IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

VANDON PRETTY WEASEL,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Throughout this Appellant's Brief, Defendant below and Appellant here, Vandon Joseph Pretty Weasel, will be referred to as "Defendant" or by name. Plaintiff and Appellee, the State of South Dakota, will be referred to as "State." The alleged victim in this matter, who is a minor child, will be referred to by the initials "AD." Citation to the transcript of the jury trial shall be referenced as "JT" followed by the volume number and the specific page number(s). All other documents within the settled record shall be referred to as "SR" followed by the page number. Transcripts of the court hearings from this matter will be cited by name followed by the page number.

JURISDICTIONAL STATEMENT

On May 13, 2020, a Lawrence County Grand Jury issued an indictment against Mr. Pretty Weasel, alleging 12 counts of sexual contact with a child under sixteen, violations of SDCL 22-22-7, 22-22-1.2, and one count of rape in the first degree, a violation of SDCL 22-22-1 and 22-22-1.2. (See Indictment at SR 6, see also, Judgment of

Conviction at appendix A1). On March 2, 2022, a Lawrence County jury returned guilty verdicts on 10 of the sexual contact with a child under sixteen counts and the rape in the first-degree count. (Id.). On July 28, 2022, the trial court sentenced Mr. Pretty Weasel to serve 10 years on each of the 10 counts of sexual contact with a child under sixteen years. The trial court ordered that these sentences to be served concurrently with each other. On the rape in the first degree conviction, the trial court sentenced Mr. Pretty Weasel to serve 25 years' consecutive to the 10 sexual contact with a child under sixteen years convictions. (See Id.). The Judgment of Conviction was filed on July 28, 2022. (Id.).

Notice of Appeal from the Judgment of Conviction was filed August 11, 2022. This appeal is brought as a matter of right pursuant to SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUES

1. The circuit court violated Mr. Pretty Weasel's right to a fair trial and related statutory rights when it permitted the State to submit unnoticed expert testimony from the alleged victim's counselor.

   The circuit court held that the defense was on notice of these expert opinions given that the defense had subpoenaed the counselor's records. (See, JT Vol. 3 at p. 367, see also transcript at appendix A6).

   State v. Krebs, 2006 S.D. 43, 714 N.W.2d 91.
   Papke v. Harbert, 2007 S.D. 87, 738 N.W.2d 510.
   Kaiser v. University Physician's Clinic, 2006 S.D. 95, 724 N.W.2d 186.

2. The circuit court improperly permitted expert opinions that bolstered the testimony of the alleged victim.

   The circuit court simply overruled the defense objection to these expert opinions without providing any analysis.

   State v. Buchholtz, 2013 S.D. 96, 841 N.W.2d 449.
   United States v. Whitted, 11 F.3d 782 (8th Cir.1993).
   Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

STATEMENT OF THE CASE AND FACTS

In this appeal, Mr. Pretty Weasel challenges the trial court's ruling to permit the State to use the unnoticed expert testimony of Debra Hughes (Hughes), a counselor from Rapid City. Additionally, he also challenges the admissibility of Hughes' expert opinions. The factual background information related to this case, as well as Hughes' expert opinions are outlined below. (Hughes' opinions and the defense's objections are also contained at Appendix A6-A18).

AD, who was 12 years-old at the time of the trial, testified that she woke up one morning, upset with her stepfather, Vandon Pretty Weasel, because he had been sexually touching her for years. She explained that she was upset and "bawling...[her] eyes out," and that she was "...angry at the same time." (JT Vol. 3 p. 233). She then told her mother, Jennean Pretty Weasel (Jennean), that Mr. Pretty Weasel had been sexually touching her. (Id. at 234). Jennean testified that this occurred on March 10, 2020. (JT Vol. 2 at pp. 143-144.

Jennean and Mr. Pretty Weasel were married at the time of AD's allegations and lived in Spearfish, South Dakota. The Pretty Weasel family was a blended one, and the couple had four children living together in a three-bedroom home. (JT Vol. 2 at pp. 126-127, 130, 132).

AD testified that the sexual touching by Mr. Pretty Weasel was frequent, as much as every day, and that the toughing included his hands going down in her "private area," included vaginal penetration and oral sex. (JT Vol. 3 at pp. 248, 251). She told the jury that the touching typically occurred in her mother's and Mr. Pretty Weasel's bedroom at night, when her mother was away at work. (Id. at pp. 235, 238-240, 244-245).

After AD made the allegations about Mr. Pretty Weasel to her mother, Mr. Pretty Weasel sent several text messages to AD, including one that read, "I love you. I'm very sorry for everything." (Id. at p. 256). AD also testified that Mr. Pretty Weasel had also sent her song lyrics. (Id.). The State argued that these messages were a type of admission on Mr. Pretty Weasel's part. Jennean also claimed that Mr. Pretty Weasel said "sorry" when she confronted him with AD's allegations on March 10, 2022. (JT Vol. 2 at p. 145). Mr. Pretty Weasel also sent several text messages to Jennean that the State argued contained admissions. (Id. at p. 148).

After AD made the sexual allegations to her mother, a report was made to law enforcement. (Id. 146). AD underwent a forensic interview on March 19, 2020 and made a number of allegations related to sexual abuse against Mr. Pretty Weasel. (Id. at p. 151, JT Vol. 3 at pp. 330-331. The forensic interview was played for the jury and the State's expert discussed the common characteristics associated with child sexual abuse. (Id. at pp. 333-347). However, no physical evidence of rape was ever presented to the jury.

AD's mother, Jennean, also agreed with law enforcement's request to conduct a pretext phone call. (JT Vol. 2 at p. 151). Jennean, with the assistance of law enforcement, made a recorded phone call to Mr. Pretty Weasel. During this phone call, Jennean confronted Mr. Pretty Weasel about AD's allegations. Law enforcement remained in the background and wrote notes to help Jennean with the questions that she asked Mr. Pretty Weasel. (Id. at pp.151-153). The pretext phone call was also played for the jury. (Id. at p. 154). The State argued that Mr. Pretty Weasel made a number of admissions during the phone call. The defense maintained that Mr. Pretty Weasel only made the admissions to try and preserve the marital relationship. This argument was

based upon the fact that Jennean continued to have sex with Mr. Pretty Weasel even after the pretext phone call. Jennean did not disclose this fact to anyone until under cross examination at trial. (JT Vol. 3 at pp. 210, 217). Even after Jennean informed Mr. Pretty Weasel that she had helped law enforcement conduct the pretext call, Mr. Pretty Weasel continued to plead with Jennean to not end the marriage. (JT Vol. 3 at pp. 210-212).

Several years before AD made the allegation against Mr. Pretty Weasel, she had also claimed that her stepbrother, who is also child, sexually touched her on several occasions. (Id. at p. 253). AD was nine years old at the time she was touched by her stepbrother. (Id. at p. 264). AD's stepbrother is Mr. Pretty Weasel's biological son. (Id. at p. 369).

Soon after AD was sexually touched by her stepbrother, she told her mother about the touching. She explained that she felt comfortable telling her mother even though she knew there might be some consequences for her stepbrother. (Id. at p. 264).

Mr. Pretty Weasel was also told about what had happened between AD and her stepbrother. The family decided that AD should receive counseling. The family then decided to have Debera Hughes, a counselor in Rapid City, assist by providing family counseling. Mr. Pretty Weasel assisted by sometimes driving AD to Rapid City from Spearfish to attend counseling. (Id. at p. 221). The counseling consisted of individual and family counseling. (Id. at p. 204). Jennean testified that Mr. Pretty Weasel was very much involved in the counseling sessions and that he wanted the children to be in counseling. (Id. at pp. 218-219).

AD's counseling records from her sessions with Hughes were provided to the court. The parties were able to review these records on the first morning of trial. (JT Vol. 1 at p. 100). The records indicated that AD shared with Hughes that she was mad at Mr.

Pretty Weasel because he had spanked her. (JT Vol. 3 at pp. 369-370). Even though AD told Hughes she was mad at Mr. Pretty Weasel for being spanked, she never disclosed any sexual abuse related to Mr. Pretty Weasel to Hughes. (See generally Hughes' testimony JT Vol. 3 at pp. 363-371). However, she did discuss the sexual touching that occurred with her stepbrother. (Id.). The defense argued at trial that AD's anger at Mr. Pretty Weasel was evidence of motive to fabricate the sexual abuse allegations against him.

The time frame where Mr. Pretty Weasel was taking AD to counseling to talk to Hughes about what had happened between her and her stepbrother was also the same time period where AD claims that Mr. Pretty Weasel was sexually abusing her. The defense argued that if Mr. Pretty Weasel were in fact sexually abusing AD, he would not have wanted AD attending counseling.

Additionally, near Halloween of 2015, AD's biological father had claimed that while AD was visiting with him at his home, she had disclosed that she was being sexually abused by Mr. Pretty Weasel. Jennean informed AD's biological father that AD was probably just talking about something she had seen on a video and was just being curious. (JT Vol. 2 at p. 137). Additionally, Jennean's relationship with AD's biological father was "rocky" and he did not like Mr. Pretty Weasel. (Id. at p. 139). As a result of AD's biological father's claims, AD underwent a forensic interview during that time. However, she did not make any disclosures of sexual abuse during the forensic interview[1]. (Id. at p. 139). Jennean informed the jury that Mr. Pretty Weasel denied that any sexual touching had occurred, but that he had also told her that the State was violating their rights by having AD undergo the forensic interview. (Id. at pp.138-139).

[1] See also, testimony of forensic interviewer Tonkel at JT Vol. 3 at p. 332.

In preparation for trial, the defense filed a motion seeking the disclosure of the State's expert witnesses and their opinions. (SR 18). This motion was granted by the trial court during a motions hearing. (See transcript of Evidentiary Motions Hearing of July 29, 2021, at pp. 20-21). Although the State did not provide notice that it intended to call Hughes as an expert witness, the State did call her as a witness at trial. Over objection, the State sought expert opinions from Hughes. Hughes testified that in her "profession," AD had made herself unattractive and "hideous" as she felt that this would make her safer from abuse. (JT Vol. 3 at p. 366).

Additionally, part of the defense's theory of the case was that AD had a motive to lie because she was unhappy with Mr. Pretty Weasel because he had spanked her. Even though AD was mad at her stepfather and disclosed this anger during her counseling with Hughes, she did not disclose any sexual abuse to Hughes related to Mr. Pretty Weasel. When AD made her allegation, she claimed Mr. Pretty Weasel had been sexually abusing her for years. At trial, Hughes was permitted to testify that AD not liking her stepfather for being spanked was unrelated to her later allegations that she had been sexually assaulted by him. "I do not see the two incidents connecting at all." (Id. at p 370).

Finally, Hughes was also permitted to inform the jury that AD was suffering from post-traumatic stress. (Id. at p. 367).

ARGUMENTS

1. The circuit court violated Mr. Pretty Weasel's right to a fair trial and related statutory rights when it permitted the State to submit unnoticed expert testimony from the alleged victim's counselor.

Standard of review: "[This Court] presume[s] the evidentiary rulings made by a trial court are correct, and review[s] those rulings under an abuse of discretion standard."

State v. Krebs, 2006 S.D. 43, ¶ 19, 714 N.W.2d 91, 99. Further, if a discovery order is violated, this Court must determine "whether the defendant suffered any material prejudice as a result[.]" *State v. Reay*, 2009 S.D. 10, ¶ 39, 762 N.W.2d 356, 368. "Material prejudice is established "when in all probability ... it produced some effect upon the final result and affected rights of the party assigning it." *Id.* (citation omitted). *See generally*, *State v. Muhm*, 2009 S.D. 100, ¶ 37, 775 N.W.2d 508, 521.

Summary of the legal analysis: At trial, the State surprised the defense by presenting unnoticed expert opinions from AD's counselor. Even though AD's counselor was not on the State's witness list, the counselor was permitted to tell the jury that she had diagnosed AD with post-traumatic stress disorder. She also provided the expert opinion that AD felt safer from abuse if she remained unattractive and "hideous." (JT Vol. 3 at p. 366). The defense was unaware of these opinions until the counselor was testifying before the jury.

Additionally, part of the defense's theory of the case was that AD had a motive to lie because she was unhappy with Mr. Pretty Weasel, who was her stepfather. AD had told her counselor that she was mad at Mr. Pretty Weasel because he had spanked her. Even though AD was mad at her stepfather when she claimed to have been spanked, she did not disclose any sexual abuse. When AD made her allegation, she claimed Mr. Pretty Weasel had been sexual abusing her for years.

Over the defense's objection, the counselor was permitted to testify about the meaning of AD not liking her stepfather. The counselor explained to the jury that AD not liking her stepfather for being spanked was unrelated to her later allegations that she had been sexually assaulted by him. "I do not see the two incidents connecting at all." (Id. at p. 370). The defense maintains that this testimony only served to bolster AD's

credibility given that it dispelled any reason or motive AD would have for lying about the sexual abuse.

