IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. Appeal No. 29020

JOSE ANIBAL QUINONES-RODRIGUEZ,
Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Day County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPELLANT'S BRIEF

Notice of Appeal was filed on June 5, 2019.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

JURISDICTIONAL STATEMENT[1]

The appellant, Jose Anibal Quinones-Rodriguez ("Rodriguez"), appeals from the trial court's Judgment of Conviction dated May 28, 2019. Notice of Appeal was filed on June 5, 2019. Jurisdiction is proper pursuant to SDCL § 23A-32-2.

QUESTIONS PRESENTED

I. Whether the trial court erred by failing to properly dispose of Rodriguez's pretrial motion to suppress evidence prior to, during, or after the court trial.

The trial court failed to dispose of Rodriguez's pretrial motion to suppress evidence. The trial court determined it would handle these matters as they came up at trial. When the motion was raised during the trial, the court simply denied the motion without directing the prevailing party to draft proposed findings of fact and conclusions of law. Further, the trial court failed to make and findings of fact or conclusions of law on the record when it denied Rodriguez's motion. The matter must be sent back to the trial court for proper findings of fact and conclusions of law.

Authorities: SDCL 23A-8-3; SDCL 23A-8-8; State v. Hartley, 326 N.W.2d 226 (S.D. 1982); State v. Holiday, 335 N.W.2d 332 (S.D. 1983).

II. Whether the trial court abused its discretion in denying the Defendant the ability to question certain witnesses as adverse witnesses.

The trial court's decision to deny the Defendant the ability to question certain witnesses as adverse witnesses was in error. Prior to trial, the defense noticed Brandon Kroll as a third-party perpetrator. The trial court, being aware of the notice, denied the defense's request for Kroll to be declared an adverse witness. The trial court again

[1] References to the Settled Record will be made as "SR at ____." References to the court trial will be made as "CT at ___," with the appropriate page and line numbers included. References to the April 16, 2019 motion hearing will be made as "MH at ___," with the appropriate page and line numbers included.

denied the defense's request for Special Agent Neitzert, who is employed and paid by the State of South Dakota, to be declared an adverse witness. In both instances, the trial court abused its discretion by denying the defense's requests.

Authorities: SDCL 19-19-611(c); In re Estate of Heer, 316 N.W.2d 806 (S.D. 1982).

III. Whether the defendant's right to confront and cross-examine witnesses was violated by the trial court's admission of unavailable witness testimony.

Rodriguez has a constitutional right to confront witnesses against him, and this right was violated by the trial court when it admitted the testimony of unavailable witnesses. The trial court allowed the transcript of one unavailable witness's interview with law enforcement to be admitted into evidence, despite that those statements to law enforcement were testimonial, and the defense had no opportunity for cross-examination. Further, the trial court erred when it allowed the prosecution to make an offer of proof with respect to another unavailable witness's statements to law enforcement in order to determine whether those statements could be admitted under a hearsay exception. This allowed the trial court to hear the witness's statements, without affording the defense any opportunity to properly cross-examine the witness on her statements. The trial court's errors resulted in a clear violation of the defendant's Sixth Amendment right to confront and cross-examine witnesses.

Authorities: Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004); Davis v. Washington, 547 U.S. 813 (2006); State v. Podzimek, 2019 SD 43 ; State v. Vargas, 2015 SD 72.

IV. Whether the evidence was insufficient to support the trial court's decision on each count.

The evidence presented against Rodriguez was insufficient and did not support a reasonable theory that he committed the charges against him. The trial court failed to base its findings on the evidence presented, or lack thereof, and instead made assumptions when determining a verdict on all counts. Specific examples include: 1) the trial court's determination that Gaver Glover was a credible witness, despite his contradictory and uncorroborated testimony; 2) the prosecution's failure to connect Rodriguez to the murder weapon; and 3) the prosecution's failure to establish that Rodriguez was responsible for starting the fire at the apartment. Instead of acknowledging that the prosecution failed to meet its burden in this case, the trial court simply made assumptions to determine a verdict.

Authorities: State v. Janklow, 2005 SD 25, 693 N.W.2d 685 (2005); State v. Martin, 2017 S.D. 65, 903 N.W.2d 749; State v. Running Bird, 2002 SD 86, 649 N.W.2d 609.

V. Whether the cumulative effect of trial court's errors deprived Rodriguez of his right to a fair trial.

The collective errors by the trial court severely hampered Rodriguez's right to a fair trial. Though not entitled to a perfect trial, Rodriguez was certainly entitled to a fair one. Due to the trial court's errors, the defendant was denied this right.

Authorities: McDowell v. Solem, 447 N.W.2d 646 (S.D. 1989); State v. Davi, 504 N.W.2d 844 (S.D. 1993); State v. Smith, 477 N.W.2d 27 (S.D. 1991).

STATEMENT OF THE CASE

This case is an appeal from a judgment of conviction entered on May 28, 2019. On March 2, 2018, Rodriguez was indicted on charges of first-degree premeditated murder, first degree felony murder, second degree murder, first degree arson, first degree burglary, commission of a felony while armed with a firearm, and aggravated assault in

Day County, South Dakota. Rodriguez's trial was held on May 13 through May 28, 2019.

Prior to trial, Rodriguez knowingly and voluntarily waived his right to a jury trial. Rodriguez also filed a motion to suppress evidence, specifically his statements to law enforcement during questioning. Prior to the court trial, the Honorable Richard A. Sommers indicated that all pre-trial evidentiary motions would be handled during the trial as they came up.

A court trial was held in front of Judge Sommers. After both sides rested, Judge Sommers found Rodriguez guilty of first-degree murder, second degree murder, first degree arson, commission of a felony while armed with a firearm, and aggravated assault. The charge of first-degree burglary was dismissed by the prosecution. Rodriguez filed a timely notice of appeal on June 5, 2019.

STATEMENT OF THE FACTS

On February 9, 2018, a report of an apartment fire was called in by Terry Schwabe ("Schwabe"), a newspaper delivery driver, who was traveling east on US Highway 12 near Andover, South Dakota around 1:30 a.m. (CT at 19:10-12). Schwabe was delivering newspapers for the Aberdeen American News. (CT at 17:5-6). After calling in the fire, Schwabe left Andover in a hurry prior to law enforcement or the fire department arriving. (CT at 20:1-25).

Day County Deputy Sheriff Jerred Schreur ("Deputy Schreur") responded to the fire as soon as the 911 call came in. (CT at 26:23 – 27:1). While driving to Andover, Deputy Schreur could see the glow of the fire. (CT at 28:2-4). By the time Deputy Schreur arrived at the apartment complex in Andover, the fire was engulfing one side of

the apartment. (CT at 28:7-8). While securing the scene, Deputy Schreur identified Tawny Rockwood's ("Rockwood") van sitting outside the apartment complex. (CT at 31:13-25). Rockwood was the only occupant of the apartment complex at the time of the fire. (CT at 32:7-16).

Prior to February 9, 2018, Deputy Schreur, who drives by the complex every day on his way to work, observed Rodriguez's pickup parked outside the apartment complex from time to time. (CT at 34:9-36:12). Deputy Schreur provided Rodriguez's name to the Aberdeen Police Department to make contact with Rodriquez. (CT at 39:2-9). Later in the morning on Feburary 9, 2018, Deputy Schreur contacted South Dakota Division of Criminal Investigation Special Agent Brandon Neitzert ("Special Agent Neitzert") to inform him that the apartment complex fire in Andover seemed suspicious in nature. (CT at 43:10-17).

Once the fire was put out, Day County Sheriff Barry Hillestad ("Sheriff Hillestad") requested a search warrant for the apartment complex, eventually leading to the discovery of Rockwood's deceased body. (CT at 68:15-22). Upon discovering Rockwood, South Dakota Division of Criminal Investigation Special Agent Chris Konrad ("Special Agent Konrad") saw a circle-sized hole above her right eye, which appeared to be a bullet hole. (CT at 92:5-9). An autopsy was conducted on Rockwood. Rockwood was found to have died by two gunshot wounds to the head. (CT at 167:22-168:22).

Prior to the discovery of Rockwood's body, Rodriguez was located at this daughter's residence in Aberdeen, South Dakota. (CT at 107:24-108:18). Upon discovery, multiple officers descended on the residence. (CT at 132:6-14). Aberdeen Police Detective Kyle Fadness ("Detective Fadness") began to question Rodriquez. (CT

at 188:7-9). During the questioning, Detective Fadness knew Rodriguez only spoke Spanish, yet he refused to obtain an interpreter even though Detective Fadness admitted to having trouble communicating with Rodriquez. (CT at 205:13-209:18). After the questioning by Detective Fadness, officers collected clothing, shoes, a phone, and other items from Rodriguez. (CT at 213:5-9). The Aberdeen police officers then left the residence.

Eventually, special agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") returned to question Rodriguez again. (CT at 221:19-222-22). None of the ATF agents used an interpreter to assist with their questioning, which caused issues with what was being said and understood between the agents and Rodriguez. (CT at 242:4-7). Following the ATF agents questioning Rodriguez, they left the residence. Later that afternoon, Rodriguez was taken into custody by law enforcement for additional questioning, and was eventually arrested on a charge of aggravated assault. (CT at 235:23-237:9).

At trial, the court heard from 47 different witnesses, 37 of which were called by the prosecution. Immediately after the defense rested, Judge Sommers found Rodriquez guilty of first-degree murder, second degree murder, first degree arson, commission of a felony while armed with a firearm, and aggravated assault. Rodriguez was sentenced to life in prison, without parole, on May 28, 2019.

ARGUMENT

I. Whether the trial court erred by failing to properly dispose of Rodriguez's pretrial motion to suppress evidence prior to, during, or after the court trial.

On April 10, 2019, Rodriguez timely filed, as required by SDCL 23A-8-3, a motion to suppress evidence regarding certain statements made by the defendant to law enforcement during a custodial interrogation. (SR 664-665). This motion was set to be heard during a motion hearing on April 16, 2019 in front of the trial court and to preserve the suppression issue. During the April 16, 2019 motion hearing, the trial court stated, "[w]ell, obviously in a court trial a motion to suppress seems somewhat odd." The trial court continued by stating, "[i]t would strike me that it would be more appropriate to hold off on those issues until the time set for trial, and then a proper objection could be made and we could address it at that time." The settling of any pretrial motions during the court trial, including motions in limine, was agreed to by all parties during the April 16, 2019 motion hearing, per the trial court's request. (MH 4:7-5:21).

On May 14, 2019, during the court trial, the prosecution called Detective Fadness. Detective Fadness is the law enforcement officer who conducted the first interview with the defendant on February 9, 2018. (CT at 188:7-9). Detective Fadness questioned Rodriquez for an extensive period of time prior to requesting the assistance of a Spanish speaking interpreter. Rodriquez requested an interpreter 9 times during the first part of Detective Fadness's questioning. (CT at 205:13-209:18). Detective Fadness, by his own admission, had difficulty communicating with the Rodriguez. Id. Rodriquez only speaks Spanish.

Later that same day, Special Agent Kevin Wiese ("Special Agent Wiese") of the ATF, along with multiple other special agents from the ATF, returned to the defendant's residence. (CT at 221:19-222-22). Again, the special agents began questioning the defendant. During the questioning, ATF Special Agent Elizabeth McElroy ("Special

Agent McElroy") attempted to interpret the questions and answers to the defendant. The extent of evidence presented regarding Special Agent McElroy's Spanish speaking capabilities stem from a mission trip to Guatemala. (CT at 245:22-246:2). Special Agent Wiese indicated, "[s]o we each knew a little bit, but not enough to say where we'd speak the language." (CT at 225:2-9).

Following the testimony of Detective Fadness and Special Agent Wiese, counsel for defendant raised the motion to suppress issue with the trial court, specifically regarding the interviews with Detective Fadness and Special Agent Wiese. (CT at 246:20-247:5). These are the same interviews raised in the motion to suppress evidence filed by the defendant on April 10, 2019. (SR 664-665).

The trial court inquired whether defense counsel was renewing its motion to suppress evidence. Even though the motion to suppress evidence was never withdrawn by the Rodriguez, defense counsel indicated they were renewing the motion per the trial court's request. (CT at 246:20-247:5). After raising the issue during the actual court trial, as directed by the trial court at the April 16, 2019 motions hearing, the trial court denied Rodriguez's motion to suppress evidence by stating, "[t]hat motion would be denied." Id. That's it. At no point following the denial of Rodriguez's motion to suppress evidence did the trial court make any findings of fact or conclusions of law as required under SDCL 23A-8-8.

This Court, in State v. Holiday, 335 N.W.2d 332, 336 (S.D. 1983), specifically stated "SDCL 23A-8-3 mandates that motions to suppress evidence be raised before trial under penalty of waiver." Rodriguez filed the motion to suppress evidence on April 10, 2019 so it could be heard on April 16, 2019. Any evidence and findings regarding

Rodriguez's motion were deferred by the trial court until they were raised during the actual court trial. Rodriguez's motion to suppress was timely filed in accordance with SDCL 23A-8-3.

At the court trial, on May 14, 2019, Rodriguez timely raised the issue with the court and pointed out the testimony presented by Detective Fadness and Special Agent Wiese were the basis for the motion to suppress evidence that was previously filed on April 10, 2019. Without hesitation, the trial court denied the Rodriguez's motion to suppress evidence. In Holiday, this Court stated, "[a] motion made before a trial shall be determined before the trial unless the court, for good cause, orders that it be deferred…Where factual issues are involved in determining a motion, the court shall state its essential findings on the record." The trial court made no findings, either oral or written, as required by SDCL 23A-8-8.

Further, this Court previously stated in State v. Stumes, 90 S.D. 382, 241 N.W.2d 226 (S.D. 1982), that "with regard to the trial court's ruling on a suppression motion (confession), this court pointed out that 'absent the necessary findings of fact and conclusions of law which make up a "decision,"…this court's review is seriously hampered, if not made impossible….'" This Court also pointed out in State v. Hartley, 326 N.W.2d 226, (S.D. 1982) that it prefers "the entry of written formal and specific findings and conclusions," Id. at 228, "but we nevertheless recognized that verbal findings and conclusions made on the record are acceptable, noting however that such findings and conclusions must be such that there is no room for speculation and conjecture concerning what the trial court found or concluded." Holiday, 335 N.W.2d at 336.

