

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

STATE OF SOUTH DAKOTA,

Appeal No. 30893

Plaintiff/Appellee,

vs.

CLIFFORD WILLIAM OLSON,

Defendant/Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Julia M. Dvorak, Presiding

AMENDED APPELLANT'S BRIEF

Notice of Appeal was filed on November 10, 2024

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JURISDICTIONAL STATEMENT¹

This is an appeal from three Judgments of Convictions, entered and filed on November 5, 2024, by the Honorable Julia M. Dvorak, Fifth Judicial Circuit Court. SR at 541-546. Notice of Appeal was filed by Defendant Clifford William Olson (hereinafter referred to as “Defendant”), on November 8, 2024. SR at 549. This Court has jurisdiction pursuant to SDCL 15-26A-3.

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED THE STATE’S MOTION IN LIMINE BARRING DEFENDANT FROM PRESENTING EVIDENCE OF HIS BEING THE VICTIM OF SEXUAL ASSAULT AS A CHILD.

The trial court granted the State’s Motion in Limine.

State v. Van Der Weide, 2024 S.D. 18, ¶53 5 N.W.3d 577, 592.

SDCL 19-19-401
SDCL 19-19-402
SDCL 19-19-403

STATEMENT OF THE CASE

On January 16, 2024, the Brown County grand jury returned a three-count indictment charging Defendant with Count 1 - Rape in the Second Degree in violation of SDCL 22-22-1(2), Count 2 - Simple Assault- domestic in violation of

¹ References to the Settled Record will be made as “SR at ___” with the appropriate page number inserted. References to the trial transcript will be made as “TT at ___” with the appropriate page number inserted. References to other transcripts will be denoted by “HT at ___” for Hearing transcript or “ST at ___” for Sentencing transcript, date of the proceeding and the appropriate page number. Defendant and Appellant, Clifford Olson, is referred to as “Defendant.”

SDCL 22-18-1(1), 25-10-1, and Count 3 - Simple Assault-Domestic in violation of SDCL 22-18-1(4), 25-10-1. SR 23.

A jury trial began on August 12, 2024. *See generally* TT. The Honorable Julia Dvorak, Circuit Court Judge, presided over the matter. *See generally* TT. On August 13, 2024, the jury returned guilty verdicts on all three counts. TT at 160, 6-17.

On November 1, 2024, Defendant was sentenced to 50 years in the State penitentiary with 25 years being suspended for Count 1 in the indictment. ST November 1, 2024, at 40, 23-25. As to counts two and three, Defendant was sentenced to one year as to each count ran consecutively with Count 1. *Id.*, 14-20. Judgments of Conviction were entered on November 5, 2024. SR 541-545.

STATEMENT OF FACTS

Defendant married Laura Olson on July 3, 2022. TT at 22, 12-14. The couple met in recovery while attending Narcotics Anonymous meetings. TT at 75, 8-9. The couple lived together until Laura left the marital home in October of 2023. TT at 22, 19. Laura left the home due to Defendant's relapse and active drug use. TT at 22, 20-22. Laura moved to another apartment complex in town and for the next several months the couple remained married but lived apart. TT at 23, 2. During the months of separation the couple remained in contact with one another, would meet for dates, and on one occasion engaged in marital intimacy. TT at 29, 22-24; TT at 30, 1-7.

Early on the Morning of January 4, 2024, Defendant called and texted Laura several times. TT at 24, 5-7. Laura, who was getting ready for work, was unaware of the missed calls and messages. *Id.* While getting ready for work Laura heard knocking on her door but did not answer until she got dressed. TT at 24, 10-15. After getting dressed, Laura answered the door and learned it was Defendant who was knocking. TT at 24, 15. Laura let Defendant into the apartment. *Id.* Once in the apartment the couple began to argue. TT at 24, 16-20.

At trial conflicting testimony was presented as to what happened next. Laura testified that during the course of the argument, Defendant attempted to kiss her, but she pulled away. TT at 25, 7-9. He then pushed her into her bedroom and then onto the bed. *Id.*, 10-12. He flipped her over and removed her pants and underwear. *Id.*, 13-16. Defendant removed his pants and forced himself inside of her but was unable to maintain an erection. *Id.*, 16-17. Laura testified that she fought Defendant and was screaming. TT at 25, 14-15. She also noted that at one point Defendant covered her mouth. *Id.*, 18-19. Eventually Defendant became frustrated, stopped and stated, “this is bullshit I shouldn’t have to fight my Laura.” *Id.*, 20-23. Following this Defendant went to the bathroom and Laura got dressed. *Id.*, 23-25.

Defendant, testifying on his own behalf, told a similar story albeit with a few key differences. Defendant testified he tried to kiss Laura however she pulled away and smiled and giggled at him. TT at 102, 22-25. He then led her into the bedroom. TT at 103, 6. He got on top of her and pulled his pants down. *Id.*, 14-17.

Defendant struggled to take Laura's pants off, so he told her to take them down. Id, 23-25. She pulled them down part way and he pulled them the rest of the way down. Id, TT at 104, 1. Defendant testified that he attempted to have sex with Laura but could not as he could not achieve an erection. TT at 104, 2-5. He also noted that at one point he did cover Laura's mouth, however he would remove his hand throughout. TT at 103, 21-22. Defendant got off of Laura, knelt by the bed and said, "this is bullshit." Id, 8-9. Defendant got up and went to the bathroom. Id, 14.

While both Laura and Defendant were getting dressed, they heard loud knocking on the apartment door. The knocking was Sheriff's Deputy Erin Spencer who was dispatched to the apartment after a neighbor had called 911 due to over hearing Defendant's argument with Laura. TT at 33, 2-17. Following Law Enforcement's investigation, the decision was made to arrest Defendant for Rape and Simple Assault.

On January 10, 2024, Defendant was indicted on one count of Rape in the Second Degree in violation of SDCL 22-22-1(2), and two counts of Simple Assault-Domestic in Violation of SDCL 22-18-1(1) & 22-18-1(4). Defendant was arraigned on January 29, 2024 and entered not guilty pleas. *See generally* HT January 29, 2024. A two-day jury trial commenced on August 12, 2024. During opening statements Defense counsel² set forth their theory of the case. TT at 11.

² Appellate counsel did not represent defendant in the trial of this matter.

The theory which was explained to the jury was that Defendant and his wife included fantasies and role playing in their marital intimacy. TT at 11, 16-20.

One of these fantasies was a rape fantasy wherein Defendant would come into the home and make love to Laura in what would appear to be against her will. TT at 11, 21-25. Defense counsel explained that the couple employed a safe word and a safe gesture to communicate to the other “no” or “stop”. TT at 12, 1-9. Defense counsel continued stating that in the couple’s relationship “no did not mean no” and “stop did not mean stop” rather their safe word indicated no or stop. *Id.*

Defense Counsel explained that prior to the morning of January 4 the couple had not engaged in the rape fantasy. TT at 15, 12-16. However, Defendant decided to indulge Laura’s fantasy on that morning in an effort to save their marriage. *Id.* The reason, defense counsel explained, that Defendant had never before attempted this fantasy with his Wife was that he was raped as a young boy. TT at 16, 1-2.

Following the first day of trial the State filed a motion in limine seeking to keep out any reference to Defendant being a victim of sexual assault. SR at 247. In its motion the State argued that allowing in evidence of Defendant being the victim of sexual assault would “lead to confusing the issues, misleading the jury, and wasting time.” *Id.* Following the close of State’s evidence a hearing was held, outside the presence of the jury, on the Motion in Limine. TT at 70-73. During the hearing the State noted that prior to opening statements it had no knowledge of Defendant being the victim of sexual assault as a child. TT at 71, 1-

5. The State argued that the evidence is irrelevant and that it seemed to be an effort to elicit sympathy from the jury. TT at 71, 10-14. Defense Counsel responded that the evidence was relevant to explain why Defendant had not carried out Laura's rape fantasy previously. TT at 71, 17-25. Ultimately, the court granted the State's motion and excluded Defendant from testifying about his being the victim of sexual assault and why he was opposed to carrying out the rape fantasy. TT at 72, 22-25; TT at 73, 1-3.

Defendant testified on his own behalf in a narrative fashion. TT at 74, 16-18. Defendant explained to the jury that on the night of he and Laura's honeymoon they developed a "safe word" to be used in the context of their marital intimacy. TT at 93, 1-4. During cross-examination Defendant would clarify that the safe word was "pineapple." TT at 111, 17-18. Defendant testified that during the marriage Laura had expressed that she had a rape fantasy. TT at 93, 8-9. Defendant explained that the fantasy involved him coming in, holding down Laura, and engaging in sex in a way that appeared to be a rape. *Id.*, 11-15. Defendant testified that although Laura would be resisting and saying no, she would be consenting. *Id.*

During Defense Counsel's cross-examination of Laura, she denied engaging in role playing or intimate fantasies with Defendant, she denied expressing a rape fantasy to Defendant, denied having a safe word or ever using a safe word in the context of her marriage to Defendant. TT at 30, 8-25.

The jury returned guilty verdicts as to all three counts in the indictment. A sentencing hearing took place on November 1, 2024. See generally ST November 1, 2024. As to count 1 Defendant was sentenced to 40 years in the State Penitentiary with 25 years suspended. ST at 40, 23-25. As to counts 2 & 3 Defendant was sentenced to one year in jail to be run concurrently with count 1. ST at 40, 14-20.

