IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

_____

No. 28450

_____

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

v.

MICHAEL B. SWAN,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT L. SPEARS,
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed November 14, 2017.

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PRELIMINARY STATEMENT

Throughout this Brief, Plaintiff/Appellee State of South Dakota will be referred to as "State." Defendant/Appellant Michael B. Swan will be referred to as "Swan." References to the alleged victim, Angelina Swan, will be referred to as "Angelina." References to the Grant County criminal file CRI 16-130 will be made by "SR." References to the jury trial transcript will be referred to as "JT."

JURISDICTIONAL STATEMENT

Swan respectfully appeals from a Judgment of Conviction which was entered on November 6, 2017.

Swan timely filed his Notice of Appeal on November 14, 2017 pursuant to SDCL 23A-32-15. The jurisdiction of this Court is invoked under SDCL 23A-32-2, SDCL 21-34-13 and SDCL 15-26A-7. The scope of review is authorized under SDCL 23A-32-9.

STATEMENT OF LEGAL ISSUE

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF FIRST AND SECOND DEGREE MANSLAUGHTER.

Swan was indicted for Second Degree Murder in connection with the death of his wife, Angelina. At the close of the evidence, Swan asked the trial court to instruct the jury on the lesser included offenses of First Degree Manslaughter (SDCL 22-16-15(2)) and Second Degree Manslaughter (SDCL 22-16-20). The trial court refused to instruct the jury on First and Second

Degree Manslaughter despite there being some evidence in the record to support the lesser included offenses.

Most relevant case authorities:

Cases:

State v. Waloke, 2013 S.D. 55.
State v. Klaudt, 2009 S.D. 71.
State v. Hoadley, 2002 S.D. 109.
State v. McCahren, 2016 S.D. 34.

Most relevant statutes:

SDCL 22-16-7.
SDCL 22-16-15.
SDCL 22-16-20.1.
SDCL 22-16-20.2.

II. WHETHER THERE IS EVIDENCE IN THE RECORD WHICH, IF BELIEVED BY THE FACT FINDER, IS SUFFICIENT TO SUSTAIN A FINDING OF GUILT BEYOND A REASONABLE DOUBT ON THE CHARGE OF SECOND DEGREE MURDER.

In denying Swan's Motion for Judgment of Acquittal, the trial court found that there was sufficient evidence for a reasonable jury to find him guilty of Second Degree Murder.

Swan was charged in the death of his wife, Angelina, based entirely on circumstantial evidence. Swan did not make any admissions to committing the crime, nor were there any eyewitnesses to the allegation. The State's case rested solely on a variety of witnesses who appeared on the scene and the testimony of Dr. Kenneth Snell. The defense's expert, Dr. Robert Bux, and the State's expert, Dr. Kenneth Snell, agreed that Angelina sustained an internal decapitation. Dr. Bux testified that based on Angelina's medical history consisting mainly of

back injuries and dementia, it is likely that she sustained the injury by falling. Dr. Snell could not rule out falling as a cause of her death and testified that the cause of her death could have been caused by Swan stomping on Angelina.

Most relevant case authorities:

Cases:

State v. Traversie, 2016 S.D. 19.
State v. Bariteau, 2016 S.D. 57.
State v. Johnson, 2015 S.D. 7.
State v. Swan, 2008 S.D. 58.

Most relevant statute:

SDCL 22-16-7

STATEMENT OF THE CASE

On October 24, 2016, Swan was charged by Complaint with Simple Assault (Domestic) in connection with allegations pertaining to Angelina. On October 31, 2016, the State filed an Amended Complaint for Murder in the Second Degree. On November 4, 2016, Swan was indicted by the Grant County Grand Jury on one count of Murder in the Second Degree in violation of SDCL 22-16-7.

A jury trial was held in Grant County on September 11, 2017 with the Honorable Robert L. Spears presiding. The nature of the case was that Swan and Angelina had recently relocated from Florida to Milbank, South Dakota, as Swan graduated from Milbank High School. Witnesses in the Swan's apartment complex in Milbank testified that Swan and Angelina were heard arguing daily, sometimes twice a day. On Sunday, October 23, 2016, Swan and

Angelina were consuming alcohol, and Angelina did not feel well. Swan attempted to convince Angelina to leave the living room and go to the bedroom. Swan attempted to assist Angelina, and Angelina kicked him and he struck her foot in retaliation. They argued, and eventually Swan helped Angelina to the bathroom and then the bedroom.

Once Angelina was in the bedroom lying on the air mattress that they used for a bed, Angelina yelled at Swan half a dozen times. Each time Swan immediately went back to the bedroom and did what Angelina requested, be it getting her aspirin, water, helping her to the bathroom or turning down the television. Swan has a history of high blood pressure and was frustrated with Angelina repeatedly yelling at him. (Exhibit BBB, p. 20). On one of the occasions when Swan went to the bedroom, Angelina again kicked him, and he retaliated by hitting her foot. The last time Swan went in to check on Angelina, she had fallen off the mattress and was not breathing. To no avail, Swan tried resuscitating her. Swan contacted his friend, Duane Pollock, who was a former EMT and one of his only friends in Milbank. Duane Pollock arrived and thereafter determined that Angelina was not breathing and believed her to be dead. Thereafter, law enforcement and paramedics arrived and confirmed that Angelina had passed away at the age of 77.

Swan, age 62, was originally charged with Simple Assault, but upon the autopsy review, he was indicted for Second Degree Murder.

At the conclusion of the case, Swan requested that the jury be instructed on the lesser included offenses of First Degree Manslaughter (Heat of Passion) and Second Degree Manslaughter. The State opposed the requested instructions. The court refused to instruct the jury on the lesser included offenses of First Degree Manslaughter and Second Degree Manslaughter, despite there being some evidence in the record that supported the instructions.

STATEMENT OF THE FACTS

Swan graduated from Milbank High School in 1972. Upon graduation, Swan entered the Naval Academy. While serving in the Navy, he met Angelina who resided in Palm Set, Puerto Rico. (Exhibit BBB). When Swan had fulfilled his commitment, he re-enlisted and asked to go back to Puerto Rico so he could find Angelina. Swan and Angelina were married in 1976. Swan worked for RCA Service Company and became a government contractor. He then worked for RCA and Autech Range Services, but was eventually laid off. Swan and Angelina moved to West Palm Beach, Florida and made that their home. (Exhibit BBB).

On or about August, 2016, Swan and Angelina packed up their belongings and moved to Milbank, South Dakota. The main reason for the move was that Swan had lost his job and they found

Florida living to be too expensive. Before relocating to Milbank, South Dakota, Swan contacted his good friend Duane Pollock and advised that he would be coming back to Milbank, South Dakota. Duane Pollock and his wife, Sandy, helped Swan and Angelina find an apartment in Milbank, South Dakota. (JT, p. 113-115).

Angelina often appeared disoriented and unstable on her feet. At the time of Angelina's passing, she was experiencing severe back pain. While in Florida on August 20, 2013, Angelina went to the doctor for an evaluation of lower back pain that occurred as a result of a fall when she landed on her buttock. The medical records confirm that Angelina sustained an L2 compression fracture of her lumbar vertebra at 30%.

The treating physician also found that Angelina had a bruised pelvis. (Exhibit XX and JT, p. 461 and 462). Angelina was equipped with a back brace and told to come back for a re-check in October.

On September 3, 2013, Angelina had a re-check of the injury and was still complaining of radiating pain from her lower back to her buttock region, as well as palpable kyphosis, which was also confirmed at her next appointment on October 1, 2013. (Exhibit XX and JT, p. 462 through 464).

Angelina returned to the doctor on October 29, 2013, where it was determined that she had mild scoliosis, which is a side to side bending of the spine.

On January 9, 2014, radiographs were taken at Angelina's appointment and confirmed a multi-level degenerative disc disease and a grade one spondylolisthesis, which Dr. Bux described as an instability that some people have that causes their spine to tilt forward and cause chronic back pain. (JT, p. 465). Angelina again visited the doctor on April 18, 2014 still complaining of mild right sided lower back pain.

Swan and Angelina knew few people other than Duane Pollock and his wife, Sandy. Angelina rarely left the residence. In the week leading up to her passing, Angelina fell again and injured her back. Swan and Angelina did not go to the doctor, but Swan knew Angelina to be in severe pain. (Defense Exhibits A through GG, confirming Angelina was taking a variety of supplements pertaining to her back, as well as a prescription bottle showing a prescription for Tramadol).

On October 23, 2016, which was a Sunday, Swan was consuming alcohol and watching football. Angelina was not feeling well and had thrown up and was sleeping on and off in the recliner in the parties' living room. (Exhibit BBB).

Swan believed he had about one beer per quarter as he watched the Minnesota Vikings football game. That game started at noon. Swan continued to watch the football game and watch television, consuming (in his estimate) about five beers. Angelina continued to doze off in the recliner until approximately 12:30 A.M. to 1:00 A.M. when Swan and Angelina got

into an argument. The argument consisted of Angelina not wanting to leave the recliner to go to the bedroom. At that point, Angelina kicked Swan, and he hit her foot in retaliation. (Exhibit BBB and CCC).

