#29722

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

VS.

THEODORE GUZMAN
Defendant and Appellant

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE ROBERT MANDEL, PRESIDING

APPELLANT'S BRIEF

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Notice of Appeal was filed on July 27, 2021

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PRELIMINARY STATEMENT

The identities of minor children will be protected using first name and last name initials.

All references to documents in the record herein will be designated as "SR" followed by the appropriate page number.

The transcripts in this case will be referred to as set out below followed by the appropriate page number:

January 2020 Jury Trial 1JT

December 11, 2020 Status Hearing 2SH

March 19, 2021 Pretrial Conference..... 2PTC

March 25, 2021 Continued Pretrial Conference 2CPTC

April 2021 Jury Trial 2JT

July 21, 2021 Sentencing Hearing..... SENT

JURISDICTIONAL STATEMENT

Guzman appeals from a Judgment of Conviction for three counts of First-Degree Rape and one count of Sexual Contact With Child Under Sixteen Years of Age, entered and filed on July 21st 2021, before the Honorable Robert Mandel, Seventh Circuit Court Judge, Rapid City, Pennington County, South Dakota. Appeal is by right pursuant to SDCL § 23A-32-2. Notice of Appeal was filed on July 27th, 2021. An Amended Judgment correcting a clerical error was filed November 17th, 2021.

STATEMENT OF LEGAL ISSUES

1. Whether the trial court's exclusion of the testimony of Defendant's witness, Helen Guzman, was in violation of Defendant's right to due process under the 5th and

14th Amendments of the United States Constitution, and Article 6 § 2 of the South Dakota Constitution, and his right to obtain witnesses in his favor under the 6th Amendment of the United States Constitution, and Article 6, §7 of the South Dakota Constitution.

Holder v. United States 150 U.S. 91 (1893).

United States v. Atkins 487 F.2d 257 (8th Cir. 1973).

State v. Randle, 916 N.W. 2d 461 (S.D. 2018).

People v. Melendez, 80 P.3d 883 (Colo. App. 2003).

2. Whether the trial court abused its discretion and violated Defendant's right against self-incrimination under the 5th Amendment of the United States Constitution and Article 6 § 9 of the South Dakota Constitution, when it allowed into evidence a transcript of his testimony from his first trial, because that testimony was impelled by a constitutional violation. That violation occurred when the State knowingly elicited duplicitous evidence from witness N.G., violating Defendant's Due Process constitutional right to jury unanimity under the 5th Amendment to the United States Constitution, Article 6, §9 of the South Dakota State Constitution, and SDCL § 23A-8-2(4) (requiring unanimous jury verdicts in criminal cases).

Harrison v. United States, 392 U.S. 219 (1968).

State v. Brende, 835 N.W.2d 131 (S.D. 2013).

State v. Babcock, 952 N.W.2d 750 (S.D. 2020).

3. Whether admission of W.B.'s testimony as other acts evidence under SDCL §19-19-404(b) violated Defendant's constitutional right to Due Process under the 5th

and 14th Amendments of the United States Constitution, and Article 6 § 2 of the South Dakota Constitution and was therefore an abuse of discretion.

State v. Wright, 593 N.W.2d 792 (S.D. 1999).

State v. Steichen, 588 N.W.2d 870 (S.D. 1998).

State v. Lassiter, 692 N.W.2d 171 (S.D. 2005).

State v. Knecht, 563 N.W.2d 413 (S.D. 1997).

4. Whether admission of the cumulative expert testimony of former forensic interviewer Holli Strand violated Defendant's constitutional right to Due Process under the 5th and 14th Amendments of the United States Constitution, and Article 6 § 2 of the South Dakota Constitution and was therefore an abuse of discretion. Alternatively, whether it was plain error.

Stormo v. Strong, 469 N.W. 2d 816 (S.D. 1991).

State v. Logue, 372 N.W.2d 151 (S.D. 1985).

5. Whether exclusion of evidence of Defendant's son's forensic interviews with Tiffanie Petro violated Defendant's constitutional right to Due Process under the 5th and 14th Amendments of the United States Constitution, Article 6 § 2 of the South Dakota Constitution, and Defendant's right to call his own witnesses at trial under the 6th Amendment to the U.S. Constitution and Article 6 § 7 of the South Dakota Constitution and was therefore an abuse of discretion. Alternatively, whether it was plain error.

State v. Lamont, 631 N.W.2d 603 (S.D. 2001).

State v. Brammer, 304 N.W.2d 111 (S.D. 1981).

State v. Buller, 484 N.W.2d 883 (S.D. 1992).

6. Whether the order of $11,190 as restitution for expert fees was an abuse of discretion.

State v. Ryyth, 626 N.W.2d 290 (S.D. 2001).

State v. No Neck, 458 N.W.2d 364 (S.D. 1990).

State v. Garnett, 488 N.W.2d 695 (S.D. 1992).

STATEMENT OF THE CASE AND FACTS

On December 5th, 2017, 12-year-old A.C., a friend of Defendant's daughter, reported to her mother that she had been raped by Defendant at a sleepover approximately 2-3 weeks prior. A.C.'s mother called the police, and Rapid City Police Officer Dalton Santana responded to the girl's home. A.C. was not interviewed by law enforcement at this time, and was forensically interviewed on December 11th, 2017, by forensic interviewer Tiffanie Petro at the Children's Advocacy Center in Rapid City South Dakota. As a result of the allegations made by A.C., Defendant's own children were taken into foster care on December 13th, 2017.

Defendant's 10-year-old daughter N.G. was forensically interviewed by Petro on December 15th, 2017. She denied any sexual contact with her father during that interview.

On either December 22nd, December 23rd, or possibly Christmas Eve of 2017, N.G. disclosed to her foster mother, Christina Padgett, that she had been raped by her father. In response to this disclosure, N.G. was again interviewed by Petro on Jan 5th, 2018. During this interview N.G. alleged sexual contact with her father.

Seven months later, on July 10th, 2018, another of Defendant's daughters, eight-year-old L.G., made a similar disclosure to the foster mother, Padgett. In response to this

disclosure, L.G. was interviewed by Petro on July 31st, 2018. L.G. made allegations of sexual contact with her father during this interview.

Defendant's ten-year-old son, A.G. was interviewed by Petro on August 7th, 2018 (A.G. had also been interviewed by Petro regarding an incident totally unrelated to Defendant in October 4th 2017, approximately 1.5 months prior to the sleepover incident initiating these charges). During the August 2018 interview A.G. described being raped by an unknown male neighbor. Defendant filed notice of intent to offer A.G.'s interview on October 21st, 2020. SR, 2188. The court denied that motion and excluded any mention of A.G.'s forensic interviews at trial. 2PTC, 24.

Defendant was initially indicted for the first-degree rape of A.C. on March 7th, 2018, and arrested. A superseding indictment was filed on August 8th, 2018, alleging two counts of first-degree rape of both N.G. and L.G., and an additional count of Sexual Contact against N.G.

Defendant's first jury trial occurred in Pennington County from January 8th, 2018, until January 17th, 2020. This trial resulted in a hung jury. Defendant's original attorney quit the practice of law, and Defendant was appointed his current counsel. Defendant's second jury trial occurred from April 6th to April 15th, 2021. That trial resulted in Defendant's conviction on all four counts.

Defendant testified at his first trial. He did not testify at his second trial. Over his objection, the transcript of his testimony was read into evidence at his subsequent trial. SR, 2465; 2JT, 558-560 and SR2576; and 1JT, 810-898.

During the second trial, the State introduced other acts evidence pursuant to SDCL § 19-19-404(b). The evidence consisted of the testimony of W.B., who testified to

six separate episodes of sexual abuse by defendant, occurring over a period of three years, approximately two years prior to the charged acts. The court allowed the testimony over defendant's objection. 2JT, 740:17.

The State also noticed intent to offer the expert testimony of witness Holli Strand, a former forensic interviewer. The trial court allowed Strand's testimony over Defendant's objection that it was cumulative to Tiffanie Petro's. SR, 2186; 2SH, 19:25; and 2PTC, 31:18.

The second trial occurred subject to multiple COVID 19 pandemic restrictions, one of which barred spectators from the courtroom and directed them to two video-viewing rooms, on a different floor of the courthouse, where they could view the trial on a television screen. 2JT, 742:13-23. The location of these viewing rooms changed during the course of the trial. 2JT, 742: 16-18.

During trial on April 14th, 2021, the State requested an in-chambers meeting. The State's Attorney indicated that defendant's mother, Helen Guzman, who had been noticed as a witness by the defense, had been observed inside one of the video-viewing rooms by a member of the prosecution's staff, Jamie Fischer. 2JT, 742:6. The State moved to prohibit Ms. Guzman from testifying for violating "that sequestration order." 2JT 714:6. Presuming such an order existed, the court granted the motion and did not allow Helen Guzman to testify at all. 2JT, 717:2 and 798:16.

In the second trial, no written motion for witness sequestration was filed by the prosecution or the defense. No oral request for witness sequestration was made by either side. No oral order or sua sponte declaration of witness sequestration was ever made by the trial court. No written order for witness sequestration was ever signed or filed.

ISSUES AND ARGUMENT

1. ISSUE PRESENTED: Exclusion of the testimony of Defendant's witness, Helen Guzman, deprived him of his constitutional rights to due process and to obtain witnesses in his favor, contained within the 5th and 6th Amendments to the United States Constitution, and Article 6, § 2 and § 7 of the South Dakota Constitution.

An accused must "be afforded a meaningful opportunity to present a complete defense." *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988). "Those denied the ability to respond to the prosecution's case against them are effectively deprived of a `fundamental constitutional right to a fan-opportunity to present a defense.'" *State v. Lamont*, 631 N.W.2d 603, 608 (S.D. 2001).

A trial court has authority to sequester or exclude witnesses from a courtroom pursuant to SDCL § 19-19-615. The pertinent part of that rule states: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own." (this portion of SDCL § 19-19-615 is identical to Federal Rule of Evidence 615).

Although the South Dakota Supreme Court has considered violations of witness-sequestration orders multiple times, every scenario involved a prosecution witness violating a court's sequestration order. *State v. Randle*, 916 N.W. 2d 461 (S.D. 2018), *State v. Rough Surface*, 440 N.W. 2d 746 (S.D. 1989), *State v. Dixon*, 419 N.W. 2d 699 (S.D. 1988), *State v. Ashker*, 412 N.W. 2d 97 (S.D. 1987), *State v. Huettl*, 379 N.W. 2d 298 (S.D. 1985). This Court has never considered the appropriate sanction when a Defendant's witness in a criminal trial violates a sequestration order. Whether it is

constitutionally appropriate to exclude the testimony of such a witness entirely is an issue of first impression in South Dakota.

In all the above-cited South Dakota cases this Court determined that the trial judge was within his discretion to allow a prosecution witness to testify after violating sequestration. "The decision to grant or deny a mistrial or exclude testimony when the court's sequestration order is violated is within the sound discretion of the circuit court." *State v. Randle*, 916 N.W.2d 461, 466 (S.D. 2018).

However, the exclusion of a Defendant's witness in a criminal trial is a new, and constitutionally different, matter than what this court considered in the past. Excluding a defense witness in a criminal trial implicates his 6th Amendment right to call witnesses on his own behalf: "In contrast to those cases, this case involves the exclusion of a witness called by the accused in a criminal case. Thus, it implicates the fundamental right of criminal defendants to call witnesses on their own behalf." *People v. Melendez*, 80 P.3d 883 (Colo. App. 2003). (See also *Washington v. Texas*, 388 U.S. 14 (1967), for the proposition that criminal defendants have a fundamental constitutional right to call their own witnesses).

Exclusion of a defense witness also implicates his 5th Amendment right to due process. The U.S. Court of Appeals for the Fifth Circuit stated: "Closely related to Braswell's sixth amendment right is his right to a fair trial — to due process. Braswell had a right to at least present the testimony of his sole corroborating witness to the jury. That the jury might still have returned a guilty verdict is beside the point; judgment of the credibility of witnesses is for the trier of fact. The trial court arbitrarily excluded Rogers upon no other basis than that he violated the rule. Such discretion cannot be permitted

when it denies a defendant a fundamental constitutional right." *Braswell v. Wainwright*, 463 F.2d 1148, 1155. (5th Cir. 1972).

Because the trial court in *Melendez* excluded a defendant's witness in a criminal trial, it "raises concerns not present where the exclusion is of a prosecution witness..." *Id.* 885. See also: *Geders v. United States*, 425 U.S. 80, 88 (1976). "A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness..." *Id.* at 88.

In *Melendez*, the Colorado court reversed because the trial judge excluded testimony of a defense witness who broke sequestration. That court was able to find only a single instance of exclusion of a defense witness for this reason in Colorado appellate history, from 118 years ago. *Id.* at 885, See *Vickers v. People*, 73 P. 845 (1903), (that defendant's conviction was reversed for the same reason requested in this appeal). One of the reasons this is an issue of first impression in South Dakota is because outright exclusion of a defendant's witness is, and ought to be, a rare sanction for breaking sequestration.

The South Dakota Supreme Court has historically followed the approach of allowing testimony, even from order-violating witnesses. *State v. Randle,* 916 N.W.2d 461 (S.D. 2018), *State v. Rough Surface*, 440 N.W.2d 746 (S.D. 1989), *State v. Dixon*, 419 N.W. 2d 699 (S.D. 1988), *State v. Ashker*, 412 N.W. 2d 97 (S.D. 1987), *State v. Huettl*, 379 N.W. 2d 298 (S.D. 1985). This approach is in keeping with the United States Supreme Court caselaw from *Holder v. United States* 150 U.S. 91 (1893). The holding from *Holder* has been controlling law on this topic for over a century:

"If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." *Id.*, at 92

The preceding sentence has been cited as *"the controlling general rule"* by the United States Court of Appeals for the Eighth Circuit. *United States v. Kiliyan*, 456 F.2d 555, at 561 (8th Cir. 1972). For 128 years *Holder* has stood for the proposition that a witness should not typically be excluded for violating a sequestration order. The Eighth Circuit has summed up the *Holder* rule thusly: "Ordinarily the violation of a sequestration order by a witness does not call for exclusion of his testimony." *United States v. Atkins* 487 F.2d 257 (8th Cir. 1973).

