IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

BRIEF OF APPELLANT DONNIE GAY EDWARDS

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

vs.

DONNIE GAY EDWARDS
Defendant/Appellant

DOCKET #30905

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

HONORABLE CHRISTINA L. KLINGER
Presiding Circuit Judge

Timothy R. Whalen, Esq.
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
whalawtim@cme.coop
Attorney for Defendant/Appellant

Marty J. Jackley/Sarah L. Thorne
South Dakota Attorney General's Office
1302 E. Highway 14, Ste. 1
Pierre, SD 57501
atgservic@state.sd.us
Attorneys for Plaintiff/Appellee

Thomas P. Maher
Stanley County State's Attorney
204 N. Euclid Avenue
Pierre, SD 57501
tpm@maherlaw.org

NOTICE OF APPEAL FILED NOVEMBER 18, 2024

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

PRELIMINARY STATEMENT

The Appellant herein shall be referred to as "Donnie." The Appellee shall be referred to herein as "State." The victims of the crimes will be referred to herein by their initials only even though they are over the age of majority. References to the Register of Actions shall be by "RA" followed by the page number thereof. References to the jury trial transcript shall be by "TT" followed by the page number of the transcript and the line number, if necessary. References to motion hearings shall be by "MH" followed by the date of the hearing, the page number of the transcript, and line number, if necessary. References to any exhibits from the jury trial shall be by "TT" followed by "Exh." and the exhibit number or letter.

JURISDICTIONAL STATEMENT

Donnie was charged by Indictment with Count 1: Criminal Pedophilia (K.H.); Counts 2 and 3: First Degree Rape of K.R.; Count 4: Sexual Contact with a Child under Sixteen of M.S.; Counts 5 and 6: First Degree Rape of M.S.; Counts 7 and 8: Aggravated Incest of M.S.; Count 9: Fourth Degree Rape of M.S.; and Counts 10 and 11: Incest of M.S.. *RA, p. 22.* Donnie pled not guilty to all counts and a jury trial was held on July 25, 2024, through and including August 1, 2024. *TT, pp. 1-759.* At the conclusion of the jury trial on August 1, 2024, the jury returned a verdict of guilty on Counts 2 and 3 Rape in the First Degree (K.R.); Count 4 Sexual Contact with a Child (M.S.); Counts 5 and 6 Rape in the First Degree (M.S.); Counts 7 and 8 Aggravated Incest (M.S.); Count 9 Rape in the Fourth Degree (M.S.); and Count 11 Incest (M.S.). *RA, p. 1050.* Prior to the trial Count 1: Criminal Pedophilia (K.H.) was dismissed and during the trial, Count 10: Incest (M.S.) was dismissed. *TT, pp. 51, 484.* Donnie was sentenced by the Court on November 1, 2024. *RA, p. 1298.* Notice of Appeal was filed November 18, 2024. *RA, p.*

1329. This Court has jurisdiction over this matter pursuant to SDCL 23A-32-2, 23A-32-14, and 15-26A-3.

STATEMENT OF THE LEGAL ISSUES

ISSUE 1: WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SEVER THE CHARGES

Trial court holding: No.

Relevant court cases:

1. *State v. Loeschke, 2022 S.D. 56, 980* N.W.2d 266
2. *State v. Thomas*, 2019 S.D. 1, 922 N.W.2d 9
3. *State v. Anderson,* 2000 S.D. 45, 608 N.W.2d 644
4. *State v. Hirning*, 2023 S.D. 28, 992 794

Relevant statutes or authority:

1. SDCL 19-19-401
2. SDCL 19-19-403
3. SDCL 23A-6-23
4. SDCL 23A-11-2

ISSUE 2: WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AS A RESULT OF JUROR BIAS WHICH CAUSED STRUCTURAL ERROR IN THE TRIAL

Trial court holding: No.

Relevant court cases:

1. *Ally v. Young*, 2023 S.D. 65, 999 N.W.2d 237
2. *State v. Arguello*, 2015 S.D. 103, 873 490
3. *State v. Blem*, 2000 S.D. 69, 610 N.W.2d 803
4. *State v. Guthmiller*, 2011 S.D. 62, 804 N.W.2d 400

Relevant statutes or authority:

1. SDCL 23A-20-29

ISSUE 3: WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AS A RESULT OF THE PROSECUTION QUESTIONING A WITNESS ABOUT THE DEFENDANT'S PAST CONDUCT WITHOUT THE PROPER HEARING HAVING BEEN HELD BY THE COURT

Trial court holding: No.

