APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 28522

Plaintiff and Appellee,

v.

KEVIN ALLEN KRUEGER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

HONORABLE JON R. ERICKSON
Circuit Court Judge

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Notice of Appeal Filed February 8, 2018.

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PRELIMINARY STATEMENT

Any references in this brief will be consistent with the page numbers set forth in the settled record, indicated by "SR" followed by the page number. Counsel will attempt to specify any other documents referred to in the record by name in order to provide clarity to the Court. Appellant Kevin Allen Krueger will be referred to as "Krueger" or "Kevin." The State of South Dakota will be referred to as the "State." The alleged victim will be referred to as "Houck" or "Keith". References to items included in the Appendix will be referred to as "Appx" followed by the appropriate letter.

JURISDICTIONAL STATEMENT

On June 13, 2016, Kevin Allen Krueger was charged by Indictment with Homicide as Murder in the First Degree (SDCL § 22-16-4(1)) on or about the 31st of

May, 2016. (SR, 5) A Corrected Indictment was filed on April 10, 2017, charging the same offense. (SR, 421) A jury trial was held on January 10, 11, 16, and 17, 2018, before the Honorable Jon Ericson, Circuit Court Judge. (SR, 1097-1588) On January 17, 2018, the jury returned a guilty verdict to Murder First Degree (SDCL 22-16-4(1)). (SR, 1024) On January 19, 2018, the trial court sentenced Krueger to be imprisoned for life in the South Dakota State Penitentiary. (SR, 1026) The Judgment of Conviction and Sentence was filed on January 19, 2018. (SR, 1026; Appx. 1-2) Krueger timely filed his Notice of Appeal on February 8, 2018. (SR, 1046)

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED KRUEGER'S MOTION FOR JUDGMENT OF ACQUITTAL AND WHETHER SUFFICIENT EVIDENCE EXISTED TO SUPPORT THE CONVICTION?

Krueger moved for a Judgment of Acquittal, which was denied by the trial court. (SR, 1546) The jury found Krueger guilty of Murder in the First Degree (SDCL 22-16-4(1)). (SR, 1024)

SDCL 22-16-4(1)

State v. Carter, 2009 S.D. 65, ¶55, 770 N.W.2d 329 (SR, 1007).

State v. Bradley, 431 N.W.2d 317 (S.D. 1988)

II. WHETHER THE TRIAL COURT ERRED IN DENYING KRUEGER'S MOTION TO CHANGE VENUE?

Krueger filed a Motion for Change of Venue or Alternatively, Motion for Expert to Conduct Study re: Venue on March 24, 2017. (SR, 256) A Motions hearing was held on April 13, 2017, and the Motion to Change Venue was denied by the trial court. (SR, 551)

South Dakota Constitution Article VI, §7

SDCL 23A-17-5

State v. Meservey, 53 S.D. 60, 220 N.W. 139 (1928)

State v. Reiman, 284 N.W.2d 860 (S.D. 1979)

State v. Wellner, 318 N.W.2d 324

Skilling v. United States, 561 U.S. 358, 382, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010).

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE'S EXPERT TO TESTIFY REGARDING DNA RECOVERED FROM A PAIR OF SHOES?

At trial, Krueger moved to strike DNA expert Amber Bell's testimony as it related to DNA evidence on a pair of shoes. The shoes were not allowed into evidence, but the DNA evidence from the same shoes was admitted by the trial court. (SR, 1546-47)

SDCL 19-19-402

SDCL 19-19-403

SDCL 19-15-2

State v. Kryger, 2018 S.D. 13, 907 N.W.2d 800

IV. WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT?

Krueger objected to the prosecutor's rebuttal argument at trial as improper, and the trial court sustained Krueger's objection, but made no curative comments or instructions to the jury.

State v. McMillen, 2019 S.D. 40

State v. Smith, 1999 S.D 83, ¶ 38, 599 N.W.2d 344

Stanley, 2017 S.D. 32, ¶ 32

V. WHETHER THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED KRUEGER OF A FAIR TRIAL?

The trial court did not rule on this issue.

Jenner v. Leapley, 521 N.W.2d 422, 432 (SD 1994)

McDowell v. Solem, 447 NW2d 646 (S.D. 1989))

State v. Davi, 504 N.W.2d 844, 857 (SD 1993)

State v. Jahnke, 353 N.W.2d 606, 611 (Minn.App. 1984)

STATEMENT OF THE CASE

On June 13, 2016, Kevin Allen Krueger was charged by Indictment and Corrected Indictment with Homicide as Murder in the First Degree (SDCL 22-16-4(1)), alleging that Krueger killed Keith Houck on or about May 31, 2016, without authority of law and with a premeditated design to effect Houck's death. (SR, 5, 421) Krueger pled not guilty at his arraignment held on April 18, 2016. (SR, 1078) Krueger filed a Motion for Change of Venue or Alternatively, Motion for Expert to Conduct Study re: Venue on March 24, 2017. (SR, 256) A Motions hearing was held on April 13, 2017, and the Motion to

Change Venue was denied by the trial court. (SR, 551) Krueger maintained his innocence, and the case proceeded to a jury trial on January 10, 11, 16, and 17, 2018, before the Honorable Jon Ericson, Circuit Court Judge, Third Judicial Circuit, Beadle County, South Dakota. (SR, 1097-1588) On January 17, 2018, the jury returned a guilty verdict to Murder First Degree (SDCL 22-16-4(1)). (SR, 1024) On January 19, 2018, the trial court sentenced Krueger to be imprisoned for life in the South Dakota State Penitentiary, located in Sioux Falls, South Dakota, Minnehaha County. (SR, 1026) The Judgment of Conviction and Sentence was filed on January 19, 2018. (SR, 1026; Appx. 1-2) Krueger appeals his conviction. (SR, 1046)

STATEMENT OF THE FACTS

In late May/early June, 2016, law enforcement officers in Beadle County, South Dakota were looking for a man named Keith Houck.[1] (SR, 1392) Keith Houck owned a farm and residence located south of Highway 14 in Beadle County, South Dakota. (SR, 765, 1468) The Beadle County Sheriff's Department was trying to serve Houck with papers, but had been unable to locate him. (SR, 1392)

On June 2, 2016, another resident of Beadle County, Trent Jankord, reported to the Huron Police Department that Keith Houck was missing, or possibly killed. (SR, 1463-64) Supervisory Special Agent Brent Spencer with the Division of Criminal Investigation interviewed Jankord the same day. (SR, 1462-64)

[1] Testimony at trial indicated that law enforcement had been looking for Keith Houck to serve him with paperwork, possibly a protection order. (SR, 1389,1393)

After interviewing Jankord, Agent Spencer and other law enforcement officers went to Houck's residence. (SR, 1464) Houck was not home, and neither his two dogs nor his vehicle were present. (SR, 1464) Agent Spencer observed a window of the residence was totally broken out. (SR, 1464) Agent Spencer attempted to call Houck, but the call went straight to voicemail. (SR, 1465) The next day, June 3, 2016, Agent Spencer and Special Agent Brandon Neitzert returned to Houck's residence, but Houck again was not home. (SR, 1466) On June 3, 2016, Agent Spencer received a phone call in reference to Kevin Krueger. (SR, 1467) Agent Spencer was told that Kevin Krueger went to Deputy Shane Ball's residence in Huron, South Dakota, and told Deputy Ball that Keith Houck was at his farm. (SR, 1467-68)

Krueger owned a farm near Huron, South Dakota. (SR, 763, 765, 1397, 1468) Krueger's property was not used for farming, but contained several abandoned vehicles, thousands of old appliances, scrap metal, a barn, and a couple of houses that were vacant and/or full of material. (SR 781, 1397-1398) Krueger also owned and lived at a residence in Huron, South Dakota. (SR, 773, 1468)

On June 3, 2016, Deputy Ball was off duty and having a get together with family in the driveway of his residence. (SR, 1385, 1391) At approximately 8:00 p.m., a white Dodge pickup pulled into the driveway. (SR, 1386) Deputy Ball recognized the passenger of the vehicle as Kevin Krueger, and he knew Krueger from previous occasions. (SR, 1386) Deputy Ball walked toward the end of his driveway to meet the vehicle. (SR, 1386)

Deputy Ball observed Krueger in the passenger seat, and Krueger's girlfriend, Bonnie Goehring, driving the vehicle. (SR, 1388) Deputy Ball asked Krueger and

Goehring "what was up", and Goehring asked if he had Sheriff Solem's phone number. (SR, 1388) Deputy Ball told Goehring that Sheriff Solem was out of town. (SR, 1388) Goehring then made a gesture toward Krueger, "like she wanted Krueger to tell [Ball] something". (SR, 1388) Krueger then asked Deputy Ball if "we were looking for Keith". (SR, 1388) Deputy Ball answered that he believed they were, and knew they had been looking for him the last couple of days. (SR, 1392) Krueger then told Deputy Ball "he [was] dead. He's buried at my farm." (SR, 1389) Deputy Ball asked, "why's that?", and Krueger responded "because I hit him with a bat". (SR, 1389)

After Krueger made the above statement, Deputy Ball called 911 and requested a uniformed officer come to his residence. (SR, 1389) During this time frame, which was approximately one to one and one-half minutes, Krueger had his head down and was talking quietly. (SR, 1389-90) Krueger said Houck kept messing with his family, and that he had had enough. (SR, 1390)

Agent Spencer was notified of Krueger's statements to Deputy Ball. (SR, 1468) Krueger was transported to the Beadle County Detention Center on June 3, 2016 and arrested. (SR, 1468) Agent Spencer proceeded with the investigation and prepared search warrants for Krueger's farm, Krueger's residence, and Houck's residence. (SR, 1468) Agent Spencer also obtained a search warrant to seize the clothes Krueger was wearing when he entered the jail on June 3, 2016. (SR, 1478)

Krueger's residence and Krueger's farm were secured the night of June 3, 2016 by law enforcement while they were waiting for a search warrant to be signed. (SR, 1468) The search warrants were signed just after midnight on June 4, 2016. (SR, 1468) Agent

Spencer and other officers arrived at Krueger's farm at 1:15 am on June 4, 2016 to execute the search warrant. (SR, 1468) There were three dogs that were not allowing the officers onto the property, so animal control was contacted to secure the dogs. (SR, 1468)

Agent Spencer and Agent Neitzert searched Krueger's farm and located Houck's body under some tarps and tires. (SR, 1470) Agent Spencer could see the skull, but the body was missing the scalp, and the face and the neck were also gone. (SR, 1470)

DCI Agent Jeff Kollars noted the challenges in processing this particular crime scene. (SR, 1397) It appeared that it had been some time that Houck's body had been there, but Agent Kollars could not say the exact amount of time. (SR, 1402) It was later determined that Houck died on May 31, 2016, and the crime scene investigation didn't take place until June 4, 2016, approximately four and one-half (4½) days later. (SR, 1418) It had rained some during the previous couple of days prior to the crime scene investigation. (SR, 1402) Agent Kollars indicated that rain could impact the crime scene, and potentially wash away evidence. (SR, 1403)

Houck's body was located near a barn and two vehicles, a white suburban and a blue pickup. (SR, 801-13, 1403-06) Houck's body was situated underneath a pile of tires, and the top of Houck's skull was visible in the pile of tires. (SR, 805-813, 1405-07) As law enforcement removed the tires one by one, Houck's body was found underneath a black body bag, wrapped in a gray blanket, with his head resting on a tire. (SR, 813-15, 1406-08) Once the blanket was removed, Houck's body was visible, and he was wearing blue jeans that were unbuckled, and socks that were very soiled on the bottom; he did not have a shirt on, and was not wearing shoes. (SR, 817, 1406-08) Houck's shoes were never

located. (SR, 1409) Parts of Houck's body were missing. (SR, 1409) A couple of pieces of bone fragments were located next to the body, and two pieces of what appeared to be an upper and lower jaw bone with teeth on them were found southeast of the body in the grass. (SR, 785, 825, 1405, 1409-10) Krueger's rural farm had the potential for animal activity, and Agent Kollars concluded that the jaw bones being moved away from Houck's body was likely due to animals. (SR, 1419-20)

A baseball bat was located on the other side of the white suburban and blue pickup truck. (SR, 827, 1411) Agent Kollars recovered the bat, and it was sent to the lab for testing. (SR, 827-32; 1412) No fingerprints were detected on the baseball bat. (SR, 1434)

Houck's vehicle, a tan and green Suburban, was located toward the west edge of Krueger's farm. (SR, 833-38, 1414-15) The stereo was gone from the vehicle, and the dash appeared to be altered. (SR, 841, 1417-18)

Dr. Kenneth Snell, a forensic pathologist, performed an autopsy on Houck. (SR, 1358, 1362) Dr. Snell concluded that the cause of death was a blunt force injury to the head, and the manner of death was homicide. (SR, 1380)

Houck's body had multiple areas of contusions on the back, arms, and legs. (SR, 872, 1365) Houck's fourth and fifth ribs were fractured on the right side of his body, the third and fourth ribs were fractured on the left side, and his right forearm and left ulna were also fractured. (SR, 1370-71, 1379) Dr. Snell explained the discoloration to Houck's back was not all caused by contusions. (SR, 1373) As Houck was laying on his back, the blood settled in his back causing a generalized reddish look known as livor. (SR, 1373)

Dr. Snell explained which marks and discoloration were livor, and which ones were contusions. (SR, 1373)

Dr. Snell explained that he could see a central pallor to the contusions, and this indicated to him that Houck was struck with an object that was round or roundish. (SR, 1374) Dr. Snell testified a baseball bat striking the body would create the pattern with the central pallor and abrasions on both sides, consistent with Houck's contusions. (SR, 1375)

Dr. Snell indicated both the right side of the skull and the left side of the skull had fractures that radiated forward. (SR, 1376) Dr. Snell testified these fractures were traumatic inflicted injuries to the skull. (SR, 1377) Dr. Snell indicated the patterned injuries were consistent with being hit with a baseball bat. (SR, 1379)

Dr. Snell testified that in his opinion, two blows to Houck's head caused his death. (SR, 1381) Dr. Snell indicated it would take a single blow to each side of the head to cause the injuries to Houck's skull, meaning one hit on the right side and one hit on the left side. (SR, 1381) The fractures to the ribs were also likely caused by a baseball bat. (SR, 1381) The other contusions could have been caused by a baseball bat, or possibly kicking, but none of the other injuries that Houck suffered would have caused his death. (SR, 1381-82) Dr. Snell concluded the only fatal impacts causing Houck's death were the two blows to the head. (SR, 1383)

Amber Bell, a forensic scientist at the South Dakota Crime Lab, testified at trial. Ms. Bell was employed in the biology section of the lab where she analyzed evidence for the presence of bodily fluids (serology) and DNA. (SR, 1440) The barrel of the bat

contained several stains, and the DNA profile obtained from the barrel of the bat indicated a mixture of DNA from two individuals; the main contributor of the DNA was Keith Houck. (SR, 1453, 1455) The DNA testing did not indicate who the second individual was. (SR, 1455) Ms. Bell testified that there was nothing found through DNA testing that could indicate who may have been holding the baseball bat on May 31, 2016.

Ms. Bell also analyzed swabs taken from a pair of shoes. (SR, 1457, 1478) Swab 3.01, taken from the left shoe, and swab 3.02, taken from the right shoe, contained DNA from a single source, Keith Houck. (SR, 1459)

Agent Spencer testified that Krueger had been arrested and transported to the Beadle County Detention Center on June 3, 2016, and the next day Agent Spencer retrieved a pair of black velcro tennis shoes from Krueger's property at the jail. (SR, 1471) A picture of the black velcro tennis shoes was entered into evidence, and Agent Spencer testified that the shoes "were property of Mr. Krueger." (SR, 908, 1472) The actual shoes were not allowed into evidence, as there was no testimony presented that the shoes tested by Ms. Bell were the shoes that were retrieved by Agent Spencer at the jail. (SR, 1472-73, 1544)

Further investigation into Houck's death led law enforcement to Montevideo, Minnesota, where Jose Antonio Vega was also arrested for Houck's death. (SR, 1423) Vega ultimately pled guilty to the lesser offense of manslaughter, and was sentenced to the South Dakota State Penitentiary. (SR, 1529, 1532)

At trial, the State's theory of the case was that Krueger lured Houck to his property with the intent of killing him. The State further theorized that Krueger enlisted

Vega's assistance to kill Houck. To prove their theory, the State introduced a summary timeline they created of phone calls and text messages between Krueger, Vega, Houck, and Goehring. (SR, 928-38, 1504) The timeline reflected the dates and time of the communications, but not the actual content of the communications. (SR, 1505) The State also introduced the contents of text messages taken from Goehring's phone and Krueger's phone. (SR, 939-81, 1507)

The summary timeline and the phone records showed the following on May 31, 2106:

1. 7:00 a.m. Vega at DJ's gas station in Huron, South Dakota.