Only in special circumstances should a court impose the ultimate sanction of exclusion of a witness' testimony entirely. *United States v. Smith,* 578 F.2d. 1227, 1235 (8th Cir. 1978). The Eighth Circuit has held that these special circumstances mean some indication that the witness "was in court with the consent, connivance, procurement or knowledge of the appellant or his counsel." *United States v. Kiliyan*, 456 F. 2d 555 (8th Cir. 1972), citing *United States v. Schaefer*, 299 F.2d 625, at 631 (7th Cir. 1962).

Although even wrongfully excluded evidence may be harmless error if the excluded evidence was cumulative, Helen's proposed testimony was not cumulative. *United States v. Atkins,* 487 F.2d 257, 258 (8th Cir. 1973), see also: *State v. Ashker*, 412 N.W.2d 97, 104 (S.D. 1987). In the case at bar, Helen Guzman, who is the defendant's elderly mother, was noticed as a witness to testify that she did not hear anything on the

night of the alleged rape of A.C., despite her bedroom being just down the hall and her bedroom door open. She had already testified to this at the first trial. 1JT, 780:9-11, 781:16. Her testimony was limited, but it was powerful and non-cumulative- there was no other witness to testify to that particular fact, and the event A.C. described at trial would have been noisy. Defendant was therefore prejudiced by the decision to disallow Helen's testimony, and the error was not harmless.

"Sequestration orders are meant to prevent witnesses from tailoring their testimony to that of prior witnesses." *United States v. Engelmann*, 701 F.3d 874, 878 (8th Cir. 2012). The danger of Helen Guzman changing or tailoring her testimony in response to hearing other testimony was almost non-existent. This is not only because her testimony was so factually limited, but because the state had a transcript of her previous trial testimony and any attempt to deviate from it would have resulted in immediate impeachment. 2JT, 715:16. This impeachment would have neutralized any possible prejudice to the state's case. "Prejudice is established where a witness' testimony has changed or been influenced by what [they] heard from other witnesses." *State v. Randle*, 916 N.W.2d 461 (S.D. 2018), citing *State v. Dixon*, 419 N.W.2d 699 (S.D. 1988). Here, the defense obtained no advantage whatsoever from the sequestration violation. The court simply excluded the evidence without conducting any analysis of whether the State would be prejudiced by the offered testimony. Had the court done so, it would have determined that the violation conferred no advantage upon the defense, and there is no set of circumstances under which it ever could have.

The court also failed to analyze the nature of the violation. The witness never entered the courtroom. Due to pandemic restrictions, the public was restricted to video-

observation rooms elsewhere in the courthouse, and the location of these rooms changed during the trial. 2JT, 741: 16-18. Defendant's counsel was unable to monitor the comings and goings of the video room and could not see if a witness was violating sequestration. Defense counsel learned from Helen herself, during a witness interview in the days before she was to testify, that she had visited the viewing room. 2JT, 714:8-9.

Jamie Fischer, a paralegal from the State's Attorney's Office, testified that she observed Helen Guzman in the video observation room during her granddaughter L.G.'s testimony, on April 13th, 2021. 2JT, 743:25. Had COVID restrictions not been in place, defendant's counsel, or the court itself, would have seen Helen enter the courtroom and resolved the situation.

Helen was a heartbroken grandmother who, due to this case, had not seen her grandchildren in over three years. 1JT, 775:19. She was seemingly unable to resist the allure of seeing one of them live on a video screen. Fischer testified that she had been in the viewing room for 98% of the trial, and Helen was present for only L.G.'s testimony. 2JT 743:2. Her violation conferred no possible tactical advantage and was motivated by the most innocent of impulses. This hardly rises to the level of a sequestration violation which was accomplished with the "connivance consent, or procurement" of either party. *United States v. Kiliyan*, 456 F. 2d 555 (8th Cir. 1972). The trial court did not perform an appropriate analysis of the nature of the violation. A more thorough and thoughtful analysis of the nature of the violation would have resulted in a more reasonable remedy short of total exclusion.

Complete exclusion of Helen's testimony was an unnecessarily harsh sanction for the nature of the violation. Other states, when considering the appropriate sanction for a

violation of a sequestration order, have developed a multi-factor analysis to scrutinize the nature of the violation.

"Sanctions for violation of a sequestration order, in addition to a mistrial, fall into three categories: (1) Citing the witness for contempt; (2) permitting comment on the witness' noncompliance in order to reflect on his credibility; or (3) refusing to let the witness testify or striking his testimony. *People v. P.R.G.*, 729 P.2d 380 (Colo. App. 1986).

The court should have conducted some analysis of the potential sanctions available to it and considered those against the nature of the violation. Because no such analysis occurred before total exclusion of the offered testimony, the court abused its discretion in refusing to allow Helen Guzman to testify at Defendant's trial.

2. ISSUE PRESENTED: The admission of a transcript of Defendant's testimony from a previous mistrial violated his right against self-incrimination guaranteed by the 5th and 14th Amendments of the United States Constitution and Article 6, § 9 of the South Dakota Constitution. This is because the testimony Defendant gave during his mistrial was impelled by the State's violation of his due process constitutional right to jury unanimity under the 5th Amendment of the United States Constitution, and Article 6, § 9 of the South Dakota State Constitution (that testimony was elicited by the state at: 1JT, 337:25 and 1JT 343:9-16). The introduction of the duplicitous evidence also violated SDCL § 23A-8-2(4) (requiring unanimous jury verdicts in criminal cases).

Defendant's decision to testify in his first trial was the fruit of that constitutional violation and should have been excluded from his second trial. *Harrison v. United States*, 392 U.S. 219, 222 (1968). The court's admission of his trial testimony therefore violated

his right against self-incrimination, guaranteed by the 5th Amendment of the United States Constitution and Article 6, § 9 of the South Dakota Constitution.

"Duplicity is the joining in a single count of two or more distinct and separate offenses." *State v. Babcock*, 952 N.W.2d 750, 762 (S.D. 2020). The constitutional danger arises when a jury has multiple acts to consider under a single count, in which case the jury may convict without reaching a unanimous agreement on the same act, thereby implicating the defendant's right to jury unanimity.

Duplicitous evidence was introduced in Defendant's first trial. The prosecution in defendant's first trial purposefully elicited duplicitous evidence from victim N.G. regarding an incident that was not charged and was not noticed as other acts evidence. 1JT, 337:25 and 343:9-16. Defendant's counsel objected to the introduction of the evidence, and a hearing was held outside the presence of the jury.

After the hearing, the court instructed the prosecution: "I don't want anything outside the time period of the indictment." 1JT, 341:12. This admonition was inadequate under South Dakota law. *State v. Brende*, 835 N.W.2d 131.

Brende instructs: "...the due process right to jury unanimity requires that the jury be unanimous as to the single act or acts that are the basis for the verdict," and: "...even though due process may not require time specificity in charging such cases, the jury must have been in agreement as to a single occurrence or the multiple occurrences underlying each count." *Id.* at 138.

Directly following this in-chambers hearing wherein the court inadequately warned the prosecutor regarding duplicity, the prosecution proceeded to immediately elicit testimony of the duplicitous other act. 1JT, 343:1-16.

In response to this constitutional violation, defendant then testified in his own defense. 1JT 810-874. Over Defendant's objection, the transcript of his testimony was read into evidence at his subsequent trial. SR, 2465. 2JT, 558-560 and SR2576. 1JT, 810-898.

Typically, a defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that testimony is admissible at a subsequent trial. *Unites States v. Gianakos*, 415 F.3d 912, 919 (8th Cir. 2005). However, if the Defendant was motivated to testify as a reaction to evidence admitted in violation of his constitutional rights, such prior testimony is "fruit of the poisonous tree" and should be excluded in a subsequent trial. *Harrison v. United States*, 392 U.S. 219, 222 (1968). *State v. Long*, 185 N.W.2d 472 (S.D. 1971).

Here, Defendant was impelled to take the stand in response to the constitutional violation which occurred in his first trial; the admission of duplicitous evidence. The admission of the transcript into evidence violated Defendant's right against self-incrimination and was therefore an abuse of discretion.

3. ISSUE PRESENTED: The admission of W.B's testimony as other acts evidence under SDCL § 19-19-404(b) was an abuse of discretion. "SDCL 19-19-404(b) governs the admission of other act evidence." *State v. Evans*, 956 N.W.2d 68, 79 (S.D. 2021). "A trial court's decision to allow the admission of other acts evidence will not be reversed unless the trial court abused its discretion." *State v. Steichen*, 588 N.W.2d 870, 874 (S.D. 1998).

"Evidence of a defendant's other crimes or acts is generally not admissible, unless an exception can be met." *State v. Moeller*, 548 N.W.2d 465, 471. Here, the trial court

listed the exceptions it relied upon as: "intent, preparation, plan, and absence of mistake." 2JT, 740:17. Admission of the testimony on these grounds was without analysis or application of the proposed evidence to the facts of the case and the 404(b) exceptions. 2JT, 740:18. This was an abuse of discretion.

A review of the record indicates that W.B.'s testimony was admitted for propensity purposes, and the 404(b) exceptions enumerated by the court did not justify inclusion of the testimony. "Prior bad acts evidence is not admissible to show that, merely because a defendant committed a similar offense on another occasion, he has a propensity to commit the offense charged." *Id.* at 874.

The "lack of mistake" 404(b) exception does not apply in this case because mistake was never advanced as a defense, and there was never any chance that it would be. Mistake will almost never be used at trial as a defense to the crime of child rape. The circumstances under which such a scenario could occur are so limited to be nearly nonexistent, and "absence of mistake or lack of accident" should almost never be used as a 404(b) justification in a case like this. The fact that the court advanced it as a justification in this case reveals that it used an impermissible "blunderbuss" approach, in which evidence is declared admissible to satisfy a number of disparate 404(b) exceptions without independently applying each exception to the facts of the case. "We encourage trial courts to avoid the "blunderbuss " approach, declaring the evidence admissible to prove any issue including motive, identity, absence of mistake, intent, or plan, without independently applying each theory to the facts." *State v. Wright*, 593 N.W.2d 792, 800 n.6 (S.D. 1999).

"Intent" was likewise never at issue in this case. The sole question of the trial was whether defendant did or did not rape these children. In this trial, there was no scenario under which a sex act with a child could be legally excusable based on a lack of intent, and there was no additional *mens rea* element requiring proof of intent outside of the acts being committed. Intent was also an improper justification for admission of the other acts evidence in this case.

The trial court's reliance on the "preparation" 404(b) exception was equally misplaced. Determining that a sexual assault committed against an unrelated victim was somehow preparation for a subsequent rape, years in the future, misunderstands the "preparation" exception. See *State v. Anderson*, 608 N.W.2d 644 (S.D. 2000). (Defendant's prior discussion of using "walkie talkies" to commit a kidnapping was a preparation under 404(b)). If the trial court's reasoning was that any crime committed in the past is necessarily preparation for the commission of any similar crime in the future, such a conception of the "preparation" exception reduces SDCL § 19-19- 404(b) to a mere vehicle for the introduction of forbidden propensity evidence and amounts to an abuse of discretion.

"Plan" is an appropriate 404(b) exception only if accompanied by the appropriate analysis. Simply citing "plan" as justification for the introduction of otherwise forbidden evidence, without analysis, is no better than a blank check for the admission of any propensity evidence the State desires to introduce. In this case, the trial court's application of the proposed testimony to 404(b)'s "plan" exception was so cursory that the evidence was in reality admitted as propensity evidence. "This is the kind of propensity evidence Rule 404(b) was designed to preclude: evidence of other crimes

cannot be used to prove conduct through an inference about the defendant's character." *State v. Lassiter*, 692 N.W.2d 171, 179 (S.D. 2005).

None of the court's 404(b) exceptions justified admission of W.B.'s testimony.

The admission of W.B's testimony was also more prejudicial than probative under SDCL § 19-19-403, due to the number of events of prior sexual abuse she was allowed to testify to. SDCL § 19-19-403 permits the trial court to exclude evidence if, among other reasons, it is cumulative or prejudicial. *State v. Knecht*, 563 N.W.2d 413, 417 (S.D. 1997).

While all other acts evidence is inherently prejudicial, if unfair prejudice results, it should be excluded. "Even though the admission of other acts evidence will usually result in some prejudice, it will not be admitted only if that prejudice is unfair. " *Steichen,* at 876.

Because W.B. was allowed to testify to six different instances of sexual abuse, the prejudice that resulted was unfair. 2JT, 739:20. The admission of six prior incidents was excessive to the point the testimony became more prejudicial than probative, and the trial court's failure to limit or exclude it under § 19-19-403 was an abuse of discretion.

The overwhelming nature of six prior incidents of sexual abuse persuaded the jury by illegitimate means. "Prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means which results in one party having an unfair advantage." *Id.* at 876. The admission of W.B.'s testimony was therefore an abuse of discretion that deprived Defendant of a fair trial.

4. ISSUE PRESENTED: Because the testimony of former forensic interviewer Holli Strand was cumulative to that of Tiffanie Petro, Strand's testimony was more

prejudicial than probative, and its admission was an abuse of discretion. SDCL § 19-19-403 permits the trial court to exclude evidence if, among other reasons, it is cumulative or prejudicial. *State v. Knecht*, 563 N.W.2d 413, 417 (S.D. 1997). "Whether the probative value of relevant evidence has been substantially outweighed by the danger of unfair prejudice due to its cumulative nature is within the discretion of the trial court." *State v. Devall*, 489 N.W.2d 371, 375 (S.D. 1992)

The State originally noticed two forensic interviewers as witnesses. Defendant objected to the testimony of an additional forensic interviewer as cumulative. SR, 2186; 2SH, 19:25; and 2PTC, 31:18. "Cumulative evidence is evidence of the same character as evidence previously produced and which supports the same point." *Stormo v. Strong*, 469 N.W.2d 816, 824 (S.D. 1991). Strand's testimony and expertise were nearly identical to Petro's. SR, 2644 and SR, 2683. Both Strand and Petro have master's degrees, and both are child forensic interviewers. Strand was not capable of offering any relevant expert opinion that Petro could not. Her presence at the trial was an improper attempt to bolster the testimony of the alleged victims with additional expert opinion.