STANDARD OF REVIEW

“‘[A] trial court's evidentiary rulings are presumed to be correct.’ We review evidentiary rulings for abuse of discretion.” *State v. Bausch*, 2017 S.D. ¶12 1, 889 N.W.2d 404, 408 (quoting *State v. Crawford*, 2007 S.D. 20, ¶ 13, 729 N.W.2d 346, 349 (quoting *State v. Boston*, 2003 S.D. 71, ¶ 14, 665 N.W.2d 100, 105)). “This applies as well to rulings on motions in limine.” *Id* (quoting *Ferebee v. Hobart*, 2009 S.D. 102, ¶ 12, 776 N.W.2d 58, 62). “An abuse of discretion is a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.” *Id* (quoting *State v. Hayes*, 2014 S.D. 72, ¶ 22, 855 N.W.2d 668, 675 (quoting *Schieffer v. Schieffer*, 2013 S.D. 11, ¶ 14, 826 N.W.2d 627, 633)).

“Under this standard, ‘not only must error be demonstrated, but it must also be shown to be prejudicial error.’” *Id* (quoting *State v. Perovich*, 2001 S.D. 96, ¶ 11, 632 N.W.2d 12, 15–16 (quoting *State ex rel. Dep't of Transp. v. Spiry*, 1996 S.D. 14, ¶ 11, 543 N.W.2d 260, 263)). “Error is prejudicial when, in all probability ... it produced some effect upon the final

result and affected rights of the party assigning it.” Id at 408-409 (quoting *State v. Hauge*, 2013 S.D. 26, ¶ 24, 829 N.W.2d 145, 152 (quoting *State v. Jucht*, 2012 S.D. 66, ¶ 47, 821 N.W.2d 629, 640)).

ARGUMENT AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED THE STATE’S MOTION IN LIMINE BARRING DEFENDANT FROM PRESENTING EVIDENCE OF HIS BEING THE VICTIM OF SEXUAL ASSAULT AS A CHILD.

“All relevant evidence is admissible... [e]vidence which is not relevant is not admissible.” SDCL § 19-19-402. “Evidence is relevant if: (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact is of consequence in determining the action.” SDCL § 19-19-401. However, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” SDCL § 19-19-403.

First, it should be noted that the court did not provide a reason for granting the State’s motion in limine. In ruling on the motion, the court simply stated that “[t]he court is going to grant the motion in limine such that Mr. Olson cannot testify as to his, his ever being a victim of sexual assault and/or his sisters or, frankly, anyone else. Why he would be opposed to any rape fantasy is not going to be allowed in.” TT at 72-73, 22-25, 1. There is no indication in the record whether the court found the evidence to be irrelevant pursuant to SDCL § 19-19-

401 or if the court found the evidence relevant but chose to exclude pursuant to the balancing test of SDCL § 19-19-403. Both issues will be addressed in turn below.

A. Defendant's proffered testimony was relevant.

“Evidence, to be relevant to an inquiry, *need not conclusively prove the ultimate fact in issue*, but only have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v. Hankins*, 2022 S.D. 67, ¶26 982 N.W.2d 21, 31 (quoting *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 46, 764 N.W.2d 474, 488 (additional citations omitted)). “The law favors admitting relevant evidence no matter how slight its probative value.” *State v. Kihega*, 2017 S.D. 58, ¶22 902 N.W.2d 517, 524 (quoting *State v. Bunger*, 2001 S.D. 116, ¶ 11, 633 N.W.2d 606, 609). The defense in this case was that on the morning of January 4 Defendant decided to indulge his wife's rape fantasy, which the couple had never engaged in before, in a last-ditch effort to save his failing marriage.

Had the court allowed it, Defendant would have testified that the reason the couple had not engaged in this fantasy before was due to the traumas he endured as a child. The evidence is relevant as it explains the reason why the couple had not engaged in this fantasy prior. Allowing The Defendant to simply state he was against the fantasy, which the court allowed in this case, did not provide the jury with the necessary context that the proffered testimony would have. This evidence makes the fact that the couple had not previously engaged in this fantasy more

probable. The fact they had not engaged in the fantasy previously is of consequence because it goes to the heart of Defendant's defense.

B. The probative value of the evidence was not substantially outweighed by the dangers of unfair prejudice.

"When evidence has been deemed relevant, 'the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 'substantially' outweigh probative value.'" *State v. Shelton*, 2021 S.D. 22, ¶17 958 N.W.2d 721, 727 (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 38, 693 N.W.2d 685, 698 (quoting *State v. Wright*, 1999 S.D. 50, ¶ 14, 593 N.W.2d 792, 799)). "The admission of ... evidence is favored under [Rule 403], and the judicial power to exclude such evidence should be used sparingly." *Kihega* at ¶22. (quoting *Supreme Pork, Inc.*, 2009 S.D. 20, ¶30 764 N.W.2d 474, 484). "Prejudice 'refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means.'" *Shelton*, 2021 S.D. 22, ¶17 958 N.W.2d 721, 727 (citing *State v. Birdshead*, 2015 S.D. 77, ¶ 63, 871 N.W.2d 62, 83 (quoting *State v. Moeller*, 1996 S.D. 60, ¶ 38, 548 N.W.2d 465, 478)).

The evidence the State sought to exclude was being proffered to explain why Defendant had not previously engaged in his Laura's alleged rape fantasy. This evidence is not so prejudicial as to persuade the jury by illegitimate means. Defendant was not attempting to convince the jury that his status as a victim of childhood sexual abuse would immunize him from being a perpetrator of rape. A

jury could learn that an individual was the victim of sexual abuse earlier in life and still find that the individual was guilty of the same at a later time.

C. The court's granting of the State's Motion in Limine precluded Defendant from presenting a meaningful defense.

“[D]ue process is in essence the right of a fair opportunity to defend against the accusations. State evidentiary rules may not be applied mechanistically to defeat the ends of justice.” *State v. Packed*, 2007 S.D. 75, ¶23 736 N.W.2d 851, 859 (quoting *State v. Luna*, 378 N.W.2d 229, 233 (S.D. 1985)(citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 1049 35 L. Ed. 2d 297 (1973)). When “a trial court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion.” *Id* at ¶24 (quoting *State v. Guthrie*, 2001 S.D. 61, ¶ 30, 627 N.W.2d 401, 415). Following the tests set out in rules 402 and 403, the evidence is relevant, and its probative value is not substantially outweighed by the danger of unfair prejudice. Therefore, it was an abuse of discretion for the trial court to grant the State's motion in limine and exclude Defendant from testifying about his being a victim of sexual abuse.

“Normally, ‘[t]o establish reversible error with regards to an evidentiary ruling, a defendant must prove not only that the trial court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice.’” *State v. Van Der Weide*, 2024 S.D. 18, ¶53 5 N.W.3d 577, 592 (quoting *State v. Little Long*, 2021 S.D. 38, ¶49, 962 N.W.2d at 255 (quoting *State v. Lassiter*, 2005 S.D. 8, ¶ 13, 692 N.W.2d 171, 175)). However, when a defendant's right to present a

defense has been unconstitutionally infringed, the burden shifts to the State to demonstrate “that the constitutional error was harmless beyond a reasonable doubt.” *Id* at ¶54 (quoting *State v. Taylor*, 2020 S.D. 48, ¶ 49, 948 N.W.2d 342, 356). “If this burden is not met, the defendant is entitled to a new trial.” *Id*.

The instant case is similar to *State v. Van Der Weide*. In *Van Der Weide*, the Defendant was precluded from testifying about the use of sex toys in his relationship with the victim. *Id* at ¶2. The South Dakota Supreme Court reversed the trial court finding it had abused its discretion in misapplying both SDCL 19-19-412 and 19-19-403. *Id* at ¶50. As it relates to SDCL 19-19-403 the Court held that the trial court “failed to consider the probative value of the sex toy evidence in relation to Van Der Weide's claim that S.O. had consented.” *Id* at ¶51. The Court concluded “as a result, the [trial court] improperly precluded Van Der Weide from proffering this evidence regarding consent.” *Id*.

The Court in *Van Der Weide* noted that the issues in that case directly implicated the Defendant’s constitutional right to testify in his own defense. *Id* at ¶53. Therefore, the burden shifted to the State to show the constitutional error was harmless beyond a reasonable doubt. *Id* at ¶54. The Court in *Van Der Weide* concluded that excluding the Defendant’s testimony was not harmless beyond a reasonable doubt and ordered a new trial. *Id*.

Here, the State’s motion in limine was directed exclusively at evidence the Defendant intended to personally testify to. As noted above, the trial court erred in granting the State’s motion therefore Defendant’s constitutional right to present

a defense was infringed and it is the State's burden to show harmless error beyond a reasonable doubt.

The error in this case was not harmless. Similar to *Van Der Weide* Defendant here was going to testify personally that the sex was a consensual act. Defendant's testimony that he was sexually abused as a child added important context to his theory of the case. Denying Defendant, the ability to present this testimony denied him an opportunity to present a complete and meaningful defense.

CONCLUSION

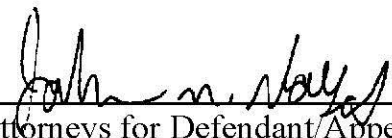
The trial court committed reversible error when it granted the State's motion in limine which improperly infringed upon Defendant's constitutional right to present a complete and meaningful defense. This error was not harmless therefore Defendant is entitled to a new trial in this matter.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument.

Dated this 12th day of February, 2025.

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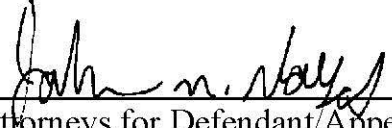
CERTIFICATE OF COMPLIANCE

John M. Noyes, attorney for Appellant, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

- a. Appellant's brief does not exceed 32 pages;
- b. The body of Appellant's brief was typed in Times New Roman 13-point typeface, with foot notes being in 13 point typeface; and
- c. Appellant's brief contains 3,281 words, 15,640 characters (no spaces), and 19,098 characters (with spaces), according to the word and character counting system in Microsoft Word for Microsoft 365 used by the undersigned.

Dated this 12th day of February, 2025.