2. 7:24 a.m. Text sent from Houck to Goering. "Bonnie, this is Keith. I would appreciate it if you would pay me the money you own me. I h[a]ve been more than patient, and you do owe me. I have talked with an attorney; it sounds like you could end up getting quite a [b]it added on if you refuse to pay me. I would just as soon be done with it but I'll do what I have to to get what I'm owed. Please let's just get this done Thank you Keith". (SR, 948, 1508)

3. 8:56 a.m. Krueger calls Goehring. (SR, 929, 1509)

4. 9:00 a.m. Krueger calls Goehring. (SR, 929, 1509)

5. 9:04 a.m. Krueger calls Vega. (SR, 929, 1509)

6. 9:16 a.m. Krueger calls Vega. (SR, 929, 1509)

7. 9:26 a.m. Vega purchases "ammo" from Runnings. (SR, 109, 921, 929, 1509)

8. 10:50 a.m. Text sent from Goehring to Krueger. "So what so u wan me to do". (SR, 930, 939, 1509)

9. 10:52 a.m. Krueger calls Goehring. (SR. 930, 1509)

10. 10:52 a.m. Text sent from Krueger to Goehring. "Wait till i'm ready" (SR. 930, 961, 1509)

11. Text sent from Krueger to Vega. "Im on my way did u get 40 rounds" (SR. 931, 979, 1510) [2]

12. Text sent from Krueger to Vega. "Showtim" (SR. 931, 980, 1512)

13. Text sent from Krueger to Vega. "Time" (SR. 931, 981, 1512)

14. 11:26 a.m. Text sent from Krueger to Goehring. "Send it" (SR. 932, 962, 1513)

15. 11:30 a.m. Text sent from Krueger to Goehring. "??" (SR. 932, 963, 1513)

16. 11:32:08 a.m. Krueger calls Goehring. (SR, 932, 1513)

17. 11:32:08 a.m. Text sent from Krueger to Goehring. "Answer" (SR, 932, 964, 1513)

18. 11:33 a.m. Text sent from Goehring to Houck. "Kevin will discuss this with u at the farm" (SR, 932, 940, 1513)

19. 11:36 a.m. Text sent from Krueger to Goehring. "Tell if he ansers" (SR, 933, 965, 1514)

20. 11:36 a.m. Text sent from Houck to Goehring. "Kevin didn't have anything to do with it, this was our deal. I don't go out there anyway. What's to discuss? You owe me for hours put in and you know it. I been waiting patiently for you to get ahold of me but you never did so now I'm asking for what you owe me" (SR, 932, 949, 1514)

21. 11:41 a.m. Text sent from Houck to Goehring. "The past time I asked you when you were going to pay me you said next year after taxes. Guess what it is six months past that" (SR, 932, 950, 1514)

22. 11:42 a.m. Text sent from Krueger to Goehring. "????" (SR, 932, 966, 1515)

23. 11:44 a.m. Text sent from Houck to Goehring. "I didn't even get a thank you for the solid oak railing for your basement staircase I gave you" (SR, 932, 951, 1515)

[2] Vega purchased 40 rounds at Runnings that morning. (SR, 921, 1510-11)

24. 11:46 a.m. Text sent from Krueger to Goehring. "Well" (SR, 932, 967, 1515)

25. 12:02 p.m. Krueger calls Goehring. (SR, 933, 1516)

26. 12:04 p.m. Text sent from Goehring to Houck. "U didn't give me anything u have Kevin so go deal with him" (SR, 933, 941, 1516)

27. 12:05 p.m. Text from Goehring to Krueger. "Yes he did saying its my deal not urs and I didn't thank him for railing I said that was between u and Kevin not me and to go deal with u" (SR, 933, 942. 1516)

28. 12:08 p.m. Text sent from Houck to Goehring. "I haven't talked to Keven in over 2 months I didn't, where u think u got that railing for you staircase, from me that's where. I knew you needed one I no longer did so there u go. The house was between u and I, Kevin never had anything to do with it. He told u that and told me that" (SR, 933, 952, 1516)

29. 12:10 p.m. Text sent from Houck to Goehring. "What's your problem Bonnie I did the work at 1/3 price anyone else would an you owe me" (SR, 933, 953, 1517)

30. 12:11 p.m. Text from Krueger to Goehring. ""Tell I have the money" (SR, 933, 968, 1517)

31. 12:16:38 p.m. Text sent from Houck to Krueger. "When you gonna come get ur trailer" (SR, 933, 954, 1517)

32. 12:16:40 p.m. Text sent from Krueger to Goehring. "?" (SR, 933, 969, 1517)

33. 12:21 p.m. Text sent from Krueger to Houck. "When u cu m ing. To get your money" (SR, 933, 970, 1518)

34. 12:24 p.m. Phone call from Goehring to Krueger. (SR, 934, 1518)

35. 12:27 p.m. Text sent from Houck to Krueger. "Idk yet my grass is 6'0 tall tryin get mowin done" (SR, 934, 955, 1518)

36. 12:28 p.m. Text sent from Goehring to Houck. "He told me to have u come out there because it is he's prob and has the money" (SR, 934, 943, 1518)

37. 12:29 p.m. Text sent from Houck to Goehring. "Ok" (SR, 934, 956, 1519)

38. 12:31 p.m. Text sent from Goehring to Krueger. "He said ok" (SR, 934, 944, 1519)

40. 12:32 p.m. Text sent from Krueger to Houck. "Got your mower going whats the deal" (SR, 934, 971, 1519)

41. 12:41 p.m. Text sent from Krueger to Houck. "By a goat" (SR, 934, 972, 1519)

42. 12:51 p.m. Text sent from Houck to Krueger. "Yea got it running, just need to fix joy stick, too much play so no control like should have" (SR, 935, 957, 1520)

43. 1:02 p.m. Text sent from Krueger to Goehring. "Hes trining to mowe" (SR, 935, 974, 1520)

44. 1:09 p.m. Text sent from Goehring to Krueger. "What?" (SR, 935, 945, 1521)

45. 1:12 p.m. Text sent from Krueger to Goehring. "Hes trining to mowe" (SR, 935, 973, 1521)

46. 1:13 p.m. Text sent from Goehring to Krueger. "Move?" (SR, 935, 946, 1521)

47. 1:15 p.m. Text sent from Krueger to Goehring. "moe" (SR, 935, 975, 1522)

48. 4:04 p.m. Text sent from Houck to Krueger. "U gonna be round later" (SR, 936, 958, 1522)

49. 5:39 p.m. Text sent from Krueger to Houck. "When" (SR, 937, 976, 1522)

50. 6:02 p.m. Phone call from Goehring to Krueger. (SR, 937, 1522)

51. 6:04 p.m. Text sent from Houck to Krueger. "I'm out gas U at farms" (SR, 937, 959, 1522)

52. 6:15 p.m. Text sent from Krueger to Houck. "Ya" (SR, 937, 977, 1523)

53. 6:16 p.m. Text sent from Houck to Krueger. "K be over shortly"" (SR, 937, 960, 1523)

54. 6:30 p.m. Text sent from Krueger to Goehring. "Tonys wife and kids are coming in so watch for them" (SR, 937, 978, 1523)

55. 6:33 p.m. Text sent from Goehring to Krueger. "I am going to jacks to watch he's kids for an hr" (SR, 937, 947, 1523)

Agent Spencer testified that no other text messages were sent from Houck's phone after 6:16 p.m., and no more phone activity on Houck's phone took place after 6:52 p.m. (SR, 1525) Agent Spencer testified that through his investigation there was no indication that Houck and Vega had direct contact with each other, and no indication of any connection between them. (SR, 1526)

Law enforcement also searched Houck's residence. (SR, 1482) Agent Spencer located two empty gun boxes in a closet. (SR, 1483) One of the guns, a Uberti El Patron .45 caliber single action revolver, was found on June 4, 2016, inside of a leather holster on the floor of the backseat of Krueger's white Dodge Ram 2500 pickup truck. (SR, 1479-80) The second missing gun was turned over to Agent Spencer approximately one year later by Vega's private investigator; he had retrieved the gun from Vega's family. The gun matched the second empty box at Houck's residence. (SR, 1484-85, 1531)

Agent Spencer also had information that Houck used methamphetamine. (SR, 1537) Eight jewelry bags with residue were located in Houck's residence. (SR, 1538) Houck's autopsy produced positive tests for amphetamine and methamphetamine in his system. (SR, 1538)

Finally, at trial the State also introduced into evidence a note that Krueger attempted to pass to Vega while they were both in jail:

> "Dear Tony, Hay How it going I got us A Lawyer cummi to reprset us stay cool. Be soon. There is no way we can say the exact same thing it is impossible I can prove that Hangtight. Kevin the Boss. P.S. did u bring your 4x4 Ha, Ha, Ha that is Funny" "Believe nothing they say they lie through there teeth."

(SR, 910-11, 1494-96) A total of eight sheets of notes, some of them written to the DCI or Agent Spencer, were recovered. (SR, 922-26, 1495-97) Page five of the notes stated "What lie do you tell Tony? You have the wrong person. He didn't do it". (SR, 1497)

After the State rested its case, the trial court denied Krueger's motion for a Judgment of Acquittal. (SR, 1546) Krueger also moved to strike Amber Bell's testimony regarding DNA evidence from the pair of shoes, asserting there was insufficient evidence to establish that the shoes that Ms. Bell tested were the same shoes retrieved from Krueger's property at the jail. (SR, 1546) The trial court denied Krueger's motion. (SR, 1546-47) The trial court allowed a picture of the shoes into evidence, but sustained Krueger's objection and excluded the shoes themselves from evidence. (SR, 1472-78)

The jury found Krueger guilty of Murder in the First Degree (SDCL 22-16-4(1)). (SR, 1024) On January 19, 2018, the trial court sentenced Krueger to life in the South Dakota State Penitentiary. (SR, 1026) Krueger appeals.

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED KRUEGER'S MOTION FOR JUDGMENT OF ACQUITTAL AND WHETHER SUFFICIENT EVIDENCE EXISTED TO SUPPORT THE CONVICTION?

A. Standard of Review

Krueger combines his arguments as to both issues because "whether the circuit court erred when it denied a judgment of acquittal and whether sufficient evidence exists to support a verdict implicate the same standard of review". *State v. Foote, Sr.*, 2019 S.D. 32, ¶7. Both questions require this Court to examine "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). A circuit court properly denies a motion for a judgment of acquittal if the State produces evidence that—if believed by the jury—may reasonably support a guilty verdict. *Id.* (citing *State v. Abdo*, 518 N.W.2d 223, 227 (S.D. 1994)). This Court's review as to the sufficiency of the evidence to sustain the convictions is de novo. *Id.* (citing *State v. Jucht*, 2012 S.D. 66, ¶ 18, 821 N.W.2d 629, 633). However, this Court does not resolve conflicts in the evidence, "assess the credibility of witnesses, or reevaluate the weight of the evidence." *Id.*

B. Argument

In the present case, the record does not contain evidence which if believed, could be sufficient to sustain a finding of guilt beyond a reasonable doubt. Krueger was found guilty of Murder in the First Degree (SDCL 22-16-4(1)). SDCL 22-16-4 states in relevant part that homicide is murder in the first degree "If perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being, …". SDCL 22-16-4(1). The elements of the crime of murder in the first degree, each of which the State must prove beyond a reasonable doubt, are that:

1. The defendant caused the death of Keith Houck.
2. The defendant did so with a premeditated design to effect the death of Keith Houck.
3. The killing was not excusable or justifiable. (SR, 986)

Pursuant to SDCL 22-16-5, "the term, premeditated design to effect the death, means an intention, purpose, or determination to kill or take the life of the person killed, distinctly formed and existing in the mind of the perpetrator before committing the act resulting in the death of the person killed. A premeditated design to effect death sufficient to constitute murder may be formed instantly before committing the act."

Krueger asserts there was insufficient evidence in the present case to sustain a finding of guilt beyond a reasonable doubt for the following reasons: (1) There was no direct physical evidence connecting Krueger to Houck's death; (2) the State did not prove Krueger had any motive to cause Houck's death; (3) mere presence at a crime scene is not sufficient evidence to find Krueger guilty of murder; and (4) the jury engaged in speculation, as no eye witnesses to the crime testified at trial.

First, there was no physical evidence directly linking Krueger to the murder. The State presented testimony from Dr. Kenneth Snell that the cause of death was blunt force injury of the head. (SR, 1380) Dr. Snell indicated both the right side of the skull and the left side of the skull had fractures that radiated forward, and those fractures were traumatic inflicted injuries to the skull consistent with being hit with a baseball bat. (SR, 1376, 1379) Dr. Snell testified that in his opinion, these two blows to Houck's head caused his death. (SR, 1381) The other contusions found on Houck's body could have been caused by a baseball bat, but none of the other injuries that Houck suffered would

have caused his death. (SR, 1381-82) Dr. Snell concluded the only fatal blows causing Houck's death were the two blows to the head. (SR, 1383)

Krueger does not dispute the cause of death, but stresses that no physical evidence was found on the bat collected from the crime scene that would link him to Houck's death. First, no fingerprints were detected on the baseball bat. (SR, 1434) Second, there was nothing found through DNA testing to establish who may have been holding the baseball bat. (SR, 1461) In short, no physical evidence found on the baseball bat indicated Krueger ever used the bat in a fatal attack on Houck.

Jose Vega pled guilty to manslaughter, and in so doing acknowledged that he had killed Houck. Therefore, it is undisputed that Vega struck a killing blow with the bat. When Krueger spoke to Deputy Ball in the driveway, Krueger did make a general statement that he had hit Houck with a bat. However, testimony at trial established that Houck had been struck with the bat multiple times in other areas of his body, and that none of those blows were fatal. Thus, Krueger's statement that he had hit Houck with a bat does not establish beyond a reasonable doubt that he struck a killing blow. And, taken in connection with the evidence that Vega did strike a killing blow, Krueger's general statement amounts to only an acknowledgment that he struck Houck, but is not evidence that he struck a fatal blow.

The State's theory of the case was that Krueger enlisted Vega's help, but the evidence did not establish for what purpose. In other words, there was no evidence indicating whether Vega was there to help with collecting money from Houck, settling a dispute, or even just there to keep Houck from causing trouble. Furthermore the text

messages do not establish Krueger's purpose or motive in having Houck come to the farm. The State did not prove Krueger had any motive or reason to kill Houck.

Thus, the record is devoid of evidence as to what actually happened once Houck arrived at the farm. No eyewitnesses to the events testified at trial. Any conclusion that premeditated murder took place is based only on speculation and unsupported inference. It is certainly possible that Vega hit Houck in the head with the bat, killing him, and that Krueger did not intend or know that was going to happen.

Third, evidence that established Krueger's presence at the farm does not implicate him in the crime. The State offered scientific evidence in the form of the results of DNA testing of a pair of shoes. The admissibility of this evidence is discussed in Issue III below. Assuming, *arguendo*, that the DNA evidence was properly allowed by the trial court, the DNA evidence nevertheless established nothing more than Krueger's presence at the farm at the time Vega killed Houck.

It is well established that "mere presence alone of the defendant at the scene of a crime is not sufficient to make that person an aider or abetter." *State v. Carter*, 2009 S.D. 65, ¶55, 770 N.W.2d 329 (SR, 1007).

> "a party's presence at the scene of the crime is one circumstance which tends to support a finding that he was a participant[,] which, along with other circumstantial evidence, can establish his guilt as an aider and abetter." *State v. Brings Plenty*, 490 N.W.2d 261, 267-68 (S.D. 1992) (citing *State v. Ashker*, 412 N.W.2d 97 (S.D. 1987)). A defendant is more than a bystander if he knowingly did something to assist in the commission of a crime, which changes his status to that of an aider and abetter. *Id*. (citing *State v. Schafer*, 297 N.W.2d 473, 476, (S.D. 1980))). In order to obtain a conviction under an aider and abetter theory, the State must prove beyond a reasonable doubt that the defendant "acted with intent to promote or facilitate the commission of the crime, by aiding, abetting or advising another person in planning or committing the crime alleged to have been committed." *Id*. (citing SDCL 22-3-3)."

Id. at ¶56.

The DNA evidence from the shoes tends only to establish Krueger's presence at the farm at some point either during or after Houck's death. The DNA evidence does not support a finding that Krueger took part in Vega's fatal attack on Houck. Cf. *Carter* at ¶57 (affirming conviction on aiding and abetting theory where witnesses testified defendant participated in the physical assault). See also *State v. Bradley*, 431 N.W.2d 317 (S.D. 1988) (finding no evidence that purported accomplice had "promoted, facilitated, planned or participated" in premeditated murder, and mere presence at the scene only rendered him a "witness to murder.")

Houck was found buried under tires at Krueger's farm, but there was no testimony or physical evidence presented in regards to who placed Houck's body there. No physical or scientific evidence was presented to the jury regarding anything found on the tires, body bag, blanket, Houck's clothing or Houck himself. No eyewitness to the crime testified at trial. Vega did not testify. Jankord did not testify. The prosecution engaged in bald and unsupported speculation regarding what happened at Krueger's farm.

The jury knew Vega pled guilty to killing Houck. The jury was told a theory that Krueger enlisted Vega to help assist him in killing Houck. The jury heard and saw a summary timeline of text messages and phone calls. However, that circumstantial evidence alone is not sufficient to convict Krueger of murder in the first degree, especially in the absence of a clear motive. The jury was left to speculate as to what actually happened.