Relevant court cases:

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

Relevant statutes or authority:

1. SDCL 19-19-403(b)(3)

STATEMENT OF THE CASE

Donnie was initially charged by Indictment with one count of criminal pedophilia, four counts of first degree rape, one count of sexual contact with a child under age sixteen, two counts of aggravated incest, one count of fourth degree rape, and two counts of incest. *RA, p. 22.* Donnie pled not guilty to all counts. *TT, pp. 1-759.* The charges all stem from actions and conduct Donnie was accused of perpetrating against three young girls, namely, K.H., K.R., and M.S. *Id.* Prior to the jury trial the State dismissed the criminal pedophilia charge regarding K.H. *TT, p. 51.* Additionally, prior to the jury trial Donnie moved to sever the charges in the Indictment based upon the circumstances and allegations associated with the charges. *RA, p. 242.* The trial court denied Donnie's motion to sever and the case was tried to a jury from July 25, 2024, through and including August 1, 2024. *TT, pp. 1-759.* During the trial, Count 10: Incest (M.S.) was dismissed. *TT, pp. 51, 484.*

After voir dire concluded and the jury had been selected, but before the commencement of the evidentiary portion of the trial, Juror #77 contacted the Clerk of Courts via e-mail and advised that due to past experiences in her family she felt she would not be able to sit on the jury. *MH July 26, 2024, pp. 3-18.* Juror #77 indicated that she knew she should have said something the previous day during voir dire, but was uncomfortable and failed to mention her bias and prejudice during voir dire. *Id.* Juror #77 had preconceived notions of Donnie's guilt and could not overcome or set aside

those notions in order to sit fairly and impartially. *TT, p. 8.* Donnie filed a written motion for mistrial on the issue associated with Juror #77. *RA, p. 472.* The trial court held a hearing on Juror #77, the trial court questioned Juror #77, and, ultimately, the trial court excused the juror. *TT, pp. 4-18.*

At the conclusion of the jury trial on August 1, 2024, the jury returned a verdict of guilty on Counts 2 and 3 Rape in the First Degree (K.R.); Count 4 Sexual Contact with a Child (M.S.); Counts 5 and 6 Rape in the First Degree (M.S.); Counts 7 and 8 Aggravated Incest (M.S.); Count 9 Rape in the Fourth Degree (M.S.); and Count 11 Incest (M.S.). *RA, p. 1050.* Donnie was sentenced by the Court on November 1, 2024. *RA, p. 1298.*

During the trial, a witness was asked by the State about whether Donnie had a "past." *TT, p. 510.* The trial court had previously considered other acts evidence and ruled as to what evidence would be admitted and what limitations applied to that evidence. *RA, pp. 317, 430, 451, 470.* The prosecutor's question was objected to by Donnie based upon the trial court's prior ruling and the fact that no hearing had been held on the subject matter of the questions regarding Donnie's "past." *TT, pp. 510-528.* Donnie made a motion for a mistrial based upon the evidence solicited by the State, but the motion was denied by the trial court. *TT, pp. 510-530.*

Donnie asserts the trial court erred regarding its decisions in the above matters and those errors are the basis for this appeal.

Notice of Appeal was filed November 18, 2024. *RA, p. 1329.*

STATEMENT OF THE FACTS

Donnie is the biological father to M.S. and was the stepfather to K.R. *TT, pp. 109, 257-258,584.* Donnie and M.S.'s biological mother were never married and M.S. lived with her grandparents until age 10 due to her mother's unfitness to parent her. *TT, pp. 109-111, 181-182, 563, 584-587, 606.* As a result of a dysfunctional home life at her

grandparents' home, M.S. came to live with Donnie and his wife at the time, Phil Lehrkamp-Edwards (Phil), K.R., and Phil's son Weston. *Id.* Phil is K.R.'s biological mother. *TT, pp. 584-587.*