This surprise expert testimony violated Mr. Pretty Weasel's Sixth Amendment right to a fair trial, SDCL 23A-13-14(Rule16)(a)(1)(D), and SDCL 19-19-702. Given the surprise nature of this testimony, the defense was unable to properly prepare. For example, the defense was unable to counter this expert testimony with another expert or to properly prepare to cross-examine the counselor after conducting research or examining the basis for the expert opinion.

Applicable Law: The right to have advance notice of expert opinions is well established under South Dakota law. SDCL 23A-13-14(Rule16)(a)(1)(D) reads,

> Upon written request of a defendant, the prosecuting attorney shall permit a defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecuting attorney, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney, and which are material to the preparation of the defense or are intended for use by a prosecuting attorney as evidence in chief at the trial.

In this matter, on June 21, 2021, the defense also filed a written motion requesting the disclosure of expert opinions. (SR 18). On July 29, 2021, the trial court granted this motion. (See transcript of Evidentiary Motions Hearing of July 29, 2021, at pp. 20-21). The disclosure of expert witnesses was also extensively addressed during the pretrial conference held on February 11, 2022. Hughes was not disclosed by the State as an expert witness. Both parties did acknowledge this Court's holding in *State v. Buchholtz*, 2013 S.D. 96, 841 N.W.2d 449. (See transcript of Pretrial Conference of February 11, 2022, at pp. 3-9, 15-17).

Addressing the related civil rules of disclosure of expert witnesses, this Court has written, "We recogniz[e] that the purpose of pretrial discovery is to allow the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Papke v. Harbert,* 2007 S.D. 87, ¶55, 738 N.W.2d 510, 529 (this Court reversing verdict after party failed to disclose expert opinions as to the issue of causation). This Court has also reversed criminal convictions where the prosecution has failed to provide proper notice of inculpatory witness statements. In *State v. Krebs*, 2006 S.D. 43, 714 N.W.2d 91, this Court reversed a conviction after finding that the prosecution had failed to comply with a trial court's disclosure order related to witness statements. This Court held, "...discovery statutes exist to eliminate trial by ambush. Yet an ambush is exactly what occurred here." *Id.* at ¶23, 100 (internal citation omitted).

State's failure to disclose expert opinions of Debra Hughes: In this matter, the prosecution violated the discovery statutes and the trial court's pretrial rulings when it failed to disclose the expert testimony of Debra Hughes. While she was testifying, over defense objection, the State asked Hughes about AD's lack of hygiene, "And what was that indicative of in your profession?" (JT Vol 3 at p. 366). Additionally, the State asked Hughes, "What was your diagnosis [of AD]?" (Id. at p. 367). The State also asked Hughes about AD's being angry with Mr. Pretty Weasel over the spanking incident and Hughes was permitted to inform the jury that AD's being angry about being spanked was not connected to her allegations of sexual abuse. (Id. at p. 370).

These opinions had not been disclosed by the State prior to trial. Under the law, the State was required to provide advance notice to the defense of Hughes and her opinions, but it failed to do so. The questions that the State presented to Hughes were clearly in the nature of expert testimony under Rule 702. As was discussed above,

Hughes was not on the State's witness list. (See State's witness list at SR 90 and Appendix 19).

In all candor, the counseling records that Hughes wrote related to AD were not presented to the parties until the morning of the first day of trial. Giving the State the benefit of the doubt, perhaps it only decided to call Hughes after reviewing AD's counseling records. But even in that event, the State should have announced that it was going to call Hughes as an expert witness as soon as it made the decision to call her. The parties could have then addressed the issue of continuing the trial in order to fully prepare for the newly disclosed expert witness. Perhaps even more importantly, especially considering the nature of Hughes' expert opinions, the defense could have assisted the trial court by making the objection before the witness was on the stand in the presence of the jury. The defense would also have been in a position to assist the trial court by making a record on any *Daubert* issues. This would have helped the trial court review the applicable case law and legal standards that this Court has provided in this area. Given that Hughes was a surprise to the defense, the only objection the undersigned was able to make on his feet was to say, "Unnoticed 702, improper 702." (JT Vol. 3 at p. 366).

The State was also aware of these records before the trial started. If the State wanted them, it also had the ability to issue a subpoena or to even request these records through AD's mother. It could have then, timely provided expert notice.

In any event, the State was still obligated to provide notice, even if it was sometime during the trial. Even oral notice would have helped the defense prepare to cross-examine Hughes.

The rules of discovery are designed to prevent the defense from being ambushed and surprised at trial. But similar to *Krebs* and *Papke supra*, that is what happened here.

The defense did not know that Hughes was going to provide expert testimony until she was asked for her expert opinions while she on the stand. (See JT Vol. 3 at p. 366) (Defense counsel: "I'm going to object unnoticed 702, improper 702.")). Clearly, the State did not comply with the rules of discovery and a violation of the rules of discovery occurred.

Prejudicial impact of the undisclosed expert opinions. "...[w]hen a discovery order is violated, the inquiry is whether the defendant suffered any material prejudice because of the late disclosure. *State v. Archambeau*, 333 N.W.2d 807, 810-11 (S.D. 1983). This Court has held that, "[a]lthough a trial court's order for the production of evidence must be expeditiously carried out and obeyed, not every failure to produce evidence as ordered is, without more, prejudicial error." *Id.* at 811.

Here, the defense was prejudiced by the surprise expert testimony. The purpose of discovery is to permit the opposing party the opportunity to prepare for the cross-examination of the expert and to consider retaining a counter expert who might be able to provide rebuttal testimony. *See, Papke, supra.* In the context of civil litigation, this Court has noted three areas of concern when expert evidence is disclosed in violation of a disclosure deadline: (1) the time element and whether there was bad faith by the party required to supplement; (2) whether the expert testimony or evidence pertained to a crucial issue; and (3) whether the expert testimony differed substantially from what was disclosed in the discovery process. *Papke v. Harbert,* 2007 S.D. 87, ¶ 56, 738 N.W.2d 510, 529. *See also, Kaiser v. Univ. Physicians Clinic*, 2006 S.D. 95, 724 N.W2d 186.

Papke and *Kaiser, supra,* provide two instances where this Court has found that late disclosure of expert testimony was prejudicial. In *Papke,* the plaintiff brought a medical negligence claim after she had been misdiagnosed by her medical providers. At trial, on

the morning that a defense expert was set to testify, the defense disclosed for the first time that the expert would testify that the plaintiff had a greater than fifty percent chance that she would have lost both her legs even if the defendants had properly diagnosed her condition. The newly disclosed opinion went to the issue of causation. On appeal, the Plaintiff argued that she "was unable to conduct any investigation, prepare any effective cross examination, or retain an expert to disprove or counter that testimony in rebuttal." *Papke* at ¶ 53, 528. Finding prejudice and comparing the facts in *Papke* to the facts in *Kaiser*, this Court wrote,

> Here, as in *Kaiser,* all three areas of concern are present. Dr. Goetz's opinion on causation was not disclosed during the discovery process. Not until the morning of his testimony was Papke notified that he even held an opinion on causation. In *Kaiser,* the expert expressed an opinion during the discovery process, but then in trial used new evidence to support that opinion, evidence that was untimely submitted. Here, Dr. Goetz gave no opinion on causation during the discovery process. His late revelation is more troubling than the one in *Kaiser.* Secondly, the issue of causation went to the heart of Papke's case, as she had to prove that defendants' conduct proximately or legally caused her injuries. Thus, the testimony pertained "to a crucial issue." Finally, because Dr. Goetz did not have an opinion on causation during his deposition, and then expressed an opinion on causation at trial, his testimony differed substantially.
>
> *Papke* at ¶57, 529-30 (internal citations omitted).

Although this Court has not specifically held that the *Kaiser* factors apply in the context of a Rule 16 violation, the *Kaiser* factors do address the issue of prejudice in the context of a late disclosure. Additionally, both the civil rules of procedure and criminal rules of procedure have the same goal, avoiding ambush at trial. *See Papke* at ¶55, 529 and *Krebs* at ¶23, 100. Given that both sets of rules have the same goal, the defense respectfully submits that it makes sense for this Court to apply the *Kaiser* factors in the context of Rule 16 violation.

Turning to the *Kaiser* factors, in this case, the timing element is at least as egregious here as it was in *Kaiser* and *Papke*. In *Papke*, the opposing party was provided notice of the late disclosure on the morning of trial. In Mr. Pretty Weasel's case, the defense received no advanced notice whatsoever. Rather, defense counsel only learned of Hughes' opinions when she gave them on the stand. The attorney in *Papke* apparently had at least some time to prepare for cross-examination[2]. The defense submits that the first factor has clearly been meet.

Addressing the second factor, Hughes' testimony addressed the crucial issue of the credibility of AD's testimony. The defense took the position that AD had a motive to fabricate her testimony given that she was upset with her stepfather for spanking her. The State, through Hughes, presented expert testimony that AD's anger at her stepfather was unconnected to the sexual assault allegations. (JT Vol. 3 at p. 370). This surprise expert testimony directly contradicts part of the defense theory of the case.

Additionally, although AD herself testified that she wanted to look ugly or like a boy to try and keep her stepfather from trying to have sexual contact with her (JT Vol. 3 at pp. 365-66), the State was able to bolster AD's testimony by providing expert testimony that in her "profession", "...[AD] felt that the more unattractive and ugly and hideous...she looked...people would stay away from her and she was safer." (Id. at p. 366). The State was also able to present surprise testimony that AD suffered from post-traumatic stress disorder. This diagnosis left the jury with the strong impression that AD had indeed undergone some type of traumatic experience, perhaps the sexual abuse that

[2] Although the State ambushed the defense with this expert testimony, the defense concedes that bad faith on the part of prosecution has not been established on this record. However, this Court has held that bad faith is not a prerequisite to establishing prejudice. *Papke*, at ¶58, 530 ("Even though the parties concede that no bad faith existed on the part of defense counsel, the protective nature of the statute is not dependent upon bad faith").

she was claiming against her stepfather. Similar to *Papke* and *Kaiser, supra*, this surprise expert testimony goes directly to one of the primary issues for the jury to determine. In this case, the State was permitted to provide unnoticed expert testimony to bolster its main witness.

The third factor addresses "whether the expert testimony differed substantially from what was disclosed in the discovery process." *Papke*, at ¶ 56, 529. Here, the State did not provide any notice related to Hughes' testimony. Not disclosing an expert witness, and thereby leaving the impression that no expert testimony will be presented, differs substantially from calling a surprise expert witness. Addressing this issue in *Papke,* this Court noted that the expert had not given any opinion about causation during the discovery process. Causation was the "surprise" issue, and it was not disclosed to the other side until the morning of trial. This Court found that, "His late revelation is more troubling than the one in *Kaiser. Id.* ¶ 57, 530.

The same occurred in this case. The State failed to provide any expert notice related to Hughes. The State simply called Hughes at trial, and over objection, elicited expert testimony. Just as this Court noted in *Kaiser*, not having an expert opinion before trial is a substantial difference than suddenly having an expert opinion at trial.

In *Kaiser*, the issue was that the expert witness, a doctor, initially testified at a deposition concerning his opinions. The doctor's opinions then changed at trial due to additional photos that had not been disclosed. This Court found, "Permitting [the doctor] to use the undisclosed photos was an abuse of discretion. The fact that Kaiser's counsel was unable to effectively cross-examine [the doctor] about a central issue in the case harmed Kaiser's substantial rights. The prejudice is obvious and substantial." *Kaiser* at ¶ 49, 199.

The prejudice is just as obvious and substantial here. The central issue at this trial AD's credibility. The State was able to present expert testimony that helped to bolster AD's testimony and to explain away a theory of the defense. Hughes was even permitted to put her expert stamp of approval on AD's claims about wanting to be ugly to avoid being sexually abused. "And what was that indicative of in your profession?" "...she felt the more unattractive and ugly and hideous...her behaviors and how she looked, people would stay away from her and she was safer." (JT Vol. 3 at p. 366). However, the defense was not given notice in order to properly prepare and to effectively cross-examine Hughes about this central issue. Just as the Plaintiff in *Papke*, "...was unable to conduct any investigation, prepare any effective cross examination, or retain an expert to disprove or counter that testimony in rebuttal..." *Papke* at ¶ 53, 529. Here Mr. Pretty Weasel was also denied that same chance to present a complete defense.

