsel. SR 341, SR 30-36. Also, at the hearing, State's Exhibit 1, an Affidavit from Long's previous attorney de Castro, was admitted. In the affidavit, de Castro stated that he "was aware that the December trial date set at the Arraignment was being continued to accommodate scheduling the hearing. It does not appear I emailed a Delay Motion to court administration." SR 37.

STATEMENT OF THE FACTS

Testimony at Defendant's trial began on April 10, 2019. SR 701. The first witness the State called was Kelsey Roubindeaux. SR 725. She had been Long's girlfriend in 2016. SR 726. On April 17, 2018, she agreed to pick Long up at a casino and give him a ride. The car Roubindeaux was driving was not hers but belonged to a friend she had met in prison. The owner of the car loaned it to her for some drugs. SR 849-52. Roubindeaux and Long then drove to pick up Thornton, who goes by the nickname Key Key. SR 728. When they went to pick up Key Key, he had a female friend with him named Ayom.

Once everyone was in the car, Roubindeaux was driving, Long was in the front-passenger seat, Key Key was in the rear-driver's side and Ayom was in the rear passenger's side. They were driving to "East Tenth" to drop Key Key off. SR 731. When they were near the drop off location, Key Key began "freaking out" claiming that someone was "snitching on him or something." *Id.* At that point, Roubindeaux testified that she wanted Key Key out of the car, but he refused.

SR 732. Long then pulled out a gun and orders Key Key to get out of the car. SR 733. Long was convinced to put the gun away. *Id.* Key Key then responded by stating "He's tired of people pulling guns on him and not pulling the trigger." SR 734. Ayom testified that Key Key said, "You're not going to keep on waving that gun around. You're just not going to -- if you're going to shoot, just shoot." SR 824. Ayom also said that Long had put the gun to her head at one point before shooting Key Key in the chest. SR 824. Key Key responds by saying "You shot me." SR 735. Ayom then jumps out of the car and lost one of her shoes in the process. SR 736, 825. Later she took police to the place, location where she jumped out of the car and they found her lost shoe there. SR 827. Roubindeaux wanted to drive to the hospital but Long stated "We're not taking him to the hospital." SR 736.

Roubindeaux and Long then drove out of town to dump the body in a ditch. Roubindeaux helped drag Key Key's body from the car. SR 737. The two then went to Long's girlfriend at the time, Katy, and they cleaned out the car with bleach. SR 738-39. For her part in the crime, Roubindeaux plead to accessory to murder and a separate charge of aggravated assault. SR 742, 758-59.

At trial, the State also called Jeff Barnable who is a sergeant with the Minnehaha County Sherriff's Office. He was on duty September 18, 2018, when he received a dispatch call to go out to "Ditch Road" where there was a man in the ditch who looked deceased. SR 770-71. Erin

McCaffrey, who is a Forensic Specialist for the Sioux Falls Police Department, also testified that she helped process the crime scene. She testified that she lifted the shirt of an African American male lying on his back and saw a bullet wound. SR 781-82. Adam Zishka, with the Minnehaha County Sherriff's Office, stated that the wound was in the "upper right chest just above his nipple." SR 813. He also used a chemical called Bluestar to detect the presence of blood. He testified that Bluestar identified blood on a drag path from the road to where the body was found in the ditch. SR 816.

Mark Toft from the Minnehaha County Sherriff's Office testified to finding blood under the molding and other locations in the car. SR 919, 1004. After DNA analysis was conducted by Kristina Dreckman from the South Dakota Forensic Lab, it was determined that Key Key was a contributor to some blood in the car and was the sole contributor to the blood found under the door molding. SR 1043. Toft also testified that Long's finger prints were found on a Rock Star can in the car. SR 883-95.

Kenneth Snell M.D. was the coroner called to the scene. He also conducted the autopsy on Key Key. Dr. Snell concluded that the time of Key Key's death was sometime between midnight and 1 a.m. on April 17, 2018. He also testified that the cause of Key Key's death was a gunshot wound to the chest. SR 1093.

Derek Kuchenreuther from the Minnehaha County Sherriff's Office conducted analysis of Key Key's cell phone. He was able to show that the phone utilized various phone towers that night. SR 1111. More specifically, he testified that the tower data "led to the cell tower where the victim's body was located up by Ditch Road." SR 1113

The State also called Margaret Walking Eagle as a witness. SR 390. Long would call Walking Eagle his mother. Prior to trial, Long's attorney explained the relationship as "[Walking Eagle] was the mother of my client's roommate's cellmate while he was in prison in North Dakota." SR 707. Walking Eagle was arrested in Pierre, South Dakota, on a material witness warrant and then brought to Sioux Falls to testify. SR 1000.

Walking Eagle testified that she has known Long for "four or five years" and he is her adopted son. SR 391. She stated that she had no knowledge of a conversation she had with Long on April 18, 2018. SR 392. She further claimed that she did not remember visiting with Detective Mertz about her conversation with Long. SR 393. She also claimed that even if she watched the videotape of her interview with Detective Mertz, her memory would not be refreshed regarding that conversation. *Id.*

After the State rested, Long made a Motion for Judgment of Acquittal. SR 507. The trial court denied the motion. SR 513. Long called a witness for his defense and then rested his case. He renewed

his previous motion, which was again denied. SR 524-27. After the closing arguments, the jury returned with verdicts of guilty for Murder in the Second Degree and guilty for Manslaughter in the First Degree. SR 623.

ARGUMENTS

I

THE TESTIMONY OF MARGARET WALKING EAGLE, AND THE SUBSEQUENT IMPEACHMENT WITNESS WAS NEITHER A VIOLATION OF THE RULES OF EVIDENCE NOR AN ABUSE OF DISCRETION BY THE TRIAL COURT.

A. Introduction.

State's witness, Margaret Walking Eagle was called to testify about a conversation she had with Defendant. While on the stand, she surprisingly claimed no memory of the conversation. SR 392-93. She also claimed no memory of a recorded conversation she had with Detective Mertz. *Id.* Even after an attempt to refresh her recollection, she claimed no knowledge of either conversation.

Defendant claims that the trial court committed error in allowing Walking Eagle to be questioned, her recollection refreshed, and being subject to impeachment. DB 7-8. Defendant states in his brief that "[t]his abuse of discretion generated a violation of Long's Sixth Amendment Confrontation Right." DB 8.