K.R. accused Donnie of raping her by penetrating her vaginally both by the use of his fingers and penis on numerous occasions while she lived with him and her mother, Phil. *TT, pp. 260-266, 589-590.* K.R. also accused Donnie of threatening her and engaging in intimidating conduct so as to coerce her silence about the rapes. *TT, pp. 264-266.* Donnie adamantly denies the rape allegations and engaging in any sort of intimidating behavior or coercion to obtain K.R.'s silence. *TT, pp. 589-591, 607-610.* K.R. did not report the rapes to anyone in authority or otherwise, but as an adult made a comment to her doctor that she had been raped when she was young; however, K.R. did not name the rapist. *TT, pp. 266-267, 276-278, 496-498, 501.* K.R.'s claims of rape by Donnie surfaced when M.S. reported her claims of rape in August of 2022. *TT, pp. 273, 313.* K.R. previously had accused her biological father of raping her, but those allegations were either not pursued by authorities or found to be meritless. *TT, p. 272.* There were no other witnesses to substantiate K.R.'s claims, and her mother, Phil, did not testify at the trial. *TT, pp. 2, 292, 483.* There was no physical evidence offered at trial to substantiate K.R.'s claims. *Id.* The dates of the offenses in Count 2 involving K.R. are in the month of November 2007 and in Count 3 in the month of December 2007. *RA, p. 22.*

K.R.'s conduct was inconsistent with being raped by Donnie. *TT, pp. 504-510.* In a text message discussion with Katie Johnson (Johnson) regarding the allegations against Donnie related to M.S.'s claims against Donnie, K.R. did not respond to Johnson's messages in a fashion consistent with someone who had been raped. *Id.* Johnson was acutely aware of K.R.'s responses because Johnson was the victim of rape

and she was very familiar with how she responded when discussions of her perpetrator occurred. *TT, pp. 506-509.* K.R.'s comments during conversations were not consistent with someone who had been raped repeatedly. *Id.* Moreover, Johnson testified that K.R. hugged Donnie at a 4th of July celebration in 2020 and was very friendly with Donnie which was after the time period K.R. said she was raped by Donnie. *Id.* K.R.'s response in this regard was entirely inconsistent with her allegation of rape. *Id.* K.R never acted like there was any problem with Donnie at family gatherings. *TT, pp. 587-593.* K.R. never reported to her medical providers that she did not feel safe at home. *TT, p. 501.*

M.S. claims she was raped repeatedly by Donnie over the course of almost a decade beginning when she was about 11 years old after she moved in with Donnie and Phil. *TT, pp. 112-117.* M.S. claims that Donnie penetrated her vaginally with both his fingers and penis. *Id.* M.S. testified that the sexual activity between her and her father continued after she attained the age of 18. *TT, pp.118-124, 194-195.* M.S. did not report the rapes to anyone until August of 2022 even though she had contact with law enforcement, behavioral health professionals, teachers, friends in school and through extra-curricular activities, and medical providers. *TT, pp. 122-124, 181-199, 238-242.* Donnie adamantly denies the rape allegations and engaging in any sort of intimidating behavior or coercion to obtain M.S.'s silence. *TT, pp. 589-591, 607-610.*

M.S. engaged in sexually related activity with Donnie when she was over the age of 18 voluntarily and on a consensual basis, and it was apparent to others that M.S. was obsessed with Donnie. *TT, pp. 193-195, 242-245, 547-553, 612-622; TT Exh. ##69, 71, 72, and 74.* M.S. sent frequent text messages of a sexual and explicit content to Donnie along with photographs and videos of her nude and while engaged in sexually explicit acts. *Id.; TT, 548-554, 610-622; TT Exh. ##3, 10-51, 60-63, 70-82.* M.S. behavior was

inconsistent with her allegations of rape. *Id.* M.S. treated Donnie as a boyfriend and would become jealous of him when he spent time with others including Phil and his wife Nicole Edwards (Nicole). *TT, pp. 532- 553, 610-622; TT Exh. ##10-51, 60-63, 70-82.* M.S. threatened in the past to falsely accuse Donnie of rape and sexual abuse if she did not get her way or if he did not capitulate to her wishes and demands. *TT, pp. 552-560, 598-622; TT Exh. #85.* M.S. accused Donnie of penetrating her with his penis when she was an adult, but M.S. had contracted the sexually transmitted disease of chlamydia while an adult, that was confirmed by medical providers; Donnie, however, had not contracted the disease. *TT, pp. 119-121, 556-560.* M.S.'s friends and some family members considered M.S.'s credibility to be questionable. *TT, pp. 268-269, 552-560, 598-622.* M.S. was difficult at home in the blended family of Donnie and Nicole and frequently caused family disruptions, misbehaved, and occasionally was violent. *TT, pp. 532-551, 585-587.* M.S. reported to her medical providers that she felt safe at home with Donnie. *TT, pp. 121-124.* Donnie and Nicole were sexually active and Nicole did not contract chlamydia. *TT, p. 560.*