Had the defense been given advance notice of Hughes' expert opinions, it would have requested the disclosure of the foundation of her opinions. For example, the defense would have sought discovery related to whether any medical journals or research supports Hughes' claims that a child's anger over being spanked does not provide motive to fabricate or is otherwise unrelated to a claim of sexual abuse. If any such research did exist, the defense would have then sought to learn if any other research indicates that those types of opinions are potentially flawed or not based upon valid methodology. The defense would have then potentially consulted with expert witnesses to assist in preparation for cross-examination or perhaps to even testify. These decisions would have been at least partially based upon what should have been disclosed by the State.

The main point is this, under the Sixth Amendment, a defendant has the right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90

L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). A trial court exercises a gatekeeping function and determines what expert testimony a jury is permitted receive. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). If proffered expert testimony meets the *Daubert* standard and is presented to a jury, the opposing side then has an opportunity to meaningly confront that expert testimony and present its own evidence. After each side has had the opportunity to fully cross-examine the expert and to present evidence, the jury then determines what weight to give that expert testimony. *See, Delaware v. Fensterer*, 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (Court finding that after voir dire of expert, defense had adequate notice that the expert could not recall the basis for his expert testimony and that lack of memory went to what weight the jury should give the expert opinion). In Mr. Pretty Weasel's case, the adversarial process entirely broke down related to Hughes' expert testimony. The defense did not have the opportunity to prepare to properly confront and rebut Hughes.

The Sixth Amendment has been violated and the *Kaiser* factors have been met. This Court should reverse the convictions and order that a new trial take place.

Records themselves do not serve as notice of expert testimony. When the defense objected to Hughes' expert testimony at trial, the trial court responded, "Well, these records were subpoenaed, I believe, at your request and they were given to both parties and I'm going to allow it." (JT Vol. 3 at p. 367). Admittedly, the defense made an issue about AD's statements that she made to Hughes during counseling, in particular, the statement she made about being angry with her stepfather because he spanked her. The defense also noted that Mr. Pretty Weasel took AD to counseling with Hughes during the time frame that AD claimed she was being sexually abused. The defense's position was that nobody

who was sexually molesting a child would take that child to a trained counselor out of fear of being discovered. In summary, the defense only presented facts related to AD seeing Hughes, not expert testimony.

However, simply because one side presents facts on a subject does not mean that the other side is permitted to rebut or explain those facts away with a surprise expert witness. Nothing in the rules of discovery excuses a party from providing notice of expert testimony.

The defense anticipates that the State may argue that given that AD's counseling records were only made available the first day of trial, the State was unaware that it would need to call Hughes until after it saw those records. However, given that the State was aware that the records were being subpoenaed by the defense, it seems reasonable that the State should have made its own investigation into this issue so that it could provide expert notice within the court's deadlines. In other words, the State was on notice that the defense was looking for facts to impeach AD and it should have acted accordingly.

In any event, as soon as the State made the decision to call Hughes as an expert witness, even if it was during trial, it should have made some type of disclosure. Instead, the State chose to ambush the defense.

Had the State complied with its duties to disclose expert opinions, even if it was during the middle of trial, the parties could have at least considered seeking some type of continuance to prepare for Hughes' testimony. Even preparing the night before the witness is called, is preferable to a complete surprise from the witness stand.

Although this Court in *Papke* found that the expert notice that was provided during the morning of trial was insufficient, (*Papke* at ¶ 53, 528) the parities in *Papke* had at

least some advance notice and were able to make a record on the issue. In this case, the defense did not even receive that much.

Simply issuing a subpoena for counseling records does not put a party on notice that the other side may call an expert witness, and it certainly does not provide notice of what opinions that expert will provide. "...pretrial discovery is to allow the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Papke v. Harbert*, 2007 S.D. 87, ¶55, 738 N.W.2d 510, 529. Additionally, "...discovery statutes exist to eliminate trial by ambush." *Krebs* at ¶23, 100. The defense reviewing counseling records on the morning of trial, even if they are in response to a defense subpoena, does not permit the defense to obtain the "fullest possible knowledge" of the State's expert case.

The law requires that a party provide notice of expert opinions and nothing about the defense issuing a subpoena relieves the State from providing at least some notice in this case. This Court should not permit this type of ambush to take place simply because the defense issued a subpoena.

2. The circuit court improperly permitted expert opinions that bolstered the testimony of the alleged victim.

Standard of review. This Court reviews a trial court's admission of expert testimony under the abuse of discretion standard. *See generally, State v. Buchholtz*, 2013 S.D. 96, 841 N.W.2d 499.

Summary of the argument. In the context of AD's allegations of sexual abuse against her stepfather, the circuit court permitted Hughes to diagnose AD as suffering from post-traumatic stress disorder. Hughes also told the jury that, in her professional opinion, AD was purposefully making herself ugly in order to avoid abuse. Hughes was also permitted to tell the jury that, in her expert opinion, AD's anger with her stepfather was

unconnected to her allegations of sexual abuse against him. In other words, Hughes, under the aura of an expert, told the jury that AD's anger with her stepfather was not a motive for her to fabricate her allegations. Hughes' opinions merely endorsed AD's testimony, and therefore, they ran afoul of this Court's holding in *State v. Buchholtz*, 2013 S.D. 96, 841 N.W.2d 499. Given that these opinions went to the critical issue of AD's credibility, the error that occurred here was prejudicial.

Applicable law. This Court has clearly detailed the law in the context of experts testifying in child sexual abuse cases. In *Buchholtz, supra*, this Court adopted the reasoning of the United States Court of Appeals for the Eighth Circuit in *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir.1993). There the Circuit Court held,

> In the context of child sexual abuse cases, a qualified expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits.... A doctor who examines the victim may repeat the victim's statements identifying the abuser as a family member if the victim was properly motivated to ensure the statements' trustworthiness.... A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse.... Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible.
>
> *Id.*

Addressing the standard that the *Whitted* Court had announced, this Court noted, "[w]e have generally limited expert testimony to explaining the characteristics of sexually abused children and comparing those characteristics with the account and behavior of a particular child." *Buchholtz* at ¶ 25, 458. This Court further explained,

> Trial courts must be careful to distinguish between expert opinion that helps the jury and expert opinion that merely endorses a witness's testimony. An expert's role is to assist the trier of fact to understand the evidence or to determine a fact in issue. SDCL 19-15-2 (Rule 702). That role is not to tell the trier of fact what to decide, shifting responsibility from

> the decision maker to the expert... and so an opinion that sexual abuse actually occurred based solely on a victim's statement is inadmissible.
>
> *Buchholtz* at ¶ 28, 29, 459 (internal citations omitted).

In *Buchhotlz*, the expert, who apparently was qualified to testify in this area, informed the jury that she had diagnosed the alleged victim in that case with "child sexual abuse." This Court reversed and held that this type of opinion was impermissible bolstering. Importantly, this Court found that an expert should not be able to make this type of diagnosis based only on the testimony of an alleged victim. In *Buchholtz*, similar to here, the State did not present any physical evidence of sexual abuse. This Court wrote, "[w]ith no physical evidence of abuse, all [the expert] had to analyze was the child's account... experts cannot pass judgment on a witness's truthfulness in the form of a medical opinion." *Id.* ¶28, 459.

As an initial matter, the State failed to establish that Hughes was qualified as an expert in the area of child sexual abuse. The expert in *Buchhultz* apparently had the credentials to properly testify and the State must have laid the proper foundation to permit her testimony. Here, the State failed to present any foundation for Hughes to provide any type of expert opinions on the topics of child sexual abuse. Hughes testified that she had a master's degree in social work and that she had her own practice since 2010. She explained that she is a child-trauma therapist and that she uses modality of trauma-focused child behavioral theory. But she never laid the foundation to provide expert testimony about child sexual abuse. (See JT Vol. 3 at p. 363). The defense is not aware of any legal authority from this Court that permits a counselor without additional training to testify in this area. *See, Whitted* at 785, (finding that a *qualified* expert can inform the jury of characteristics in sexually abused children) (emphasis added). This

Court should not permit this type of expert testimony without proper foundation and witness qualifications.

Moreover, the opinions that Hughes provided to the jury are beyond what this Court permitted in *Buchholtz*. In the context of AD's sexual allegations against her stepfather, Hughes told the jury that she diagnosed AD with traumatic stress disorder. Although she did not say the words, "child sexual abuse," (the diagnosis this Court prohibited in *Buchholtz*), taken in context, the implication of Hughes' diagnosis is clear. She was telling the jury that she believed AD's claims that she was sexually abused by her stepfather. Importantly, the State did nothing to further explain this diagnosis or to give any other reason for it, other than sexual abuse[3]. In this context, through her diagnosis, Hughes was telling the jury that AD's claims of sexual abuse were credible.

Hughes also assessed AD's credibility by giving her expert opinion that AD's being angry at Mr. Pretty Weasel was not connected to her allegations of sexual abuse. The jury is entrusted with determining if a witness has a motive to fabricate an allegation. When an expert tells a jury that a witness being angry with someone is unconnected to an allegation of sexual abuse, the expert is simply telling the jury that anger is not a motive to fabricate. This is just another means of telling the jury what to believe. As this Court noted in *Buhholtz*, this type of testimony is not helpful to the jury.

Perhaps just as important, the State did not present any foundation for this type of expert opinion. The defense is not aware of any legal authority or caselaw from this Court where an expert witness has been permitted to give this specific type of opinion

[3] Although arguable this diagnosis could also relate to one of AD's siblings, who had sexual toughed AD. However, the defense maintains that when considering the context of Hughes testimony, she was implicitly referring to Mr. Pretty Weasel.

about the motives of a child witness. The State did not present any of the traditional *Daubert* factors to support the admissibility of this type of opinion on motive. The *Whitted* Court did state that, "[a] doctor who examines the victim may repeat the victim's statements identifying the abuser as a family member if the victim was *properly motivated* to ensure the statements' trustworthiness." *Whitted* at 785 (emphasis added). But nothing in *Whitted* or *Buhholtz* indicates that an expert witness may discount or otherwise give an opinion on an alleged victim's motive to fabricate an allegation. Clearly this type of testimony runs against this Court's rule that "[w]e have generally limited expert testimony to explaining the characteristics of sexually abused children and comparing those characteristics with the account and behavior of a particular child." *Buhholtz* at ¶25, 458.

The same analysis applies to Hughes' expert testimony related to why AD wanted to have an ugly physical appearance. The jury was able to hear AD's testimony on this topic. They were then able to decide if they found it credible or not. Hughes giving an expert opinion as to the reason why AD wanted to look ugly merely put an expert stamp of credibility on AD's testimony. Hughes did not testify that being dirty and ugly was a characteristic of sexually abused children. She simply stated that it was her expert opinion that the reason AD was dirty and ugly was to avoid abuse. This expert opinion clearly implied that AD was in fact being abused and that the abuse was why AD chose to remain dirty. This testimony is yet another way in which Hughes was simply informing the jury that AD's testimony about being sexually abused was credible.

Additionally, as with the other opinions addressed above, the State failed to lay proper foundation for an expert opinion related to this topic. Hughes never testified that she had the qualifications or experience to be able to figure out the actual motive that a

child has to be dirty. Even assuming this type of opinion is admissible under *Buhholtz*, the State was still required to lay the proper foundation to present this expert opinion to the jury.

Turning to the issue of prejudice, Hughes' opinions in this case are at least as harmful as the improper opinion that was submitted in *Buchholtz*. In *Buchholtz*, this Court found prejudice on two separate grounds. First, this Court noted that, "...expert testimony [holds] an "aura of reliability and trustworthiness [that] surround[s] scientific evidence." *Id.* ¶ 30, 459. The Court also cited *State v. Kvasnicka*, 2013 S.D. 25, ¶ 35, 829 N.W.2d 123, 131 for the same proposition. Simply stated, given the high regard that a jury places on expert testimony, improper expert testimony standing on its own can be prejudicial.

Additionally, this Court in *Buhholtz* wrote,

> ... one of the defense theories was that [the alleged victim] may have been confused or mistaken about what really happened at Buchholtz's home. Defense witnesses testified that she had been acting strangely in the week before the day in question, entering other neighbors' bedrooms without permission. And [the alleged victim] had told her grandmother at the same time she reported Buchholtz's actions that, in another garage, two neighbor boys had shown her their penises. Yet, in the absence of any physical evidence of rape, Dr. Kertz's opinion put to rest, with an air of medical certainty, any question about whether [the alleged victim] had somehow imagined or fabricated what happened with Buchholtz.

Id. at ¶30, 459-60.

The defense maintains that AD had motive to fabricate the sexual allegations against her stepfather. AD admitted during her counseling with Hughes, that she was mad about being spanked. If she was being sexually abused when she made the allegation about being spanked (as she claims), she apparently felt safe enough to make a claim to Hughes about physical punishment. A reasonable argument is that if she were

actually being sexually abused, she could have also disclosed that to Hughes at the same time.