B. Standard of Review.

It is well established that a trial court's evidentiary rulings are presumed correct. *State v. Talarico*, 2003 S.D. 41, ¶ 35, 661 N.W.2d 11, 23; *State v. Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d 100, 105. Those rulings are reviewed under an abuse of discretion standard. *Id.; State v. Guthmiller*, 2003 S.D. 83, ¶ 24, 667 N.W.2d 295, 304. Absent a clear abuse of discretion, those rulings will not be overturned on appeal. *State v. Downing*, 2002 S.D. 148, ¶ 10, 654 N.W.2d 793, 796. The test is not whether this Court "would have made the same ruling, but whether . . . a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion." *Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d at 105. An abuse of discretion has been said to be "discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *State v. Machmuller*, 2001 S.D. 82, ¶ 9, 630 N.W.2d 495, 498.

Moreover, even if error is found, it must be prejudicial in nature before this Court will overturn the trial court's evidentiary ruling. *State v. Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d 538, 544 (*abrogated by State v. Edwards,* 2014 S.D. 63, 853 N.W.2d 246 *on other grounds*). Statute provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." SDCL 23A-44-14. Thus, even if this Court finds that there was an abuse of discretion, it "will affirm unless the defendant's substantial rights were violated."

State v. Osgood, 2003 S.D. 87, ¶ 20, 667 N.W.2d 687, 694. As noted in *State v. Smithers*, 2003 S.D. 128, ¶ 21, 670 N.W.2d 896, 900-01, "'It is not error alone that reverses judgments of convictions,' there must be 'error plus injury.'" *State v. Owens*, 2002 S.D. 42, ¶ 39, 643 N.W.2d 735, 748. Error is said to be prejudicial when "in all probability . . . it produced some effect upon the final result and affected rights of the party assigning it." *Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d at 544; *State v. Vatne*, 2003 S.D. 31, ¶ 10, 659 N.W.2d 380, 383. Moreover, evidence will only be prejudicial if it "persuades the jury in an unfair or illegitimate manner . . . not merely because it harms the other party's case." *State v, Bowker,* 2008 S.D. 61, ¶ 41, 754 N.W.2d 56, 69.

Since Defendant is also claiming a constitutional violation of his Sixth Amendment Confrontation Right, this Court reviews it de novo. *State v. Podzimek*, 2019 S.D. 43, ¶ 13, 932 N.W.2d 141, 146; *State v. Spaniol,* 2017 S.D. 20, ¶ 24, 895 N.W.2d 329, 338.

C. Analysis.

Margaret Walking Eagle had a conversation with Defendant on the day Key Key was killed, September 18, 2018. SR 392, 502. Two days later, September 20, 2018, she had a conversation with Detective Mertz where she reiterated what Defendant had told her. SR 498-99. Later on Walking Eagle was arrested in Pierre, SD, on a material witness warrant and then brought to Sioux Falls to testify at Defendant's trial. SR 1000.

When the State called Walking Eagle, she claimed to have known Defendant for "four or five years" and he is her adopted son. SR 391. The state then turned to her conversation with Defendant:

> Q. Okay. I want to specifically turn your attention back to September 18th, the early morning of September 18th. Do you remember that day?
>
> A. No.
>
> Q. You don't remember that day?
>
> A. No.
>
> Q. Do you remember having Kelsey Roubideaux and Henry Long coming to your home that day?
>
> A. No.
>
> Q. Do you recall talking to Detective Mertes (sic) about having Kelsey Roubideaux and Henry Long coming to your house that day?
>
> A. No, I don't.
>
> Q. You don't recall being interviewed by law enforcement?
>
> A. No.
>
> Q. You look confused. What do you remember about that time frame?
>
> A. I'm trying to remember the day. I can't even remember . . . .

SR 392.

Detective Mertz interviewed Walking Eagle two days after her September 18 conversation with Defendant. The interview was recorded. The State then shifted its questioning to the Detective Mertz interview to see if her memory would be refreshed:

Q. Do you recall on September 20th being interviewed by Detective Mertes (sic) at the Law Enforcement Center?

A. No, I don't.

Q. You don't?

A. No.

Q. You don't recall Detective -- talking to Detective Mertes (sic) about Henry Long telling you he killed a man?

A. No.

Q. That doesn't stand out in your memory?

A. No, it don't.

Q. That was a recorded interview. Did you know that?

A. No.

Q. If you were to watch that recorded interview, would that refresh your memory as to what took place on September 20th in your conversation with Detective Mertes (sic)?

A. No.

Q. Watching a recorded interview with you and Detective Mertes (sic) would not refresh your memory as to what you told Detective Mertes (sic)?

A. No. Probably not.

SR 393.

The parties then met outside the presence of the jury. *Id.* The State informed the court that it intends to impeach[1] her testimony, with

[1] SDCL 19-19-607. Any party, including the party that called the witness, may attack the witness's credibility.

the video interview with Detective Mertz under SDCL 19-19-613(b)[2], via "extrinsic evidence of a prior inconsistent statement . . . ." SR 394. Defendant argues that such testimony would be "the classic *Crawford* case." SR 395. The State pointed out that the witness was present for cross-examination and defense counsel was aware of the interview and had a copy of it. SR 394-95.

D. Hearsay Analysis.

This Court has held that "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *State v. Roach*, 2012 S.D. 91, ¶ 26, 825 N.W.2d 258, 266. *See also* SDCL 19-19-801(a) to (c). Hearsay is not admissible at trial, unless it falls under one of the delineated hearsay exceptions. *See* SDCL 19-19-802, -803. As for Confrontation Clause analysis under *Crawford,* a distinction is made between testimonial and nontestimonial statements. The Confrontation Clause applies only to testimonial hearsay. *State v. Richmond*, 2019 S.D. 62, ¶ 25, __ N.W.2d __.

---

[2] 19-19-613. Witness prior statement…

(b) Extrinsic evidence of a prior inconsistent statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under subdivision 19-19-801(d)(2).

E. Confrontation Analysis.

The Confrontation Clause of the Sixth Amendment to the United States Constitution, as applied to South Dakota through the Fourteenth Amendment, requires that in all criminal cases the defendant has the right "to be confronted with the witnesses against him." *State v. Kryger*, 2018 S.D. 13, ¶ 14, 907 N.W.2d 800, 808. (*See also* Article VI, § 7 of the South Dakota Constitution, which guarantees a defendant the right to confront witnesses.) *State v. McCahren,* 2016 S.D. 34, ¶ 25, 878 N.W.2d 586, 597.