Allowing identical experts with interchangeable qualifications to dogpile onto this indigent defendant was prejudicial. Within the context of a criminal trial, scientific or expert testimony particularly courts the danger of undue prejudice. *State v. Logue*, 372 N.W.2d 151, 157 (S.D. 1985).

Defendant did not object to Strand's testimony as cumulative at the time of trial because she was the first forensic interviewer to testify, and her testimony was not cumulative at that time. Defendant requests that the court apply an abuse-of-discretion standard to the court's decision to allow Strand's testimony, based on Defendant's

written objection prior to trial, despite the lack of objection during trial. Alternatively, Defendant argues that allowing Strand's testimony was plain error.

5. ISSUE PRESENTED: Exclusion of the false allegation made by Defendant's son during a forensic interview with Tiffanie Petro was plain error, as it violated Defendant's constitutional right to Due Process under the 5th and 14th Amendments of the United States Constitution, Article 6 § 2 of the South Dakota Constitution, and Defendant's right to call his own witnesses at trial under the 6th Amendment to the U.S. Constitution and Article 6 § 7 of the South Dakota Constitution.

An accused must "be afforded a meaningful opportunity to present a complete defense." *State v. Iron Necklace*, 430 N.W.2d 66, 75 (S.D. 1988). "Those denied the ability to respond to the prosecution's case against them are effectively deprived of a `fundamental constitutional right to a fan-opportunity to present a defense.'" *State v. Lamont*, 631 N.W.2d 603, 608 (S.D. 2001).

Defendant's son was forensically interviewed twice by Tiffanie Petro, the same forensic interviewer who extracted allegations from the three named victims. During one interview, Defendant's son made unbelievable allegations of rape by an unnamed male neighbor which were never followed up on by law enforcement, presumably because they were obviously untrue.

Defendant filed a "Notice of Intent to Offer Witness Interview," (SR, 2188) which was denied. 2PTC, 24. Defendant asks this Court to apply an abuse of discretion standard to the trial court's decision to exclude that evidence, although no offer of proof was made at trial and some precedent suggests the issue is waived. "This court has repeatedly held that reversible error cannot be predicated upon the denial of a motion in limine and that

failure to specifically object to the evidence during trial forecloses complaint on the issue on appeal." *State v. Jones*, 521 N.W.2d 662, 670 (S.D. 1994).

However, plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court. SDCL 23A-44-15. *State v. Brammer*, 304 N.W.2d 111, 114 (S.D. 1981). The rule must be applied cautiously and only in exceptional circumstances. *State v. Buller*, 484 N.W.2d 883, 890 (S.D. 1992).

Defendant's son made false allegations of sexual assault against a likely fictitious neighbor in response to the same line of questioning, by the same forensic interviewer, at roughly the same time, as the three named victims in the indictment. 2PTC, 21-22. Whether children can fabricate stories of sexual abuse was highly relevant at trial, 2JT, 84:10-25; 95:22; 275:12; 278:4; 280:5, etc., (the possibility of fabricated allegations of child sexual abuse was the most important issue in the trial and appears throughout the record). The circumstances of this case amount to an exceptional circumstance. Exclusion of any reference to the forensic interviews of A.G. was plain error.

6. ISSUE PRESENTED: The order in the Judgment of Conviction of $11,190 as restitution for expert fees was an abuse of discretion.

Two days prior to the sentencing hearing in this case, the Pennington County State's Attorney's Office submitted a request to the court for "expenses incurred during the pendency of this case." The invoice listed various expenses totaling $12,390.66. Defense objected to the expert witness fees of Dr. David Mueller, Dr. Cara Hamilton, Tiffanie Petro, Brandi Tonkel, and Dr. Brooke Eide, amounting to $11,190 of the total requested. SENT, 16; SR, 3525. Although the State cited no authority in its request, presumably these expenses were requested under SDCL 23A-27-26, the costs-of-

prosecution-statute, as they clearly do not qualify as restitution under South Dakota law. *State v. Ryyth*, 626 N.W.2d 290 (S.D. 2001), *State v. Olson-Lame*, 624 N.W.2d 833 (S.D. 2001) (while these cases make clear the distinction between restitution and "costs of prosecution," they also emphasize that mislabeling a cost of prosecution as "restitution" - as the court did here - will not result in reversal).

Despite being mislabeled as "restitution," the question before this Court is whether the $11,190 of expert fees in this case were lawfully ordered as a cost of prosecution. It is the Defendant's position that expert witness fees are not a cost of prosecution under SDCL 23A-27-26.

SDCL § 23A-27-26 states:

In all criminal actions, upon conviction of the defendant, the court may adjudge that the defendant pay the whole or any part of the costs of that particular prosecution in addition to the liquidated costs provided by § 23-3-52. However, the costs shall not include items of governmental expense such as juror's fees, bailiff's fees, salaries and expenses of special agents, and reporter's per diem. Payment of costs may be enforced as a civil judgment against the defendant.

The only "costs of prosecution" explicitly affirmed by the South Dakota Supreme Court have been extradition costs, *State v. Ryyth*, 626 N.W.2d 290 (S.D. 2001), *State v. Olson-Lame*, 624 N.W.2d 833 (S.D. 2001), and the housing, medical and transport costs of a defendant. *Kleinsasser v. Weber*, 877 N.W.2d 86 (S.D. 2016). The Supreme Court has held that other costs sought by the state, such as law enforcement overtime wages, and juror's fees should not be considered costs of prosecution. *State v. No Neck*, 458

N.W.2d 364 (S.D. 1990) (juror's fees). *State v. Garnett*, 488 N.W.2d 695 (S.D. 1992) (law enforcement overtime wages).

In the case at bar, the expert witness fees requested are more analogous to law enforcement wages than anything that has been recognized as a "cost of prosecution" by this Court. The requested fees are also "expenses of special agents" and therefore explicitly barred by the plain language of SDCL § 23A-27-26.

CONCLUSION

Based on the above facts, arguments and authorities, Defendant Guzman's trial contained numerous errors constituting multiple constitutional violations. As such, his conviction should be reversed, and a new trial granted.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellant Guzman respectfully requests that he be allowed to present oral argument on these issues.

Dated this 6th day of December 2021.

Respectfully,

DUFFY LAW OFFICE, Prof. LLC

/s/: *Conor Duffy*
Conor Duffy
Attorney for Defendant/Appellant
703 Main Street, Ste. 203
Rapid City, SD 57701
(605) 939-7936

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains approximately 6,267 words and is 23 pages in length.

I certify that the word processing software used to prepare this brief is Microsoft Word Version 16.44.

/s/ Conor Duffy
Conor Duffy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of December 2021, a true and correct copy of the foregoing Appellant's Brief was served via electronic mail, at the e-mail addresses listed below, upon these individuals:

Jason Ravnsborg
atgservice@state.sd.us

Mark Vargo
vargo@pennco.org

/s/ Conor Duffy
Conor Duffy

APPENDIX

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	File No. CRI 18-1107
Plaintiff,	)	
vs.	)	**JUDGMENT**
THEODORE GUZMAN, DOB: 5/30/82 CR#: 17-217037	)	
Defendant.	)	

On the 21st day of July, 2021, the Defendant, Theodore Guzman, being present personally and being represented by and through his attorney, Conor Duffy, Rapid City; the State being represented by Chief Deputy State's Attorney, Lara R. Roetzel and Deputy State's Attorney, Kelsey Weber; the Defendant having previously been arraigned on a Superseding Indictment alleging the offenses of COUNT 1: FIRST DEGREE RAPE (CLASS C FELONY), committed between the dates of November 12, 2017 and November 30, 2021, inclusive, in violation of SDCL 22-22-1(1); COUNT 2: FIRST DEGREE RAPE (CLASS C FELONY), committed between the dates of February 6, 2016 and December 13, 2017, inclusive, in violation of SDCL22-22-1(1); COUNT 3: FIRST DEGREE RAPE (CLASS C FELONY), committed between the dates of January 1, 2015 and December 31, 2015, inclusive, in violation of SDCL 22-22-1(1); and COUNT 4: SEXUAL CONTACT WITH CHILD UNDER SIXTEEN YEARS OF AGE (CLASS 3 FELONY), committed between the dates of February 6, 2016 and December 13, 2017, inclusive, in violation of SDCL 22-22-7; the Defendant having entered a plea of not guilty on September 10, 2018, to the Superseding Indictment as charged; a trial by jury having been held before this Court from April 5, 2021 - April 15, 2021; the Jury having returned its verdict of Guilty of the offenses

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of COUNTS 1-3: FIRST DEGREE RAPE (CLASS C FELONY) and COUNT 4: SEXUAL CONTACT WITH CHILD UNDER SIXTEEN YEARS OF AGE (CLASS 3 FELONY) as charged; the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the sentence is that you, Theodore Guzman, upon your conviction for the crime of COUNT 1: FIRST DEGREE RAPE (CLASS C FELONY), be and you hereby are sentenced to serve life in the South Dakota State Penitentiary, Sioux Falls, South Dakota; and it is further

ORDERED AND ADJUDGED, and the sentence is that you, Theodore Guzman, upon your conviction for the crime of COUNT 2: FIRST DEGREE RAPE (CLASS C FELONY), be and you hereby are sentenced to serve life in the South Dakota State Penitentiary, Sioux Falls, South Dakota to run consecutive to Count 1; and it is further

ORDERED AND ADJUDGED, and the sentence is that you, Theodore Guzman, upon your conviction for the crime of COUNT 3: FIRST DEGREE RAPE (CLASS C FELONY), be and you hereby are sentenced to serve life in the South Dakota State Penitentiary, Sioux Falls, South Dakota to run consecutive to Count 2; and it is further

ORDERED AND ADJUDGED, and the sentence is that you, Theodore Guzman, upon your conviction for the crime of COUNT 4: SEXUAL CONTACT WITH CHILD UNDER SIXTEEN YEARS OF AGE (CLASS 3 FELONY), be and you hereby are sentenced to serve Fifteen (15) years in the South Dakota State Penitentiary, Sioux Falls, South Dakota to run consecutive to Count 3; and it is further

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ORDERED, that the Defendant receive credit for time already served in the Pennington County Jail in the amount of 1,226 days plus credit for each day served in the Pennington County Jail while awaiting transport to the South Dakota State Penitentiary; and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's Office through the Pennington County Clerk of Courts for the costs of the grand jury transcripts which have been incurred in this action in the amount of One Hundred Fifty Five Dollars and 30/100 ($155.30); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the costs of the expert fees for Dr. David Mueller incurred in this matter in the amount of Five Hundred Dollars ($500.00); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the costs of the expert fees for Dr. Cara Hamilton incurred in this matter in the amount of Two Thousand Six Hundred Ninety Dollars ($2,690.00); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the costs of the expert fees for Dr. Brook M. Eide incurred in this matter in the amount of Six Thousand Five Hundred Dolalrs ($6,500.00); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the costs of the expert fees for Tifanie Petro incurred in this matter in the amount of One Thousand Two Hundred Fifty Dollars ($1,250.00); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the costs of the expert fees for Brandi Tonkel incurred in this matter in the amount of Two Hundred Fifty Dollars ($250.00); and it is further

ORDERED, that the Defendant reimburse the Pennington County State's Attorney's office through the Pennington County Clerk of Courts for the costs of the witness fees for Willow Bracamonte incurred in this matter in the amount of One Thousand Forty Five Dollars and 36/100 ($1,045.36); and it is further

ORDERED, that reimbursement to the Pennington County State's Attorney's office (including Grand Jury transcripts, expert fees and witness fees) in the total amount of Twelve Thousand Three Hundred Ninety Dollars and 66/100 ($12,390.66) has been contested by the Defendant and a hearing shall be scheduled to address the same, and it is further

ORDERED, that, in accordance with SDCL 23A-40-11 through SDCL 23A-40-13, the determined amount for services and expenses of court-appointed counsel, Paul Winter, that may be filed as a lien against the property of Defendant by the county or municipality is Thirty Four Thousand Eight Hundred Eighty Five Dollars and 88/100 ($34,885.88); and it is further

ORDERED, that, in accordance with SDCL 23A-40-11 through SDCL 23A-40-13, the determined amount for services and expenses of court-appointed counsel, Conor Duffy, that may be filed as a lien against the property of Defendant by the county or municipality is Thirty Two Thousand Five Hundred Sixty Four Dollars and 46/100 ($32,564.46); and it is further

ORDERED, that the Defendant pay through the Pennington County Clerk of Courts liquidated court costs pursuant to SDCL 23-3-52 which have been incurred in these proceedings in the amount of Forty Dollars ($40.00); plus the crime victims' compensation surcharge pursuant

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to SDCL 23A-28B-42 in the amount of Two Dollars and Fifty Cents ($2.50); plus the unified judicial system court automation surcharge pursuant to SDCL 16-2-41 in the amount of Sixty-one Dollars and Fifty Cents ($61.50);

ORDERED, that any bond which has been posted in this matter be discharged and the bondsman exonerated; and it is further

ORDERED, that the Defendant be remanded to the custody of the Pennington County Sheriff for transportation and delivery to the Warden of the South Dakota State Penitentiary, Sioux Falls, South Dakota.

Dated this 21st day of July, 2021, effective the 21st day of July, 2021.

BY THE COURT:

Robert A. Mandel

The Honorable Robert Mandel
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts

By: _____ (Deputy)

(SEAL)

NOTICE OF RIGHT TO APPEAL

You, Theodore Guzman, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said clerk.