The trial court in this matter did not make oral findings and conclusions on the record, nor did it direct the state, as the prevailing party, to make written findings and conclusions. The trial court failed to properly dispose of the Rodriguez's motion to suppress evidence. Therefore, the matter should be remanded back to the trial court for a determination of the factual issues and legal conclusions based upon the evidence presented.

II. Whether the trial court abused its discretion in denying the Defendant the ability to question certain witnesses as adverse witnesses.

SDCL 19-19-611(c) states, "Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. **Ordinarily, the court should allow leading questions:** (1) On cross-examination; and **(2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.** (emphasis added). During the defendant's case in chief, attorneys for the defense requested that two witnesses called to testify be treated as adverse witnesses. The requests were denied by the trial court.

The first witness was Brandon Kroll ("Kroll"). Kroll was noticed as a third-party perpetrator by the defense. Of course, the purpose of proposing a third-party perpetrator is to place the blame on an uncharged party. When it was requested that Kroll be declared an adverse witness the trial court denied the request. (CT at 736:20 – 737:3). One cannot think of a more adversarial status than a person being labeled as a third-party perpetrator in a first-degree murder trial. The trial court seems to determine that unless Kroll became an adverse party, he was not. While that may be true when determining when a witness becomes hostile, an adverse witness's status is determined based on evidence known prior to the questioning.

This Court stated in In re Estate of Heer, 316 N.W.2d 806, 812 (S.D. 1982), that it was error for the trial court to prevent the use of leading questions when there is sufficient evidence to create an "adverse witness" status. The evidence to gain adverse witness status was not gleaned from any witness's testimony, but rather from his position based on evidence known prior to any substantive questioning. In the case at hand, Kroll was being blamed for first-degree murder, among other charges. The trial court was certainly aware of this by way of the defendant's notice of third-party perpetrator evidence. (SR 662). The ability to properly question Kroll about the defense's investigative findings relating to his relationship with the victim was crucial to its case. Denying the defendant the opportunity to use leading questions was prejudicial.

The second witness was Special Agent Neitzert. Special Agent Neitzert was the lead detective on the case for the Department of Criminal Investigation. Certainly, Special Agent Neitzert identified with an adverse party as he works and is being paid by the State of South Dakota. The trial court uses the same reasoning it used with Kroll. (CT at 777:11-778:6). Again, this reasoning is misplaced. Preventing the defense from treating the lead agent on a first-degree murder case as an adverse witness is clear error by the trial court and prejudicial to the defendant's ability to defend the charges against him.

III. Whether the defendant's right to confront and cross-examine witnesses was violated by the trial court's admission of unavailable witness testimony.

a. Agnes Quinones Rios

During the trial in this matter, Agnes Quinones Rios ("Rios"), the daughter of the defendant, was called as a witness. During her questioning, she claimed to be under the

influence of drugs at the time she was interrogated by law enforcement and does not remember anything. Per the prosecution's request, Rios was declared unavailable as a witness prior to the defense having an opportunity to cross-examine her. Following the trial court's finding of Rios as unavailable, the prosecution moved to enter a transcript of Rios's interrogation with law enforcement into evidence. The trial court allowed the transcript to be admitted over the defense's proper and timely objections. (CT at 498:5-508:19).

"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. Podzimek, 2019 SD 43, ¶12; s*ee also* Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). The question of whether a defendant's Sixth Amendment right to confrontation was violated is a constitutional question which is reviewed de novo. Id. at ¶13.

"The United States Supreme Court has held that the Confrontation Clause of the Sixth Amendment of the United States Constitution 'bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."'" State v. Vargas, 2015 SD 72, ¶25. It is undisputed that the trial court found Rios unavailable as a witness under SDCL 19-19-804(3).

Following the trial court's declaration, the prosecution moved to have a transcript of Rios's interview with law enforcement admitted into evidence. The defense properly objected, citing the Confrontation Clause and that her statements to law enforcement

were testimonial. (CT at 504:17-506:6). The objection was overruled, therefore allowing the testimonial statements of Rios into evidence and foreclosing the opportunity for the defense to properly cross-examine Rios on those statements. One cannot cross-examine an unavailable witness.

Whether a statement is testimonial is not fully defined. However, the Crawford Court did explain that, at a minimum, a police interrogation and prior testimony at a preliminary hearing, grand jury, and a former trial all qualify as testimonial. Two years later, in Davis v. Washington, 547 U.S. 813 (2006), the Supreme Court provided a bit of guidance for when a statement qualifies as testimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The distinction then is the difference between a testimonial statement (for which the Confrontation Clause forbids admittance under any circumstance) and nontestimonial statements (which are subject to the hearsay analysis set forth by the prosecution at trial). As the Seventh Circuit Court of Appeals put it: "The Constitution restricts the admission of the former type of out-of-court statement, while only the rules of evidence restrict the latter." United States v. Watson, 525 F.3d 583,589. The majority of federal circuit courts have ruled the same. United States v. Tolliver, 454 F.3d 660, 665 (7th Cir. 2006); United States v. Underwood, 446 F.3d 1340, 1347-48 (11th Cir. 2006); United

States v. Hendricks, 395 F.3d 173, 182-84, 46 V.I. 704 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004).

The distinction between testimonial and nontestimonial statements has been recognized by the South Dakota Supreme Court. *See e.g.* State v. Hermann, 2004 SD 53, 679 N.W.2d 503. The Hermann decision recognized that Crawford changed the law regarding out of court statements as relates to testimonial statements in criminal cases. *Id*. at ¶ 21. It is important to recall that this decision predates the United States Supreme Court decision in Davis, which further defined what constitutes a testimonial statement.

It is clear that Rios's statements are testimonial. At the time of the interrogation, Rios was transported by law enforcement to the police station, placed into an interrogation room, and was questioned by federal agents. There was no ongoing emergency as investigators had already located the body of Rockwood, the victim, at the time of questioning. Clearly, the purpose of the interrogation was to establish or prove past events potentially relevant to the later criminal prosecution of her father, the defendant. Therefore, once the Court declared Rios unavailable, there is not a basis for the alleged statements to be admitted.

The Court's admission of the transcript of Rios after it found her to be unavailable violates Rodriquez's right to confront the witnesses against him. Admission of the transcript allowed the court to consider testimonial statements, which were of significant value to the prosecution's case, without the ability to cross-examine the witness by the defense. This is a clear violation of the defendant's Sixth Amendment rights.

b. Jamie Farmer

Following the death of Rockwood, Jamie Farmer ("Farmer"), the ex-girlfriend of the defendant, was questioned by law enforcement regarding the purchase of a firearm. Farmer was subpoenaed by the prosecution to testify at the trial but failed to comply and did not appear. As a result of Farmer's failure to appear, the prosecution questioned Special Agent Neitzert, the law enforcement officer who spoke with Farmer, about his attempts to locate Farmer and his interview with her. (CT at 350:10-352:8).

Following some preliminary questions, the prosecution asked the trial court to declare Farmer unavailable under SDCL 19-19-804(b)(5). The trial court declared Farmer unavailable, but allowed the prosecution to make an offer of proof regarding Farmer's statements to determine if they could be admitted under one of the hearsay exceptions. The defense's proper objections to the offer of proof were overruled by the trial court. (CT at 352:9-355:15).

The trial court's determination that the prosecution could move forward with an offer of proof is misplaced. The trial court's first determination should have been whether the statements of Farmer were either testimonial or nontestimonial. Such a determination could be made by the information gained from the prosecution's preliminary questions to Special Agent Neitzert.

The questioning of Farmer was an interrogation to establish or prove past events potentially relevant to the criminal prosecution of the defendant. Clearly, the statements by Farmer are testimonial and the offer of proof of whether they meet a hearsay exception was not necessary or relevant. The trial court's decision to allow the offer of proof allowed the trial court to hear Farmer's statements about the purchase and location

of the firearm, neither of which the defense was able to refute through cross-examination due to the unavailability of Farmer. Again, such conduct violated the Sixth Amendment rights of the defendant.

IV. The evidence was insufficient to support the trial court's decision on each count.

When reviewing the sufficiency of the evidence, this Court considers the evidence in a light most favorable to the verdict. It does not resolve conflicts in the evidence, rule on the credibility of the witnesses, inquire as to the plausibility of an explanation, or weigh the evidence. State v. Janklow, 2005 SD 25, ¶ 16, 693 N.W.2d 685 (2005); State v. Running Bird, 2002 SD 86, ¶ 19, 649 N.W.2d 609. A guilty verdict will be set aside whenever the evidence submitted fails to demonstrate a reasonable theory of guilt. State v. Martin, 2017 S.D. 65 ¶ 6, 903 N.W.2d 749.

In this case, the evidence did not support a reasonable theory that Rodriguez committed any of the charges he faced. It was clear from its closing comments that the trial court's findings were not based upon evidence actually presented but instead upon assumptions and conjecture designed to sustain a conviction. Most egregiously, the trial court deemed Gaver Glover ("Glover") a credible witness. This despite the fact that Glover's testimony was thoroughly debunked under cross-examination and, in many instances, contradicted other evidence introduced by the prosecution.

Further, the trial court determined that the prosecution had proven a connection between the gun that it claimed was used and Rodriguez. In order to reach this conclusion, the trial court ignored several deficiencies in the evidence, including the fact that Glover never actually identified the gun that the prosecution deemed to be the

murder weapon. In addition, it was undisputed that Rodriguez could not have disposed of the gun in the dumpster in which it was found.

Finally, the evidence as to the arson charge was wholly devoid of anything to support Rodriguez's conviction. The prosecution appeared to have changed its theory in mid-trial based on witness testimony. When discussing the arson during closing, the prosecution merely stated that whomever committed the murder also likely committed the arson. The trial court's findings on this count was nothing more than speculation.

a. Gaver Glover's testimony was not believable.

In one of the most incredible statements made at the trial, the trial court determined that Glover was a credible witness. It noted that "very few criminal defendants . . . are immediately credible and honest with law enforcement. . ." (CT at 863:22-864:2). To be sure, this is a true statement. However, Rodriguez demonstrated repeatedly during cross-examination that Glover's version of the events changed nearly every time he spoke to law enforcement. Rodriguez also demonstrated that not a single relevant thing that Glover said about that night was corroborated by law enforcement prior to trial or by the prosecution at trial.

Glover claimed at trial that Rodriguez had said to him that he "fucked up" on the night of Rockwood's murder. (CT at 491:18-19). This is a statement that came to light after he had already been interviewed on two separate occasions. (CT at 492:20-493:3). It came during an interview in which he had been told repeatedly that he needed to give them something that could actually corroborate that Rodriguez had committed the murder. (CT at 801:19-21). Having already acknowledged his willingness to say whatever was necessary to get himself out of jail, Glover added this to his story to

implicate Rodriguez. Somehow, this addition not only escaped scrutiny but became damning evidence against Rodriguez. In context, the purpose of the statement is plainly obvious. Glover wanted to go home, and law enforcement needed something to bolster its case.

The prosecution introduced an affidavit at trial signed by Glover. In the affidavit, Glover stated that early in the evening on February 8, 2018, he received a phone call from Rodriguez. In the background, Glover heard Rockwood crying. (Exhibit 127). Glover never said this in any interview and, in fact, never said this at trial. (CT at 457:1-458:25). Nonetheless, it made its way into his affidavit, and he signed it.

Other notable parts of Glover's story also changed at trial. In two prior interviews with law enforcement Glover testified that Wilberto Quinones-Rodriguez ("Wilberto") picked up Rodriguez from Rios's residence on February 8, 2018. (CT at 473:21-24). They were together from approximately 8:00 p.m. or 9:00 p.m. until just before midnight. (CT at 476:16). At trial however, Glover no longer told that story. At trial, Wilberto did not pick up Rodriguez at all.

Glover also told law enforcement that just before Rodriguez gave him the gun, the two of them heard Rodriguez's phone number over a police scanner that they were using. (CT at 438:4-5). Yet nowhere during the trial was this corroborated. At no time did the prosecution establish that Rodriguez's number came over a police scanner that morning.

According to Glover, when Rodriguez gave him the gun, he stated that Wilberto would come over in the morning to pick it up. (CT at 442:5-7). When this did not happen, Glover began messaging Wilberto on Facebook. (CT at 442:13). These alleged Facebook messages were not introduced because they did not exist. Law enforcement

searched Glover's Facebook account for them but could not find them. When pressed why he did not call Wilberto that morning, Glover said he could not because he did not know Wilberto's number. At the same time, Glover admitted to making numerous phone calls to Wilberto the day prior. (CT at 480:12-15).

Nothing demonstrates the illegitimacy of Glover's testimony quite as well as his statements about returning the gun. Glover testified that when he did not hear from Wilberto, he went to Rodriguez's apartment and returned the gun himself. (CT at 443:2-3). His testimony at trial confirmed that on three separate occasions in the same interview he told law enforcement that he returned the gun just after 9:00 a.m. on February 9, 2018. (CT at 483:2-484:7). Both Detective Fadness and Aberdeen Police Detective Jeff Neal ("Detective Neal") testified that they arrived at Rodriguez's apartment at 8:50 a.m. (CT at 156:1; CT at 186:11).

Glover's testimony about returning the gun begs the question—how did he manage to return the gun to Rodriguez, and have a conversation with him, at the exact same time that law enforcement was interrogating Rodriguez? The answer, of course, is that it did not happen. Yet this discrepancy was never explained. The trial court simply chose to believe both Glover and law enforcement in order to sustain a conviction.

Other examples of Glover's inconsistencies abound. For example, when during its rebuttal at closing, the prosecution pointed out that Glover had testified about withdrawing cash from an ATM in Aberdeen. Exhibit 125 corroborated this withdrawal as taking place at approximately 10:14 p.m. (CT at 481:8-10). But what was never addressed by the prosecution was the fact that Glover also testified that he purchased a blunt from a local gas station and his bank records did not corroborate that. In fact, the

next transaction that would qualify as a debit was at 12:53 a.m., well after the time period in which Glover claimed to be smoking marijuana with another friend. (CT at 481:15-17).