Eventually, Swan convinced Angelina to go to the bedroom, but he walked her to the bathroom before they entered the bedroom. Once in the bedroom, Angelina called to Swan frequently for a variety of reasons, including getting her aspirin, water, helping her get situated on the mattress and her asking him to turn the television volume down. (Exhibit, BBB).

It should be noted that the autopsy did confirm that there were two aspirin in her stomach. (Exhibits 71 and ZZ).

On one of the occasions when Swan went back to help Angelina get situated on the bed, she again kicked him, and he slapped her in further retaliation. Swan acknowledged getting frustrated with Angelina's continuous yelling at him. Swan knew that Angelina was having problems moving due to a fall she sustained a few days before her passing (Exhibit BBB, p. 15). This was a similar injury to the one Angelina sustained in Palm Springs when she was walking the dog to take the dog outside and tripped over her feet and landed on her buttock. (Exhibit BBB, p.16). After taking Angelina to the bathroom, getting aspirin and water for her and trying to get her back on the mattress, Swan returned to the living room. When Swan did not hear Angelina snoring, he went into the bedroom to find out what was going on. Swan estimated it

was about 1:00 A.M. but was not sure, as he was not wearing a watch at that time. (Exhibit BBB, p. 21). When Swan found Angelina, she was off the air mattress and laying on the floor. Swan explained finding Angelina in the bedroom on the floor as follows:

> "She was warm, like she had been asleep, whatever. I shook her arms, hollered at her and then started shaking her, shaking her, shaking her, and I slapped her on the side of the face like that. She opened up her eyes, she rolled her eyes and then closed them again. I kept on trying to do that, just trying to revive her because I didn't know what had happened. I was scared. Then put my hand up by her nose. I didn't feel anything coming out there. I didn't notice that she was inflating her lungs and exhaling, so that's when I commenced doing mouth to mouth." (Exhibit BBB, p. 22).

Swan did not call 911, but instead called his friend, Duane Pollock, who had served many years as an EMT for the Milbank Fire Department. Duane Pollock called the Grant County Detention Center, and shortly thereafter, law enforcement, the paramedics and the coroner arrived. Each State witness gave a different guess as to the time of Angelina's death, none with any reasonable certainty.

While Swan was being detained during the investigation in the police car, he used his cell phone to call Angelina's sister and advised her that Angelina had passed away. (Exhibit CCC, p. 19).

Swan was taken to the Grant County Detention Center where he was interviewed on two separate occasions by DCI Agent Cam Corey, each interview lasting hours. Swan was charged with Simple Assault, and Angelina' body was taken to Sioux Falls for an autopsy. The autopsy revealed that Angelina had sustained an internal decapitation which caused her to die. (Exhibits 71 and ZZ).

Defense expert Dr. Robert Bux explained to the jury that the number one cause of death in the elderly is falling from seated or standing heights. Dr. Snell, the State's expert, could not rule out falling and said stomping could have caused this injury. At no point during Dr. Snell's testimony was he able to say with any degree of reasonable medical certainty that Swan caused Angelina to die.

After the parties had rested, the defense requested that the court instruct the jury on First and Second Degree Manslaughter, as had been proposed by the defense. The State opposed the request and the court rejected the defense's request to include instructions for First and Second Degree Manslaughter despite there being some evidence in the record to support the lesser included offenses.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF FIRST AND SECOND DEGREE MANSLAUGHTER.

Whether jury instructions are sufficient is a question of law reviewed de novo by this Court. State v. Waloke, 2013 S.D. 55. A trial court's refusal of a proposed instruction is reviewed under an abuse of discretion standard. State v. Nuzum, 2006 S.D. 89; State v. Doap Deng Chuol, 2014 S.D. 33.

Swan was indicted by the Grant County Grand Jury on one count of Second Degree Murder. After the parties had rested, outside the presence of the jury, the court proceeded with settlement of final jury instructions (JT, p. 547). The court then asked the parties if they had any proposed instructions, and the State indicated it did not.

The defense requested that the court instruct the jury on the lesser included offenses of Manslaughter in the First Degree and Manslaughter in the Second Degree: "Your Honor, we did originally propose lesser included offenses of Manslaughter in the First Degree and Manslaughter in the Second Degree pursuant to statute. They are lesser included offenses and we would ask the court to consider them as instructions." (JT, p. 555 and SR, proposed final jury instructions 122 - Homicide, the killing of one human being by another, is Manslaughter in the First Degree, which constitutes a lower degree of Homicide and is a lesser offense than the crime of Murder, if perpetrated without any design to effect death, and in a heat of passion, but in a cruel and unusual manner).

In denying the defense's request for the lesser included instructions, the court said:

> "The Court's going to deny the lesser included instructions as proposed by the Defense. In the Court's opinion, pursuant to *State v. Hoadley*, 651 N.W2d 249, South Dakota Supreme Court 2002, there's a legal test as I mentioned in my comments to Mr. Reedstrom. There's also a factual test. There is no evidence before the Court presented at trial in this Court's opinion that on the day of this offense and when it occurred that the parties were arguing in any way other than a minor, a minor argument or a disagreement pursuant to the transcript and the police reports that have been entered into evidence. So based on that, the Court's going to deny Defendant's proposed instructions for the reasons I just stated." (JT, p. 557, lines 11 through 23).

On 2005, the South Dakota Legislature attempted to clarify the confusion regarding lesser included offenses as they pertain to Murder and Manslaughter cases. The following statutes became effective on July 1, 2006:

SDCL 22-16-20.1 states:

> "Lesser included offenses. Murder in the Second Degree is a lesser included offense of Murder in the First Degree. Manslaughter in the First Degree is a lesser included offense of Murder in the First and Murder in the Second Degree. Manslaughter in the Second Degree is a lesser included offense of Murder in the First Degree, Murder in the Second Degree, and Manslaughter in the First Degree."

SDCL 22-16-20.2 states:

> "Lesser included offense instruction. A lesser included offense instruction shall be given at any homicide trial whenever any facts are submitted to the trier of fact which would support such an offense pursuant to this chapter. The state and the defendant each have the separate right to request a lesser included offense instruction. The failure to request a lesser included offense instruction constitutes a waiver of the right to such an instruction."

SDCL 22-16-20.2 is very specific, in that it requires the trial court to grant a lesser included offense instruction if there are any facts submitted to the jury which would support such an offense pursuant to this statute. It does not say the facts must be substantial or believable. There just must be any facts submitted to the jury which would support the lesser included instruction. Therefore, pursuant to SDCL 22-16-20.2, "the trial court's remaining task is to consider 'where there [is] some evidence to support giving the instruction' but the question is not . . . whether there was sufficient evidence." State v. Waloke, 2013 S.D. 55 citing State v. Hoadley, 2002 S.D. 109.

This court further determined that when a defendant's theory is supported by law and has some foundation and evidence, however tenuous, the defendant has a right to present it. State v. Klaudt, 2009 S.D. 71, citing State v. Packed, 2007 S.D. 75.

To be clear, this legislature has determined that SDCL 22-16-20.2 requires that a lesser included offense instruction be

given whenever "any facts" are submitted to the trier of fact, even if those facts are tenuous. Tenuous is defined as having little substance or strength, flimsy, weak, lacking a sound basis or unsubstantiated.

There clearly was some evidence that Swan may have acted in a heat of passion in connection with the unfortunate death of his spouse, Angelina. The evidence at trial was that Swan and Angelina argued daily and consumed alcohol daily. On Sunday, October 23, 2016, Swan and Angelina were again consuming alcohol. Angelina was not feeling well and Swan urged her to leave the recliner in the living room and go to bed. (Exhibit BBB, p. 19). The parties argued, and Angelina kicked Swan. Swan then slapped Angelina's foot. (Exhibit BBB, p. 19).

Swan eventually convinced Angelina to leave the living room and go to the bedroom to sleep. Swan became increasingly frustrated with Angelina's repeated requests for him to go to the bedroom about a half a dozen times for various reasons, including getting her aspirin, getting her water, helping her to the bathroom, turning down the television or repositioning her on the air mattress that was utilized as a bed (Exhibit BBB, p. 15 through 23).

Swan has a history of high blood pressure and was frustrated with Angelina repeatedly yelling at him. Again, when Swan went to check on Angelina in the bedroom, she kicked him, as she had done in the living room. He again hit her foot as they argued.

There clearly is some evidence of heat of passion. In State v. McCahren, 2016 S.D. 34, this Court determined that the trial court properly instructed the jury on Second Degree Murder, despite the defendant not originally being charged with Second Degree Murder. This Court determined that SDCL 22-16-20.2 "ensures that an instruction will not be given if no facts support the instruction. Such an approach satisfies due process concerns." It was clearly error not to instruct the jury on First Degree Manslaughter as a result of the arguing and fighting between Swan and Angelina.

In State v. Leinweber, 228 N.W.2d 120 Minn. (1975), the Supreme Court of Minnesota reversed the defendant's conviction for Murder on the grounds that the trial court should have instructed the jury on First Degree Manslaughter. In Leinweber, the 60 year old defendant was charged with murdering his spouse. Like Swan and Angelina, Leinweber and his spouse argued frequently, and like the facts in Swan, there was no evidence presented that there was a violent physical altercation leading to Leinweber's wife's death. Leinweber at 223.