Yet, in the absence of any physical evidence, with an air of expert certainty, any question about AD having motive to fabricate the allegations against her stepfather were put to rest by Hughes' testimony. She told the jury that any anger AD had against her stepfather was unrelated to allegations of sexual abuse.

The central issue in this case was AD's credibility. The State did not present any physical evidence that AD had been sexually abused. In order to find Mr. Pretty Weasel guilty, the jury had to find AD's allegations credible. The State, through an ambush, was able to present an expert witness who informed the jury that AD was suffering from post-traumatic stress disorder, that AD's testimony about why she was dirty was credible, and that AD's anger was not a motive for her to fabricate a sexual allegation.

CONCLUSION

The jury found Mr. Pretty Weasel guilty, but they only made this decision after hearing an expert witness explain that any motive AD might be lying was unconnected to her claims about sexual abuse. This type of opinion testimony only served to improperly bolster the credibly of AD. Even if this type of evidence was permissible, the defense should have had the opportunity to prepare for it. The State should have provided notice.

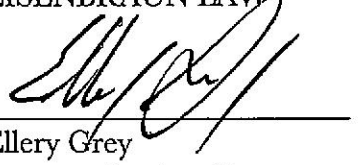
Mr. Pretty Weasel requests that this Court enter an order reversing and remanding this action for a new trial.

REQUEST FOR ORAL ARGUMENT

Mr. Pretty Weasel respectfully requests oral argument on all issues.

Dated this 8th day of December 2022.

GREY &
EISENBRAUN LAW



Ellery Grey
Attorney for Appellant
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701
(605) 791-5454

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

VANDON PRETTY WEASEL,

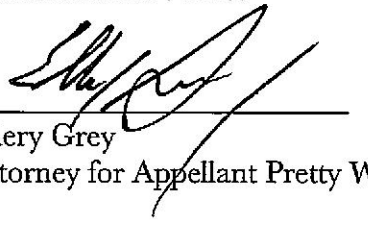
Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Brief is 29 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates that there is a total of 8,003 words in the body of the brief.

Dated this 8th day of December 2022.

GREY &
EISENBRAUN LAW



Ellery Grey
Attorney for Appellant Pretty Weasel

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CERTIFICATE OF SERVICE

VANDON PRETTY WEASEL,

Defendant and Appellant.

The undersigned hereby certifies that he served a true and correct copy of the Appellant's Brief upon the persons herein next designated, on the date shown, by e-service through the State of South Dakota e-filing system, Odyssey, to-wit:

Erin Handke
Office of the Attorney General
atgservice@state.sd.us

John Fitzgerald
State's Attorney's Office
jfitzger@lawrence.sd.us

Supreme Court Of South Dakota
scclerkbriefs@ujs.state.sd.us

The undersigned further certifies that on the date shown, one paper copy of the Appellant's Brief was sent by mailing said copies by United States Mail, first-class, postage prepaid, in envelopes addressed to said addresses; to wit.:

Supreme Court of South Dakota
Office of the Clerk
500 East Capitol Avenue
Pierre, SD 57501

Erin Handke
Office of the Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501

John Fitzgerald
State's Attorney's Office
90 Sherman St., # 6
Deadwood, SD 57732

Which addresses are the last known addresses of the addressees known to the subscriber.

Dated this 8th day of December 2022.

GREY &
EISENBRAUN LAW

Ellery Grey
Attorney for Appellant Pretty Weasel

APPENDIX

Appendix **Page**

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff,	)	CRI 20-379
VS.	)	**JUDGMENT OF CONVICTION**
VANDON JOSEPH PRETTY WEASEL Defendant.	)	

An Indictment was filed with this Court on the 13th day of May, 2020 charging the Defendant with the crime of Count 1 through 12: Sexual Contact With A Minor Child Under Age 16 (SDCL 22-22-7 and 22-22-1.2) and Count 13: Rape First Degree (SDCL 22-22-1(1) and 22-22-1.1).

On the 29th day of April, 2021, the Defendant, the Defendant's Attorney, Ellery Grey, and John H. Fitzgerald as prosecuting attorney appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant entered a plea of not guilty and requested a Jury Trial on the charges contained in the Indictment.

A Jury Trial commenced on the charges on the 28th day of February, 2022 and March 1 and March, 2022 in Deadwood, South Dakota. On the 2nd day of March, 2022, the Jury returned a verdict of guilty to the charges of Count 3 through 12: Sexual Contact With A Minor

Child Under Age 16 (SDCL 22-22-7 and 22-22-1.2) and Count 13: Rape First Degree (SDCL 22-22-1(1) and 22-22-1.1).

IT IS THEREFORE the Judgment of the Court that the Defendant is guilty of Count 3 through 12: Sexual Contact With A Minor Child Under Age 16 (SDCL 22-22-7 and 22-22-1.2) and Count 13: Rape First Degree (SDCL 22-22-1(1) and 22-22-1.1).

S E N T E N C E

On the 28th day of July, 2022, the Court asked the Defendant if any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

COUNT III: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. Defendant shall pay court costs in the amount of $104.00 LEOTF.

COUNT IV: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III. Defendant shall pay court costs in the amount of $104.00 LEOTF.

COUNT V: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III and IV. Defendant shall pay court costs in the amount of $104.00 LEOTF.

COUNT VI: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served

of 157 days. This Sentence shall run concurrent with Count III and IV and V. Defendant shall pay court costs in the amount of $104.00 LEOTF.

COUNT VII: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III and IV, V and VI. Defendant shall pay court costs in the amount of $104.00 LEOTF.

COUNT VIII: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III and IV, V, VI and VII. Defendant shall pay court costs in the amount of $104.00 LEOTF.

COUNT IX: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III and IV, V, VI, VII, VIII. Defendant shall pay court costs in the amount of $106.50 LEOTF.

COUNT X: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III and IV, V, VI, VII, VIII and IX. Defendant shall pay court costs in the amount of $106.50 LEOTF.

COUNT XI: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III and IV, V, VI, VII, VIII, IX and X. Defendant shall pay court costs in the amount of $106.50 LEOTF.

COUNT XII: SEXUAL CONTACT WITH A MINOR

IT IS HEREBY ORDERED that the Defendant shall serve 10 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run concurrent with Count III and IV, V, VI, VII, VIII, IX, X and XI. Defendant shall pay court costs in the amount of $106.50 LEOTF.

COUNT XIII: RAPE FIRST DEGREE

IT IS HEREBY ORDERED that the Defendant shall serve 25 years in the South Dakota State Penitentiary with credit for time served of 157 days. This Sentence shall run consecutive with Count III and IV, V, VI, VII, VIII, IX, X, XI and XII. Defendant shall pay court costs in the amount of $106.50 LEOTF.

IT IS FURTHER ORDERED that the Defendant shall have no contact with the victim.

IT IS FURTHER ORDERED that the Defendant shall follow all recommendations of the sex offender evaluation.

IT IS FURTHER ORDERED that the Defendant shall reimburse Lawrence County for warrant fees of $40.00, costs of prosecution in the amount of $294.40, and $5,000.00 for the sex offender evaluation to be paid through the Lawrence County Auditor's Office.

7/28/2022 2:41:24 PM

BY THE COURT:

Attest: CAROL LATUSECK,CLERK
Mund, Tonisha
Clerk/Deputy

Michelle Comer

Hon. Michelle Comer
Circuit Court Judge

DATE OF OFFENSE:
Count 3 and 4: Year of 2016
Count 5 and 6: Year of 2017
Count 7 and 8: Year of 2018
Count 9 and 10: Year of 2019
Count 11 and 12: Year of 2020
Count 13: Year of 2020

NOTICE OF APPEAL

You are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise within thirty (30) days from the date that this Judgment and Sentence is signed, attested and filed, written Notice of Appeal with the Lawrence County Clerk of Courts, together with proof of service that copies of such Notice of Appeal have been served upon the Attorney General of the State of South Dakota, and the Lawrence County State's Attorney.

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

VANDON JOSEPH PRETTY WEASEL,

Defendant.

JURY TRIAL

40CRI20-379

Volume 3 of 4
(Pages 201 - 375)

BEFORE: **THE HONORABLE MICHELLE K. COMER**
Circuit Court Judge
Deadwood, South Dakota
March 1, 2022, at 9:00 a.m.

APPEARANCES:

For the State: **MR. JOHN H. FITZGERALD**
Lawrence County State's Attorney
90 Sherman Street
Deadwood, SD 57732

For the Defendant: **MR. ELLERY GREY**
Grey & Eisenbraun Law
909 St. Joseph Street, 10th Floor
Rapid City, SD 57701

DEBRA HUGHES,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FITZGERALD:

Q Good afternoon. Would you tell us your name?

A My name is Debra Hughes.

Q And what is your occupation?

A I am a private, independent practice, mental health practitioner.

Q Okay. And how long have you been so employed?

A I've been a private, independent practitioner since 2010.

Q Okay. What's your educational background?

A I have a master's degree in social work and I have a license to treat clinically in the state of South Dakota.

Q Okay. And where is your practice located at?

A Rapid City, South Dakota.

Q All right. And can you just tell us a little bit about your professional background?

A I am a child trauma therapist and I use the modality of trauma-focused child behavioral therapy, which is the evidence practice. I was also a trauma therapist to the secret pilots from Ellsworth Air Force Base, and I also worked at Rapid City Regional Hospital where I did the treatment and programming for the adolescent unit.

Q Okay. Ms. Hughes, what town do you live in?
A I live in Rapid City, South Dakota.
Q Okay. Have you come to be involved in, basically, I'll call it, the family -- the Pretty Weasel family?
A Yes, I have.
Q Okay. And, in particular, did you deal with several of the children in that family?
A Yes, I did.
Q Which ones?
A I've had interaction and treatment with all of the children.
Q Okay. Have you had specific contact with Arianna?
A Yes, I have.
Q Okay. And over what period of time have you been dealing with Arianna?
A The treatment and interaction began in March of 2019.
Q Okay. And Kion Pretty Weasel, have you had contact with him?
A Yes.
Q All right. And did you treat him also?
A Yes.
Q What started your contact with those two individuals?
A I was contacted by Vandon Pretty Weasel as his son Kion had touched sexually inappropriately Arianna and he wanted me to address the issue for safety and how to help him with

his son.
Q Okay. So it was the dad? The defendant? Do you recognize him?
A Yes.
Q Okay. He's here in court with us, Ms. Hughes?
A Yes.
Q Okay. So he was the one that brought this to your attention?
A Yes, he did.
Q And so then you got to deal with Arianna as a result of what Kion was accused of?
A Yes.
Q Did Kion admit that he had done it?
A Yes.
Q What did he admit he had done to Arianna?
A They were laying there and he had touched her twice and --
Q And we're talking about touching her private parts?
A Yes.
Q Okay. In dealing with Arianna, did you see that she exhibited certain kinds of symptoms of a lack of -- or wanting to be a boy or --
A Yes.
Q -- talking about that? Okay. And when did that start? When did those conversations about her wanting to be a boy start with you?

A Those conversations evolved from the beginning of treatment, when the issue with Kion had come about.
Q Did she indicate why she wanted to be a boy?
A She believes that if she were a boy, then she would not have been touched.
Q Okay. Did she exhibit any signs that you worked with her on as far as a lack of hygiene?
A Yes.
Q Okay. And what was that indicative of in your profession?
MR. GREY: I'm going to object. Unnoticed 702, improper 702.
THE COURT: Overruled. You can answer.
A In Arianna's personality and presenting herself during our sessions, she felt the more unattractive and ugly and hideous, if you will, her behaviors and how she looked was, people would stay away from her and she was safer.
Q **(BY MR. FITZGERALD, continuing)** Okay. Did you document that in your records about her doing some things to keep people away or just what she termed as gross?
A Yes, I did.
Q Okay. Did Vandon talk about Arianna as far as her truthfulness?
A Yes, he did.
MR. GREY: I'm going to object improper. It would be invading the province of the jury. It's one witness

discussing the veracity of another witness.

THE COURT: What was your question, Mr. Fitzgerald?

MR. FITZGERALD: Did Vandon discuss Arianna being a truthful person.

THE COURT: Oh, sustained.

Q (BY MR. FITZGERALD, continuing) What was your diagnosis of Arianna?

MR. GREY: Objection. 702, State versus Buchholtz.

THE COURT: Well, these records were subpoenaed, I believe, at your request and they were given to both parties and I'm going to allow it.

Q (BY MR. FITZGERALD, continuing) What was your diagnosis?

A Post-traumatic stress disorder.

Q And what does that mean?

A That is an event where an individual fears being harmed or the harm of someone else and, as a result of that fear, then they have different behaviors and actions that continue to reproduce fear and the need to protect.

Q Is she being treated for that now?

A Yes.

Q By you?

A Yes.

