IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28886

State of South Dakota,
Plaintiff and Appellee,
v.
Chance Harruff,
Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Gregory County, South Dakota

The Honorable Bobbie Rank
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed on the 04th day of February, 2019

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JURISDICTIONAL STATEMENT

In this appeal, Chance Harruff seeks review of the following orders: (1) the Court's denial of Defendant's oral Motion for Judgment of Acquittal on Second Degree Murder on October 29, 2018; (2) January 6, 2019 Order Re: Defendant's Motion for Judgment of Acquittal; (3) and the Court's allowance of Kristen Wallace, Marissa Bridges, and Melvin Vosika's testimony at trial despite Defendant's objections pursuant to SDCL § 19-19-403.

Harruff respectfully submits that jurisdiction exists pursuant to SDCL § 15-26A-3(1) (appeal from final judgment as a matter of right).[1]

STATEMENT OF THE ISSUES

I. Whether the Trial Court Erred in Denying Harruff's Motion for Judgment of Acquittal on Second Degree Murder

SDCL 22-16-7

State of South Dakota v. Primeaux, 328 N.W.2d 256 (S.D. 1982)

State of South Dakota v. McCahren, 2016 SD 34, 878 N.W.2d 586

II. Whether Sufficient Evidence Exists to Sustain Second Degree Murder Conviction

SDCL 22-16-7

State of South Dakota v. Primeaux, 328 N.W.2d 256 (S.D. 1982)

State of South Dakota v. McCahren, 2016 SD 34, 878 N.W.2d 586

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[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "JT" designates the Jury Trial held October 24-November 1, 2018; (3) "App." designates Appellant's Appendix.

III. Whether the Trial Court violated Harruff's right to a fair trial when it allowed the cumulative testimony of Marissa Bridges, Melvin Vosika, and Kristin Wallace

SDCL § 19-19-403

SDCL § 19-19-404(b)

State of South Dakota v. Wright, 1999 SD 50, 593 N.W.2d 792

State of South Dakota v. Moeller, 1996 SD 60, 548 N.W. 2d 465

STATEMENT OF THE CASE

Chance Harruff was arrested and charged on June 1, 2017, with Second Degree Murder for the death of Kristi Olson. Harruff was indicted by a Gregory County Grand Jury on June 7, 2017, for First Degree Murder (Domestic), Second Degree Murder (Domestic), and Manslaughter in the First Degree (Domestic). CR. 11. Harruff pleaded not guilty to all charges at his June 12, 2017 Arraignment.

On February 7, 2018, the circuit court granted Harruff's Motion to Change Venue. CR. 300. Harruff's trial was moved from Gregory County to Stanley County. CR. 300. Although originally scheduled for April 2018, the trial was continued at Harruff's request due to pregnancy related issues of one of his attorneys. CR. 323.

A hearing on Defendant's Motion to Exclude Other Acts Evidence Pursuant to SDCL § 19-19-404(b), Defendant's Motions in Limine, State's Notice of Intent to Introduce Other Acts Evidence, and State's Motion to Admit Evidence of Domestic Relationship was held on September 28, 2018. The circuit court made oral rulings at that time. Orders memorializing the circuit court's decision were filed on October 23, 2018. CR. 885; CR. 887; CR. 891; CR. 914.

An evidentiary hearing on the State's Motion to Admit Decedent Statements was held on September 28, 2018 and October 12, 2018. Oral rulings were made by the circuit court. Findings of Fact and Conclusions of Law and Order re: State's Motion to Admit Statement of the Decedent Victim was filed on October 22, 2018. CR. 863.

Harruff's Jury Trial commenced on October 22, 2018, in Ft. Pierre, Stanley County, South Dakota. At the close of the State's case-in-chief, Harruff moved for a judgment of acquittal on the Second Degree Murder charge. *JT.* 717:16-718:1. After hearing argument from both sides, the circuit court denied Harruff's oral motion. *JT.* 718:3-17.

On November 1, 2018, Harruff was acquitted of First Degree Murder. Harruff, however, was found guilty of Second Degree Murder. A subsequent written Motion for Judgment of Acquittal was filed on November, 5, 2018. CR. 1376. The circuit court issued an Order Denying Defendant's Motion for Judgment of Acquittal on January 6, 2019. CR. 1524; App. 4. Harruff was sentenced on January 9, 2019, to life in the South Dakota State Penitentiary. CR. 1525; App. 1-3.

STATEMENT OF THE FACTS

On June 1, 2017, Kristi Olson was found unresponsive in her Dallas, SD home. She was fully clothed and curled up in bed. Her bedroom was undisturbed and there was no sign of forced entry. EMTs transferred Olson to the Gregory Hospital where she was pronounced dead. Her cause of death was listed as asphyxia by manual strangulation.

Despite only being 38 years old, Olson was a sick woman. At the time of her death, Olson suffered from a variety of medical conditions requiring invasive surgeries and treatment. She had had multiple throat stretching procedures to deal with esophageal strictures; she'd had gastric bypass; she'd had her stomach removed. She was also on a plethora of medication in an attempt to combat the symptoms and side effects. In the year leading up to her death she was in the hospital or at the clinic almost monthly. As recently as April 2017, 45 days before she died, she was experiencing problems swallowing and was vomiting.

In June 2017, Olson was in an on-again/off-again relationship with Chance Harruff. The two had a tumultuous relationship marked by domestic abuse on both sides. The greatest source of conflict and tension between Olson and Harruff was Olson's communication with former boyfriends and ex-husbands. Olson assigned specific ring tones or text tones for her exes. When Olson's phone would chirp or beep with the notice that one of her former lovers was messaging her, Harruff would get upset and the two would argue. On more than one occasion Harruff took and broke Olson's phone as a result.

On May 30, 2017, Olson and Harruff traveled to Sioux Falls to look at a vehicle for Olson. They spent the night in a Sioux Falls hotel and then returned to Gregory the following day. Harruff left Olson's residence around suppertime on May 31, 2017, due to a disagreement. The two, however, continued to communicate that evening.

In the early morning hours of June 1, 2017, Harruff returned to Olson's residence. Olson would not let him in her home. The two argued outside Olson's house. Harruff took Olson's phone and shoved her. Olson fell to one knee, got back up, and slammed the door in Harruff's face. When Harruff left Olson's house, Olson was alive.

STANDARD OF REVIEW

On appeal, the standard of review for a circuit court's denial of a motion for judgment of acquittal is whether "evidence was sufficient to sustain the convictions." *State v. Running Bird*, 2002 SD 86, ¶ 19, 649 N.W.2d 609, 613 (quoting *State v. Verhoef*, 2001 SD 58, ¶ 22, 627 N.W.2d 437, 442) (internal citations omitted). "When reviewing sufficiency of the evidence, this [C]ourt, considers the evidence in a light most favorable to the verdict." *Id.* "A guilty verdict will not be set aside if the state's evidence and all favorable inferences that can be drawn therefrom support a rational theory of guilt." *Id.* "The question is whether there is evidence in the record, which, if believed by the jury, is sufficient to sustain a finding of guilt beyond a reasonable doubt." *State v. Sprik*, 520 N.W.2d 595, 601 (S.D.1994) (citing *State v. Davi*, 504 N.W.2d 844, 856 (S.D.1993); *State v. Brings Plenty*, 490 N.W.2d 261, 266 (S.D.1992); *State v. Ashley*, 459 N.W.2d 828, 831 (S.D.1990); *State v. Davis*, 401 N.W.2d 721, 722 (S.D.1987)).

When reviewing a trial court's exercise of "balancing the probative value against the risk of unfair prejudice and the other Rule 403 considerations," this Court will

"determine whether there has been an abuse of discretion." *State v. Johnson*, 316 N.W.2d 652 (S.D. 1981) (quoting *State v. Houghton*, 272 N.W.2d 788, 791, (S.D. 1978)). "The term 'abuse of discretion' refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Id.* (quoting *State v. Engelmann,* 541 N.W.2d 96, 100 (S.D. 1995)). 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 and unreasonable.'" *Kaberna v. Brown,* 2015 SD 34, ¶ 13, 864 N.W.2d 497, 501 (quoting *Gartner v. Temple,* 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850).

ARGUMENT

I. Harruff's Motion for Judgment of Acquittal Should Have Been Granted; Insufficient Evidence to Sustain Second Degree Murder Conviction

> Homicide is murder in the second degree if perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child.

SDCL § 22-16-7.

"The 'depraved mind' requirement is a genuine additional element which must be established in order to prosecute for second degree murder." *State v. Primeaux*, 328 N.W.2d 256, 258 (S.D. 1982). The South Dakota Criminal Pattern Jury Instruction 3-24-13 provides:

> "Evincing a depraved mind, regardless of human life" means conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but a lack of regard for the life of another.