A conviction must be supported by proof beyond a reasonable doubt. In this case, the proof falls far short of that standard. Krueger asks this Court to find that his conviction for Murder in the First Degree is not supported by sufficient evidence.

II. WHETHER THE TRIAL COURT ERRED IN DENYING KRUEGER'S MOTION TO CHANGE VENUE?

A. Standard of Review

The decision regarding a change of venue is within the discretion of the trial court and, as is true of most matters involving the exercise of that discretion, "the denial of a change of venue usually presents a question not free from doubt and difficulty." *State v. Reiman*, 284 N.W.2d 860, 867 (S.D. 1979) (citing *State v. McNabb*, 60 S.D. 431, 244 N.W. 651 (1932). "Unless that discretion has been abused, however, we will not reverse the decision of the trial court." *Id.* (citing *State v. Kingston*, 84 S.D. 578, 174 N.W.2d 636 (1970); *State v. Belt*, 79 S.D. 324, 111 N.W.2d 588 (1961).

B. Argument

Prior to trial, Krueger filed a Motion for Change of Venue or Alternatively, Motion for Expert to Conduct Study Re: Venue. (SR, 256) Krueger's motion was based on allegations of community prejudice against him. In support of his motion, Krueger filed an affidavit signed by one of his trial attorneys that included copies of news articles about the case. (SR, 261-271) After a pre-trial hearing on April 13, 2017, the trial court denied Krueger's motion. (SR, 551) The trial court stated "I'm going to deny it now, but we will take it up again after the Vega trial." (SR, 551) However, the trial court never revisited the issue.

Pursuant to Article VI, §7 of the South Dakota Constitution a defendant is entitled to a trial by a fair and impartial jury. A change of venue may be ordered by the trial court if it appears that a fair and impartial jury cannot be had in the county where the prosecution is pending. SDCL 23A-17-5; *State v. Wellner,* 318 N.W.2d 324 (citing *State v. Reiman*, supra). The test is whether there is, in fact, prejudice in the minds of the county residents sufficient to raise a reasonable apprehension that the accused will not receive a fair and impartial trial in the county. *Id.* (citing *State v. Reiman,* supra; *State v. Meservey*, 53 S.D. 60, 220 N.W. 139 (1928)). The burden of establishing that a fair and impartial trial cannot occur in such county is upon the applicant. *Id.* Transfer of the case to a different venue at the defendant's request is necessary if extraordinary local prejudice will prevent a fair trial, which is a "basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

Krueger asserts the trial court erred in denying his motion to change venue. According to Krueger's motion, the most recent U.S. Census Bureau statistics for Beadle County, South Dakota, had a population of 18,101 people. (SR, 256; Appx 3-5) Twenty seven percent of that population was under the age of eighteen. (SR, 256) Mathematically, the maximum number of constituents eligible for the jury pool was 13,213. (SR, 256) That number did not include ineligible adults such as felons, etc. (SR, 256) It is settled law that "the size and characteristics of the community in which the crime occurred" is an important factor when assessing the ability to empanel an impartial jury. *Skilling v. United States*, 561 U.S. 358, 382, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). A large, diverse pool of jurors serves to mitigate unfair pretrial publicity. *Id.* In

the present case, the juror pool was extraordinarily small, and therefore the potential jurors were much more likely to be prejudicially affected by unfair pretrial media coverage.

The pretrial publicity of the case at hand was demonstrated to the trial court in Krueger's Exhibits A – F. (SR, 261-271; Appx 6-19) Notably, the first newspaper article regarding this case stated, "Krueger turned himself in to the Beadle County Sheriff's Office…making a statement implicating himself and someone named 'Tony' in the murder"'. (SR, 263) However, Krueger's statement regarding Vega (AKA "Tony") was suppressed by the trial court prior to jury trial. Further, the news article mentions highly prejudicial evidence that was never introduced at trial, including a statement indicating that Krueger had confessed to a witness that "he had snapped", and a statement made by the Beadle County State's Attorney that "[t]he methamphetamine and use and distribution definitely played a role in what was happening" and " that Vega had been supplying methamphetamine to Krueger". (SR, 264)

Our State Supreme Court has found venue to be proper even in cases where pretrial publicity exists, provided such media coverage was fair, involved matters that were subsequently received in evidence, and did not include views on the guilt or innocence of the defendant. See *Reiman*. In *Reiman*, the court characterized acceptable pretrial media coverage as follows:

> "An examination of the pretrial publicity discloses that it was, for the most part, factual reporting. Most of what was published involved matters that were subsequently received in evidence. The tone was not designed to create prejudice against the defendants. The news media made no expressions concerning its view of the guilt or innocence of the defendants and generally followed recognized fair

> trial and free press standards. There is no showing that the pretrial coverage was inaccurate, misleading or unfair."

Id. at 867.

In contrast, in the case at bar the media articles contained important information that was not received in evidence at the trial. Furthermore, the pretrial publicity unfairly expressed an opinion that Krueger was guilty of the charged offense.

At the pre-trial hearing, Krueger argued that in addition to the publicity the case had received already, the publicity of co-defendant Vega's case would also influence whether or not Krueger could receive a fair and impartial trial in Beadle County. Indeed, evidence was presented to the jury at trial that Vega pled guilty to the lesser offense of manslaughter for the killing of Houck, and was sentenced to the State Penitentiary. (SR, 1529, 1532) Given the pre-trial publicity that the two men were implicated in the same matter, Krueger asserts the prejudice in the minds of the county residents was sufficient to raise a reasonable apprehension that he could not receive a fair and impartial trial in the county. See *Wellner* at 330-31; see also *Skilling v. United States*, 561 U.S. at 385 (noting that "[a]lthough publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily… warrant an automatic presumption of prejudice.")

Finally, the trial court was not diligent in addressing the venue issue. The trial court initially denied the change of venue motion, but never followed through on its decision to revisit the venue issue after Vega's case concluded. The trial court's ruling on the motion is incomplete.

Here, the small jury pool, the unfair and negative pretrial publicity, and Vega's guilty plea all combined to deny Krueger a fair trial. The trial court erred in not following its own ruling and examining the venue issue after Vega's case concluded, and before Krueger's trial began.

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE'S EXPERT TO TESTIFY REGARDING DNA RECOVERED FROM A PAIR OF SHOES?

At trial, Krueger moved to strike Amber Bell's testimony as it related to DNA evidence from a pair of shoes on foundational grounds. Krueger asserted there was an insufficient chain of custody regarding the shoes, and that the state failed to show that the shoes Ms. Bell tested were the same shoes that were taken from Krueger. (SR, 1546) The trial court denied Krueger's motion to strike the DNA testimony. (SR, 1546-47)

A. Standard of Review

"This Court reviews a decision to admit or deny evidence under the abuse of discretion standard." *State v. Stanley*, 2017 SD 32, ¶21, 896 N.W. 2d 699 (quoting *Donat v. Johnson*, 2015 S.D. 16, ¶24, 862 N.W. 2d 122; *Ferebee v. Hobart*, 2009 S.D. 102, ¶12, 776 N.W. 2d 58, 62). The trial court abuses its discretion when it exercises its discretion "to an end or purpose not justified by, and clearly against, reason and evidence.'" *Pesicka v. Pesicka*, 2000 SD 137, ¶17-18, 618 N.W.2d 725, 728 (citations omitted). This Court considers "'whether [a] judicial mind, in view of the law and the circumstances, could reasonably have reached the conclusion.'" *Id.* The trial court's discretion "is to be exercised liberally in accord with legal and equitable principles in order to promote the

ends of justice." *Estate of Nelson*, 1996 S.D. 20 ¶14, 544 N.W.2d 882, 886 (additional citations omitted).

B. Argument

Krueger asserts that the trial court erred by allowing inadmissible evidence. Forensic DNA analyst Amber Bell testified regarding the results of DNA testing on a bat and a pair of shoes. (SR, 1439) Krueger moved to strike Ms. Bell's testimony on the grounds of an insufficient chain of custody. (SR, 1442)[3] The trial court stated it was "foundational" and informed the State to lay some foundation for the evidence. (SR, 1442) The State argued Ms. Bell's testimony should be allowed under SDCL 19-19-703. (SR, 1445) The trial court agreed and allowed the testimony, even though some of the steps involved in the testing were performed by a non-testifying analyst. (SR, 1449).

Ms. Bell told the jury she tested swabs taken from a pair of shoes associated with the case at hand. (SR, 1457) Ms. Bell did not testify who the shoes belonged to. Ms. Bell testified that Swab 3.01, taken from the left shoe, and swab 3.02, taken from the right shoe, contained DNA from a single source, Keith Houck. (SR, 1459) At the time of Ms. Bell's testimony, the jury had not heard any other testimony regarding the shoes.

Next, Agent Spencer testified that Krueger had been arrested on June 3, 2016, and the next day Agent Spencer retrieved a pair of black velcro tennis shoes from Krueger's property at the jail. (SR, 1471) A picture of the black velcro tennis shoes was entered into evidence, and Agent Spencer testified that the shoes "were property of Mr. Krueger." (SR, 908, 1472)

[3] Krueger concedes proper foundation was laid for the bat and will only discuss the testimony and picture regarding the shoes.

The State then attempted to enter the actual shoes into evidence, and Krueger objected on foundational grounds and chain of custody grounds. (SR, 1472,73) The trial court sustained Krueger's objection, and the actual shoes were not allowed into evidence. However, Agent Spencer was allowed to testify that the shoes he was referring to and handling in front of the jury were the shoes he got out of Krueger's personal property at the jail. (SR, 1473, 1478) Thus, the picture of the shoes was allowed into evidence, testimony by Ms. Bell and Agent Spencer regarding the shoes was allowed into evidence, but the actual shoes were not.

The State rested, but asked the trial court to reconsider admitting the shoes into evidence based on the foundation laid by Agent Spencer. (SR, 1544) The following exchange took place:

> Trial Court: "The reason I didn't allow them is that while there was testimony by the expert that a pair of shoes were examined, they weren't identified in any way as being associated with Krueger."
>
> State: "But Agent Spencer testified he got them out of Krueger's property at the jail."
>
> Trial Court: "But there's nothing that indicates that those were the ones she examined. Now, the testimony was she examined a pair of Krueger's shoes, but you never showed those shoes to her. She never identified those as the ones she examined. So it's on the basis of foundation." (SR, 1544-45)

After Krueger's motion for acquittal, he moved the court to strike Ms. Bell's testimony as it related to DNA evidence from the shoes, because there was insufficient foundation to link her testimony back to Krueger's shoes. (SR, 1546) Krueger argued there was no evidence that the shoes Ms. Bell tested were the shoes that were taken from Krueger's property at the jail. (SR, 1546) The trial court denied Krueger's motion, stating

that “As I explained earlier, [Ms. Bell] did testify she tested Krueger’s shoes. She just can’t testify that they were those shoes…I don’t think you need to necessarily have the shoes present here for her to give her opinion.” (SR, 1547-48)

In this case, the trial court erred by allowing the testimony of Amber Bell regarding DNA evidence from a pair of shoes that were themselves excluded from evidence. The trial court's rulings and statements are contradictory. First, the trial court excluded the shoes from evidence on the grounds that the state did not establish that Ms. Bell had tested shoes belonging to Krueger. But, in subsequently allowing Ms. Bell's testimony to stand, the trial court inexplicably stated "[Ms. Bell] did testify she tested Krueger’s shoes." However, the record contains no such testimony from Ms. Bell. (SR, 1439-61) Ms. Bell testified that she tested swabs taken from shoes, but she never testified that the shoes belonged to Krueger. The state never established that Krueger's shoes were the source of the swabs that were tested. Because the DNA evidence was not linked to Krueger, it should not have been admitted. See *State v. Kryger*, 2018 S.D. 13, ¶¶ 24-25, 907 N.W.2d 800 (upholding admission of testimony regarding a burn pit where the evidence revealed a sufficient link between defendant and the burn pit).

The trial court confused admission of the DNA evidence with admission of the shoes into evidence. The trial court excluded the shoes from evidence, when the trial court's stated rationale actually called for the DNA testimony to be excluded from evidence.

The proponent of expert testimony has the burden to prove its admissibility by a preponderance of the evidence. SDCL 19-15-2. To be admissible, evidence must be

relevant. SDCL 19-19-402. "Evidence is relevant if: (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact is of consequence in determining the action." *Kryger* at ¶24 (quoting SDCL 19-19-401)

In the case at bar, the expert testified about DNA evidence collected from a pair of shoes. However, the state never established anything about the shoes that were tested. The state never established who owned the shoes, where the shoes were found, when the shoes were taken into evidence, or any other circumstances about the shoes that were tested. The state offered additional evidence about shoes taken from Krueger's property at the jail, but never established that Krueger's shoes were the shoes that Ms. Bell tested. Therefore, the DNA evidence did not have any probative value whatsoever, and it was error to admit that evidence.

IV. WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT?

A. Standard of Review

We review prosecutorial misconduct claims for an abuse of discretion. *State v. Stanley*, 2017 S.D. 32, ¶ 32 (citing *State v. Bariteau*, 2016 S.D. 57, ¶ 23, 884 N.W.2d 169, 177).

B. Argument

Krueger asserts the prosecutor in the case at bar committed misconduct during the rebuttal portion of his closing argument, denying Krueger the right to a fair trial. Krueger further asserts the trial court’s failure to give any curative measures was insufficient and erroneous, entitling him to a new trial.

During the prosecutor's rebuttal argument, when discussing facts and the burden of proof, the prosecutor stated "I know Don Houck.[4] I met him over the last year and a half because of this. Five facts. He['s] sitting in my office. He says the Defendant killed my boy. He killed my boy." (SR. 1580)

Krueger objected to the statements as improper argument, and the trial court sustained the objection. (SR, 1580) However, the trial court did not make any curative comments or statements to the jury at that time, and the prosecutor merely proceeded with his argument. (SR, 1580) Furthermore, the trial court did not give any curative instruction to the jury.

This Court recently discussed the issue of prosecutorial misconduct in *State v. McMillen*, 2019 S.D. 40. "We have held prosecutorial misconduct to be a 'dishonest act or an attempt to persuade the jury by the use of deception or by reprehensible methods.'" *McMillen* at ¶ 27. (quoting *State v. Janis*, 2016 S.D. 43, ¶ 22, 880 N.W.2d 76, 82) (quoting *State v. Hayes*, 2014 S.D. 72, ¶ 23, 855 N.W.2d at 675). "[N]o hard and fast rules exist which state with certainty when prosecutorial misconduct reaches a level of prejudicial error which demands reversal of the conviction and a new trial; each case must be decided on its own facts." *Id.* (quoting *State v. Stetter*, 513 N.W.2d 87, 90 (S.D. 1994) (quoting *State v. Kidd*, 286 N.W.2d 120, 121-22 (S.D. 1979)). "'A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone,' but, if the prosecutor's conduct affects the fairness of the trial when

[4] Don Houck is Keith Houck's father.

viewed in context of the entire proceeding, reversal can be warranted."' *Id.* (quoting *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1 (1985)).

This case is similar to *State v. Smith,* 1999 S.D 83, ¶38, 599 N.W.2d 344, where this Court examined whether the prosecutor committed misconduct in closing arguments. In that case, *Smith* claimed that in closing arguments the prosecutor deliberately inflamed the passions of the jurors. *Id.* at ¶40. After counsel for the defendant repeatedly objected to the prosecutor's inflammatory statements, the trial court sustained the objections and instructed the jury to disregard the prosecutor's comments. *Id.*

On review, this Court stated, "It is well established ... that the prosecutor and the defense have considerable latitude in closing arguments, for neither is required to make a colorless argument." *Id.* at ¶41. (quoting *State v. Smith*, 541 N.W.2d 584, 589 (Minn 1996). "Counsel has a right to discuss the evidence and inferences and deductions generated from the evidence presented". (quoting *State v. Reynolds*, 816 P.2d 1002, 1006 (IdahoApp 1991). "However, our cases have held fast to the idea that '[t]he prosecutor has an overriding obligation, which is shared with the court, to see that the defendant receives a fair trial."' *Id.* (quoting *State v. Blaine*, 427 N.W.2d 113, 115 (S.D. 1988) (citing *State v. Brandenburg*, 344 N.W.2d 702 (S.D. 1984)). "He or she may not seek a conviction at any price." *Id.* (quoting *State v. Porter*, 526 N.W.2d 359, 362-3 (Minn 1995). The Court stated "[t]he question then is when does the prosecutor's argument cross the line of colorful argument and become misconduct?" *Id.*

In South Dakota, "we approach prosecutorial misconduct using a two-prong analysis." *Id.* at ¶43. First, we must determine that the misconduct occurred." *Id.*

(quoting *State v. Hofman*, 1997 S.D. 51, ¶13, 562 N.W.2d at 902 (citing *State v. Robbins*, 1996 S.D. 84, ¶6, 550 N.W.2d at 425). "If misconduct did occur, we will reverse the conviction only if the misconduct has prejudiced the party as to deny him or her a fair trial." *Id.* The Court in *Smith* found "The prosecutor may cross the line when he or she injects "unfounded or prejudicial innuendo into the proceedings ... [or appeals] to the prejudices of the jury." *Id.* at ¶46. (quoting *Blaine*, 427 N.W.2d at 115 (citation omitted).