This right, however, is not absolute and the defendant bears the burden of establishing that "a reasonable jury would have had a significantly different impression," if this limitation did not exist. *State* v. *Walton*, 1999 S.D. 80, ¶¶ 25-27, 600 N.W.2d 524, 530-31. The United States Supreme Court has stated, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15, 19 (1985) (emphasis in original). *State v. Bogenreif*, 465 N.W.2d 777, 782 (S.D. 1991).

F. Refreshed Recollection – SDCL 19-19-803(5).

The trial court held that under SDCL 19-19-803(5)[3] the video recording of her interview with Detective Mertz could be used to assist Walking Eagle in recalling her conversation with Defendant. SR 402. The court reasoned that if her recollection is not refreshed, then the State could play the video as an exhibit.

As the video was viewed by Walking Eagle, outside the presence of the jury, the court ruled that some of the language in the video was more prejudicial than probative and would need to be removed if it were to be shown to the jury. SR 406. After Walking Eagle viewed the video, the jury was brought in and the questioning continued. Below are portions of that questioning:

> Q. (By Ms. Johnson) Now Ms. Walking Eagle, you just had an opportunity to review your interview from September 20, 2018 with Detective Mertes (sic). Did that refresh your memory as to what you had talked to Detective Mertes (sic) about?
>
> A. No, it hasn't.
>
> Q. That did not refresh your memory at all?

---

[3] 19-19-803

(5) Recorded recollection. A record that:

(A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) Accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

A. No.

Q. Watching yourself be interviewed on September 20th did not refresh your memory as to what you said to him?

A. No.

Q. Okay. And the information would have been on September 20th in regards to an incident that took place on September 18th; is that correct?

A. I don't know.

Q. Did you watch that interview?

A. Yes, I did.

Q. Did you see yourself in that interview?

A. I seen somebody.

Q. Okay. Sounded like you?

A. Sounded like me.

Q. Looked like you?

A. Pretty high, yeah.

Q. And you don't recall what you're -- you don't recall today what you told him at that time?

A. No, I don't.

Q. And that was an audio and a visual recording of you being spoken to by the detective, correct?

A. I guess it is.

Q. And that, you would agree with me, would reflect your knowledge as of September 20th of what you knew of the incident?

A. No.

Q. That would not have accurately reflected your knowledge?

A. No, I don't remember any of it.

Q. You don't recall meeting with Henry Long's attorney for an hour yesterday?

A. No, I don't. Sleeping. I remember sleeping. Sleeping.

Q. Did you meet with anybody at the jail?

A. No.

Q. You did not meet with a single person at the jail yesterday?

A. No. I don't remember meeting with anybody.

Q. So if there is a visitor log that Mr. Hanson came and visited with you for an hour yesterday, and there was a video of you meeting with him in a room, would that be inaccurate?

A. I don't remember.

Q. You don't remember meeting with somebody yesterday at the jail?

A. No.

Q. Not even 24 hours ago, last night at 7:00?

A. No.

Q. And at one point another person came in, a female?

A. No.

Q. You have no memory of that?

A. No, I don't.

SR 410-13.[4]

After Walking Eagle's testimony, the State called Detective Mertz. He testified on various matters which included cell phone tower locations. SR 415-30. Upon the conclusion of his testimony, the court met with the parties to discuss the playing of the video tape. SR 472. The court set forth its analysis of the *Crawford* issue by pointing out that Defendant did not have a previous opportunity to cross-examine Defendant. SR 478-79. The court also pointed out since she has no memory, she is unavailable to question and thus an unavailable

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[4] Defendant complains that the State was allowed to use the video to attempt to refresh Walking Eagle's memory, when she said it would not help. DB 12. Defendant also claims he "was prejudiced by allowing the state to continue questions Walking Eagle on an interview she did not remember . . ." DB 12.

When Walking Eagle was called by the state, she claimed zero memory, even after viewing a video of her interview. The jail log showed she had visited with Defendant's counsel for an hour the day before she testified. One hour is a long time to visit with a witness who knows nothing. Defendant's victimization claims for Walking Eagle and himself ("egregious" treatment) via the application of the rules of evidence is overstated. DB 12-16.

On the video Walking Eagle states that her son, set a gun on the table; told her "I fucking killed someone tonight;" and "I love you, mom; if you tell anybody, I'm coming for you." SR 504. This threat is likely the basis of Walking Eagles amnesia and unavailability. SDCL 19-19-804(b)(6)states:

(b) Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

> (6) Statement offered against a party that wrongfully caused the declarant's unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness and did so intending that result.

See also State v. Huber, 2010 S.D. 63, ¶¶ 47-49, 789 N.W.2d 283, 298.

witness. SR 478. The court reviewed various other exceptions and denied the playing of the video. SR 481-82.

The State then recalled Walking Eagle and asked her whether she knew some certain people. SR 484-85. She answered "No" to those questions. SR 483-86. The State argued these were inconsistent statements to what she said on the video and wanted the video played for impeachment. SR 487. Defense counsel suggested an alternative resolution:

> Mr. Hanson: ". . . Detective Mertes (sic) can testify that 'I interviewed her. She said he was there.' I mean, narrow it--the prosecution made the point they were short, succinct questions. And the impeachment of those is going to be short and succinct. Kelsey Roubideaux, according to the statement, Mertes (sic) can testify she said she was there . . . . We don't need to play the video, because the video is going to throw in everything.
>
> Ms. Johnson: The state will agree to do the impeachment through Detective Mertes (sic).
>
> The Court: That certainly solves that issue. I appreciate that . . . ."

SR 493.

An agreement was reached between the parties to have impeachment take place through Detective Mertz and not the video. The trial court stated that it would instruct the jury both before Detective Mertz testimony and in the final written instructions. SR 494.

Mr. Hanson states, "The only thing is I may want to recall Ms. Walking Eagle so I'd keep her available after the state rests."

SR 494. Walking Eagle was available for defense counsel to call and fully examine. The State then renewed the examination of Walking Eagle who denied specific questions regarding issues involving her conversations with Defendant on September 18. SR 495-98. Defendant chose to not cross-examine Walking Eagle. SR 498.