Pennington County, SD
FILED
IN CIRCUIT COURT
JUL 22 2021
Ranae Truman, Clerk of Courts
By _____ Deputy

1.5

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	File No. CRI 18-1107
Plaintiff,	)	
vs.	)	**AMENDED JUDGMENT**
THEODORE GUZMAN, DOB: 5/30/82 CR#: 17-217037	)	
Defendant.	)	

On the 21st day of July, 2021, the Defendant, Theodore Guzman, being present personally and being represented by and through his attorney, Conor Duffy, Rapid City; the State being represented by Chief Deputy State's Attorney, Lara R. Roetzel and Deputy State's Attorney, Kelsey Weber; the Defendant having previously been arraigned on a Superseding Indictment alleging the offenses of COUNT 1: FIRST DEGREE RAPE (CLASS C FELONY), committed between the dates of November 12, 2017 and November 30, **2017,** inclusive, in violation of SDCL 22-22-1(1); COUNT 2: FIRST DEGREE RAPE (CLASS C FELONY), committed between the dates of February 6, 2016 and December 13, 2017, inclusive, in violation of SDCL22-22-1(1); COUNT 3: FIRST DEGREE RAPE (CLASS C FELONY), committed between the dates of January 1, 2015 and December 31, 2015, inclusive, in violation of SDCL 22-22-1(1); and COUNT 4: SEXUAL CONTACT WITH CHILD UNDER SIXTEEN YEARS OF AGE (CLASS 3 FELONY), committed between the dates of February 6, 2016 and December 13, 2017, inclusive, in violation of SDCL 22-22-7; the Defendant having entered a plea of not guilty on September 10, 2018, to the Superseding Indictment as charged; a trial by jury having been held before this Court from April 5, 2021 - April 15, 2021; the Jury having returned its verdict of Guilty of the offenses

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of COUNTS 1-3: FIRST DEGREE RAPE (CLASS C FELONY) and COUNT 4: SEXUAL CONTACT WITH CHILD UNDER SIXTEEN YEARS OF AGE (CLASS 3 FELONY) as charged; the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the sentence is that you, Theodore Guzman, upon your conviction for the crime of COUNT 1: FIRST DEGREE RAPE (CLASS C FELONY), be and you hereby are sentenced to serve life in the South Dakota State Penitentiary, Sioux Falls, South Dakota; and it is further

ORDERED AND ADJUDGED, and the sentence is that you, Theodore Guzman, upon your conviction for the crime of COUNT 2: FIRST DEGREE RAPE (CLASS C FELONY), be and you hereby are sentenced to serve life in the South Dakota State Penitentiary, Sioux Falls, South Dakota to run consecutive to Count 1; and it is further

ORDERED AND ADJUDGED, and the sentence is that you, Theodore Guzman, upon your conviction for the crime of COUNT 3: FIRST DEGREE RAPE (CLASS C FELONY), be and you hereby are sentenced to serve life in the South Dakota State Penitentiary, Sioux Falls, South Dakota to run consecutive to Count 2; and it is further

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ORDERED, that the Defendant pay through the Pennington County Clerk of Courts liquidated court costs pursuant to SDCL 23-3-52 which have been incurred in these proceedings in the amount of Forty Dollars ($40.00); plus the crime victims' compensation surcharge pursuant

2.4

to SDCL 23A-28B-42 in the amount of Two Dollars and Fifty Cents ($2.50); plus the unified judicial system court automation surcharge pursuant to SDCL 16-2-41 in the amount of Sixty-one Dollars and Fifty Cents ($61.50);

ORDERED, that any bond which has been posted in this matter be discharged and the bondsman exonerated; and it is further

ORDERED, that the Defendant be remanded to the custody of the Pennington County Sheriff for transportation and delivery to the Warden of the South Dakota State Penitentiary, Sioux Falls, South Dakota.

Dated this 28th day of October, 2021, effective the 21st day of July, 2021.

BY THE COURT:

Robert A. Mandel

The Honorable Robert Mandel
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts
By: _____ (Deputy)

(SEAL)

NOTICE OF RIGHT TO APPEAL

You, Theodore Guzman, are hereby notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said clerk.

Pennington County, SD
FILED
IN CIRCUIT COURT
OCT 28 2021
Ranae Truman, Clerk of Courts
By _____ Deputy

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29722

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

THEODORE GUZMAN,

Defendant and Appellant.

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

THE HONORABLE ROBERT MANDEL
Circuit Court Judge

APPELLEE'S BRIEF

Conor Duffy
730 Main Street, Suite 203
Rapid City, SD 57701
Telephone: (605) 939-7936
Email: conor@duffylaw.us

ATTORNEY FOR PETITIONER
AND APPELLANT

JASON R. RAVNSBORG
ATTORNEY GENERAL

Chelsea Wenzel
Jonathan Van Patten
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR RESPONDENT
AND APPELLEE

Notice of Appeal filed July 27, 2021

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29722

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

THEODORE GUZMAN,

Defendant and Appellant.

JURISDICTIONAL STATEMENT

On July 22, 2021, the Honorable Robert Mandel, Circuit Court Judge, Seventh Judicial Circuit, entered a Judgment in *State of South Dakota v. Theodore Guzman*, Pennington County Criminal File Number 18-1107. SR:3518-22. Defendant filed his Notice of Appeal on July 27, 2021. SR:3523. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE COURT ERRED IN EXCLUDING DEFENSE WITNESS HELEN GUZMAN AFTER SHE VIOLATED THE WITNESS SEQUESTRATION ORDER?

The trial court granted the State's request to exclude Helen as a witness.

Holder v. United States, 150 U.S. 91 (1983)

State v. Willingham, 2019 S.D. 55, 933 N.W.2d 619

United States v. Kiliyan, 456 F.2d 555 (8th Cir. 1972)

SDCL 19-19-615

II

WHETHER THE COURT ERRED IN ADMITTING DEFENDANT'S TESTIMONY FROM HIS FIRST TRIAL?

The trial court allowed Defendant's prior testimony to be read to the jury with various redactions.

Harrison v. United States, 392 U.S. 219 (1968)

State v. Brende, 2013 S.D. 56, 835 N.W.2d 131

United States v. Gianakos, 415 F.3d 912 (8th Cir. 2005)

III

WHETHER THE COURT ERRED IN ADMITTING 404(b) EVIDENCE?

The trial court admitted the 404(b) testimony, finding that it was relevant to prove Defendant's intent, lack of mistake, preparation, and plan.

State v. Anderson, 2000 S.D. 45, 608 N.W2d 644

State v. Evans, 2021 S.D. 12, 956 N.W.2d 68

State v. Steichen, 1998 S.D. 126, 588 N.W.2d 870

SDCL 19-19-404(b)

IV

WHETHER THE COURT ERRED IN ALLOWING EXPERT STRAND TO TESTIFY AT TRIAL?

The trial court allowed Strand to testify at trial.

State v. Devall, 489 N.W.2d 371 (S.D. 1992)

Webb v. Bouton, 85 S.W.3d 885 (Ark. 2002)

SDCL 19-19-403

V

WHETHER THE COURT ERRED IN EXCLUDING A.G.'S FORENSIC INTERVIEWS?

The trial court excluded the recordings of A.G.'s forensic interviews.

State v. Birdshead, 2015 S.D. 77, 871 N.W.2d 62

State v. Fisher, 2010 S.D. 44, 783 N.W.2d 664

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

SDCL 19-19-401

SDCL 19-19-403

VI

WHETHER THE COURT ERRED IN ORDERING DEFENDANT TO REIMBURSE THE STATE FOR EXPERT WITNESS FEES PURSUANT TO SDCL 23A-27-26?

The trial court ordered Defendant to reimburse the State for fees related to several of the State's expert witnesses.

State v. Baldwin, 299 N.W.2d 820 (S.D. 1980)

State v. Garnett, 488 N.W.2d 695 (S.D. 1992)

State v. Ryyth, 2001 S.D. 50, 626 N.W.2d 290

SDCL 23A-27-26

STATEMENT OF THE CASE

In August 2018, a grand jury indicted Defendant on three counts of first-degree rape involving A.C., N.G., and L.G. in violation of SDCL 22-22-1; and one count of sexual contact with a child under sixteen, namely N.G. in violation of SDCL 22-22-7. SR:61-62.

The first jury trial was held in January 2020 and ended in a mistrial when the jury was unable to return a verdict. JT1:1040. A second jury trial was held in April 2021 and Defendant was found guilty of all four counts. JT2:893-94.

Defendant was sentenced to life in prison for each of counts one through three and fifteen years in prison for count four. SR:3519. The court ordered Defendant to reimburse the State $12,390.66 for costs of prosecution. SR:3555-57.

STATEMENT OF FACTS

During the summer of 2017, ten-year-old N.G. and eight-year-old L.G., along with their brother A.G., their father, Theodore Guzman ("Defendant"), and Defendant's girlfriend, Sue, lived with twelve-year-old A.C. and her family. JT2:108-109. A.C.'s family and the Guzmans had been friends for years and previously lived across the street from each other. JT2:135-36, 163-64. The Guzman family moved out of A.C.'s house in the fall of 2017 after Defendant was arrested on charges unrelated to this case. JT2:114.

After Defendant was released from jail, he, his children, and Sue, moved in with Defendant's parents, Helen and Benny Guzman. JT2:349. Helen and Benny's house ("Guzman house") had three bedrooms upstairs and a basement with an apartment and a separate laundry room. JT2:349-50. Helen and Benny, Nicole (Defendant's sister), and another adult, occupied the three bedrooms upstairs. JT2:349.

Victim A.C.

In November 2017, A.C. and her younger sisters stayed the night with N.G. and L.G at the Guzman house. JT2:138-40. That day, Defendant let A.C. and N.G. take turns sitting on his lap to drive his car. JT2:170-73. Later, at the house, Defendant asked A.C. to help him with laundry. JT2:176. In the laundry room, Defendant, who was kneeling in front of A.C., asked her to show him her private parts. JT2:177-78. A.C. said "no" and "giggled it off." JT2:178.

While living at the Guzman house, L.G., N.G., and A.G. slept in the living room. JT2:179, 355. When A.C. and her sisters spent the night, they also slept in the living room. JT2:180. N.G. slept on the couch and A.C. slept on blankets on the floor next to A.G. and L.G. JT2:180-81. Defendant also laid on the floor next to A.C. JT2:181. While lying next to A.C., Defendant showed her pictures of girls' butts on his phone. JT2:200-01. Defendant told A.C. not to tell her mom. JT2:201. At one point, N.G. asked A.C. to sleep on the couch next to her. JT2:181-82.[1] A.C. stayed on the floor because she did not think there was enough room on the couch. JT2:181-82.

In the night, A.C. was awoken by Defendant pulling her pants down. JT2:182. Defendant then rubbed his penis on her butt. JT2:183.

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[1] After N.G. disclosed that Defendant raped her, she explained that when she saw Defendant lying next to A.C., she was worried Defendant was going to rape A.C. JT2:357, 379. That was why N.G. asked A.C. to sleep next to her on the couch. *Id.*

A.C. said "stop" and Defendant stopped. JT2:184. Later, Defendant again pulled A.C.'s pants down and rubbed his penis on her butthole. JT2:185-86. This time, Defendant put his "private part" in A.C.'s butthole and it went in and out several times. JT2:186. A.C. said it hurt and burned. JT2:186. When A.C. tried to get away from Defendant, he "smacked" her on top of her head. JT2:188. A.C. cried and Defendant rubbed her back to comfort her. JT2:187. Defendant told A.C. not to tell anyone about what happened because his kids needed him. JT2:189.

The next morning, Defendant took A.C., her sisters, and N.G. to A.C.'s house. JT2:189-90. A.C. and N.G. went into A.C.'s room and N.G. said "I know what's going on. He's doing it to me too." JT2:190, 358. A.C. said she did not want to talk about it and acted like nothing happened. JT2:190. A.C. did not tell N.G. what happened to her. JT2:191, 358.

After that night, A.C. acted angry and standoffish. JT2:118. A.C. did not initially disclose what Defendant did to her because she was scared. JT2:189. On December 5, 2017, A.C. was pacing throughout her house and told her mother, Heather, that she needed to tell her something. JT2:119. A.C. said "Mom, he did it" and then started bawling. JT2:119. Heather asked A.C. what she meant and who she was talking about. JT2:119. A.C. repeated "he did it" as she continued to cry. JT2:119. Heather asked if it was sex. JT2:119. A.C. said it was

Defendant. JT2:119-20. Heather called the police and held A.C. as she cried. JT2:120-21.

A.C. did not tell Heather anything else about Defendant's actions and the responding officer did not ask A.C. questions. JT2:120-21, 152. The officer told Heather he would set up an interview for A.C. with a specialist. JT2:121-22. The officer told Heather not to ask A.C. questions about the disclosure and Heather complied. JT2:121. Heather took A.C. to the emergency room that night to be examined. JT2:122. At the emergency room, A.C. complained of a stomachache and nausea, which can be a sign of severe emotional distress. JT2:225, 325. Dr. Brook Eide examined A.C. for physical injuries and tested her for gonorrhea and chlamydia. JT2:224-26. A.C. tested negative. JT2:226. Dr. Eide referred A.C. to the pediatrics department for further tests and examination. JT2:224-26.

Tifanie Petro ("Petro") completed a forensic interview with A.C. on December 11. JT2:124; Exhibit 5. Heather told A.C. she was going to have to talk to some people about what happened and to tell the truth. JT2:195. Dr. Cara Hamilton performed a sexual assault examination on A.C. JT2:316. The examination was "normal" and A.C. tested negative for sexually transmitted diseases and pregnancy. JT2:321; SR:2706-08.

A.C. has not communicated with N.G. or L.G. since December 2017 when A.C. disclosed that Defendant raped her. JT2:126-27, 196, 435.

Victim N.G.

On December 13, 2017, the Department of Social Services ("DSS") took custody of N.G., L.G., and A.G. JT2:477-79. L.G. and N.G. were placed in a foster home. JT2:360. Petro completed a forensic interview with N.G. on December 15. JT2:491; Ex. 11. N.G. did not disclose any sexual abuse. JT2:499.

Around December 25, N.G. told her foster mom that Defendant sexually abused her. JT2:379. N.G. admitted that she lied in her first forensic interview because she was afraid Defendant would go to prison for a long time and the interviewer was a stranger. JT2:361. N.G. eventually told her foster mom about the abuse because she trusted her and felt bad for lying. JT2:361, 379.

Petro completed a second forensic interview with N.G. on January 5, 2018. JT2:537; Ex. 15. N.G. disclosed details about her father sexually abusing her. JT2:544-45. N.G. told Petro certain facts but did not tell her everything because Petro still felt like a stranger. JT2:380. N.G. believed the less she told Petro, the better chance she had to go home. JT2:423. When she testified at the second trial, N.G. was living with her family. JT2:432.