The trial court in Leinweber refused to instruct the jury on First Degree Manslaughter and the Supreme Court of Minnesota reversed the trial court and determined that:

> "The jury might reasonably have inferred from the testimony and circumstantial evidence that this was a marriage under increasing emotional strain, resulting in anger and

> frustration on the part of both deceased and defendant as reflected in their habitual arguing when living together and in their correspondence when the defendant was away from home. On the date preceding the shooting, the signs of stress in the marriage were particularly apparent." Leinweber at 124.

The Court went on to acknowledge that on the date of the shooting, the defendant had frequented a number of local bars and returned home to argue with his spouse. Id.

The Court reversed the defendant's conviction on the grounds that from this and other testimony, the jury might reasonably have inferred that defendant, frustrated and desperate about the apparently imminent breakup of his marriage, intentionally shot his wife in the heat of passion aroused by bitter domestic argument. Id. at 24.

The Court concluded that with such inferences as supported by the evidence, it was error to deny the requested instruction on First Degree Manslaughter and, therefore, a new trial was ordered.

The trial court in Leinweber, like here, declined to instruct on the lesser included offense of First Degree Manslaughter saying "not only does the defendant completely repudiate such a concept, but there is no testimony in this case of what words were spoken, or what acts were performed by any one."

In Swan, the trial court was aware of both actions performed by Swan and Angelina (multiple times she kicked him and multiple

times he hit her back) and words spoken by Swan and Angelina (more than half a dozen times she screamed at him for a variety of reasons as stated, and more than half a dozen times he responded to her screaming to turn down the television, retrieve her aspirin and move her on the air mattress).

The Leinweber Court discussed in great detail the responsibilities of the prosecutor and defense counsel as it pertains to lesser included instructions, but correctly determined that the trial Judge has the ultimate responsibility to ensure all essential instructions are given. That clearly was not done in this case.

The Supreme Court of California has also determined that a trial court's failure to give a lesser included instruction on Manslaughter, committed as the result of a sudden quarrel or heat of passion, was reversible error in People v. Berry, 556 P.2d 777 (Cal. 1976).

In Berry, the defendant was convicted of First Degree Murder in the death of his spouse. Berry did not deny killing his wife by strangulation, but claimed he was provoked into killing her because of a sudden and uncontrollable rage caused by her taunting him for approximately two weeks with her claims to love another man, while at the same time claiming she was sexually attracted to Berry.

The trial court denied Berry's request for a lesser included instruction on Manslaughter committed in the heat of passion on

the grounds that there was only verbal provocation at issue here, and it spanned a two week period.

In reversing the trial court, the Supreme Court of California ruled there is no specific type of provocation required and that verbal provocation may be sufficient to justify an instruction on Manslaughter committed in the heat of passion. (Upholding their decision in People v. Valentine, 169 P.2d 1 (Cal. 1946)).

In Swan, the evidence consisted of witnesses in their apartment building testifying they heard Swan and Angelina argue daily and drink daily. On the day in question, the evidence is the parties were again drinking and arguing, but also engaged in at least two physical altercations. The evidence also showed that 77 year old Angelina suffered from dementia and very poor physical health and that 62 year old Swan was also in poor health, utilizing a cane to walk and suffering from high blood pressure. The issue as to whether there was sufficient provocation was one that should have been left to the jury.

To say there is no evidence in the record to support the lesser included offenses is to ignore the facts and the arguments presented at trial. The State painted the picture of the life of the Swans, their daily arguments, and characterized their lives as miserable. The State argued that Swan was annoyed and frustrated and grew angry and finally could not handle it. Those comments and the evidence presented regarding the physical

confrontations on the date in question absolutely show there was some evidence of heat of passion. Specifically in closing the State argued:

> "What did happen? The truth of the matter is the defendant and Angelina Swan, they lived a miserable life. They fought and yelled at each other. They drank. That's all they did. The Wohllebers who had no interest in this case heard them screaming at each other constantly. The Defendant admits he was—she was asking him for stuff constantly. He was annoyed. He was frustrated. She kept asking for things, bring me this, bring me that. He said it was like every five minutes. I would go sit down and ten minutes later she would be asking me for something again. And you know what, she does probably have a sore back. She does maybe have some cognitive disabilities, some memory loss. She's needy. She's dependent. She's becoming more and more dependent on this Defendant all the time and he can't handle it. He gets fed up by it. And instead of helping her the way he should have, he grew angry and he started beating her up. I think with his foot, the foot you saw. And I'm not going to show it to you. It's hideous. It's so callused and you'll look at the picture when you get back. He's stomping on her. She's protecting herself. And he stomps on her neck and he ends her life. Maybe he didn't mean to, but he did." (JT, p. 602 through 603).

There is clearly some evidence in the record to support the Swan's request that the jury be instructed on the lesser included offenses of First and Second Degree Manslaughter. The trial court abused its discretion when it failed to instruct the jury on the lesser included offenses as requested.

II. NO RATIONAL TRIER OF FACT COULD HAVE FOUND SWAN GUILTY OF SECOND DEGREE MURDER BEYOND A REASONABLE DOUBT.

Standard of Review. Challenges to the sufficiency of evidence are reviewed de novo. State v. Plenty Horse, 2007 S.D. 114. State v. Morse, 2008 S.D. 66.

At the time of her passing, Angelina was a very fragile and sick individual. In 2013, she sustained a serious back injury that resulted in an L2 compression fracture of her lumbar vertebra of 30%. She also bruised her pelvis. (Exhibit XX and JT, p. 461 and 462).

Angelina went to four follow-up appointments where she was diagnosed with mild scoliosis, multi-level degenerative disc disease, a grade one spondylolisthesis. (JT, p. 465).

In the days leading up to her passing, Angelina fell again and injured her back. She was again in severe pain. Defense expert Dr. Robert Bux and the State's expert Dr. Kenneth Snell agreed that Angelina had sustained an internal decapitation which caused her to die. (Exhibit 71 and ZZ).

Dr. Bux explained to the jury that his opinion was that based on Angelina's very poor health, including numerous falls, it was likely that falling caused her death. Dr. Bux' opinion was that Angelina sustained yet another fall that caused her death. His opinion was based on the fact that she was 77 years old, had a history of falls and she had evidence on x-ray of ischemic changes on CT which are consistent with dementia. (JT, p. 468).

Dr. Snell did not believe that Angelina could have sustained her injuries by falling, but did not know how Angelina died. He

was specifically asked "So she had injuries on the left side of her head and the left side of her neck that were consistent in your opinion with being stomped?" (JT, p. 431). His answer was "Well they could have been caused by stomping." He was again asked "So they could have been caused by stomping?" His answer again was "Yes sir." For clarification he was asked two more times if the injury could have been caused by stomping, after which he replied "Yes." (JT, p. 431 and 432).

Neither Dr. Snell nor any State witness could testify with any reasonable medical certainty how Angelina died, and a conviction for Second Degree Murder cannot be based on something that "could have been" caused by Swan.

CONCLUSION

Swan was convicted of Second Degree Murder, and after the parties rested, the defense requested that the jury be instructed on First and Second Degree Manslaughter based on the evidence in the record supporting the request. The trial court abused its discretion when it determined that there was no evidence in the record to justify the lesser included instructions of First and Second Degree Manslaughter.

Further, there is not sufficient evidence in the record to sustain a finding of guilty beyond a reasonable doubt based on an expert opinion that Swan "could have" caused Angelina's death.

WHEREFORE, Swan requests that this Court reverse his conviction for Second Degree Murder, and remand to the trial court

with instructions to strike the life sentence given for this conviction and to enter a Judgment of Acquittal on this charge. In the alternative, Swan requests that the Judgment of Conviction be reversed and the case be remanded for a new trial.

Respectfully submitted this 28th day of February, 2018.

BRATLAND LAW

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REQUEST FOR ORAL ARGUMENT

Defendant-Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, hereby certifies that the Appellant's Brief in the above entitled action was duly served upon Appellee by mailing two true copies thereof to:

Marty J. Jackley
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Mark A. Reedstrom
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by United States mail, postage prepaid, this 28th day of February, 2018.

The undersigned further certifies that he emailed a copy of Appellant's Brief to the following this 28th day of February, 2018:

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The undersigned further certifies that he mailed the original and two copies of Appellant's Brief to:

Shirley Jameson-Fergel
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Pierre, South Dakota 57501-5070

by United States mail, postage prepaid, this 28th of February, 2018.

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CERTIFICATE OF COMPLIANCE

Scott R. Bratland of Bratland Law, attorney for Appellant, hereby certifies that the Appellant's Brief dated February 28, 2018, complies with SDCL 15-26A-66(b) in that it contains 4,618 words.

Dated at Watertown, South Dakota, this 28th day of February, 2018.

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APPENDIX

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF GRANT) THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

File No.: 25CRI16-000130

vs.

JUDGMENT OF CONVICTION

MICHAEL BERT SWAN,
Defendant.