Q Did you see things that indicated to you that there was something more going on here than what had happened at the hands of Kion?

MR. GREY: Objection. Calls for speculation, improper 702, unnoticed 702.

THE COURT: Sustained.

Q (BY MR. FITZGERALD, continuing) Was the mother and the father involved in the actual individual therapy sessions that you conducted with Arianna and Kion?

A They are not involved in the sessions themselves. We did have a family session in which we discussed boundaries and safe touch and telling the truth and all of the things which is common when you have a situation as this where there's been some type of touching. You want to establish safety rules, and that consisted of the entire family.

Q Okay. So the individualized counseling did not involve the parents, but there were family sessions that involved everyone in this family?

A Yes.

Q Okay. And you would have conversations, then, with the entire family at certain points --

A Yes.

Q -- during family therapy?

A Yes.

Q And you would discuss all of the issues that involved these cases?

A In the beginning we established boundaries for safety and that was the primary focus of the family session. Fears of

relationships. And at that time Kion had struggled with the relationship with Jennean, so we worked on that relationship.

Q Okay. Has Arianna expressed concerns about what's happened to her family as a result of what she disclosed?

A Arianna several times has said that Vandon told her her family would be ruined, and she believes everything that's happened to her family is her fault.

Q And has she seen issues with her brothers develop since this?

A This has been very hard for her relationship with Adonte, because that is Vandon's son, and she sees that she did this to Adonte. Now Adonte doesn't have a dad. So, yes, she sees this as her fault.

Q Thank you.

MR. FITZGERALD: That's all the questions I had.

THE COURT: Mr. Grey?

CROSS-EXAMINATION

BY MR. GREY:

Q Good afternoon, ma'am. Did you review your records or notes in preparation for today?

A I did not. I was given very little time to get here, so I have not looked at them in depth.

Q Understood. What I'd like to do -- and this might be a bit unfair, but I'll do my best here. I believe there's a

record entry on June 19th of 2019. I'll ask you if this sounds familiar. Did Arianna explain that she did not like Vandon because Vandon will spank her? Do you recall if that's an entry in your notes?

A Yes, I do, actually.

Q Thank you, ma'am.

MR. GREY: No further questions.

THE COURT: Mr. Fitzgerald, anything further?

REDIRECT EXAMINATION

BY MR. FITZGERALD:

Q So she indicated that Vandon had spanked her?

A Yes.

Q Is there any connection that you see between that and her revelation of being sexually abused by Vandon?

MR. GREY: Objection. Improper 702, beyond the scope, unnoticed 702.

THE COURT: Overruled.

A So children are very compartmentalized thinkers and in that minute, when you say, "Do you like him," and if there is an event that has occurred where he's punished her or spanked her, whatever, that is going to be what she speaks to. So it is not uncommon for her to say, "I don't like him. He spanked me." I do not see the two incidents connecting at all.

Q Okay. Thank you.

MR. FITZGERALD: That's all the questions I have.

THE COURT: Mr. Grey?

MR. GREY: Doesn't prompt anything else. Thank you.

THE COURT: Thank you.

Thank you, Ms. Hughes.

MR. FITZGERALD: The State would rest.

THE COURT: All right. We better take a break. There are some legal matters we have to address. It may be that I let you go for the day and then we'll reconvene tomorrow. Do you --

MR. GREY: Maybe recess for the day, Your Honor.

THE COURT: Okay. I think that would be good because there are several matters that have to take place before we move on to the defense's case, so I will recess for the day, then.

Please do not discuss the case or form an opinion about it until it is submitted to you for deliberation. We'll start at 8:30 again tomorrow. All rise for the jury.

(The jury exits the courtroom.)

THE COURT: Thank you. Please be seated.

We are on the record, outside the presence of the jury. The State having rested, Mr. Grey, do you have any motions you'd like to make at this time?

MR. GREY: Thank you, Your Honor. At this time, I would move for a judgment of acquittal on the basis that no

reasonable jury could find the elements of any of the counts alleged beyond a reasonable doubt.

THE COURT: Thank you.

Mr. Fitzgerald?

MR. FITZGERALD: I would just rest on the record.

THE COURT: The Court will deny the motion. The Court finds that there is sufficient evidence in the record from which a jury could support a verdict on the counts set forth in the Indictment.

Mr. Grey, do you have witnesses you're going to call tomorrow?

MR. GREY: I may, Your Honor, and I'll let you know -- well, I guess, if you put me on a deadline, I'll try to have an answer for you. I'll only have one.

THE COURT: Okay. I'm just asking just to try to get an estimate.

I have given both parties the jury instructions that I have -- that I propose that I'm going to use. If you have any additional proposed, based upon the facts as they've come in, you could let me know that in the morning. We'll do jury instructions before you proceed, just so that we can be ready to kind of go right into --

MR. GREY: Whether we rest or not?

THE COURT: Yeah, whether you rest or not. I did -- this packet does not include -- I guess I was wondering if your

client is going to testify. That's the only thing. This does not -- I think I took out the defendant has a right not to testify, so -- or maybe it's in there and we need to take it out. I can't remember which one I need to do, but, basically, that's why I was asking is because we maybe need to modify the instructions to make sure that that's either in as it should be or out as it should be. And you don't have to say that today. I understand that you might want to discuss that with your client.

Mr. Fitzgerald, is there anything you'd like me to discuss today?

MR. FITZGERALD: No, Your Honor.

THE COURT: I mean, anything further on the record.

Mr. Grey?

MR. GREY: Now that the evidence is concluded, the one issue I suppose would be the number of counts that we have, and the counts aren't specifically tied to a transaction, by and large, other than I anticipate the State will argue that the first degree rape charge is either tied to a cunnilingus incident or a digital penetration incident.

My reading of State versus Muhm basically states that having the Indictment in this fashion is proper but that the Court would normally provide a unanimity instruction or a standard instruction, and so I will have that prepared for the Court. In fact, I have a draft and I'll tweak it

here and email it to the Court and the State tonight.

THE COURT: Okay.

MR. GREY: And then I believe I have one other pattern that I will also email to the Court and State tonight.

THE COURT: All right. Very good.

I did find the instruction. It's No. 35. It says the right -- that he has the right to not testify, so if he is going to testify, we need to remove that instruction. Otherwise, we'll start at 8:30. We'll see you then. Thank you.

(A recess was taken at 4:15 p.m.)

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF LAWRENCE)		FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,	*	
Plaintiff,	*	CRI 20-378
	*	
vs.	*	POTENTIAL
	*	TRIAL WITNESSES LIST
VANDON JOSEPH PRETTY WEASEL	*	
Defendant.	*	

Comes now the State and discloses the following names of potential witnesses for trial in the case in chief:

1. Vincent Barrios
2. Jennean Pretty Weasel
3. Brandi Tonkel
4. Tom Derby
5. A.D.
6. Any other witness who's name has been disclosed through discovery

Dated this 4th day of February, 2022.

State's Attorney

Filed: 2/4/2022 12:03 PM CST Lawrence County, South Dakota 40CRI20-000379

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

VANDON JOSEPH PRETTY WEASEL,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
LAWRENCE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

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Notice of Appeal filed August 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED: **PAGE**

CASES CITED:

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

VANDON JOSEPH PRETTY WEASEL,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Appellant, Vandon Joseph Pretty Weasel, is referred to as "Pretty Weasel." Appellee, the State of South Dakota, is referred to as "State." References to documents will be designated as follows:

Settled Record (Lawrence County Criminal File No. 20-379) ..... SR

Jury Trial Transcripts (February 28-March 2, 2022) ..... JT

Pretty Weasel's Brief ..... PWB

Exhibits ..... EX

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

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Convictions and Sentences entered by the Honorable Michelle K. Comer, Circuit Court Judge, Fourth Judicial Circuit, on July 28, 2022. SR 426-30.

Defendant filed a Notice of Appeal on August 11, 2022. SR 436-37. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT PROPERLY ALLOWED DEBRA HUGHES TO TESTIFY AT TRIAL?

The circuit court allowed Debra Hughes to testify at trial.

Osdoba v. Kelley-Osdoba, 2018 S.D. 43, 913 N.W.2d 496

State v. Buchholtz, 2013 S.D. 96, 841 N.W.2d 449

State v. Thomas, 2019 S.D. 1, 922 N.W.2d 9

STATEMENT OF THE CASE

On May 13, 2020, the Lawrence County Grand Jury indicted Pretty Weasel on twelve counts of Sexual Contact with a Minor Under the Age of Sixteen, a Class 3 felony, contrary to SDCL 22-22-7, and one count of First-Degree Rape, a Class C felony, contrary to SDCL 22-22-1(1). SR 6-10. A.D. was the victim in all thirteen counts.

On June 21, 2021, Pretty Weasel moved for a Subpoena *Duces Tecum* for an in-camera review of A.D.'s counseling records. SR 24. The circuit court granted Pretty Weasel's request over the State's objections on July 29, 2021. SR 476-77. The State was unaware A.D. was in counseling and did not have access to her counseling records. SR 476-77. The court signed the Subpoena *Duces Tecum* on February 11, 2022. SR 97-98. Debra Hughes, A.D.'s counselor, signed the Admission of Service for the Subpoena *Deces Tecum* on February 24, 2022. SR 99.

The court received the counseling records the weekend before trial, with trial starting on Monday. JT 378. The court disseminated the counseling records to both parties Monday morning, and the parties reviewed them after jury selection, but before the first witness was called. JT 378. Pretty Weasel's Counsel acknowledged there was a subpoena for the counseling records and Hughes had been in contact with his office informing him that she had COVID, providing a reason for the delay. JT 378-79.

Pretty Weasel did not challenge Hughes's credibility as an expert witness at trial. *See* JT 362-73. In fact, when the State called Hughes as a witness, Pretty Weasel did not object, ask for a recess, or request a *Daubert* hearing. JT 362-63; *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). When the State questioned Hughes, Pretty Weasel objected when the prosecutor asked Hughes, "[a]nd what was that indicative of in your profession?"[1] Pretty Weasel's objection relied on unnoticed 702 and improper 702. The similar objection was made when the prosecutor asked what Hughes's diagnosis[2] for A.D. was. JT 367. The circuit court overruled Pretty Weasel's objections and told him that he was the one who subpoenaed the records and both parties were provided copies. JT 367.

[1] This question was asked after Hughes described A.D.'s lack of hygiene. JT 366.

[2] Pretty Weasel objected stating, "702, *State v. Buchholtz*." JT 367.

After a three-day trial, the jury found Pretty Weasel guilty on ten counts of Sexual Contact with a Minor Under the Age of Sixteen and one count of First-Degree Rape. SR 228-30. The court sentenced Pretty Weasel to ten years in prison for each count of Sexual Contact with a Minor Under the Age of Sixteen. SR 426-29. These sentences were ordered to run concurrent with each other. SR 426-29. The court sentenced Pretty Weasel to twenty-five years in prison for his First-Degree Rape conviction. It ordered the sentence run consecutive to the other sentences. SR 426-29.

STATEMENT OF FACTS

On March 10, 2020, A.D. (DOB 4/9/2009) seemed unhappy, and not her ordinary self. JT 140. She did not want to go to school and was distraught. JT 143. Her mother, J.P. (Mother), told her to get in the car and they would go for a drive. JT 144. Once in the car, Mother asked A.D. if something was going on and why she did not want to go to school. JT 144. A.D. began crying and told Mother she did not want to break up the family. JT 144. She disclosed that her stepfather, Pretty Weasel, had been inappropriately touching her for "a very long time." JT 144.

This was not the first time A.D. revealed Pretty Weasel had abused her. Around Halloween 2015, A.D.'s father, V.B. (Father), noticed A.D. exhibited inappropriate behavior and contacted Mother. JT 137. Law enforcement was contacted, and A.D. participated in a forensic interview conducted by Brandi Tonkel at Children's Home Child Advocacy Center.

JT 328. During the interview, A.D. did not disclose sexual abuse, but did say Pretty Weasel hit her. JT 139, 332-33.

Because of A.D.'s new disclosure, Mother filed a report with law enforcement. JT 146. A.D. participated in another forensic interview, again with Tonkel at Children's Home Child Advocacy Center. JT 328. During the interview A.D. told Tonkel that Pretty Weasel had been sexually abusing her. JT 329-30; EX 5. She described how Pretty Weasel digitally penetrated her and performed cunnilingus on her. EX 5.

ARGUMENT

THE CIRCUIT COURT PROPERLY ALLOWED DEBRA HUGHES TO TESTIFY AT TRIAL.[3]

Pretty Weasel claims the circuit court errored when it allowed Debra Hughes, an "unnoticed expert witness," to testify. *See* PWB. He provides several reasons why the testimony was inappropriate, including:

- it violated his right to a fair trial;
- it bolstered A.D.'s credibility;
- Hughes was not qualified as an expert;
- there was no foundation to her testimony;
- Hughes testified beyond the scope allowed in *State v. Buchholz*;
- Pretty Weasel was denied the opportunity to rebut Hughes's testimony; and
- there was not an opportunity for a *Daubert* hearing.