The dates of the offenses involving M.S. were from 2013 to 2022. *RA, p. 22.* The date of the offense in Count 4 is between October of 2013 and October 13, 2015. *RA, p. 22.* The date of the offenses in Counts 5, 6, 7, and 8 is between October of 2013 and October 13, 2014. *RA, p. 22.* The date of the offenses in Counts 9 and 10 is September 1, 2018, and October 13, 2018. *RA, p. 22.* The date of the offense in Count 11 is August of 2022. *RA, p. 22.*

Prior to the jury trial, Donnie moved to sever the charges in the Indictment based upon the circumstances and allegations associated with the charges. *RA, p. 242.* The trial court denied Donnie's motion to sever and the case was tried to a jury from July 25, 2024, through and including August 1, 2024. *TT, pp. 1-759.* During the trial, Count 10:

Incest (M.S.) was dismissed. *TT, pp. 51, 484.* After voir dire, but before the commencement of the evidentiary portion of the trial, Juror #77 contacted the Clerk of Courts via e-mail and advised that due to past experiences in her family she felt she would not be able to sit on the jury. *MH July 26, 2024, pp. 3-18.* Juror #77 indicated that she knew she should have said something the previous day during voir dire, but was uncomfortable and failed to mention her bias and prejudice during voir dire. *Id.* Juror #77 had preconceived notions of Donnie's guilt and could not overcome or set aside those notions in order to sit fairly and impartially. *TT, p. 8.* Donnie filed a written motion for mistrial on the issue associated with Juror #77. *RA, p. 472.* The trial court held a hearing on Juror #77, the trial court questioned Juror #77, and, ultimately, the trial court excused the juror. *TT, pp. 4-18.* At the conclusion of the jury trial on August 1, 2024, the jury returned a verdict of guilty on Counts 2 and 3 Rape in the First Degree (K.R.); Count 4 Sexual Contact with a Child (M.S.); Counts 5 and 6 Rape in the First Degree (M.S.); Counts 7 and 8 Aggravated Incest (M.S.); Count 9 Rape in the Fourth Degree (M.S.); and Count 11 Incest (M.S.). *RA, p. 1050.* Donnie was sentenced by the Court on November 1, 2024. *RA, p. 1298.*

During the trial, a witness was asked by the State about whether Donnie had a "past." *TT, p. 510.* The trial court had previously considered other acts evidence and ruled as to what evidence would be admitted and what limitations applied to that evidence. *RA, pp. 317, 430, 451, 470.* The prosecutor's question was objected to based upon the trial court's prior ruling and the fact that no hearing had been held on the subject matter of the questions regarding Donnie's "past." *TT, pp. 510-528.* Donnie moved for a mistrial based upon the evidence solicited by the State, but the motion was denied by the trial court. *TT, pp. 510-530.*

ARGUMENT

A. Standard of Review.

The standard of review for the denial of a motion to sever charges is abuse of discretion. *State v. Loeschke, 2022 S.D. 56, ¶17, 980* N.W.2d 266. Abuse of discretion on a motion to sever charges "...arises only where the party requesting severance of joined counts can make a clear showing of prejudice to substantial rights." *Id.*, at ¶17. The standard of review for the denial of a motion for mistrial is abuse of discretion as well. *State v. Stone,* 2019 S.D. 36, ¶16, 931 N.W.2d 253. In both instances, 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. Rudloff*, 2024 S.D. 73, ¶32, 15 N.W.3d 468. Under the abuse of discretion standard, "not only must error be demonstrated, but it must also be shown to be prejudicial." *Id.*, at ¶32.

B. Discussion of the Issues.

ISSUE 1: WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SEVER THE CHARGES.

Under the standard of review for the denial of a motion to sever charges is abuse of discretion. *Loeschke, 2022 S.D. at 56, ¶17.* Abuse of discretion on a motion to sever charges "... arises only where the party requesting severance of joined counts can make a clear showing of prejudice to substantial rights." *Id.*, at ¶17. In order to prevail on this issue, Donnie needs to show that the trial court made "... a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable.'" *Rudloff*, 2024 S.D. at 73, ¶32. Additionally, Donnie must also show that the error by the trial court was prejudicial." *Id.*, at ¶32.