In addition, Glover claimed in one of the interviews that he saw Rodriguez's identification card at the gas station when they bought beer, then on the stand he said he did not see it. (CT at 482:21-483:1). He claimed that Rodriguez was driving so fast that the trailblazer they were driving "slid into" the gas station parking lot. (CT at 482:18-20). The video introduced did not demonstrate that at all. Finally, Glover gave three different versions of the story regarding his return of the gun to Rodriguez on the morning of February 9, 2018. (CT at 805:13-15).

It was not just that Glover's statements were contradictory that should give this Court pause. It was that the prosecution produced nothing to substantiate or demonstrate his truthfulness. Examples of this include his claims not to have known Wilberto's phone number as well as his claim to have messaged him on Facebook on the morning of February 9, 2018.

Those were not the only opportunities for Glover's claims to be substantiated. He also told law enforcement about a Somalian that he met in prison. According to Glover, this Somalian told him that Rodriguez was working to frame Glover. (CT at 485:7-11). He said that this Somalian had a voicemail of Rodriguez and Rockwood arguing. (CT at 485:7-11). Later, Special Agent Neitzert testified that law enforcement located the Somalian and asked him about Glover's statement. (CT at 801:5-18). He flat denied any knowledge of it and did not have a voicemail recording as claimed by Glover. (CT at 801:5-18).

The trial court found Glover credible because he was the only person who could actually convict Rodriguez. Every other witness could provide, at best, evidence that incriminated but did not prove Rodriguez's involvement. Glover, however, could literally put a gun in Rodriguez's hands on the night Rockwood was murdered. As such, the trial court had to either deem Glover truthful or risk acknowledging that the prosecution had not met its burden. On review, this Court should correct the error made by the trial court and classify Glover as exactly what he was—an inconsistent, self-serving witness whose statements were not only not corroborated by the prosecution's evidence but in important respects were flatly contradicted by other evidence.

b. The prosecution failed to connect the murder weapon to Rodriguez.

One of the rights afforded every criminal defendant is the presumption of innocence. U.S. CONST. amend. V; U.S. CONST. amend. XIV. Included in this right is the requirement that the prosecution prove its case beyond a reasonable doubt. A criminal defendant need never prove his innocence. Rodriguez was essentially asked to do just this in regards to the murder weapon. The trial court's closing comments turned that presumption of innocence on its head. They indicate that the burden was on Rodriguez to prove that the murder weapon had somehow stayed with his girlfriend or otherwise left his possession. (CT at 862:8-863:5).

The prosecution introduced evidence that approximately one year prior to the incident, a woman Rodriguez dated, Farmer, bought a firearm. This woman never testified, but the prosecution suggested throughout trial that the gun was purchased for Rodriguez and was, in fact, Rodriguez's gun. Further, even though Rodriguez and the

woman separated, the gun allegedly stayed with Rodriguez. No one testified to any of this, it was just assumed to be true by the trial court.[2]

The prosecution called an expert in DNA to testify about three separate DNA patterns located on the grip of the murder weapon. Nothing in her testimony established that Rodriguez's DNA was one of the three found. This is surprising given that the prosecution tried repeatedly to demonstrate that Rodriguez was known to carry this exact type of firearm. If this were true it would seem likely that his DNA would be somewhere on it.

Unable to connect the gun by DNA, the prosecution turned to photographs and prior police reports. Exhibit 37 was a photograph of a black holster located inside the bed of Rodriguez's pickup truck. (CT at 99:14-16). A highway patrol officer, John Berndt ("Trooper Berndt"), testified about a traffic stop with Rodriguez in December of 2017. During an inventory search of the vehicle, Trooper Berndt located a .40 caliber magazine with bullets. (CT at 603:18-20).

Neither the photograph nor the report tied Rodriguez to the murder weapon. The holster in the photograph was never introduced. There was no testimony that the holster was seized by law enforcement and that it fit the murder weapon. Trooper Berndt testified that Rodriguez was driving another individual's vehicle and there was nothing to suggest he owned anything inside of it. (CT at 604:1-5). Trooper Berndt never asked Rodriguez anything about the items found inside nor did he ever try and locate the registered owner to ask her about them. (CT at 604:16-18).

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[2] Rodriguez contends that the trial court made these determinations based on the prosecution's introduction of testimonial statements made by Jamie Farmer. As argued elsewhere in this brief, those statements should never have been allowed.

At trial, the prosecution introduced photographs of a gun located in a dumpster in Aberdeen, South Dakota. With some significant assistance from the trial court, the prosecution had its firearm expert match the gun with a bullet taken from the scene of the murder. (CT 305:1-306:2). From there, the prosecution simply left it to the trial court to put the gun in Rodriguez's hands on the night of the murder. In fact, Glover never actually identified the murder weapon, even though he claimed Rodriguez gave it to him that night.

The trial court claimed witnesses testified that Rodriguez possessed the gun and even pointed it at people. It further stated that the "idea that somehow Mr. Kroll came into possession of that gun and used it to murder Tawny Rockwood is unsupported by any evidence that exists." (CT at 863:8-11). This fact, even if true, does not establish that Rodriguez kept the gun and used it to kill Rockwood. According to the firearm expert, the murder weapon was a very common gun. (CT at 303:20-21). Also, Glover himself testified that Rodriguez's apartment was robbed and everything was taken from it. (CT at 479:3-5). Although he did not recall the exact date of the robbery, Glover knew that "all of [Rodriguez's] stuff was taken." (CT at 479:3-5). This would necessarily have included the gun (if indeed Rodriguez possessed it at that time). No explanation was ever provided for this discrepancy in the prosecution's case.

The trial court did not even address the fact that the weapon could not have been placed in the dumpster by Rodriguez. Instead, it noted that Glover had identified the gun found in the dumpster as being the one Rodriguez gave to him the night of the murder. This is just not true. Glover was never provided even a photograph of the murder weapon to establish the connection to Rodriguez. He was just asked to describe it. He

described it as a black Smith and Wesson. (CT at 441:5-6). He had previously described it as a gray gun and had admitted to law enforcement in a prior interview that he did not know much about guns. (CT at 477:13-15). He disclosed that he had met with the prosecution the night before his testimony in order to go over it. (CT at 478:9-12). Unsurprisingly, at trial, he could identify it as a black Smith and Wesson. However, it does not explain why he previously described the gun as gray. Further, as mentioned, it also does not connect the gun Rodriguez allegedly gave Glover as being the actual murder weapon. Again, the prosecution's own expert testified that this model of gun was widely available.

Neither the prosecution nor the trial court were able to answer the critical question regarding how and when the gun was found. It was clear from the evidence that the gun was found inside a trash bag in a dumpster in Aberdeen. (CT at 805:20-25). It was also undisputed that inside the same trash bag was a receipt dated February 10, 2018. (CT at 806:3-5). This is significant because Rodriguez was arrested on February 9, 2018, and was in custody from that date forward. Even Special Agent Neitzert conceded that it would have been impossible for Rodriguez to have disposed of the gun. (CT at 806:13-22).

Special Agent Neitzert indicated that law enforcement had its "beliefs" about who put the gun in the dumpster but could not state with certainty who might have done it. The only person involved in the case who could officially be ruled out was the defendant. This is troubling. It bears repeating that Glover was adamant that he returned the gun to Rodriguez on February 9th and that it found its way into one of three locations inside the trailblazer. If that statement is to be believed, and if Detectives Neal and Fadness were

correct in their testimony, then there is an unresolvable conflict in the prosecution's case. Rodriguez was under near constant law enforcement supervision that day.

c. The prosecution never established that Rodriguez started the fire.

Regarding the arson charge, the trial court relied on its belief that the "fire was set in a fashion that probably delayed some type of immediate explosion. . ." (CT at 861:11-16). This assumption was made without any reference to any evidence or testimony and was based on nothing more than speculation. The trial court itself admitted that it was unclear where Rodriguez was at the time of the fire started.

The trial court's belief that the fire was set as a delayed explosion was not supported by the prosecution's case. Special Agent Konrad testified that no accelerants were located at the scene. No officer or expert testified that a delayed explosion took place. The prosecution offered no theory to support that Rodriguez started some type of controlled burn which then led to an explosive, fast-moving fire at a later time. Nonetheless, this finding made its way into the trial court's decision.

It was never made clear at trial when the fire was started. If anything, the prosecution attempted to prove at trial that the fire took place between 11:00 p.m. and 11:30 p.m. on February 8, 2018. It introduced a multitude of phone records from Wilberto and pointed out that his phone pinged off a tower near Groton, South Dakota at approximately 11:07 p.m. (CT at 537:11-15). There were two problems with that theory. The first one the prosecution likely anticipated. Wilberto's cell phone pinged off a tower on the west side of Aberdeen at approximately 10:49 p.m. and again in central Aberdeen at 11:50 p.m. Thus, he (or Rodriguez) would not have had sufficient time to travel 30 miles to Andover in icy conditions, start a fire, and return to Aberdeen by 11:50 p.m.

The second problem with this theory is one the prosecution could not have anticipated because of a critical mistake made by law enforcement in the days after the fire. Angela Locke ("Locke") lived in close proximity to Rockwood's residence. She was contacted by law enforcement in the days after Rockwood's death, but no meaningful attempt was made to speak with her about the night of the fire. At trial, Rodriguez called her to testify. According to Locke, she was working at 3M in Aberdeen until midnight on the evening of the fire. (CT at 714:7-25). Then she went to a local bar for roughly ten minutes before returning home to her residence in Andover. (CT at 715:6-7). She testified that sometime between 12:45 a.m. and 12:50 a.m. she was a half-block away from the apartment, that she looked right at the apartment, and that she saw no evidence of a fire. (CT at 715:9). In its findings, the trial court determined that Locke testified truthfully. (CT at 861:11-16).

The significance of Locke's testimony is heightened by the fact that the fire was reported at 1:30 a.m. and it was described by Deputy Scheuer as suspicious and large. (CT at 28:3-4; CT at 28:9; CT at 44:15-17). In addition, it is undisputed based on the prosecution's own evidence that Rodriguez was at a gas station in Aberdeen at 12:48 a.m. on February 9, 2018. There is simply no way that Rodriguez could have started the fire based on the evidence presented.

Locke's testimony forced the prosecution to adjust its theory. Other than Glover, the prosecution's case regarding the murder and arson was premised on the theory that Rodriguez shot Rockwood, then drove to Aberdeen to recruit Wilberto's help with disposing of the body. To this end, an excruciating amount of time was spent on the cell phone records of five individuals, among them Rodriguez and Wilberto. This was done

through the testimony of Jay Berni ("Special Agent Berni"). Special Agent Berni is an FBI agent who reviewed the cell tower data and concluded that Wilberto's phone utilized a Groton tower[3] at approximately 11:07 p.m.

Rodriguez had previously told officers that his phone broke early in the evening on February 8, 2018 and he did not have a phone thereafter. As a result, the prosecution implied throughout the trial a theory that either Wilberto assisted Rodriguez with the arson or that he gave Rodriguez his phone and Rodriguez returned to Andover with it. This theory was not supported by any evidence introduced. Wilberto testified that he never gave his phone to his brother. His girlfriend testified that Wilberto was home that night save for about 8:00 p.m. to 10:00 p.m. (CT at 593:16-19). She also stated he was using his phone that night to talk to her which was not usual because he spoke mostly Spanish and she spoke English. (CT at 594:7-15).

The prosecution's theory could have been proven in various ways. No one testified about talking to Rodriguez on his brother's phone that evening. Additionally, there are a multitude of businesses between Aberdeen and Andover that have video surveillance. No evidence was introduced depicting the Trailblazer traveling east that evening. None of the witnesses who testified supported the theory.

The trial court found that the "whereabouts" of Rodriguez and his brother "would have had ample time" to set the fire and return to Aberdeen. (CT at 861:17-23). Again, this is unsupported by the prosecution's case and places the burden on Rodriguez to establish his "whereabouts" during the evening rather than on the prosecution to establish his presence at the fire. It makes no sense in relation to the evidence that was introduced

[3] Groton, South Dakota is approximately 18 miles from Aberdeen and approximately 12 miles from Andover.

and makes less sense when one considers what evidence could have supported this charge.

In closing, the prosecution stated Rodriguez "could be convicted of the arson charge in connection with this matter due to the fact that the arson was a part of the crime of murder itself." (CT at 834:7-10). That might be true, but it does not justify a conviction for arson without sufficient evidence of how and when the fire started or how Rodriguez was able to be in two places at one time.

V. The cumulative effect of trial court's errors deprived Rodriguez of his right to a fair trial.

The Court has consistently held that "the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." State v. Davi, 504 N.W.2d 844, 857 (S.D. 1993); McDowell v. Solem, 447 N.W.2d 646, 651 (S.D. 1989). Although a defendant is not entitled to a perfect trial, he is entitled to a fair one. State v. Smith, 477 N.W.2d 27, 37 (S.D. 1991).

The errors cited herein meet the criteria previously laid out by this Court for retrial. Trial courts are rightly granted considerable discretion regarding the introduction of evidence at trial. However, in a case such as this one, with scant evidence against the defendant, those decisions take on even greater significance.

CONCLUSION

For the reasons set forth, this Court should reverse Rodriguez's convictions on each count and a new trial be granted.

REQUEST FOR ORAL ARGUMENT

Rodriguez hereby requests oral argument.

Respectfully submitted this 29th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 29 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service, is typeset in Times New Roman (12 pt.) and contains 8,109 words. The word processing software used to prepare this Brief is Microsoft Word 2019 for Windows 10 Pro.