"Closing arguments are not evidence." *Smith* at ¶48. "The argument should be no more than an accurate summary of the state of the evidence." *Id.* (quoting *State v. Nachtigall*, 296 N.W.2d 530, 531-2 (S.D. 1980) (citing *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). "Juries are presumed to follow the trial court's instruction that the attorneys' final arguments do not constitute evidence. However, unfair closing arguments invite a jury decision by emotion rather than by evidence. This improper type of argument cuts to the heart of juror independence." *Id.*

The Court in *Smith* found "The prosecutor's penchant for making statements meant to inflame the passion of the jury and go outside the realm of admissible evidence, is an example of the unprofessional, "win-at-all costs" attitude that scars the judicial system." *Smith* at 49. The Court also found that "Nothing necessitated these comments, especially considering the strong evidence against *Smith*." *Id.* Although the prosecutor "may prosecute with earnestness and vigor. ... [and] he may strike hard blows; he is not at liberty to strike foul ones." *Id.* (quoting *Blaine*, 427 N.W.2d at 116 (citing *Viereck v. United States*, 318 U.S. 236, 248, 63 S.Ct. 561, 566-67, 87 L.Ed. 734, 741 (1943)). The

court found that calling *Smith* a “monster” or a “pervert” was a foul blow, abhorrent and misconduct. *Id.*

In the present case, misconduct clearly occurred. The prosecutor's statement referred to matters outside of the evidence introduced during the trial. The statement from Houck's father that "the Defendant killed my boy" implies that Houck's father may have had some additional knowledge of the facts of the case. Houck's father did not testify at trial, and was not subject to cross-examination. Furthermore, the prosecutor’s statements served only to inflame the passions of the jury, and invited the jury to make a decision based on an emotional plea from the victim's father, rather than on the evidence. See *Smith* at ¶48. Unlike in *Smith*, Krueger’s counsel said nothing in his closing argument to invoke the prosecutor’s inappropriate comments. (See *State v. Stanley*, 2017 S.D. 32, ¶ 31, 896 N.W.2d 699, 720)

The next prong of the test is whether the misconduct is prejudicial. *Smith* at 52. “[P]rosecutorial misconduct reaches the level of a federal constitutional violation only if the argument “so infect[s] the trial with unfairness as to make the resulting convictions a denial of due process.” *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In *Smith* the Court found no prejudicial error, reasoning that “In all probability it is very unlikely the prosecutor’s inflammatory statements altered the jury’s verdict.” *Id.*at 53. “This is particularly true when considering the overwhelming evidence that *Smith* committed the crimes of which he was charged.” *Id.*

The case at hand differs greatly in this regard. Unlike in *Smith*, the prosecutorial misconduct in the case at bar was sufficiently prejudicial to affect the overall fairness of

Krueger's trial. First, the evidence was not overwhelming; it was circumstantial at best. It is safe to infer the prosecutor made his comments to further his likelihood of winning. Second, the trial court failed to "curtail any improper inference the jury may have taken" from the prosecutor's rebuttal argument. See *Smith* at ¶40 (finding "the trial court sustained the objections and instructed the jury to disregard the prosecutor's comments."); see also *Stanley* at ¶31 (finding that in addition to sustaining the objection, the trial court "interrupted the State's argument, and when closing arguments ended, advised the jury to reread the jury instruction on comments made by the attorneys.) See also *State v. Lee*, 599 N.W.2d 630 (stating "we agree with the trial court and find that the court's admonitions prevented the jury from taking any improper inference from the prosecutor's comments"). Although the trial court here sustained Krueger's objection to improper argument, the court did not admonish the jury any further. No curative comments were made by the trial court to mitigate the prejudicial effect of the prosecutor's statements.

The prosecutor's statement "He['s] sitting in my office. He says the Defendant killed my boy. He killed my boy," is not harmless, and constitutes a significant error. Given the scant amount of direct physical evidence against Krueger, the implication that Houck's father knew of evidence the jury did not, the sympathy likely invoked in the jury, and the failure of the trial court to make any curative statements regarding the misconduct, the cumulative effects of the prosecutor's misconduct prejudiced Krueger and denied him the right to a fair trial.

V. WHETHER THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED KRUEGER OF A FAIR TRIAL?

The cumulative effects of the trial court's errors and their resulting prejudice affected the fairness of Krueger's trial. 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 (SD 1993) (quoting *McDowell v. Solem*, 447 NW2d 646 (S.D. 1989)). See also *State v. Dokken*, 385 N.W.2d 493 (S.D. 1986); *State v. Bennis*, 457 N.W.2d 843 (S.D. 1990)). "The question we must decide is whether, on a review of the entire record, [the defendant] was provided a fair trial." *Id.* "As we have said numerous times, the defendant is not entitled to a perfect trial but rather a fair one." *Id.* (quoting *State v. Smith*, 477 N.W.2d 27, 35 (S.D. 1991)).

This Court has also recognized that "a 'snowball effect' of the errors at trial may deprive a defendant of a fair trial."' *Jenner v. Leapley*, 521 N.W.2d 422, 432 (SD 1994). The cumulative effects of the errors which occurred during Krueger's trial denied him the right to a fair trial. See *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn.App. 1984) (reversing Jahnke's conviction and remanding for a new trial based on prosecutorial misconduct). As Justice Sabers stated in his dissent in *State v. Frazier*, 2001 SD 10, ¶ 65, 262 N.W.2d 246, 264, "Viewing the errors at *Frazier's* trial in isolation may lead some to conclude that they were not sufficiently prejudicial, yet that is not the consideration. "Our system of criminal justice is founded on the twin cornerstones of fairness and proof beyond a reasonable doubt."" *Id.* at ¶ 65.

Three significant errors stand out in this case. The admission of Amber Bell's DNA testimony from a pair of shoes, the denial of Krueger's motion to change venue, and the prosecutor's misconduct in closing argument. The combination of those significant errors, when considered together as a whole, undermined Krueger's right to a fair trial.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Krueger respectfully submits that his conviction must be reversed, and the case should be remanded for a new trial.

Respectfully submitted this ___ day of August, 2019.

_____
Kenneth M. Tschetter
Tschetter & Adams Law Office, P.C.
5919 S. Remington Place, Suite 100
Sioux Falls, SD 57108
Telephone: (605) 367-1013
Attorney for Appellant Krueger

APPENDIX

APPENDIX

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

STATE OF SOUTH DAKOTA, Plaintiff vs. KEVIN ALLAN KRUEGER, Defendant.	Cr. 02CRI16-000240 **JUDGMENT OF CONVICTION AND SENTENCE**

An Indictment was filed with this Court on the 14th day of June, 2016, charging the Defendant, KEVIN ALLAN KRUEGER, with the crime of MURDER FIRST DEGREE (SDCL 22-16-4(1)) committed on or about the 31st day of May, 2016, in Beadle County, South Dakota.

The Defendant, KEVIN ALLAN KRUEGER, his court-appointed attorney, and the prosecuting attorney appeared before the Honorable Jon R. Erickson, Circuit Court Judge, on the 18th day of August, 2016, for arraignment.

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 of confrontation, and the right to a jury trial. The Defendant pled NOT GUILTY to the charge of MURDER FIRST DEGREE (SDCL 22-16-4(1)); and requested a jury trial.

A jury trial commenced on the 10th day of January, 2018, in Beadle County, Huron, South Dakota, on the charges of MURDER FIRST DEGREE (SDCL 22-16-4(1)). At the trial, the Defendant was present with his attorneys, Zachary Flood and Clint Sargent, and Michael R. Moore, Beadle County State's Attorney, was the prosecuting attorney for the State of South Dakota. On January 17, 2018, the jury returned a verdict of GUILTY to the charges of MURDER FIRST DEGREE (SDCL 22-16-4(1)).

IT IS THEREFORE ORDERED that a JUDGMENT of GUILTY be entered against the Defendant, KEVIN ALLAN KRUEGER, for the charge of MURDER FIRST DEGREE (SDCL 22-16-4(1)).

SENTENCE

On the 19th day of January, 2018, the Defendant, KEVIN ALLAN KRUEGER, and his court-appointed attorneys, Zachary Flood and Clint Sargent, together with Michael R. Moore, Beadle County State's Attorney, appeared before the Honorable Jon R. Erickson, Circuit Court

Judge, for sentencing. The Court asked whether 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, ADJUDGED AND DECREED that the Defendant, KEVIN ALLAN KRUEGER, on the charge of MURDER FIRST DEGREE (SDCL 22-16-4(1)) shall be sentenced to serve life in the South Dakota State Penitentiary, Sioux Falls, South Dakota.

IT IS FURTHER ORDERED that the Sheriff of Beadle County or one of his deputies shall immediately transport the Defendant to the South Dakota State Penitentiary, Sioux Falls, South Dakota, for execution of this sentence.

Dated this 19th day of January, 2018, at Huron, Beadle County, South Dakota.

BY THE COURT:

Jon R. Erickson
Judge of the Circuit Court

ATTEST:
Beadle County Clerk of Courts/~~Deputy~~

(SEAL)

NOTICE OF RIGHT TO APPEAL

You, KEVIN ALLAN KRUEGER, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of South Dakota and the State's Attorney of Beadle County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within thirty (30) days from the date that this Judgment of Conviction was signed, attested and filed.

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. KEVIN ALLAN KRUEGER, Defendant.		02CRI16-000240 **MOTION FOR CHANGE OF VENUE OR ALTERNATIVELY, MOTION FOR EXPERT TO CONDUCT STUDY RE: VENUE**

COMES NOW the above named Defendant, Kevin Allan Krueger, by and through his attorneys of record, Donna L. Bucher of Tinan Smith & Bucher of Mitchell, South Dakota and Zachary T. Flood of MorganTheeler LLP of Mitchell, South Dakota, and hereby submits this *Motion for Change of Venue, or alternatively, Motion for Expert to Conduct Study Re: Venue*. This motion is supported by the records and files herein. Defendant further states:

1. Defendant was indicted on June 13, 2016 for First Degree Murder in violation of SDCL § 22-16-4-(1), a Class A Felony.

2. According to the most recent U.S. Census Bureau statistics, Beadle County, South Dakota has a population of 18,101 people. 27% of that population is under the age of eighteen. Mathematically, the maximum number of constituents eligible for the jury pool is 13,213. This does not include ineligible adults such as felons, etc.

3. Arguably, every person over the age of eighteen has access to the print media, television, cell phones, the internet, and radio containing coverage of the death of Keith Houck.

4. Article VI, § 7 of the South Dakota Constitution provides that a defendant is entitled to a trial by a fair and impartial jury.

5. From the outset of this case and at every motions hearing, the local news media has written an article updating the events of the case. The State is also pictured giving the public a briefing after the arrest of Defendant. *See Affidavit of Zachary T. Flood in Support of Gag Order, Prohibiting Media, Change of Venue, and Jury Consultant.*

6. Undoubtedly, the news coverage will continually increase in the months leading up to trial. By the time jury selection begins, it will be impossible for Defendant to find fair and impartial jurors who do not already have a preconceived notion of the appropriate verdict.

7. The media coverage will be intensified and further deprive Defendant of his constitutional right to a fair and impartial trial if Jose Vega is tried first and convicted. It is not a stretch to surmise that every news station in eastern South Dakota will be in attendance at the trial and penalty phase of both trials.

8. Due to the circumstances surrounding this case, and due to the fact that this will be one of the first death penalty jury trials in South Dakota in over fifteen years, it cannot be said Defendant can get a fair trial in Beadle County, South Dakota.

9. Defendant respectfully requests the Court to transfer venue a significant distance from Beadle County to further guarantee Defendant's constitutional rights are protected.

10. If the Court does not feel there are sufficient grounds to change venue at this time, Defendant, in the alternative, is requesting an expert to conduct a public opinion survey or venue poll in Beadle County to determine the public's perception surrounding the death of Keith Houck.

11. Defendant cannot reasonably ascertain, on his own, the public perception surrounding his case. An expert will be able to adequately address the issues and allow Defendant to meet his burden for change of venue once surveys and studies are conducted.

12. Defendant is aware of multiple companies in South Dakota capable of conducting said studies. Defendant is requesting funds to allow the employment of said expert to begin immediately.

WHEREFORE Defendant moves this Court to enter its order as follows:

1. Granting Defendant's *Motion for Change of Venue*;

2. Alternatively, granting Defendant an expert to conduct a study regarding venue in Beadle County; and

3. Setting the initial cap on this expert's funding at $10,000.00.

Dated this 24th day of March 2017.

/s/ Zachary T. Flood
Zachary T. Flood, Esq.
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ATTORNEYS FOR DEFENDANT
KEVIN ALLAN KRUEGER

STATE OF SOUTH DAKOTA) :SS COUNTY OF BEADLE)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. KEVIN ALLAN KRUEGER, Defendant.	02CRI16-000240 **AFFIDAVIT OF ZACHARY T. FLOOD IN SUPPORT OF MOTIONS RE: GAG ORDER, PROHIBITING MEDIA, CHANGE OF VENUE, AND JURY CONSULTANT**

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF DAVISON)

Zachary T. Flood, having been first duly sworn on oath, deposes, and states:

1. I am one of Mr. Krueger's attorneys in the above-entitled matter and submit this Affidavit in support of the following motions:

(a) *Motion for a Gag Order;*
(b) *Motion to Exclude Press from Voir Dire and Pre-Trial Proceedings;*
(c) *Motion for Change of Venue, or alternatively, Motion for Expert to Conduct Study Re: Venue; and*
(d) *Motion for Jury Consultant.*

2. On June 7, 2016, the Plainsman printed a giant front page article documenting a press conference held by the Beadle County State's Attorney. The article detailed the autopsy, alleged drug connections, and other facts disseminated by the Beadle County State's Attorney. A true and correct copy of said article is attached hereto as **EXHIBIT A**.

3. On June 9, 2016, another article appears showing co-defendant Jose Vega and detailing the same facts disseminated by the Beadle County State's Attorney's Office. A true and correct copy of said article is attached hereto as **EXHIBIT B**.

4. In October 2016, two more articles appeared discussing the Defendant's psychiatric evaluation and motions hearing. A true and correct copy of said articles is attached hereto as **EXHIBIT C**.

5. Articles appeared in November, January, and again in March updating the public in regard to Defendant's case. True and correct copies of the articles are attached hereto as **EXHIBIT D**, **EXHIBIT E**, and **EXHIBIT F**, respectively.

6. I am also aware of numerous articles appearing in KSFY with pictures of Defendant and descriptions from law enforcement.

Zachary T. Flood

Subscribed and sworn to before me this 24th day of March, 2017.

Megann E. Davis
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

Megann Davis
Notary Public
My commission expires: 4-12-2022

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF BEADLE	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. KEVIN ALLAN KRUEGER, Defendant.		02CRI16-000240 **MOTION FOR CHANGE OF VENUE OR ALTERNATIVELY, MOTION FOR EXPERT TO CONDUCT STUDY RE: VENUE**

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Dated this 24th day of March 2017.

/s/ Zachary T. Flood
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ATTORNEYS FOR DEFENDANT
KEVIN ALLAN KRUEGER

...ISIAN · BANCROFT · CARPENTER · CARTHAGE · CAVOUR · DE SMET · DOLAND · ESMOND · FORESTBURG · FRANKFORT · HIGHMORE · HITCH-
...HER · MILLER · REDFIELD · REE HEIGHTS · ST. LAWRENCE · TULARE · VIRGIL · WESSINGTON · WESSINGTON SPRINGS · WILLOW LAKE · WOLS

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Two charged with first-degree murder in court Monday

Authorities mum while looking for second suspect

BY ROGER LARSEN
OF THE PLAINSMAN

HURON — First-degree murder charges have been filed against Kevin Krueger and Jose Antonio Vega in last week's death of Keith Houck, authorities said.

Krueger, 50, of rural Huron, is being held in lieu of a $500,000 cash bond and Vega, 32, is in custody in Montevideo, Minn., where extradition proceedings are under way.

Houck, 49, of rural Huron, died from blunt force trauma to the head. Autopsy results Monday morning indicated multiple fractures and injuries to the head, Beadle County State's Attorney Mike Moore said.

Houck was killed on Tuesday and Krueger turned himself in to the Beadle County Sheriff's Office on Friday, making a statement implicating himself and someone named "Tony" in the mur-

MURDER - Page 3

ROGER LARSEN/PLAINSMAN

Beadle County State's Attorney Mike Moore briefs the media on the investigation into the death of Keith Houck. Two individuals are in custody and there is no danger to the public, he said.
At left: Kevin Krueger of rural Huron is escorted from the courtroom Monday afternoon after a short bond hearing. Krueger is charged with first-degree murder in the death of Keith Houck.

MURDER:

From Page 1

der, according to an affidavit in support of an arrest warrant.

After talking with Krueger, law enforcement authorities executed a search warrant and found Houck's body at Krueger's residence north of Cavour.

But authorities kept silent about the investigation over the weekend until Vega was arrested in Montevideo.

They had been in the process of determining who "Tony" was, Moore said in a news conference Monday afternoon.