The analysis of the severance issue begins with the statutory provisions governing severance. SDCL 23A-6-23 provides as follows:

> ... [t]wo or more offenses may be charged in the same indictment or information in separate counts for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

SDCL 23A-6-23. SDCL 23A-11-2 allows a party to move for severance of the charges in an indictment and provides as follows:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the prosecuting attorney to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

SDCL 23A-11-2. The hinge pin on severance of charges after they were joined in an indictment either by the court or in the initial pleading is prejudice. Consequently, when considering a motion to sever, it is important for the Court to consider the factors which allow joinder of charges in the indictment. Specifically, there are three tests that allow for the joinder of offenses

> ... The first test, involving offenses with the same or similar circumstances, permits joinder 'where separately charged offenses are closely related in time, location, and manner of execution.' ... When the 'separately charged offenses are closely related in location and manner of execution,' the close in time requirement 'has been broadly construed.' ... The second test asks whether the charges are 'based on the same act or transaction' ... and the third test examines whether the charges constitute 'parts of a common scheme or plan.' (Citations omitted).

Loeschke, 2022 S.D. at 56, ¶19. While the trial court has complete discretion as to whether or not to grant a motion for severance, the deciding factor in severing charges is whether or not Donnie gets a fair trial. *State v. Shape*, 517 N.W.2d 650, 655 (S.D. 1994);

State v. Zakaria, 2007 S.D. 27, ¶14, 730 N.W.2d 140. The trial court abused its discretion and committed reversible error when it denied Donnie's motion to sever the charges.

1) Offenses with the Same or Similar Circumstances.

The offenses charged in the Indictment are all sex offenses and may be similar in nature in that they are sex offenses, but they are not closely related in any other regard. The offenses are not closely related in time, location, and manner of execution. The time of the offenses ranges from 2007 to 2022, which is a span of 15 years. Count 1 of the Indictment which was dismissed prior to trial, but after the motion hearing on the severance, allegedly occurred in 2003. Consequently, the time span in the original pleading was 19 years. The location of the crimes is spread far and wide, and there is no pattern or scheme as to the location of the events complained of in this case. Specifically, there was no specific modus operandi engaged in by Donnie, and the victims each claim that Donnie engaged in the sexual assaults wherever and whenever he could. The crimes are all sex offenses and rely upon the sole testimony of the victims to prove the elements of each offense. There is no physical evidence in either case of the criminal conduct when K.R. and M.S. were minors. There is no incriminating forensic evidence regarding the sex offenses against neither K.R. nor M.S. when they were minors. The execution of the offenses involving K.R. were said to be violent and hostile with threats, intimidation, and coercion to ensure K.R. remained silent. In the offenses involving M.S., the events were said to be more of a consensual nature, with little or no claims of threats, intimidation, or coercion to remain silent. There was physical evidence in M.S.'s case in the nature of sex toys, text messages, nude and provocative photographs, and sexually explicit videos, all of which were generated voluntarily by M.S. at various times after she had attained the age of 18. There were no text messages, photographs, or videos or other

physical evidence in K.R.'s cases. K.R. claims the raping ended when she left the home due to the parental divorce between Donnie and Phil. M.S. testified that her relationship with Donnie was not just based upon the love as a father, but also on the perceived love as a partner, and continued for a substantial period of time after she left home to attend college. K.R. claims she hated Donnie and loathed his presence, but M.S. loved Donnie, became jealous and protective of him, and despised and rejected Donnie's wife, Nicole.

2) Offenses Based on the Same Act or Transaction.

The second test inquires as to whether the events are part of the same act or transaction. Here the time span is important, again, as it breaks the transactions into separate events that occurred over a long period of time. While the time-frame issue in a severance motion may be "broadly construed" it is not without limitations. *Loeschke*, 2022 S.D. at 56, ¶19. It is true that in domestic abuse-cases many times the events transpire over a long period of time, this does not automatically mean, however, that the trial court can conclude that in all domestic-abuse or sexual-assault cases a long time span allows for the charges to be justifiably joined. Moreover, there were other children who were around Donnie, K.R., and M.S., and none of those persons were called to testify or provide corroborating evidence of K.R. and M.S.'s stories. Donnie was sexually active with his wife Nicole. The allegations associated with the different victims are not from the same transaction, but involve different events, dates, times, and places. This is clear from the Indictment because different and separate charges are pleaded therein. The evidence at trial also supports the claim of separate events and the crimes not being the product of the same actions or transaction.