Dated this 29th day of October, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellant Jose Anibal Quinones-Rodriguez, hereby certifies that on the 29th day of October, 2019, a true and correct copy of **APPELLANT'S BRIEF** was electronically transmitted to:

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Patricia Archer
Assistant Attorney General
South Dakota Attorney General's Office

and the original and two copies of **APPELLANT'S BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Microsoft Word format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 29th day of October, 2019.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. Appeal No. 29020

JOSE ANIBAL QUINONES-RODRIGUEZ,
Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Day County, South Dakota
The Honorable Richard A. Sommers, Presiding

A P P E N D I X

Notice of Appeal was filed on June 5, 2019.

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INDEX TO APPENDIX

FILED
MAY 28 2019
CLAUDETTE OPITZ
DAY CO. CLERK OF COURTS

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:ss	
COUNTY OF DAY	)	FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, vs. JOSE ANIBAL QUINONES RODRIGUEZ DOB: 10-29-1981 Defendant.	#18CRI18-000022 JUDGMENT OF CONVICTION

An Indictment was filed in this Court on May 2, 2018, charging the Defendant with the crimes of:

COUNT I: MURDER IN THE FIRST DEGREE (Premeditated Murder) in violation of SDCL 22-16-1(1) and 22-16-4(1), a Class A Felony;

COUNT II: MURDER IN THE FIRST DEGREE (Felony Murder) in violation of SDCL 22-16-1(1), 22-16-4(2) and 22-18-1.1, a Class A Felony;

COUNT III: SECOND DEGREE MURDER (SDCL 22-16-7), a Class B Felony;

COUNT IV: FIRST DEGREE ARSON (SDCL 22-33-9.1), a Class 2 Felony;

COUNT V: FIRST DEGREE BURGLARY (SDCL 22-32-1), a Class 2 Felony;

COUNT VI: COMMISSION OF A FELONY WHILE ARMED WITH A FIREARM (SDCL 22-14-12), a Class 2 Felony; and

COUNT IV: AGGRAVATED ASSAULT/DOMESTIC ABUSE (SDCL 22-18-1.1[1] and subject to SDCL 25-10-3.1), a Class 2 Felony.

The State dismissed Count II of the Indictment on March 20, 2018.

The Defendant was arraigned on said Indictment and received a copy thereof on the 20th day of April, 2018. The Defendant appeared personally and with his attorneys, Thomas J. Cogley and Joshua K. Finer. The State was represented by Day County State's Attorney Danny R. Smeins and Kelly Marnette, Assistant Attorney General. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges

filed against the Defendant including, but not limited to, the right against self-incrimination, the right to confrontation, and the right to a jury trial.

On April 20, 2019, the Defendant pled not guilty to the offenses alleged in Counts I, III, IV, V, VI, and VII of the Indictment. The Defendant requested a court trial on the charges contained in the Indictment.

A court trial commenced on the 13th day of May, 2019, on the charges. At the conclusion of the trial, the State dismissed Count V of the Indictment alleging First Degree Burglary and there was no objection by Defendant. On the 28th day of May, 2019, the Court returned verdicts of:

COUNT I: First Degree Murder (premeditated) in violation of SDCL 22-16-4(1) – Guilty.

COUNT III: Second Degree Murder, in violation of SDCL 22-16-7, – Guilty

COUNT IV: First Degree Arson, in violation of SDCL 22-33-9.1 – Guilty

COUNT VI: Commission of a Felony While Armed With a Firearm, in violation of SDCL 22-14-2 – Guilty

COUNT VII: Aggravated Assault/Domestic Abuse, in violation of SDCL 22-18-1.1(1) and subject to SDCL 25-10-3.1 – Guilty

It is therefore,

ORDERED, that a Judgment of Guilty is entered as to the following:

GUILTY of First Degree Murder (premeditated) in violation of SDCL 22-16-4(1), a Class A Felony, which offense was committed on or about February 8, 2018;

GUILTY of Second Degree Murder, in violation of SDCL 22-16-7, a Class B Felony, which offense was committed on or about February 8, 2018;

GUILTY of First Degree Arson, in violation of SDCL 22-33-9.1, a Class 2 Felony, which offense was committed on or about February 8, 2018 and February 9, 2018;

GUILTY of Commission of a Felony While Armed with a Firearm, in violation of SDCL 22-14-12, a Class 2 Felony, which offense was committed or about between February 8, 2018 and February 9, 2018; and

GUILTY of Aggravated Assault/Domestic Abuse, in violation of SDCL 22-18-1.1(1) and subject to SDCL 25-10-3.1, a Class 3 Felony, which offense was committed on or about between February 8, 2018 and February 9, 2018;

SENTENCE

On the 28th day of May, 2019, the Court asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, and Defendant consented to proceeding with sentencing, the Court thereupon pronounced the following sentences:

ORDERED that to the charge of First Degree Murder (premeditated) as alleged in Count I, the Defendant shall be incarcerated in the South Dakota State Penitentiary for life without parole; and it is further

ORDERED that no sentence is imposed to the charge of Second Degree Murder based upon the verdict and sentence imposed to the charge of First Degree Murder as alleged in Count I of the Indictment; and it is further

ORDERED that to the charge of First Degree Arson, as alleged in Count IV of the Indictment, the Defendant shall serve twenty-five (25) years in the State Penitentiary; and it is further

ORDERED that to the charge of Commission of a Felony While Armed With a Firearm as alleged in Count VI of the Indictment, the Defendant shall serve twenty-five (25) years in the State Penitentiary; and it is further

ORDERED that to the charge of Aggravated Assault/Domestic Abuse as alleged in Count VII of the Indictment, the Defendant shall serve fifteen (15) years in the State Penitentiary.

IT IS FURTHER ORDERED that all sentences shall run concurrently and Defendant shall reimburse Day County for the cost of his court-appointed attorneys' fees, witness fees, investigative costs and expert fees and restitution to victim/victim's family for funeral expenses. If Defendant disagrees with any of the amounts claimed, he may request a hearing for the sole purpose of determining the amount to be paid.

DEFENDANT IS REMANDED TO THE DAY COUNTY SHERIFF PENDING TRANSFER TO THE SOUTH DAKOTA STATE PENITENTIARY.

Dated this 28th day of May, 2019, at Webster, South Dakota.

BY THE COURT:

Richard A. Sommers, Circuit Court Judge

ATTEST:

Clerk of Courts

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29020

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSE ANIBAL QUINONES-RODRIGUEZ,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE RICHARD A. SOMMERS
Circuit Court Judge

APPELLEE'S BRIEF

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AND APPELLANT

Notice of Appeal filed June 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

OTHER AUTHORITIES:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29020

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSE ANIBAL QUINONES-RODRIGUEZ,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Jose Quinones-Rodriguez, is referred to as "Defendant." The settled record in *State v. Jose Quinones-Rodriguez*, Day County Crim. No. 18-022, is denoted "SR," followed by the e-record pagination. Motion hearing transcripts are identified as "MH," followed by the date of hearing. The Court Trial transcript is cited as "CT," and the State's trial exhibits are denoted "EXH."

JURISDICTIONAL STATEMENT

On May 28, 2019, the Honorable Richard A. Sommers, Circuit Court Judge, Fifth Judicial Circuit, entered and filed a Judgment of Conviction. SR:796-99. Defendant filed his Notice of Appeal on June 5, 2019. SR:1171-72. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER REMAND IS WARRANTED REGARDING THE TRIAL COURT'S HANDLING OF DEFENDANT'S SUPPRESSION MOTION?

The trial court denied Defendant's suppression motion.

In re M.D.D., 2009 S.D. 94, 774 N.W.2d 793

People v. Samuels, 228 P.3d 229 (Colo. App. 2009)

State v. Fischer, 2016 S.D. 1, 873 N.W.2d 681

United States v. Zannino, 895 F.2d 1 (1st Cir. 1990)

SDCL 19-19-103

SDCL 23A-44-13

II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION REGARDING DEFENDANT'S DIRECT EXAMINATION OF BRANDON KROLL AND AGENT BRANDON NEITZERT?

The trial court refused Defendant's request to declare the witnesses as adverse.

Nicolay v. Stukel, 2017 S.D. 45, 900 N.W.2d 71

State v. Brown, 285 N.W.2d 843 (S.D. 1979)

SDCL 19-19-611(c)

III

WHETHER DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED?

The trial court allowed the offer of proof regarding Jamie Farmer and admitted the interview transcript of Agnes Quinones-Rios.

Crawford v. Washington, 541 U.S. 36 (2004)

Edgar v. Mills, 2017 S.D. 7, 892 N.W.2d 223

State v. Toohey, 2012 S.D. 51, 816 N.W.2d 120

United States v. Owens, 484 U.S. 554 (1988)

SDCL 19-19-804(a)(3)

SDCL 19-19-804(a)(5)(B)

SDCL 19-19-804(b)(3)

IV

WHETHER THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE COURT'S FINDINGS OF GUILT?

The trial court found the Defendant guilty of the charges.

State v. Laible, 1999 S.D. 58, 594 N.W.2d 328

State v. Most, 2012 S.D. 46, 815 N.W.2d 560

State v. Nekolite, 2014 S.D. 55, 851 N.W.2d 914

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

V

WHETHER DEFENDANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED DUE TO CUMULATIVE ERROR?

The trial court did not rule on this issue.

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

State v. Delehoy, 2019 S.D. 30, 929 N.W.2d 103

STATEMENT OF THE CASE

On March 2, 2018, Defendant was indicted on charges of first-degree premediated murder, first-degree felony murder, second-degree murder, first-degree arson, first-degree burglary, commission of a felony while armed with a firearm, and aggravated assault. SR:16-18. The State dismissed the first-degree felony murder charge on March 20, 2018 (SR:47) and dismissed the first-degree burglary charge at the conclusion of the evidence at trial. CT:822.

Defendant waived his right to a jury trial and a court trial was held May 13 through May 28, 2019. The court found Defendant guilty of first-degree murder, second-degree murder, arson, commission of a felony while armed with a firearm, and aggravated assault. SR:797-98. On May 28, 2019, Defendant was sentenced to life in prison for first-degree murder conviction, twenty-five years each for arson and commission of a felony while armed with a firearm, and fifteen years for aggravated assault, all to run concurrently. *Id.* No sentence was imposed for the second-degree murder conviction. *Id.*

STATEMENT OF THE FACTS

At approximately 1:30 a.m. on Friday, February 9, 2018, a newspaper delivery man traveling on Highway 12 saw an apartment building on fire in the town of Andover, South Dakota, about thirty miles east of Aberdeen. CT:18. His 911 call came in at 1:35 a.m.

CT:19, 26. Day County Deputy Sheriff Jerred Schreur was on duty and responded. CT:26-27. Upon arrival, he saw one side of the building engulfed in flames, concentrated in one upstairs apartment. CT:28, 34.

A resident of Andover, Dep. Schreur was familiar with the four-plex apartment building and knew it was occupied by only one resident, Tawny Rockwood, who lived in that upstairs apartment. CT:25, 32. Her van was parked outside. CT:31.

When fire fighters entered the apartment, they did not locate Tawny so Dep. Schreur took steps to try to determine where she might be. CT:38. He recalled seeing a Dodge pickup truck parked outside the four-plex numerous times the prior month, and as recently as Wednesday, February 7. Dep. Schreur had run the license plate to determine the registered owner because the pickup was unfamiliar to him and seemed suspicious because it appeared to have been spray painted blue or black. CT:34-36.

Around 2:00 a.m. Friday morning, Dep. Schreur retrieved that registration information and radioed dispatch to obtain the phone number of the owner. CT:41. He thought that person might have information regarding Tawny's whereabouts. CT:38. When the deputy called the phone number, which was Defendant's cell phone, he only got voicemail. CT:42; SR:870.

Dep. Schreur contacted the Aberdeen Police Department and requested their assistance in locating Defendant and Tawny in

Aberdeen. CT:39, 144. At approximately 9:00 a.m. on February 9, police detectives Kyle Fadness and Jeff Neal arrived at the residence of Defendant's adult daughter, Agnes Quinones-Rios. CT:146, 185-86. There, they saw a black Dodge pickup matching the description given by Dep. Schreur and observed a Hispanic male. CT:146-47. It was Defendant.

Det. Fadness asked Defendant if he would be willing to talk to him, and Defendant agreed. CT:187. It was cold outside so the two got into the detective's car. *Id.* Defendant was not handcuffed or restrained in any way. CT:197. Det. Fadness explained there was a fire in Andover and he wanted to ask Defendant some questions. CT:188. After some initial conversation, it was evident Det. Fadness and Defendant were having trouble communicating. Defendant asked Det. Fadness to have his daughter Agnes assist them. The detective did not do so because he believed she would be interviewed as well, and typical investigative protocol was to interview individuals separately. CT:214. Instead, Det. Fadness contacted a Spanish-speaking interpreter, Marie DeGroot, by telephone and had her participate in the conversation via speakerphone. CT:193-94; EXH 111 at 18:16.

Before starting, the interpreter explained to Defendant that Det. Fadness had a few questions to ask and Defendant said no problem. EXH 111 at 19:09. She translated Det. Fadness' questions to Defendant in Spanish, then translated in English what Defendant said

in response. CT:194. The interview was audio recorded. *See* EXH 111. A review of the recording reveals the nature and tone of the interview was conversational, not accusatory, and Defendant appeared to answer questions willingly.

During the interview Defendant admitted knowing Tawny and said they were in a casual relationship. CT:189; EXH 111 at 54:48. He said the last time he saw her was the night before. Defendant explained he drove his black pickup to her apartment in Andover on Wednesday (February 7) and spent the night. He left her apartment about 8 p.m. Thursday (February 8) and got back to Aberdeen about 8:30 p.m. EXH 111 at 22:30-24:10; 33:25; 37:50. He said he went to his daughter, Agnes', residence and took a bath. Later, he went to the home of his brother, Wilberto, in Aberdeen. *Id.* at 35:20, 40:20-42:30.

When recounting his activity the night before, Defendant told the detective he drove his brother's white Jeep to the Holiday gas station to get gas and later in the night went back to buy beer. He also went to Walmart and offered to provide Det. Fadness the receipt. *Id.* at 40:54; 1:10:49; 1:24. Defendant mentioned going to the house of a friend who he called "Kit." *Id.* at 44:00-45:25.