When N.G was around ten years old, she and Defendant were driving to the store. JT2:370. As he was driving, Defendant pulled down his pants and placed N.G.'s hand on his penis. JT2:370. Defendant held N.G.'s hand on his penis and forced her to stroke it. JT2:370-71. When

N.G. stopped, Defendant would put her hand back on his penis. JT2:371. Defendant let N.G. play the claw game after they were done shopping. JT2:372.

While living at the Guzman house, N.G. was laying under the covers in Nicole's bed. JT2:372-74. Defendant came into the room and laid down next to N.G. under the covers. JT2:372-74. Both N.G. and Defendant were laying on their side and Defendant's stomach was facing N.G.'s back. JT2:374. Defendant tried to pull N.G.'s pants down and N.G. tried to keep them up. JT2:374. L.G. walked into the room and searched for something in the closet. JT2:374. Defendant moved closer to N.G. and put his penis in her vagina. JT2:375-77. N.G. said "ow" because it hurt. JT2:375-77. L.G. looked back at N.G., and Defendant told N.G. to shut up. JT2:375-77. L.G. grabbed an item and left the room. JT2:375.[2] Defendant told N.G. she was filling in for Sue. JT2:378. He also told her if she told anyone he would go away for a long time. JT2:378.

Victim L.G.

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[2] L.G. recalled being in Nicole's room during this incident. JT2:649-53. L.G. heard N.G. crying when Defendant was lying in bed with her and noticed N.G.'s pants did not fit her correctly after she got out of bed. JT2:649-53.

(continued . . .)

In July 2018, L.G. told her foster mom and N.G. that Defendant raped her. JT2:596-98, 624. Petro completed a forensic interview with L.G. on July 31, 2018. JT2:680; Ex. 18.

When L.G. was approximately six years old, she, her siblings, and Defendant were living with Nicole, Defendant's sister. JT2:638-39.[3] L.G., her siblings, and Defendant slept on the living room floor. JT2:639-40. One night, Defendant was sleeping next to L.G. with his front side facing L.G.'s back. JT2:640-41. L.G. woke up to Defendant putting his penis in her butt. JT2:641-42 (describing Defendant's penis as his "front part" that he uses to pee). Defendant's penis went in her and then repeatedly went in and out. JT2:643. L.G. woke up one of her sisters, went to the bathroom, and then laid back down on the other side of the room. JT2:644.

STANDARDS OF REVIEW

This Court reviews evidentiary rulings for an abuse of discretion and presumes the rulings are correct. *State v. Bausch*, 2017 S.D. 1, ¶12, 889 N.W.2d 404, 408. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v.*

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[3] L.G. could not remember her age when Defendant raped her but reported that it was around when she got into trouble for throwing rocks. JT2:454-58 (indicating the rock incident occurred in April 2015), 627 (L.G. DOB is 4/15/2009), 688.

Birdshead, 2015 S.D. 77, ¶51, 871 N.W.2d 62, 79. Under this standard, Defendant must demonstrate error and show that it was prejudicial. *Bausch* at ¶12, 889 N.W.2d at 408. "Error is prejudicial when, in all probability, it produced some effect upon the final result and affected rights of the party assigning it." *Id.*

This Court applies the abuse of discretion standard to a court's determination of what costs fall within costs of prosecution attributable to Defendant. *State v. Baldwin*, 299 N.W.2d 820, 822 (S.D. 1980). But, issues of statutory interpretation are reviewed de novo. *State v. Ryyth*, 2001 S.D. 50, ¶11, 626 N.W.2d 290, 292.

ARGUMENTS

I

THE COURT PROPERLY EXCLUDED HELEN'S TESTIMONY.

In the first trial, the court granted Defendant's motion for a reciprocal witness sequestration order. SR:14, 104-05. Defendant's mother, Helen, testified as a defense witness at Defendant's first trial. JT1:746-84. Helen's testimony consisted of trying to recall the timeframe when A.C. stayed the night and the conditions and people present at her house on that night. *Id.* Helen reported that she was awake until 2:30AM and that Nicole was doing laundry when Helen went to bed. JT1:764-67, 779-81. Helen testified that both she and Nicole sleep with their bedroom doors open. JT1:748, 781. Helen explained that she did not go back into the living room until she woke up at 10:00AM. JT1:767,

779. Nicole also testified during the trial and her testimony was substantially similar to Helen's. JT1:792-810.

During the second trial, the court set up viewing rooms so the public could social distance while watching the trial. JT2:742. Helen and Benny were in the viewing rooms throughout the trial. JT2:713-14. The State recognized Helen's presence as an issue on April 14 (fifth day of trial) when Helen and Benny were sitting on the hallway benches with other witnesses. JT2:713-14. The State requested Helen be precluded from testifying due to her violation of the sequestration order. JT2:713-14.[4] Defense counsel stated: "Yeah. I went and talked with them a couple of nights ago. It did seem like they had popped into that room." JT2:714. Defense counsel also specified: "I didn't—I wasn't able to touch base with them to let them know not to be in that viewing room and I didn't know they were going there." JT2:715.

Defense counsel claimed that Helen's testimony would be that she was there on the night of the sleepover and did not hear anything. JT2:716. The court wanted more time to review Helen's testimony from the first trial and told Defense counsel he could make further arguments. JT2:716-17.

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[4] The State requested Benny be precluded from testifying because he was not noticed as a witness. JT2:715. The trial court precluded Benny from testifying because he was present for too much of the trial and was not listed on Defendant's witness list. JT2:716.

After the State rested, Defense counsel stated that, due to the court's "reticence," he wanted to call Helen as a rebuttal witness to rebut A.C.'s "additional" testimony. JT2:797. Counsel claimed that, in the second trial, A.C. provided additional testimony about crying after Defendant raped her and argued that Helen would rebut the noise that A.C. described.[5] JT2:797. The court noted that Helen could not be a rebuttal witness if she was called in the defense's initial case and made the following ruling:

> So, as we stand at this point, at least, I haven't been presented anything regarding Helen, but at this point, I'm not going to allow her testimony in the main part of your case, unless I hear something different off the record that convinces me you should. Because I think it's just a violation of the sequestration. I haven't seen a reason for it. And they're not rebuttal witnesses at this point, so that's where we're at.

JT2:798.

On appeal, Defendant argues that the exclusion of Helen as a witness violated his constitutional rights because Helen's testimony was "non-cumulative," and there was no other witness to testify to her set of facts. Defendant's Brief ("DB") at 7, 10-11. Defendant did not bring the constitutional claim before the trial court and, thus, has failed to preserve it for appellate review. *State v. Willingham*, 2019 S.D. 55, ¶25,

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[5] A.C. testified she cried when Defendant raped her in both trials. JT1:109; JT2:186-87.

933 N.W.2d 619, 625. Nevertheless, the trial court did not abuse its discretion.

A. *The Court did not Err when it Excluded Helen's Testimony.*

Under the rules of evidence, the court may sequester witnesses to prevent a later witness from tailoring her testimony to that of a prior witness. *State v. Johnson*, 254 N.W.2d 114, 116-17 (S.D. 1977); SDCL 19-19-615. Upon the violation of a sequestration order, the decision of whether to grant a mistrial or exclude testimony is within the court's sound discretion. *See State v. Randle*, 2018 S.D. 61, ¶21, 916 N.W.2d 461, 466.

In *Holder v. United States*, the United States Supreme Court commented that the majority of courts would not disqualify a witness for violation of a sequestration order, alone. 150 U.S. 91, 92 (1893). The Court also noted that "the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." *Id.*; *see also Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (recognizing state and federal rule makers have broad latitude to establish rules excluding evidence from criminal trials). The "particular circumstances" that allow for exclusion of a witness include some indication that the witness was in court with the connivance, consent, procurement, or *knowledge of the defendant or his counsel*. *United States v. Kiliyan*, 456 F.2d 555, 560-61 (8th Cir. 1972) (affirming the exclusion of defense witness); *see also State v. King*, 70 N.W. 1046, 1046 (S.D.

1897) (noting that a witness present during other testimony should not be excluded "unless the party calling him connived at his disobedience.").

In the first trial, Helen had no issue complying with the sequestration order. Defense counsel was aware of the sequestration order in the second trial and affirmatively asked that the State comply with the order in a pre-trial conference. SR:3660-61 (requesting victims' comfort witnesses testify before the victims "in order to comport with the Court's order keeping them apart.").

Defense counsel also knew Helen was in the viewing room days before she was to testify. JT2:713-15; DB:12. Counsel did not bring the violation to the court's attention and Helen continued to violate the order. *See*, *infra*, n.6. Days later, the State discovered violation and brought the violation to the court's attention. It does not appear that the circumstances of the sequestration violation were as innocent as Defendant suggests.

Unlike other cases, where the violation of the sequestration order was limited and the exposure was not related to the violating witness's testimony, in this case, Helen's exposure to other witnesses was likely extensive and her testimony overlapped with several of the State's fact

witnesses.[6] *State v. Dixon*, 419 N.W.2d 699, 701 (S.D. 1988) (refusing to grant a mistrial, after witnesses were seen talking to each other, because the witnesses' testimony related to different counts and defendant did not establish prejudice); *Randle* at ¶¶15-19, 916 N.W.2d at 465-66 (affirming the refusal to grant a mistrial, the only remedy requested, when the violating witness's exposure was limited and her testimony did not overlap with the witness she viewed). Helen was going to testify about the night of the sleepover. Her testimony would have overlapped with Petro, N.G., and A.C., all of whom testified about that same night. JT2:168-90, 255-62, 351-57. At the first trial, Helen's testimony regarding the date of the sleepover, Defendant's whereabouts, and the location of the children was very different than A.C.'s and N.G.'s testimony. *Compare* JT1:746-83, *with* JT1:96-111 and 352-57. After listening to Petro, A.C., or N.G.'s testimony, Helen could have strategically changed her testimony to match that of the other witnesses in order to seem more credible when she offered the parts of her testimony that were different. This change in testimony would have been unfairly prejudicial to the State, and it would have severely diminished the jury's ability to detect unreliable testimony through contradictions.

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[6] Helen admitted to being in the viewing room *days* before April 14 (day she was called as a witness) and an employee from the State's Attorney's office testified that she saw Helen in the viewing room during L.G.'s testimony on April 13. JT2:714, 743; DB:12. By her own admission, Helen was present for more than L.G.'s testimony.

See Dixon, 419 N.W.2d at 701 (explaining how prejudice is established when a witness violates a sequestration order); *United States v. Collins*, 340 F.3d 672, 681 (8th Cir. 2003) (stating that the purpose of sequestration is to aid the jury in detection of dishonesty). Therefore, the court did not abuse its discretion when it excluded Helen as a witness.

Defendant argues that the trial court failed to conduct an analysis before it excluded Helen's testimony and that such an analysis would have resulted in a "more reasonable remedy." DB:11-13 (citing *People v. P.R.G.*, 729 P.2d 380 (Colo. App. 1986) for a list of alternative remedies). However, Defendant did not cite any case law suggesting an analysis was necessary, request an alternative remedy, or make many of the arguments he now makes on appeal. *State v. Rodriguez*, 2020 S.D. 68, ¶¶34-35, 952 N.W.2d 244, 254 (explaining that, if defendant thought the court's denial of his motion was terse, it was his obligation to preserve his record for appeal). The court offered counsel several opportunities to provide argument and was open to hearing further argument or authority from counsel, but none was offered. JT2:798. Defendant did not preserve this argument for appeal and should not be able to claim that the court erred when South Dakota law does not require a certain analysis and Defendant failed to ask for further analysis. *State v. Janis*, 2016 S.D. 43, ¶19, 880 N.W.2d 76, 81 (noting that the defendant could not complain of the court's failure to investigate contact between a juror and a spectator when his counsel consented to the court's suggested

remedy and failed to suggest any other remedy). The trial court did not err in excluding Helen's testimony.

B. *The Exclusion of Helen's Testimony did not Prejudice Defendant.*

Defendant has failed to show any prejudice arising from the court's ruling. The accused in a criminal trial must be "afforded a meaningful opportunity to present a complete defense," including the right to call witnesses on his behalf. *State v. Dale*, 439 N.W.2d 98, 104 (S.D. 1989); *State v. Reay*, 2009 S.D. 10, ¶34, 762 N.W.2d 356, 367. However, those rights are not unfettered. *Reay* at ¶34 (A defense theory must have legal support and some evidentiary foundation); *Rodriguez* at ¶50, 952 N.W.2d at 258 (The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross examination that is effective in whatever way defendant wishes); *Dale*, 439 N.W.2d at 104-05 (The right to compulsory process is subject to the witness's refusal to testify). Indeed, the State is entitled to a fair trial, too.

Defendant responded to the State's case and presented his theory that A.C. fabricated her story, through unrestricted cross-examination of A.C., N.G., Heather, and the State's expert witnesses. Defendant was also allowed to call an unnoticed witness to lay foundation for medical records that included his own self-serving hearsay comments. JT2:804-05 (allowing the witness to read Defendant's 2/28/18 medical record, including Defendant's self-report that his STD symptoms had been present for the past four months).

Defendant claims that Helen would have testified that she did not hear anything the night of A.C.'s rape, even though her bedroom door was open down the hall. DB:10-11. According to Defendant, "there was no other witness to testify to [the particular facts in Helen's testimony], and the event A.C. described would have been noisy." DB:11. However, in the first trial, Nicole testified to these same exact facts. Nicole testified that she was doing laundry until around 3:00AM and then went to bed. JT1:800-01. Nicole's room was across the hall from Helen's room. JT1:804. Nicole did not mention waking up until the next morning. JT1:806. Nicole was also properly noticed as a witness in the second trial and the court did not prevent Defendant from calling her as a witness. SR:2310. Nor did the court preclude Defendant from offering either Helen or Nicole's testimony from the first trial. As Defendant pointed out in his opening statement, there were up to fourteen other people in the house on the night of the sleepover. JT2:10; *see also* SR:2310-11. N.G. slept inches away from A.C. and testified about the night A.C. was raped. She did not testify to hearing A.C. cry, nor did Defendant ask. JT2:356-57, 424-26.