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CERTIFICATE OF SERVICE

The undersigned attorney for Appellant, Defendant Clifford William Olson, hereby certifies that on the 12th day of February, 2025, a copy of **Amended Appellant's Brief** was filed electronically with the Clerk of Court through the Odyssey File & Serve and email notification was sent to:

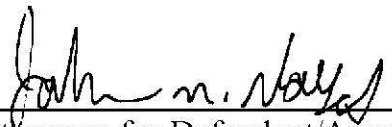
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APPENDIX

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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

Plaintiff,

CR24-22

-vs-

JUDGMENT OF CONVICTION

CLIFFORD WILLIAM OLSON,

DOB: 5-7-1980

Defendant.

An Indictment was filed with this Court on January 16, 2024, charging the Defendant with the crime of Second Degree Rape in violation of SDCL 22-22-1(2) and a Habitual Offender Information was filed on January 29, 2024 in violation of SDCL 22-7-7 through 8.1. The Defendant was arraigned on said Indictment and Habitual Offender Information on January 29, 2024. The Defendant, the Defendant's attorney Tom Cogley and Jennifer Stoddard, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant. The Defendant pled not guilty to the charge Second Degree Rape in violation of SDCL 22-22-1(2) and being a Habitual Offender in violation of SDCL 22-7-7 through 8.1.

A Jury Trial commenced on August 12, 2024 and on August 13, 2024, the defendant was found guilty of Second Degree Rape in violation of SDCL 22-22-1(2) and on August 26, 2024 defendant appearing with Brandon Taliaferro, defendants attorney and Jennifer Stoddard, prosecuting attorney, and pled guilty to being a Habitual Offender in violation of SDCL 22-7-7 through 8.1.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; and that the Defendant was represented by competent counsel.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Second Degree Rape in violation of SDCL 22-22-1(2) and being a Habitual Offender in violation of SDCL 22-7-7 through 8.1.

SENTENCE

On November 1, 2024, 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:

ORDERED that the defendant be incarcerated in the South Dakota State Penitentiary for a period of forty (40) years, with twenty five (25) years suspended, and with credit of 189 days for time already served through November 1, 2024, and it is

FURTHER ORDERED that defendant promptly pay \$616.50 fine and court costs, and \$25.00 DV Surcharge, and it is

FURTHER ORDERED that defendant reimburse Brown County for the costs of the rape kit in the amount of \$750.00, the psychosexual evaluation in the amount of \$2,500.00, the Grand Jury Transcript in the amount of \$69.00, and the costs of the private investigator, and it is

FURTHER ORDERED that defendant reimburse Brown County for all court appointed attorney fees, and it is

FURTHER ORDERED that defendant provide a DNA sample to law enforcement, and it is

FUTHER ORDERED that defendant have no contact with the victim, L.O. or her children for 40 years, and that defendant reimburse her for any counseling costs, and it is

FURTHER ORDERED that defendant follow all the recommendation of the psychosexual evaluation, and it is

FURTHER ORDERE that defendant attend and successfully complete an Anger Management Program and a Domestic Violence Program at his own expense, and it is

FURTHER ORDERED that supervision of any suspended portion of this sentence be under the Department of Corrections, Board of Pardons & Paroles.

IT IS HEREBY NOTED that the defendant was informed in open court of the estimated minimum period he must serve before being eligible for parole.

IT IS THE RECOMMENDATION of this Court that defendant evaluation while in the penitentiary and that he follow all recommendations

11/5/2024 8:11:26 AM

Attest:
Rathert, Carissa
Clerk/Deputy



BY THE COURT:

A handwritten signature in cursive script, reading "Julia Dvorak", is written over a horizontal line. Below the line, the text "Circuit Court Judge Julia Dvorak" is printed.

Circuit Court Judge Julia Dvorak

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

Plaintiff,

CR24-22 – COUNT 2

-vs-

JUDGMENT OF CONVICTION

CLIFFORD WILLIAM OLSON,

DOB: 5-7-1980

Defendant.

An Indictment was filed with this Court on January 16, 2024, charging the Defendant with the crime of Simple Assault Domestic in violation of SDCL 22-18-1(1) and 25-10-1. The Defendant was arraigned on said Indictment on January 29, 2024. The Defendant, the Defendant's attorney Tom Cogley and Jennifer Stoddard, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant. The Defendant pled not guilty to the charge of Simple Assault Domestic in violation of SDCL 22-18-1(1) and 25-10-1.

A Jury Trial commenced on August 12, 2024 and on August 13, 2024, the defendant was found guilty of Simple Assault Domestic in violation of SDCL 22-18-1(1) and 25-10-1.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; and that the Defendant was represented by competent counsel.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Simple Assault Domestic in violation of SDCL 22-18-1(1) and 25-10-1.

SENTENCE

On November 1, 2024, 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:

ORDERED that the defendant be imprisoned in the Brown County Jail for 365 days, with credit of 189 days for time already served, and to run concurrent with defendant's penitentiary sentence, and it is

FURTHER ORDERED that defendant promptly pay \$196.50 fine and court costs, and \$25.00 DV Surcharge, and it is

FURTHER ORDERED that defendant reimburse Brown County for all court appointed attorney fees, and it is

FURTHER ORDERE that defendant attend and successfully complete an Anger Management Program and a Domestic Violence Program at his own expense, and it is

11/5/2024 8:10:57 AM

BY THE COURT:

Attest:
Rathert, Carissa
Clerk/Deputy




Circuit Court Judge Julia Dvorak

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA

Plaintiff,

CR24-22 – COUNT 3

-vs-

JUDGMENT OF CONVICTION

CLIFFORD WILLIAM OLSON,

DOB: 5-7-1980

Defendant.

An Indictment was filed with this Court on January 16, 2024, charging the Defendant with the crime of Simple Assault Domestic in violation of SDCL 22-18-1(4) and 25-10-1. The Defendant was arraigned on said Indictment on January 29, 2024. The Defendant, the Defendant's attorney Tom Cogley and Jennifer Stoddard, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charge that had been filed against the Defendant. The Defendant pled not guilty to the charge of Simple Assault Domestic in violation of SDCL 22-18-1(4) and 25-10-1.

A Jury Trial commenced on August 12, 2024 and on August 13, 2024, the defendant was found guilty of Simple Assault Domestic in violation of SDCL 22-18-1(4) and 25-10-1.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense; and that the Defendant was represented by competent counsel.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Simple Assault Domestic in violation of SDCL 22-18-1(4) and 25-10-1.

SENTENCE

On November 1, 2024, 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:

ORDERED that the defendant be imprisoned in the Brown County Jail for 365 days, with credit of 189 days for time already served, and to run concurrent with defendant's penitentiary sentence, and it is

FURTHER ORDERED that defendant promptly pay \$196.50 fine and court costs, and \$25.00 DV Surcharge, and it is

FURTHER ORDERED that defendant reimburse Brown County for all court appointed attorney fees, and it is

FURTHER ORDERE that defendant attend and successfully complete an Anger Management Program and a Domestic Violence Program at his own expense, and it is

11/5/2024 8:11:13 AM

BY THE COURT:

Attest:
Rathert, Carissa
Clerk/Deputy




Circuit Court Judge Julia Dvorak

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
 2 COUNTY OF BROWN) FIFTH JUDICIAL CIRCUIT

3 * * * * *

4 STATE OF SOUTH DAKOTA,) 06CRI24-22
) Plaintiff,)
 5) JURY TRIAL
)
 6 -vs-)
)
 7 CLIFFORD WILLIAM OLSON,)
) Defendant.)

8 * * * * *

9 DATE & TIME: August 12, 2024
 10 1:00 p.m.

11 BEFORE: THE HONORABLE JULIA DVORAK
 12 CIRCUIT COURT JUDGE
 Brown County Courthouse
 Aberdeen, South Dakota 57401

13 LOCATION: Brown County Circuit Courtroom
 14 Brown County Courthouse
 Aberdeen, South Dakota 57401

15 APPEARANCES: FOR PLAINTIFF:
 16 JENNIFER STODDARD, ESQ.
 Brown County State's Attorney's Office
 17 22 Court Street, #2
 Aberdeen, SD 57401

18
 19 FOR DEFENDANT:
 20 BRANDON TALIAFERRO, ESQ.
 Taliaferro Law Firm, P.C.
 21 PO Box 287
 Aberdeen, SD 57402-0287
 22
 23
 24
 25

Kristi A. Brandt, RPR

1 opening statement?

2 MR. TALIAFERRO: I'll open, Your Honor.

3 THE COURT: Thank you.

4 MR. TALIAFERRO: Good afternoon.

5 So this case starts quite a while before January 4th when
6 Clifford was arrested.

7 As mentioned, both Clifford and his wife before they met
8 were recovering addicts. They actually met and fell in love
9 in recovery. They were both sober, both successful, fell in
10 love and got married. They've been married I believe close to
11 two years as of today's date.

12 Now, when they got married, they were doing great. They
13 moved in together. The marriage was going well. The intimacy
14 was going well. Both of them were remaining sober.
15 Everything was looking very positive for their relationship.

16 Now, they took a honeymoon. And you'll hear testimony
17 that their marital intimacy was somewhat unique. As I
18 mentioned in jury selection, you'll hear testimony and
19 evidence that they, the intimacy included things such as role
20 playing and fantasies.

21 One of the fantasies you will hear about is a rape fantasy
22 that Laura had that she wanted her husband to play out with
23 her. A fantasy where he would come into the home and take her
24 and make love to her in what would appear to be against her
25 will.

Kristi A. Brandt, RPR

1 You're going to hear testimony and evidence that because
2 of the unique nature of their marital intimacy, the two of
3 them discussed and came up with a safe word and a safe hand
4 gesture to use that communicated to the other party "no". So
5 you'll hear testimony that in their relationship, specific to
6 their marital intimacy, no did not mean no, stop did not mean
7 stop. The safe word or the safe hand gesture meant no and
8 meant stop, anything else didn't, and that worked just fine
9 throughout their marriage.