In *State v. McCahren*, this Court explained that "we consider the mens rea requirement of depraved mind as a less culpable mens rea contained within the greater offense's requirement of premeditation – 'evincing a depraved mind, regardless of human life, although without any premeditated design to effect death is a lesser mental state than premeditation.'" 2016 SD 34, 10, 878 N.W.2d 586, 592 (quoting Tim Dallas Tucker, *State v. Black: Confusion in South Dakota's Determination of Lesser Included Offenses in Homicide Cases*, 42 S.D. L. Rev. 465, 496 (1996)).

The State's theory was that Harruff killed Olson out of anger and jealousy. At trial, the State put on its theory of intentional, premeditated murder through the testimony of numerous law enforcement officers, forensic pathologists Dr. Kenneth Snell and Dr. Clifford Nelson, EMTs, medical personnel, and Olson's friends and family.

> Question by Attorney Robert Mayer: How does asphyxia cause a person to die?
>
> Answer by Dr. Kenneth Snell: The asphyxia, the reason it causes death is again because it starves the brain from oxygen so there's no oxygen getting to the brain.
>
> Your brain can survive for a few minutes before the damage to the brain without oxygen becomes irreversible or you can't recover from that. So if we get oxygen back to the brain before we see any damage, you can recover. The longer it stays there, the greater chance the damage occurs and that damages becomes permanent. And of course, if you have permanent damage to the brain, you lose brain function whether it be just a part of the brain or the entire brain.
>
> Q. Once the brain dies or stops functioning, everything else stops functioning?
>
> A. Yes, sir.
>
> Q. Could you apply a timeline to this process?

A. So in cases of strangulation, and a lot of this is based off of Hanes, which is the seminal principle where we're blocking off the vastus of the neck, we can see those individuals lose consciousness in 10 to 15 seconds and that's blocking off the blood flow to the neck and so therefore, you wouldn't get blood flow to your brain and we would lose consciousness in about 10 to 15 seconds. Now, that's maintaining a constant pressure.

If I put pressure, let go and put pressure again, that would have to go out a little bit longer, of course. But if I maintain that pressure beyond when you lose consciousness and I maintain it out to the five – three- or five-minute mark, we will get irreversible damage to the brain resulting in asphyxia death.

Q. So to summarize, if I am strangling somebody, that person will pass out in 10 to 15 seconds?

A. With constant pressure, yes, sir.

JT. 697:25-699:10.

Question by Attorney Amy Bartling-Jacobsen: Gay Lynn, on the first page, if you'll go down to a message that you sent to Kristi at 15:26, can you read what you sent to Kristi and what Kristi's response was?

Answer by Gay Lynn Barry: My text message is, "I think he must do this all the time and then the women have to get him in trouble to get him to leave. I'm beginning to think he's dangerous when he's drinking. You shouldn't have to keep up with his moods."

Q. And what is Kristi's response?

A. "I think he is very unstable when he's drinking, too. It scares me. After the other night I've never seen him like that bad to physically hurt me so much so I'm trying to keep it civil as I can.

Q. Gay Lynn, I'll have you go to the next page of this same exhibit and there's a text message exchange that starts at 17:23. It's about the middle of the page.
...

Q. Can you read starting there and just read the rest of the messages?

A. Okay. Krisi had sent a text to me. “We need to have a code word or something if I need you or you to call cops.” My response was, “I agree.” She replied back, “I’m just worried he’s going to get worse so I want a backup.” And her next text was, “Where are you?” My reply was, “Checking out at Walmart.” She asked, “Can you go back and buy the smallest baby monitor you can?” And I replied, “Yes, I will.” And I also asked, said, “How about a nanny cam?” Her reply was, “I want something to put in Mattie or Layne’s room so they could her me if I yelled.”

JT. 283:8-284:14.

Question by Attorney Amy Bartling-Jacobsen: Gay Lynn, where were you going on April 25th?

Answer by Gay Lynn Barry: I was closing on a property that I owned out in Hot Springs and the closing was set for that – those particular days.

Q. So you were going to be out of town for a few days?

A. Yes, I was.

Q. And now, Gay Lynn, if you can go down, there’s a text message that Kristi sent you at 11:28. Can you read what that text message is?

A. Yes. It says, “Don’t tell Chance how long you gone, if he asks. I don’t want him knowing I’m there alone.”

JT. 289:13-22.

Question by Attorney Amy Bartling-Jacobsen: Now, Sam, if you look at 8-A and the first page of Exhibit 8, that top message you read, “This is what Chance just did to me,” with the picture.

Answer by Samantha York: Yes.

Q. Is 8-A that picture that was attached?

A. Yes.

Q. What did you notice about your mom in this picture?

A. The fact that her face was red and it looked like she had been crying.

Q. Did your mom follow this picture up with more text messages?

A. Yes.

...

Q. And Sam, if you could just read from lines 2459 through 2461.

A. The first one said, “So your phone isn’t broke?” And then the next one was, “What happened?” And the next text I got from my mom said, “I called him a hypocrite so he grabbed my phone and threw it across the floor and it shattered so I slapped him and he hit me with girls in bathtub. They started screaming and Layne was yelling at me.”

Q. Who was she referencing when she says him?

A. Chance.

Q. How do you know that?

A. He was at our home at the time.

Q. Who’s your mom dating in September of 2016?

A. Chance.

JT. 339:11-340:14.

Question by Attorney Amy Bartling-Jacobsen: And in April 2017, what was the status of your mom and Chance’s relationship?

Answer by Samantha York: They were on the outs. I would say pretty close to completely.

Q. And when you say down at your grandma’s camper what do you mean by that?

A. It’s on the same property but right down the hill from our house.

Q. And you observed his vehicle down at this camper?

A. Yes.

Q. What vehicle was he driving?

A. I believe my grandma’s Jeep at that time.

Q. And Sam, if you would go to page two of this exhibit, if you would read lines 7245 through 7247.

A. “Maybe he’s making arrangements to leave. We can only hope.” “I doubt it. I’m sure he is giving someone the poor me story. He’s never going to leave willingly.

Q. So this is an exchange of concern that your mom expressed to you?

A. Yes.

Q. Was this the first time your mom had expressed that concern to you?

A. No.

JT. 355:6-356:4.

Question by Attorney Amy Bartling-Jacobsen: Sam, were you home over Christmas of 2016?

Answer by Samantha York: Yes.

Q. Do you recall how long your break was?

A. Two and a half weeks.

Q. Was there an incident over December of 2016 that stands out to you?

A. Yes.

Q. What was that incident?

A. There was an altercation between Chance and my mom the night of Christmas, early morning of December 26th.

Q. When you say altercation what do you mean?

A. Apparently, he had choked her when he woke her up and threw her – or took her phone.

...

Q. When did you find out about this incident?

A. The morning of the 26th when I woke up.

Q. And when you woke up what did you do?

A. I went downstairs to talk to my mom.

Q. And was your mom in her room?

A. No. She was in our living room.

Q. What was her appearance at that time?

A. She was upset.

Q. And again, how could you tell that?

A. Her demeanor, how she looked at me and what she said.

Q. Did you have a conversation as to why she was upset?

A. Yes.

Q. Why was she upset?

A. She told me what had happened during the night between her and Chance and the fact that she couldn't find her phone.

Q. So this is when she confides in you about the Defendant's actions the previous night?

A. Yes.

Q. Was it weird that your mom couldn't find her phone?

A. No.

Q. Why not?

A. Because he was always taking it and breaking them.

Q. Was your mom one of those people who just kind of lost her phone?

A. No.

Q. Did she ever forget it places?

A. No.

Q. How often did your mom have her phone on her?

A. All the time.

Q. But you said the morning of December 26th she couldn't find it?

A. No.

Q. Did she stay at the house on the December 26th date?

A. No. She had to leave to go open our flower shop.

Q. So what do you do after your mom leaves the house?

A. I took my younger siblings downstairs and we kept looking for the phone.

Q. Were you able to find the phone?

A. My youngest sister did.

...

Q. Where did Marisa find the phone?

A. In our wood stove?

Q. Where is the wood stove at in your house?

A. Our basement.

Q. And how close is it to your mom's bedroom?

A. Maybe 10, 15 feet.

Q. How were you able to identify the phone in the wood stove?

A. You could tell that it was a phone. You could still see the protective screen that I had put on it and a little bit of the coloring.

Q. Did you tell your mom about this hone?

A. Yes.

Q. What was your mom's reaction to you telling her about this phone?

A. She was upset. She started to cry.

Q. Sam, were you ever made aware as to what happened on this night to cause this altercation?

A. I was told that Chance got upset after reading text messages on my mom's phone between her and her ex-husband.

JT. 348:13-351:17.

From Opening Statements to Closing Arguments, the State continuously discussed Harruff's temper and resulting actions as motive and intent for First Degree Murder.