AN INDICTMENT was filed with this Court before the Honorable Vincent Foley on the 4th day of November, 2016, charging the defendant with the crime of MURDER IN THE SECOND DEGREE, SDCL 22-16-7, a Class B felony, which occurred on the 24th day of October, 2016. The defendant was arraigned on the Indictment on the 4th day of November, 2016. The defendant, defendant's attorney, Scott Bratland, and Mark A. Reedstrom, Grant County State's Attorney, appeared at the defendant's arraignment. The Court advised the defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the defendant. The defendant pled not guilty to the afore-mentioned charge and requested a jury trial on the charge.

A jury trial commenced on the 11th, 12th, 13th, and 14th day of September, 2017, in Milbank, South Dakota, on the charge. On the 14th day of September, 2017, the jury returned a verdict of guilty to the charge of Murder in the Second Degree, a Class B felony.

IT IS THEREFORE, the judgment of this Court that the defendant is guilty of the offense of MURDER IN THE SECOND DEGREE, SDCL 22-16-7, a Class B felony.

SENTENCE

On the 31st day of October, 2017, after Court and counsel reviewed the presentence investigation report, the Court asked the defendant if any legal cause existed to show why judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

IT IS HEREBY ORDERED, that the defendant forthwith be imprisoned in the South Dakota State penitentiary, situated in the City of Sioux Falls, State of South Dakota, at hard labor for life, there to be kept, fed and clothed according to the rules and discipline governing said institution. A lesser sentence may not be given for a Class B felony.

IT IS FURTHER ORDERED, that the Court expressly reserves control and jurisdiction over the defendant, and that this Court may revoke the suspension any time

and reinstate the sentence and/or the fine without diminishment or credit for any of the time that the sentence was suspended.

IT IS FURTHER ORDERED, that the Court reserves the right to amend any and all of the terms of this Order at any time.

BY THE COURT:

Signed: 11/6/2017 8:58:39 AM

Robert L. Spears

Judge of Circuit Court

Attest:
Anderson, Julie
Clerk/Deputy

Filed on: 11/06/2017 Grant County, South Dakota 25CRI16-000130

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28450

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MICHAEL B. SWAN,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT L. SPEARS
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed November 14, 2017

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28450

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

MICHAEL B. SWAN,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Michael B. Swan, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name. The settled record in the underlying criminal case, *State of South Dakota v. Michael B. Swan,* Grant County Criminal File No. 16-130, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." The various transcripts and other documents will be cited as follows:

Jury Trial (Volume I) – September 11, 2017 ..... JTI

Jury Trial (Volume II) – September 11, 2017 ..... JTII

Jury Trial (Volume III) – September 12, 2017 ..... JTIII

Jury Trial (Volume IV) – September 13, 2017 ..... JTIV

Jury Trial (Volume V) – September 14, 2017 ..... JTV

Motions Hearing – October 10, 1017.....MH

Sentencing Hearing – October 31, 2017 ..... SH

All such references will be followed by the appropriate page designation as well as citation to the settled record. The State's jury trial exhibits will be identified as "State's Exhibit" followed by the exhibit number.

JURISDICTIONAL STATEMENT

Defendant was convicted of one count of second-degree murder. JTV 608, SR 1287. A Judgment of Conviction was entered by the Honorable Robert L. Spears, Circuit Court Judge, Third Judicial Circuit, on November 6, 2017. SR 550-51. Defendant filed a Notice of Appeal on November 14, 2017. SR 553. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE LESSER-INCLUDED OFFENSE INSTRUCTIONS REQUESTED BY DEFENDANT?

The trial court determined that no evidence was provided to support instructing the jury on the lesser-included offenses of first and second-degree manslaughter.

State v. Hart, 1998 S.D. 93, 584 N.W.2d 863

State v. McCahren, 2016 S.D. 34, 878 N.W.2d 586

State v. Waloke, 2013 S.D. 55, 835 N.W.2d 105

State v. Hoadley, 2002 S.D. 109, 651 N.W.2d 249

SDCL 22-16-7

SDCL 22-16-15

SDCL 22-16-20

SDCL 22-16-20.1

SDCL 22-16-20.2

II

WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION FOR SECOND-DEGREE MURDER?

The trial court denied Defendant's motion for judgment of acquittal, finding that the State provided sufficient evidence to present questions of fact for the jury.

State v. Martin, 2015 S.D. 2, 859 N.W.2d 600

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

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

State v. Hart, 1998 S.D. 93, 584 N.W.2d 863

SDCL 22-16-7

STATEMENT OF THE CASE AND FACTS

At approximately 4:00 a.m. on Monday October, 24, 2016, Duane Pollock (Pollock) received a telephone call from Defendant, a man he had known for almost fifty years. JTII 112-13, 127, SR 713-14, 728. Defendant, now 63 years old, had grown up in Milbank, South Dakota, and recently returned to the area. JTII 114-15, SR 715-16. He and Pollock were childhood friends. JTII 112, SR 713. Pollock assisted Defendant and his wife, Angelina, 77 years old, with

finding an apartment and getting settled in Milbank. JTII 115-16, SR 716-17. Defendant and Pollock saw each other regularly, and their families became friends. JTII 121-22, SR 722-23.

Defendant called Pollock on that Monday morning because he said he could not wake Angelina, and he knew Pollock had experience as an Emergency Medical Technician. JTII 127-28, SR 728-29. Pollock immediately went to Defendant's apartment, arriving within five minutes. JTII 128, SR 729. Pollock checked Angelina as soon as he arrived and could not find a pulse. *Id.* He attempted to open her mouth to attempt CPR and found her jaw to be locked shut. *Id.* Based on his prior experience as an EMT, Angelina's state of rigor mortis led Pollock to believe she had been dead between two and four hours.[1] *Id.* Pollock also noticed extensive bruising on Angelina's face and arms. JTII 129, 132-33, SR 730, 733-34.

Concerned about his observations, Pollock contacted the Grant County Detention Center and requested law enforcement assistance and an ambulance. JTII 133, SR 734. Michael Morgan, Milbank Police Officer, arrived on the scene at approximately 4:15 a.m. JTIII 175-76, SR 793-94. Officer Morgan's observations of Angelina were similar to those of Pollock – she was cold, gray, stiff, and her jaw

[1] Duane Tillman, a paramedic who responded with the ambulance testified that Angelina had been dead between one and four hours when he arrived on the scene at approximately 4:19 a.m. JTIII 197, 203, SR 815, 821. Timothy Mundwiler, the local funeral director, estimated that Angelina had been dead approximately four hours when he arrived. JTIII 217, SR 835.

was locked. JTIII 177, SR 795. Officer Morgan also noticed that Angelina had a black eye, bruising on the left side of her face, bruising on her right hand, and blood in her nose. JTIII 182, 184, SR 800, 802. Officer Morgan became concerned based on his observations and contacted his supervisor, Chief of Police Boyd Van Vooren. JTIII 186-87, SR 804-05. Chief Van Vooren in turn contacted Special Agent Cameron Corey with the South Dakota Division of Criminal Investigation to assist with the investigation of Angelina's death. JTIII 227, SR 845.

Agent Corey arrived and, with the assistance of Special Agents Jeff Kollars and Jeff Belon, led the investigation into Angelina's death. JTIII 285, 288, SR 903, 906. While Agents Kollars and Belon processed the crime scene, Agent Corey conducted two interviews with Defendant. JTIII 288-89, 297, SR 906-7, 912. Defendant explained that on Saturday afternoon, Pollock had driven him to the store to buy a case of beer.[2] JTIII 291, SR 909. After returning from the store on Saturday afternoon, neither Defendant nor Angelina left the apartment, and they did not have any visitors.[3] JTIII 295-96, SR 913-14.

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[2] Pollock testified at trial that when he brought Defendant home he helped Defendant bring the beer and other groceries into the apartment. He also stayed for a few minutes and visited with Angelina. At that time, Angelina had no visible injuries to her face or anywhere else, and she was acting normally. JTII 125-27, SR 726-28.

[3] Defendant provided inconsistent stories about whether he had taken a box of garbage to the dumpster late Sunday night. He first said he

Defendant told Agent Corey that he and Angelina watched television most of the day Sunday. JTIII 296, SR 914. Between 12:30 and 1:00 a.m. Monday morning, Angelina was lying in her chair, and Defendant told her she should go to bed. JTIII 297, SR 915. Angelina kicked her foot at Defendant because she did not want to go to bed, so "he gave the bottom of her foot a pop." *Id.* Due to a recent back injury, Angelina required some assistance from Defendant when moving around. JTIII 323-24, SR 941-42. Defendant assisted Angelina to the bathroom and then into the bedroom where he helped her to lay down on an air mattress where the couple slept. JTIII 297, SR 915. Defendant said the couple "squabbled" as he tried to lay her on the bed. JTIII 298, SR 916. Defendant said he and Angelina "squabbled" again as she repeatedly called to him to bring her things like water and aspirin. JTIII 308, SR 926.