See PWB. Pretty Weasel argues because of these alleged violations, he was prejudiced. PWB 12-25. But Pretty Weasel's arguments fail. First,

[3] Pretty Weasel raised two issues on appeal. *See* PWB. Because both issues related to the testimony of Debra Hughes, the State has combined the issues for brevity.

he waived these issues on appeal because he did not preserve these. Second, Hughes was not testifying as an expert. And third, Hughes's testimony was not prejudicial.

A. *Standard of Review.*

The circuit court's "'evidentiary rulings are presumed to be correct and are reviewed under the abuse of discretion standard.'" *State v. Goodshot*, 2017 S.D. 33, ¶ 14, 897 N.W.2d 346, 350 (quoting *State v. Hannemann*, 2012 S.D. 79, ¶ 19, 823 N.W.2d 357, 362).

"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.'" *People in Interest of D.S.*, 2022 S.D. 11, ¶ 21, 970 N.W.2d 547, 554 (quoting *State v. Stone,* 2019 S.D. 18, ¶ 34, 925 N.W.2d 488, 499-500). "'Not only must error be demonstrated, but it must also be shown to be prejudicial error.'" *State v. Hayes*, 2014 S.D. 72, ¶ 22, 855 N.W.2d 668, 675 (quoting S*tate v. Moran*, 2003 S.D. 14, ¶ 13, 657 N.W.2d 319, 324). Prejudicial error occurs when "'in all probability the error produced some effect upon the jury's verdict and is harmful'" to defendant's substantial rights. *State v. Reeves,* 2021 S.D. 64, ¶ 11, 967 N.W.2d 144, 147 (quoting *State v. Shelton*, 2021 S.D. 22, ¶ 16, 958 N.W.2d 721, 727).

The circuit court has "'broad discretion in determining the qualifications of expert witnesses and in admitting expert testimony.'" *State v. Machmuller*, 2001 S.D. 82, ¶ 14, 630 N.W.2d 495, 499 (quoting

State v. Edelman, 1999 S.D. 52, ¶ 38, 593 N.W.2d 419, 425). The court's "rulings in this regard are [also] reviewed under the abuse of discretion standard." *Machmuller*, 2001 S.D. 82, ¶ 14, 630 N.W.2d at 499.

B. *Pretty Weasel Waived the Ability to Challenge Hughes's Testimony on Appeal.*

"'[P]arties must object to specific court action and state the reason underlying their objection so that the circuit court has an opportunity to correct any error.'" *State v. Guzman,* 2022 S.D. 70, ¶ 26, –N.W.2d- (quoting *State v. Divan*, 2006 S.D. 105, ¶ 9, 724 N.W.2d 865, 869). "'To preserve issues for appellate review litigants must make known to the [circuit] courts the actions they seek to achieve or object to the actions of the court, giving their reasons.'" *State v. Bryant*, 2020 S.D. 49, ¶ 18, 948 N.W.2d 333, 338 (quoting *State v. Dufault*, 2001 S.D. 66, ¶ 7, 628 N.W.2d 755, 757). "Even issues over the denial of constitutional rights may be deemed waived by failure to take action to preserve the issues for appeal." *State v. Fifteen Impounded Cats*, 2010 S.D. 50, ¶ 10, 785 N.W.2d 272, 277 (citing *Schlenker v. South Dakota Dept. of Pub. Safety,* 318 N.W.2d 351, 353 (S.D. 1982)).

While it is true that Pretty Weasel objected to a few questions asked by the State and provided the reasoning as unnoticed 702, improper 702, he did not expand on why it was improper. To preserve an issue for appeal, the "'objection must be sufficiently specific to put the circuit court on notice of the alleged error so it has the opportunity to

correct it.'" *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 23, 913 N.W.2d 496, 503 (quoting *Halbersma v. Halbersma*, 2009 S.D. 98, ¶ 29, 775 N.W.2d 210, 220). But Pretty Weasel did not object when the State called Hughes as a witness. He did not ask the court for a *Daubert* hearing. He did not ask to voir dire the witness to see if she was properly qualified. These are all things Pretty Weasel now complains he was denied on appeal. When a party "raises a material dispute as to the admissibility of expert scientific evidence, the district court must hold an in limine hearing (a so-called *Daubert* hearing) to consider the conflicting evidence and make findings about the soundness and reliability of the methodology employed by the scientific experts." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 n.10 (9th Cir. 1995).

Because Pretty Weasel did not object to Hughes's testimony at the time of trial, he did not give the circuit court an opportunity to correct any potential error. Therefore, his argument is waived.

C. *Hughes Did Not Testify as an Expert Witness in Child Sexual Abuse.*

An expert's role is to "assist the trier of fact to understand the evidence or to determine a fact in issue." *State v. Buchholtz*, 2013 S.D. 96, ¶ 28, 841 N.W.2d 449, 459 (quoting SDCL 19-15-2[4] (Rule 702)). Here, the issue for the jury to determine was whether Pretty Weasel

[4] SDCL 19-15-2 (Rule 702) has been updated to SDCL 19-19-702. The statute language did not change in updating the citation.

sexually abused A.D. Hughes's testimony did not address this. She testified that A.D. had been sexual abused by her stepbrother, K.P., how A.D.'s behavior changed in terms of her appearance and hygiene, and whether there was a correlation between being spanked and the sexual abuse A.D. endured. JT 363-71.

Hughes was allowed to testify to A.D.'s mental health diagnosis, which was post-traumatic stress disorder (PTSD). But she never explained the diagnosis. She never said what caused the diagnosis. And ultimately being diagnosed with PTSD, does not go to the ultimate question before the jury. Additionally, the circuit court never declared Hughes was an expert witness, nor did the State ask the court to make such finding.

By way of comparison, the State did offer expert testimony from Tonkel. How the State treated Tonkel compared to Hughes is a stark contrast. It asked Tonkel several questions about her education and work history, continuing education, how many cases she has testified at, and if she has previously testified as an expert. But it did just the opposite with Hughes. The State spent minimal time questioning Hughes regarding her background asking only a handful of questions[5] in

[5] The State asked Hughes what her occupation was, how long she had worked as such, her educational background, and her professional background.
JT 363-64.

that regard. This further shows her testimony was not elicited as an expert.

Pretty Weasel argues the State failed to establish Hughes as an "expert in the area of child sexual abuse." PWB 21. By Pretty Weasel's own admission, the State never offered Hughes's testimony as expert testimony. He also argues the State failed to lay proper foundation "for Hughes to provide any type of expert opinions on the topics of child sexual abuse." PWB 21. Again, Hughes was not used as an expert witness in this case. And certainly not an expert in child sexual abuse. Instead, Tonkel was offered as the expert in child sexual abuse.

Because Hughes did not testify as an expert in child sexual abuse, Pretty Weasel's argument fails.

D. *Hughes's Testimony Was Not Prejudicial.*

Pretty Weasel claims he was prejudiced by Hughes's testimony. PWB 12-25. To prove prejudice, Pretty Weasel must show that "'in all probability, [the claimed error] produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'" *State v. Thomas*, 2019 S.D. 1, ¶ 27, 922 N.W.2d 9, 17 (quoting *State v. Mollman*, 2003 S.D. 150, ¶ 23, 674 N.W.2d 22, 29).

Hughes's testimony did not change the outcome of the trial. There was overwhelming evidence against Pretty Weasel. Father testified about a time around Halloween 2015 where Father was laying down, watching a movie with A.D., and A.D. reached over and grabbed his "privates." JT

291-93. A.D. giggled and said Pretty Weasel lets her touch him "there." JT 293. When Father asked A.D. what she was talking about, A.D. said Pretty Weasel "itched" her and "played with her panties." JT 293. Father called Mother and law enforcement. A.D. participated in a forensic interview, but she did not disclose abuse at that time. JT 139.

A.D. testified that Pretty Weasel digitally penetrated her and performed cunnilingus on her. JT 239, 248-49, 250-51. She said it started as Pretty Weasel giving her backrubs, but as she got older, the touching turned inappropriate. JT 235. At first, A.D. did not know Pretty Weasel's behavior was wrong, but around the age of seven or eight, she realized it was wrong. JT 236.

Sometimes A.D. would be sleeping, and she would be awoken by Pretty Weasel touching her. JT 239. The abuse took place in Mother and Pretty Weasel's bedroom, at night, while Mother was at work. JT 237, 330. Pretty Weasel would take off A.D.'s pants and underwear. JT 243. She would tell Pretty Weasel to stop and that she did not like what he was doing. JT 240. Pretty Weasel would apologize but would not stop the abuse. JT 247. One time, A.D. kicked her feet and elbowed Pretty Weasel and he stopped. JT 243.

A.D. described a time she wanted a pink llama scented stuffed animal toy. JT 248. Pretty Weasel asked her what "was in it for [him]." JT 248. Pretty Weasel said he wanted "to do it his way." JT 248. A.D. really wanted the toy, so she "let him do what he wanted." JT 248.

Pretty Weasel turned off the lights, closed the door, and took A.D.'s pants and underwear off. JT 248. He put her legs over his shoulders and put his head between her legs. JT 248. Pretty Weasel kissed A.D.'s ankle "all the way down[,]" and then moved to her other leg and did the same. JT 248-49. He then "kissed [A.D.'s] private area." JT 249.

A.D. said the abuse was constant and felt like it happened every day. JT 235, 238. One day, A.D. finally had enough, and she confided in Mother about Pretty Weasel sexually abusing her. JT 233.

The jury also heard Tonkel testify not only about the forensic interviews she conducted with A.D., but also about child abuse victims in general. She talked about how A.D. told her Pretty Weasel offered to show her his penis, "in case she was curious." JT 330. A.D. told her it felt like the abuse occurred every day. JT 330.

Tonkel also told the jury it was common for victims to not disclose abuse immediately. JT 333. She stated the closer a victim is to the offender, the longer it takes for the victim to disclose the abuse. JT 333. Sexual abuse is typically at the hands of a well-known individual, which can cause conflicting feelings. JT 334. The victim can experience fear, shame, or embarrassment. JT 334.

The forensic interview conducted by Tonkel was played at trial. EX 5. A.D. told Tonkel that Pretty Weasel offered to show her his penis "in case she was curious." EX 5. A.D. told Tonkel that Pretty Weasel

said “something really gross” to her. EX 5. He asked her if she touched his nipples, he could then touch hers. EX 5.

Throughout her testimony and the forensic interview, A.D. described Pretty Weasel’s behavior as “gross,” “upsetting,” and made her “uncomfortable.” *See* JT 224-87. EX 5. A.D. also told the jury about a text message Pretty Weasel sent apologizing to her. EX 4.

The jury also heard a recorded phone conversation that Mother had with Pretty Weasel. EX 1. Mother made the call with law enforcement present, and they recorded the call with an external recording device. JT 311-12. During the conversation Pretty Weasel told Mother he felt so guilty. EX 1. He told Mother he thought A.D. was her, when she asked why he was touching A.D. EX 1. Mother asked Pretty Weasel if he inappropriately touched A.D. He said that he “didn’t teach her to be a liar” and if “she says then . . . I feel guilty . . . ” EX 5. He told Mother he felt “so freaking guilty” and told Mother he thought A.D. was her. EX 1.

When Mother asked Pretty Weasel when he started sexually abusing A.D., he said he did not know, but that A.D. “was the one that started it.” EX 1. Pretty Weasel said he was giving A.D. a belly rub and she grabbed his hand and moved it higher up. EX 1. He stopped but A.D. “liked the belly rubs. And then she just pushed [Pretty Weasel’s] hand lower a couple of times.” EX 1. Pretty Weasel said the abuse happened maybe once a month, “if that.” EX 1.

In short, the evidence against Pretty Weasel, even without Hughes's testimony, was overwhelming. It cannot be shown that Pretty Weasel was prejudiced by Hughes's testimony that did not even address his actions.

E. *Pretty Weasel Opened the Door to Portions of Hughes's Testimony.*

Portions of Hughes's testimony Pretty Weasel now wishes to rebut was caused by his questioning of Hughes. Pretty Weasel's defense was A.D. fabricated being sexually abused by Pretty Weasel because she was upset that he spanked her. PWB 8. Pretty Weasel was the one who initially asked Hughes if A.D. told that A.D. did not like Pretty Weasel because he spanked her. JT 370. In redirect, the State asked Hughes to expound upon whether A.D. fabricated Pretty Weasel raping her because she was upset he spanked her. JT 370. Defendant claims this directly cuts against his defense and had no way to rebut the testimony. But Pretty Weasel opened the door to this testimony.