Well, the Defendant's at the scene. He's the only other person at the scene that we know of. He's angry – he's angry enough, and you've heard this ad nauseum, but he's angry enough to strike frail Kristi with a mule punch. This is about 4:00am. About 7:15 a.m. Kristi is found in her bedroom. Rigor mortis has fully set in. Follow the timeline. Keep your eye on the ball.

So who did it? How do you determine that the Defendant did it?

Meghan, could you bring up the other acts evidence instruction, please?

> Although evidence of this nature is allowed, it may be only used to show intent, motive, identity or modus operandi. All those other acts can show identity. Who's the guy that's thumping on Kristi? Who's the guy that's strangling her? It's the Defendant, the only other person that we know of at the scene. This is the guy who had choked Kristi previously.
>
> Also, other acts can prove intent. What was the Defendant thinking? What was he thinking on his drive on the way out to Kristi's, uninvited? What was he thinking at the time Kristi's phone chirped at her door? What was he thinking at the time he wound up to deliver the mule punch? Just as he told Kristin Wallace, I am effing done with her. We would submit the phone chirp only escalated that uncontrollable anger. And as you are instructed, this premeditation can be formed instantaneously. When the phone chirped, it was all over for Kristi.

JT. 943:11-9:44:13.

Harruff, however, was acquitted on the First Degree Murder charge.

Even if the jury believed all of the state's evidence – except the evidence submitted as premeditation proof - Harruff's Second Degree Murder conviction cannot be sustained. Although Second Degree Murder is a lesser included offense of First Degree Murder, it isn't a lesser offense in the sense that it includes fewer elements. Rather, Second Degree Murder requires proof beyond a reasonable doubt of a different mens rea element than that of First Degree Murder. "The 'depraved mind" requirement is a genuine additional element which must be established in order to prosecute for second-degree murder." *State v. Primeaux*, 328 N.W.2d 256, 258 (citing *Hagenkord v. State*, 100 Wis.2d 452, 302 N.W.2d 421 (1981)).

The critical distinction between indifference towards the life of others and disregard for another's safety is codified by South Dakota's Second Degree Murder statute, SDCL § 22-16-7. Courts across the country, including South Dakota, have upheld second degree murder convictions illustrating this central difference. Conduct evincing a depraved mind includes continued abuse of a child culminating in its death, *South Dakota*

v. Miller, 2014 SD 49, 851 N.W.2d 703, firing "shots" to disable a vehicle known to be occupied, *South Dakota v. Lyerla*, 424 N.W.2d 908, (S.D. 1988), firing "warning shots" into the darkness in the direction of a vehicle known to be occupied but without intent to hit the vehicle's occupants, *Kansas v. Cordray*, 82 P.3d 503 (Kan. 2004), "blindly" swinging a golf club at a person with great force with the intent to hit but not kill, *Kansas v. Robinson*, 934 P.2d 38 (Kan. 1997), randomly firing a gun over a crowd with one's eyes closed, *Kansas v. Jones*, 8 P. 3d 1282 (Kan. 2000), and opening fire into a crowd, *State v. Brooks*, 962 So.2d 1220 (La.App.2 Cir. 2007).

Absent the State's introduction of evidence on Second Degree Murder's mens rea requirement, the only charges from the Indictment that should have been considered by the jury was First Degree Murder and First Degree Manslaughter. A "favorable inference" should not replace the requirement to prove "depraved mind" beyond a reasonable doubt. Failure to prove premeditation does not default to "evincing a depraved mind" for a Second Degree Murder conviction. Harruff's anger was the State's focus. Second Degree Murder is not and should not be a fallback option. Because there is not evidence in the record sufficient to sustain a Second Degree Murder conviction beyond a reasonable doubt, the jury's November 1, 2018 Verdict should be Vacated, the Court's Order Denying Defendant's Motion for Judgment of Acquittal should be Reversed, and the matter should be remanded for a new trial.

II. Fair Trial Rights Violated by Court's Abuse of Discretion in Allowing Cumulative Testimony

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

SDCL § 19-19-403.

On the first day of trial Olson's mother, Gay Lynn Barry, and daughter, Samantha York, both testified at length as to events in Olson and Harruff's relationship that Olson personally shared with them via text or in person. *JT*. 272:6-329:18; *JT*. 330:6-373:4. Barry and York also testified as to Olson's statements about her fear of Harruff. *JT*. 272:6-329:18; *JT*. 330:6-373:4. Copies of the text message communications were admitted into evidence. *JT*. 277; 283; 286; 288; 290; 333; 335; 338; 339; 344 ;346; 354; 356. Two days later, testimony by and exhibits admitted through Marissa Bridges, Kristen Wallace, and Melvin Vosika reiterated many of the same stories and sentiments already testified to and already admitted as exhibits.

> Question by Attorney Amy Bartling Jacobsen: And when I say go on a mail route with Kristi what am I talking about?
>
> Answer by Kristin Wallace: We didn't really, between our schedules, didn't have a lot of time to talk so she was going on her mail route and she asked if I wanted to go along with her so we could talk. And I just rode along and she did her mail and we talked.
>
> Q. And at this point this is in May of 2017?
>
> A. Yes.
>
> Q. You were aware that she'd been in a relationship with Chance Harruff for a while?
>
> A. Yes.
>
> Q. What did you guys talk about on this mail route?

A. We talked about her relationship with Chance, how she was very scared, she was worried. She felt that she hadn't been herself and she had mentioned that she thought that he had been drugging her.

JT. 603:1-16.

Question by Attorney Amy Bartling-Jacobsen: At some point, Marissa, do you become aware of some abuse between Kristi and the Defendant?

Answer by Marissa Bridges: Yes.

Q. And when was that?

A. It would have been in March?

Q. Do you recall what the situation was?

A. She had came and asked me if I heard her screaming for help or yelling for help.

Q. Where were you at when she asked you this?

A. I was upstairs in her house.

Q. Where did Kristi come from, if you know?

A. She had come from her downstairs area.

Q. Where was Kristi's bedroom at?

A. Downstairs.

Q. So you're upstairs in Kristi's house in your room?

A. Yes.

Q. And she had asked why you hadn't helped her?

A. Yes.

Q. Did she tell you anything more about why she needed help?

A. Yes.

W. And what was that?

A. She had told me that her head got hit against the door by Chance.

Q. She was yelling for help?

A. Yes.

Q. Could you hear Kristi yelling?

A. No, I could not.

Q. And in March of 2017, are you aware of what the relationship status between the Defendant and Kristi were?

A. Yes.

Q. And what was that?

A. They were boyfriend and girlfriend.

Q. So after Kristi tells you this in March, do you do anything in response to that?

A. Yes.

Q. What do you do?

A. I had to put a baby monitor in her room.

Q. Did you purchase the baby monitor?

A. No.

Q. Who purchased it, if you know?

A. Her mother, Gay Lynn.

JT. 611:19-613:14.

Question by Attorney Doug Barnett: Did there come a point where Kristi began confiding in you as to problems she was having with the Defendant?

Answer by Melvin Vosika: Yes.

Q. Did she do that often?

A. Yes.

Q. Did she confide in you as to physical abuse by the Defendant?

A. Yes.

Q. Did she confide in you as to violent confrontations she had with him?

A. Yes.

Q. I want to visit about some of those discussions. When the Defendant became violent and physically abusive towards her did you ever tell her to call 911?

A. Yes.

Q. Did she take your advice?

A. No.

Q. Did she tell you why she could not call law enforcement?

A. She figured after he got out he'd probably kill her.

Q. Did Kristi ever tell you she was afraid of the Defendant becoming angry with her?

A. Yes.

Q. Did she tell you what would happen if she attempted to make changes in their relationship?

A. He would – he'd hold her and shove her and choke her and beat her and wait until he got his way.

JT. 624:14-625:14.

Question by Attorney Doug Barnett: Melvin, I'm handing you what's been marked as State's Exhibit 38. Can you identify that?

Answer by Melvin Vosika: These are messages between me and Kristi.

Q. How do you know they're between you and Kristi?

A. It has Kristi's phone number on it and I definitely recognize the messages.

...

Q. Melvin, and you can look at the paper that's in your hand there. Melvin, could you just start at the beginning and read for the jury.

A. "Hey, we still on for movie?"

And she said, "I don't know. Arguing with Chance."

And I said, "Okay. I'll be there in a little while. Argue later."

And she said, "Huh?" She said, "He's going to flip out even more if you show up."

And I said, "Movie night Kong and I don't care. It's BS. Life can't stop because one person. Shit, it's just a movie."

And she said, "I don't want to set him off any more. I can't take the physical anymore."