In this case, Defendant should not be able to claim that the court violated his constitutional rights when (1) his witness violated the sequestration order and Defense counsel admitted to knowing about it; and (2) he had the ability to call a different properly noticed witness to mitigate the damage he now complains of on appeal. *State v. Buller*, 484

N.W.2d 883, 888-89 (S.D. 1992) ("A party to a criminal proceeding will not be permitted to allege an error in proceedings in the trial court in which he himself acquiesced, or which was invited or induced by him.").[7]

II

THE COURT DID NOT ERR IN ADMITING DEFENDANT'S PRIOR TESTIMONY.

Defendant was charged with two counts related to N.G., namely, sexual contact and first-degree rape. SR:61. Defendant filed a motion in limine to preclude the State from introducing evidence alleging that he engaged in more than one act of rape and one act of sexual contact. SR:664-65. The court suggested handling any issue with duplicitous evidence in the presentation of the case or in the jury instructions. JT1:3-4. The State agreed that it could be an issue, due to N.G.'s repeated and extensive abuse, and noted that they were working on a proposed instruction. JT1:4. During opening statements, the State

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[7] The exclusion of Helen's testimony did not prejudice Defendant's case. Even if it did, the only conceivable prejudice would have been applicable to Defendant's conviction for raping A.C. As Defendant points out, Helen's testimony was relevant to the night A.C. stayed at Helen's house. Helen's testimony would not have had any effect on the convictions involving N.G. or L.G., both of which were supported by independent evidence. The jury was also instructed to consider each count separately and that a finding of guilty or not guilty must not control their verdict on any other count. SR:2761. This court presumes the jury follows the trial court's instructions. *State v. Honomichl*, 410 N.W.2d 544, 547 (S.D. 1987) (presuming the jury followed the instruction requiring the evidence for each defendant to be considered separately).

mentioned only two acts concerning N.G., one of rape and one where Defendant forced N.G. to masturbate him. JT1:29.

When asked about the "first incident" that occurred, N.G. testified about a time when she had a nightmare and sought comfort with her parents. JT1:336-37. She was unable to wake her mother, so she woke up Defendant. As she laid down in front of him, he put his hands under her shirt and in her pants. *Id.* Defendant's counsel objected and a conference in chambers followed. JT1:338-42. Defendant argued that the State was bringing in several incidents that would fit within the charges and asked the State to elect an incident for each charge. JT1:338-41. The State agreed to try to keep N.G. focused on two incidents and to elect a specific incident in the jury instructions. JT1:339-42.

N.G. finished describing the first incident and then the incident was not mentioned again. JT1:342-43. N.G. next testified about an incident involving vaginal penetration and then described another sexual contact incident where her father forced her to masturbate him in the car. JT1:344-51. During closing arguments, the State elected only one incident per charge, and the jury was given a unanimity instruction. JT1:949-50; SR:761.

As part of his defense in the first trial, Defendant waived his Fifth Amendment Right against self-incrimination and testified as a witness. JT1:810-77. At the second trial, the State sought to admit Defendant's

testimony from the first trial. JT2:558-63. Defendant objected and argued that his prior testimony was impelled due to the State's admission of duplicitous evidence, citing *Harrison v. United States*, 392 U.S. 219 (1968). SR:2465-66; JT2:558-60. The court determined that duplicitous evidence was not a significant issue in the first trial and admitted Defendant's testimony. JT2:563; SR:2576-2643. This ruling was not an abuse of discretion. *See United States v. Gianakos*, 415 F.3d 912, 919 (8th Cir. 2005) (reviewing a similar claim for an abuse of discretion).

Harrison, *supra*, establishes the framework for evaluating this claim. In *Harrison*, the defendant was charged with felony murder. At trial, the prosecution introduced three separate confessions he made while in police custody. The substance of the confessions was that Harrison had gone to the victim's house intending to rob him and that the victim was killed while resisting Harrison's entry into the victim's home. At trial, Harrison testified that the killing was an accident while he was trying to sell a shotgun to the victim. He was found guilty, but his conviction was reversed on appeal because the confessions were illegally obtained. 392 U.S. at 220-21. On remand, the case proceeded without the confessions, but Harrison's testimony from the first trial was admitted. This testimony placed him at the scene and in possession of the shotgun used in the killing. *Id.* at 221.

According to *Harrison*, the general rule is that a defendant's testimony at a former trial is admissible against him in later proceedings. *Id.* at 222. When defendant chooses to testify and waives the privilege against compulsory self-incrimination, that waiver is no less complete or effective if the defendant was motivated to take the stand due to the strength of the State's case.

In *Harrison*, suppression of the trial testimony was appropriate because the underlying confessions were a violation of the Fourth Amendment, to which suppression is a prescribed remedy, and Defendant's trial testimony was fruit of that violation. 392 U.S. at 222; *State v. Tenold*, 2019 S.D. 66, ¶23, 937 N.W.2d 6, 13 (explaining the exclusionary rule and fruit of the poisonous tree doctrine). Unlike *Harrison*, Defendant's first trial did not include any constitutional errors or illegally obtained evidence.

On appeal, Defendant argues that the "duplicitous evidence" introduced at his first trial violated his Fifth Amendment right to jury unanimity. But, the introduction of multiple offenses that could fit within a single count is not automatically a unanimity issue. The issue arises when the duplicitous evidence is submitted to the jury without a unanimity instruction. *State v. Brende*, 2013 S.D. 56, ¶¶13-14, 835 N.W.2d 131, 137-38 (requiring the State to either elect a single offense or provide an unanimity instruction when duplicitous evidence arises). At the time Defendant testified, no constitutional violation had occurred.

See Harrison, 392 U.S. at 225-26 (focusing on how Harrison chose to testify only *after* the introduction of the illegally obtained evidence).

Unlike Fourth Amendment violations, the proper remedy for the admission of duplicitous evidence is a jury instruction explaining the requirement of unanimity. *Brende* at ¶¶13-14, 835 N.W.2d at 137-38. Before opening statements, the State agreed that duplicitous evidence could be an issue and agreed to a unanimity instruction. The State, again, agreed to a unanimity instruction after the duplicitous evidence arose. At the time Defendant testified, the remedy for the unanimity issue was already decided and promised, causing any taint or constitutional threat arising from the duplicitous evidence to dissipate. *Tenold* at ¶23, 937 N.W.2d at 13 (explaining how the causal connection between an initial illegality and evidence derived from that illegality may become so attenuated as to dissipate the illegal taint).

Furthermore, the duplicate evidence at issue was not illegally obtained. The incident was obtained from a DSS Referral and was provided to Defendant before the first trial. JT1:339; DSS Referral #339516 (zip drives). At most, the admission of the additional incident was a violation of the rules of evidence. Defendant has failed to show that a constitutional violation occurred in his trial, much less a constitutional violation that would require suppression of his prior

testimony.[8] *See Gianakos*, 415 F.3d at 919 (refusing to exclude prior testimony under *Harrison* because the decision to testify was not impelled by a *constitutional* violation); *Tenold* at ¶24, 937 N.W.2d at 13 (stating that the party seeking to suppress evidence has the burden of proving the evidence is fruit of the poisonous tree).

Finally, there is no causal connection between the asserted constitutional violation and the claim that Defendant's testimony was involuntary. In *Harrison*, evidence of the events at the victim's house came in through the illegal confessions. Once before the jury, the evidence coming from the defendant's own voice could not be ignored. The Supreme Court held that Harrison's decision to counteract the confessions was not voluntary and should not have been used in the second trial. 392 U.S. at 225-26 (noting that Harrison likely would not have admitted to being at the scene or holding the gun if the confessions were not introduced).

In this case, the problem is that the jury heard about an additional incident of sexual contact with N.G. This is materially different from *Harrison*, in that the jury here properly heard evidence of Defendant's sexual contact with N.G., L.G., and A.C. Defendant testified that no

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[8] The unanimity instruction related to the rape count. SR:761. Defendant did not offer an instruction for the sexual contact count, but the State explained the incidents that applied to each count during closing arguments. JT1:973-74; *Brende* at ¶¶16-19; SR:765, 781.

wrongful contact had ever occurred with any of the victims. JT1:823-24. His decision must be viewed as voluntary because it was intended to counteract testimony that was properly before the jury, not just the additional incident with N.G. *United States v. Cooper*, 2019 WL 4918149 (D.S.D.) (refusing to exclude defendant's prior testimony because he testified to counteract other witness testimony that was not illegally obtained or constitutionally suspect); *Cf. State v. Roden*, 380 N.W.2d 669, 670 (S.D. 1986) (amending information by inserting "or finger" after the word "penis," was not a surprise and did not alter the defense strategy, which was a general denial of all acts). Defendant's defense was always a general denial and there is no indication that the additional incident had any bearing on his decision to testify.

Without a constitutional violation at the first trial, Defendant cannot show that the court abused its discretion when it admitted his prior testimony at the second trial. Defendant also failed to show how the admission of his testimony in the second trial was prejudicial. Defendant must prove that the court abused its discretion *and* that prejudice resulted. He has done neither.

III

THE COURT DID NOT ERR IN ADMITTING 404(b) EVIDENCE.

The State filed a Notice of Intent to Use 404(b) Evidence. SR:110-13. The other act evidence consisted of reports and testimony that

Defendant had sexual contact with and raped W.B. when she was thirteen to fourteen years old. JT2:750-73.

When determining whether to admit evidence under SDCL 19-19-404(b), the trial court will consider whether the evidence is relevant to some material issue in the case, other than character, and whether its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Evans*, 2021 S.D. 12, ¶25, 956 N.W.2d 68, 79. "Upon a trial court's determination that the proffered evidence is relevant, 'the balance tips emphatically in favor of admission unless the dangers set out in Rule 403 substantially outweigh probative value.'" *State v. Stone*, 2019 S.D. 18, ¶24, 925 N.W.2d 488, 497.

After reviewing the State's proffered reports at a pre-trial hearing, considering briefing and argument from both parties, and hearing W.B.'s proposed testimony outside the presence of the jury, the court held:

> The Court is going to allow this material in. It is relevant. The probative value is significant in this case. I think it goes to a number of things, but certainly intent, preparation, plan, absence of mistake. And I – you can – I guess you can argue about all these things, but I think those are the most significant. I am going to allow it in. I find that it does not – it's not going to prejudice the jury in an unfair or illegitimate manner. It is – I understand that the prosecution wants it in, 'cause it's helpful to their case, but that doesn't make it prejudicial in a legal sense. So I don't see any question that it was the defendant. The Court is going to allow it under those terms.

JT2:740-41; *see also* SR:3656-59.

W.B. identified the following incidents in the proffers:

1. At Defendant's home in Rapid City, then twelve-year-old W.B. spent the night with her friend, Brianna, one of Defendant's daughters. W.B. slept in Brianna's room. Defendant came into the room, woke up W.B., and asked her if she wanted different pants to sleep in. Defendant provided W.B. with leggings and then came in again to check on her. W.B. mentioned that the pants had a hole. Defendant brought her a different pair and then asked W.B. if he was scaring her. She said yes. Defendant left and W.B. went back to sleep. JT2:724-26; SR:2427.

2. The next incident occurred at Nicole's house and involved another sleepover but with several other kids as well. Defendant directed Brianna to ask W.B. to come to his bedroom. W.B. did so and, with the door shut, was subjected to several questions of a sexual nature, including "have you ever had sex before" and "has anyone ever licked your vagina." Defendant then laid down on his bed, grabbed W.B. by her buttocks, and pulled her down to sit on his lap. He also touched her vagina. Defendant told W.B. not to tell anyone because they would "get in trouble." JT2:727-28; SR:2426, 2432.

3. Another time at Nicole's house, W.B. was sleeping on the living room floor with Brianna and other kids. She awoke when Defendant was playing with her feet. Defendant's penis was out of his pants, and he put it in her face. She tried to avoid it and Defendant kissed her on the lips. Defendant pulled down W.B.'s pants, penetrated her vagina with his penis, and ejaculated on her stomach. JT2:728-30; SR:2426-27.

4. The next incident occurred at Helen's house. Defendant told W.B. to "grab items," which W.B. believed was to allow Defendant to observe her "butt." Defendant also talked about how his daughter, N.G., was developing an attractive butt. Defendant repeated the request to grab items with another girl who was visiting that night. That night, Defendant had sex with that girl in the same room where W.B. was sleeping. Later, Defendant came back to W.B. and stroked her butt while she was clothed. JT2:730-33; SR:2427.

5. The next incident occurred at what W.B. called "the big house" during another sleepover. While W.B. was in bed with Brianna, Defendant came into the room and stood by the bed with his penis exposed. He asked W.B. to touch Brianna's butt. She refused, but Defendant remained nearby while he masturbated and eventually ejaculated on the bed. W.B. told Brianna about this incident and she just laughed. JT2:733-36; SR:2427.

6. The last incident occurred at the big house in the laundry room. Defendant tried to put his penis in W.B.'s anus. W.B. said it hurt because his penis went in. JT2:736-38; SR:2427.

The State noted the similarities between Defendant's actions with W.B. and his actions with the other victims, especially A.C. The encounters with friends of his own children occurred during sleepovers. She was in the same age range as the other victims. There was grooming, sexual contact, and then sexual penetration. JT2:739-40.

Preparation and Plan. These two exceptions should be considered together as there is considerable overlap both in their meaning and in the case law. The "common plan or scheme exception" refers to a larger continuing plan of which the present crime is only one part of. *See State v. Anderson*, 2000 S.D. 45, ¶94, 608 N.W2d 644, 670. An essential component of executing a continuing plan is preparation. *Id.* (noting the other act evidence was relevant under the common plan or scheme exception to show preparation, plan, motive, and intent).

Defendant argues there is no evidence of preparation in this case, except for the erroneous assumption that "any crime committed in the past is necessarily preparation for the commission of any similar crime in the future." DB:17. But, this misunderstands the "preparation" exception and the evidence to support it. The preparation in this case involved grooming, *i.e.*, what the offender did before, during, and after to overcome resistance, to maintain access, and to prevent a child from disclosing the abuse. JT2:64. The evidence presented through W.B.'s

testimony showed a remarkable similarity with the evidence presented in connection with A.C.'s rape.