> The term 'opening the door' usually describes the waiver of an objection to the admission of evidence. It often occurs when one party introduces evidence that causes another party to introduce counterproof that would otherwise be inadmissible but for the first party's introduction of the subject matter. The concept of 'opening the door' represents an effort by courts to prevent one party from creating a misleading impression through the selective presentation of facts by allowing the other party to explain or contradict that impression through evidence that might otherwise be inadmissible.

Itin v. Ungar, 17 P.3d 129, 132, n.4 (Colo. 2000), *as corrected* (Nov. 28, 2000). "[W]hen a party leaves the trier of fact with a false or

misleading impression, the opposing party is entitled to counter with evidence to refute the impression created and cure the misleading advantage." *Figlioli v. R.J. Moreau Companies, Inc.*, 151 N.H. 618, 628, 866 A.2d 962, 971–72 (2005).

Here, Pretty Weasel asked Hughes if A.D. told her A.D. was upset because Pretty Weasel spanked her, to which she said yes. JT 370. This is misleading because Pretty Weasel argued A.D. was upset with him for spanking her so she fabricated the abuse. PWB 8. The State has a right to refute the defense, which it did by asking Hughes in redirect if there was a connection between the spanking and sexual abuse.

F. *Hughes Did Not Exceed the Scope of Testimony Allowed in Buchholtz.*

Pretty Weasel also argues Hughes testified beyond the scope allowed in *Buchholtz.* PWB 20-22. This Court held that an expert diagnosis of "child sexual abuse" given by a doctor was prejudicial because the "'medical diagnosis' acted in effect as independent evidence of the offense[]" but was merely an "endorsement of the [victim's] testimony". *Buchholtz*, 2013 S.D. 96, ¶ 30, 841 N.W.2d at 459. Because the defense's theory of the case was the victim was confused as to what had happened; the doctor's testimony solidified to the jury any question of whether the victim fabricated the abuse. *Buchholtz,* 2013 S.D. 96, ¶ 30 841 N.W.2d at 459.

But this case is distinguishable. Hughes testified that A.D. was diagnosed with (PTSD). She did not state the cause of A.D.'s PTSD. In fact, based on the line of questioning, the cause could be various things. Hughes said Pretty Weasel contacted her because his son, K.P., had sexually abused A.D. and he wanted Hughes to address the problem. JT 364-65. The State asked Hughes if A.D. exhibited lack of hygiene. JT 366. Hughes stated she had and stated A.D. felt if she was "unattractive and ugly" she would be safer, and people would "stay away from her." JT 366. Then, the following exchange took place:

> State: Okay. Did [Pretty Weasel] talk about [A.D.] as far as her truthfulness?
>
> Hughes: Yes, he did.
>
> Pretty Weasel: I'm going to object improper. It would be invading the province of the jury. It's one witness discussing the veracity of another witness.
>
> Court: What was your question, Mr. Fitzgerald?
>
> State: Did [Pretty Weasel] discuss [A.D.] being a truthful person.
>
> Court: Oh, sustained.
>
> State: What was your diagnosis of [A.D.]?
>
> Pretty Weasel: Objection 702, *State versus Buchholtz*.
>
> Court: Well, these records were subpoenaed, I believe, at your request and they were given to both parties and I'm going to allow it.
>
> State: What was your diagnosis?
>
> Hughes: Post-traumatic stress disorder.
>
> State: And what does that mean?
>
> Hughes: That is an event where an individual fears being harmed or the harm of someone else and, as a result of that

> fear, then they have different behaviors and actions that continue to reproduce fear and the need to protect.
>
> State: Is she being treated for that now?
>
> Hughes: Yes.
>
> State: By you?
>
> Hughes: Yes.
>
> State: Did you see things that indicated to you that there was something more going on here than what had happened at the hands of [K.P.]?
>
> Pretty Weasel: Objection. Calls for speculation, improper 702, unnoticed 702.
>
> Court: Sustained.

JT 366-68. The State then inquired about how the therapy sessions were conducted and if the parents were involved. JT 368.

By telling the jury A.D. was diagnosed with PTSD, Hughes did not invade the province of the jury. She did not vouch for A.D.'s credibility. She did not say Pretty Weasel raped A.D. She merely stated A.D.'s diagnosis. The cause, based on the record, is still unknown. It could be from Pretty Weasel sexually abusing her. It could also be K.P. sexually abusing her. It could have been from Pretty Wesel spanking her. It could be a litany of other things not even mentioned during the trial. For Pretty Weasel to say this diagnosis was so damning, it changed the outcome of the trial is absurd. In fact, Pretty Weasel concedes that is "arguable this diagnosis could also relate to A.D.'s siblings, who had sexual touched A.D." PWB 22, n.3.

CONCLUSION

Because Pretty Weasel did not object to Hughes's testimony at trial, he waived this issue on appeal. Nor did Hughes testify as an expert in child sexual abuse, so her testimony could not be improper expert witness testimony. Lastly, Hughes's testimony was not prejudicial as the evidence against Pretty Weasel was overwhelming.

The State respectfully requests that Defendant's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 4,032 words.

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

Dated this 23rd day of January 2023.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 23, 2023, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Vandon Joseph Pretty Weasel* was served electronically through Odyssey File and Serve on Ellery Grey at ellery@greyeisenbranlaw.com.

/s/ Erin E. Handke
Erin E. Handke
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

VANDON JOSEPH PRETTY WEASEL,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. COMER

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL WAS FILED August 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

VANDON JOSEPH PRETTY WEASEL,

Defendant and Appellant.

PRELIMINARY STATEMENT

Appellant's Reply Brief will utilize the same abbreviations as were used in the Appellant's Brief. Additionally, the State's Appellee's Brief will be cited as "SB" for State's Brief followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

Mr. Pretty Weasel reasserts the Jurisdictional Statement from his Appellant's Brief.

STATEMENT OF THE LEGAL ISSUES

1. The circuit court violated Mr. Pretty Weasel's right to a fair trial and related statutory rights when it permitted the State to submit unnoticed expert testimony from the alleged victim's counselor.

   The circuit court held that the defense was on notice of these expert opinions given that the defense had subpoenaed the counselor's records. (See, JT Vol. 3 at p. 367).

   State v. Krebs, 2006 S.D. 43, 714 N.W.2d 91.
   Papke v. Harbert, 2007 S.D. 87, 738 N.W.2d 510.
   Kaiser v. University Physician's Clinic, 2006 S.D. 95, 724 N.W.2d 186.

2. The circuit court improperly permitted expert opinions that bolstered the testimony of the alleged victim.

The circuit court simply overruled the defense objection to these expert opinions without providing any analysis.

State v. Buchholtz, 2013 S.D. 96, 841 N.W.2d 449.
United States v. Whitted, 11 F.3d 782 (8th Cir.1993).
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

SUMMARY

Mr. Pretty Weasel requests that this Court review two separate but related issues on appeal. First, Mr. Pretty Weasel submits that the State surprised the defense at trial by presenting unnoticed expert opinions from AD's counselor. Even though AD's counselor was not on the State's witness list, the counselor was permitted to tell the jury that she had diagnosed AD with post-traumatic stress disorder. She also provided the expert opinion that AD felt safer from abuse if she remained unattractive and "hideous." (JT Vol. 3 at p. 366). The defense was unaware of these opinions until the counselor was testifying before the jury.

In addition, part of the defense's theory of the case was that AD had a motive to lie about the sexual abuse allegations because she was unhappy with Mr. Pretty Weasel for spanking her. Over the defense's objection, the counselor explained to the jury that AD not liking her stepfather for being spanked was unrelated to her later allegations that she had been sexually assaulted by him. "I do not see the two incidents connecting at all." (Id. at p. 370). The defense maintains that this, as well as other portions of her testimony, only served to improperly bolster AD's credibility.

STATEMENT OF THE CASE AND FACTS

Mr. Pretty Weasel reasserts his Statement of the Case and Facts as presented in his Appellant's Brief.

ARGUMENTS

1. **The circuit court violated Mr. Pretty Weasel's right to a fair trial and related statutory rights when it permitted the State to submit unnoticed expert testimony from the alleged victim's counselor.**

Standard of Review: "[This Court] presume[s] the evidentiary rulings made by a trial court are correct, and review[s] those rulings under an abuse of discretion standard." *State v. Krebs*, 2006 S.D. 43, ¶ 19, 714 N.W.2d 91, 99.

Response to State's Arguments. The State provides a number of arguments against Mr. Pretty Weasel's position. The State also takes both of Mr. Pretty Weasel's separate issues and combines them into one argument. (SB 5). All though Mr. Pretty Weasel has presented two distinct issues, this brief will address the State's arguments in the order presented in its Appellee's Brief.

State's Argument of Waiver. Although the State acknowledges that Mr. Pretty Weasel objected to the testimony of Hughes by citing Rule 702 and informing the trial court that the testimony was both "improper" and "unnoticed," the State maintains that Mr. Pretty Weasel's trial objections were not specific enough to persevere the objection for this Court's review. The State goes on to argue that in order to preserve the issues, Mr. Pretty Weasel was required to object when Hughes was first called as a witness and to request a *Daubert* hearing and/or request to voir dire Hughes. (SB 7-8).

The standard for preserving trial error is found at SDCL 19-19-103. The relevant portion of the statute reads:

(a) Preserving a claim of error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
(1) If the ruling admits evidence, a party, on the record:
(A) Timely objects or moves to strike; and
(B) States the specific ground, unless it was apparent from the context;

Nothing in the plain language of SDCL 19-19-103 requires a party who has raised an objection to also request permission to voir dire a witness and/or to request a separate *Daubert* hearing. To the contrary, the statute only requires the party claiming error to "timely object" and state the "specific ground."

A similar waiver argument was raised by the State in *State v. Blem,* S.D. 2000 69, ¶38, 610 N.W.2d 803, 811 (S.D. 2000). In *Blem*, the defendant was on trial for first degree manslaughter. At trial, the State surprised the defense with a blood splatter expert. The defense objected on the grounds that the state had violated the trial court's discovery order related to disclosing expert opinions. On appeal, the state argued that the defendant had waived the objection given that the defense "1) did not make immediate objections to [the expert's] testimony, (2) did not ask for a continuing objection or for an immediate mistrial, and (3) did not ask for a *Daubert* hearing." *Id.* at 38. In response to this argument this Court simply wrote, "We disagree. The record indicates that Blem's attorney objected and preserved the issue for appeal." *Id.*

In this matter, Mr. Pretty Weasel specifically stated the legal grounds for his objections, just as in *Blem supra*. Here, the defense cited "chapter and verse" to Rule of Evidence 702 and informed the trial court that the evidence was "improper" and that it was also "unnoticed." These are the two issues that Mr. Pretty Weasel now brings on appeal.

While it is always possible with hindsight to consider the possibility of having made longer or more detailed objections, the rules of evidence do not require the perfect objection. Based upon the objections made here, the trial court was clearly in a position to

rule on the two questions of whether Hughes' testimony was improper under Rule 702 and whether the State had provided proper notice of her opinions. With all due respect, citing a specific rule of evidence is about as clear an objection that a party can make without making a "speaking objection." Just as in *Blem*, this Court should find that citing to a specific rule of evidence complies with SDCL 19-19-103 and find that the issues are preserved for this Court's review.

Hughes Did Not Testify as an Expert Witness. The State also argues that "...Hughes was not used as an expert witness in this case. And certainly, not an expert in child sexual abuse." (SB 10). Mr. Pretty Weasel respectfully points to the record of her testimony.

While she was testifying, over defense objection, the State asked Hughes about AD's lack of hygiene, "And what was that indicative of in your profession?" (JT Vol 3 at p. 366). Additionally, the State asked Hughes, "What was your diagnosis [of AD]?" (Id. at p. 367). The State also asked Hughes about AD's being angry with Mr. Pretty Weasel over the spanking incident and Hughes was permitted to inform the jury that AD's anger over being spanked was not connected to her allegations of sexual abuse. (Id. at p. 370).

Hughes is not making fact claims in her testimony. To the contrary, she is diagnosing AD and she is giving her opinions, which are based on her experience as a counselor, as to what AD's behaviors and statements meant. This is clearly expert testimony.

The State points out that the trial court never declared Hughes to be an expert. (SB 9). However, the State fails to cite any authority for the proposition that witness opinions only become expert opinions if a trial court declares the witness to be an expert.

What the jury heard was a counselor who diagnosed AD and then explained and interpreted what AD's behaviors and words meant. This is clearly expert testimony.