> And I asked her, "Is he hitting you?"
>
> And she seaid, "Yes, but let me deal with it, please."
>
> And I said, "That's bullshit. I can't."
>
> She said, "Yes, you can. Let me handle it."
>
> And I told her, "I already told Jace he was coming to play with your kids. I'll just stop and BS with you guys."
>
> And she said, "If you could find an excuse for me to leave and talk would be good."
>
> And I said, "Okay. I honestly need to talk to you."

JT. 626:1-627:17.

The individual testimony about domestic abuse or statements by Olson is not, standing alone, unfairly prejudicial. Harruff acknowledged his tumultuous relationship with Olson from the outset and throughout the trial. *JT.* 240:6-10. Unfair prejudice, however, resulted when the trial court allowed the State to "needlessly present[ ] cumulative evidence" about abuse incidents and Olson's fear of Harruff through Bridges, Wallace, and Vosika's testimony. SDCL § 19-19-403.

But the trial court didn't just allow cumulative evidence – it allowed cumulative "other acts" evidence. The trial court's decision to allow the State's repetitive presentation of 404(b) evidence runs afoul of South Dakota's explicit prohibition on propensity evidence. *State v. Wright*, 1999 SD 50, ¶ 14, 593 N.W.2d 792, 798. This distinction elevates the unfair prejudice suffered by Harruff.

> In this country it is a settled and fundamental principle that persons charged with crimes must be tried for what they allegedly did, not for who they are.

State v. Moeller, 1996 SD 60, ¶ 6, 548 N.W.2d 465, 468 (citing *United States v. Hodges,* 770 F.2d 1475, 1479 (9th Cir. 1985)).

It was a "fundamental error of judgment" for the trial court to allow Bridges, Wallace, and Vosika's testimony about "other acts" evidence already in the record. *Kaberna v. Brown,* 2015 SD 34, ¶ 13, 864 N.W.2d 497, 501 (quoting *Gartner v. Temple,* 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850). The arbitrary and unreasonableness is further illustrated by the undisputed nature of the abuse between Harruff and Olson. *Id.*

Harruff's right to a fair trial was violated when the trial court abused its discretion in allowing Bridges, Wallace, and Vosika's, testimony. SDCL § 19-19-403. Harruff does not seek a perfect trial – he simply seeks that which the Constitution guarantees – a fair one. *State v. Smith,* 477 N.W.2d 27, 35 (S.D. 1991). Therefore, the Jury's November 1, 2018 Verdict should be Vacated, and the matter should be remanded for a new trial.

III. Conclusion

Absence of the requisite mens rea for Second Degree Murder coupled with the abuse of discretion in allowing cumulative "other acts" evidence to reach the jury demonstrates Harruff's constitutionally deficient trial. Harruff respectfully requests that this Honorable Court vacate his Second Degree Murder conviction, reverse the trial court's erroneous Order Denying Judgment of Acquittal, reverse the trial court's decision to allow Bridges, Wallace, and Vosika testify to "other acts" evidence previously testified to by Barry and York, and remand for a new trial.

Respectfully submitted this 1st day of May, 2019.

/s/ Raleigh Hansman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Brief and all appendices were filed online and served upon:

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On this 1st day of May, 2019.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 5,195 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 1st day of May, 2019.

/s/ Raleigh Hansman
MEIERHENRY SARGENT LLP

APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS	
COUNTY OF GREGORY	)	SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff	)	**JUDGMENT OF CONVICTION**
vs.	)	**26CRI17-34**
CHANCE GLENN HARRUFF DOB: 10/03/1970 Defendant	)	

An Indictment was filed with this court on June 7, 2017, charging the defendant, CHANCE GLENN HARRUFF, with the crime of Count 1: FIRST DEGREE MURDER; Count 2: SECOND DEGREE MURDER; and Count 3: FIRST DEGREE MANSLAUGHTER in causing the death of KRISTI LYNN OLSON on June 1, 2017. The Defendant was arraigned on the Indictment on June 13, 2017. The Defendant and his counsel, Clint Sargent, appeared at the arraignment. The Court advised the Defendant of his constitutional and statutory rights pertaining to the charges filed against him. The Defendant pled not guilty to the Indictment and requested a jury trial.

A jury trial commenced at the Stanley County Courthouse in Ft. Pierre, South Dakota, on October 22, 2018. At trial, the Defendant was represented by his attorneys, Clint Sargent and Raleigh Hansman, and the State of South Dakota was represented by Gregory County State's Attorney Amy R. Bartling Jacobsen, Deputy Attorney General Robert Mayer and Assistant Attorney General Douglas Barnett. On November 1, 2018, a Stanley County jury found the defendant GUILTY of SECOND-DEGREE MURDER.

It is, therefore, the JUDGMENT of this Court that the Defendant, CHANCE GLENN HARRUFF, is GUILTY of the crime of SECOND-DEGREE MURDER in violation of SDCL 22-16-7, a Class B Felony.

On January 9, 2019, the Defendant, CHANCE GLENN HARRUFF, and his counsel, Clint Sargent and Raleigh Hansman, and the prosecuting attorneys, Gregory County State's Attorney Amy R. Bartling Jacobsen, Deputy Attorney General Robert Mayer and Assistant Attorney General Douglas Barnett, appeared for the Defendant's sentencing. The Court inquired whether any legal cause existed to show why sentence should not be pronounced and, there being none, the Court entered the following sentence:

1. **IT IS ORDERED** that the Defendant, CHANCE GLENN HARRUFF, be and hereby is SENTENCED to LIFE IMPRISONMENT in the South Dakota State Penitentiary in Sioux Falls, South Dakota, there to be housed, boarded and

clothed for the remainder of his natural life according to the rules and discipline governing the institution;

2. **IT IS FURTHER ORDERED** that the Defendant receive credit for 587 days of time already served awaiting trial;
3. **IT IS FURTHER ORDERED** that the Defendant pay court costs pursuant to SDCL 23-3-52, 23-28B-42 and 16-2-41 in the amount of $104 to the Gregory County Clerk of Courts;
4. **IT IS FURTHER ORDERED** that the Defendant pay restitution costs in the amount of $14,054.23 to the following:
    a. $4,997.03 – one half to Gay Lynn Barry and one half to Jerry Olson; and
    b. $9,057.20 to Crime Victim's Compensation Program.
5. **IT IS FURTHER ORDERED** that the Defendant pay prosecution costs in the amount of $80,775.07 to the following:
    a. $43,919.41 for witness fees/autopsy/forensic examinations;
    b. $1,194.20 for transcript fees;
    c. $6,681.46 for medical costs for the Defendant paid by Gregory County; and
    d. $29,080.00 for housing expenses in the county jail.
6. **IT IS FURTHER ORDERED** that the Defendant reimburse Gregory County through the Gregory County Clerk of Courts for the costs of his court- appointed fees which have been incurred in this matter in the amount of $71,691.64 plus such further billings as are submitted to the court for payment;
7. **IT IS FURTHER ORDERED** that the Defendant be remanded to the custody of the Gregory County Sheriff for transportation and delivery to the Warden of the South Dakota State Penitentiary in Sioux Falls, South Dakota.

Dated this 9th day of January, 2019.

BY THE COURT:

Bobbi J. Rank

Bobbi J. Rank
Circuit Court Judge

STATE OF SOUTH DAKOTA
CIRCUIT COURT, GREGORY CO
FILED
JAN 09 2019
Sandy Teigen Clerk
By _____ Deputy

RIGHT TO APPEAL

You, **CHANCE GLENN HARRUFF,** 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 by filing a copy of the same, together with proof of such service, with the clerk of this court within 30 days from the date that this judgment of conviction was signed, attested and filed.

STATE OF SOUTH DAKOTA :SS	)	IN CIRCUIT COURT
COUNTY OF GREGORY	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff v. CHANCE HARRUFF, Defendant.	)	**ORDER RE: DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL**

The Defendant having moved for a judgment of acquittal at the close of the State's case in chief, which motion was denied; and the Defendant having filed a written motion for judgment of acquittal after the jury returned a verdict of guilty on Second Degree Murder; and the State having filed a written resistance to the Defendant's motion; and the Defendant not requesting a hearing on his written motion; and the Court having considered the written motion and response and the oral motion and related arguments made at trial regarding that motion; and the Court having presided at the jury trial of this matter and having considered all evidence presented to the jury by both parties; the Court hereby

FINDS that, after viewing the evidence in the light most favorable to the verdict rendered, the jury could have found the essential elements of the crime of Second Degree Murder beyond a reasonable doubt; it is therefore

ORDERED that the Motion for Judgment of Acquittal is DENIED.

Dated this 6th day of January, 2018.

Bobbi J. Rank
Circuit Court Judge

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28886

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHANCE HARRUFF,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY, SOUTH DAKOTA

THE HONORABLE BOBBI J. RANK
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEYS FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed February 4, 2019

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28886

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHANCE HARRUFF,

Defendant and Appellant.