10 There have been no issues like this that came up. But as
11 happens with a lot of individuals in recovery, the vast
12 majority, Clifford relapsed. And his wife didn't, so she
13 wasn't comfortable with him not in sobriety. So all she
14 wanted to happen was for Clifford to get help, go back to
15 treatment, get clean again so that he could come back and be
16 the loving husband and great person that she knew and fell in
17 love with.

18 Now, to impress upon Clifford how serious she was about
19 that, she moved out of the marital home. She got her own
20 apartment. They were not separated. They were actively
21 working on their marriage even when she lived in that
22 apartment. They were still communicating regularly. They
23 were still going out on dates, still telling each other they
24 love each other, and still having marital intimacy.

25 Now, in fact, the day prior to Clifford's arrest - so he

1 playful manner. Not in a stop, get away from me; in a playful
2 manner with a smirk on her face. And Clifford knows from
3 dealing with his wife, you know, that she's not using the safe
4 word, she is not using the safe hand gesture, so that
5 communication to him was she is being playful.

6 So he grabs her by the shoulders and turns her around, and
7 he leads her into the bedroom. He does not shove her down on
8 the bed face first. She got on the bed on her own on her
9 back. He did not rip her clothes off. You'll hear testimony
10 and evidence there was nothing wrong with her clothes or
11 underwear. They had not been ripped off. She took them off.

12 See, Clifford at this point thinks, "I'm finally going to
13 play out the rape fantasy with my wife." She wanted that
14 previously. He had never given that to her. But right now
15 the marriage was on the rocks. He was pretty much willing to
16 do whatever the wife wants to try to save it.

17 So did she say no? Yes. Was she screaming bloody murder?
18 Absolutely not. The more important point that you'll hear is
19 that at no point during that encounter did she ever use the
20 safe word or the safe hand gesture.

21 Now, Clifford, the one thing the State's opening statement
22 was accurate about, was unable to achieve an erection. He
23 didn't rape her. He didn't penetrate her. When he took out
24 his penis to engage in sex, his mind wouldn't allow him to be
25 aroused with the rape fantasy. Unbeknownst to his wife, the

1 reason why he hadn't played out that fantasy with her in the
2 past was because Clifford was raped as a young boy. He did
3 not -- as much as he played out all her other fantasies, that
4 was the one that he struggled with. But on this day, he was
5 willing to do it because he wanted to save the marriage.

6 When he couldn't achieve an erection, he did say, "This is
7 bullshit." And he then put his pants back on, went into the
8 bathroom.

9 Laura got up, she put her clothes back on, and she went
10 back to get ready. She didn't call 911. She didn't run out
11 of the apartment screaming that she had just been raped. No.
12 They're still in there talking to one another while she is
13 finishing getting ready for work.

14 And then about five minutes later, not seconds, we're
15 talking minutes after the two of them have left the bedroom,
16 there is a knock on the front door. And it's a loud knock.
17 It's a knock that most of us would consider to be something
18 like a cop knock. Very loud.

19 Laura doesn't even go to answer it. She doesn't go to
20 that door to answer it until Clifford, her husband says,
21 "Well, are you going to answer the door?" Then she goes and
22 answers the door, and it's law enforcement.

23 Law enforcement comes inside. They separate husband and
24 wife to talk to them separately. And the law enforcement
25 officer that talks to the wife, now all of a sudden she

1 with the Court outside the presence of the jury, Your Honor.

2 THE COURT: Okay. About how long will that take, do you
3 anticipate?

4 MR. TALIAFERRO: I would say 10 minutes.

5 THE COURT: Okay. Would the jury like to go back to the
6 jury room for that 10 minutes or sit in here?

7 JUROR: Stay here.

8 THE COURT: Okay. We'll step out of the courtroom then.
9 We're going to be in recess, so feel free to stand and
10 stretch.

11 I do need to admonish you that you should not discuss this
12 case with each other or anyone else or form or start to form
13 any opinions in regard to the matter until the case is finally
14 submitted to you.

15 Thank you. We'll be in recess.

16 (Whereupon, a conference was held on the record in
17 chambers out of the presence of the jury.)

18 THE COURT: So we are outside the presence of the jury
19 with both attorneys and the defendant ready to hear motions
20 from counsel.

21 MS. STODDARD: Judge, so I did file this motion in limine.
22 My office filed it this morning. You were probably in a bond
23 hearing at the time, but --

24 I don't know if you've seen it either.

25 MR. TALIAFERRO: I haven't read it yet, but you told me

1 about it yesterday.

2 MS. STODDARD: Okay. So, essentially, the first time the
3 State was made aware of any sort of allegation or backstory or
4 anything involving the defendant having been sexually
5 assaulted as a child was in opening remarks yesterday. So I
6 guess the State is seeking to exclude any remarks about his
7 sexual assault, previous sexual assault from trial or closing
8 absent any sort of evidence. We don't have any sort of
9 charges or convictions or anything that have to do with it
10 that I'm aware of. But for the reasons laid out, that it is
11 prejudicial. It seems to be in an effort to elicit sympathy
12 from the jury, and it really does not have a bearing on the
13 facts of this case or the fact that he raped or didn't rape
14 the victim in this matter.

15 THE COURT: Mr. Taliaferro.

16 MR. TALIAFERRO: Thank you, Your Honor.

17 Both Clifford's rape as a child and what I believe he
18 intends to also testify to is that his three sisters were also
19 raped by their stepfather, the reason he contends this is
20 relevant in this case is because he's intending to testify
21 that he did not carry out wife's rape fantasy previously and
22 part of that reason was because he's kind of diametrically
23 opposed to rape because of what he experienced as a child and
24 because of what his sisters went through as kids. So does it
25 prove or disprove whether or not he raped her? No. But I

1 think it's relevant to his defense that he wouldn't have done
2 that to his wife because of what's happened to him and his
3 family throughout his lifetime.

4 MS. STODDARD: And, Judge, I think he can do that without
5 bringing up these allegations of sexual abuse on him or a
6 sister, which now this literally is the first time we've heard
7 of this, so we don't have any time to investigate whether any
8 of that is true or not. And I think he's already going to put
9 on a story, you know, to begin with. But to put that out
10 there is only going to confuse the jury, muddy the water, and
11 take their attention off the actual facts at hand.

12 MR. TALIAFERRO: And, lastly, Your Honor, I'd just say I
13 guess evidence-wise, you know, the State's position is there
14 is no evidence this actually occurred. I mean, I guess the
15 evidence we would proffer would be the defendant's testimony
16 which would be very similar to the evidence being presented
17 against him as allegedly raping someone in this trial.

18 MS. STODDARD: I think we get into then recalling
19 witnesses for rebuttal to ask if this is something that they
20 knew about in his past. And, again, it starts to muddy the
21 water and distract from what the issue is at hand.

22 THE COURT: Okay. The Court is going to grant the motion
23 in limine such that Mr. Olson cannot testify as to his, his
24 ever being a victim of sexual assault and/or his sisters or,
25 frankly, anyone else. Why he would be opposed to any rape

1 fantasy is not going to be allowed in. He can say he's
2 opposed, was opposed to a rape fantasy or carrying that out,
3 but he cannot say why and get into these types of allegations.

4 So, Mr. Olson, I just want to make sure before you, if you
5 end up testifying in this case that you understand that as
6 well, that you understand the order. And so I want your
7 attorney to go over that with you before you testify, if you
8 choose to testify of what you can and cannot get into based on
9 this motion and the Court's granting of this motion.

10 MS. STODDARD: Thank you, Your Honor. Nothing further
11 from the State.

12 MR. TALIAFERRO: Then all I need is about five minutes
13 alone with my client and the court reporter to make a record
14 on his decision to testify or not, and then we'll be ready.

15 THE COURT: Do you have any other motion at this time,
16 motion for judgment of acquittal or anything that you want on
17 the record at this time?

18 MR. TALIAFERRO: Your Honor, yes. I'll make a motion for
19 a judgment of acquittal at this time. The evidence presented
20 is that my client raped his wife. What we heard on the Axon
21 was that he almost raped her. The DNA evidence matches a male
22 that was not a match for Clifford. So all we really have in
23 the record for penetration would be the wife's statement that
24 kind of did but was unable to go forward. We would argue the
25 evidence is insufficient to submit to the jury.

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF BROWN

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

CRI24-022

STATE'S MOTION IN LIMINE

vs.

CLIFFORD WILLIAM OLSON,
Defendant.

Comes now the State of South Dakota, by and through Jennifer Stoddard, Brown County Deputy State's Attorney, and hereby submits State's Motion in Limine to exclude any reference to the Defendant being a victim of sexual assault. The State contends that any evidence regarding the Defendant being a victim of prior sexual assault is irrelevant and substantially more prejudicial than probative.

The assertion that the Defendant is a prior victim of sexual assault is not relevant to the present action or would be of such limited probative value that it would be substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, and a waste of time. South Dakota law lists the test for relevant evidence:

19-19-401. Test for relevant evidence.

Evidence is relevant if:

- (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) The fact is of consequence in determining the action.

Here, claims by the Defendant that he was sexually assaulted in his past are not relevant because it does not make any fact in question more or less probable than it would be without the evidence. The question at hand is whether the Defendant raped his wife; the Defendant's past sexual assault history is not relevant to this question. The jury in this case is not being asked to determine whether the Defendant was assaulted. The fact that the Defendant may have been assaulted is not of consequence for the jury to determine his guilt.

Further, South Dakota law provides guidance for when evidence should be excluded:

19-19-403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.

The court may exclude relevant evidence if its probative value is substantially

outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

In this case, the Court should exclude any reference to the Defendant's alleged prior sexual assault because it may lead to confusing the issues, misleading the jury, and wasting time. If this testimony or argument is allowed into evidence, it's only purpose would be to garner sympathy for the Defendant. The jury is not trained to parse out which facts are relevant from an evidentiary standpoint and admission of this evidence would only serve to confuse the issues. Admission of the Defendant's claims that he was assaulted previously could lead to the jury considering evidence that is not relevant to the question of whether the Defendant committed an assault, which would lead to time being wasted as the jury considers irrelevant or misleading evidence.