While Det. Fadness was interviewing Defendant in the car, other officers arrived at the residence. They talked to Agnes, who said Tawny was not there and allowed the officers to search the residence for her.

CT:149-50. The officers saw a red gas can through an open door of a shed in the backyard. CT:152.

Det. Fadness asked Defendant about the gas can in the shed. Defendant said it belonged to Wilberto, who had come to Agnes' house the night before. Wilberto asked Defendant to take the gas can out of Wilberto's car because it was "stinking up the vehicle"; Defendant retrieved it and put it in the shed. EXH 111 at 1:04-1:10; 1:12. Defendant said his own gas can was in the bed of his black pickup. *Id.* at 1:05.

Defendant said he was willing to provide Det. Fadness the clothing he was wearing. He also agreed to turn over his cell phone, although he said it did not work. He claimed that the day before he dropped it and ran it over with his pickup. *Id.* at 1:25-1:28. After the detective obtained these items from Defendant, the officers left.

Later that afternoon, Defendant was interviewed again. Special Agents Kevin Wiese, Franklin Gonzales, and Elizabeth McElroy from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) were in Aberdeen on an unrelated case and agreed to conduct an interview of Defendant. They found him outside at Agnes' residence around 2:30 p.m. CT:221-22. At the time, the agents knew about the fire and were trying to find Tawny. CT:223, 225, 243.

Defendant agreed to speak with them. CT:223, 231. At first they were talking outside, but due to the cold weather, they got into the

agent's vehicle to continue the interview. CT:224; EXH 112 at 5:50. The agents told him he was not under arrest and was free to leave at any time. EXT 112 at 6:25. The interview was audio recorded. CT:230; EXH 112.

During the interview, some of the questions and answers were in English but much of the interview was in Spanish between Defendant and one or two of the agents. CT:225, 240-41, 245; EXH 112. During this interview, Defendant relayed much of the same information he had told Det. Fadness that morning. CT:226-28; *see* EXH 112.

In the meantime, on Friday morning Day County officers called state and federal law enforcement agencies to help with the fire investigation. CT:49. Because the fire seemed suspicious, a warrant was obtained to search what was left of Tawny's apartment. CT:43. When officers arrived around noon, the still-smoldering apartment was completely destroyed, its contents consumed by the fire. CT:86. After several hours of methodically sifting through debris, around 3:45 p.m. officers discovered in the living room the severely burned remains of Tawny. CT:87, 271; *see* EXH 109 (SR:974). She had what appeared to be a bullet hole in her skull. CT:92.

During the autopsy, the medical examiner identified two separate gunshot wounds to Tawny's skull, which he determined to be the cause of death. EXH 109 (SR:973-74). He discovered an intact bullet stuck in Tawny's hair. *Id.*

On February 14, 2018, an Aberdeen police officer was assisting probation services with a search of a probationer's residence in an unrelated case. CT:117. When searching a dumpster in the alley, he opened a bag of garbage. Inside a beer carton was a black handgun. CT:122. The gun appeared to be damaged and part of the slide was missing. CT:141, 162. The serial number was visible. CT:123. The gun was seized and submitted for testing in this case.

Frans Maritz, a DCI forensic scientist and ballistic expert, identified the handgun as a Hi-Point model JCP Smith & Wesson .40 caliber. CT:295. He was able to replace the missing parts and test fire the gun. CT:294. This particular Hi-Point firearm has unique characteristics. CT:298. After comparing the test-fire results, he concluded the intact bullet recovered from Tawny's hair during the autopsy was fired from the Hi-Point gun found in the dumpster. CT:301.

Law enforcement's search for the gun's owner led them to the EZ Pawn Shop in Aberdeen. CT:334. The shop's firearm transaction records revealed the gun was sold to a woman named Jamie Lynn Farmer in October of 2017, along with an extra clip and holster. CT:335-39; EXH 2-5 (SR:813-22). The pawn shop manager personally knew Jamie and was aware she lived with Defendant at the time the gun was purchased; she later identified Defendant at trial. CT:343. In addition, the pawn shop clerk who sold the gun recalled making the

sale to Jamie and at trial, positively identified Defendant as being with Jamie at the time of the sale. CT:346-49.

During the investigation, law enforcement obtained search warrants and searched Defendant's black pickup and the white Jeep he also drove. CT:60, 784. They seized, among other things, a black nylon holster and gas can from the pickup bed and a propane torch from the Jeep. CT:102, 229, 263-64. During another search of Tawny's apartment, law enforcement discovered the melted remnants of a plastic gas can. It was on the floor inside the apartment near the front door, a location the officers considered "odd." CT:267, 273.

Officers obtained surveillance videos from the Holiday gas station in Aberdeen from the night of February 8-9, 2018. CT:248-49. Defendant was seen inside the store at 9:04 p.m. Thursday night. He appeared within the view of the camera but did not actually buy anything and left. CT:251; EXH 95-97. Later, at 12:48 a.m. Friday morning, a white Jeep pulled into the Holiday parking lot, then Defendant entered the store. CT:252-53; EXH 98-101. A third video from that night, timestamped 1:52 a.m., showed Defendant in the store with another man who bought beer, then they left. CT:254, 436; EXH 102-106. Surveillance video taken from the Walmart store in Aberdeen showed Defendant was present from 1:18 a.m. to 1:32 a.m. that Friday morning. CT:775-76.

As part of the investigation, law enforcement interviewed several people. This included Defendant's daughter Agnes, whom ATF Agent Wiese interviewed on February 9. CT:232; EXH 131 (SR:1058). Agnes said Defendant had been dating Tawny for three or four months. SR:1079. Agnes talked about events occurring the day before. She said at one point, she was with a friend, Gaver Glover. Around 7:40 p.m. Thursday evening, Defendant called. He was extremely upset with Agnes over a deal she made with Gaver to sell him a vehicle that was parked at her residence. SR:1072-73. Agnes said Defendant was using Tawny's cell phone. SR:1076. During the call, Agnes could hear Tawny in the background crying. SR:1077.

Later that night, Defendant showed up at Agnes' residence and was "really acting crazy" and not normal. Agnes sensed something was happening. SR:1084-86. Defendant asked if someone could download a police scanner app so he could listen to it. *Id.* Defendant started a load of laundry, washing just one pair of jeans, his t-shirt, and a sweater. SR:1087, 1090. Then he took a shower and left. *Id.* Agnes said the next morning, Defendant came into her room and was worried the police were looking for him and said he needed to go. A few minutes later the Aberdeen detectives arrived. SR:1094-98.

Law enforcement interviewed Agnes' friend Gaver, sometimes referred to as "Kid," who later testified at trial for the State pursuant to

a plea agreement.[1] Gaver testified that he knew Defendant and Wilberto. CT:420-21. He said he was with Agnes when Defendant called shortly before 8 p.m. on the night of February 8. CT:427. Over the phone, he heard Defendant arguing with a female, who was crying. *Id.*; EXH 127. Agnes said it was Tawny.

Gaver further testified that later that evening Defendant showed up at Agnes' residence and Gaver and Defendant talked. CT:430. Defendant said he had "fucked up" that night and needed money for gas so he could leave. CT:491; 808; EXH 127 (SR:1050). Wilberto came and Defendant left with him and Gaver left separately to go get some money. CT:430; EXH 127. Sometime after 1:00 a.m., Gaver returned to Agnes' residence and saw Defendant. CT:435. At Defendant's urging, they went to the Holiday store shortly before 2:00 a.m. and Gaver bought beer. CT:436; EXH 106.

Awhile later Defendant asked Gaver if he had a police scanner app on his phone. CT:436; EXH 127. As they listened to the police scanner, they heard Defendant's cellphone number being broadcast, and Defendant said that was his number. *Id.* Later, at Defendant's

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[1] Gaver had more than one interview and initially was not totally truthful with law enforcement, which he later explained was due to his desire to cover for his friend. CT:449, 471, 489. After he was charged with being an accessory to homicide, he reached a plea agreement and agreed to testify truthfully at Defendant's trial. EXH 126. Gaver also provided a sworn affidavit in support of the factual basis in his criminal file, where he plead guilty to misprision of a felony regarding his involvement in this case. EXH 127.

request, Gaver provided Defendant a different phone that had a police scanner app installed so Defendant could listen. CT:439.

Before the two parted, Defendant handed Gaver a black Smith & Wesson pistol and two boxes of bullets. He asked Gaver to hold onto it, as Defendant believed police were looking for him and he was not allowed to possess a gun. CT:440-41; EXH 127. Defendant said he would have Wilberto pick it up later in the morning. *Id.* Gaver kept the gun and bullets overnight. When Wilberto did not come Friday morning, sometime before 9 a.m. Gaver drove to Agnes' residence and saw Defendant working outside in the white Jeep. CT:442-43. Gaver told Defendant he still had the gun and bullets and then put them in the Jeep and left. *Id.*; EXH 127.

At trial, Wilberto testified. CT:561. He said he saw Defendant the evening of February 8 when Defendant showed up and asked him for money. CT:566. He saw Defendant again later in the evening at Agnes' residence. Wilberto admitted he had a gas can in his car that night and had Defendant put it in the shed. CT:572-74. Wilberto claimed he went home at 11 p.m. and did not see Defendant after that. CT:577, 585. He claimed he was home and his cell phone was with him at all times. CT:579.

The State also called Anthony Olsen, a former boyfriend of Tawny's who testified he knew Defendant and socialized with him. CT:365. Olsen bought drugs from Defendant and sold drugs for him.

Id. Soon after hearing news of homicide, Olsen contacted law enforcement. CT:370-71. He said he had seen Defendant carry a black .40 caliber Hi-Point handgun on several occasions. *Id.* This included an incident in November of 2017, when Defendant was trying to get Olsen to leave Defendant's apartment and gestured at Olsen with the handgun. CT:369. When shown a photograph of the gun found by law enforcement in this case, Olsen said it was similar to the gun he had previously seen in Defendant's possession. CT:371.

State Highway Patrol Trooper John Berndt testified that on December 9, 2017, he stopped Defendant in a Chevy Impala. CT:600. Because Defendant had an active warrant, he was taken into custody. *Id.* When the trooper did an inventory search of the vehicle, he discovered a .40 caliber magazine with bullets. CT:603.

In addition, at trial the State produced evidence involving cell phone information gathered by law enforcement. This included data of call and text activity, as well as cell tower information, on February 8-9, 2018, involving the cell phones associated with Defendant, Wilberto, Tawny, Agnes, and Gaver. CT:400-12; EXH 39-43. The State's expert, FBI Special Agent Jay Berni, testified and presented exhibits regarding his analysis of the records. CT:509; EXH 87, 89-93. Agent Berni testified that one can generally tell where a cell phone is located at a given time, based on what cell tower the phone is using. CT:517-18.

Agent Berni testified that the last known activity with Defendant's phone was at 6:03 p.m. on February 8, east of the cell tower near Groton, South Dakota. CT:524; EXH 90. With regard to Wilberto's phone, Agent Berni testified that it had much activity while within Aberdeen the night of February 8. This includes using an Aberdeen tower at 10:49 p.m. and again 11:53 p.m. CT:536-38; EXH 93. However, in the interim his phone was using towers east of Aberdeen. At 11:05 p.m. it used the Groton tower. *Id.* Then between 11:38 and 11:42 p.m., his phone was east of Bath, South Dakota. *Id.* When Wilberto testified at trial, he could not explain why the cell tower information identified his phone as being east of Aberdeen on the night of February 8. CT:577.

ARGUMENTS

I

NO REMAND IS WARRANTED REGARDING THE TRIAL COURT'S HANDLING OF DEFENDANT'S SUPPRESSION MOTION.

A. Background and standard of review.

On April 9, 2019, Defendant filed a motion to suppress evidence, followed by an amended motion on April 10, 2019. SR:658, 664. Specifically, Defendant's amended motion sought to suppress Defendant's statements made to law enforcement during his interview with Det. Fadness and his interview with the ATF special agents. SR:664-65. At a pretrial hearing held April 16, 2019, defense counsel

asked the court how it wished to handle the motion in light of the fact they would be having a court trial. He offered to address the motion in a pretrial brief or make a record at the hearing. MH(4/16/19) at 3-4. The court told counsel that "it would be more appropriate to hold off on those issues until the time set for trial, and then a proper objection could be made and we could address it at that time." *Id.* The court indicated that at the time of trial, the court would rule on the motion after having a chance to hear what is being offered and any objections. *Id.* at 5.

During trial, the State called Det. Fadness. CT:182. Det. Fadness testified on direct examination, with no objection by the defense, about the contents of Defendant's statements made during the interview. CT:188-99. The State then offered the audio recording of the interview (EXH 111). CT:199. When the court asked if there were any objections, defense counsel responded, "I don't know that I can object until I hear it, Your Honor, but if it's the same one I heard I would not object." CT:200. The court admitted the exhibit into evidence and the recording was played.[2] *Id.* Thereafter, during cross-examination Det. Fadness provided further testimony regarding the contents of Defendant's statements during the interview. CT:204-10.

[2] A transcript of the recording was prepared and used during trial, but it was not itself admitted into evidence. *See* CT:200-01.

The State next called ATF Special Agent Kevin Wiese. Without objection by the defense, the agent testified about the contents of Defendant's statements during the Friday afternoon interview. CT:225-31. The State then sought to introduce the audio recording of the interview. CT:233; EXH 112. The court stated, "Well, let's first deal with the offer. Any objection to 112?", to which defense counsel responded, "No, Your Honor." CT:233-34. The court admitted the exhibit, which was then played as the parties and the court followed along with the transcript. CT:234.

After Agent Wiese was excused from the stand, Defendant's counsel brought up, for the first time during the trial, the matter of the suppression motion. CT:246. Defense counsel noted the pretrial motion to suppress statements and inquired how the court wished to address it. He did not move to strike the testimony and evidence already admitted, nor did he present argument or authorities as to why the statements should be suppressed. The court asked if counsel was renewing the motion to suppress and counsel responded that he was. The court stated, "That motion would be denied." CT:247. Thereafter, the parties did not submit proposed findings and conclusions, nor did the court enter any.