PRELIMINARY STATEMENT

Defendant and Appellant, Chance Harruff, is called "Harruff," while Plaintiff and Appellee, State of South Dakota, will be referred to as "State." Citations to the settled record and other documents are as follows:

Settled Record ..... SR

Arraignment Transcript ..... AT

Defendant's Brief ..... DB

Jury Trial Transcript ..... JT

Motions Hearing Transcript ..... MH

The appropriate page number(s) follows each citation.

JURISDICTIONAL STATEMENT

On January 9, 2019, the Honorable Bobbi J. Rank, Circuit Court Judge, Sixth Judicial Circuit, entered a Judgment of Conviction and

Sentence in *State of South Dakota v. Chance Harruff*, Gregory County Criminal File Number 17-34. SR 1525. Harruff filed his Notice of Appeal on February 4, 2019. SR 1765. This Court accordingly has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT HARRUFF'S CONVICTION UNDER SDCL 22-16-7?

After the circuit court denied Harruff's motion for judgment of acquittal, the jury found Harruff guilty of Second-Degree Murder in violation of SDCL 22-16-7.

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808

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

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

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

SDCL 22-16-7

II

WHETHER THE CIRCUIT COURT PROPERLY ADMITTED THREE WITNESSES' TESTIMONY OVER HARRUFF'S OBJECTION THAT THE TESTIMONY WAS CUMULATIVE IN VIOLATION OF SDCL 19-19-403?

The circuit court ruled that other acts evidence was not cumulative and thus admissible to show Harruff's intent and motive.

State v. Phillips, 2018 S.D. 2, 906 N.W.2d 411

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

State v. Huber, 2010 S.D. 63, 789 N.W.2d 283

State v. Armstrong, 2010 S.D. 94, 793 N.W.2d 6

SDCL 19-19-403

SDCL 19-19-404(b)

STATEMENT OF THE CASE

On June 1, 2017, a Gregory County Grand Jury indicted Harruff for the homicide of his girlfriend Kristi Olson. SR 11-14. It charged three alternative counts: (1) First-Degree Murder in violation of SDCL 22-16-4(1), (2) Second-Degree Murder in violation of SDCL 22-16-7, and (3) First-Degree Manslaughter in violation of SDCL 22-16-15(2). *Id.*

Almost six months later, the State filed a Notice of Intent to Offer Other Act Evidence. SR 141-44. The other acts listed in that notice detailed Harruff's abuse of Kristi during their relationship. SR 141-42. Those acts, according to the State, would establish Harruff's intent and motive. SR 143. Harruff opposed the notice. SR 338.

At a pretrial hearing, the circuit court determined whether to admit those other acts. SR 586-674 (MH 1-89). The court noted that "past abusive conduct in a domestic situation is highly relevant in murder cases." SR 625 (MH 40). The court stated further that an "accused's past conduct in the relationship provides context that tends to explain later interactions with the same person." *Id.* And Harruff's past conduct showed a "controlling and hostile relationship fueled by jealousy of Olson's relationships with other men[.]" *Id.* So, the court

held that the other acts evidence the State intended to offer were relevant to Harruff's motive and intent. SR 626 (MH 41). Then it conducted the requisite balancing test under SDCL 19-19-403, finding the evidence more probative than prejudicial. *Id.*

With the completion of the pretrial hearings, an eight-day jury trial started on October 22, 2018. SR 1841-2928 (JT 1-957). At the end of the State's case-in-chief, Harruff made a motion for judgment of acquittal, which the circuit court denied.[1] SR 2657-58 (JT 717-18). After each side completed its closing arguments, the circuit court submitted the case to the jury. SR 2922 (JT 951). The jury convicted Harruff of second-degree murder. SR 2924 (JT 953).

The circuit court sentenced Harruff about two months later. SR 1525. As mandated by statute, the court imposed a life sentence in the South Dakota State Penitentiary. *Id.* The court entered a Judgment of Conviction that same day. SR 1525-27.

STATEMENT OF FACTS

Kristi took an active approach in raising her children. SR 2165 (JT 301). She coached her kids' softball games. *Id.* On her farm in Dallas, she raised horses, goats, and sheep; she made sure each child had their own animal to enjoy. *Id.* Kristi maintained daily conversations with family. SR 2136, 2194 (JT 272, 330). Kristi, at the

[1] Harruff also moved for judgment of acquittal after trial, which the circuit court denied. SR 1376, 1524.

very least, always tried to be a "good mom" to her children. SR 2233 (JT 369).

But Kristi's life was not without conflict. In July 2016, she met one source of that conflict: Chance Harruff. SR 2138 (JT 274). Within days of meeting one another, Kristi and Harruff began dating. SR 2139 (JT 275). Harruff took little time in moving in with Kristi and her children. *Id.* The relationship deteriorated as rapidly as it began. Kristi talked about her and Harruff's issues with her family and close friends. SR 2140, 2196, 2514, 2535 (JT 276, 332, 603, 624).

Harruff sparred verbally and physically with Kristi throughout their relationship. Kristi shared examples of this abuse with her family. SR 2142, 2203 (JT 278, 339); EX 2, 8, 8-A.

Once, as Kristi bathed her young daughters, she and Harruff started another argument. *Id.* Harruff broke Kristi's phone in anger. *Id.* He did that frequently. SR 2143, 2213 (JT 279, 349); EX 2. But this argument didn't just end in verbal abuse or broken phones: Kristi retaliated by slapping Harruff, who responded in kind by slapping her in the face. *Id.* Kristi went to the doctor days later because she had difficulty hearing. SR 2207 (JT 343); EX 8.

The abuse even occurred during Kristi's visits to the hospital to deal with her ongoing stomach issues. SR 2157 (JT 293). Kristi suffered from severe ulcers, so doctors surgically removed part of her stomach. SR 2158 (JT 294). After the surgery, while trying to recover,

Harruff slapped Kristi. SR 2211 (JT 347). Hospital staff removed Harruff from the premises immediately. *Id.* Then Kristi sent a frantic text to her daughter, Samantha, to come to Sioux Falls. SR 2210 (JT 346); EX 10. Samantha arrived at the hospital to console her upset mother and stayed until she was released. SR 2211-12 (JT 347-48).

The violent relationship escalated. On the day after Christmas 2016, Harruff choked Kristi; he placed his hands around her neck and squeezed as she lay sleeping. SR 2212 (JT 348). After surviving the wakeup call, an upset Kristi told Samantha what happened. SR 2213 (JT 349). Kristi eventually calmed down and left for work, but she couldn't find her phone, so went without it. *Id.* Her children found the phone later that day. SR 2214 (JT 350). Harruff had thrown the phone in a wood stove after he saw a message from Kristi's ex-husband wishing her a "Merry Christmas." SR 2215 (JT 351).

Harruff's violent, escalating outbursts scared Kristi. SR 2147, 2522 (JT 283, 611). That fear prompted Kristi to ask her mother, Gay Lynn, to buy a small baby-monitor set. SR 2148 (JT 284); EX 3. Kristi thought placing one monitor in her bedroom and the other in Marissa Bridges's room, a friend who lived with Kristi, would protect her. *See* SR 2524-25 (JT 613-14). Kristi reasoned that if a violent outburst occurred again, she could just call out for help. SR 2525 (JT 614). Convinced, Gay Lynn bought the small baby-monitor set. SR 2148 (JT 284).

Harruff eventually moved out, yet he was never far away. SR 2219 (JT 355). He first lived in a camper on the farm property and then in an apartment in Gregory. SR 2154, 2220-21 (JT 290, 356-57). Kristi tried "to stay away" from Harruff, but still maintained contact with him. SR 2221 (JT 357). At the end of May 2016, Harruff and Kristi traveled to Sioux Falls to buy Kristi a new pickup. SR 2225, 2229 (JT 361, 365). They returned to Dallas in the evening. *Id.* After another heated argument, Harruff left the house shortly after arriving. SR 2226. Annoyed, Kristi vented to Marissa and Samantha that night. SR 2228. The venting stopped around 11:00 p.m. and everyone headed to bed. SR 2228, 2526 (JT 364, 615).

Samantha, who lived nearby in the old farm house, tried to call her mom the next morning. SR 2229 (JT 365). Kristi didn't answer. *Id.* She was confused; Kristi planned to leave for Sioux Falls early that day and always had her phone with her. *Id.* Worried, Samantha immediately walked to Kristi's house and entered. SR 2230 (JT 366). Confusion turned to panic as she found Kristi lying unresponsive on her bed; she frantically called 911 and woke everyone in the house. SR 2230-31 (JT 366-67); EX 13. An ambulance arrived and transported Kristi to the Gregory hospital. SR 2247 (JT 383). She was pronounced dead on arrival. SR 2270 (JT 406).