Further, if, arguendo, there is some probative value in any evidence, testimony or argument regarding the Defendant's status as a sexual assault victim, it would be substantially outweighed by the danger of unfair prejudice to the State. Introduction of this type of evidence or argument is essentially an attempt to introduce some sort of defense that the Defendant could not have committed this crime because he was himself a victim of a similar crime.

WHEREFORE, the State respectfully requests this Court grant the State's Motion in Limine precluding the introduction of evidence, testimony and argument referring to the Defendant's alleged prior sexual assault.

Dated this 13th day of August 2024.



Jennifer Stoddard

CERTIFICATE OF SERVICE

Comes now the undersigned and hereby certifies that on the 13th day of August 2024, a true and correct copy of the foregoing STATE'S MOTION IN LIMINE was electronically delivered to:

Brandon Taliaferro
Attorney at Law
Aberdeen, SD 57402



Jennifer Stoddard

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30893

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CLIFFORD WILLIAM OLSON,

Defendant and Appellant.

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

THE HONORABLE JULIA M. DVORAK
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed November 8, 2024

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30893

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CLIFFORD WILLIAM OLSON,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Clifford William Olson, is called “Olson.” Plaintiff and Appellee, the State of South Dakota, is called “State.” Document and video exhibit references are as follows:

Brown County Criminal File No. 24-22 SR

Transcript of Jury Trial, August 12, 2024.....JT

Deputy Erin Spencer Body Worn Camera FootageBWC

Olson’s Brief.....OB

All document designations are followed by the appropriate page numbers. All video citations are followed by the appropriate times they occur in the files.

JURISDICTIONAL STATEMENT

The Honorable Julia M. Dvorak, Fifth Circuit Court Judge, filed three Judgments of Conviction on November 5, 2024. SR:541-46. Olson filed a Notice of Appeal on November 8, 2024. SR:549. This Court has jurisdiction to hear the appeal under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT PROPERLY EXCLUDED OLSON'S TESTIMONY THAT HE AND HIS SISTERS WERE VICTIMS OF CHILDHOOD SEXUAL ABUSE?

The circuit court granted the State's Motion in Limine.

State v. Belt, 2024 S.D. 82, 15 N.W.3d 732

State v. Reay, 2009 S.D. 10, 762 N.W.2d 356

State v. Van Der Weide, 2024 S.D. 18, 5 N.W.3d 577

SDCL 19-19-401

SDCL 19-19-403

STATEMENT OF THE CASE

A grand jury indicted Olson on three counts in January 2024:

- Count 1: Rape in the Second Degree, violating SDCL 22-22-1(2);
- Count 2: Simple Assault – Domestic, violating SDCL 22-18-1(1), and SDCL 25-10-1; and
- Count 3: Simple Assault – Domestic, violating SDCL 22-18-1(4), and SDCL 25-10-1.

SR:26-27. The State also filed a Part II Information alleging prior convictions for Second Degree Burglary, Driving under the Influence Third Offense, and Driving under the Influence Fourth Offense. SR:42.

A jury trial occurred in August 2024, and the jury convicted Olson of all three counts. SR:294-95. The circuit court entered three Judgments of Conviction in November 2024 that sentenced Olson to 40 years in prison with 25 years suspended. SR:541-46.

STATEMENT OF THE FACTS

L.O. met Olson in drug and alcohol rehab. JT:22; BWC:8:42-53. They married in July 2022. JT:22; BWC:8:42-53. About two months after their marriage, Olson relapsed and started using methamphetamine. JT:22, 80; BWC:8:53-9:00. L.O. tried to make the marriage work and lived in Olson's trailer for a short time. JT:22; BWC:9:00-43. But because of Olson forcing himself on her sexually, bringing alcohol into the home, accusing her of cheating, and talking to hallucinatory voices, L.O. moved out and got her own apartment. JT:22; BWC:9:25-43. The apartment was in a secure complex, and L.O. did not give Olson keys to get into the complex or her apartment. JT:23; BWC:0:00-10.

On the day Olson raped her, L.O. woke up and had what started as a normal morning. JT:23-24. She showered as she got ready for work. JT:24. During this shower, she heard knocking from the hallway of the apartment complex, but she did not think it came from her door.

JT:24; BWC:10:10-21. L.O. was mistaken. Unbeknownst to L.O., Olson had texted and called her multiple times that morning. JT:24. When she did not answer him, Olson waited outside her apartment complex. JT:100. As someone exited the complex, Olson caught the door and let himself in. JT:100. He then pounded on L.O.'s apartment door for about 30 minutes while yelling as she showered. JT:101; BWC:0:21-27.

When L.O. got out of the shower, she saw she had missed texts and phone calls from Olson. JT:24. One text said he had been "let in" to the apartment complex. JT:24. L.O. then realized the pounding, which at this point had become very loud, was coming from her door. BWC:10:10-21; JT:18, 24. She got dressed, answered her door, and told Olson he could not cause such a commotion because people in the complex were still sleeping. JT:24.

Olson entered L.O.'s apartment. JT:24. After an argument about why she did not let him in right away, L.O. went back to the bathroom and continued getting ready. JT:25; BWC:11:30-55. Olson followed her into the bathroom and kept arguing with her. JT:25; BWC:11:30-55. He grabbed her chin and neck and tried to forcibly kiss her. JT:25; BWC:11:30-55. L.O. resisted the forced kiss, and Olson seized her by her shoulders. JT:25; BWC:11:30-55, 12:00-12. He turned her around and shoved her out of the bathroom, pushing her into the bedroom across the hall. JT:25; BWC:11:30-55, 12:00-12. Olson threw L.O. on the bed, tore off her pants, took his own pants off, and crawled on top of

her. JT:25; BWC:11:30-55, 12:00-12, 12:30-40. Olson then forced his penis inside L.O.'s vagina. JT:25.

L.O. screamed and cried during Olson's sexual assault, and she said "no" multiple times. JT:25; BWC:10:27-33. Olson placed his hand over her mouth. JT:25; BWC:10:27-33. L.O. unsuccessfully attempted to push him away. JT:25; BWC:10:27-33. But Olson could not maintain an erection during the rape. JT:25; BWC:12:13-24. He ended by saying, "this is bullshit — I shouldn't have to fight my wife," then stood up and went to the bathroom. JT:25. L.O. got off the bed and continued getting ready for work. JT:25.

During the rape, another tenant in the building heard L.O.'s screams. JT:19; BWC:0:15-38. He called law enforcement and let Brown County Deputy Erin Spencer into the building. JT:19; 0:00-10. He told Deputy Spencer, "she was just screaming bloody murder," and "they argued for a few minutes and all of a sudden she started screaming. It sounded like somebody was getting thrown around a little bit." BWC:0:15-48. He had heard L.O. scream "no" and "stop." JT:19. He led Deputy Spencer to L.O.'s apartment, and she knocked on L.O.'s door. BWC:1:30-55. After waiting for about twenty seconds with no response, Deputy Spencer banged heavily on the door, and L.O. answered. BWC:1:55-2:15.

Deputy Spencer stepped into the entryway of the apartment and a distressed looking L.O. pointed to show Olson was farther inside.

BWC:2:20-30. Deputy Spencer called for Olson to come out and he replied, "I will in just a second." BWC:2:30-35. Deputy Spencer stepped around the corner of the entryway and saw Olson fastening his belt down the hall. BWC:2:35-40. Olson looked up, saw her, and darted into the bedroom as he continued putting on his pants. BWC:2:35-40. Deputy Spencer walked toward the bedroom and said "sir, I prefer that you stand where I can see you," to which Olson responded, "I prefer to pick my shit up if I have to come talk to you." BWC:2:40-45.

Olson came out of the bedroom and spoke with Deputy Spencer by the entryway. BWC:2:50-3:00. When asked what happened, Olson said, "I came over, my wife was in the shower. I knocked long enough for her to answer, which was probably about 15 minutes' worth of knocking." BWC:2:50-3:00. Deputy Spencer asked if they both lived at the apartment, and Olson replied "no, she does." BWC:3:00-05. Olson then looked over at L.O. and said, "don't act shy now, you were just acting big and bad to me in there." BWC:3:29-34. Deputy Spencer explained a tenant heard yelling and said it sounded like someone could have been hurt. BWC:3:45-55. Olson claimed that the tenant lied about having heard any yelling. BWC:3:55-4:00.

Deputy Spencer asked why Olson was at the apartment if he did not live there and he replied he came over to have sex with L.O. BWC:4:28-51. He then said, "it's one of those being separated but not, right baby?" BWC:4:51-5:00. He directed his attention at L.O. as he

said this, and he had an agitated demeanor. BWC:4:51-5:00. Deputy Spencer told Olson he did not “need to get into this right now,” but he continued to pressure L.O. on declaring their relationship status.

BWC:5:15-25. Deputy Spencer directed Olson to sit down and wait for another deputy to arrive so they could separate the two and get both sides of the story. BWC:5:55-6:15, 7:10-27. L.O. went to the bathroom and continued to get ready, and Olson sat down in the living room.

BWC:5:55-6:15. As they waited, Olson yelled at L.O. about a bra on the living room floor, “who’s this Valentine’s bra for? Obviously not fucking me.” BWC:6:19-30. Deputy Spencer then asked him “have you guys had any domestic problems in the past?” BWC:7:30-35. Olson replied, “no domestic problems in the past except for one week ago when there were officers at that door saying they got called because they heard yelling, or some other bullshit.” BWC:7:35-45.

Another deputy arrived and waited with Olson in the apartment complex hall as Deputy Spencer retrieved L.O. from the bathroom.