The State then recalled Detective Mertz to impeach Walking Eagle and the court provided the following limiting instruction:

> Sometimes evidence is received for a very limited purpose, and that's what's going to happen with the answer to this question and some of the questions to follow. It's received for a limited purpose. And let me try to explain that a little bit more. So the credibility of Margaret Walking Eagle may be attacked by introducing evidence that on some former occasion Ms. Walking Eagle made a statement on a matter of fact or acted in a manner inconsistent with her testimony in this case on a material -- excuse me, on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of Margaret Walking Eagle. But you must not consider any such prior statement as establishing the truth of any fact contained in that statement.
>
> So again, I want to read that last line. You must not consider any such prior statement as establishing the truth of any fact contained in that statement.

SR 499-500.

Defendant objected based on *Crawford* and was overruled. SR 500. The State asked Detective Mertz many of the questions that Walking Eagle had previously denied. Defendant did not cross-examine Walking Eagle or Detective Mertz. SR 498, 506

After the State rested, the court stated on the record that at the time discussions were being made regarding inconsistent prior statements, the court conducted "the balancing test under 403." SR 506. The court also pointed out that during the questioning of Walking Eagle and Detective Mertz, the court again conducted the balancing test. The court determined that "the probative value is not substantially outweighed by the danger of unfair prejudice." SR 507.

Defendant cites *State v. Gage*, 302 N.W.2d 797 (S.D. 1981) for the claim that the State wrongly impeached Walking Eagle to get inadmissible hearsay before the jury. DB 17. The situation in *Gage* involved an "informant" who was told by Defendant's girlfriend, that Defendant told her, he was going to commit a robbery. Gage cites *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976), regarding four "requirements founded in fundamental fairness (for) the use of prior inconsistent statements for impeachment." They are as follows:

> 1) Inconsistency: The statements must be inconsistent.
>
> 2) Relevancy: The inconsistency must "relate to a matter of sufficient relevancy that the prosecution's case will be adversely affected if the inconsistent testimony is allowed to stand." *Id.* at 496.
>
> 3) Compliance with Rule 613 (SDCL 19-14-24 and 19-14-25): The prior statement must, on request, be shown or disclosed to opposing counsel, and "if extrinsic evidence is to be used to prove the prior statement, the witness must be afforded an opportunity to explain or deny it, and the opposing party must have an opportunity to interrogate the witness about it." *Id.* at 497.

> 4) Limiting instructions: The trial court "must adequately instruct the jury about the limited purpose for which the prior inconsistent statement is admitted." *Id.*

Gage, 302 N.W.2d at 798 (citing *Rogers*, 549 F.2d at 495).

In *Gage*, this Court found two of the requirements unfulfilled. One was the lack of a limiting instruction. *Gage*, 302 N.W.2d at 799. In Defendant's case, the statements admitted were inconsistent, relevant, previously disclosed and a limiting instruction was provided. All the requirements were met.

Defendant also cites *State v. Rufener*, 401 N.W.2d 740 (1987) for prohibiting testimony when the prosecution "knew before the testimony was offered to the jury that [the witness] . . . was going to deny having the conversation . . . ." *Rufener*, 401 N.W.2d at 745. The scenario in *Rufener* is not the situation in Defendant's case. After Walking Eagle took the stand for the first time, the State was surprised that she denied remembering anything. During the break, the State said to the trial court "I apologize, Your Honor. I was not aware of what Ms. Walking Eagle would testify to beyond her statements that she had previously made." SR 403.

F. Prejudice.

The State maintains that no error occurred. Moreover, even if "error is found, it must be prejudicial in nature before this Court will overturn the trial court's evidentiary ruling." *Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d at 544. Statute provides: "Any error, defect,

irregularity, or variance which does not affect substantial rights shall be disregarded." SDCL 23A-44-14. Thus, even if this Court finds that there was an abuse of discretion, it "will affirm unless the defendant's substantial rights were violated." *Osgood*, 2003 S.D. 87, ¶ 20, 667 N.W.2d at 694. As noted in *Smithers*, 2003 S.D. 128, 670 N.W.2d at 900, "'It is not error alone that reverses judgments of convictions,' there must be 'error plus injury.'" *Owens*, 2002 S.D. 42, ¶ 39, 643 N.W.2d at 748. Error is said to be prejudicial when "in all probability . . . it produced some effect upon the final result and affected rights of the party assigning it." *Mattson*, 2005 S.D. 71, ¶ 13, 698 N.W.2d at 544; *Vatne*, 2003 S.D. 31, ¶ 10, 659 N.W.2d at 383. Moreover, evidence will only be prejudicial if it "persuades the jury in an unfair or illegitimate manner . . . not merely because it harms the other party's case." *Mattson*, 2005 S.D. 71, ¶ 20, 698 N.W.2d at 546.

Should this Court disagree and find that the testimony contained improper hearsay, reversal of Defendant's conviction is still not appropriate because any error resulting from admission of the statements is harmless. Admission of hearsay statements alone is insufficient to justify reversal of a conviction – Defendant must also demonstrate prejudice resulting from the improper statements. *State v. Harris*, 2010 S.D. 75, ¶ 17, 789 N.W.2d 303, 310 (finding that "a defendant must prove not only that the trial court abused its discretion

in admitting the [improper] evidence, but also that the admission resulted in prejudice.").

Defendant makes no showing of prejudice other than a general statement. This Court has held that admission of hearsay statements is harmless where "the evidence was cumulative of other evidence presented independently at trial." *State v. Kihega*, 2017 S.D. 58, ¶ 33, 902 N.W.2d 517, 527 (quoting *State v. Davi*, 504 N.W.2d 844, 855 (S.D. 1993)) (*See also Podzimek*, 2019 S.D. 43, ¶ 15, 932 N.W.2d at 146). It must be remembered that the trial testimony included an eyewitness who saw Defendant shoot Key Key (Lakendrick Thornton) in the chest. SR 735, 824. Ayom also saw the shooting. There was also blood evidence, cellphone evidence and Dr. Snell testified that the cause of Key Key's death was a gunshot wound to the chest. SR 1093. (*See Richmond*, 2019 S.D. 62, ¶ 43; ". . . when considered in light of the evidence submitted at trial, the circuit court's admission of . . . statements about J.C.'s disclosure, though erroneous, was harmless.").

Further, any potential prejudice is removed via the court's limiting instruction. Jury Instruction number 36 states that:

> The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement on a matter of fact or acted in a manner inconsistent with the witness's testimony in the case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness, but you must not consider

> any such prior statement as establishing the truth of any fact contained in that statement.

SR 293.