While other details of Defendant's story changed, he remained consistent in his description of the disagreements he had with Angelina – they were insignificant marital "squabbles." Defendant told Agent Corey, "[w]e squabbled after she had gone to bed, but that's all, just husband and wife after so much time, just squabbling." JTIII 307, SR 925. According to Defendant, "[w]e didn't really fight or

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had left the apartment to take the box out. But, when Agent Corey pointed out that the box was still near the front door of the apartment on Monday morning, Defendant admitted that he did not leave the house between returning from the store on Saturday evening and calling Pollock Monday morning. JTIII 293-96, SR 911-14.

anything like that, just squabbled." JTIII 308, SR 926. He continued, "[i]t was no cursing at each other or anything like that. It did get a little vocal when I was taking her to bed saying just lay down, get some sleep. That's all." JTIII 310, SR 928.

After Angelina fell asleep, Defendant sat at his desk, which was closer to the bedroom, so he could hear her snoring. JTIII 299, SR 917. Defendant said he could hear Angelina snoring softly "like women do." JTIII 299-300, SR 917-18. Defendant said he checked on Angelina at least three times. JTIII 311, SR 929. Once when he checked on her, she had rolled off the air mattress, but she did not want him to help her back onto it. JTIII 315, SR 933. Defendant continued watching television and checking on Angelina until at least 2:00 a.m. JTIII 299, SR 917.

After a while, Defendant said he could no longer hear Angelina snoring, so he went to check on her again. JTIII 302, SR 920. When he checked on her, she was lying in the same position next to the air mattress, but he was not able to wake her up. JTIII 302, 316, SR 920, 934. Defendant said he began slapping the side of Angelina's face, but she would not wake up. JTIII 302, SR 920. Defendant said he attempted to give Angelina mouth-to-mouth resuscitation, and then he called Pollock for help at 4:00 a.m. JTIII 303, 313, SR 921, 931.

Dr. Kenneth Snell, Minnehaha County Medical Examiner, performed an autopsy on Angelina's body the day after she was

discovered. JTIV 353, 361, SR 998, 1006. Dr. Snell discovered extensive external and internal trauma. Dr. Snell found significant injuries on Angelina's face, including bruising on the upper and lower eyelids of her right eye, bruising on her left cheek, and hemorrhaging to the sclera in both eyes. JTIV 371-72, 374-75, SR 1016-17, 1019-20. *See also* State's Exhibits 18-20, 32-34, 38-39. Dr. Snell also found bruising on Angelina's body, including on her abdomen, right buttock, right arm, right hand, right thigh, right knee, and inner left shin. JTIV 376-77, SR 1021-22. *See also* State's Exhibits 31, 43-51, 53-59, 61-62.

During his internal examination, Dr. Snell found a severe atlanto-occipital dislocation (AOD), also known as an internal decapitation. JTIV 384, 389, SR 1029, 1034. An internal decapitation causes the base of the skull to separate from the top vertebrae causing substantial trauma to the upper cervical spinal cord and brain stem. JTIV 384-85, 387, SR 1029-30, 1032. An AOD injury damages the nerves that control functioning of the heart, lungs, and appendages. JTIV 385, 387, SR 1030, 1032. Dr. Snell also observed two subdural hemorrhages and several hemorrhages on Angelina's back where her ribs met her spine. JTIV 397, SR 1042.

An internal decapitation, as the name suggests, is often rapidly fatal. JTIV 387, SR 1032. Based on the severity of the internal injuries observed by Dr. Snell, Angelina's prognosis for survival was

zero. JTIV 389, SR 1034. Dr. Snell explained that AOD injuries are considered high-energy impact injuries, resulting most often from car accidents and high falls. JTIV 390, SR 1035. Dr. Snell testified that he had never seen a case of an AOD injury suffered after a fall from a standing height.[4] JTIV 391, SR 1036. He had seen on two occasions internal decapitations result from victims being stomped. JTIV 391, SR 1036. Dr. Snell concluded that the cause of Angelina's death was an internal decapitation, and the mechanism of her injury was stomping. JTIV 394, SR 1039.

The State initially filed a complaint against Defendant charging him with Domestic Simple Assault, a Class 1 Misdemeanor, in violation of SDCL 22-18-1(1). SR 1. After receiving the results of the autopsy, the State amended the complaint, charging Defendant with Murder in the Second Degree, a Class B Felony, in violation of SDCL 22-16-7. SR 5. Defendant was indicted for Murder in the Second Degree by a Grant County grand jury on November 4, 2016. SR 12.

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[4] Defendant's medical expert, Dr. Robert Bux, testified that Angelina's injury was the result of a fall from a standing height. JTIV 467, SR 1112. He based his conclusion primarily on the surrounding circumstances, such as an absence of an assaultive pattern to her injuries, absence of any signs of a struggle at the scene, and her history of falling. JTIV 467-69, SR 1112-14. Dr. Bux did not point to a specific case in his experience or in the medical literature where an AOD injury resulted from a fall from a standing height. JTIV 496-97, SR 1141-42. Dr. Snell rejected Dr. Bux's conclusion as to the mechanism of Angelina's injury on the basis that Dr. Bux could not point to any known instance of an AOD injury resulting from a low-impact fall. JTIV 520, SR 1165.

Defendant's jury trial commenced on September 11, 2017. JTI 1, SR 589. During opening arguments, closing arguments, and throughout trial Defendant asserted that he did not cause Angelina's death, and her fatal injuries resulted from a fall. JTII 108-9, SR 709-10; JTV 596-97, SR 1275-76. Defendant denied that he and Angelina engaged in any type of violent altercation. JTIII 308, SR 926.

While settling jury instructions, Defendant requested instructions on lesser-included offenses of First-Degree and Second-Degree Manslaughter pursuant to SDCL 22-16-20.1 and 20.2. JTV 555, SR 1234. The State opposed these instructions, arguing that no evidence existed on the record to provide factual support for those instructions. JTV 556, SR 1235. The trial court agreed with the State that no evidence was presented to support the manslaughter instructions, and the Defendant's request was denied. JTV 557, SR 1236.

Defendant was ultimately convicted of second-degree murder. JTV 608, SR 1287. Defendant moved for judgment of acquittal at the close of the State's case, and the trial court denied that motion. JTIV 436-37, SR 1081-82. Defendant renewed his motion in writing after the trial concluded. SR 529-30. The trial court held a hearing on the motion. MH 2, SR 584. But it was again denied. MH 4, SR 586.

The trial court sentenced Defendant to life imprisonment in the South Dakota State Penitentiary pursuant to SDCL 22-6-1(2). SH 5,

SR 561. The trial court filed a Judgment of Conviction on November 6, 2017. SR 550-51. Defendant filed a Notice of Appeal on November 14, 2017. SR 553.

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S REQUESTED LESSER-INCLUDED OFFENSE INSTRUCTIONS.

Defendant first asserts that he was entitled to jury instructions of first and second-degree manslaughter pursuant to SDCL 22-16-20.2. DB 14-15. Specifically, Defendant argues that evidence was presented to the jury showing that Defendant acted in the "heat of passion" justifying an instruction on first-degree manslaughter as defined in SDCL 22-16-15. DB 15-16, 20-22. But Defendant is incorrect. There is no evidence in the record to show that Defendant was provoked to the point that he exhibited "violent emotion" that overwhelmed his reason as required for "heat of passion." *State v. Hart*, 1998 S.D. 93, ¶ 15, 584 N.W.2d 863, 865.

A. Standard of Review.

This Court has repeatedly held that a trial court's decision to grant or deny a particular jury instruction will be reviewed for an abuse of discretion. *State v. McCahren*, 2016 S.D. 34, ¶ 5, 878 N.W.2d 586, 590; *State v. Waloke*, 2013 S.D. 55, ¶ 27, 835 N.W.2d 105, 112; *State v. Roach,* 2012 S.D. 91, ¶ 13, 825 N.W.2d 258, 263; *State v. Klaudt,* 2009 S.D. 71, ¶ 13, 772 N.W.2d 117, 121.

B. Relevant Statutes and Jury Instructions.

Defendant was charged and convicted of second-degree murder. SR 5, 550-51. Second-degree murder is a homicide "perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child." SDCL 22-16-7. The State successfully argued at trial that Defendant acted with a "depraved mind" in beating his wife, Angelina, and stomping on the back of her neck as she lay on the floor. *See* JTII 83, 97-98, SR 684, 698-99; JTV 573-74, 604, SR 1252-53, 1283. The stomping resulted in an internal decapitation that caused her death within minutes. JTIV 390, SR 1035.

When settling jury instructions, Defendant requested that the trial court instruct the jury on the lesser-included offenses of first and second-degree manslaughter. JTV 555, SR 1234. As relevant to this case, first-degree manslaughter is a homicide perpetrated "[w]ithout

any design to effect death, including [to] an unborn child, and in a heat of passion, but in a cruel and unusual manner." SDCL 22-16-15. Second-degree manslaughter is "[a]ny reckless killing of one human being, including an unborn child, by the act or procurement of another which . . . is neither murder nor manslaughter in the first degree . . ." SDCL 22-16-20.