"We were afraid that if that information leaked out that he might take off or hurt somebody else," Moore said. "We were trying to keep it quiet until we had a good feel on who that was."

He said he understands how rumors circulate when people want to know what's happening.

"That's going to happen in a small town like this," Moore said. "The public obviously has a right to know. If we felt that the public was in any type of danger, we would have come out and said that. We didn't feel that was the case.

"Once he was arrested, we felt that we had everybody involved and that there was no further danger to the community at that point," he said.

Moore said the investigation has shown that there was a drug connection between the individuals. Vega had been supplying methamphetamine to Krueger, he said. Authorities are still investigating how Houck was involved.

"The methamphetamine and use and distribution definitely played a role in what was happening," Moore said.

According to the affidavit, state Division of Criminal Investigation Agent Brett Spencer received information Thursday evening that a possible homicide had occurred two days earlier at Krueger's residence.

It was reported that an unidentified Hispanic male named "Tony" was hitting Houck, who was on the ground, in the head with the blunt end of a wooden baseball bat, the affidavit reads.

The witness said Krueger was present and told the witness "to get."

On Thursday morning, the witness said he saw Krueger in Huron and asked him if everything was cool, the affidavit reads. At that point, Krueger had his head hung down, he started crying and told the witness he snapped.

The sheriff's office had been looking for Houck since May 26 to serve him court papers. They went to his residence to try to find him, but he wasn't home.

"At first it was an investigation to find out where Keith Houck was," Moore said. He said authorities had been looking for Krueger as well.

Krueger's next court appearance is set for June 14. He indicated to the judge he will be hiring an attorney to represent him.

Moore is reminding the public that the state has not proven anything in the case and that the defendant is presumed innocent and should be treated that way.

Law enforcement authorities investigating the case are the DCI, Beadle County Sheriff's Office, Huron Police Department, South Dakota Highway Patrol and Minnesota law enforcement.

Second suspect makes appearance in beating case

BY ROGER LARSEN
OF THE PLAINSMAN

HURON – The second man facing a first-degree murder charge in a beating death in rural Huron last week made his initial court appearance on Wednesday.

Jose Antonio Vega, 32, of Montevideo, Minn., was returned to Huron on Tuesday after waiving extradition.

Also charged with first-degree murder in the death of Keith Houck, 49, of rural Huron, is Kevin Krueger, 50, of rural Huron.

In his court appearance, Vega requested a court-appointed attorney and his bond was set at $500,000 cash. Krueger is also being held at the Regional Correction Center in lieu of a $500,000 cash bond.

An autopsy revealed that Houck died from blunt force trauma to the head after suffering multiple fractures and injuries. Prosecutors allege that a wooden baseball bat was used to kill him last Tuesday at Krueger's residence.

His body was discovered on Friday at the farm north of Cavour.

Krueger was arrested on Friday after he turned himself in to the Beadle County Sheriff's Office. Minnesota law enforcement authorities arrested Vega on Saturday in Montevideo.

Both men will appear in court again on Tuesday.

ROGER LARSEN/PLAINSMAN

Jose Antonio Vega returns to the Beadle County Correctional Center after his first appearance in court on a first-degree murder charge, for the death of Keith Houck.

6/9/16

EXHIBIT B

Defense motion for psychiatric evaluation granted

10/5/16

BY ROGER LARSEN
OF THE PLAINSMAN

HURON – One of the two men charged with first-degree murder in the beating death of a man in rural Huron last spring was in court Tuesday for a motions hearing.

Kevin Krueger, 51, of rural Huron, appeared with one of his attorneys, Zachary Flood of Mitchell, before Circuit Judge Jon Erickson for the brief hearing.

The other man charged, Jose Antonio Vega, 33, of Montevideo, Minn., is scheduled to appear in court Oct. 18 for a hearing on the same motions.

Erickson granted a defense motion requesting that Krueger undergo a psychiatric evaluation at the Human Services Center in Yankton.

Two prosecution motions introduced by Beadle County State's Attorney Mike Moore for

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MOTION:

From Page 1

reciprocal discovery and character evidence were granted by the judge.

He granted one part and denied another part of a prosecution motion pertaining to trial procedures when there are multiple attorneys on either side.

Both men are being held in custody at the Regional Correction Center in lieu of a $500,000 cash bond.

Their trials are not expected to be scheduled until early next year.

An autopsy revealed that Houck died from blunt force trauma to the head after suffering multiple fractures and injuries.

The state alleges that a wooden baseball bat was used to kill him at Krueger's rural Huron residence.

His body was discovered at the farm north of Cavour.

EXHIBIT tabbies C

10/19/16

Judge rules on motions in murder

BY PLAINSMAN STAFF

HURON – A judge has ruled on prosecution motions filed in the case of one of the men charged with first-degree murder in a beating death last spring.

Jose Antonio Vega, 33, of Montevideo, Minn., appeared before Circuit Judge Jon Erickson on Tuesday.

Prosecution motions for reciprocal discovery and character evidence were granted by the judge.

MOTIONS:

From Page 1

Erickson granted one part and denied another part of a prosecution motion pertaining to trial procedures when there are multiple attorneys on either side.

The other man charged in the case, Kevin Krueger, 51, of rural Huron, was in court for a motions hearing [illegible]

His case is being delayed after the judge granted a defense motion asking that Krueger undergo a psychiatric evaluation at the Human Services Center in Yankton.

The defendants are charged in the death of Keith Houck, 49, discovered at Krueger's farm north of Cavour.

Beadle County State's Attorney Mike Moore asked the court to set a trial date in Vega's case. However, the defense said, it wasn't ready, and Erickson then set a Nov. 1 status hearing at which time a trial date may be

There will be separate jury trials for the two defendants. They are not likely to get under way until next year.

Both men are being held in custody at the Regional Correction Center in lieu of a $500,000 cash bond.

Vega trial date set

BY ROGER LARSEN
OF THE PLAINSMAN

HURON – A judge has set Jan. 17 as the trial date for Jose Antonio Vega, one of two men charged with first-degree murder in a beating death last spring.

At a status hearing, Circuit Judge Jon Erickson on Tuesday also heard two additional motions from defense attorneys David Wheeler of Huron and Doug Papendick of Mitchell.

Vega, 33, of Montevideo, Minn., and Kevin Krueger, 51, of rural Huron, are charged in the death of Keith Houck, 49, of rural Huron.

The court-appointed defense attorneys offered a motion to spend another $5,000 for a private investigator. They have

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TRIAL: From Page 1

spent an initial $5,000 for the investigator.

Erickson took that motion under advisement.

A second motion asks permission to hire a pathologist, who would be paid $350 an hour to review the case and $400 an hour to testify at trial.

The judge asked the attorneys to submit their motion to the court in writing.

Krueger has made no recent court appearances as his case proceeds toward a separate jury trial.

Earlier the judge granted a defense motion asking that Krueger undergo a psychiatric examination at the Human Services Center in Yankton.

Both men are being held in custody at the Regional Correction Center.

11/2/16

EXHIBIT
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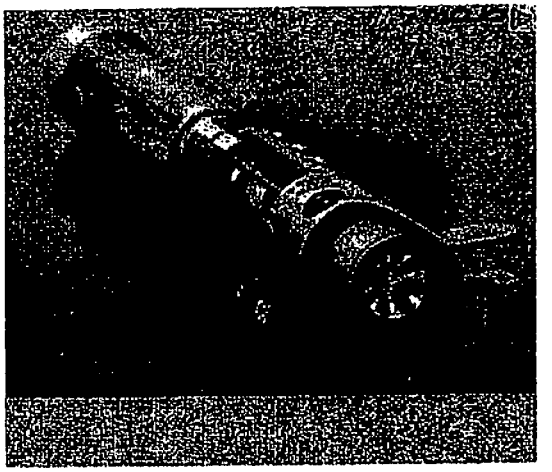
Krueger, Vega back in court for motions hearings

Posted: Monday, Jan 9th, 2017
BY: ROGER LARS

HURON - Prosecution and defense motions were heard by a judge Friday in the first-degree murder cases against Kevin Krueger and Jose Vega.



Lawyers for Vega also asked for a continuance in his case as his jury trial had been set for Jan. 17.

Circuit Judge Jon Erickson granted that request and set the new date for April 3.

Vega, of Montevideo, Minn., and Krueger, of rural Huron, are charged in connection with last spring's beating death of Keith Houck of rural Huron.

Prosecution motions for a juror questionnaire and the printing of law enforcement interviews of the defendants so jurors can follow along with the transcripts when the audio is played in court were granted.

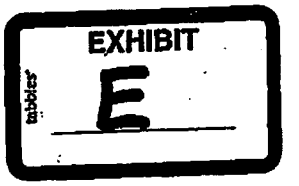
Vega's attorneys were granted motions to spend up to $5,000 to hire a pathologist to review the case and testify in court, and an additional $3,000 for a private investigator.

A Vega defense motion to prevent the state from introducing evidence at trial regarding the use and distribution of methamphetamine was denied by the judge.

The judge took under advisement a Vega defense motion to suppress statements he made to law enforcement officers.

Another motions hearing for both defendants has been scheduled for Feb. 24.

A separate trial date for Krueger has not been set.



Early on in the proceedings, the judge granted a defense motion to have Krueger undergo a psychiatric evaluation at the Human Services Center in Yankton.

A report on the evaluation is expected to be available by the February court date.

Both men are being held in custody at the Regional Correction Center.

For the complete article see the 01-07-2017 issue.

Click here to purchase an electronic version of the 01-07-2017 paper.

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New trial date set in murder cases

Posted: Monday, Mar 13th, 2017
BY: ROGER LARSEN

HURON - A new trial date in July has been set in the first-degree murder cases against Kevin Krueger and Jose Vega.

Circuit Judge Jon Erickson moved Vega's April 3 trial to July 12 on a defense motion for a continuance as part of a motions hearing on Friday.

The judge also set the trial date for Krueger for July 12. However, the cases will not be consolidated for purposes of trial; one or the other will proceed on that day.

The defendants are charged in connection with the May 2016 beating death of Keith Houck, 49, of rural Huron.

Attorneys for Krueger, 51, of rural Huron, filed a motion to suppress two statements he made to law enforcement officers. One was denied and the other was taken under advisement.

Lawyers for Vega, 33, of Montevideo, Minn., filed a dozen procedural motions with the court. The judge granted some, denied some and took others under advisement.

The next motions hearing was set for April 13.

Both men are being held in custody at the Regional Correction Center in Huron.

Houck died May 31, 2016 at Krueger's home in rural Beadle County, authorities said. His body was discovered on June 3, 2016 by law enforcement. An autopsy report revealed that Houck died of blunt force trauma to the head.

EXHIBIT F

For the complete article see the 03-11-2017 issue.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28522

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KEVIN ALLEN KRUEGER,

Defendant and Appellant.

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

THE HONORABLE JON R. ERICKSON
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed February 8, 2018

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28522

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KEVIN ALLEN KRUEGER,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, is referred to as "State." Defendant and Appellant, Kevin Allen Krueger, is referred to as "Defendant." The settled record below, Beadle County Crim. No. 16-240, is denoted "SR," followed by the e-record pagination. The four-volume transcripts of the jury trial held January 10, 11, 16, and 17 of 2018, are denoted "JT," followed by the respective transcript volume number. Motion hearing transcripts are denoted "MH," followed by the date of hearing. Designations are followed by the appropriate transcript page number(s). The State's trial exhibits are called "EXH __."

JURISDICTIONAL STATEMENT

Defendant appeals as a matter of right from the Judgment of Conviction entered and filed by the Honorable Jon R. Erickson, Circuit Court Judge, Third Judicial Circuit, on January 19, 2018. A Notice of Appeal was timely filed on February 8, 2018. This Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I.

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF FIRST-DEGREE MURDER?

The trial court denied Defendant's motion for judgment of acquittal.

State v. Bariteau, 2016 S.D. 57, 884 N.W.2d 169
State v. Dowty, 2013 S.D. 72, 838 N.W.2d 820,

SDCL 22-3-3
SDCL 22-16-4(1)

II.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR CHANGE IN VENUE?

The trial court denied the motion but indicated it could be revisited at a later time. Defendant never renewed the motion.

State v. Corey, 2001 S.D. 53, 624 N.W.2d 841
State v. Martin, 493 N.W.2d 223 (S.D. 1993)
State v. Sickler, 334 N.W.2d 677 (S.D. 1983)
State v. Willingham, 2019 S.D. 55, 933 N.W.2d 619

SDCL 23A-17-5

III.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO STRIKE THE DNA EXPERT'S TESTIMONY REGARDING DNA RECOVERED FROM A PAIR OF SHOES?

After all the evidence was in, Defendant moved to strike certain testimony of the State's DNA expert.

State v. Lownes, 499 N.W.2d 896 (S.D. 1993)
State v. Reay, 2009 S.D. 10, 762 N.W.2d 356
State v. Stone, 2019 S.D. 18, 925 N.W.2d 488
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IV.

WHETHER THE PROSECUTOR'S COMMENTS IN THE REBUTTAL CLOSING ARGUMENT CONSTITUTED PREJUDICIAL PROSECUTORIAL MISCONDUCT THAT DEPRIVED DEFENDANT OF A FAIR TRIAL?

The trial court sustained Defendant's objection to certain comments made by the prosecutor in rebuttal closing argument.

State v. Corey, 2001 S.D. 53, 624 N.W.2d 841
State v. Janis, 2016 S.D. 43, 880 N.W.2d 76, 82
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State v. Smith, 1999 S.D. 83, 599 N.W.2d 344

V.

WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL?

The trial court did not rule on this issue.

State v. Davi, 504 N.W.2d 844 (S.D. 1993)
State v. Stone, 2019 S.D. 18, 925 N.W.2d 488
State v. Wright, 2009 S.D. 51, 768 N.W.2d 512

STATEMENT OF THE CASE AND FACTS

A. Procedural history.

On June 13, 2016, a Beadle County Grand Jury heard evidence of the May 31, 2016 death of Keith Houck, which occurred as a result of being beaten with a baseball bat by Defendant and his co-defendant, Jose Antonio Vega. The grand jury indicted Defendant on one count of premeditated first-degree murder, a Class A felony in violation of SDCL 22-16-4(1). SR 5; SR 421. Vega was separately indicted on an identical count.[1] SR 35-36; *see* Beadle County Crim. No. 16-241. The two co-defendants' cases were not consolidated for trial. SR 524. The Honorable Jon R. Erickson, Circuit Court Judge in the Third Judicial Circuit, presided over the cases.

The court appointed two attorneys, Donna Bucher[2] and Zachary Flood, to represent Defendant. SR 7, 14. Counsel filed several motions, including a Motion to Suppress statements that Defendant made to law enforcement in which he admitted killing Houck. SR 92. This included

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[1] In interviews with law enforcement and later during his plea hearing, Vega admitted that both he and Defendant beat Houck with a baseball bat; Vega pled guilty to first degree manslaughter on June 26, 2017. SR 49-50; SR MH(4/13/17) at 4-5; JT3 199, 210-11. *See also* Plea Transcript in *State v. Jose Antonio Vega,* Beadle County Crim. No. 16-241 (judicial notice requested).

[2] Ms. Bucher withdrew as counsel in August 2017, after she was appointed to be a magistrate judge. The trial court appointed Clint Sargent as substitute co-counsel for Defendant. SR 513, 573.

Defendant's statements made to Beadle County Sheriff's Deputy Shane Ball when Defendant voluntarily approached the off-duty deputy at the deputy's home on June 3, 2016, and told him that Houck was dead and buried at Defendant's farm because—in Defendant's words—"I hit him with a bat." MH(3/10/17) at 16-17. The reason, according to Defendant, was because Houck "kept messing with [Defendant's] family and [Defendant] had had enough." *Id.*

Defendant also sought to suppress statements made during interviews with Division of Criminal Investigation Special Agent Brett Spencer. The agent interviewed Defendant on June 3, 2016 after Defendant was taken into custody; three additional custodial interviews occurred on June 4 and 5, 2016, after Defendant requested to speak to Agent Spencer again each time. *See* MH(3/10/17) at 21-39; Hearing Exhibit 5 (DCI interview recordings); SR 126-164 (transcript of first DCI interview); SR 310-420 (corrected transcripts of three additional interviews). The trial court ruled all the statements to law enforcement were admissible. *See* MH(3/10/17) at 42; MH(7/14/17) at 2. Later, Defendant filed a motion asking the court to reconsider its ruling allowing admission of the first DCI interview on June 3, 2016. SR 560. At a hearing on the motion, the State indicated it would not use any of the statements from the DCI interviews in the State's case-in-chief, but potentially only for impeachment purposes if Defendant took the stand.

MH(10/18/17) at 13-16. The court entered a suppression order consistent with that understanding. SR 577.

On March 24, 2017, Defendant's counsel filed several motions, including a Motion for a Gag Order (regarding counsel and the press); Motion to Exclude the Press from Voir Dire and Pre-Trial Proceedings; Motion for Change of Venue, or alternatively, Motion for Expert to Conduct Study re: Venue; and an Affidavit with attached exhibits. SR 256-71. The motions were heard on April 13, 2017. The trial court denied the motion to exclude the press from court proceedings; granted the gag order as to the attorneys in the case but not as to the press; and denied Defendant's request to prevent public access to the record. MH(4/13/17) at 36-37. The court denied the change of venue motion but indicated they could re-evaluate the motion after Vega's July 2017 jury trial, which was scheduled first. *Id.* at 35.