In *State v. Brings Plenty*, 459 N.W.2d 390 (S.D. 1990) this Court held "In light of the oral and written limiting instructions given to the jury, we believe that the jury was adequately instructed to only consider those statements as affecting credibility *and* not as substantive evidence. *O'Brien, supra; Gage, supra.*" *Id.* at 403.

G. Summary.

This Court has held that "'[a] trial court's evidentiary rulings are presumed to be correct.' We review evidentiary rulings for abuse of discretion." *State v. Bausch*, 2017 S.D. 1, ¶ 12, 889 N.W.2d 404, 408 (quoting *State v. Crawford*, 2007 S.D. 20, ¶ 13, 729 N.W.2d 346, 349). Absent a clear abuse of discretion, evidentiary rulings will not be overturned on appeal. *Downing*, 2002 S.D. 148, ¶ 10, 654 N.W.2d at 796.

Based on the record, law and limiting jury instruction, the State maintains there was no abuse of discretion when the trial court admitted the statements.

II

THE CIRCUIT COURT DID NOT VIOLATE DEFENDANT'S RIGHT TO BE BROUGHT TO TRIAL WITHIN 180 DAYS.

A. Introduction.

Defendant maintains that the trial court "randomly tolled 89 days from one trial date to another trial date without good cause." DB 28. This Court has held that "the 180-day rule requires exclusion of delay which is occasioned by defendant's conduct, such as delay caused by pretrial motions and certain continuances . . . ." *State v. Webb*, 539 N.W.2d 92, 95 (S.D. 1995); *See also State v. Two Hearts*, 2019 S.D. 17, ¶ 10, 925 N.W.2d 503, 509. The circuit court stated in its Decision Regarding Issues Relating to 180 Day Rule, that:

> . . . delay of trial from January 2, 2019 to April 1, 2019 was necessary due to the request by Mr. Long's attorney for a motions hearing, which by consent of the parties was scheduled for January 29, 2019 . . . SDCL 23A-44-5.1(4)(b) . . . .
>
> The competency evaluation of Mr. Long, as requested by his counsel and ordered by the Court was not completed and was still pending . . . primarily to Mr. Long's prior refusal to cooperate with the evaluation . . . . Thus, under SDCL 23A-44-5.1(4)(a), the time period of January 2, 2019, until the examination is completed is a 'period of delay' excluded . . . .

SR 47-48 (#36 & 38).

B. Standard of Review.

The 180-day rule is a court procedural rule and not a constitutional requirement. *State v. Duncan*, 2017 S.D. 24, ¶ 14, 895

N.W.2d 779, 782. This Court reviews the determination of whether the 180-day period has expired, as well as what constitutes good cause for delay, under a de novo standard. *State v. Fowler*, 1996 S.D. 79, ¶ 10, 552 N.W.2d 391, 393; *State v. Andrews*, 2009 S.D. 41, ¶ 6, 767 N.W.2d 181, 183. This Court has also held that the clearly erroneous standard of review applies to the trial court's findings concerning reasons for good cause delay. (citing *State v. Shilvock-Havird*, 472 N.W.2d 773, 776 (S.D. 1991)).

C. Analysis Under the 180-Day Rule.

Under South Dakota law, a criminal defendant must be brought to trial within 180 days of when he "has first appeared before a judicial officer on an indictment, information or complaint." The 180-day period may be tolled for various statutory reasons. These reasons include the time it takes to resolve pretrial motions filed by a defendant, and for "good cause." SDCL 23A-44-5.1(4)(a) through (g).[5]

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[5] 23A-44-5.1.

(1) Every person indicted, informed or complained against for any offense shall be brought to trial within one hundred eighty days, and such time shall be computed as provided in this section.

(2) Such one hundred eighty-day period shall commence to run from the date the defendant has first appeared before a judicial officer on an indictment, information or complaint.

(3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, filing of the order granting a new trial, or the filing of the mandate on remand.

(4) The following periods shall be excluded in computing the time for trial:

(continued . . .)

The time impacted from filing [pretrial] "motions to their final determinations is to be excluded from the 180-day period under SDCL 23A-44-5.1(4)(a)." *Fowler*, 1996 S.D. 79, ¶ 13, 552 N.W.2d at 393. In

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(. . . continued)

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions brought under § 23A-8-3; motions for a change of venue; and the time consumed in the trial of other charges against the defendant;

(b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent;

(c) The period of delay resulting from a continuance granted by the court at the request of the prosecuting attorney if the continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date and provided a written order is filed;

(d) The period of delay resulting from the absence or unavailability of the defendant;

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him;

(f) The period of delay resulting from a change of judge or magistrate obtained by the defendant under chapter 15-12; and

(g) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. A motion for good cause need not be made within the one hundred eighty day period.

(5) If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the defendant shall be entitled to a dismissal with prejudice of the offense charged and any other offense required by law to be joined with the offense charged.

addition, good cause may be found when exceptional circumstances exist. *State v. Cooper*, 421 N.W.2d 67, 70 (S.D. 1988). Examples of exceptional circumstances include: (1) unique, nonrecurring events; (2) nonchronic court congestion; (3) unforeseen circumstances, such as unexpected illness or unavailability of counsel or witness. *Id.* In Long's case, exceptional circumstance occurred, such as:

- Delay of trial due to request by Defense counsel request for a motions hearing;
- Original defense counsel failing to email a written motion to delay as requested by court administration;
- Defense counsel filing a motion for a competency evaluation but Defendant refusing to cooperate with the evaluation.

SR 47-48.

Here is the timeline of events for Long

- A Complaint against Long was signed on September 20, 2018.
- Long was arrested on September 21, 2018. SR 9. On that same day, he made his initial appearance before Magistrate Judge Eric Johnson. SR 10.
- On October 3, 2018, the Minnehaha County grand jury indicted Long for Count 1: Murder – First Degree; Count 2: Murder – Second Degree; Count 3: Manslaughter – First Degree – Dangerous Weapon. SR 14-15.
- On October 11, 2018, the Minnehaha County Public Defender's Office filed a Motion to Withdraw due to a conflict in representing Long. SR 17-18. An order was then entered appointing Manny de Castro as Long's attorney. SR 18. Long appeared at his arraignment hearing, along with de Castro, on October 11, 2018. SR 659-65. Also, on October 11, 2018, a Scheduling Order was entered by Judge Sabers which set Motions deadline for November 21,

2018, and the Jury Trial set to begin on December 31, 2018. SR 19. The trial date was a mistake in that the Minnehaha Courthouse was closed for the New Year's holiday on December 31, 2018 through January 1, 2019.