On appeal, Defendant claims the trial court did not properly dispose of the motion to suppress because it did not make findings and conclusions. Appellant's Brief 10. Typically, this Court reviews a "the

denial of a motion to suppress based on the alleged violation of a constitutionally protected right as a question of law by applying the de novo standard of review." *State v. Willingham*, 2019 S.D. 55, ¶ 21, 933 N.W.2d 619, 625. However, on appeal, Defendant is not challenging the constitutionality of the trial court's ruling.

B. Regardless of the lack of findings and conclusions, Defendant has failed to preserve any substantive challenge regarding the propriety of the court's denial of his suppression motion.

Defendant's sole claim of error is that the court did not issue findings and conclusions regarding its denial of his suppression motion. He seeks a remand so the trial court may do so. Appellant's Brief 10. But remand is not warranted. Although this Court has urged trial courts to enter findings of fact and conclusions of law in support of its suppression rulings, the entire purpose for such findings and conclusions is to promote meaningful appellate review of an issue raised on appeal. *State v. Flegel*, 485 N.W.2d 210, 215 (S.D. 1992). But here, there is no substantive issue to review. In his brief, Defendant does not challenge the correctness of the court's denial of his renewed motion made at trial, nor does he raise a substantive claim—constitutional or otherwise—on the merits. He makes only a procedural claim regarding the lack of findings. Because Defendant has, on several levels, failed to preserve for appeal any issue regarding the merits of a substantive claim involving his motion to suppress statements, in this case the lack of findings is of no consequence.

First, Defendant failed to make a timely and properly supported objection to the statements when they were introduced at trial. When the matter of the suppression motion was raised at the pretrial hearing, the court told counsel it would be deferred to the time of trial and then a proper objection could be made and the issue addressed. MH(4/16/19) at 4. However, when the State questioned both Det. Fadness and Agent Wiese about the content of Defendant's statements during their interviews, Defendant did not object. When the recordings were offered as exhibits, Defendant's counsel affirmatively stated he had no objection to their introduction. CT:200, 234. Afterward, there was no motion to strike the testimony or admission of the recordings. Even though Defendant had filed a pretrial suppression motion, because the court had not yet made a definitive ruling, Defendant was required to make his objections known to the court in order to preserve any claim of error. SDCL 19-19-103 (party must make timely objection or motion to strike and state specific ground); *State v. Graham*, 2012 S.D. 42, ¶ 19 n.11, 815 N.W.2d 293, 302 n.11.

After the evidence was admitted, Defendant did raise the matter of his earlier pretrial motion, which the trial court treated as a renewed motion and denied. CT:247. Defendant cannot now resurrect a substantive claim challenging the court's ruling on the merits, because he failed to preserve it for appeal by fully presenting to the trial court the reasons he believed suppression was warranted. Defendant's

counsel mentioned his prior motion, which merely referred to the Fifth Amendment of the United States Constitution and Article VI, § 9 of the South Dakota Constitution. SR:664. But there are many facets of a potential Fifth Amendment claim. Beyond the amended motion's generic reference to the constitutional provisions, Defendant did not present any arguments or authority explaining why his rights were allegedly violated and why the statements should not be considered by the court. CT:246. *See People v. Samuels*, 228 P.3d 229, 238 (Colo. App. 2009) (conclusory, boilerplate contention in a motion to suppress is insufficient, by itself, to preserve an issue for appeal); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Although defense counsel offered to brief the issue after the trial, nothing was presented prior to or at the time the court made its ruling. CT:247. To preserve an issue for appeal, a defendant must identify to the trial court the factual and legal reasons for the motion or objection. *State v. Fischer*, 2016 S.D. 1, ¶ 12, 873 N.W.2d 681, 687; *In re M.D.D.*, 2009 S.D. 94, ¶ 11, 774 N.W.2d 793, 796-97; *see* SDCL 19-19-103 (party must state specific ground when objecting to admission of evidence); SDCL 23A-44-13 (a party, at the time a ruling or order of the court is made or sought, must make known to the court his objection *and the grounds therefor*). The scope of a suppression motion is

necessarily limited by the arguments offered to support it. *Fischer*, 2016 S.D. 1, ¶ 12, 873 N.W.2d at 687; *State v. Danielson*, 2012 S.D. 36, ¶ 28, 814 N.W.2d 401, 410 (this Court generally does not reverse trial courts for reasons not argued before them). Here, Defendant presented no arguments to the court. By failing to advance the specific basis for the motion to the trial court, with supporting rationale and authority, Defendant has not preserved for appeal any issue involving the trial court's ruling. *Fischer*, 2016 S.D. 1, ¶ 12, 873 N.W.2d at 687.

If the substantive issue is not preserved, then the lack of trial court findings and conclusions does not impact this Court. *See Willingham*, 2019 S.D. 55, ¶ 27, 933 N.W.2d at 626. Moreover, on appeal Defendant is not asking this Court to review the trial court's ruling on the merits. A remand for findings and conclusions is not warranted because there is no remaining viable issue for review.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION REGARDING DEFENDANT'S DIRECT EXAMINATION OF BRANDON KROLL AND AGENT BRANDON NEITZERT.

A. Background and standard of review.

During Defendant's case in chief, his counsel called Brandon Kroll and DCI Agent Brandon Neitzert to testify and asked the court to treat them as "adverse witnesses." CT:736, 777. With regard to Kroll, whom Defendant had named as a third-party perpetrator and the alleged killer (SR:662), the State objected to his designation as an

adverse witness before he was asked any questions. CT:736. The trial court agreed with the State and declined to designate Kroll as an adverse witness "until that [became] apparent." CT:737. Defense counsel responded, "Sure," and then questioned Kroll at length and unhindered, without renewing the request for adverse-witness designation. CT:737-61, 763-66.

Later, after calling Agent Neitzert in their case in chief, defense counsel asked questions to establish that he was the "case agent for the Jose Rodriguez case" and had gathered evidence "to be used in this prosecution." CT:777. Defense counsel then asked that Agent Neitzert be treated as an adverse witness. CT:777. The State objected, arguing the agent was not yet an adverse witness because he was answering defense counsel's questions. CT:777-78. The trial court agreed with the State and said the court would address the issue if defense counsel encountered difficulties with his questioning. CT:778. Again, defense counsel responded, "Sure," and then questioned the agent and never renewed the request. CT:778-808, 812-13.

On appeal, Defendant argues the trial erred in denying the adverse-witness designations and that denial hindered defense counsel's ability to properly question the two witnesses using leading questions. Appellant's Brief at 11. Regulating the mode and manner of the examination of witnesses, including whether to allow the use of leading questions, is within the discretion of the trial court. *State v.*

Brown, 285 N.W.2d 843, 845 (S.D. 1979). This Court reviews the trial court's rulings under the abuse of discretion standard and will reverse only upon a showing of prejudice. *Id.* at 845-46; *Nicolay v. Stukel*, 2017 S.D. 45, ¶ 30, 900 N.W.2d 71, 82.

B. Because the trial court did not prevent Defendant from using leading questions, Defendant fails to show prejudicial error.

In support of his argument, Defendant relies on SDCL 19-19-611(c), a provision governing the use of leading questions when examining a witness. The provision states that leading questions are generally not permitted on direct examination but should ordinarily be allowed "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." Defendant's argument seems to rest on the premise that the court misapprehended the distinction between a hostile witness and a witness identified with an adverse party.

But here, it is a distinction without a difference. Regardless of the "label" assigned to the witnesses, Defendant fails to demonstrate any error in the way the trial court allowed defense counsel to question them. A review of the record shows that defense counsel was unrestricted in his direct and re-direct examinations of Kroll and Agent Neitzert, including his liberal use of leading questions throughout. *See generally* CT:737-61, 763-66, 778-808, 812-13. Indeed, in over sixty transcript pages of defense counsel's questioning, the State objected just three times; only once was the objection arguably based on the use

of a leading question and that objection was overruled by the court. CT:797, 801, 812. Defense counsel never asked the court to re-visit the issue by claiming he was unable to properly question the witnesses. On appeal, Defendant does not identify any leading questions he was prevented from asking nor does he demonstrate any prejudicial error. Because he has not shown the court abused its discretion regarding the manner in which the defense was allowed to question these witnesses, this claim must fail. *Brown,* 285 N.W.2d at 845.

III

DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED.

A. The State's offer of proof regarding Jamie Farmer's statements did not violate Defendant's Sixth Amendment right to confrontation.

At trial, Agent Neitzert testified about his investigation involving the gun purchased at the EZ Pawn Shop, which led him to interview Defendant's ex-girlfriend, Jamie Farmer. CT:350-51. The State had attempted to secure Jamie's appearance through a material witness warrant but was unsuccessful; therefore she was not present for trial. CT:351. The State asked the court to declare Jamie unavailable under SDCL 19-19-804(a)(5)(B), in anticipation of introducing Jamie's statements made to Agent Neitzert under the statements against interest hearsay exception. CT:351, 354-55; *see* SDCL 19-19-804(b)(3).

Defendant's counsel objected based on *Crawford v. Washington*, 541 U.S. 36 (2004). CT:352. He argued Jamie's statements were

testimonial and their admission would violate Defendant's constitutional right to confront witnesses against him because Jamie was unavailable for cross-examination. CT:352-53.

The State proposed that it be allowed to present an offer of proof so the court could make a threshold determination of admissibility. CT:354. The offer would be accomplished by asking the agent a few questions; the recorded interview itself would not be introduced. *Id.* Defense counsel conceded Jamie was unavailable but maintained his confrontation argument. *Id.*

The court noted that offers of proof are normally done out outside the presence of the jury in a jury trial, but this was a court trial. Nonetheless, the need for preserving the record still existed, so the court allowed the State to make a limited offer of proof in a generalized way. CT:354-55.

The State asked the agent a few questions designed to establish Jamie's potential criminal liability based on her knowledge of Defendant's status as a felon and her handling of the gun after she purchased it. CT:355-56. The court found Jamie's statements were admissible under the hearsay exception. CT:359. The State explained it did not intend to introduce the recording of the interview at that time. The court noted that since the evidence was not being introduced immediately, defense counsel was given the opportunity to submit a brief and it was possible the court may change its ruling. CT:359. The

defense filed a brief later that day. SR:783-86. Ultimately, the State did not seek to offer the recording of Jamie's statements.

Because the recorded statements were not actually introduced and admitted at trial, on appeal Defendant challenges only the trial court's decision to hear the State's offer of proof. Without citing any authority, Defendant alleges that the court erred in permitting the offer of proof, and that this violated his Sixth Amendment rights. Appellant's Brief at 15-16. Failing to cite authority waives consideration of the issue on appeal. *State v. Uhing*, 2016 S.D. 93, ¶ 15, 888 N.W.2d 550, 555.

The State submits that the manner in which the court addressed the offer of proof—an *evidentiary ruling*—was not an abuse of discretion. *See State v. Harruff*, 2020 S.D. 4, ¶ 14, __ N.W.2d __ (evidentiary rulings reviewed for abuse of discretion). A trial judge is vested with broad discretion in regulating the mode and manner of witness testimony and "will be reversed only for an abuse of that discretion" and a showing of prejudice. *People ex rel. O.S.*, 2005 S.D. 86, ¶ 17, 701 N.W.2d 421, 427; *Brown*, 285 N.W.2d at 845.

Nonetheless, according to Defendant the trial court should not have heard the offer of proof before first ruling on the testimonial nature of Jamie's statements. Appellant's Brief at 15-16. But at the time of the objection, the trial court did not know the nature of Jamie's recorded statements. CT:355. A court cannot make evidentiary rulings

in a vacuum. In order rule on the admissibility of the statements—under the hearsay exception or the Confrontation Clause—it was necessary for the court to have at least some information about the nature of the statements. Instead of being exposed to the entire statement, the court chose to allow a limited offer of proof, in generalized terms. CT:354.

In a bench trial, it is presumed a court is "equipped to sift through any excess or perceived inadmissible evidence" and will consider only competent evidence in reaching its final decision. *Edgar v. Mills*, 2017 S.D. 7, ¶ 23, 892 N.W.2d 223, 230; *see also Brown*, 285 N.W.2d at 845. Here, through other comments made at trial, it is evident the court understood its role in this regard. Indeed, when considering the Defendant's offer of proof on a different matter, the court told the parties that "I'm not going to consider, in arriving at a verdict in this case, anything that I viewed as inadmissible for purposes of going to a jury trial when I make my decision." CT:683; *see also* CT:708 (commenting that ". . . it's a court trial. The court can separate the wheat from the chaff[.]").

Even though the court heard a limited version of Jamie's statements to Agent Neitzert, it was able to separate that from admitted evidence for purposes of rendering its verdict. The court did not rely on the information in the offer of proof regarding Defendant's connection to the gun used to kill Tawny. CT:862-63. Instead, that information was

provided through the testimony of other witnesses, the pawn shop manager and sales clerk, along with relevant exhibits.

Defendant fails to show the court abused its discretion, and that he suffered prejudice, regarding the court's handling of the offer of proof.

B. The prior out-of-court statements by Agnes Quinones-Rios to law enforcement were properly admitted, where she testified at trial and Defendant had the opportunity for cross-examination.

1. Background and standard of review.

During her interview with ATF Agent Weise, Agnes Quinones-Rios made several statements regarding the events of February 8-9, 2018, particularly regarding Defendant. At the trial, the State called Agnes as a witness. CT:498-500. On direct examination, the State asked Agnes questions about her and her father's whereabouts on February 8-9, 2018. CT:500-01. Agnes was able to recall where she lived, who lived with her, and that her father kept some of his belongings at her house for his "come and go" stays during that time. *Id.* However, Agnes stated she did not remember if she had phone contact with her father on February 8 or if she knew his whereabouts that night. CT:501. Agnes was able to recall she was interviewed by law enforcement but claimed she could not recall what she said during the interview. CT:501-503. Anticipating where the prosecutor was going, defense counsel asked the court to declare Agnes to be unavailable pursuant to

SDCL 19-19-804(a)(3).[3] CT:502. The court indicated it was premature at that point, and the State continued its examination. *Id.*

The State attempted to refresh Agnes' memory with the transcript of her interview with the ATF agent on February 9, 2018, but Agnes claimed she was on drugs during that time and could not remember what she said at the interview. CT:501-03. Agnes stated that, because of her drug use, she did not remember what happened on February 8-9 of 2018. CT:503-04. The State asked the trial court to deem Agnes to be unavailable. After defense counsel responded, "No objection," the court stated, "All right. So deemed." CT:504.