The Gregory County Sheriff's Office, along with the assistance of the South Dakota Division of Criminal Investigation, immediately began

an investigation. Law enforcement saw Kristi had abrasions and discoloration on her neck. SR 2357 (JT 462); EXs 18-24. And they learned not only about the relationship's violent history, but also that Kristi's phone was missing. SR 2403 (JT 508). Harruff was a person of interest. *Id.* So, law enforcement located Harruff and asked if he would come in to speak to them. SR 2404 (JT 509). Harruff cooperated and voluntarily agreed to speak to law enforcement. SR 2405 (JT 510).

During the first interview, Harruff recounted his night. Harruff said he last saw Kristi at her house around 6:00 p.m. the night before. EX 34 4:36-4:45. He then went to Mr. G's convenience store in Gregory. SR 2515 (JT 604). Kristin Wallace, a friend to Kristi, worked at Mr. G's. SR 2512, 2515 (JT 601, 604). At around 10:00 p.m. that night, she saw a "visibly upset" Harruff, who told her that he and Kristi had an argument on the way back from Sioux Falls. SR 2515-16 (JT 604-05). Wallace tried to console him, going with him to his apartment to drink some beers. SR 2516 (JT 605). After a few beers and going to another residence for cigarettes, Wallace left Harruff's apartment around 12:30 a.m. SR 2517-18 (JT 605-606). After that, Harruff never left his apartment. SR 2420 (JT 525); EX 34 1:13:20-1:13:34. He did, however, speak with Kristi over the phone at about 2:45 a.m. SR 2425 (JT 530); EX 34 48:10-48:30.

Hearing that story and knowing Kristi's phone was missing led law enforcement to ask if Harruff knew where Kristi's phone was

located. SR 2403 (JT 508). Harruff claimed he didn't. EX 34 1:18:02-1:18:15. And with that, the first interview ended. SR 2409 (JT 514).

Later that day, law enforcement determined that Harruff lied during the interview. Kristi's cell phone pinged that night around 4:00 a.m. in Gregory. SR 2281 (JT 417). So, law enforcement reviewed footage from surveillance videos of several businesses in Gregory around that time. SR 2280 (JT 416); EXs 28-32. That footage showed Harruff's Jeep driving into Gregory on U.S. Highway 18 from Dallas. SR 2286 (JT 422). Harruff then traveled through town, before turning into Mr. G's parking lot. SR 2289 (JT 425). Harruff stopped there for a moment and then traveled back to his apartment. SR 2290-92 (JT 426-28).

After seeing that footage, law enforcement searched the large dumpster located at Mr. G's. SR 2421 (JT 526). They found the remnants of a purple iPhone laying in a white kitchen trash bag—Kristi's phone. *Id.*; EX 26-A.

Armed with this information, law enforcement interviewed Harruff a second time that day—and his story began to unravel. Confronting Harruff with that information led him to admit not only that he traveled to Kristi's home that night, SR 2465 (JT 554); EX 36 7:10-8:15, but also that he took Kristi's phone while there. SR 2465 (JT 554); EX 36 9:02-9:10. That second admission came only after Harruff first claimed the phone was in Kristi's pickup. SR 2465 (JT 554); EX 36 9:02-9:10, 9:43-

9:56. During that interaction, Harruff shoved Kristi "pretty hard" and took her phone. EX 36 31:14-31:32. Kristi, according to Harruff, retaliated by slamming the door on him. EX 36 1:06:00-1:06:15. Harruff then simply left the house.

Kristi's autopsy revealed a different story. Dr. Kenneth Snell, serving as a coroner and medical examiner for the eastern half of South Dakota, performed a forensic autopsy on Kristi.[2] SR 2597 (JT 657); EX 44. Dr. Snell observed slightly curved abrasions on the right side of Kristi's neck. SR 2604 (JT 664); EX 46. Those curved abrasions, according to Dr. Snell, were the "right size and consistent shaped of that of a fingernail." SR 2606 (JT 666). He also found abrasions on the left side of Kristi's neck. SR 2611 (JT 671); EX 50. Dr. Snell then directed his attention to "little red dots" around Kristi's face. SR 2612 (JT 672); EX 51-52. Dr. Snell explained that those dots were petechial hemorrhages—ruptures in Kristi's smallest blood vessels due to increased pressure. *Id.* The location of those petechial hemorrhages was significant because they were located on the face and neck but did not fall below the abrasions on each side. SR 2614-15 (JT 674-75). The location of those marks indicated that pressure was applied where the abrasions on Kristi's neck were located. SR 2615 (JT 675).

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[2] During the autopsy, Dr. Snell saw a contusion on Kristi's chest. SR 2610 (JT 670). He opined that an open-handed blow could have caused that bruise. *Id.*; EX 49.

Dr. Snell then proceeded to conduct an internal examination of Kristi's neck. He found hemorrhages on the right side of Kristi's internal neck musculature that corresponded to the locations of the abrasions on Kristi's skin. SR 2625 (JT 685); EX 56. Those hemorrhages showed the force that created Kristi's neck abrasions was strong enough to damage the musculature underneath her neck. *Id.* Hemorrhages in the internal musculature of Kristi's left side of her neck also corresponded to the abrasions on her skin. SR 2626 (JT 686); EX 57. Dr. Snell noted how the hemorrhages he discovered deep in the musculature of Kristi's neck were fresh wounds. SR 2636 (JT 696).

Based on the findings of his autopsy, Dr. Snell formed two opinions about Kristi's death. SR 2641 (JT 701). Kristi died from asphyxia due to manual strangulation. *Id.* And her death was no accident; it was a homicide. SR 2641 (JT 701).

STANDARD OF REVIEW

A challenge to the sufficiency of the evidence is a question of law. *State v. Bausch*, 2017 S.D. 1, ¶ 25, 889 N.W.2d 404, 411 (citation omitted). As a result, it is reviewed *de novo*. *State v. Brende*, 2013 S.D. 56, ¶ 21, 835 N.W.2d 131, 140 (citing *State v. Plenty Horse*, 2007 S.D. 114, ¶ 5, 741 N.W.2d 763, 764). That *de novo* review, however, is limited to "whether 'there is evidence in the record, which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt.'" *State v. Beck*, 2010 S.D. 52, ¶ 7, 785 N.W.2d 288,

292 (quoting *State v. Carter*, 2009 S.D. 65, ¶ 44, 771 N.W.2d 329, 342). A guilty verdict will therefore not be set aside "[i]f the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustain[s] a reasonable theory of guilt[.]" *Id.* (citing *State v. Shaw*, 2005 S.D. 105, ¶ 19, 705 N.W.2d 620, 626).[3]

Unlike a challenge to the sufficiency of the evidence, this Court reviews a circuit court's admission of other acts evidence under the abuse of discretion standard. *State v. Phillips*, 2018 S.D. 2, ¶ 13, 906 N.W.2d 411, 415. A circuit court abuses its discretion if its decision 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. Kvansnicka*, 2016 S.D. 2, ¶ 7, 873 N.W.2d 705, 708 (citation and internal quotation marks omitted).

ARGUMENTS

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT HARRUFF'S CONVICTION UNDER SDCL 22-16-7.

Harruff first asserts insufficient evidence existed for the jury to convict him of second-degree murder. DB 6-15. According to Harruff, the State's case at trial focused exclusively on premeditation—an element of first-degree murder—not a depraved heart. DB 15. Those

[3] *See also State v. Uhing*, 2016 S.D. 93, ¶ 10, 888 N.W.2d 550, 554 (quoting *State v. Hauge*, 2013 S.D. 26, ¶ 12, 829 N.W.2d 145, 149).

mens rea requirements, Harruff recognizes, need different proof. DB 14. He contends that because the jury acquitted him of first-degree murder, and the State's case was geared exclusively towards that crime, the verdict cannot stand. *Id.*

That argument cannot withstand scrutiny. Harruff's argument ignores this Court's past warnings that a defendant "convicted by a jury on one count [can] not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." *State v. Mulligan*, 2007 S.D. 67, ¶ 11, 736 N.W.2d 808, 814 (quoting *United States v. Powell*, 469 U.S. 57, 58 (1984) (alteration in original)). Instead, this Court's precedent requires only an analysis of the sufficiency of the evidence. *Id.* ¶ 12. And the record shows that sufficient evidence exists to support Harruff's conviction for second-degree murder.

First, Harruff's argument is foreclosed by *Mulligan*. 2007 S.D. 67, ¶ 13, 736 N.W.2d at 814. The defendant there argued that when the jury acquitted him on a first-degree murder charge, the jury "must have rejected the intent to kill element[.]" *Id.* So, the defendant surmised that he couldn't be convicted of the lesser charge of manslaughter; there was insufficient evidence to justify that verdict because the State based its case primarily on the murder charge. *Id.* This Court,

following the holding of *Powell*,[4] expressly rejected that notion: "[i]nstead of speculating whether the inconsistent verdicts are evidence of jury error, appellate courts should review the sufficiency of the evidence to support the conviction that was rendered." *Id.* ¶ 12.