A.C. was a friend of N.G. JT2:167. On the way to a sleepover at N.G.'s, Defendant allowed A.C. and N.G. to drive while sitting on his lap. JT2:170-72. Later, Defendant isolated A.C. in the laundry room and asked if he could see her "private parts." JT2:176-78. When everyone was sleeping in the living room, Defendant raped A.C. JT2:183-87. Defendant told A.C. not to tell anyone because his kids needed him. JT2:189.

The preparation in W.B.'s case was similar. Defendant's approach to his prey was through a friendship with his own daughter, in this case, W.B. with Brianna. The opportunity came during a sleepover. It led to pointed questions of a sexual nature. It involved sitting on Defendant's lap, followed by stroking W.B.'s body, and finally sexual penetration. That is preparation, in the form of grooming. JT2:64. Defendant's actions in preparing to rape W.B. contextualize his similar interactions with the three victims in this case as preparation for sexual contact. *See Anderson* at ¶¶88-89, 97-99, 608 N.W.2d at 668-69, 671 (affirming other act evidence relating to the defendant's use of walkie-talkies along the Big Sioux River and his discussion of using tie downs to restrain victims to show his "preparation and plan in abducting women."); *State v. Werner*, 482 N.W.2d 286, 290 (S.D. 1992) (describing how the defendant used his church position to identify and cultivate a relationship of trust

with his victims); *State v. Christopherson*, 482 N.W.2d 298, 300-01 (S.D. 1992) (detailing how the defendant used his position as a special education teacher to set up opportunities for isolation with his victims).

The Defendant concedes that "plan" might be a proper 404(b) exception in this case, but "only if accompanied by the appropriate analysis." DB:17. Defendant does not explain what "analysis" is missing. Nevertheless, the trial court conducted the two-part balancing test on the record as required. JT2:740-41; *see Birdshead* at ¶57, 871 N.W.2d at 81. Several other cases support the court's decision. *See State v. Steichen*, 1998 S.D. 126, ¶24, 588 N.W.2d 870, 875-76; *State v. Perkins*, 444 N.W.2d 34, 38 (S.D. 1989) ("The challenged testimony demonstrates a consistent pattern of molesting young girls with whom Perkins was long acquainted, when they were within his home."). The evidence presented concerning W.B. was well within the parameters of the preparation or plan exception.

Intent. Defendant argues that intent was never an issue in the case and thus was an improper justification for admission of other acts evidence. DB:17. This Court has rejected the argument that a denial of any wrongdoing negates the need for proof of intent. In *State v. Ondricek*, this Court held that "'where specific intent is an element of an offense, proof of similar acts may be admitted so that the State may carry its burden even if the defense to the charge is a complete denial.'" 535 N.W.2d 872, 874 (S.D. 1995). While intent is sometimes an issue in a

rape case, it is *always* an issue when the charge is sexual contact with a minor under the age of sixteen, a specific intent crime. *Christopherson*, 482 N.W.2d at 302.

The grooming that established Defendant's preparation and plan also shows his intent to prey on the vulnerability of young girls, including his own daughters, to accomplish sexual gratification. *Anderson* at ¶¶94, 97, 608 N.W.2d at 670 (explaining that the purpose in showing plan is to establish, circumstantially, that the act was committed and the intent with which it was committed).

Absence of Mistake. *State v. Steichen* stands for the proposition that admission of other acts testimony to show lack of mistake is error when the defendant denies the acts occurred. *Steichen* at ¶26, 588 N.W.2d at 876. However, the Court also held the error to be harmless in light of the proper admission under the other exceptions. *Id.* As the Court noted, "[t]o reverse on this issue would serve no purpose." *Id.*

Probative v. Prejudice. The second part of the 404(b) analysis requires the court to balance the probative value of the evidence against the potential for unfair prejudice. *Evans* at ¶25, 956 N.W.2d at 79. "Prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means which results in one party having an unfair advantage. Evidence is not prejudicial merely because its legitimate probative force damages the defendant's case." *Steichen* at ¶26, 588 N.W.2d at 876. The court's ruling quoted above shows that it performed

the balancing analysis required by 404(b). JT2:740-41. The court also read a limiting instruction before W.B. testified and included it in the final instructions. JT2:746; SR:2740, 2770.

The similarity between the acts testified to by W.B. and the acts testified to by A.C., both friends of Defendant's daughters, who had the misfortune of attending a sleepover while he was present, was damaging to his defense, but not unfairly so. Defendant argues that the trial court's "exceptions" are a virtual blank check for impermissible propensity evidence, but the evidence was well within the case law parameters for showing Defendant's intent, preparation, and planning. Defendant used his daughters to expand the "pool" of victims by hosting sleepovers where he could scout, groom, prepare, isolate, and finally, attack his next prey.

IV

THE COURT DID NOT ERR IN ADMITTING STRAND'S EXPERT TESTIMONY.

Before the first trial, the State filed Notices to Offer expert testimony from Petro and Brandi Tonkel. SR:115, 285. Defendant objected to Tonkel's testimony on several grounds, including that it would be cumulative of Petro's. SR:560-64. The court held an evidentiary hearing and determined both experts could testify. SR:365-490, 574, 576.

Before the second trial, Defendant again objected to Tonkel's testimony as cumulative. SR:2156-57. The court reiterated that it

already heard the testimony of both witnesses and was not going to preclude testimony at that time. SR:3780-81. The State filed a Notice to Substitute Hollie Strand for Tonkel, noting that Strand's testimony would be substantially similar. SR:2341. Defendant objected and argued the testimony would be cumulative. SR:3591. The court allowed the substitution and reminded Defendant he could raise the issue again at trial. SR:3591-92.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice due to its cumulative nature. *State v. Devall*, 489 N.W.2d 371, 375 (S.D. 1992) (allowing three witnesses to testify about defendant's reputation for truthfulness tended to be cumulative but was not an abuse of discretion). But, the admission of relevant evidence is favored, and exclusion should be used sparingly. *State v. Kihega*, 2017 S.D. 58, ¶22, 902 N.W.2d 517, 524.

While small parts of Strand and Petro's testimony overlapped, their testimony covered different subjects or different aspects of a subject. Much of the overlap occurred while the State was laying foundation for their testimony and on cross-examination as Defendant asked both experts the same questions.

Petro provided testimony regarding her expertise and her factual knowledge of this case. Her testimony focused on the forensic interviewing protocols she used and the content in her interviews with

the victims. Petro's testimony was crucial because there was no physical evidence in the case and Defendant specifically targeted Petro's methods. JT2:11-12.

Strand primarily testified about the effects of trauma on a child's disclosure of sexual abuse and the different types of forensic interviewing. JT2:29-74, 99-101 (explaining piecemeal disclosures, delayed reporting, children's sense of time, the effect of developmental age on language use, and peer review of past interviews). Strand's testimony was critical because N.G. initially denied being sexually abused, L.G. delayed disclosing her abuse for years, and Defendant's theory attacked the science behind forensic interviewing. *See Gutierrez v. Vargas*, 239 So.3d 615 (Fla. 2018) (calling several physicians—two treating physician (fact and expert witnesses) and two general experts that assisted the jury in determining the issues—was not unnecessarily cumulative).

Defendant argues that Petro could have testified to the same things Strand testified to. On the contrary, Strand has a different educational and professional background that contributed to her testimony. *Compare* SR:2644-45 *with* SR:2683-85. Strand has a law enforcement background and previously trained law enforcement agencies and schools about recognizing and responding to child abuse investigations. JT2:23. She also conducted thousands of interviews not only as a forensic interviewer, but also as a police officer, counselor to

sex offenders, and private counselor. JT2:24-27; *Webb v. Bouton*, 85 S.W.3d 885, 889 (Ark. 2002) (comparing testimony from two surgical experts and concluding that their credentials and approach to the issues were not so similar as to make the testimony cumulative). Defendant tried to undermine the entire investigation and Strand's testimony addressed aspects of the investigation outside of forensic interviewing—a topic Petro's testimony could not. JT2:11 (defining government agencies and others involved when a sexual abuse allegation is made as "the apparatus.").

The admission of both Strand and Petro's testimony was not needlessly cumulative, Defendant did not suffer unfair prejudice, and the trial court did not abuse its discretion.

V

THE COURT PROPERLY EXCLUDED A.G.'S FORENSIC INTERVIEWS.

In the second trial, Defendant sought to offer a recorded forensic interview between Petro and A.G., Defendant's son. SR:2188. The court ordered production of the interviews for an in-camera review. SR:2256, 2313; 2316, 2877-94.

Defendant requested to play the videos of A.G.'s forensic interviews in his case in chief or, at a minimum, to reference the interviews "as impeachment on cross-examination of Ms. Petro for how she has elicited false accusations by a member of the same family during the same time period." SR:3582-83. Defendant asserted that the accusations were

false because A.G. made his allegations in a "casual" manner and because law enforcement did not investigate the allegations. SR:3582-84. Defendant also argued that the words A.G. used when making his allegations were similar to words the other victims used when making their allegations. *Id.* (noting A.G. claimed he put his "bad spot in a butt" during his first interview, which occurred one month before the allegations against Defendant arose).

The State argued that evidence related to A.G.'s forensic interviews was irrelevant because A.G. was not a victim in this matter, there was no determination that his accusations were false, and the evidence would be confusing and lead to a trial within a trial. SR:3579-84. The State also noted that the accusations were reported to DSS before the forensic interviews with Petro took place. SR:3580-81. The court declined to admit the videos, finding that the videos were not relevant and would lead "down a side street . . . that's not relevant to the facts of this case." SR:3584. But, the court agreed to consider the evidence for cross-examination if Defendant raised the issue during trial. *Id.* (explaining that the court's decision would be based on "factually what we have at that point and what the intent is."). Defendant did not request to reference A.G.'s interviews when he cross-examined Petro.

On appeal, Defendant argues that exclusion of A.G.'s "false allegation" was a violation of his constitutional right to Due Process. DB:20. Notably, the only evidence that was excluded was the recording

of A.G.'s forensic interviews. Without providing analysis, Defendant asks this Court to review the issue for plain error. DB:20-21. But, the trial court did not rule on the admissibility of the evidence for use on cross-examination and Defendant abandoned the issue during trial. *Willingham* at ¶29, 933 N.W.2d at 626 (refusing to consider the portion of a claim the defendant abandoned). Because the trial court did not actually exclude references to A.G.'s forensic interviews, there is nothing for this Court to review. *State v. Sickler*, 334 N.W.2d 677, 679-80 (S.D. 1983) ("no error is preserved for review on appeal when the court below fails to rule on a matter presented for decision."); *State v. Corey*, 2001 S.D. 53, ¶9, 624 N.W.2d 841, 844 (stating that a defendant must give the court a chance to make a ruling on an issue before this Court will review it on appeal).

A. *The Recordings were Irrelevant and Would have Confused the Jury.*

Evidence is relevant if it tends to make a fact more or less probable and if the fact is of consequence in determining the action. *Bausch* at ¶14, 889 N.W.2d at 409; SDCL 19-19-401. The question before the jury was whether the victims' allegations against Defendant were true. Whether A.G.'s allegations of sexual abuse against others were true has no bearing on the truthfulness of A.C., N.G., and L.G.'s accusations of abuse against Defendant. *State v. Sieler*, 397 N.W.2d 89, 71-72 (S.D. 1986) (explaining that prior false allegations of sexual abuse can be relevant on cross-examination *of a victim*, to challenge the victim

witness's credibility). A.G. was not a witness called at trial and his credibility was not at issue. *Birdshead* at ¶ 39, 871 N.W.2d at 76 (affirming the exclusion of evidence when it was unrelated to primary issue at trial).

Defendant claims that whether children fabricate stories of sexual abuse was highly relevant at trial and argued that A.G.'s videos were relevant because A.G. made "false allegations" of sexual assault "in response to the same line of questioning, by the same forensic interviewer, at roughly the same time" as the three victims. DB:21. But, Petro was not the first person A.G. disclosed his allegations to. *Birdshead* at ¶39, 871 N.W.2d at 76 (affirming a limitation on cross-examination where the proposed evidence would not have impeached the witness). A.G.'s first forensic interview occurred on October 4, 2017, and concerned allegations of sexual contact with two other female children. SR:2878-88. A witness saw the children engaged in sexual contact and reported the incident to law enforcement on September 13, 2017. DSS Referral #Q333402 (zip drives). The second interview occurred on August 7, 2018, and concerned allegations of rape against an unidentified male neighbor. SR:2889-94. A.G. reported this incident on July 11, 2018, and it was reported to DSS the next day. SR:3581; DSS Referral #Q349450 (zip drives). The allegations in the referrals are consistent with what A.G. disclosed to Petro.

Furthermore, Defendant failed to show that the allegations were false. *State v. Most*, 2012 S.D. 46, ¶25, 815 N.W.2d 560, 567 (requiring defendant to show that victim's prior allegation of sexual abuse was "demonstrably false" before using it for cross-examination of victim); *Reay* at ¶34, 762 N.W.2d at 366 (requiring defense theories to be supported by law and have some foundation in evidence). A third party witnessed the first incident. And Defendant's speculation about why law enforcement did not investigate the second allegation is not enough to prove that the allegation was "indisputably false." SR:3581 (noting issues with identifying the perpetrator in the second incident); JT2:459 (Detective testifying that cases can be closed due to a lack of evidence). Here, the court properly determined that the evidence was not relevant.

Even if the recordings were relevant, allowing Defendant to admit A.G.'s forensic interviews and assert his opinion about their veracity would have misled the jury, confused the material issues at trial, and resulted in an irrelevant trial within a trial. SDCL 19-19-403; *Reay* at ¶37, 762 N.W.2d at 367 (refusing a jury instruction that would have been speculative and confusing, was not germane to the issue before the jury, and would not have been exculpatory); *State v. Fisher*, 2010 S.D. 44, ¶¶12-15, 783 N.W.2d 664, 669-70 (affirming exclusion of defendant's evidence that would distract the jury from the issue). The issue before the jury was whether Defendant raped A.C., N.G., and L.G., not whether an unidentified neighbor raped A.G. Here, the trial court properly

excluded the videos of A.G.'s forensic interviews and kept the jury from going down an irrelevant and confusing path.