On June 26, 2017, Vega pleaded guilty to first-degree manslaughter and thereafter received a 50-year sentence. *See supra* note 1. Defendant's case continued toward trial. At the parties' request, in mid-November of 2017 a questionnaire was sent to potential jurors seeking preliminary information and responses. SR 581-89. It contained questions regarding the potential jurors' knowledge of and opinions about the case, including their opinion about the fact Vega had already pled guilty. *Id.* Defendant did not renew his motion for change of venue.

Defendant's trial commenced on January 10, 2018, with approximately 124 potential jurors reporting. JT1 7. After two days of voir dire, the parties selected a jury of twelve with two alternates. JT2 98; SR 621. On January 16, 2018, both sides made opening statements and the State presented its case-in-chief. *See generally* JT3. Vega did not testify. In Defendant's opening statement and closing argument, and through cross-examination of the State's witness, Defendant pointed to the fact that Vega had pleaded guilty to manslaughter for the killing of Houck. JT3 26, 199; JT4 27.

After the State rested, the defense moved for judgment of acquittal, which the court denied. JT3 216. Defendant's counsel also moved the strike the testimony of the State's DNA expert regarding DNA found on Defendant's shoes, in light of the court subsequent ruling that the shoes were inadmissible. JT3 214-16. The court denied the motion. *Id.* On January 17, 2018, the defense rested without presenting evidence. JT4 8. After closing arguments, the case was given to the jury. JT4 34. Thereafter, the jury announced its verdict declaring Defendant guilty of first-degree murder. JT4 35; SR 1024.

On January 19, 2018, the court sentenced Defendant to a mandatory life sentence without parole and entered a Judgment of Conviction and Sentence the same day. SR 1026, 1590. A Notice of Appeal was filed on February 8, 2018. SR 1046. Defendant retained

different appellate counsel, Kenneth Tschetter, and his trial counsel withdrew from the case. SR 1058-60.

B. Statement of facts.

The State concurs with the Statement of Facts presented in Appellant's Brief and does not restate them here. Additional facts and procedure, pertinent to the issues raised, are presented below.

ARGUMENT

I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT OF FIRST-DEGREE MURDER.

After the State rested, Defendant moved for judgment of acquittal, which the trial court denied. Defendant now contends the evidence was insufficient to support his conviction for first-degree murder.

This Court has explained:

> We review the denial of a motion for judgment of acquittal de novo. . . . The ultimate question to be decided during our review "is whether the evidence was sufficient to sustain the convictions." . . . In making this determination, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." . . . "[T]he court will accept the evidence, and the most favorable inference fairly drawn therefrom, which will support the verdict."

State v. Bariteau, 2016 S.D. 57, ¶ 13, 884 N.W.2d 169, 173-74 (internal citations omitted).

Defendant was convicted of first-degree premeditated murder under SDCL 22-16-4(1), which required the State to prove a homicide

"with premeditated design to effect the death of the person killed." Under SDCL 22-16-5,

> The term, premeditated design to effect the death, means an intention, purpose, or determination to kill or take the life of the person killed, distinctly formed and existing in the mind of the perpetrator before committing the act resulting in the death of the person killed. A premeditated design to effect death sufficient to constitute murder may be formed instantly before committing the act.

The jury was instructed as to the elements of premeditated murder under these statutes. SR 986-97. In addition, the court gave an instruction on aiding and abetting, which allowed the jury to find Defendant guilty even if he "did not personally commit the act or acts constituting the crime but aided, abetted or advised in its commission," if he acted with the intent to aid Jose Vega in the killing of Houck. SR 1005, 1009; *see* SDCL 22-3-3. It is well settled that an aider and abettor may be held accountable as a principal to the offense, if the evidence supports either theory of liability. *State v. Dowty*, 2013 S.D. 72, ¶ 18, 838 N.W.2d 820, 826-27. In reaching its verdict, the jury is not required to expressly decide whether a defendant acted as a principal or as an aider and abettor. *Id.* at ¶ 20.

Here, the State introduced substantial evidence supporting Defendant's conviction of premeditated first-degree murder. Keith Houck was found dead on Defendant's farm, buried under a pile of tires. He was the victim of a ruthless beating with a baseball bat, which was found on the scene. He suffered multiple injuries all over

his body, including significant bruising, fractured ribs and a fractured arm. He died from two blows to the head with the bat that fractured his skull in two places.

Through cell phone evidence demonstrated on a timeline, the jury saw how Defendant, enlisting the help of his girlfriend, had set up a scheme to lure Houck out to the farm. The pretense was that Houck would get paid money he was owed and had been trying to collect. When Houck balked, Defendant communicated directly with Houck, asking him when he was coming to the farm to get his money. Eventually, Houck went to the farm, where he met his untimely death.

The timeline evidence also showed Defendant's communications with the co-defendant, Jose Vega, on the day of the crime, at one point telling Vega it was "Showtime." The jury also heard evidence of Defendant's attempt to pass a note to Vega when they were housed at the same time in the jail, telling him to "stay cool," "there is no way we can say the exact same thing," and told him to "hang tight." In another note intercepted from Defendant to another person, Defendant addressed his comments to DCI, telling them "What lie do you tell Tony? You have wrong person. He didn't do it."

The State's case also included forensic testimony involving DNA evidence. Houck's DNA was on the barrel of the bat and DNA from two other contributors was on the grip. Houck's DNA was also on the shoes Defendant was wearing when he was arrested.

Finally, the jury heard how three days after the murder, Defendant voluntarily drove to the residence of a local sheriff's deputy, Shane Ball, and asked if they were looking for Houck. Head bowed, Defendant quietly told the deputy, "He's dead. He's buried at my farm." He told the deputy, "I hit him with a bat." Defendant said he was tired of Houck "messing with my family" and that Defendant had "had enough."

Based on the entirety of the evidence heard at trial, there was more than sufficient evidence for a rational jury to have found Defendant guilty, either as a principal or as an aider and abettor to Vega. Viewing the evidence in a light most favorable to the jury's verdict, this Court should uphold Defendant's conviction.

II.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR CHANGE IN VENUE.

A. Background and standard of review.

On March 24, 2017, Defendant filed a motion for change of venue with supporting affidavit. SR 256, 261. The affidavit attached seven articles from the local newspaper (or its website) regarding Defendant's and Vega's cases. According to the dates provided in the affidavit, the first two articles were published in June 2016, shortly after Defendant's and Vega's arrests. SR 263-65. The remaining five articles—from October and November of 2016, and January 9 and March 13 of 2017—

contained brief descriptions of pre-trial proceedings and case status information. SR 266-71.

The motion was based on Defendant's assumption that media coverage would intensify as the cases went forward, particularly if Vega were tried and convicted. SR 257. At a hearing held April 13, 2017, defense counsel voiced concern that Vega's trial, scheduled to go first in July of 2017, would generate publicity that could impact Defendant's subsequent trial. Defense counsel argued:

> Your honor, my biggest fear is the publicity that the co-defendant's case is going to receive—and it's going first. After that, if he's convicted in this county, I don't see how Mr. Krueger will be able to get a fair jury in this county. They are going to have a preconceived notion. It's generally open to the public. Everybody is going to know that Vega was convicted, if he does get convicted. *Perhaps it may be early to rule on that motion.* As [State's Attorney] Moore pointed out, *we haven't got a lot of publicity yet*. . . . So we would ask your consideration to grant the motion now. *Or hold it in abeyance until after the Vega trial and we can reassess.*

MH(4/13/17) at 35 (emphasis added). In response, the court stated, "I'm going to deny it now, but we will take it up again after the Vega trial." *Id.* Two months later, Vega pleaded guilty. Defendant's trial was not held until January of 2018. Defendant did not re-new his motion for change of venue at any time.

On appeal, Defendant asserts the trial court erred in initially denying his motion and in failing to revisit the venue issue after Vega's case concluded. This Court reviews a court's denial of a change of

venue motion under an abuse of discretion standard. *State v. Martin*, 493 N.W.2d 223, 227 (S.D. 1993).

B. Defendant failed to preserve this issue for appeal.

Although Defendant filed a motion for change of venue, during the hearing on the motion his counsel acknowledged it was perhaps premature for the court to rule on it at that time. He suggested the court could hold the motion "in abeyance" and reassess it later. The court agreed with this option, denying the motion but clearly indicating the parties could address it after Vega's trial. Defendant's action at the hearing was essentially an abandonment of the issue at that point in time. *State v. Willingham*, 2019 S.D. 55, ¶ 29, 933 N.W.2d 619, 626. Under these circumstances, Defendant cannot be heard to complain about the trial court's denial at the hearing, which must be viewed as only a preliminary ruling and one in which Defendant acquiesced. The court's denial was not an abuse of discretion.

Thereafter, Defendant did not re-assert the issue or otherwise bring it to the court's attention after Vega's case concluded in July 2017 through a plea—not the public jury trial Defendant's venue motion and counsel's comments contemplated. The burden was on Defendant to demonstrate that his early speculation about *potential* unfair prejudice had come to actual fruition. *Martin*, 493 N.W.2d at 227 (test is whether, in fact, there is prejudice in the minds of county residents sufficient to raise a reasonable apprehension the accused cannot secure a fair and

impartial trial). At any time, if Defendant still believed he had a basis for the motion, he could have sought a renewed ruling on the merits and provided further evidentiary support.[3] The law presumes a defendant can receive a fair trial in the county where the offense occurred, and Defendant bore the burden of proving entitlement to a change of venue. SDCL 23A-17-5; *Martin*, 493 N.W.2d at 227.

It was, therefore, Defendant's burden to resurrect his motion and obtain a ruling on the merits in order to have an adequate record for review:

> Where a ruling on a motion or objection is reserved by the court, the moving party must subsequently obtain a direct ruling in order to preserve the matter for appellate review. The burden of demanding a ruling rests upon the party desiring it. "If a party permits the court to proceed to judgment without action upon his motion or objection, he will be held to have waived the right to have the motion or objection acted upon."

State v. Sickler, 334 N.W.2d 677, 679 (S.D. 1983) (citation omitted).

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[3] The decision not to proceed with the motion was likely well-founded. No evidence of actual prejudice was presented in the motion and affidavit, nor in Appellant's Brief to this Court. The motion cited "pretrial publicity," but at the hearing defense counsel admitted "we haven't gotten a lot of publicity yet." MH(4/13/17) at 35. The limited articles cited in the record, largely factual in nature, were stale by the time of trial, having been published ten to nineteen months earlier. Pretrial publicity alone is insufficient to warrant a change in venue, especially when the parties were able to question the potential jurors through written questionnaires and extensive voir dire regarding their knowledge and opinions about the case. SR 648-759; JT1 and JT2. *See State v. Petersen*, 515 N.W.2d 687 (S.D. 1994); *State v. Smith*, 477 N.W.2d 27 (S.D. 1991). Defendant has not shown that the jurors—who were passed for cause and ultimately seated to hear the case—were not impartial. *State v. Weatherford*, 416 N.W.2d 47, 50-52 (S.D. 1987).

See State v. Corey, 2001 S.D. 53, ¶ 9, 624 N.W.2d 841, 844; *State v. Birdshead*, 2015 S.D. 77, ¶ 66, 871 N.W.2d 62, 84. Defendant cannot claim error based on an absent ruling on the merits he did not pursue. This issue is not preserved for appeal. *Sickler*, 334 N.W.2d at 679; *Corey*, 2001 S.D. 53, ¶ 9, 624 N.W.2d at 844; *Willingham*, 2019 S.D. 55, ¶ 25, 933 N.W.2d at 625.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO STRIKE THE DNA EXPERT'S TESTIMONY REGARDING DNA RECOVERED FROM A PAIR OF SHOES.

A. Background and standard of review.

After Defendant was arrested and taken to jail, Agent Spencer verified with jail staff what clothes Defendant had been wearing when he was brought to jail. JT3 141. Pursuant to a warrant, Spencer seized Defendant's clothing, including a pair of black tennis shoes, from the jail evidence locker and took them into his possession. JT3 142. Because the shoes appeared to have stains on them, Agent Spencer wanted them tested to determine if the stains contained Houck's blood or other DNA. JT3 144. The agent completed the necessary laboratory request form, indicating what the evidence was and requesting blood and DNA testing. JT3 144-45. The shoes, along with other evidence (including the bat found at the crime scene), were then handed over to personnel from the South Dakota Forensic Laboratory for testing. JT3 144.

At trial, the State called Amber Bell, a forensic scientist at the State Lab who performed DNA analysis of the submitted evidence. She described the process when evidence is received at the lab and in particular, what occurred after the lab received the bat and the shoes. JT3 116-131. She testified that serologists from the State Lab biology section first perform testing of biological samples taken from evidence, complete a serology report, and create swabs for a DNA analyst to then do DNA testing. JT3 118-19, 121. According to Ms. Bell, in this case State Lab serologist Chelsea Pollreisz[4] processed the bat by swabbing stains found at three different locations on the bat (swabs labelled 5.01, 5.02, and 5.03 respectively). JT3 116, 121, 123. She also created two swabs after swabbing stains on the shoes, one from the right shoe (labelled 3.01) and one from the left shoe (labelled 3.02). JT3 127-28. All the swabs were placed into individual tubes, which were sealed, initialed, and dated. They were also labeled with yellow bar code stickers with the case number and identification of where the swab was taken from. JT3 116-17, 123, 127. Ms. Pollreisz created bench notes of

[4] Ms. Pollreisz did not testify. By the time of trial, she no longer worked at the State Lab as she had moved out of state. JT3 118. The record reveals there was a misunderstanding whether a stipulation existed between the parties as to foundation and chain of custody at the lab. After Defendant objected to certain trial testimony of Ms. Bell on foundation grounds, the prosecutor explained, during his offer of proof, that he had not called Ms. Pollreisz because he believed he had a stipulation with the defense. JT3 113. Defendant's counsel stated the parties had never specifically reached such an agreement. JT3 114.

her activities and a serology report. *Id.* The tubes were placed in the freezer at the lab awaiting testing. *Id.*

When Ms. Bell was ready to test the swabs, she checked them out from the freezer, noting that she had the correct bar code and case number. JT3 117, 127. She also reviewed Pollreisz's bench notes and report. JT3 121, 123, 127. Ms. Bell then conducted DNA testing of the swabs. JT3 124, 127-28.

Ms. Bell testified as to her conclusions regarding the sources of the DNA found on the bat.[5] JT3 123-26. First, the DNA profile on the swab taken from the barrel of the bat (labelled 5.01) was Houck's and one other unknown person's. Next, the swab of the knob (labelled 5.02) was inconclusive. Finally, the swab from the grip (labelled 5.03) had DNA from at least two individuals, but Ms. Bell could not identify them due to the complexity of the mixture.

Ms. Bell then testified regarding the two swabs labelled as having been taken from "shoes." Her findings for swab 3.01 (right shoe) was that it was consistent with originating with Houck as the single source of DNA. Likewise, swab 3.02 (left shoe) matched Houck's DNA as the single source as well. JT3 127-28. Other evidence from the case was also submitted to the State Lab. JT3 128-29. Not all the evidence was tested for DNA, however, including a pair of brown boots. *Id.*

[5] She did not testify as to any serology testing results or conclusions reached by Ms. Pollreisz.

After Ms. Bell testified, the State called Agent Spencer. He described how he went to the jail and obtained the black tennis shoes Defendant was wearing when he was arrested. JT3 142. A photograph of the shoes was admitted with no objection from defense counsel. *Id.*; see EXH 96. The State sought to introduce the actual shoes (as EXH 96A) and defense counsel objected on foundation grounds, which the court sustained. JT3 143. The State then asked questions to further develop Agent Spencer's handling of the shoes. Spencer explained how he packaged them into an evidence bag, sealed it, and submitted it to the lab for testing along with the laboratory request form. JT3 143-44.

The agent also explained how evidence logged into the State Lab is assigned a barcode and tracked through the system. When analysts conduct the different testing, reports are generated, and agents are able to review the testing results. JT3 145. Agent Spencer stated that DNA testing of the shoes he submitted was done in this case. *Id.*

Thereafter, he obtained the shoes and retained them in his agency's evidence room. JT3 146. In anticipation of trial, he took the shoes out of the original paper evidence bag, which still bore his original markings as well as a State Lab evidence label. JT3 147. He re-packaged the shoes into a clear bag and sealed it. JT3 146. It was assigned proposed State's EXH 96A for trial. When shown EXH 96A at trial, Agent Spencer positively identified the shoes as the ones he obtained from Defendant's personal property at the jail. JT3 148.