BWC:7:55-8:10. As Deputy Spencer retrieved her, L.O. looked fearful and shook her head “no” when asked if everything was okay.

BWC:8:05 - 15. After L.O. verified Olson was no longer in the apartment, she agreed to speak with Deputy Spencer in the living room.

BWC:8:15-35. As they sat down L.O. said “I’m sorry, I’m just scared.”

BWC:8:25-35. She explained to Deputy Spencer she was married to Olson but moved out of his trailer due to his relapse. BWC:8:45-9:45.

L.O. then explained she had not invited Olson over, but he came banging on her door while she showered. BWC:10:10-21. L.O. described Olson's forced kiss, the rape, and his inability to maintain an erection.

BWC:10:20-12:40.

Law enforcement arrested Olson. Buccal, anal, and vaginal swabs were collected from L.O. for DNA testing. JT:54; SR:290. Law enforcement also asked Olson if he would provide a buccal swab, but he refused. SR:62. They therefore obtained a search warrant for his DNA. SR:63, 292-93. Olson defied the warrant and told law enforcement they would have to fight him if they wanted a swab from him. SR:63-64. Law enforcement never obtained a swab from Olson, but L.O.'s DNA testing showed she had male DNA on her vaginal and anal swabs that came from the same person. JT:57, 65; SR:290-91.

During the two-day jury trial that occurred on this matter, Olson pursued a two-part defense: 1) he never penetrated L.O. because he did not have an erection; and 2) rather than raping L.O., he indulged a rape fantasy of hers in one last attempt to save their marriage. JT:15-16, 104. In furtherance of his rape fantasy defense, Olson argued in his opening statement that he would not rape someone because he was a victim of childhood rape. JT:15-16. Olson's opening was the first time the State heard this argument from him. JT:71.

After opening statements, the first day of trial involved the State's presentation of its case, which consisted of witness testimony, Deputy

Spencer's body worn camera footage, and a forensic report detailing L.O.'s DNA results. JT:17-69; SR:290-91; *See generally* BWC. The following morning, the State filed a Motion in Limine to exclude any remarks about Olson being a victim of sexual assault. JT:70-71; SR:247-48. The circuit court heard arguments on the motion. JT:70. The State argued this defense prejudiced the prosecution because it was unverified and irrelevant. JT:71, 247. The State also argued the testimony was misleading, confused the issues, and wasted time because it only functioned to elicit sympathy for Olson. JT:71, 248. Olson responded that the argument was relevant to showing he had not previously indulged L.O.'s alleged rape fantasy due to his own trauma as a sexual assault victim, as well as the fact that his stepfather raped his sisters. JT:71. The circuit court made an oral ruling that Olson could not testify he or his sisters were victims of sexual assault. JT:72-73. The circuit court specified that Olson could testify he opposed any rape fantasy, but he could not say why. JT:73.

Following the circuit court's ruling on the Motion in Limine, Olson presented his case, which consisted exclusively of his own narrative testimony. JT:74-106, 118. During his testimony, Olson said he was "adamantly against rape for many reasons." JT:93. As to the alleged rape fantasy, Olson testified he did not stop when L.O. said "no" because of the fantasy. JT:103. He elaborated that "no" and "stop" did not have the ordinary meanings in their marriage. JT:92. He claimed the actual

signal to stop during sex was the word “pineapple.” JT:93, 111. Thus, his argument was he attempted to engage in a consensual rape fantasy but could not maintain an erection and did not achieve penetration. JT:104. Olson did not discuss him or his sisters being childhood rape victims. JT:74-106. The jury found him guilty on all counts. SR:294-95.

ARGUMENT

THE CIRCUIT COURT PROPERLY EXCLUDED OLSON’S TESTIMONY THAT HE AND HIS SISTERS WERE VICTIMS OF CHILDHOOD SEXUAL ABUSE.

A. Background

The State’s Motion in Limine asked the circuit court to exclude any reference to Olson or his sisters being victims of sexual assault. SR:247; JT:72. After hearing arguments from the State and Olson, the circuit court orally granted the Motion to the extent that Olson could say that he opposed any rape fantasy but could not say why. JT:72-73. The circuit court did not specify which reasons under SDCL 19-19-401 or SDCL 19-19-403 it based its ruling on.¹ JT:72-73. But by granting the

¹ It may have been better for the circuit court to outline which reason under SDCL 19-19-401 or SDCL 19-19-403 it based its ruling on. But this Court has not held that a circuit court must identify the specific reason for exclusion when ruling on SDCL 19-19-401 or SDCL 19-19-403. *See Birdshead*, 2015 S.D. 77, ¶ 59, 871 N.W.2d at 81 (“the circuit court’s ‘mere failure to make a record of its Rule 403 weighing is not reversible error[.]’ ”)(quoting *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 885 (8th Cir.2006)).

(continued . . .)

Motion, the circuit court impliedly agreed with the State’s reasoning why the testimony should be excluded. *See State v. Birdshead*, 2015 S.D. 77, ¶ 59, 871 N.W.2d 62, 81 (“when there is a specific objection pursuant to Rule 403 and the court rules on that objection, we presume that the circuit court weighed the evidence before ruling on the motion”).

B. Standard of Review

“We review evidentiary rulings using our abuse of discretion standard.” *State v. Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d 732, 737. “An abuse of discretion is defined as a ‘fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration is arbitrary or unreasonable.’ ” *Id.* (quoting *State v. Krueger*, 2020 S.D. 57, ¶ 29, 950 N.W.2d 664, 672)(other citation omitted). “The trial court[’s] evidentiary rulings are presumed to be correct.” *State v. Hankins*, 2022 S.D. 67, ¶ 20, 982 N.W.2d 21, 30 (quoting *State v. Babcock*, 2020 S.D. 71, ¶ 21, 952 N.W.2d 750, 757)(other citation omitted).

“In order to justify relief on appeal, an evidentiary error ‘must also be shown to be prejudicial.’ ” *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737 (quoting *Krueger*, 2020 S.D. 57, ¶ 39, 950 N.W.2d at 674)(other citation

(. . . continued)

On the other hand, this Court has held that identifying a specific exception is necessary when ruling on SDCL 19-19-404. *State v. Barber*, 1996 S.D. 96, ¶ 15, 552 N.W.2d 817. That requirement has not been extended to SDCL 19-19-401 and 19-19-403. *See Birdshead*, 2015 S.D. 77, ¶ 59, 871 N.W.2d at 81.

omitted). “Error is prejudicial when, in all probability, it produced some effect upon the final result[.]” *Id.* ¶ 21, 15 N.W.3d at 737 (quoting *State v. Osman*, 2024 S.D. 15, ¶ 35, 4 N.W.3d 558, 569)(other citation omitted). “In all probability refers to a ‘reasonable probability that, but for [the claimed error], the result of the proceeding would have been different.’ ” *Id.* ¶ 21, 15 N.W.3d at 737-38 (quoting *Osman*, 2024 S.D. 15, ¶ 35, 4 N.W.3d at 569)(other citation omitted). “In other words, ‘a probability sufficient to undermine confidence in the outcome.’ ” *Id.* (quoting *Osman*, 2024 S.D. 15, ¶ 35, 4 N.W.3d at 569)(other citation omitted).

C. Analysis

i. The testimony was irrelevant.

“Evidence is relevant if: (a) [i]t has any tendency to make a fact more or less probable than it would be without the evidence; and (b) [t]he fact is of consequence in determining the action.” *State v. Hankins*, 2022 S.D. 67, ¶ 26, 982 N.W.2d 21, 31 (quoting SDCL 19-19-401). “The law favors admitting relevant evidence no matter how slight its probative value.” *Id.* (quoting *State v. Thoman*, 2021 S.D. 10, ¶ 44, 955 N.W.2d 759, 772)(other citation omitted). Olson wanted to testify that he and his sisters were child sex abuse victims. OB:9; JT:71. He argues this testimony would have shown that he never previously engaged in L.O.’s alleged rape fantasy. OB:9; JT:71. Olson does not explain how prior refusals to engage in a rape fantasy were of consequence to his claim

that he did participate in one on the morning in question. OB:9; JT:71; *Hankins*, 2022 S.D. 67, ¶ 26, 982 N.W.2d at 31.

L.O. denied the rape fantasy existed at all. JT:30. The trial therefore came down to a credibility determination between Olson and L.O.—did she lie about consenting to a faux rape or did he lie that the fantasy existed in the first place? JT:30, 104. The crux of Olson’s argument was he broke his moral code and engaged L.O.’s rape fantasy to save his marriage. JT:93, 104. The jury heard this testimony, including that Olson was “adamantly against rape for many reasons” and thus had never indulged the fantasy before. JT:93, 103-04. The jury therefore knew everything it needed to determine the truth: Olson and L.O. disagreed about whether she possessed a rape fantasy, Olson said he had not engaged in it before because he was “adamantly against rape,” and Olson claimed he pursued the fantasy to save the marriage but could not maintain an erection. JT:30, 93, 104. Testimony that childhood sex abuse was the reason he did not previously indulge the fantasy was inconsequential to the evaluation, and the circuit court did not err in excluding it. *Hankins*, 2022 S.D. 67, ¶ 26, 982 N.W.2d at 31; *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737.

It is remarkable that Olson argues his sex abuse victim testimony was exclusively about showing why he had not previously participated in a rape fantasy. OB:9. The context of his entire defense illustrates Olson’s primary intent was to elicit sympathy from the jury. JT:77-79.

Garnering sympathy was a large part of his trial strategy—Olson attempted to depict L.O. as possessive and jealous but himself as a concerned husband that endured L.O.’s abuse out of love for her. JT:77-99. He pursued this strategy with testimony such as “if I was not immediately sexually aroused for her, she would yell at me[,]” and “men are abused in a relationship as well just like a woman can be.” JT:77, 79. Olson’s effort to gain sympathy through testimony about his childhood was of no consequence in determining whether he raped L.O. *State v. Reay*, 2009 S.D. 10, ¶¶ 29-32, 762 N.W.2d 356, 366 (holding testimony about a murder victim’s family having suffered unrelated but similar tragedies in the past was irrelevant). The circuit court did not abuse its discretion by excluding Olson’s irrelevant statements. *Id.*; *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737.

ii. The testimony would have substantially prejudiced the State, confused the issues, and misled the jury.