Perhaps more importantly, the State is taking a different position on appeal then it did at trial. The record clearly established that the State's trial counsel intended Hughes to be an expert witness. When defense counsel objected to Hughes' testimony under Rule 702, the State did not respond by making an argument that Hughes was only a fact witness. Rather, the State asked Hughes, "And what was that indicative of in your profession?" (JT Vol 3 at p. 366). "What was your diagnosis [of AD]?" (Id. at p. 367). Under the rules of evidence, these are questions that can only be asked of experts. The State on appeal should not be permitted to take a different position then it did a trial. *See, United States v. Jereb*, 882 F.3d 1325 (10th Cir. 2018) (invited error doctrine precludes a party from taking one position and then a contrary position on appeal), *United States v. LaHue*, 261 F.3d 993 (10th Cir. 2001) (invited error doctrine prevent defendants from arguing opposite position on appeal).

Hughes Testimony Was Not Prejudicial. The State maintains that Hughes' testimony was not prejudicial and that it did not change the outcome of the trial. (SB 10). However, for some reason, trial counsel for the State thought it was important to call Hughes as a surprise witness. Additionally, the State's argument ignores the reality of the impact that an expert witness can have on a jury. Mr. Pretty Weasel submits that the prejudice that occurred in this case is the same that occurred in *Buchholtz,* cited and discussed extensively in the Appellant's Brief. AD's credibility is central to this case. The State was able to present a surprise expert that testified, in effect, about the credibility of AD. At the risk of being redundant, in *Buchholtz*, this Court was careful to lay out the grounds for prejudice. This Court wrote,

> Yet, in the absence of any physical evidence of rape, Dr. Kertz's opinion put to rest, with an air of medical certainty, any question about whether [the alleged victim] had somehow imagined or fabricated what happened with Buchholtz.

Id. at ¶30, 459-60.

In this case, the same prejudicial impact occurred. The State did not present any physical evidence that AD was sexually abused. However, the State was able to present evidence with "an air of medical certainty" that AD did not fabricate her claims or have a motive to do so.

In addition, and unlike the defendant in *Buchholtz*, here the defense was taken by surprise and was not able to fully confront the expert testimony presented by Hughes. This means that the prejudicial impact of an expert opinion that "puts to rest, with an air of medical certainty," the credibility of an alleged victim, was not fully challenged or submitted to the full test of cross-examination. The prejudice here is very similar to the prejudice that this Court found in the civil case of *Papke v. Harbert,* 2007 S.D. 87, ¶ 56, 738 N.W.2d 510, 529. In *Papke,* this Court reversed a jury's verdict after one of the parties was surprised by expert testimony on the issue of causation of damages. This Court found that the surprise that took place warranted a new trial given that the opposing side was unable to prepare to meet this testimony. The Court noted that the surprised party "was unable to conduct any investigation, prepare any effective cross-examination, or retain an expert to disprove or counter that testimony in rebuttal." *Papke* at ¶ 53, 528.

The prejudice here is that the convictions are based, at least in part, on expert testimony that addresses the credibility of the alleged victim, and that expert testimony has not been fully challenged and confronted. Had the defense had the opportunity to prepare to confront this testimony, the result of the case may well have been different. This Court

did not permit a civil verdict to stand when it was based upon surprise expert testimony. *Id.* This Court should apply the same principles and analysis in the context of a criminal conviction as well.

The Door Was Opened to Portions of Hughes' Testimony. Does asking a witness a fact question open the door to undisclosed expert opinions? In this matter, the defense took the position that AD's being mad at her father gave her motive to fabricate her allegations of sexual abuse. The defense did not just make this argument up from thin air. This argument was based on the fact that AD had told her counselor that she was mad at Mr. Pretty Weasel for having spanked her. This argument could hardly come as a surprise to the State given the nature of the discovery in this case. Both sides had access to Hughes' records.

This Court has recently addressed the open-door doctrine in *State v. Nohava*. This Court noted that the open-door doctrine is not without limits and wrote,

> The gist of the open-door doctrine is proportionality and fairness. When the opponent's response does not directly contradict the evidence previously received or goes beyond the necessity of removing prejudice in the interest of fairness, it should not be admitted.
>
> 2021 S.D. 34, ¶ 19, 960 N.W.2d 844, 850-51 (internal citation omitted).

The State argues that the door to Hughes' testimony was, at least in part, opened on the grounds that the defense had mislead the jury about the fact that AD had claimed to be mad about being spanked. The State goes on to argue that based on the defense presenting the jury with this "misleading" evidence, the State had a "right to refute the defense, which it did by asking Hughes in redirect if there was a connection between the spanking and the sexual abuse." (SB 14-15).

The record establishes that the defense did not mislead the jury. According to Hughes' records, AD did claim to be mad for having been spanked by Mr. Pretty Weasel. The defense never claimed that AD *confessed* to Hughes that she had fabricated her claims of sexual abuse to Hughes. To be clear, the defense claimed that AD had *motive* to fabricate her claims of sexual abuse because she had been angry with Mr. Pretty Weasel.

The fundamental flaw with the State's argument is that it assumes, as true, that AD's claims of being angry about being spanked are unrelated to her claims of sexual abuse. The defense maintained that the jury could interpret AD's anger about being spanked as motive. The State disagreed. The jury decides how to interpret the evidence. The defense did not misstate the facts or mislead the jury by leaving out relevant facts. Simply because the State disagrees with an argument does not mean the defense is misleading the jury.

If the State wanted to refute the defense's theory about AD's motive to lie, the proper method would have been to recall AD to the stand so that she could explain her motives and whether her being spanked had anything to do with her claims of sexual abuse. AD is the one witness who can properly testify about her motive. A lay fact witness is not permitted to interpret the meaning of someone else's past statements. See, Rule 701. A lay witness would not be able to lay the foundation for that type of opinion. See, Rule 602. Additionally, the defense is not aware of any legal authority that permits an expert witness to testify about an alleged victim's specific motives as they relate to specific past statements.

Even if the defense had somehow misled the jury, the door cannot be opened to expert testimony that does not comply with the rules of evidence. Such a response would not be proportional and would go "beyond the necessity of removing prejudice." *Id.* A reading of this Court's precedent on this matter seems to indicate that the open-door

doctrine permits facts into evidence that might not otherwise be admissible to rebut facts that leave an unfair impression. But nothing in the open-door doctrine seems to indicate that a party is permitted to submit improper expert testimony in response to facts. *Id.*

Hughes Did Not Exceed the Scope of Testimony Allowed in Bucchultz. The State argues that Hughes' expert testimony did not exceed the scope of Rule 702 or this Court's ruling in *State v. Buchholtz*. *Buchholtz* places limits on an expert testifying to ultimate credibility of an alleged victim in a sexual abuse case.

In this matter, the trial court permitted Hughes to testify that in her expert opinion, "...[AD] felt that the more unattractive and ugly and hideous...she looked...people would stay away from her and she was safer." (Id. at p. 366). The State was also able to present surprise testimony that AD suffered from post-traumatic stress disorder. This diagnosis left the jury with the strong impression that AD had indeed undergone some type of traumatic experience, perhaps the sexual abuse that she was claiming against her stepfather. Hughes was also permitted to testify that AD's anger with Mr. Pretty Weasel was, in her professional opinion, unrelated to AD's claims of sexual abuse.

The opinions that Hughes provided to the jury are beyond what this Court permitted in *Buchholtz*. In the context of AD's sexual allegations against her stepfather, Hughes told the jury that she diagnosed AD with post-traumatic stress disorder. Although she did not say the words, "child sexual abuse," (the diagnosis this Court prohibited in *Buchholtz*), taken in context, the implication of Hughes' diagnosis is clear. She was telling the jury that she believed AD's claims that she was sexually abused by Mr. Pretty Weasel. The State argues that Hughes' diagnosis was unclear and perhaps it was related to allegations that AD was abused by her stepbrother. (SB 17). The defense maintains that a fair reading of Hughes' testimony establishes that this was not the case. Moreover, if the

diagnosis was only based on AD's stepbrother's sexual abuse, Hughes' diagnosis would not be relevant to Mr. Pretty Weasel's case. The reason the trial prosecutor submitted the evidence concerning AD's traumatic stress disorder diagnosis was to imply that AD suffered traumatic stress at the hands of Mr. Pretty Weasel.

Importantly, the State did nothing to further explain this diagnosis or to give any other reason for it, other than sexual abuse[1]. In the context of this record, through her diagnosis, Hughes was telling the jury that AD's claims of sexual abuse were credible.

Hughes also assessed AD's credibility by giving her expert opinion that AD's being angry at Mr. Pretty Weasel was not connected to her allegations of sexual abuse. The jury is entrusted with determining if a witness has a motive to fabricate an allegation. When an alleged victim's treating counselor explains that a witness being angry with someone is unconnected to an allegation of sexual abuse, the expert is simply telling the jury that anger is not a motive to fabricate. This is just another means of telling the jury what to believe. As this Court noted in *Buchholtz*, this type of testimony is not helpful to the jury.

Prejudicial Surprise. Even if this Court were to find that Hughes' testimony was proper under Rule 702, the fact remains, the defense was unfairly surprised by this evidence. The defense should have had the opportunity to prepare to meet this expert evidence. In *State v. Blem*, this Court held,

> Once an expert opinion is known to the State and the State determines that it will solicit that opinion in court, it must disclose the opinion to the defense regardless of the number of days or hours before the witness is scheduled to testify.
>
> 2000 S.D. 69 ¶ 40, 610 N.W.2d 803, 811.

[1] Although arguable, this diagnosis could also relate to one of AD's siblings, who had sexually touched AD. However, the defense maintains that when considering the context of Hughes' testimony, she was implicitly referring to Mr. Pretty Weasel.

The central issue at this trial was AD's credibility. The State was able to present expert testimony that helped to bolster AD's testimony and to explain away a theory of the defense. Hughes was even permitted to put her expert stamp of approval on AD's claims about wanting to be ugly to avoid being sexually abused. The trial prosecutor asked, "And what was that indicative of in your profession?" Hughes responded, "...she felt the more unattractive and ugly and hideous...her behaviors and how she looked, people would stay away from her and she was safer." (JT Vol. 3 at p. 366). Without notice, the defense was unable to properly prepare and to effectively cross-examine Hughes about this central issue. The defense was unable to conduct any investigation, prepare an effective cross-examination, or retain an expert to disprove or counter that testimony in rebuttal.

Had the defense been given advance notice of Hughes' expert opinions, it would have requested the disclosure of the foundation of her opinions in order to prepare to challenge those opinions. The one opinion that perhaps stands out the most is whether any medical journals or research supports Hughes' claims that a child's anger over being spanked does not provide motive to fabricate a false claim. Importantly, the defense should not be called upon to ask these questions for the first time in front of a jury. Under the rules of discovery, and the trial court's rulings, the defense should have had an opportunity to prepare to meet this testimony instead of being ambushed.

2. The circuit court improperly permitted expert opinions that bolstered the testimony of the alleged victim.

Structurally, the State made its arguments against this issue under the argument presented above and Mr. Pretty Weasel's responses are contained there as well. Based upon those arguments, Mr. Pretty Weasel maintains that the circuit court did permit impermissible expert opinions that prejudiced his right to a fair trial.

CONCLUSION

The State's arguments to the contrary notwithstanding, the jury found Mr. Pretty Weasel guilty only after they heard a surprise expert testify about AD's diagnosis and that, in effect, AD's anger over being spanked was not a motive for her to fabricate her claims of sexual abuse. This type of opinion testimony only served to improperly bolster the credibility of AD. Even if this type of evidence was permissible, the defense should have had notice and the opportunity to prepare to meet it. The rules require the State to provide notice and it failed to do so.

Mr. Pretty Weasel requests that this Court enter an Order reversing and remanding this action for a new trial where he can be prepared to meet the witnesses against him.

REQUEST FOR ORAL ARGUMENT

Mr. Pretty Weasel respectfully requests oral argument on all issues.

Dated this 21st day of February 2023.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

VANDON JOSEPH PRETTY WEASEL,

Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Reply Brief is 13 pages in length. It is typed in proportionally spaced typeface Baskerville 12 point. The word processor used to prepare this brief indicates there are a total of 3, 822 words in the body of the brief.

Dated this 21st day of February 2023.

GREY &
EISENBRAUN LAW

Ellery Grey
Attorney for Appellant

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30087

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

VANDON JOSEPH PRETTY WEASEL,

Defendant and Appellant.

The undersigned hereby certifies that he served a true and correct copy of the Appellant's Reply Brief upon the persons herein next designated, on the date shown, by e-service through the State of South Dakota e-filing system, Odyssey, to-wit:

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The undersigned further certifies that one paper copy of the Appellant's Reply Brief was sent by mailing said copies by United States Mail, first-class, postage prepaid, in envelopes addressed to said addresses; to wit.:

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Which addresses are the last known addresses of the addressees known to the subscriber.

Dated this 21st day of February 2023.

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