The phrase "heat of passion" as it is used in SDCL 22-16-15 means "intent 'formed suddenly, under the influence of some violent emotion, which for the instant overwhelmed the reason of the slayer.'" *Hart*, 1998 S.D. 93, ¶ 15, 584 N.W.2d at 865 (quoting *Graham v. State*, 346 N.W.2d 433, 434 (S.D. 1984)). "Heat of passion" is further defined in the South Dakota Criminal Pattern Jury Instruction that Defendant requested. SR 134. The relevant jury instruction states

> "Heat of passion" which will reduce a killing from murder to manslaughter in the first degree means a suddenly formed passion which was caused by reasonable and adequate provocation on the part of the person slain, causing a temporary obscurity of reason rendering a person incapable of forming a premeditated design to kill and which passion continues to exist until the commission of the homicide.
>
> "Heat of passion" is such mental disturbance or condition as would so overcome and dominate or suspend the exercise of the judgment of the defendant as to render his mind for the time being deaf to the voice of reason, make him incapable of forming and executing the distinct intent to take human life, and to cause him, uncontrollably, to act from impending force of the disturbing cause rather than from any real wickedness of heart or cruelty or recklessness of disposition. The sufficient provocation must be such as would naturally

> and reasonably arouse the passion of an ordinary person beyond his power to control.

SDCPJI 3-24-26 (1996).

Through SDCL 22-16-20.1, the South Dakota Legislature codified that first and second-degree manslaughter are lesser-included offenses of second-degree murder. *See McCahren*, 2016 S.D. 34, ¶ 8, 878 N.W.2d at 591-92; *Waloke*, 2013 S.D. 55, ¶¶ 29-30, 835 N.W.2d at 113-14. The Legislature continued in SDCL 22-16-20.2 that lesser-included offense instructions shall be given at the request of either the State or the defendant "at any homicide trial whenever any facts are submitted to the trier of fact which would support such an offense pursuant to this chapter." *Id.*

This Court has interpreted SDCL 22-16-20.2 by stating that lesser-included offense instructions will be given in homicide trials when "some evidence" exists to support the requested instruction. *Waloke*, 2013 S.D. 55, ¶ 30, 835 N.W.2d at 114 (quoting *State v. Hoadley*, 2002 S.D. 109, ¶ 64, 651 N.W.2d 249, 264). Lesser-included offense instructions are only appropriate where evidence is presented to support a conviction on the lesser charge. *Hoadley*, 2002 S.D. 109, ¶ 51, 651 N.W.2d at 261.

C. No evidence exists in the record to support the first or second-degree manslaughter instructions.

Before Defendant's requested lesser-included offense instructions on first and second-degree manslaughter can be given,

the trial court must establish that two separate tests have been met. *Waloke*, 2013 S.D. 55, ¶ 29, 835 N.W.2d at 113. *See also Hoadley*, 2002 S.D. 109, ¶ 49, 651 N.W.2d at 260. The first test is the elements test, which requires a comparison of the elements and the punishments of the greater and lesser offenses. *Waloke*, 2013 S.D. 55, ¶ 29, 835 N.W.2d at 113. The Legislature simplified the trial court's task in applying this test in homicide cases, codifying the possible lesser-included offenses for various degrees of murder and manslaughter in SDCL 22-16-20.1. *Id.*

The second test is a factual test. For the factual test, the trial court must determine "whether there [is] *some* evidence to support giving the instruction." *Id.* at ¶ 30 (quoting *Hoadley*, 2002 S.D. 109, ¶ 64, 651 N.W.2d at 264) (emphasis in original). "SDCL 22-16-20.2 requires the trial court to complete a factual analysis before granting a requested instruction on a lesser included offense." *Id.* at ¶ 32. If there is no evidence on the record to support any one element of the lesser offense, the lesser-included offense instruction need not be given. *Id.* As the trial court correctly found, the factual test was not met in this case because no evidence was presented to the jury supporting an instruction on either first or second-degree manslaughter.

In *State v. Hoadley*, the defendant was convicted of premeditated murder, among other crimes. 2002 S.D. 109, ¶ 14, 651 N.W.2d at

254. Hoadley argued on appeal that the heavy rocks he threw at the victim's head should be viewed as an attempt to silence the victim rather than intent to kill him. *Id.* at ¶ 48. According to Hoadley, the facts when interpreted in this light supported lesser-included offense instructions because he lacked "a design to effect death" as required for first-degree murder. *Id.*

This Court found that for the factual test to be met, "evidence must be presented that would support a conviction on the lesser charge." *Id.* at ¶ 51 (quoting *State v. Black*, 506 N.W.2d 738, 744 (S.D. 1993)). A request of a lesser-included offense instruction should be denied where a rational jury would have found that the evidence supported only the offense of which the defendant was convicted. *Id.* at ¶ 52. *See also Black*, 506 N.W.2d at 744. This Court found that Hoadley's argument was contrary to his actions, and "actions speak louder than words." *Hoadley,* 2002 S.D. 109, ¶ 52, 651 N.W.2d at 261 Based on the evidence presented that Hoadley planned the murder of his victim and tortured him for several hours before killing him, this Court found that any instruction on a lesser homicide offense was inappropriate. *Id.*

As was the case in *Hoadley*, the evidence Defendant points to on appeal does not support conviction on a lesser included offense of first or second-degree manslaughter. With regard to first-degree manslaughter, the evidence makes clear that Defendant did not kill

Angelina in the "heat of passion." Defendant's own statements show that he considered his disagreements with his wife to be nothing more than typical marital "squabbles." JTIII 307, SR 925.

First, Defendant talked about giving Angelina's "foot a pop" because she kicked at him when he told her to go to bed. JTIII 297, SR 915. Defendant then said, "they began to squabble" when he was helping Angelina to bed because she wouldn't "scooch more up onto the air mattress." JTIII 298, SR 916. After she laid down, Angelina called to Defendant to bring her water and aspirin. JTIII 309, SR 927. Defendant said they squabbled "just like couples do" because he was not "in the mood" to help her. JTIII 309-10, SR 927-28. Defendant told Agent Corey that "there was no cursing at each other or anything like that." *Id.* "We didn't really fight or anything like that, just squabbled." JTIII 308, SR 926.

Defendant's description of his disagreements with Angelina does not constitute evidence of "heat of passion." No evidence was presented to show that Defendant was "under the influence of some violent emotion, which for the instant overwhelmed [his] reason." *Hart*, 1998 S.D. 93, ¶ 15, 584 N.W.2d at 865. Angelina's requests were not "reasonable and adequate provocation" that would cause a "temporary obscurity" of Defendant's reason. SDCPJI 3-24-26 (1996). Similarly, the couple's "squabbles" did not cause Defendant to experience "sufficient provocation [that] would naturally and

reasonably arouse the passion of an ordinary person beyond [his] power to control." *Id.*

Defendant presented no evidence at trial, and has pointed to none on appeal, that would support a conviction for "heat of passion" manslaughter. In fact, Defendant's only argument at trial was that he did not cause Angelina's injury. Defense counsel argued in opening and closing that Angelina's injuries resulted from a fall. *See* JTII 108, SR 709. JTV 578, 592, 596-97, SR 1257, 1271, 1275-76. Defendant's expert witness also provided considerable testimony that Angelina's injuries were the result of a fall. JTIV 467-73, SR 1112-18. Defendant argued at trial that he did not cause Angelina's injuries, and the minimal evidence he points to on appeal of marital "squabbles" does not support a "heat of passion" state of mind.

Defendant relies on two out-of-state cases, arguing that they support his request for a "heat of passion" manslaughter instruction. DB 17-20. Defendant's reliance on these cases is misplaced as the facts are distinguishable. In *State v. Leinweber*, the defendant shot his wife after weeks of increasing emotional strain and discovering that she was planning to file for divorce. 303 Minn. 414, 418, 228 N.W.2d 120, 123 (1975). In *People v. Berry*, the defendant strangled his wife after several days of taunting him with sexual excitement and then telling him she planned to leave him because she had become pregnant by another man. 18 Cal. 3d 509, 513, 556 P.2d 777, 779

(1976). Here, Defendant did not express concern that his marriage was ending or that Angelina had been unfaithful. Both of the cases Defendant cites are factually different from the present case because the "squabbles" between Defendant and Angelina do not rise to the levels of emotional turmoil experienced by those defendants.

Likewise, Defendant has pointed to no evidence that would justify an instruction on second-degree manslaughter. Homicide is manslaughter in the second-degree only when "under . . . this chapter, [the homicide] is neither murder nor manslaughter in the first degree." SDCL 22-16-20. Here, Defendant's actions were "imminently dangerous" to Angelina, and they evinced a "depraved mind" because the evidence shows that he stomped on the back of her neck until the base of her skull dislocated from her spine. SDCL 22-16-7. Based on the evidence presented, the jury appropriately found Defendant guilty of second-degree murder. JTV 608, SR 1287. Because Defendant's violent act fits squarely within the definition of second-degree murder, he is not entitled to an instruction on second-degree manslaughter.