The State then offered the transcript of Agnes' interview. CT:502-04; *see* EXH 131 (SR:1058-1111). Defense counsel objected to the admission of the transcript "for the same reasons that [he] talked about with Ms. Farmer." CT:504. Defense counsel argued that Agnes, like Jamie, was an unavailable witness, so the Confrontation Clause did not allow her statements to come in because they were made to law enforcement in the course of an investigation. CT:504. The trial court rejected defense counsel's Confrontation Clause argument, explaining that "[Agnes] is present in the courtroom. She's claiming not to remember anything. The difference between [Agnes] and Ms. Farmer is

[3] SDCL 19-19-804(a)(3) is one of the statutory hearsay exceptions applicable to unavailable witnesses, and states that a declarant is considered unavailable if the declarant "testifies to not remembering the subject matter[.]"

that Ms. Farmer is not present in the courtroom." CT:504-05. The court also noted there was a difference between Agnes and Jamie when considering the cases defense counsel had cited. *Id.* Defense counsel then asserted, "So the record is clear, my objection is that the entrance of that transcript violates my client's right to confront witnesses against him because this witness has been declared unavailable." CT:505. The court advised defense counsel that he "certainly [has] the right to cross-examine [Agnes] as to anything in the transcript because she is present[.]" CT:506. The court then received EXH 131 into evidence. SR:1058.

The State continued to examine Agnes and defense counsel again objected, arguing the State could not continue to examine Agnes after she was declared unavailable. CT:507. The trial court overruled the objection, explaining that Agnes was "declared unavailable for purposes of the questions that were asked earlier regarding the interview" and that the State could ask her other questions. CT:507. After the State finished its direct examination, the trial court offered defense counsel an opportunity to cross-examine Agnes. CT:507-08. Defendant's counsel stated he could not cross-examine her because the trial court declared her unavailable and he re-asserted his objection. CT:508. Defense counsel did not ask Agnes any questions and she was allowed to step down. CT:508.

On appeal, Defendant argues the admission of the transcript of Agnes' statements during the interview was a violation of his Sixth Amendment right to confront witnesses against him. Appellant's Brief at 11-12. Whether a defendant's constitutional right to confrontation was violated is a question this Court reviews de novo. *State v. Podzimek*, 2019 S.D. 43, ¶ 13, 932 N.W.2d 141, 146.

2. *Agnes Quinones-Rios was not unavailable for purposes of the Sixth Amendment.*

In *Crawford v. Washington*, the United States Supreme Court held that the Sixth Amendment's Confrontation Clause bars the admission of "testimonial statements of a witness *who did not appear at trial*, unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." 541 U.S. at 53-54 (emphasis added). Likewise, "when a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)); *see also State v. Toohey*, 2012 S.D. 51, ¶ 16, 816 N.W.2d 120, 128. Here, because Agnes *appeared at the trial*, testified, and was subject to cross-examination, the use of her prior statements was not a violation of Defendant's Sixth Amendment rights under *Crawford*. *See State v. Carothers*, 2005 S.D. 16, ¶ 12, 14, 692 N.W.2d 544, 548-49.

Furthermore, Agnes' purported loss of memory does not render her unavailable for Sixth Amendment purposes. In *United States v. Owens*, after a witness was unable to recall the basis of his previous out-of-court identification of the defendant at trial, the Supreme Court held that a defendant's opportunity to confront a witness is not denied when the witness's past statements are introduced at trial and the witness is unable to recall the previous statements or the basis of those statements. *Owens*, 484 U.S. 554, 559 (1988). Indeed, "[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." *Id.* at 559 (other citations omitted) (emphasis in original); *see also Toohey*, 2012 S.D. 51, ¶ 16, 816 N.W.2d at 128 (noting that many courts have interpreted *Crawford's* categorical language in footnote 9 to mean that a witness who claims to have no memory of the events in question is still present and available for cross-examination purposes).[4]

The Court in *Owens* went on to explain that the Confrontation Clause does not guarantee that every witness called by the State will abstain from giving testimony that is "marred by forgetfulness, confusion, or evasion." *Owens*, 484 U.S. at 558. Instead, it is sufficient

[4] The Court in *Toohey* cited *State v. Pierre,* 277 Conn. 42, 890 A.2d 474, 499–500 (2006); *State v. Gorman,* 854 A.2d 1164, 1177 (Me.2004); *State v. Holliday,* 745 N.W.2d 556, 567–68 (Minn.2008); *State v. Biggs,* 333 S.W.3d 472, 477–78; *State v. Legere,* 157 N.H. 746, 958 A.2d 969, 977–78 (2008).

that Defendant had an opportunity to point out matters such as the witness's poor memory, bias, or lack of care and attentiveness. *Owens*, 484 U.S. at 559. The Court reasoned that probing and exposing the witness's infirmities through cross-examination offers the factfinder reasons to give little weight to the witness's previous testimony. *Id.* at 558 (citing *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985)).

As the trial court pointed out in this case, even though defense counsel did not attempt to ask Agnes questions, he had the *opportunity* to cross-examine her regarding her previous statements because she was present in the courtroom as a witness and subject to cross-examination. CT:506-08. Defendant was not deprived of his Sixth Amendment rights just because Agnes claimed to have forgotten making some of her previous statements.

Finally, the trial court's finding that Agnes was unavailable under SDCL 19-19-804(a)(3), due to her claimed loss of memory, does not change the above analysis. Certain types of unavailability under Rule 804(a) may be the type of unavailability contemplated by *Crawford.* However, under *Owens* and *Crawford*, loss of memory does not render a witness unavailable for purposes of the Sixth Amendment so long as the witness testifies at trial and is subject to cross-examination. *See Toohey*, 2012 S.D. 51, ¶ 16 n.2, 816 N.W.2d at 128 n.2; *Smith v. State*, 25 So.3d 264, 270 (Miss. 2009); *State v. Price*, 146 P.3d 1183, 1187 n.5 (Wash. 2006); *Proctor v. State*, 874 N.E.2d 1000, 1002 (Ind. Ct. App.

2007). Because Agnes was present at the trial and subject to cross-examination, *Crawford* does not apply and therefore Defendant's confrontation rights were not violated.

On appeal, Defendant argues that Agnes' statements were testimonial. Appellant's Brief at 13-14. However, since Agnes was present at the trial and available for cross-examination for purposes of the Confrontation Clause, the Court does not need to determine whether her statements were testimonial. *See Toohey*, 2012 S.D. 51, ¶ 18 n.3, 816 N.W.2d at 129 n.3.

IV

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE COURT'S FINDINGS OF GUILT.

It is well established that this Court reviews de novo whether there is sufficient evidence in the record to sustain a conviction. *Harruff*, 2020 S.D. 4, ¶ 15, _ N.W.2d _. In making this determination, the Court asks:

> '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.' " "We accept the evidence and the most favorable inferences fairly drawn therefrom, which will support the verdict."

Id. (internal citations omitted); *see State v. Most*, 2012 S.D. 46, ¶ 28, 815 N.W.2d 560, 568; *State v. Miland*, 2014 S.D. 98, ¶ 11, 858 N.W.2d 328, 331.

Moreover, in non-jury criminal trials, the court "shall make a general finding and shall in addition, on request made before submission of the case to the court for decision, find facts specially. Such findings may be oral." SDCL 23A-18-3. When interpreting this statute, this Court held:

> [W]hen factual findings have been made, and those findings are not clearly erroneous, an appellate court may not set aside those findings and imply contradictory findings. *See [State v. Catch the Bear*, 352 N.W.2d 640, 646 (S.D. 1984)] ("Findings made under Rule 23(c) shall not be set aside unless clearly erroneous."); *cf. State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 26, 785 N.W.2d 272, 282 ("All conflicts in the evidence must be resolved in favor of the [trial] court's determinations."); *Pellegrin v. Pellegrin*, 1998 S.D. 19, ¶ 13, 574 N.W.2d 644, 647 ("Where findings of the trial court are based on conflicting testimony . . . we will not disturb them on appeal."). To do so would usurp the fact-finder's "function in resolving conflicts in the evidence, weighing credibility, and sorting out the truth." *Cf. State v. Dowty*, 2013 S.D. 72, ¶ 15, 838 N.W.2d 820, 825 (noting that when reviewing the sufficiency of the evidence when a jury is the fact-finder, "this Court will not usurp the jury's function in resolving conflicts in the evidence, weighing credibility, and sorting out the truth"); *Hubbard v. City of Pierre*, 2010 S.D. 55, ¶ 26, 784 N.W.2d 499, 511 ("On review, this Court defers to the [trial] court, as fact finder, to determine the credibility of witnesses and the weight to be given to their testimony.")

State v. Nekolite, 2014 S.D. 55, ¶ 12, 851 N.W.2d 914, 917.

In this case, the trial court found Defendant guilty of the offenses and, because Defendant had previously requested special findings, the court rendered oral factual findings in support. CT:862. The evidence was sufficient to support the court's decision and findings.

At trial, the parties entered into a stipulation. Under the stipulation, it was undisputed that on or about February 8 or 9, 2018, "the cause of death of Tawny Rockwood was gunshot wounds to the head and the manner of death of Tawny Rockwood was homicide[.]" SR:811. Furthermore, the parties stipulated that on or about those dates, the fire "was intentionally set to destroy the building[.]" *Id.* This case was not really about what happened or when, but whether Defendant was the perpetrator.

The evidence supports the court's finding of guilt for first and second-degree murder. There can be no question that two gunshots to the head demonstrates a "premeditated design to effect death" (first-degree murder under SDCL 22-16-4) and constitutes "an act imminently dangerous to others and evincing a depraved mind, without regard to human life" (second-degree murder under SDCL 22-16-7).

With respect to first-degree murder, this Court has explained:

> When determining if premeditation exists[,] we consider the following factors: 1) the use of a lethal weapon; 2) the manner and nature of the killing; 3) the defendant's actions before and after the murder; and 4) whether there was provocation." . . . "However, direct proof of deliberation and premeditation is not necessary. It may be inferred from the circumstances of the killing."

State v. Wright, 2009 S.D. 51, ¶ 60, 768 N.W.2d 512, 532 (internal citations omitted).

Moreover, regarding second-degree murder, this Court has held that "whether conduct is imminently dangerous to others and evincing

a depraved mind regardless of human life is to be determined from the conduct itself and the circumstances of its commission." *State v. Laible*, 1999 S.D. 58, ¶ 14, 594 N.W.2d 328, 333 (victim shot at close range after a struggle).

The two gunshots to the head support, as well, the crime of commission of a felony (homicide) with a firearm under SDCL 22-14-2. Finally, firing a loaded weapon at someone also constitutes the crime of causing bodily injury under "circumstances manifesting extreme indifference to the value of human life" (aggravated assault under SDCL 22-18-1.1(1)). Regarding all of the offenses against Tawny, the question, therefore, is whether Defendant pulled the trigger.

In his brief, Defendant challenges the sufficiency of the evidence by asserting the State failed to show he was involved in the crimes. Appellant's Brief 16. However, this is supported in the record and in the court's findings.

The court found that Defendant was in Andover and killed Tawny early in the evening on February 8. CT:862. On the night Tawny died, witnesses saw Defendant in Andover. CT:637, 646. Defendant placed himself at the murder scene until 8 p.m. that night. *See* EXH 111. The last activity from Tawny's phone was at 7:57 p.m. SR:874.

The murder weapon, a .40 caliber Hi-Point Smith & Wesson handgun recovered by law enforcement, was tied to Defendant. As the court found, that particular handgun was connected to Defendant

through his former girlfriend, Jamie Farmer. She purchased it while he was with her at the pawn shop several months before the murder, at a time when they were living together.[5] The court found this evidence was undisputed. CT:862-63.

Other witnesses also connected the gun to Defendant. Anthony Olsen, Defendant's drug associate, testified he often saw Defendant with a black .40 caliber Hi-Point handgun and, on one occasion, Defendant had pointed it at him. Additionally, Gaver Glover testified to Defendant having a black Smith & Wesson handgun on the night of the murder. The trial court specifically found these two witnesses to be credible (CT:863) and this Court must defer to the trial court's credibility determinations. This Court may not, as Defendant requests in his brief, substitute its opinion or weigh the evidence in that regard. *See Harruff, Nekolite, supra.*

Moreover, Defendant's attempt to cover up the homicide by intentionally starting the apartment on fire, and Defendant's other after-the-fact actions demonstrating consciousness of guilt, are highly relevant. This includes Defendant's actions that night involving his appearances at the gas station and Walmart, which the court found were attempts to establish an alibi. CT:862.

[5] This was provided at trial through the testimony of the pawn shop manager and clerk and supporting exhibits.

Agnes and Gaver also provided evidence about Defendant's actions after the murder. Agnes told law enforcement how Defendant came to her residence that night and was acting "very crazy" and wanting access to a police scanner. Defendant washed his clothes and took a shower at her house. The next morning, Defendant acted strangely and was worried police were looking for him.

Gaver explained how Defendant said he had "fucked up" and Defendant needed money so he could leave. Within hours of the homicide, Defendant wanted Gaver to provide him access to a police scanner so Defendant could listen. Defendant heard his phone number broadcast over the police scanner. This was because Dep. Schreur had radioed dispatch to obtain the phone number of the registered owner of the black pickup, which turned out to be Defendant's. Assuming the police would be looking for him, Defendant then asked Gaver to hold his handgun and bullets for him. This evidence supports the trial court's finding, as the court specifically found Gaver was credible. CT:863-64.