Even if Olson’s sex abuse victim testimony was relevant, “a ‘court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.’” *State v. Falkenberg*, 2021 S.D. 59, ¶ 43, 965 N.W.2d 580, 592 (quoting SDCL 19-19-403). “When evidence has been deemed relevant, ‘the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 ‘substantially’ outweigh probative value.’” *State v. Shelton*, 2021 S.D. 22, ¶ 17, 958

N.W.2d 721, 727 (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 38, 693 N.W.2d 685, 698)(other citation omitted). “The judicial power to exclude such evidence should be used sparingly.” *State v. Kihega*, 2017 S.D. 58, ¶ 22, 902 N.W.2d 517, 524 (quoting *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 30, 764 N.W.2d 474, 484).

In discussing its Motion, the State argued “it is prejudicial. It seems to be an effort to elicit sympathy from the jury[.]” JT:71. As discussed, appealing to juror sympathy was a major part of Olson’s trial strategy. JT:77-79. “To cause unfair prejudice, the evidence must persuade the jury in an unfair and illegitimate way.” *State v. Carter*, 2023 S.D. 67, ¶ 38, 1 N.W.3d 674, 689 (quoting *St. John v. Peterson*, 2011 S.D. 58, ¶ 16, 804 N.W.2d 71, 76). In *Reay*, the prosecution offered testimony from a murder victim’s mother about how her family had reacted to similar tragedies they had endured. *Id.* ¶ 29, 762 N.W.2d at 366. The defense objected, claiming testimony about previous tragedies was irrelevant and only functioned to gain juror sympathy. *Id.* This Court held, “there is no link to [the witness’s] previous family tragedy” and “the court abused its discretion when it allowed this testimony.” *Id.* ¶ 32, 762 N.W.2d at 366. While this Court’s opinion reflects that it excluded the testimony because of irrelevance, it still shows that attempts at winning sympathy are not a legitimate means of persuasion, partly because they are irrelevant to begin with. *Id.*; *Carter*, 2023 S.D. 67, ¶ 38, 1 N.W.3d at 689. Thus, allowing Olson to gain

sympathy by testifying about him and his sisters experiencing childhood sex abuse would have resulted in substantial prejudice outweighing any limited probative value it had. *Reay*, 2009 S.D. 10, ¶ 32, 762 N.W.2d at 366; *Shelton*, 2021 S.D. 22, ¶ 17, 958 N.W.2d at 727.

The State also argued that Olson’s testimony would “confuse the jury, muddy the water, and take their attention off the actual facts at hand.” JT:72. It pointed out “we get into then calling witnesses for rebuttal to ask if this was something they knew about in the past. And, again, it starts to muddy the water and distract from what the issue is at hand.” JT:72. The calling of rebuttal witnesses to examine the veracity of Olson’s claims would have created a rape trial within a rape trial. This sub-trial would have been especially frivolous given that Olson’s testimony was meant to support his assertion that he did not previously engage L.O.’s fantasy—a claim the jury already knew. JT:93, 103. Any probative value from saying he did not participate in the fantasy because he and his sisters were victims of abuse would thus be substantially outweighed by its distraction from the ultimate issue. *Falkenberg*, 2021 S.D. 59, ¶ 43, 965 N.W.2d at 592. It is especially confusing because the testimonies would have explored whether Olson was raped, the same issue before the jury regarding L.O. *Id.* The circuit court did not make an impermissible choice in excluding this testimony. *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737.

This Court offered guidance on when an issue is not substantially misleading or confusing in *State v. Dickerson*. 2022 S.D. 23, 973 N.W.2d 249. In that case, the lower court suppressed evidence regarding a robbery victim’s illegal immigration status. *Id.* ¶¶ 4-5, 973 N.W.2d at 252-53. This Court commented the victim was the key witness for the State and had discrepancies in his story. *Id.* ¶¶ 35-39, 973 N.W.2d at 261-62. This Court held that because part of the defense in *Dickerson* was the victim had attempted to rape the defendant, and rape was a deportable offense, the victim’s immigration status related to his motive to lie about what happened and should have been allowed. *Id.* Suppressing the evidence therefore violated the defendant’s constitutional right to cross-examine witnesses. *Id.*

Here, Olson’s testimony about child sex abuse did not explain any testimonial inconsistencies—he could still say L.O. had a rape fantasy he never indulged in the past. JT:93, 103; *See Dickerson*, ¶¶ 35-39, 973 N.W.2d at 261-62. Further, excluding it did not inhibit his ability to cross-examine any witnesses against him as he still questioned L.O. about the supposed rape fantasy. JT:30; *See Dickerson*, ¶¶ 35-39, 973 N.W.2d at 261-62. The testimony would have created a substantially confusing and misleading minitrial, and the circuit court did not make an impermissible choice by excluding it. *Falkenberg*, 2021 S.D. 59, ¶ 43, 965 N.W.2d at 592; *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737.

iii. Olson cannot show prejudice.

“In order to justify relief on appeal, an evidentiary error ‘must also be shown to be prejudicial.’” *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737 (quoting *Krueger*, 2020 S.D. 57, ¶ 39, 950 N.W.2d at 674)(other citation omitted). “Error is prejudicial when, in all probability, it produced some effect upon the final result[.]” *Id.* ¶ 21, 15 N.W.2d at 737 (quoting *State v. Osman*, 2024 S.D. 15, ¶ 35, 4 N.W.3d 558, 569) (other citation omitted). “In all probability refers to a ‘reasonable probability that, but for [the claimed error], the result of the proceeding would have been different.’” *Id.* ¶ 21, 15 N.W.2d at 737-38. (quoting *Osman*, 2024 S.D. 15, ¶ 35, 4 N.W.3d at 569)(other citation omitted).

The jury convicted Olson of second degree rape and simple assault. SR:294-95. His argument on appeal relates to the second degree rape conviction. *See generally* OB. To sustain a second degree rape conviction, the jury needed to find beyond a reasonable doubt that Olson committed “an act of sexual penetration[,], through the use of force[,], accompanied by apparent power of execution.” SDCL 22-22-1. “Sexual penetration means an act, however slight, of sexual intercourse[,], or any intrusion, however slight, of any part of the body[,], into the genital or anal openings of another person's body[.]” SDCL 22-22-2. The exclusion of Olson’s statements must therefore undermine confidence that the jury would have found these elements had it heard

Olson testify he did not previously engage a rape fantasy due to a history of childhood sexual abuse. *Belt*, 2024 S.D. 82, ¶ 21, 15 N.W.3d at 737.

The State presented video evidence and testimony that L.O.’s neighbor called law enforcement because he heard her “screaming bloody murder” and yelling “no” and “stop” while it sounded like someone “was getting thrown around a little bit.” JT:19; BWC:0:00-38. He testified Olson had pounded on L.O.’s door for about a half hour. JT:18; BWC:21-27. He led Deputy Spencer to the source of the screaming, which was L.O.’s apartment with Olson located inside. BWC:1:30-2:15. The jury also saw Deputy Spencer’s body camera footage and heard her testify. *See generally* BWC; JT:32-37. Thus, they saw how distressed L.O. looked and how she made certain Olson was no longer in the apartment before saying he sexually assaulted her. BWC:1:55-2:15, 8:05-35, 10:20-12:40.

The jury considered L.O.’s testimony. JT:21-26. She said Olson came to her apartment uninvited. JT:26. He pounded on her door while she was in the shower. JT:24. The jury heard her story of his forced kiss that she resisted, and how he responded by shoving her out of the bathroom and into the bedroom. JT:25 L.O. testified Olson ripped her pants off, took his own clothes off, crawled on top of her, and forced his flaccid penis in her as much as he could. JT:25. She said she fought him and screamed as this occurred. JT:25. L.O. testified Olson said, “this is bullshit—I shouldn’t have to fight my wife” when he ended the

rape. JT:25. Through the body camera footage, the jury saw how L.O.'s testimony was consistent with her statements to Deputy Spencer on the morning in question. JT:20-26; BWC:10:27-12:40.

The jury also witnessed the domineering behavior Olson exhibited in the body camera footage. BWC:3:00-5:15. This included his statement "don't act shy now, you were just acting big and bad to me in there," and his glaring at L.O. as he demanded her to declare their relationship status in front of a Deputy Sheriff. BWC:3:25-34. The jury viewed his vulgar language and combative attitude with statements such as "I prefer to pick my shit up if I have to come talk to you," and "who's this Valentine's bra for? Obviously not fucking me." BWC:2:40-50, 6:19-30. They also saw Olson was pulling his pants up when Deputy Spencer arrived, and that he said he came over to the apartment intending to have sex with L.O. BWC:2:35-40, 4:28-51. Olson admitted in the footage that law enforcement had been called on him at the apartment in the past due to complaints of yelling. BWC:7:35-45. The State also presented testimony that Olson ignored a warrant and told officers they would have to fight him if they wanted a DNA sample. SR:63-64. The jury additionally knew that male DNA was found on L.O.'s vaginal and anal swabs that came from the same unidentified source. JT:57; SR:290-91.