- On October 24, 2018, defense counsel filed a motion for psychiatric examination to determine Long's competence to stand trial and his ability to know the wrongfulness of the charged criminal acts. SR 22-23. An order granting the motion was entered the same day. SR 24-26.

- The Minnehaha Court Administration Office assisted the trial judge in scheduling matters in this case. On October 16, 2018, attorney de Castro emailed the Administration requesting a hearing "to start handling some preliminary motions." SR 35. The communication between the parties, including Judge Sogn and concluded with a scheduled motion hearing set for January 29, 2019. SR 31-32.

- The trial court stated that due to the "motions hearing requested by the defense, it was necessary to modify the scheduling deadlines and jury trial date." SR 44 (#15). On November 16, 2018, an email from Administrator set out a new motion's deadline of February 8, 2019, with a new jury trial date of April 1, 2019. SR 34. The trial court stated that "the attorneys did not object to the new motions deadline and trial date." SR 45 (#16). The November 16, 2018 email correspondences included Administrator reminding "attorney de Castro to 'Please submit the motion for delay.'" SR 45 (#18).

- On January 10, 2019, attorney de Castro filed a Motion to Withdraw due to a conflict within his law office resulting from representing Long. SR 28. On January 23, 2019, an Order was signed by Judge Sogn discharging de Castro and appointing Michael Hanson. SR 28-29.

- On January 29, 2019, a hearing was held. During the hearing, defense counsel raised some scheduling problems. This resulted in it being agreed to change the trial date from April 1, 2019 to April 8, 2019. SR 681, SR 45 (#26).

- Also, at the January 29, 2019 hearing, the judge was informed that Long "had been refusing to cooperate with the evaluator regarding the psychiatric examination. As a result, the examination had not been completed." SR 46 (#27), 684-86. After additional discussions, Long agreed to cooperate with the examination so that the April 8, 2019 trial date could be maintained. *Id.*

On February 5, 2019, a motion hearing was held regarding Defendant's 180-day rule motion. SR 340. The state called Brittan Anderson as a witness. SR 344. Both parties acknowledged that she did court scheduling for Judge Sogn. *Id.* She explained that most of her scheduling communication occurs via email. *Id.*

Exhibit 2 was admitted at the hearing. SR 346. This exhibit included various email communications that took place between Anderson, Judge Sogn, the State and defense counsel. SR 345-46, SR 30-36. Anderson explained that part of the email communication include attorney de Castro seeking a motions hearing. SR 345. Anderson testified that the motion hearing was set for January 29, which is after the trial date. SR 345-46. She explained that as a result of the motion hearing date, she had to reschedule all the other dates. There was no objection raised by any of the parties. She asked de Castro to submit a Motion for Delay. SR 346.

State's Exhibit 1, an Affidavit from attorney de Castro, was also admitted at the hearing. In part, the affidavit stated that "I was aware that the December trial date set at the arraignment was being continued to accommodate scheduling the hearing. It does not appear I emailed a

Delay Motion to court administration." SR 37. Anderson concluded her testimony by informing the court that the State had never requested any delay during the pendency of the case. SR 346.

Defense counsel acknowledge that de Castro filed motions for a private investigator and a competency evaluation. SR 356. The trial court then summarizes the facts by stating:

> "Court Admin schedules that hearing at the request of Mr. Long's attorney, and as part of that, give new trial dates to everyone, and is asked to submit the motion for delay, but doesn't follow through with that. How do we hold that whole process against the State and not exclude that from the 180, since it was all done at the request of Mr. Long's attorney?"

SR 356-7.

This Court has held that "[w]here a defendant assents to a period of delay and later attempts to take advantage of it, courts should be loathe to find a violation of an accused's speedy trial rights." *State v. Cottrill*, 2003 S.D. 38, ¶ 11, 660 N.W.2d 624, 630 (citing *Hays v. Weber*, 2002 S.D. 59, ¶ 23, 645 N.W.2d 591, 599).

In the trial court's Decision Regarding Issues Relating To 180-Day Rule it held that the 180-day period began on September 21, 2018, when Defendant "first appeared before a judicial officer . . ." SR 43, 46. It further held that the time between January 2, 2019 to April 1, 2019 should be excluded from the 180-day calculation. The exclusion resulted from defense counsel's request for a motion hearing. The rescheduled motions hearing date (January 29) was consented to by all

parties. SR 47. The court cited SDCL 23A-44-5.1(4)(b)[6] as the statutory basis for the ruling. The court explained that no written order approving the continuance had been entered because de Castro had not submitted a written motion for delay per the November 16, 2018 emails. SR 47. The court further held that SDCL 23A-44-5.1(4)(b) does not state that a written order must be entered.

The trial court also cited the competency evaluation motion filed by defense counsel, and ordered by the court, as another reason to exclude the time between January 2, 2019 to April 1, 2019 from the 180-day calculation. SR 48 (#38). At the January 29, 2019 hearing, the judge was informed that Long "had been refusing to cooperate with the evaluator regarding the psychiatric examination. As a result, the examination had not been completed." SR 46 (#27), 684-86, *See also* SR 48 (#38). The trial court held that "even if the trial date had not been continued at the request of or with the consent of Mr. Long's attorney, per the November 16, 2018 emails, the trial could not have

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[6] 23A-44-5.1

(4) The following periods shall be excluded in computing the time for trial:

(b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent . . . .

taken place on January 2, 2019." SR 48 (#38). The court cited SDCL 23A-44-5.1(4)(a)[7] as its authority for the time exclusion. SR 48.

In the alternative, the law allows for the trial court to exclude certain delays from the 180-day period upon a showing of "good cause." SDCL 23A-44-5.1(4)(g). The trial court in this case found good cause and cited Findings of Fact 13-18, 22, 27 and 31-32 in his Decision Regarding Issues Relating To 180-Day Rule. SR 43-46.

The trial court's findings are not clearly erroneous concerning the reasons determined for good cause delay. *State v. Pellegrino*, 1998 S.D. 39, ¶ 23, 577 N.W.2d 590, 599. Some days are correctly excluded resulting from defendant's conduct, "such as delay caused by pretrial motions . . . [and] defendant's competency examination . . . ." *Two Hearts*, 2019 S.D. 17, ¶ 10, 925 N.W.2d at 509 (citing *Webb*, 539 N.W.2d at 95); SDCL 23A-44-5.1(4)(a)-(f). The Court correctly excluded the time between January 2, 2019 to April 1, 2019, from the 180-day calculation.