In addition, the trial court's findings on the arson charge are supported by the significant evidence connecting Defendant to the victim, the murder scene, and the murder weapon. The evidence showed Defendant had the motive, means, and opportunity.

First, the court found the fire was intentionally set with the intent to cover up the murder. CT:861. Having killed Tawny, Defendant is the only one with the motive to try to destroy the evidence.

Second, the court found that after killing Tawny, Defendant came back to Aberdeen to seek assistance and the supplies to commit the arson. CT:862. The evidence supports this finding. Defendant met with Wilberto at Wilberto's home, then the two of them left together. Both of the men had gas cans, and Defendant had a propane torch. Defendant admitted that Wilberto had a gas can in his car that was "stinking it up" and Defendant removed it and put it in the shed. Wilberto confirmed this. It cannot be mere coincidence that this just happened to occur on the same night that Tawny was killed and her apartment set on fire.

Third, the evidence supports the trial court's finding that Defendant (and Wilberto) had time to go to Andover, set the fire, and return to Aberdeen. Defendant suggests he couldn't have committed the crimes because he had an alibi, as he was seen on video surveillance in Aberdeen at 9:04 p.m., 12:48 p.m., and 1:18 a.m. that night. But that provides him no cover if, as the court found, the fire was started in a manner that did not result in an immediate explosion. CT:861.

Moreover, it is undisputed that Wilberto's cell phone left Aberdeen and travelled east, likely on Highway 12, prior to the fire. The

cell phone used the tower near Groton at 11:05 p.m. and then the tower east of Bath at 11:38 p.m. and 11:42 p.m. As the trial court found, "there was no explanation why Wilberto's phone would be travelling that direction on that particular night at that particular time." CT:864. Although Wilberto claimed he was home with his phone, the court found all of Wilberto's testimony to be not credible. CT:863.

Defendant also argues that Wilberto's phone was in Aberdeen at 10:49 p.m. and again at 11:53 p.m. and therefore they would not have had sufficient time to travel the 30 miles to Andover and back within those 64 minutes. But Defendant's witness, Angela Locke, testified she made the trip from Aberdeen to Andover that night in 25 minutes, and said the weather was normal. CT:721. Surely, someone on a mission to get to Andover, commit a serious criminal act, and leave quickly to avoid detection could complete the trip in even less time.

In this case, the evidence was sufficient to support Defendant's convictions and the trial court's findings in support. The convictions should be affirmed.

V

DEFENDANT'S RIGHT TO A FAIR TRIAL WAS NOT VIOLATED DUE TO CUMULATIVE ERROR.

This Court has previously held that "the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial. *State v. Davi*, 504

N.W.2d 844, 857 (S.D. 1993). This Court must decide "whether, on a review of the entire record, [Defendant] was provided a fair trial." *Id.*; *see also Delehoy*, 2019 S.D. 34, ¶ 20, 929 N.W.2d at 108. As this Court has said many times before, Defendant "is not entitled to a perfect trial but rather a fair one." *Davi*, 504 N.W.2d at 857. Because Defendant failed to establish any prejudicial error, as discussed above, this Court should conclude that there is no cumulative error and Defendant received a fair trial.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that Defendant's convictions and sentences 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 9,549 words.

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

Dated this 14th day of February 2020.

/s/ Patricia Archer
Patricia Archer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of February 2020, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Jose Quinones-Rodriguez* was served via electronic mail upon Thomas Cogley at tom@cogleylaw.com and Joshua Finer at jfiner@rwwsh.com.

/s/ Patricia Archer
Patricia Archer
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs. Appeal No. 29020

JOSE ANIBAL QUINONES-RODRIGUEZ,
Defendant and Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Day County, South Dakota
The Honorable Richard A. Sommers, Presiding

APPELLANT'S REPLY BRIEF

Notice of Appeal was filed on June 5, 2019.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This reply brief will not repeat arguments or claims already made in Rodriguez' initial brief. It is limited to replying only to certain arguments raised by the State's case. Rodriguez reiterates and incorporates all of the arguments made in his initial brief into this reply.

1. Remand to the trial court for specific written findings and conclusions on Defendant's motion to suppress is warranted.

The State's position that there is no substantive issue to review is correct. However, no substantive issue for review exists because the trial court failed issue "separate, appropriate, and specific findings of fact and conclusions of law in order to aid appellate review and 'insure against speculation and conjecture.'" State v. Flegel, 485 N.W.2d 210, 2015 (S.D. 1992). The trial court's failure to do so prevents the Defendant from being able to substantively address the issue with this Court. Without findings of fact and conclusion of law, the defendant and, most importantly, this Court is left to speculation and conjecture on why the trial court denied the Defendant's motion. Challenging the correctness of a ruling is impossible without clearly knowing what facts and law the trial court based its ruling on. The State's cited case, Flegel, stands for that very proposition. Id.

Next, the State argues that the Defendant failed to preserve the suppression issue due to failing to object prior to the State offering certain testimony and evidence. Such an argument is misplaced. The Defendant clearly put the trial court on notice by properly filing its motion to suppress as required by SDCL 23A-8-3. The trial court's decision to address the issue during the trial, doesn't require the Defendant to then object again prior

to the testimony coming in. Ultimately, the trial court has to hear the evidence before making a ruling.

The State claims that "[d]efendant was required to make his objections known to the court in order to preserve any claim of error." Appellee's Brief 20. This is correct. Fortunately, the Defendant already put the court on notice regarding the testimony by properly filing the motion to suppress on April 10, 2019. (SR 664-665). "SDCL 23A-8-3 mandates that motions to suppress evidence be raised before trial under penalty of waiver." State v. Holiday, 335 N.W.2d 332, 336 (S.D. 1983). This Defendant properly raised the motion to suppress as required under SDCL 23A-8-3. Failure to raise the motion constitutes a waiver, not objecting prior to the court hearing the evidence is not. One would not make a formal object prior to the testimony or evidence at a suppression hearing, and therefore it is not required in this instance. A properly filed motion to suppress, outlining exactly the evidence in question, is what is required to preserve the issue. The Defendant did what it needed to do to preserve the issue for appeal.

The trial court treating Defendant's motion to suppress as a "renewed motion" is irrelevant. (CT at 246:20-247:5). It is clear that Defendant never withdrew his motion. The motion was stayed, by the trial court, until the evidence was presented at trial. (MH 4:7-5:21). Following the State's presentation of the evidence, the Defendant raised the issue with the trial court. (CT at 246:20-247:5). Upon raising the issue, the trial court instantly denied the motion. Id. The trial court did not request argument by either side, it did not ask that the matter be briefed, although offered, nor did give a factual or legal basis as to why it was denying the motion. The State indicates that Defendant was required to fully present "to the trial court the reasons he believed suppression was

warranted." Appellee's Brief 20. The Defendant was prepared to do so and even asked to do so via a formal brief in the attempt to develop argumentation. Unfortunately, the trial court denied the motion without any argument or briefing. The trial court had notice of Defendant's motion to suppress evidence, heard the evidence, denied the Defendant's motion and ultimately failed to make any findings of fact or conclusions of law as required by SDCL 23A-8-8.

Lastly, a Defendant cannot substantively argue a ruling to this Court when the trial court has failed to provide a basis for which it made its ruling. The Defendant properly filed its motion to suppress to preserve the issue as required under SDCL 23A-8-3. The trial court had notice of the motion, the defendant raised the issue after the presentation of the evidence, and the motion was denied. Upon denial, the court was required to issue "separate, appropriate, and specific findings of fact and conclusions of law in order to ad appellate review and 'insure against speculation and conjecture.'" State v. Flegel, 485 N.W.2d 210, 2015 (S.D. 1992). Without the trial court doing so, this Defendant cannot ask, or argue to, this Court to review the trial court's ruling on the merits. This isn't a case where the findings and conclusions are deficient; they don't even exist. The matter must be remanded to the trial court for specific written findings and conclusions on Defendant's motion to suppress evidence.

2. Agnes was declared unavailable by the trial court and therefore the State's analysis is inapplicable.

The State appears to have conceded that Agnes' statements to law enforcement were testimonial. It instead argues that because Agnes physically appeared at the trial, Rodriguez has no constitutional claim. Its attempt to circumvent Rodriguez' right to cross-examine is premised upon an interpretation of Crawford v. Washington that so long

as a witness appears physically at the trial, a defendant's constitutional right to confront witnesses is not implicated. This argument ignores both federal and this Court's precedent as well as the particular facts of this case.

The cases cited by the State do not actually support its argument. United States v. Owens, 484 U.S. 554 (1988), involved a victim who was unable to recall a hospital record indicating that he had attributed the assault to someone other than the defendant. The decision is easily distinguishable from the present case. Owens predated Crawford by over a decade. More importantly, the trial court in Owens never declared the victim unavailable. This factual distinction is true of each case cited by the State save for one—State v. Smith, 25 So.3d 264 (Miss. 2009). In every other case, the witness was never declared unavailable by the trial court.

A review of this Court's precedent provides further support for Rodriguez. In State v. Carothers, this Court reversed the trial court's decision to exclude a child victim's statements to police and a social worker. 2005 S.D. 16, ¶ 1, 692 N.W.2d 544. The State cites this decision as support for its argument that "because Agnes appeared at the trial, testified, and was subject to cross-examination, the use of her prior statements was not a violation" of Rodriguez' rights under Crawford. Appellee's Brief at 32. Carothers actually does just the opposite.

The defendant in Carothers was indicated in November, 2003. Carothers, at ¶ 5, 692 N.W.2d at 546. One month later, the State provided a notice of intent to offer statements made by the child victim. Id. The trial court initially indicated the statements would be admitted. Id. In April, 2004, the trial court reversed course, advising the parties that based on the Crawford decision (released in March, 2004), the statements

made by the child victim would no longer be admissible. The State appealed this decision.

This Court reversed, noting that the holding in Crawford did not automatically render the statements inadmissible. Instead, Crawford does not even apply if "the declarant testifies and is subject to cross-examination at trial." Id. at ¶ 12, 692 N.W.2d at 549. Crawford "involved the admissibility of hearsay under the Confrontation Clause where the witness was *unavailable*." Carothers at ¶ 8, 692 N.W.2d at 547.

Notably, the Court also briefly addressed a motion by the defendant to declare the child "unavailable" as a witness. The trial court had dismissed that motion as premature, a move with which this Court agreed. Citing with approval the trial court's rational that "[i]f any unavailability issue comes up, they would come up theoretically during or after [child victim's] testimony at trial…" Id. at ¶ 13, 692 N.W.2d at 549. Clearly then, this Court anticipated the possibility that a witness may show up *and then be declared unavailable*. In that instance, this Court has at least tacitly indicated that the Confrontation Clause is implicated.

State v. Toohey dealt with a situation where the witness was deemed available by the trial court. 2012 S.D. 51, 816 N.W.2d 120. This Court agreed with the trial court that the child victim was in fact "available" for purposes of the Confrontation Clause. Id, at ¶ 18. This was true even though the child could not answer questions about certain aspects of the crime for which defendant was charged. Id. at ¶ 15.

Rodriguez presents an entirely different set of circumstances. Unlike the cases discussed above, here the trial court found that Agnes was unavailable. CT at 504:16. There is no dispute over this fact. Further, the trial court deemed Agnes unavailable *at*

the request of the State. CT at 503-04. Under this Court's precedent, the trial court was not required to declare Agnes unavailable simply because she claimed not to remember. In Toohey, this Court recognized that a faulty memory does not automatically render a witness unavailable for purposes of the Confrontation Clause. But here, the trial court made just that determination when it declared the witness unavailable. Thereafter, despite having just declared Agnes unavailable, the trial court authorized the introduction of testimonial statements.

The case which most-closely aligns with the State's position is State v. Smith, 25 So.3d 264 (Miss. 2009). In Smith, the trial court, after declaring a witness unavailable, authorized out of court, testimonial statements into trial over the objection of the defendant. Id. at 264. The Court of Appeals reversed this decision. Id. However, the Mississippi Supreme Court reversed the decision of its appellate court. In doing so, it makes the same mistake made by the State in this case. Both the Mississippi Supreme Court and the State cite an incomplete passage from Crawford—that being that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." However, that same footnote in Crawford makes clear that what is required is for the witness to be "defend or explain" the statement. Crawford, 541 U.S. at 59 n.9. Agnes was never going to be able to defend or explain her prior statements because she could not remember them.

Crawford is the only case that is factually similar to the present appeal. In each, the witness was declared unavailable. In Crawford, the witness was unavailable to testify because of spousal privilege. Here, Agnes was declared unavailable because she could not recall the events about which she was being questioned. CT at 504:16. After a

lengthy historical review, Justice Scalia in Crawford came to the following conclusion: "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 60. Nothing about this holding has changed.

The State has provided no precedent which squares the facts of this case and the trial court's decision to admit testimonial statements of an unavailable witness. It asserts that Crawford stands for the proposition that so long as the witness testifies at trial and is subject to cross-examination, the use of prior statements does not violate a defendant's rights. As previously noted, this short-sighted viewpoint is not supported by a full reading of Crawford. Nothing in the record suggests Agnes was able to explain or defend her statements. As such, Rodriguez' Sixth Amendment right to confront the witnesses against him was violated.

CONCLUSION

For the reasons set forth, this Court should reverse Rodriguez's convictions on each count and a new trial be granted.

Respectfully submitted this 27th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief complies with SDCL 15-26A-66(4). This Reply Brief is 7 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service, is typeset in Times New Roman (12 pt.) and contains 3,122 words. The word processing software used to prepare this Brief is Microsoft Word 2019 for Windows 10 Pro.

Dated this 27th day of February, 2020.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellant Jose Anibal Quinones-Rodriguez, hereby certifies that on the 27th day of February, 2020, a true and correct copy of **APPELLANT'S REPLY BRIEF** was electronically transmitted to:

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Patricia Archer
Assistant Attorney General
South Dakota Attorney General's Office

and the original and two copies of **APPELLANT'S REPLY BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Microsoft Word format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 27th day of February, 2020.

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