Defendant was not entitled to instructions of first or second-degree manslaughter because the evidence showed he acted with a "depraved mind, without regard for human life" when he killed Angelina by stomping on her neck. JTIV 394, SR 1039. *See also* SDCL 22-16-7. Further, Defendant offered no evidence at trial or on appeal of an event that caused him a "violent emotion" that

"overwhelmed his reason" leading to a "heat of passion" state of mind. *Hart*, 1998 S.D. 93, ¶ 15, 584 N.W.2d at 865. Some evidence was offered by the State of marital disagreements, but Defendant discounted these disagreements as marital "squabbles." Defendant maintained throughout trial that he did nothing to hurt Angelina and her fatal injuries were the result of a fall. Neither side presented any evidence at trial to support giving an instruction on either first or second-degree manslaughter. And the trial court did not abuse its discretion in denying those instructions.

II

THE STATE OFFERED SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION FOR SECOND-DEGREE MURDER.

Defendant next asserts that insufficient evidence was provided to the jury to support his conviction. DB 22. Defendant contends that because there is conflicting expert testimony and the State's expert could not state with certainty the exact mechanism of Angelina's injury there is insufficient evidence to uphold his conviction. DB 22-23. Defendant is ostensibly asking this Court to reweigh the evidence and testimony presented to the jury, which it will not do. *State v. Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d 600, 606.

A. Standard of Review.

This Court reviews "challenges to the sufficiency of the evidence de novo." *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606 (quoting *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140). "The ultimate

question in such an appeal is 'whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *Id.* (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342) (internal quotation marks omitted). *See also State v. Roubideaux*, 2008 S.D. 81, ¶ 13, 755 N.W.2d 114, 118; *State v. Owen*, 2007 S.D. 21, ¶ 35, 729 N.W.2d 356, 367. Restated, this Court must establish whether, when viewing the evidence in a light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606 (quoting *Brende,* 2013 S.D. 56, ¶ 21, 835 N.W.2d at 140).

B. The State submitted sufficient evidence to allow a rational trier of fact to sustain a guilty verdict beyond a reasonable doubt.

Defendant claims that a conviction cannot be based on "something that 'could have been.'" DB 23. Defendant asserts that because the State's expert witness could not establish with certainty the cause of Angelina's death there is insufficient evidence to convict him of second-degree murder. *Id.* Defendant's assertion is incorrect. Based on the expert testimony and the circumstantial evidence surrounding Angelina's death, there is sufficient evidence to support Defendant's conviction.

This Court will not "resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence on appeal." *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606 (quoting *Carter*, 2009 S.D. 65,

¶ 44, 771 N.W.2d at 342). "If the evidence including circumstantial evidence and reasonable inferences drawn therefrom sustain a reasonable theory of guilt, a guilty verdict will not be set aside." *State v. Miller*, 2014 S.D. 49, ¶ 10, 851 N.W.2d 703, 706 (quoting *Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d at 342). This Court "will not reexamine a jury's assessment on which witness bears more credibility or which expert's opinion carries greater weight." *State v. Laible*, 1999 S.D. 58, ¶ 10, 594 N.W.2d 328, 331 (citations omitted).

Defendant is specifically asking this Court to reweigh the evidence and to reexamine the weight of the experts' testimony. Defendant cites to Dr. Snell's testimony that Angelina's injuries "*could have been*" caused by stomping. DB 23 (emphasis added). He also points to Dr. Bux's testimony that "it was *likely* that falling caused [Angelina's] death." DB 22. (emphasis added). Defendant appears to argue that since Dr. Bux called his determination as to the mechanism of Angelina's death "likely" and Dr. Snell said only that the mechanism "could have been" stomping, then the defense expert's testimony should be given more weight. DB 22-23. But the jury heard this exact same evidence and found Defendant guilty. JTV 608, SR 1287. The jury weighed the evidence, including the circumstantial evidence and expert testimony, and determined that Defendant was guilty beyond a reasonable doubt.

For this Court to find sufficient evidence to support a conviction, a rational trier of fact must be able to find the essential elements of the crime were committed beyond a reasonable doubt. *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606. To convict Defendant for second-degree murder, the jury must have found the following four elements beyond a reasonable doubt: (1) Defendant caused Angelina's death; (2) Defendant caused Angelina's death by an act imminently dangerous to her and evincing a depraved mind, without regard for human life; (3) Defendant acted without the design to effect the death of any particular person; (4) the killing was not excusable or justifiable. SDCL 22-16-7. *See also* SDCPJI 3-24-12 (2007).

The State offered considerable evidence to prove that Defendant caused Angelina's death. First, the State showed through the testimony of Dr. Snell that Angelina's death was inflicted and not accidental. JTIV 391-92, SR 1036-37. Based on his examination of Angelina's body, Dr. Snell testified that her injury was likely inflicted by someone stomping on the back of her neck while she lay on the ground. JTIV 394, SR 1039.

Based on Defendant's statements, Agent Corey concluded that Defendant was the only person with the opportunity to inflict Angelina's injuries. In his interviews, Defendant said that neither he nor Angelina left their apartment after he returned from the store on Saturday evening. JTIII 295-96, SR 913-14. Defendant also said that

they did not have any visitors. *Id.* Defendant was awake Sunday night listening to Angelina snore. JTIII 299-300, SR 917-18. At one point, Defendant could no longer hear Angelina snoring. JTIII 302, SR 920. When he went to check on her again, he discovered she was not breathing. *Id.*

Defendant also provided suspicious explanations of Angelina's external injuries and the CPR that he attempted. Defendant told Agent Corey that he attempted to perform mouth-to-mouth on Angelina; and, when he was unsuccessful, he immediately contacted Pollock. JTIII 303, 313, SR 921, 931. When Pollock arrived five minutes later, he was unable to pry Angelina's jaw open. JTII 128, SR 729. Because Angelina's jaw was locked shut due to rigor mortis, it would have been impossible for Defendant to attempt mouth-to-mouth five minutes earlier as he claimed. JTIII 181, SR 799.

Defendant also told Officer Morgan that the bruises on Angelina's face were from him slapping her to try to wake her up. JTIII 181, SR 799. But Officer Morgan recognized that a body cannot bruise after death. JTIII 186, SR 804. The state of Angelina's body and Defendant's explanations for her injuries raised significant questions for first responders about her death. JTIII 186, SR 804.

Further, Defendant's explanation of Angelina's death did not make sense. Defendant consistently argued throughout trial that Angelina's fatal injury resulted from her falling down. JTII 108-9,

SR 709-10; JTIV 467, SR 1112; JTV 596-97, 1275-76. But despite Defendant's repeated statements that he could hear Angelina snoring in the bedroom, he provided no evidence that he heard her fall so violently that it caused an internal decapitation. JTIII 300-302, SR 918-20. This evidence is more than sufficient to convince a reasonable fact finder that Defendant caused Angelina's death, proving the first element of second-degree murder.

The second element of second-degree murder asks whether Defendant caused Angelina's death by an act imminently dangerous to others, evincing a depraved mind, without regard for human life. SDCL 22-16-7. The imminence and dangerousness of Defendant's acts are self-apparent as Angelina died as an immediate result of Defendant's actions. JTIV 390-94, SR 1035-39. "The phrase 'evincing a depraved mind, regardless of human life' . . . means conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but a lack of regard for the life of another." *Hart*, 1998 S.D. 93, ¶ 10, 584 N.W.2d at 864-65. *See also* SDCPJI 3-24-13 (1999).

Defendant showed absolutely no regard for the life of his wife when he beat her all over her body, causing significant bruising. JTIV 371-72, 374-75, SR 1016-17, 1019-20. *See also* State's Exhibits 18-20, 32-34, 38-39; JTIV 376-77, SR 1021-22. *See also* State's Exhibits 31, 43-51, 53-59, 61-62. He further showed no regard for her

life when he stomped on the back of her neck causing the base of her skull to dislocate from her vertebrae and resulting in fatal damage to her spinal cord and brain stem. JTIV 384, 394, SR 1029, 1039. These facts prove the second element of second-degree murder beyond a reasonable doubt.

The third and fourth elements of second-degree murder were also satisfied. The evidence presented was sufficient for the jury to find that Defendant did not act with premeditated intent when he caused Angelina's death. Further, Defendant did not offer any excuse or justification for causing Angelina's death because he asserted that her death was the result of a fall, so the fourth element is similarly not at issue. SDCL 22-16-7.

This Court will not reweigh evidence. *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606. This Court will also not reexamine the weight of expert testimony. *Laible*, 1999 S.D. 58, ¶ 10, 594, N.W.2d at 331. Based on the evidence provided at trial, any rational fact finder could determine beyond a reasonable doubt that Defendant committed every essential element of second-degree murder when he stomped on the back of his wife's neck, causing an internal decapitation. *Martin*, 2015 S.D. 2, ¶ 13, 859 N.W.2d at 606. This Court should not second-guess that determination on appeal.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence in this matter be affirmed in all respects.

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 5,862 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 16th day of April, 2018.

/s/ *Grant Flynn*
Grant Flynn
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of April, 2018, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Michael B. Swan* was served by electronic mail on Scott R. Bratland at Bratlandlaw@iw.net.

/s/ *Grant Flynn*
Grant Flynn
Assistant Attorney General

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

No. 28450

STATE OF SOUTH DAKOTA,

Plaintiff/Appellee,

v.