B. *The Excluded Evidence did not Prejudice Defendant.*

The exclusion of A.G.'s forensic interviews did not deprive Defendant of his right to present a defense or call witnesses on his behalf. Defendant wanted to show that Petro's "same line of questioning" elicited a false allegation from A.G. and, therefore, elicited false allegations from the victims. DB:21. However, if (1) the same line of questioning was used on the victims, and (2) Defendant had a full opportunity to cross-examine Petro regarding that line of questioning, then he was given a full and fair opportunity to expose any bias or infirmities in her testimony and protocol. *State v. Iron Necklace*, 430 N.W.2d 66, 78-79 (S.D. 1988) (acknowledging a defendant's right to impeach the State's key witness by showing bias).

Nor was Defendant prevented from presenting his theory that "the apparatus" caused the victims to fabricate their accusations. JT2:11. Defendant was in no way restricted from offering relevant evidence or cross-examining the victims regarding their accusations and the State's experts regarding their actions and protocol. Defendant was afforded his right to present a complete defense.

VI

THE COURT DID NOT ERR IN INCLUDING EXPERT WITNESS FEES IN THE COSTS OF PROSECUTION.

The court ordered Defendant to reimburse the State $12,390.66 for cost of prosecution. SR:3555-56. Defendant objected to the amount, arguing that the costs associated with the State's expert witnesses were not proper under SDCL 23A-27-26. SR:3525-26. The court overruled Defendant's objection and concluded, based on the language of the statute, that the expert witnesses were not "special agents." SR:3555-56.

Under SDCL 23A-27-26, Defendant is liable to pay certain costs of prosecution. The statute, in relevant part, provides:

> In all criminal actions, upon conviction of the defendant, the court may adjudge that the defendant pay the whole or any part of the costs of that particular prosecution in addition to the liquidated costs provided by § 23-3-52. However, the costs shall not include items of governmental expense such as juror's fees, bailiff's fees, salaries and expenses of special agents, and reporter's per diem.…

Words of a statute are given their plain meaning and effect. *State v. Jensen*, 2003 S.D. 55, ¶15, 662 N.W.2d 643, 648. When the language of a statute is unambiguous, clear, and certain, there is no need for construction and the Court's role is to declare the meaning of the statute as expressed. *Goetz v. State*, 2001 S.D. 138, ¶16, 636 N.W.2d 675, 681. SDCL 23A-27-26 clearly allows the court to assess against Defendant the costs of his *particular prosecution*, in addition to the general criminal justice costs contemplated in SDCL 23-3-52. The statute then

specifically enumerates the costs of prosecution that the court *may not* include—importantly, "expert witness fees" are not listed under the exclusion.

In *State v. Baldwin*, this Court implicitly approved the inclusion of expert witness fees in the costs of prosecution so long as there was actual, apparent, or probable necessity for incurring those expenses. 299 N.W.2d 820, 822 (S.D. 1980) (reversing the expert witness fees assessed against the defendant, pursuant to SDCL 23A-27-26, where the expert testimony did not relate to the speed gun used and defendant did not claim the speed gun was defective). In this case, Defendant accused everyone involved in the investigation of being part of the "apparatus" that creates fabricated allegations and challenged forensic interviewing both generally and as it was applied in this case. JT2:11-20.

As the trial court explained, each expert had firsthand experience with one or more of the victims in the case. SR:3555-56. The expert testimony either explained the timeline of events leading up to the trial or refuted Defendant's "apparatus" theory. Petro interviewed the victims. Doctors Hamilton and Eide examined A.C. after she disclosed sexual abuse. JT1:127, 139. Dr. David Mueller was noticed as a witness in the first trial and provided consultation to the State. SR:117, 450, 3509. Tonkel testified about forensic interviewing and delayed disclosure of sexual abuse in the first trial. JT1:594-636.

Defendant did not provide any authority supporting his contention that the State's experts are "special agents," nor does the statutory language support this interpretation. DB:22-23. The above-named expert witnesses work at private facilities and do not receive a salary from the State. *State v. Garnett*, 488 N.W.2d 695, 698-99 (S.D. 1992); *Ryyth* at ¶8, 626 N.W.2d 290, 291. Notably, the State did not request expert witness fees for Hollie Strand who is employed by the Pennington County Sheriff's Office. As an employee of a law enforcement agency, Strand is government personnel, most akin to a special agent, and her salary and fees are specifically excluded under SDCL 23A-27-26. *Id.* As the trial court noted, none of the other experts work for law enforcement agencies and, thus, are not "special agents" under the statute. SR:3556. The court properly included expert witness fees in the costs of prosecution assessed to Defendant.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that Defendant's convictions be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,921 words.

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

Dated this 28th day of February 2022.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 28, 2022, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Theodore Guzman* was served via electronic mail upon Conor Duffy at conor@duffylaw.us.

/s/ Chelsea Wenzel
Chelsea Wenzel
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#29722

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

VS.

THEODORE GUZMAN
Defendant and Appellant

APPEAL FROM THE CIRCUIT COURT
OF PENNINGTON COUNTY, SOUTH DAKOTA
SEVENTH JUDICIAL CIRCUIT

HONORABLE ROBERT MANDEL, PRESIDING

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

STATE STATUTES:

SOUTH DAKOTA CASES:

1. The testimony of W.B. was not properly admitted under the "intent" exception to SDCL §404(b)

The jury could not properly consider W.B.'s testimony under SDCL § 19-19-404(b)'s "intent" exception as to Count I, Count II, and Count III. Because first degree rape is a general intent crime, and because defendant never made intent a material issue, the court should have instructed the jury that they could only consider the prior bad acts evidence when deciding Count IV; Sexual Contact with a Child. Failure to do so was an abuse of discretion and convictions for Counts I, II and III should be reversed.

This Court fashioned the rule governing admission of prior bad acts evidence under 404(b)'s "intent" exception in *State v. Willis*, 370 N.W.2d 193 (S.D. 1985): "Admission of other acts evidence to prove intent…is dependent on the establishment of intent as a material issue." *Id.* at 198.

Sexual Contact with a Child, SDCL §22-22-7, is a specific intent crime, and the State is required to prove the contact was made with the specific purpose and intent of sexual arousal or gratification. Intent was therefore at issue in regards to Count IV, and prior acts of sexual misconduct are admissible to prove intent when the crime charged is the specific intent crime of Sexual Contact With a Child. *State v. Champagne*, 422 N.W.2d 840 (S.D. 1988), *State v. Ondricek*, 535 N.W.2d 872 (S.D. 1995), *State v. Christopherson*, 482 N.W.2d 298 (S.D. 1992), *State v. Werner*, 482 N.W.2d 286 (S.D. 1992), *State v. Means*, 363 N.W.2d 565 (S.D. 1985).

First Degree Rape, however, is a general intent crime. "Rape is a general intent offense." *State v. Means*, 363 N.W.2d 565, 568 (S.D. 1985). The rule for admission of prior bad acts under 404(b)'s "intent" exception is different with general intent crimes.

In trials of general intent crimes, courts should allow prior bad acts under the intent exception only if intent becomes a material issue, such as in *State v. Willis*: "When appellant claims innocence…by a mitigating factor, namely consent, he thus begets establishment of intent as a material issue in the crime of rape." *Id.* 198.

This Court has an extensive catalogue of caselaw dealing with the admission of prior sexual misconduct under 404(b)'s intent exception. However, most of that caselaw concerns appellants convicted only of Sexual Contact with a Child; a specific intent crime with an obvious intent element. *State v. Champagne*, 422 N.W.2d 840 (S.D. 1988), *State v. Ondricek*, 535 N.W.2d 872 (S.D. 1995), *State v. Christopherson*, 482 N.W.2d 298 (S.D. 1992), *State v. Werner*, 482 N.W.2d 286 (S.D. 1992), *State v. Means*, 363 N.W.2d 565 (S.D. 1985).

This Court has endorsed the use of 404(b)'s "intent" exception to admit prior sexual misconduct in rape trials far less often, and has done so only when the Defendant made intent a material issue by claiming innocence through consent (State v. *Willis,* 370 N.W.2d 193, at 198.) or unconsciousness (*State v. Perkins*, 444 N.W.2d 34 (S.D. 1989), at 38.). Under South Dakota law, the testimony of W.B. was therefore not admissible under 404(b)'s "intent" exception.

2. The record shows that Defendant's excluded witness, Helen Guzman, observed the testimony of a single witness.

The only proof in the record is that Helen Guzman observed the testimony of a single witness, L.G. Although the Appellee's brief seems to assert otherwise, testimony at trial only supports a finding that Helen viewed LG's testimony. During an in-chambers hearing, outside the presence of the jury, the State's Attorney called an employee of the

Pennington County State's Attorney's Office, paralegal Jamie Fischer, who had been observing the trial:

Ms. Roetzel: Have you been able to see all of the courtroom testimony in this case?
Mr. Fischer: Yes. I've been in there for about 98 percent of it. JT2 743:2.

Ms. Roetzel: And has Helen Guzman been identified to you?
Mr. Fischer: Yes.
Ms. Roetzel: And was she in the court viewing room for any part of the testimony in this case?
Mr. Fischer: Yes.
Ms Roetzel: Which part?
Mr. Fischer? Lynda's
Ms. Roetzel: Was that all?
Mr. Fischer: That's all I remember her being at, yes. JT2 744:2.

Given the above testimony, there is no support for the State's conjecture that "Helen's exposure to other witnesses was likely extensive." (AB 15).

3. Nicole Guzman's presumed availability as a witness cannot cure the constitutional violation of Helen Guzman's exclusion as a witness.

The State assumes that defendant's sister Nicole was available to testify at the second trial. (AB 19). They then assert that the constitutional violation of excluding the defendant's mother as a witness is somehow cured by this. They cite *State v. Buller,* 484 N.W.2d 883 (S.D. 1992), as authority for this assertion. (AB 20). None of the facts or legal conclusions from *Buller* inform this issue. The constitutional violation resulting from exclusion of one of defendant's witnesses is not excused by the hypothetical availability of another witness with similar testimony. *Buller* is not authority for such a concept.

4. Helen Guzman's exclusion as a witness prejudiced the entire trial, not simply the conviction involving A.C.

The State argues that exclusion of Helen's testimony could only have had any prejudicial impact on Count I, regarding A.C. (AB 20, footnote 7). A.C. was the catalyst of the investigation and prosecution of Defendant. A.C. was the only victim who did not initially deny sexual abuse at a first forensic interview. A.C. was the cornerstone of the State's case; her testimony tended to excuse the initial denials by L.G. and N.G. and make their changed-stories more believable. By restricting the Defendant's response to A.C.'s account of the sleepover, the entire trial and all convictions were tainted by prejudice.

While the State assures us that such things do not happen so long as the jury is instructed to consider each count separately, common sense, and at least one of this Court's prior opinions, warn otherwise. In *State v. Dixon*, this Court considered the improper joinder of two separate criminal incidents in a single trial. Dixon seemed obviously guilty of burglarizing an arcade, but not so much of slashing his vice principal's tires. As to the possibility that one incident may have prejudiced trial on the other, this Court said: "The chance of getting a fair trial on these counts is slim under these circumstances." *State v. Dixon*, 419 N.W.2d 699, 703 (S.D. 1988).

5. The issue of exclusion of Helen's testimony was properly preserved for appeal.

The State asserts that Defendant waived appellate review of the constitutional violation resulting from exclusion of Helen's testimony. (AB 14, 17), citing *State v. Rodriguez*, 2020 S.D. 68, and *State v. Willingham*, 2019 S.D. 55, as authority for that assertion. Willingham attempted to raise an entirely new pretrial suppression issue on appeal and Rodriguez did not make a constitutional challenge at all (he complained only of the

court's failure to issue findings of fact and conclusions of law- a procedural issue). *Id.* 624. *Id.* 254. *Willingham* and *Rodriguez* are inapposite to facts at bar- those defendants raised pretrial suppression issues before this Court that the trial court had clearly not had an opportunity to address.

Here, Defendant met the requirements to preserve this issue for appeal statutorily: "...it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor." SDCL § 23A-44-13.

Defendant also preserved the issue according to the Court's prior caselaw: "To preserve issues for appellate review litigants must make known to trial courts the actions they seek to achieve or object to the actions of the court, giving their reasons."" *State v. Dufault*, 628 N.W.2d 755, 757 (S.D. 2001).

In support of their argument that this issue was not preserved, the State asserts that:

Defendant did not cite any case law suggesting an analysis was necessary. (AB 17). This is perhaps unsurprising as exclusion of a defense witness for violation of sequestration is an issue of first impression in South Dakota, suggesting the situation has arisen rarely, if at all. While the State asserts that "The court offered counsel several opportunities to provide argument and was open to hearing further argument or authority," the trial transcript reveals otherwise.

The issue was first raised the morning of the last day of trial. (JT 2, 713). The state then proffered W.B.'s 404(b) testimony outside the presence of the jury. (JT 2 723-739). W.B. then testified, was cross-examined and redirected. (JT 2 747-792). The State

then rested its case, and defense made a motion for judgment of acquittal (JT-2 796). All of this happened by 11:00 AM. (JT 2, 798:22) An in-chambers hearing was had at this point and Helen's testimony was excluded. (JT 2, 798:16). The time-period from when the issue arose until the court ruled on it was less than three hours and was filled with nonstop trial tasks. There was no meaningful opportunity to find caselaw or develop an argument. Under such circumstances the failure to object at all may even be excused, much less the failure to recite caselaw on the spot: "...if a party has no opportunity to object to a ruling or order the absence of an objection does not thereafter prejudice him." SDCL § 23A-44-13. The State's argument is essentially that an attorney waives an objected-to ruling at trial by failing to immediately recite all relevant caselaw. The law does not require such a strict standard.

The State also asserts that *Defendant did not...request an alternative remedy* (AB 17). Defendant submits that he requested the alternative remedy of allowing Helen Guzman to testify.

Dated this 8th day of April 2022.

Respectfully,

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CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Times New Roman typeface in 12-point type. Appellant's Brief contains approximately 1,653 words and is 6 pages in length.

I certify that the word processing software used to prepare this brief is Microsoft Word Version 16.44.

/s/ Conor Duffy
Conor Duffy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of April 2022, a true and correct copy of the foregoing Appellant's Reply Brief was served via electronic mail, at the e-mail addresses listed below, upon these individuals:

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