Later, after the close of the State's case-in-chief, the parties met with the court out of the presence of the jury to confirm the exhibits that were admitted into evidence. JT3 213. The State asked the court to admit the black shoes (EXH 96A) in light of the additional foundation that had been laid. The court declined, stating that "the reason I didn't allow them is that while there was testimony by the expert [referring to Ms. Bell] that a pair of shoes were examined, they weren't identified in any way as being associated with Mr. Krueger." JT3 214. The prosecutor pointed out that Agent Spencer had retrieved the shoes from Defendant's property at the jail. The court responded, "But there's nothing that indicates that those were the ones that she examined. Now, the testimony was she examined a pair of Krueger's shoes, but you never showed those shoes to her. She never identified those as the ones that she examined. So it's on the basis of foundation." JT3 214-15. The State then rested. JT3 216.

In light of the court's ruling on the inadmissibility of the shoes, Defendant's counsel moved to strike the testimony of Amber Bell as it related to any DNA found on the shoes. He argued there was "an insufficient chain that the shoes that she [Ms. Bell] tested and offered an opinion on were, in fact, the shoes that were taken from Kevin Krueger." JT3 216. The court stated that "she did testify she tested

Krueger's[6] shoes. She just can't testify that they were those shoes. . . . That's why I'm – *I don't think you need to necessarily have the shoes present here for her to give her opinion.* So your request is denied." JT3 216-17 (emphasis added). In response, defense counsel stated, "I don't have anything else on that issue."

On appeal, Defendant asserts the trial court erred in admitting Ms. Bell's testimony regarding DNA recovered from shoes that were themselves excluded from evidence. Appellant's Brief 29. This court reviews evidentiary rulings for abuse of discretion. *State v. Stone*, 2019 S.D. 18, ¶ 22, 925 N.W.2d 488, 497. An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109. Under this standard, "not only must error be demonstrated, but it must also be shown to be prejudicial." *Stone*, 2019 S.D. 18, ¶ 22, 925 N.W.2d at 497. To establish prejudice, a defendant must show that but for the court's alleged error the jury would have delivered a different verdict. *Id.* at ¶ 33. A trial court's evidentiary ruling is not reversible error if any valid reason exists therefor. *State v. Willis*, 370 N.W.2d 193, 201 (S.D. 1985).

[6] This appears to be a misstatement by the court, but as will be explained below, it does not affect the correctness of the court's ultimate ruling.

B. Forensic expert Amber Bell's testimony regarding DNA testing of the swabs taken from the shoes was properly admitted because the State established a sufficient chain of custody for the evidence leading to those test results.

The State admits the posture of the case involving this issue is somewhat convoluted, particularly where the defense challenge below came in the form of a motion to strike the DNA expert's previous testimony after the court ruled the shoes were inadmissible. But the analysis of the actual issue is straightforward: whether an adequate foundation existed for Amber Bell's testimony regarding her DNA testing of swabs taken from the shoes submitted to the lab. The State submits the answer is "yes" and therefore the court did not abuse its discretion in allowing the testimony to remain.

To begin, this issue is not about whether the shoes themselves should have been admitted.[7] That is because Ms. Bell, as a DNA

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[7] Although arguably, they could have been admitted because the State established proper foundation for them. The court's rationale was that foundation was lacking because the shoes had not been shown and identified by Ms. Bell in court. But in this instance, in her role as a forensic DNA scientist Ms. Bell handled and tested *swabs*, not the actual physical item. She would not have necessarily ever seen the actual shoes. The real question for admission of the shoes was whether *Agent Spencer* could identify EXH 96A as being the same shoes he transported from the jail to lab personnel. *See* SDCL 19-19-901; *State v. Lohnes*, 432 N.W.2d 77, 86 (S.D. 1988) (physical articles admissible if properly identified).

Here, EXH 96A contained readily identifiable physical objects, with original packaging bearing the agent's markings, such that Agent Spencer positively identified them as the same shoes he obtained from Defendant's belongings at the jail, submitted to the lab for testing, received back from the lab, and brought to court.

expert, was called to testify about her lab results, not to identify the shoes in open court before the jury. The court ruled that admission of the expert's testimony about the DNA testing was not dependent on the shoes being admitted themselves. The court's ruling was ultimately correct (and therefore may be affirmed), because Ms. Bell testified about information that she knew based on *her* role in the process, and an adequate chain of custody was established for all steps leading to the DNA testing she performed.

Particularly for items that are not readily identifiable or distinguishable (such as biological swabs or a blood sample), the State must show a chain of custody in order to demonstrate with reasonable probability that no alteration, tampering or substitution has occurred. *State v. Lownes*, 499 N.W.2d 896, 901 (S.D. 1993). The State need not establish an absolute perfect chain by calling every person who handled the evidence, nor negate every possibility of tampering or substitution. *Id.; State v. Reay*, 2009 S.D. 10, ¶¶ 26-27, 762 N.W.2d 356, 364. But the testimony must at least strongly suggest the exact whereabouts of the exhibit at all times. *Reay*, 2009 S.D. 10, at ¶ 25. In *Reay*, the Court held that even though one of the lab personnel who handled the evidence did not testify, a sufficient chain of custody was established allowing the lab's experts to testify about the results of their testing. *Id.*

In this case, there is no question about the whereabouts of the shoes from the time they left the jail to the time Ms. Bell tested the

swabs created from the shoes. On appeal, Defendant does not challenge the integrity of the State Lab's evidence handling or suggest any tampering or alteration to the evidence occurred. Indeed, he concedes proper foundation was laid for the bat, and challenges only the expert's testimony regarding the shoes. Appellant's Brief 27, n.3. But once the evidence arrived at the lab, the exact same process was used for the bat and the shoes. In the end, Ms. Bell provided testimony about her lab results for both, based on the same process.

Defendant argues, however, that there is nothing connecting the "shoe" DNA testimony to Defendant. There is no serious doubt that the shoes that were swabbed—and whose swabs were assigned numbers 3.01 and 3.02 and were tested by Ms. Bell—are the same ones Agent Spencer seized from Defendant's property at the jail and delivered to the lab. The agent seized only one pair of shoes from Defendant's property and submitted them to the lab and only swabs from one pair of shoes were tested for DNA. The State established a sufficient foundation for Ms. Bell's laboratory results of that testing. *See Lownes*, 499 N.W.2d 896; *United States v. Glaze*, 643 F.2d 549, 552 (8th Cir. 1981) (lab chemist was properly allowed to testify as to results of drug testing, where chain of custody evidence established with reasonable probability that the tested substance was the same evidence that came from the suspect and was transferred to the lab). Because sufficient foundation

was laid, the trial court did not abuse its discretion in permitting Ms. Bell's testimony to remain.

C. Any error in admission of Ms. Bell's testimony was not prejudicial and did not change the outcome of the trial.

Defendant fails to show not only error in the court's evidentiary ruling, but that it was so prejudicial that it changed the outcome of the trial. Even without Ms. Bell's testimony, there was substantial evidence to support the guilty verdict. *See supra,* Issue I. This includes other evidence that connected Defendant to Houck and the crime scene, Defendant's farm. Notably, Defendant did that himself when he told Deputy Ball that Houck was dead and buried at the farm because "I hit him with a bat." This was the same bat that had Houck's DNA on the barrel, and DNA from two other sources on the grip. In light of the entirety of the evidence at trial, Defendant has not established that the verdict would have been different if Ms. Bell's testimony had not been admitted. *Stone*, 2019 S.D. 18, ¶ 33, 925 N.W.2d at 499.

IV.

THE PROSECUTOR'S COMMENTS IN THE REBUTTAL CLOSING ARGUMENT DID NOT CONSTITUTE PREJUDICIAL PROSECUTORIAL MISCONDUCT THAT DEPRIVED DEFENDANT OF A FAIR TRIAL.

A. Background and standard of review.

During the initial closing argument, the prosecutor identified five specific points ("five facts") that the prosecutor argued were presented at trial and supported the State's case. JT4 10-11. In Defendant's closing

argument, counsel attempted to poke holes in the State's case by pointing to perceived omissions in the evidence. JT4 21-28. In the rebuttal closing, the prosecutor addressed some of the defense arguments. JT4 29-31. After making several rebuttal points, the prosecutor then stated:

> And the last thing I would say, I think he's absolutely right.[8] Go out and explain it. And I think—I know Don Houck. I met him over the last year and a half because of this. Five facts. [He's] sitting in my office. He says the defendant killed my boy. He killed my boy."

JT4 31. At that point, defense counsel objected, stating: "Your Honor, I would object. I believe this is improper argument." The court sustained the objection. *Id.* Nothing further was said about the comments and the prosecutor moved on, continuing his argument about the evidence the State produced at trial. JT4 32. Thereafter, Defendant did not ask the court for a jury admonishment or curative instruction, nor move for a mistrial or any other relief regarding the objected-to comments.

On appeal, Defendant asserts the prosecutor committed prosecutorial misconduct by making these comments in his rebuttal closing argument. Normally, this Court reviews a trial court's handling of claims of prosecutorial misconduct under the abuse of discretion

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[8] The prosecutor was referring to defense counsel's argument urging the jurors to go out, after trial, and tell their friends, families, and co-workers about the case. Counsel suggested the jurors would not be able to explain exactly what happened among Defendant, Vega, and the victim. JT4 24, 28.

standard. *Corey,* 2001 S.D. 53, ¶ 19, 624 N.W.2d at 845. Here, the trial court immediately sustained Defendant's objection, so Defendant prevailed on that ruling. He alleges, however, that the prosecutor's comments deprived him of a fair trial, and that the trial court's failure to sua sponte[9] take any *further* curative measures was erroneous and entitles him to a new trial. Appellant's Brief 31.

B. Defendant fails to show the prosecutor's one-time, isolated comments rose to the level of prejudicial error that entitles him to a new trial.

This Court has explained that prosecutorial misconduct is a "dishonest act or an attempt to persuade the jury by the use of deception or by reprehensible methods." *State v. Janis*, 2016 S.D. 43, ¶ 22, 880 N.W.2d 76, 82; *State v. McMillen*, 2019 S.D. 40, ¶ 27, 931 N.W.2d 725, 733. With respect to closing arguments, this Court has held:

> While trial counsel has "considerable latitude in closing arguments," a prosecutor also shares in the court's obligation to ensure that the defendant receives a fair trial. *State v. Smith*, 1999 S.D. 83, ¶ 42, 599 N.W.2d 344, 353. It is not the prosecutor's duty to "seek a conviction at any price." *Id.* "The prosecutor must refrain from injecting unfounded or prejudicial innuendo into the proceedings, and [must] not appeal to the prejudices of the jury." *State v. Janklow,* 2005 S.D. 25, ¶ 47, 693 N.W.2d 685, 700–01 (quoting *State v. Blaine*, 427 N.W.2d 113, 115 (S.D.1988)).

Janis, 2016 S.D. 43, ¶ 22, 880 N.W.2d at 82.

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[9] Defendant did not seek any additional curative measures such as moving to strike, asking for an immediate jury admonishment, or moving for mistrial or a new trial.

To prevail, a defendant must show not only the existence of misconduct, but that it was so prejudicial that it denied him a fair trial. *Smith*, 1999 S.D. 83, ¶¶ 44, 53, 599 N.W.2d at 354, 355; *Janklow*, 2005 S.D. 25, ¶ 49, 693 N.W.2d at 701. "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone," but rather, the conduct must be viewed in the context of the entire trial. *Janis*, 2016 S.D. 43, ¶ 22, 880 N.W.2d at 82. Where the evidence against a defendant is strong, it is more unlikely he will be able to show the prosecutor's comments prejudiced him and altered the jury's verdict. *Smith*, 1999 S.D. 83, ¶ 53, 599 N.W.2d at 355. This Court will defer to a trial court's on-the-scene assessment of the situation, as the judge is the one who "heard the arguments and had the opportunity to note whether they had any apparent effect on the jury." *State v. Stetter*, 513 N.W.2d 87, 90 (S.D. 1994). The Court has stated it will "accede to [the trial court's] judgment lacking any showing on the part of the defense of actual bias or prejudice." *Id.*

Defendant relies heavily on *State v. Smith*, where this Court condemned a prosecutor's repeated comments calling the defendant a "monster," "child molester," and "pervert," among other things. 1999 S.D. 83, ¶ 41, 599 N.W.2d at 353. The Court found the prosecutor's statements were "meant to inflame the passion of the jury and go outside the realm of admissible evidence." *Id.* at ¶ 49, 599 N.W.2d at 354-55. In that case, the Court found the prosecutor had crossed the

line of appropriate conduct. *Id.* at ¶¶49-50, 599 N.W.2d at 355. Nonetheless, the Court held the defendant failed to show the error was prejudicial error resulting in the denial of a fair trial, ruling that "[i]n all probability it is very unlikely the prosecutor's inflammatory statements altered the jury's verdict. This is particularly true when considering the overwhelming evidence that Smith committed the crimes of which he was charged." *Id.* at ¶ 53, 599 N.W.2d at 355. *See also Janis*, 2016 S.D. 43, 880 N.W.2d 76 (prosecutor's comments about defendant raping the maid of honor on defendant's wedding night were improper, but defendant failed to show they affected the outcome of trial).

Here, the prosecutor's comments did not even approach the kind of comments previously condemned by this Court as improper. The record is ambiguous as to what the prosecutor's line of thought was when making the comments about Don Houck. It is worth noting, however, that they were made during rebuttal closing argument and do not appear to have been deliberately scripted or meant to be intentionally inflammatory. They did not permeate the entire closing argument but were an isolated, singular occurrence to which defense counsel timely objected and the court sustained the objection. The prosecutor did not make any further reference to it. *See Corey*, 2001 S.D. 53, ¶ 18, 624 N.W.2d at 845. Defense counsel apparently did not feel the need to make any additional record on the matter, nor did the judge, who heard the comments and had the opportunity to assess any

impact they may have had on the jury. In the final instructions, the court gave limiting instructions to the jurors telling them that arguments of counsel are not evidence and statements of counsel not supported by the evidence should not be considered by the jury in arriving at its verdict. SR 1017, 1019. The jury is presumed to have followed the court's instructions. *Janis*, 2016 S.D. 43, ¶ 12, 880 N.W.2d at 83.

In the context of the entire record, including the substantial evidence of Defendant's guilt, Defendant has failed to demonstrate actual prejudice or show the result of the trial would have been different had the comments not been made. *Janis*, 2016 S.D. 43, ¶ 28, 880 N.W.2d at 84; *Smith*, 1999 S.D. 83, ¶ 53, 599 N.W.2d at 355. The comments did not deprive Defendant of a fair trial.

V.

THERE WAS NO CUMULATIVE ERROR THAT DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

Defendant claims the combination (or "cumulative effect") of the alleged errors of the trial court and the prosecutor deprived him of his constitutional right to a fair trial. The State submits that no prejudicial error occurred below and therefore the Court need not examine this issue further. *Stone,* 2019 S.D. 18, ¶ 46, 925 N.W.2d at 502. Even if the Court were to consider this issue, it should conclude there is no merit to Defendant's claim. Defendant has not established prejudicial error and a review of the entire record reveals he received a fair trial.

State v. Wright, 2009 S.D. 51, ¶ 69, 768 N.W.2d 512, 534; *State v. Davi*, 504 N.W.2d 844, 857 (S.D. 1993).

CONCLUSION

The State respectfully requests that the trial court's Judgment of Conviction and Sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 6,930 words.

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

Dated this 31st day of October, 2019.

/s/ Patricia Archer
Patricia Archer
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of October, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Kevin Allen Krueger,* Appeal No. 28522, was served via electronic mail upon Kenneth Tschetter, counsel for Appellant, at kenmtschetter@gmail.com.

/s/ Patricia Archer
Patricia Archer
Assistant Attorney General

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 28522

Plaintiff and Appellee,

v.

KEVIN ALLEN KRUEGER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE
THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

HONORABLE JON R. ERICKSON
Circuit Court Judge

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Notice of Appeal Filed February 8, 2018.

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STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

No. 28522

Plaintiff and Appellee,

v.

KEVIN ALLEN KRUEGER,

Defendant and Appellant.

PRELIMINARY STATEMENT

To avoid repetitive arguments, Appellant limits his discussion in the Reply Brief to portions of the issues which need further development or argument. Appellant does not waive any matter raised earlier in Appellant's Brief, but not specifically mentioned in the Reply Brief. Appellant will attempt to avoid revisiting matters adequately addressed in the initial briefs of the parties.

Any references in this brief will be consistent with the page numbers set forth in the settled record, indicated by "SR" followed by the page number. All references to the parties are the same as used in Appellant's Brief. Counsel will refer to the Appellant's initial brief as "AB", followed by the appropriate page number. Counsel will refer to the State's/Appellee's Brief as "SB", followed by the appropriate page number.

Counsel relies on the Jurisdictional Statement, Statement of Facts and Statement

of the Case as set forth in his initial brief.

ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED KRUEGER'S MOTION FOR JUDGMENT OF ACQUITTAL AND WHETHER SUFFICIENT EVIDENCE EXISTED TO SUPPORT THE CONVICTION?