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[7] 23A-44-5.1

(4) The following periods shall be excluded in computing the time for trial:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions brought under § 23A-8-3; motions for a change of venue; and the time consumed in the trial of other charges against the defendant . . . .

III

THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND FOR THE JURY TO FIND DEFENDANT GUILTY OF SECOND-DEGREE MURDER.

A. Introduction.

Defendant argues that the circuit court erred when it denied his motion for judgment of acquittal. Defendant specifically claims, "Because the jury acquitted on First Degree Murder, and there was no evidence of a depraved heart, Long's Motion for Judgement of Acquittal on Second Degree Murder should have been granted . . . [and] [t]he verdict on Murder in the Second Degree should be vacated . . . . " DB 32.

This Court has held that "'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.'" *State v. Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d 900, 904 (quoting *State v. Martin*, 2017 S.D. 65, ¶ 6, 903 N.W.2d 749, 751).

B. Standard of Review.

This Court reviews "'the denial of a motion for acquittal de novo.'" *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at 904 (quoting *State v. Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d 327, 330). When tasked with such a review, it must "'determine whether the evidence was sufficient to sustain the conviction.'" *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at

904 (quoting *Guthmiller*, 2014 S.D. 7, ¶ 21, 843 N.W.2d 364, 371). It must "'ask 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.'" *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at 904. When conducting its review, "this Court 'will not resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence[,]'" because those tasks rest solely with the trier of fact. *Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d at 330 (quoting *State v. Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83).

C. The Circuit Court Did Not Err by Denying Defendant's Motion for Judgment of Acquittal.

The crime of Murder in the Second Degree is set out in SDCL 22-16-7 as:

> Homicide is murder in the second degree if perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child.

The trial court correctly set out the elements of Murder in the Second Degree in Jury Instruction number 23:

> The elements of the crime of Murder in the 2nd Degree as charged in Court 2 of the indictment, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged:
>
> 1. The defendant caused the death of Lakendrick Thornton;

2. The defendant did so by an act imminently dangerous to others evincing a depraved mind, without regard for human life;
3. The defendant acted without the design to effect the death of Lakendrick Thornton.

SR 279.

The testimony at trial included an eyewitness who saw Defendant shoot Key Key (Lakendrick Thornton) in the chest. SR 735, 824. Ayom also saw the shooting. Dr. Snell testified that the cause of Key Key's death was a gunshot wound to the chest. SR 1093.

Defendant states that since "the jury found the element of premeditation was not met, [thus Defendant should be] guilty of Manslaughter in the First Degree . . ." DB 30. Defendant's predicates his argument on the fact that a not guilty verdict for First Degree Murder prevents the jury from finding the "depraved heart (sic)" element was met for Second Degree murder. DB 30-31. He supports his argument by claiming that, "if the jury believed that Long pulled a gun directly on Thornton and pulled the trigger while only pointing directly at Thornton, and yet determined that was not premeditated murder, then this was Manslaughter . . . not Murder in the Second Degree." DB 30. Defendant is incorrect in this assertion. In *State v. Stone*, 2019 S.D. 18, 925 N.W.2d 488 *reh'g denied* (Apr. 16, 2019), this Court held that:

> The State provided evidence showing that Stone intentionally shot White Eyes in the head at close range. This evidence was sufficient for a prima facie case of second-degree

> murder. *See Kleinsasser,* 2016 S.D. 16, ¶ 24, 877 N.W.2d 86, 95; *Laible*, 1999 S.D. 58, ¶ 14, 594 N.W.2d at 333.

Stone, 2019 S.D. 18, ¶ 45, 925 N.W.2d at 502, *reh'g denied* (Apr. 16, 2019).

The trial court correctly defined the term "depraved mind" in Jury Instruction number 24:

> 'Evincing a depraved mind, regardless of human life' means conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but a lack of regard for the life of another.

SR 280.

The testimony at trial sets forth a record of Defendant manifesting a depraved mind. Roubindeaux testified that she wanted Key Key out of the car. When he would not get out of the car, Defendant responds by pulling out a gun. SR 733. This extreme reaction is clearly "an act imminently dangerous to others evincing a depraved mind, without regard for human life." SR 279.

Defendant also claims that the jury cannot find he had a "depraved heart (sic)" because "[t]here was no evidence at trial that Long was intentionally waiving the gun around . . ." DB 31. Ayom testified to the contrary. She said that right before he was shot, Key Key said to Defendant, "You're not going to keep on waving that gun around . . . ." SR 824. Ayom also said that Long had put the gun to her head at one point before he eventually shot Key Key. *Id.* Defendant's conduct was

clearly "an act imminently dangerous to others evincing a depraved mind, without regard for human life."

This Court must determine if the State "made a prima facie case from which [the trier of fact] could reasonably find the defendant guilty." *State v. Sabers*, 442 N.W.2d 259, 266 (S.D. 1989). From the above facts in evidence, viewed "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." *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at 904. This Court has held that "'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.'" *Quist*, 2018 S.D. 30, ¶ 13, 910 N.W.2d at 904 (quoting *Martin*, 2017 S.D. 65, ¶ 6, 903 N.W.2d at 751). Further, this Court does not "evaluate the weight of the evidence" as that task is solely the jury's in this case. *Traversie*, 2016 S.D. 19, ¶ 9, 877 N.W.2d at 330 (quoting *Brim*, 2010 S.D. 74, ¶ 6, 789 N.W.2d at 83).

Because the State presented sufficient evidence to establish a prima facie case that Defendant committed Murder in the Second Degree (SDCL 22-16-7). The circuit court did not err when it denied Defendant's Motion for Judgment of Acquittal.

CONCLUSION

The State respectfully requests the circuit court's judgment and 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 9,726 words.

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

Dated this 20th day of December 2019.

/s/
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this December 20, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Henry Francis Little Long* was served via electronic mail upon Kristi Jones at kristi@dakotalawfirm.com.

/s/
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 29002

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.
HENRY FRANCIS LITTLE LONG
Defendant and Appellant.

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

THE HONORABLE JON SOGN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on the 5th day of May 2019

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I. THE TESTIMONY, AND SUBSEQUENT IMPEACHMENT, OF WALKING EAGLE VIOLATED THE RULES OF EVIDENCE, ESTABLISHED CASE LAW, AND THE CONSTITUTION.