That logic applies here. Just because the jury acquitted Harruff of first-degree murder doesn't render its finding he committed second-degree murder insufficient. Harruff can't be allowed to challenge this verdict "on the ground that in [his] case the verdict was not the product of lenity, but of some error that worked against [him]." *Id.* That challenge would lead this Court down a road to speculating into the jury's deliberations; a road better left untraveled. Instead, it should review whether, given the State's evidence, "the jury could rationally have reached a verdict of guilty beyond a reasonable doubt." *Id.*

Second, the record is replete with evidence that supports the conviction. In other words, each element of the offense has been proven beyond a reasonable doubt.

Under SDCL 22-16-7, second-degree murder occurs when a homicide is "perpetrated by any act imminently dangerous to others

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[4] "Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. . . . [T]he mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility." *Id.* (quoting *People v. Vaughn,* 409 Mich. 463, 466, 295 N.W.2d 354, 355 (1980)).

and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child." So, to convict under that statute, the State must prove, beyond a reasonable doubt, that Harruff (1) "caused the death of Kristi Olson" and did so (2) "by an act imminently dangerous to others evincing a depraved mind, without regard for human life" but he (3) "acted without the design to effect the death of any particular person." SR 1157. The circuit court instructed the jury accordingly. *Id.* And it defined "evincing a depraved mind, regardless of human life" as "conduct demonstrating an indifference to the life of others, that is not only disregard for the safety of another but a lack of regard for the life of another." SR 1158.

Kristi's lifeless body was found by her children. SR 2230 (JT 366). Dr. Snell opined how her body got that way: asphyxia by manual strangulation. SR 2641 (JT 696); *cf. State v. Miller*, 2014 S.D. 49, ¶ 27, 851 N.W.2d 703, 709 (citation omitted). That is an activity imminently dangerous to others that evinces a depraved heart. *Cf. State v. McCahren*, 2016 S.D. 34, ¶ 16, 878 N.W.2d 586, 595 (explaining how pointing a firearm at someone and pulling the trigger evinces a depraved heart). Indeed, wrapping one's hands around someone else's throat and squeezing, no matter how long or what the intent, shows the lack of regard for human life. *State v. Kryger*, 2018 S.D. 13, ¶ 49, 907 N.W.2d 800, 815.

And given Huff's deceptive conduct after Kristi's death and the violent escalation of the relationship, all signs pointed to him as the murderer. *Cf. Miller*, 2014 S.D. 49, ¶ 24, 851 N.W.2d at 708. Consider his lies during the first interview. *See, e.g.*, EX 34. Harruff said he last saw Kristi at 6:00 p.m. the day before she was murdered. EX 34 4:36-4:45. Harruff said he never left his apartment after meeting Kristin Wallace. SR 2420 (JT 525); EX 34 1:13:20-1:13:34. Harruff said he last spoke with Kristi, by phone, at around 2:45 a.m., and had no idea where her phone was. SR 2425 (JT 530); EX 34 48:10-48:30, 1:18:02-1:18:15. Law enforcement later exposed the holes in Harruff's story. He left his apartment on the night of the murder, went to Kristi's house, pushed her "pretty hard", took her phone, and threw it in Mr. G's dumpster. SR 2286, 2425, 2465 (JT 422, 530, 554); EX 26 31:14-31:32; EXs 26-A, 36. The jury weighed the evidence and Harruff's credibility, resolving any inconsistencies in the State's favor. *Miller*, 2014 S.D. 49, ¶ 27, 851 N.W.2d at 709 (citing *State v. Swan*, 2008 S.D. 58, ¶ 9, 753 N.W.2d 418, 420) (explaining that "it is the jury's function to resolve conflicts in the evidence, weigh credibility, and sort out the truth").[5] That, in turn, establishes sufficient evidence existed to prove beyond a reasonable doubt that Harruff murdered Kristi.

Harruff's claim therefore fails. When the evidence is viewed, as it must, in the light most favorable to the verdict, with all reasonable

[5] *See also State v. Stone*, 2019 S.D. 18, ¶ 45, 925 N.W.2d 488, 502.

inferences drawn therefrom, it conclusively establishes that (1) Harruff caused Kristi's death and did so (2) by an act imminently dangerous to others evincing a depraved mind, without regard for human life. SDCL 22-16-7. The court thus correctly denied Harruff's motion for judgment of acquittal.

II

THE CIRCUIT COURT PROPERLY ADMITTED THREE WITNESSES' TESTIMONY OVER HARRUFF'S OBJECTION THAT THE TESTIMONY WAS CUMULATIVE IN VIOLATION OF SDCL 19-19-403.

Harruff next asserts the circuit court erred when it admitted the testimony of several of Kristi's close friends. DB 16-21. He argues that the testimony was cumulative and therefore unfairly prejudicial in violation of SDCL 19-19-403. DB 20. So, according to Harruff, the circuit court abused its discretion. DB 21.

His assertion fails. It ignores the well-settled principle that Rule 404(b) is a rule of inclusion, not exclusion. *Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d at 415 (citation omitted). And the jury was entitled to a complete picture of the nature of Kristi's and Harruff's relationship. The witnesses' testimony was not only relevant to Harruff's motive and intent but also necessary to provide that complete picture.

The admission of other acts evidence is governed by SDCL 19-19-404(b) (Rule 404):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted with conformity therewith. It may, however, be

> admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To determine whether other acts evidence is admissible, the circuit court must conduct a multi-prong analysis that focuses on the factual and legal relevance of the proposed other acts evidence. *State v. Armstrong,* 2010 S.D. 94, ¶ 12, 793 N.W.2d 6, 11. The circuit court must consider (1) whether the intended purpose of the prior acts evidence is relevant to some material issue other than character (factual relevance) and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *Id.*

Other acts evidence may not be admitted in accordance with this rule to show that "merely because a defendant committed a similar offense on another occasion, he has propensity to commit the offense charged." *Armstrong,* 2010 S.D 94, ¶ 11, 793 N.W.2d at 10 (citations omitted). Even so, it is a "rule of inclusion, not exclusion." *Phillips*, 2018 S.D. 2, ¶ 14, 906 N.W.2d at 415. So "if the other act evidence is admissible for any purpose other than simply character, then its use is sustainable. All that is prohibited under § 404(b) is that similar act evidence not be admitted 'solely to prove character.'" *Id.* (quoting *State v. Wright*, 1999 S.D. 50, ¶ 17, 593 N.W.2d 792, 800).

Prior domestic abuse "often has a history highly relevant to the truth finding process"—a defendant's "past conduct in a familial context tends to explain later interactions between the same persons." *State v.*

Laible, 1999 S.D 58, ¶ 21, 594 N.W.2d 328, 335. Harruff is "certainly not entitled to have the jury decide his case on a pretense that his behavior and feelings toward [Kristi] are nothing but routinely warm and affectionate." *State v. Huber*, 2010 S.D. 63, ¶ 57, 789 N.W.2d 283, 301-02 (citation omitted).

The testimony provided here was used to provide context and show the nature of the parties' relationship. The circuit court concluded that the other acts evidence was relevant to explain both Kristi's and Harruff's state of mind, and to prove Harruff's motive and intent. SR 624-27 (MH 39-42); SR 872 (Findings of Fact and Conclusions of Law and Order re: State's Motion to Admit Statements of the Decedent Victim). And once it found those other acts evidence relevant, "the balance tip[ped] emphatically in favor of admission[.]" *Huber*, 2010 S.D. 63, ¶ 59, 789 N.W.2d at 302 (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 38, 693 N.W.2d 2d 685, 698).

Harruff doesn't dispute that the other acts were relevant; he instead argues that evidence was substantially more prejudicial than probative. DB 20. In other words, the witnesses' testimony was cumulative. *Id.* It wasn't.

The circuit court concluded that "the probative value of th[o]se proffered statements [were] not substantially outweighed by a danger of unfair prejudice." SR 872. It noted that the State withdrew several statements it originally moved to offer as evidence. SR 872-73. That, in

turn, alleviated the concerns of cumulative evidence prohibited by SDCL 19-19-403. *Id.* At trial, the circuit court also mitigated the concerns of cumulative evidence by giving an "appropriate, precisely tailored cautionary instruction" after witnesses testified about other acts evidence. SR 2193, 2237, 2541 (JT 329, 373, 630); *Huber*, 2010 S.D. 63, ¶ 60, 789 N.W.2d at 303. Finally, the court excluded the testimony of the State's witness, Erin Cole, at trial due to the cumulative nature of her testimony. SR 2546 (JT 635). Those actions ensured the jury wasn't persuaded "in an unfair or illegitimate way." *State v. Kihega*, 2017 S.D. 58, ¶ 23, 902 N.W.2d 517, 525 (citations and emphasis omitted).