As discussed in Appellant's Brief, the record does not contain evidence which if believed, would be sufficient to sustain a finding of guilt beyond a reasonable doubt that Krueger committed first degree, premeditated murder. (AB, 18-22) The State claims in its brief that it introduced "substantial evidence supporting conviction of premeditated first-degree murder". (SB, 9) However, the State's evidence at trial was far less than substantial, and consisted solely of circumstantial evidence, speculation, and a vague statement made by Krueger to Deputy Shane Ball. (AB, 18-22)

Interestingly, after claiming substantial evidence existed to support Krueger's conviction, the State requests in its brief that this Court consider additional evidence which was not introduced at trial. (SB, 8) Specifically, the State in its brief requests this Court take judicial notice of the Plea Transcript in *State vs. Jose Antonio Vega,* Beadle County Crim. No. 16-241. (SB, 4) The State also says that "In interviews with law enforcement and later during his plea hearing, [the co-defendant] Vega admitted that both he and Defendant beat Houck with a baseball bat." (SB, 4) This evidence was not introduced to the jury, and no statements made by Vega were introduced to the jury. This Court should not consider statements from Vega, nor Vega's plea transcript, as evidence as they are not properly before this Court.

One can only infer that this request is made by the State to try and support the lack of evidence presented to the jury to support the conviction. Indeed, the State's citation to additional evidence not presented to the jury is telling, and is tantamount to an admission that the evidence actually produced at trial was insufficient. Why else would the State need to bolster their case on appeal by requesting this Court consider evidence that was not introduced to the jury?

Perhaps the State requests this Court consider this evidence for the first time as, throughout its brief, the State relies heavily on the aiding and abetting instruction given to the jury, which allowed the jury to find Krueger guilty even if he '"did not personally commit the act or acts constituting the crime but aided, abetted or advised in its commission,' if he acted with the intent to aid Jose Vega in the killing of Houck.'" (SB, 9) The jury heard throughout trial that Vega pled guilty to manslaughter, and in so doing acknowledged that he had killed Houck. Therefore, it is undisputed that Vega struck a killing blow with the bat. While Krueger did make a general statement that he had hit Houck with a bat, testimony at trial established that Houck had been struck with the bat multiple times in other areas of his body, and that none of those other blows were fatal. Thus, Krueger's statement that he had hit Houck with a bat does not establish beyond a reasonable doubt that he struck a killing blow. Further, the State presented no evidence as to when Vega struck Houck with the bat, and whether Krueger was present during that time, or even knew Vega was going to strike a fatal blow. In other words, the evidence established that Vega killed Houck, and the record did not contain enough evidence to prove Krueger aided or abetted Vega in doing so.

The jury knew Vega pled guilty to killing Houck. The jury was told a theory that Krueger enlisted his girlfriend's help to lure Houck to the farm, and Vega to help assist him in killing Houck. The jury heard and saw a summary timeline created by the prosecution of text messages and phone calls. But, the record is devoid of evidence as to why Vega was present at Krueger's farm, and devoid of evidence as to what actually happened once Houck arrived at Krueger's farm. The circumstantial evidence presented by the State is not sufficient to convict Krueger of murder in the first degree, especially in the absence of a clear motive. Any conclusion that premeditated murder took place is based only on speculation and unsupported inference. It is certainly possible that Vega hit Houck in the head with the bat, killing him, and that Krueger did not intend or know that was going to happen.

Even when the evidence is viewed cumulatively and, in a light most favorable to the State, the State did not have sufficient evidence to establish, beyond a reasonable doubt, that Krueger committed premeditated murder in the first degree. Based upon the foregoing, Krueger asks this Court to find that his conviction for Murder in the First Degree is not supported by sufficient evidence.

II. WHETHER THE TRIAL COURT ERRED IN DENYING KRUEGER'S MOTION TO CHANGE VENUE?

The State asserts in its brief that Krueger failed to preserve this issue for appeal. (SB, 13) Krueger disagrees. Prior to trial, Krueger filed a Motion for Change of Venue or Alternatively, Motion for Expert to Conduct Study Re: Venue. (SR, 256) After a pre-trial hearing on April 13, 2017, the trial court denied Krueger's motion. (SR, 551) Krueger appeals that denial. In no way, shape or form has that issue been waived.

Krueger also asserts that the trial court erred in not following through on its statement to reexamine the issue after Vega's case concluded. In denying the motion, the trial court stated, "I'm going to deny it now, but we will take it up again after the Vega trial." (SR, 551) The trial court ruled on the issue, and the trial court's failure to revisit the issue at a later date did not somehow constitute an appellate waiver by Krueger. Krueger properly raised the issue, and the State is now claiming he needed to raise it again. The State claims Krueger needed to "renew" his motion, or seek a "renewed ruling." (SB, 12, 14) The state cites no authority for its argument that a properly filed motion must be renewed, or that a trial court's ruling must be renewed. How many times did Krueger need to raise the issue? How many change of venue motions did he need to file in order to preserve the matter for appeal?

The State claims Krueger's action at the pre-trial hearing was "essentially an abandonment of the issue [motion to change venue] at that point in time", and cites to *State v. Willingham*, 2019 S.D. 55, ¶ 29, 933 N.W.2d 619, 626 and *State v. Sickler*, 334 N.W.2d 677,679 (S.D. 1983) for support. (SB, 13) However, both *Willingham* and *Sickler* are distinguishable from the case at hand. In *Willingham*, the Defendant himself stated he was "abandoning the issue" and waived his argument. *Willingham* at ¶ 29. In *Sickler*, the Defendant filed a motion for discovery, but the trial court never ruled on the motion. *Sickler* at 679. The Supreme Court held that because of a lack of ruling on the motion by the trial court, no error was preserved for appeal. *Id.* Here, Krueger never abandoned or waived his motion to change venue. The trial court ruled on the merits, at Krueger's

request. The trial court denied the motion, therefore preserving the issue for appeal[1.] (SR, 551)

Krueger maintains that the trial court erred in denying his motion for a change of venue. In addition to his argument in Appellant's Brief, Krueger asserts the juror pool here was extraordinarily small, and therefore the potential jurors were much more likely to be prejudicially affected by unfair pretrial media coverage. The pretrial publicity of the case at hand was demonstrated to the trial court in Krueger's Exhibits A – F. (SR, 261-271; AB, Appx 6-19) Notably, the pretrial publicity regarding this case connected Krueger and Anthony Vega together on almost every occasion. (SR, 264-65) Evidence was presented to the jury at trial that Vega pled guilty to the lesser offense of manslaughter for the killing of Houck and was sentenced to the State Penitentiary. (SR, 1529, 1532) Given the pre-trial publicity that the two men were implicated in the same matter, Krueger asserts the prejudice in the minds of the county residents was sufficient to raise a reasonable apprehension that he could not receive a fair and impartial trial in the county. See *State v. Wellner*, 318 N. W. 2d 324, 330-31; see also *Skilling v. United States*, 561 U.S. at 385 (noting that "[a]lthough publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily… warrant an automatic presumption of prejudice.")

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE'S EXPERT TO TESTIFY REGARDING DNA RECOVERED FROM A PAIR OF SHOES?

In its brief, the State "admits the posture of the case involving this

[1] Krueger's counsel specifically stated "So we would ask your consideration to grant the motion *now*. (emphasis added) Or hold it in abeyance until after the Vega trial and we can reassess." (SR, 551)

issue is somewhat convoluted", but then curiously states that "the analysis of the actual issue is straightforward: whether an adequate foundation existed for Amber Bell's testimony regarding her DNA testing of swabs taken from [a pair of shoes] submitted to the lab". (SB, 21) However, the State fails to discern that the real issue at hand is one of relevance, not foundation.

Krueger maintains his assertion that the trial court erred by allowing inadmissible and irrelevant evidence, specifically, testimony regarding the results of DNA testing on a pair of shoes. It is true that forensic DNA analyst Amber Bell told the jury she tested swabs taken from a pair of shoes associated with the case at hand. (SR, 1457) But, Ms. Bell did not testify who the shoes belonged to. Later at trial, Agent Brent Spencer testified that he retrieved a pair of black velcro tennis shoes from Krueger's property at the jail and submitted them for testing. (SR, 1471) A picture of the black velcro tennis shoes was entered into evidence, and Agent Spencer testified that the shoes "were property of Mr. Krueger." (SR, 908, 1472)

Ms. Bell testified that she tested swabs taken from shoes, but she never testified that the shoes belonged to Krueger. Crucially, *the State never established that Krueger's shoes were the source of the swabs that were tested.* Because the DNA evidence was not linked to Krueger, it was not relevant evidence and it should not have been admitted. See *State v. Kryger*, 2018 S.D. 13, ¶¶ 24-25, 907 N.W.2d 800 (upholding admission of testimony regarding a burn pit where the evidence revealed a sufficient link between defendant and the burn pit).

The trial court made a fundamental error in admitting Ms. Bell's testimony regarding the DNA test results into evidence. Further, the trial court's error was arbitrary and unreasonable. See *State v. Dehoney*, 2019 S.D. 30, ¶ 22, 929 N.W. 2d 103, 109 (stating an abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.") In the case at bar, the expert testified about DNA evidence collected from a pair of shoes. However, the State never established anything about the shoes that were tested. The State never established that Krueger's shoes were the shoes that Ms. Bell tested. Therefore, the DNA evidence did not have any probative value whatsoever, and it was error to admit it into evidence.

The trial court's error was highly prejudicial to Krueger, as the jury most likely would have delivered a different verdict without the DNA testimony regarding the pair of shoes. Contrary to the State's assertion in its brief, without Ms. Bell's testimony, there was only circumstantial evidence and speculation to support the guilty verdict.

IV. WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT?

Prosecutorial misconduct includes any attempt to persuade the jury by use of deception or reprehensible methods. *State v. Smith*, 1999 S.D 83, ¶ 42, 599 N.W.2d 344, 353 (citations omitted). Parties denied a fair trial are entitled to reversal, and the Court will reverse if misconduct has prejudiced the party or denied him a fair trial. *Id.* (citations admitted). In this case, the prosecutor engaged in misconduct by the use of reprehensible methods that denied Krueger the right to a fair trial. Krueger stands on his initial

argument made in Appellant's Brief, and examines only the State's assertions as stated below. (AB, 30-35)

The State claims the prosecutor did not engage in prosecutorial misconduct when stating in rebuttal argument "I know Don Houck. I met him over the last year and a half because of this. Five facts. He['s] sitting in my office. He says the Defendant killed my boy. He killed my boy."[2] (SR, 1580) The State contends "the record is ambiguous as to what the prosecutor's line of thought was when making the comments about Don Houck". (SB, 28) The State further contends the prosecutor's "one-time, isolated comments" did not rise to the level of prejudicial error that entitles Krueger to a new trial, and claims that the statements by the prosecutor "were not meant to be intentionally inflammatory", and "were an isolated, singular occurrence." (SB, 26, 28) Krueger disagrees.

Krueger asserts the prosecutor intentionally meant to inflame the passions of the jury when making the comments regarding Don Houck. The prosecutor "crosses the line when he injects unfounded or prejudicial innuendo into the proceedings…[or appeals] to the prejudices of the jury". *Smith* at ¶ 46. The State in this case injected prejudicial innuendo into the proceeding by indirectly insinuating that Houck's father had additional knowledge about the facts of the case. Furthermore, the prosecutor's comments appealed to the prejudices of the jury by playing on their sympathy for a father who had lost his son. Further, even though the improper comments were made only during the

[2] Don Houck is Keith Houck's father.

prosecutor's rebuttal argument, the statements can be linked all the way back to statements made by a juror during voir dire.

During jury selection, the following exchange took place between prospective juror Dorothy Miner and Krueger's counsel:

Counsel: "Ms. Miner, have you formed an opinion, or have you maintained the opinion that you expressed in your [juror] questionnaire?"

Miner: "No, because I don't know anything about it. I don't read the paper."

Counsel: "Did I read your questionnaire right? You had expressed an opinion that you felt that Mr. Krueger was guilty."

Miner: "Well, let's see, it seems a little harsh. Yeah, probably."

Counsel: "As you sit here right now, do you still hold that same opinion?"

Miner: "Well, not after I've been explained the innocent thing and beyond a reasonable doubt, no."

Counsel: "Okay. So you're able before we get started…"(interrupted by Miner)

Miner: "Oh, yeah. I don't know anything about it. What was in the sheet of paper that you sent us."

Counsel: "Okay. I think you made a comment that the fact that there's another person involved in this, a Mr. Vega, Jose Antonio Vega, goes by Tony, who has pled guilty to manslaughter for the killing of Mr. Houck. Do you recall being asked the question of whether that affects how you view things?"

Miner: "Well, yeah, I do recall saying it does affect me, yeah."

Counsel: "Sure."

Miner: "But like I said, I don't know about this."

Counsel: "So even though Mr. Vega has pled guilty to the killing of Mr. Houck, by first degree manslaughter, you can at least the start of this trial, presume Kevin innocent of anything related to Mr. Houck's death?"

Miner: "Well, yeah, I…yeah, he's innocent until proven guilty."

Counsel: "Okay. Was there anything else, do you have any relationships with anyone?"

Miner: "*I do know his dad. The victim's dad. I know him from a place where I worked. And I also met him at the storage facility."* (emphasis added)

Counsel: "Have you spoken to Mr. Houck's dad after Houck's…" (juror interrupted)

Miner: "I spoke to him at the storage units."

Counsel: "And did you talk to him about the circumstances?"

Miner: "*No, I just gave him my sympathy* and it was a general conversation. We didn't talk about it at all." (emphasis added)

(SR, 1128-30) Dorothy Miner was selected as and served as a juror in the trial. (SR, 1328)

The prosecutor knew the effect his statements about Houck's father would have on the jury. The prosecutor knew that one of the jurors had a personal acquaintance with Don Houck. The prosecutor knew that injecting statements from Mr. Houck into the case would have a direct impact on that juror.

This juror had already expressed her sympathy to Don Houck, and the prosecutor's statements invited the entire jury to reach their decision based on sympathy and emotion, rather than on the evidence. No remarks by Krueger's counsel invited these comments. Don Houck did not testify at trial.

The State argues that "the prosecutor's comments did not even approach the kind of comments previously condemned by this Court as improper". (SB, 28) However, this Court recently stated in *State v. McMillen*, 2019 S.D. 40, "[N]o hard and fast rules exist

which state with certainty when prosecutorial misconduct reaches a level of prejudicial error which demands reversal of the conviction and a new trial; *each case must be decided on its own facts*." *Id.* (emphasis added). Indeed, in this unique circumstance where a juror had disclosed that she knew the victim's father, it was highly prejudicial for the prosecutor to then manipulate the jury's emotions by offering statements made by the victim's father. The inappropriate comments invited and encouraged the jury to commit to a decision motivated by emotion rather than evidence.

The State argues the trial court's failure to take any additional curative measures after sustaining Krueger's objection to the improper argument of counsel did not prejudice Krueger, and that Krueger himself "apparently did not feel the need to make any additional record". (SB, 28) However, it is not Krueger's responsibility to ensure the jury is instructed properly; the Trial Court bears that responsibility, just as the prosecutor bears the responsibility that the Defendant receive a fair trial. Here, the prosecutor's misconduct occurred at such a critical juncture of the trial that a curative instruction was the only realistic way to attempt to remedy the situation. The statements were made during rebuttal argument, the last time the jury would hear from either attorney. Therefore, a curative instruction specifically instructing the jury not to consider the prosecutor's statements about Don Houck was critically necessary to protect Krueger's constitutional right to a fair trial by an impartial jury. When conduct detrimentally affects a defendant's constitutional rights, a trial judge has a duty to intervene. As Justice Konenkamp stated in his concurrence in *State v. Smith,* 1999 S.D. 83, 599 N.W.2d 344,

"Opposing counsel ought not to be saddled with the entire burden of upholding the honor of our system". *Smith* at ¶ 61, (Konenkamp, J. concurring) (citations omitted).

The prosecutorial misconduct in this case was sufficiently prejudicial to affect the overall fairness of Krueger's trial. The evidence was circumstantial at best, and it is safe to infer the prosecutor made his comments to improve his chances of winning. Additionally, the trial court failed to "curtail any improper inference the jury may have taken" from the prosecutor's rebuttal argument. See *Smith* at ¶ 40 (finding "the trial court sustained the objections and instructed the jury to disregard the prosecutor's comments.") While the jury was given a general instruction by the trial court that arguments of counsel are not evidence, such instruction was given prior to the closing arguments. Following the prosecutorial misconduct, the jury was not given a direct instruction or an admonishment about the prosecutor's statements regarding Don Houck. The Trial Court should have admonished the jury to disregard the prosecutor's statements. In the case at bar, there is no question that the State effectively bolstered its case when it committed prosecutorial misconduct, depriving Krueger of the right to a fair trial.

V. WHETHER THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED KRUEGER OF A FAIR TRIAL?

For the reasons discussed herein, as well as in Appellant's Brief, Krueger has demonstrated that the cumulative effects of the trial court's errors and their resulting prejudice affected the fairness of Krueger's trial. Based on a review of the entire record, three significant errors stand out in this case. The improper admission of DNA testimony from a pair of shoes, the denial of Krueger's motion to change venue, and the

prosecutor's misconduct in closing argument. The combination of those significant errors, when considered together as a whole, undermined Krueger's right to a fair trial.

CONCLUSION

For the aforementioned reasons, authorities cited, and upon the settled record, Krueger respectfully submits that his conviction must be reversed, and the case should be remanded for a new trial.

Respectfully submitted this ___ day of January, 2020.

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