MICHAEL B. SWAN,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT L. SPEARS,
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed November 14, 2017.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Throughout this Brief, Plaintiff/Appellee State of South Dakota will be referred to as "State." Defendant/Appellant Michael B. Swan will be referred to as "Swan." References to the alleged victim, Angelina Swan, will be referred to as "Angelina." References to the Grant County criminal file CRI 16-130 will be made by "SR." References to the jury trial transcript will be referred to as "JT."

JURISDICTIONAL STATEMENT

The Jurisdictional Statement is the same as Appellant's Brief.

STATEMENT OF LEGAL ISSUE

The Statement of Legal Issue is the same as Appellant's Brief.

STATEMENT OF THE CASE

The Statement of the Case is the same as Appellant's Brief.

STATEMENT OF THE FACTS

The Statement of the Facts of the Case is the same as Appellant's Brief.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF FIRST AND SECOND DEGREE MANSLAUGHTER.

The evidence showed and the State argued to the jury that Angelina died as the result of Swan stomping on her neck. To be

clear, the evidence did not show, and the State did not argue, that it was a series of violent stomps, or repeated stomping that caused her injury. The State even argued that they were not sure if Swan stomped on her neck once or twice stating, "I don't know if he stomped on her once or twice, but he stomped on her." (JTT page 574, lines 6-7). The State's Brief, attempting to characterize her death as the result of Swan, who had a bad knee, standing over her and stomping on her until she died, is completely misplaced and without merit. The State's Brief claims, "He stomped on the back of her neck until the base of her skull dislocated from her spine". (Appellee's Brief, page 19). This assertion does not square with the evidence presented and, moreover, there is a reason it is not backed up by a reference to the trial transcripts. That is because it was never alleged to be more than one stomp.

This is vital to this case. This case was not about a defendant continuously beating a victim, or a defendant wearing hiking boots, or steel toed boots, stomping somebody in a parking lot on pavement. It was an allegation about an elderly man being reckless, and accusing him of stomping his wife one time while he was wearing tennis shoes and she was on the carpet. It was about an elderly man accused of being frustrated and angry and stomping on his wife one time. This fact distinguishes this case from State v. Hoadley (2002 S.D. 109) and all other cases where defendants engaged in a pattern of aggravated assaults by

throwing rocks, physically assaulting or utilizing deadly weapons that led to the eventual death of their victims. Clearly, this court was correct in determining that Hoadley's conduct came nowhere near justifying a lesser included instruction on First or Second Degree Manslaughter.

However, the State is again confused when it attempts to convince this court that Swan's defense and the arguments made by counsel prohibit his request for a lesser included instruction. "In fact Defendant's only argument at trial was that he did not cause Angelina's injury. Defense counsel argued in opening and closing that Angelina's injuries resulted from a fall". (Appellee's Brief, page 18).

Trial courts are required to give a lesser included instruction regardless of the position taken by the defendant in defending a charge of murder. Swan relies on State v. Leinweber (228 N.W.2d 120 Minn. 1975), not only because it is factually similar to this case, as it involves an elderly defendant, but also because the defendant in Leinweber did not pose a defense of heat of passion. In reversing the trial court for failure to instruct on manslaughter, the Supreme Court of Minnesota said:

> "The court's refusal to do so failed to properly recognize in this unwitnessed shooting, the jury's task of reconstructing what actually occurred prior to and at the time of the shooting. In doing so, the jury was at liberty to credit or reject not only any part of defendant's testimony but also any other testimony, including that presented by the state. Thus, the mere fact that

> defendant's testimony repudiated a heat-of-passion shooting did not preclude the jury from finding the facts supporting a conclusion that the shooting was neither deliberate nor accidental, but some lesser degree of homicide." Leinweber at 123.

The Leinweber court went on to say:

> "The jury might reasonably have inferred from the testimony and circumstantial evidence that this was a marriage under increasing emotional strain, resulting in anger and frustration on the part of both the deceased and the defendant as reflected in their habitual arguing when living together and in their correspondence when defendant was away from home." Leinweber at 124.

It is important to understand the ages and mental and physical health of Angelina and Swan at the time of her passing, because this type of relationship in the elderly is under a tremendous amount of stress and frustration.

At the time of Angelina's passing, she was 77 years old and Swan was 62 years old. She was suffering from a variety of back injuries, a bad heart, was hallucinating and hearing voices and had Alzheimer's and dementia. Swan was dealing with high blood pressure and a bad knee that required him to wear a knee brace and occasionally use a walker. (Exhibits BBB and XX).

It is not disputed that the parties argued and drank daily. It is not disputed that Angelina required assistance to walk, go to the bathroom and basically do anything but sit in a recliner, or that she was a hot head and feisty. (Exhibit BBB).

It is not disputed that on October 23, 2016 when she was not feeling well, Swan became frustrated and angry with her. When he asked her to go to bed, she yelled and screamed at him and kicked him. He responded by grabbing her foot and hitting her foot. He finally pulled her from the recliner, her with a bad back and he with a bad knee and high blood pressure. (Exhibit BBB).

Once he got her to the bathroom and then to their makeshift bed, which was an air mattress, she screamed at him every five minutes for something. He replied each time growing more agitated and angry with her. But on each occasion, he made it out of the recliner, which he said was extremely difficult to do given his knee. He had been dealing with this behavior for weeks on end, and he admitted to law enforcement that he was frustrated and angry, and the State made a point of confirming he was frustrated and angry. She threw up in a box he set by her bed and threw tomato soup on the bed and floor. (Exhibit BBB).

He was so frustrated with her that he told her to knock it off or he would kick her out of the house. He told her he could contact her relatives and she should be gone. (Exhibit BBB). He explained that it was a way of 'separating, go to neutral corners, type thing.' (Exhibit BBB).

When he replied to yet another request of hers, he noticed she was not on the mattress, and he attempted to 'scooch' her up. When she kicked him again, he screamed at her and she screamed back, and he again grabbed a hold of her foot. It is at this

point the State alleges he stomped on her one time, said stomp alleged to have occurred after hours of arguing, yelling, kicking and hitting each other. (Exhibit BBB).

This court determined in State v. McCahren that an instruction will not be given if no facts support the instruction. (State v. McCahren 2016 S.D. 34). That is the threshold that must be met by Swan on this appeal. No facts. None. There clearly were some facts justifying the instruction of First Degree Manslaughter (SDCL 22-16-15) given the endless hours of arguing along with the physical assaultive behavior of both parties, coupled with their ages and mental states. Swan went so far as to threaten to kick her out of the house as a way of having the parties go to their neutral corners.

Further, stomping one time on a person indicates recklessness, which justifies giving an instruction on Second Degree Manslaughter (SDCL 22-16-20). It was not an allegation of firing one shot, or stabbing somebody one time. It was an allegation of recklessness, stomping one time on someone's neck. It did not happen on pavement with a steel toed boot, but on carpet with a tennis shoe.

II. NO RATIONAL TRIER OF FACT COULD HAVE FOUND SWAN GUILTY OF SECOND DEGREE MURDER BEYOND A REASONABLE DOUBT.

As stated in the Appellant's original Brief, convicting a person of Second Degree Murder on the grounds that the State

believes Angelina 'could have' died from the stomp is clearly in error.

Two experts with a vast amount of experience testified, and neither knows how Angelina died. They know that she sustained an injury to her neck and back that resulted in an internal decapitation. Dr. Bux believes she sustained the injury from falling, but he does not know for sure. Dr. Snell thinks the injury 'could have' been caused by a stomp, but he does not know with any reasonable certainty that to be true. He is simply guessing. No rational trier of fact could have found Swan guilty of Second Degree Murder given the facts of this case.

CONCLUSION

The trial court was in error in concluding there was no evidence in the record to support the lesser included instructions. For not only was there some evidence necessitating lesser included instructions of First and Second Degree Manslaughter, there was an abundance of evidence. Further, Swan simply cannot be convicted of murder on the grounds that Angelina's death 'could have' been caused by a stomp.

WHEREFORE, Swan requests that this Court reverse his conviction for Second Degree Murder, and remand to the trial court with instructions to strike the life sentence given for this conviction and to enter a Judgment of Acquittal on this charge. In the alternative, Swan requests that the Judgment of Conviction be reversed and the case be remanded for a new trial.

Respectfully submitted this 30th day of April, 2018.

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REQUEST FOR ORAL ARGUMENT

Defendant-Appellant respectfully requests oral argument.

CERTIFICATE OF SERVICE

The undersigned, attorney for Appellant, hereby certifies that the Appellant's Reply Brief in the above entitled action was duly served upon Appellee by mailing two true copies thereof to:

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by United States mail, postage prepaid, this 30th day of April, 2018.

The undersigned further certifies that he emailed a copy of Appellant's Reply Brief to the following this 30th day of April, 2018:

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The undersigned further certifies that he mailed the original and two copies of Appellant's Reply Brief to:

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CERTIFICATE OF COMPLIANCE

Scott R. Bratland of Bratland Law, attorney for Appellant, hereby certifies that the Appellant's Reply Brief dated April 30, 2018, complies with SDCL 15-26A-66(b) in that it contains 1,642 words.

Dated at Watertown, South Dakota, this 30th day of April, 2018.

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