Harruff thus suffered no unfair prejudice. *See id.* The witnesses' testimony was not only relevant but also necessary to provide the jury with a complete picture of the volatile and, ultimately, deadly relationship. The circuit court ensured the testimony wasn't cumulative through mitigation before and at trial. As a result, the circuit court did not abuse its discretion.

CONCLUSION

The State respectfully requests this Court affirm the circuit court's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 4,430 words.

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

Dated this 2nd day of July 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 2, 2019, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Chance Harruff* was served via email upon:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28886

State of South Dakota,
Plaintiff and Appellee,
v.
Chance Harruff,
Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Gregory County, South Dakota

The Honorable Bobbie Rank
Circuit Court Judge

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Notice of Appeal filed on the 04th day of February, 2019

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I. Insufficient Evidence of Second Degree Murder Elements Demands Reversal

Despite the State's assertion, Harruff's insufficiency of evidence argument regarding the Second Degree Murder conviction is not premised on the jury's acquittal on First Degree Murder. Harruff acknowledges that an acquittal on First Degree Murder charge does not disprove or prevent a finding of Second Degree Murder – but it similarly does not allow for an automatic Second Degree Murder conviction when the State fails, or in this case failed, to prove First Degree Murder's mens rea requirement.

This Court recognizes that "the 'depraved mind' requirement of Second Degree Murder is a genuine additional element which must be established in order to prosecute for second degree murder." *State v. Primeaux*, 328 N.W.2d 256, 258 (citing *Haenkord v. State*, 100 Wis.2d 452, 302 N.W.2d 421 (1981)). Throughout the trial the State focused on Harruff's anger and resulting actions as the motive and intent for First Degree Murder. All of the evidence and testimony introduced by the State was presented and submitted as proof that Harruff killed Olson with a premeditated design to do so. The State confirms such in its Closing Arguments:

> These facts best fit the elements of first-degree murder, which are that the Defendant caused the death of Kristi Olson and that he did so with a premeditated design to effect [sic] her death.
>
> The facts of this case support these elements. The Defendant went to Kristi's house around 4:00 in the morning on June 1st of 2017. He went uninvited. He went there with the intent to cause her harm; that when he gets there, he puts enough pressure on her neck for three to five minutes to end her life.

JT. 923:10-19.

Immediately thereafter, however, the State made the fallback pitch for Second Degree Murder.

> Now, as you know, he's charged with lesser included offenses. And if as a jury you're struggling with the premeditation concept of first-degree murder, the elements of second-degree-murder – Meghan, if you could pull up instruction 26 – are on the screen. The Judge read these to you, that the Defendant caused the death of Kristi Olson and that he did so with an act imminently dangerous to Kristi, evincing s depraved mind without any regard for Kristi's life.
>
> This imminently dangerous act is the strangling itself, which shows a depraved mind. He may not have acted with a design to cause her death but his strangling and holding that pressure to Kristi's neck for three to five minutes did in fact result in her death.

JT. 923:20-924:8.

By telling the jury that the facts for First Degree Murder, sans premeditation, also satisfies Second Degree Murder, the State illustrated its failure to prove the additional mens rea element for Second Degree Murder. Failure to prove premeditation does not default to "evincing a depraved mind" for a Second Degree Murder conviction. Even in the light most favorable to the Verdict, proof beyond a reasonable doubt of Second Degree Murder's "genuine additional element" is absent. *State v. Primeaux*, 328 N.W.2d 256, 258 (citing *Haenkord v. State*, 100 Wis.2d 452, 302 N.W.2d 421 (1981)); *State v. Running Bird*, 2002 SD 86, ¶ 19, 649 N.W.2d 609, 613 (quoting *State v. Verhoef*, 2001 SD 58, ¶ 22, 627 N.W.2d 437, 442). Because there is not evidence in the record sufficient to sustain a Second Degree Murder conviction beyond a reasonable doubt, the jury's November 1, 2018 Verdict should be Vacated, the Court's Order Denying Defendant's Motion for Judgment of Acquittal should be Reversed, and the matter should be remanded for a new trial.

II. Cumulative 404(b) Evidence Violated Harruff's Fair Trial Rights

From the start, Harruff informed the jury that his relationship with Olson was a "volatile one" and that "Kristi smacked Chance and that Chance smacked Kristi." *JT.* 240:4:7. Harruff made no effort to sanitize his "on-again-off again, up-down relationship" with Olson. *JT.* 241:25. At no point has Harruff argued that he is "entitled to have the jury decide his case on a pretense that his behavior and feelings toward [Kristi] are nothing but routinely warm and affectionate." *State v. Huber*, 2010 SD 63, ¶ 57, 789 N.W.2d 28, 301-02. The State's contention to the contrary ignores the record.

The testimony and text message evidence offered through State witnesses Gay Lynn Barry and Samantha York provided further context for the tumultuous relationship Harruff already admitted he and Olson had. South Dakota law regarding admission of prior domestic abuse is well-established. But so is South Dakota's prohibition on propensity evidence. *State v. Wright*, 1999 SD 50, ¶ 14, 593 N.W.2d 792, 798; *State v. Moeller*, 1996 SD 60, § 6, 548 N.W.2d 465, 468 (citing *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985)).

Vosika, Bridges, and Wallace took the stand on the third day of trial – two days after Barry and York, and one day after Forensic Pathologist Dr. Kenneth Snell, first responders, and the lead detectives testified. Vosika, Bridges, and Wallace's "other acts" testimony did not provide additional probative value evidencing the nature of Harruff and Olson's relationship beyond Harruff's personal admissions and Barry and York's. The cumulative "other acts" testimony from Vosika, Bridges, and Wallace simply bookended the State's case-in-chief.

The State points to the Court's decision not to admit Erin Cole's testimony, the Court's cautionary instruction to the jury regarding other acts, and the State's withdrawal of a few 404(b) statements from the Court's consideration as proof that Harruff suffered no unfair prejudice. Simply showing that even more prejudice could have befell Harruff at trial does not excuse the unfair prejudice that did occur. When an individual's right to a fair trial has been compromised, a potentially worse situation should not discount a bad one.

Given Harruff's consistent acknowledgment of the trying relationship between he and Olson and the Day 1 testimony of Barry and York, it was "clearly against reason and evidence" for the trial court to allow the cumulative "other acts" testimony and exhibits from Vosika, Bridges, and Wallace. *State v. Johnson,* 316 N.W.2d 652 (S.D. 1981) (quoting *State v. Engelmann,* 541 N.W.2d 96, 100 (S.D. 1995)). The trial court's "fundamental error of judgment" violated Harruff's constitutional right to a fair trial. Therefore, the Jury's November 1, 2018 Verdict should be Vacated, and the matter should be remanded for a new trial.

III. Conclusion

"We have previously held that the cumulative effect of errors by the trial court may support a finding by the reviewing court of a denial of the constitutional right to a fair trial." *State v. Davi*, 504 N.W.2d 844, 857 (S.D. 1993); *McDowell v. Solem*, 447 N.W.2d 646, 651 (S.D. 1989).

Harruff submits that the trial court committed multiple errors:

- Denying his oral Motion for Judgment of Acquittal at the close of the State's case-in-chief which allowed the jury to consider, and subsequently convict, on a charge

unsustainable due to insufficient evidence beyond a reasonable doubt on Second Degree Murder's required additional element;

- Denying his written Motion for Judgment of Acquittal despite insufficient evidence beyond a reasonable doubt on Second Degree Murder's required additional element;
- Allowing Vosika to testify regarding domestic abuse and Olson's fear of Harruff despite Harruff's acknowledgment of the relationship's volatility and the testimony and text message evidence from Barry and York;
- Allowing Bridges to testify regarding domestic abuse and Olson's fear of Harruff despite Harruff's acknowledgment of the relationship's volatility and the testimony and text message evidence from Barry and York; and
- Allowing Wallace to testify regarding domestic abuse and Olson's fear of Harruff despite Harruff's acknowledgment of the relationship's volatility and the testimony and text message evidence from Barry and York.

The trial court's cumulation of errors denied Harruff's right to a fair trial. *State v. Davi*, 504 N.W.2d 844, 857 (S.D. 1993); *McDowell v. Solem*, 447 N.W.2d 646, 651 (S.D. 1989). Harruff respectfully requests that this Honorable Court vacate his Second Degree Murder conviction, reverse the trial court's erroneous Order Denying Judgment of Acquittal, reverse the trial court's decision to allow Bridges, Wallace, and Vosika testify to "other acts" evidence previously testified to by Barry and York, and remand for a new trial.

Respectfully submitted this 17th day of July, 2019.

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In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 1,353 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 17th day of July, 2019.

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