The jury heard Olson's narrative testimony. JT:74-106. They therefore had the opportunity to compare the man that presented

himself as an abused husband to the one they saw in the body camera footage. JT:77-78; BWC: 3:00-5:15. Olson testified he was “adamantly against rape for many reasons,” and the jury evaluated his claim that L.O. had a rape fantasy he engaged to save their marriage despite past refusals to participate. JT:93, 103-04. They also examined his version of events that L.O. did not resist a forced kiss—she playfully pulled away and giggled as if she were flirting with him, and then he led her to the bedroom before gently placing her on the bed and engaging in a consensual rape fantasy. JT:102-04. They witnessed Olson agree L.O. said “no, no, no,” but he did not stop because the real word for no was “pineapple.” JT:103, 111. The jury also heard Olson’s testimony, which was consistent with L.O.’s, that he was not erect during the sexual encounter. JT:104. Finally, they reviewed the claims that Olson never yelled, and L.O.’s neighbor was wrong about there having been any screaming. JT:109-10.

After weighing all the evidence, the jury found that Olson used force to penetrate L.O. without her consent despite his inability to achieve an erection. SR:294-95; SDCL 22-22-1; SDCL 22-22-2. In making this determination, the jury considered Olson’s claim that he had never participated in L.O.’s rape fantasy before. JT:93, 103. They rejected Olson’s testimony and believed L.O. that no such fantasy ever existed. JT:30. Given the amount of evidence showing Olson raped L.O. in an act of domination and control, as well as the outlandishness of his

rape fantasy defense, it would not have changed the result if Olson had testified the reason he never previously engaged in the fantasy was childhood sex abuse experiences. *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737. This is especially so because the jury did not even believe his claim that a rape fantasy existed. JT:30, 93. Olson did not suffer prejudice. *Belt*, 2024 S.D. 82, ¶ 20, 15 N.W.3d at 737.

Olson argues this Court's reasoning in *State v. Van Der Weide* means the exclusion of his sex abuse testimony goes beyond an analysis of prejudice. OB:12-13; 2024 S.D. 18, 5 N.W.3d 577. But Olson misapplies the case. *See generally Van Der Weide*, 2024 S.D. 18, 5 N.W.3d 577. That case involved SDCL 19-19-412 and SDCL 19-19-403 exclusion of evidence about past consensual encounters that included the use of sex toys between the defendant and victim. *Id.* ¶ 45, 5 N.W.3d at 590. The lower court improperly applied SDCL 19-19-412 because the evidence was offered to prove consent, and it did not appropriately weigh probative value under SDCL 19-19-403. *Id.* ¶¶ 46-47, 5 N.W.3d at 590-91. The exclusion was of evidence so central to the defense that it "directly implicate[d] Van Der Weide's constitutional right to testify in his own defense." *Id.* ¶ 53, 5 N.W.3d at 592. Thus, this Court examined the issue in terms of the due process right to present a defense, and the burden shifted to the State to prove the exclusion was harmless beyond a reasonable doubt. *Id.* ¶ 54, 5 N.W.3d at 592-93.

Here, the circuit court never prohibited Olson from testifying L.O. brought up a rape fantasy in the past. JT:72-73. The circuit court therefore never prevented Olson from arguing *how* L.O. allegedly consented. *Van Der Weide*, 2024 S.D. 18, ¶ 46, 5 N.W.3d at 590-91. The jury heard Olson’s argument that L.O. consented on the morning in question because the sexual behavior was what she desired before—a rape fantasy she wanted but he never previously indulged. JT:93, 103-04.

Finally, Olson’s testimony about why *he* had not consented to the rape fantasy before was not central to his defense. On the other hand, the sex toys from *Van Der Weide* were central to showing that *the victim* did consent. 2024 S.D. 18, ¶ 46, 5 N.W.3d at 591-92. There is no need for this Court to engage in a due process evaluation like in *Van Der Weide* because Olson still testified L.O. consented and explained how with testimony about the rape fantasy. *Id.* ¶ 54, 5 N.W.3d at 592-93; JT:72-73, 93, 103-04. Olson also still testified he “was adamantly against rape for many reasons,” and therefore did not indulge the fantasy before. JT:93, 103. The only limitation was he could not say one of the reasons was he and his sisters suffered sexual abuse. JT:72-73. All the same, even under a due process analysis, the strength of the State’s case outlined above shows excluding Olson’s testimony was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing arguments and authorities, the State requests that Olson's convictions and sentences be affirmed.

Respectfully submitted,

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1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 5,337 words.

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Dated this 21st day of March 2025.

/s/ Jacob R. Dempsey
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The undersigned hereby certifies that on March 21st, 2025, a true and correct copy of Appellee's Brief in the matters of *State of South Dakota v. Clifford William Olson*, Appeal No. 30893, was served via electronically through Odyssey File and Serve on John M. Noyes at jnoyes@bantzlaw.com.

/s/ Jacob R. Dempsey
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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

STATE OF SOUTH DAKOTA,

Appeal No. 30893

Plaintiff/Appellee,

vs.

CLIFFORD WILLIAM OLSON,

Defendant/Appellant.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota
The Honorable Julia M. Dvorak, Presiding

APPELLANT'S REPLY BRIEF

Notice of Appeal was filed on November 10, 2024

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REPLY ARGUMENT AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT ERRED WHEN IT GRANTED THE STATE'S MOTION IN LIMINE BARRING DEFENDANT FROM PRESENTING EVIDENCE OF HIS BEING THE VICTIM OF SEXUAL ASSAULT AS A CHILD.

A. Defendant's proffered testimony was relevant.

The State's summation of what the jury had to determine at trial is correct. The trial did come down to a credibility determination between Defendant and his wife. *Appellee's Brief* at 13. That is why the court not allowing Defendant to give his reason for not having previously engaged in the rape fantasy was error. Defendant's reason provided more context for why he had never engaged in that particular fantasy than simply stating he was "adamantly against rape for many reasons." TT at 93, 17-18. Defendant being the victim of child sexual abuse would have given the jury the reason he was "adamantly against rape" which would help explain why he never chose to engage in any rape fantasy and why he chose to do so on the morning of January 4th.

In its brief the State argues that Defendant's proffered testimony was an attempt to garner sympathy from the jury. *Appellee's Brief* at 14. The fact that certain evidence may cause a jury to become sympathetic to a particular party does not automatically render that evidence irrelevant. The State cites *State v. Reay*, 2009 S.D. 10, 762 N.W.2d 356, for the proposition "that attempts at winning sympathy are not a legitimate means of persuasion..." *Appellee's Brief* at 15. However, the evidence introduced in *Reay* is different from the evidence sought to

be introduced here. The testimony in *Reay* related to the victim's mother's ability to gauge people's reaction to tragedy. *Reay* 2009 S.D. 10, ¶32 N.W.2d 356, 366. This court held that evidence was not probative of anything at issue in the trial. *Id.* However, here the Defendant was seeking to testify to his own personal experience, how that experience influenced his relationship with his wife, and how it influenced his decisions on the morning of January 4th. When compared to the evidence sought to be introduced here it is clear that the evidence in *Reay* was not probative and therefore its introduction at trial was not for a legitimate purpose.

When evidence is of consequence in determining an action, as Defendant's testimony is here, it is relevant. SDCL § 19-19-401. The fact that it may garner sympathy from the jury does not make it irrelevant. In order for evidence to be excluded it needs to either be not relevant or its "probative value needs to be substantially outweighed by a danger of unfair prejudice" or any of the other factors found in Rule 403. SDCL § 19-19-403.

B. The probative value of the evidence was not substantially outweighed by the dangers of unfair prejudice.

The State argues that allowing Defendant to testify about being the victim of child sex abuse "would have created a substantially confusing and misleading minitrial." *Appellee's Brief* at 17. While allowing Defendant to testify to his experience with child sexual abuse may have caused the State to call rebuttal witnesses; it is not certain that it would have resulted in the "substantially confusing and misleading minitrial" the State suggests would have occurred. *Id.*

Likewise, any confusion that may have resulted would not have substantially outweighed the probative value of the evidence. As noted above Defendant's proffered testimony would have provided important context to his statement that he was "adamantly opposed to rape..." TT at 93, 17-18. This context was relevant to Defendant's rape fantasy defense in that it would have helped the jury understand why Defendant was opposed to rape and why he did not engage in his wife's rape fantasy prior. Any inquiry into the veracity of Defendant's claim that he was the victim of childhood sexual abuse would not have been so prejudicial so as to outweigh the probative value of the evidence.

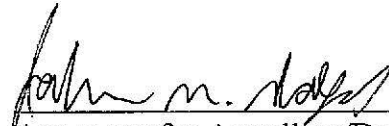
The State highlights many of the differences between *State v. Dickerson*, 2022 S.D. 23, 973 N.W.2d 249 and the present case. *Appellee's Brief* at 17. However, the cases are similar in that the evidence sought to be introduced in both was relevant to the Defense's theory of the case. In *Dickerson* the evidence was relevant to show that the victim had raped the defendant, and that the victim had motivation to lie about the rape to avoid deportation. *Dickerson*, 2022 S.D. 23 ¶35 N.W.2d 249, 261. In this case Defendant's testimony is relevant to show that his wife had a rape fantasy, and why he had not engaged in that fantasy before. In both cases it would not have been substantially confusing or misleading for the jury to hear this evidence.

CONCLUSION

For the foregoing reasons, and for the reasons asserted in his Appellant's Brief, Defendant respectfully requests the judgment and sentence be vacated and the case remanded for a new trial.

Dated this 21st day of April, 2025.

BANTZ, GOSCH & CREMER, L.L.C.

A handwritten signature in black ink, appearing to read "John M. Noyes", is written over a horizontal line.

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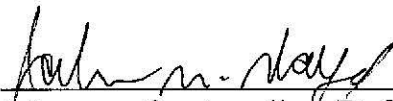
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The undersigned attorney for Appellant/Defendant Clifford William Olson, hereby certifies that on the 21st day of April, 2025, a copy of **Appellant's Reply Brief** was filed electronically with the Clerk of Court through the Odyssey File & Serve and email notification was sent to:

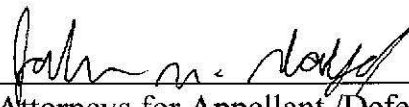
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