In review of the State's brief regarding Walking Eagle's testimony, the State seemingly ignores several key arguments proffered by Long in support of his contention that this testimony and impeachment was improper. The manner in which the State was allowed to question and impeach Walking Eagle violated three separate rules of evidence, and on appeal, Long's arguments are largely unrefuted.

A. REFRESHING RECOLLECTION

First, the State argued that Walking Eagle was appropriately allowed to review her video interview with the detective under SDCL 19-19-804(b)(6) because in the video, Walking Eagle made statements about Long threatening her, making her afraid to testify. The record in its entirety does not demonstrate that Walking Eagle was afraid or threatened by Long and therefore unwilling to testify. The State further cited *State v. Huber* in support of this argument. 2010 S.D. 63, ¶¶47-49, 789 N.W.2d 283, 298. However, *Huber* dealt with statements from a victim of a murder who was declared unavailable at trial, not an available witness that was seemingly hostile. Further, the Circuit Court in this case performed an analysis under Rule 804, and correctly declared that the requirements of this "unavailable witness" rule were not met. (JT, Vol. 5, pages 17-18). The Circuit Court

allowed Walking Eagle to review the video and be question on the same under Rule 803(5).

Walking Eagle stated the recording would not refresh her recollection, reviewed the evidence nonetheless, and maintained she still did not have recollection. Despite this, the State was allowed to continue questioning her on an interview she did not recall and never adopted. She never assented to anything regarding this interview, and accordingly, continued questioning was prohibited by the rules of hearsay, and the Circuit Court abused its discretion in permitting this line of questioning by the State.

B. IMPROPERLY IMPEACHING

The State noted in its brief that "The State asked Detective Mertz many of the questions that Walking Eagle had previously denied." (State's Brief page 22). This overly simplistic view of the record misses the issue. The record shows that Walking Eagle was questioned four times with lengthy argument in between each examination. After she was questioned a third time, the Court ruled that the State could impeach her under prior inconsistent statements. Knowing Walking Eagle would deny every statement already deemed by the Circuit Court to be hearsay, the State then went back again and asked questions specifically outlining every detail Walking Eagle gave to Detective Mertz – every statement that the Circuit Court had already declared otherwise inadmissible hearsay. This Court's precedence does not allow this type of subversive trial practice.

State v. Rufener set precedent for circuit courts to prohibit parties from using impeachment as a subterfuge to get otherwise inadmissible hearsay statements before the jury. 401 N.W.2d 740 (S.D. 1987). The State argues that this case is different from *Rufener* because unlike *Rufener*, the State did not know how Walking Eagle would testify prior to calling her. This is a slight distinction without difference. Though the State may not have known that Walking Eagle was going to deny everything when she was initially called to testify, by the time the improper impeachment statements were elicited, the State was well aware of her denials. In fact, despite being uncooperative the first time she was on the stand, Walking Eagle was specifically recalled a second time in order to get her denials before the jury. Even more, when the State knew that Detective Mertz would be called to impeach Walking Eagle, the State line-itemed their questions directly from her interview. Every statement Walking Eagle gave to the detective was back-doored into the trial under the guise of impeachment. Had the State actually wanted to attack Walking Eagle's credibility, it could have done so with the questions that had already been asked without delving into every hearsay statement in the interview.

The State also contends that all impeachment requirements, including a limiting instruction, were met here. However, this does not take into account the *Rufener* Court's examination of the curative effect of the limiting

instruction, and the notion that not all limiting instructions will "atone for the overreaching of the prosecutor." *Rufener*, 401 N.W.2d at 744.

When Walking Eagle was questioned that final time about every detail and alleged admission that Long made to her, the State knew that she would deny those statements and Detective Mertz would impeach her. These statements were not elicited for the purpose of impeaching Walking Eagle but to back-door inadmissible hearsay, and the curative instruction cannot atone for the overreaching of the State in this case.

C. IMPROPERLY BALANCING PROBATIVE V. PREJUDICIAL

In response to Long's contention that the impeachment testimony of Walking Eagle was more prejudicial than probative, the State relied on other evidence presented in the trial and declared Walking Eagle's testimony and impeachment "cumulative." (State's Brief page 26). This is not accurate. The information that was allowed through impeachment was purported admissions from Long – this was not cumulative evidence.

The State did call one other witness, Roubideaux, who stated she witnessed Long shoot Thorton. However, Roubideaux's veracity was put into question several times during her testimony, *i.e.* she initially lied to detectives about her involvement. She also seemingly was not interested in testifying as shown by the court having to direct her more than once to answer questions. Her credibility was for the jury to determine, but nothing she stated on the stand was cumulative to the impeachment testimony

elicited from Detective Mertz. As to the State's other lay witness, Ayom never stated that Long shot Thorton and she never identified him in court. All other evidence presented was circumstantial evidence for the jury to determine, but none of it was cumulative to Long's alleged admissions.

However, in making this cumulative evidence argument, the State again misses the crux of Long's argument. Here, the statements in question were being offered only for the purposes of attacking Walking Eagle's credibility – that would be the only probative value. However, the statements that were admitted as impeachment consisted of Long's purported admission to the murder of Thorton, which is the highest level of prejudice any evidence could have in this trial. These "impeachment statements" are so inflammatory as to persuade the jury by illegitimate means. Statements not just unfairly prejudicial, but statements containing the most prejudice conceivable versus the only possible probative value being to call Walking Eagle a liar. The balancing test was not satisfied here, and this evidence was inappropriately admitted.

CONCLUSION

In an effort to be brief, Long did not reiterate all important arguments in this brief, and relies on arguments in his initial brief that demonstrate the Circuit Court abused its discretion in allowing the testimony and impeachment of Walking Eagle under Rules of Evidence. The Circuit Court further erred in tolling the 180-days, erred in not granting Long's Motion for

Judgment of Acquittal on Second-Degree Murder because the required element of depravity of mind by proof beyond a reasonable doubt was not present. Accordingly, Long respectfully requests this Court reverse the Circuit Court and remand this case for further proceedings.

Dated this 21st day of January, 2019.

Respectfully submitted,

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1. I certify that appellant's rely brief is within the typeface and volume limitations provided for in S.D.C.L. § 15-26A-66(b) using Century Schoolbook typeface in proportional 12-point type. Appellant's brief contains 1,208 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of January, 2020 a true and correct copy of the foregoing brief was served on the Attorney General's Office via email to atgservice@state.sd.us

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