3) Offenses the Product of a Common Scheme or Plan.

Under the third test, in order to support the joinder of charges, the charges must be the product of a common scheme or plan. While the State argued grooming as a

probative fact at trial and offered expert testimony regarding same, there was virtually no evidence of grooming. Moreover, the expert agreed that many of the factors that lead to a claim of grooming are, in fact, the same factors that show a loving and close relationship among or between family members. Furthermore, evidence which is admissible under the common plan, design, or scheme theory must show that the ultimate act was a culmination of or a material part of a larger plan or scheme. *State v. Anderson*, 2000 S.D. 45, ¶94, 608 N.W.2d 644. It is well settled law that the "... 'common plan, design or scheme' refers to a larger continuing plan, scheme or conspiracy of which the present crime charged at trial is only a part and which is often relevant to show motive, intent, knowledge or identity ..." *Anderson*, 2000 S.D. at 45, ¶94. Under the common scheme or plan theory the events typically occur with one victim over a long period of time, not with multiple victims as in this case. See, *Loeschke*, 2022 S.D. at 56, ¶19. Here, there is no common scheme or plan which can substantiate the third inquiry under the law governing severance. The acts complained of were independent events which are claimed to have occurred with different victims at different times and in different places. There simply was no evidence of motive, intent, plan, design or other devices to commit the crimes subject of this action.

Additionally, the only physical evidence of any nature or sort was from M.S.'s case. The only evidence of any relationship was from M.S.'s case. The State entered into evidence volumes of text messages between Donnie and M.S. These messages were sexually explicit, some contained videos, and some contained nude and explicit photographs. All of the above evidence was generated when M.S. was over the age of 18 and clearly showed a consensual relationship between M.S. and Donnie, even if appalling in nature. Nothing in any of the text messages, photographs, or videos had anything to do with K.R. In spite of the true nature of the above evidence, the State argued that the text

messages, photographs, and videos were probative evidence of the crime against K.R. that occurred years before the evidence was generated by M.S. Moreover, the State relied upon the above physical evidence to support its case regarding K.R. Nothing in any of the physical evidence incriminated or involved Donnie in the claims made by K.R. All the physical evidence was generated years after Donnie had any contact with K.R.

4) Other Acts Evidence Test.

When the Court considered the severance motion it considered whether or not the text messages, photographs, and videos from M.S.'s case were, or would have been, admissible in K.R.'s case, or vice versa. See, *Loeschke*, 2022 S.D. at 56, ¶27. The trial court concluded that the evidence would be admissible, but this was error. In order for other acts evidence from M.S.'s crimes to be admissible in K.R.'s case or vice versa, the trial court must have engaged in the required analysis under the law.

In order for other acts evidence from one case to be admissible in another, the proponent of the other acts evidence has the burden to show admissibility. *State v. Fisher*, 2010 S.D. 44, ¶23, 783 N.W.2d 664. The party objecting to the admission of the evidence has the burden of establishing the basis for the objection (Rule 403 criteria). *State v. Bruce*, 2011 S.D. 14, ¶8, 796 N.W.2d 397. Admission of other acts evidence is governed by SDCL 19-19-401 et seq. Further, the South Dakota Supreme Court has established criteria and procedures for the Court to consider and follow relative to the admission of other acts evidence. The first hurdle to admission of other acts evidence is the determination of whether the offered evidence is relevant. Evidence is deemed to be relevant if "... (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact is of consequence in determining the action." *SDCL 19-19-401*. Once the evidence is determined to be relevant, then the statutory balancing test is to be applied which provides that "... [t]he court may exclude relevant

evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *SDCL 19-19-403*; see also, *State v. Thomas*, 2019 S.D. 1, ¶22, 922 N.W.2d 9. An important aspect of the two-prong balancing test is that prejudice to one side in and of itself is not a determining factor, as all evidence is prejudicial to one side or the other. *Thomas*, 2019 S.D. at 1, ¶22. The test, rather, is whether the evidence is unduly or unfairly prejudicial. *Id.*, at ¶22. Moreover, the other acts evidence is not admissible if the intent is to "... show that on a particular occasion ..." the Defendant acted in conformity with the other acts evidence. *SDCL 19-19-404(b); Thomas,* 2019 S.D. at 1, ¶22.

In order for the text messages, photographs, and videos to be admissible in K.R.'s case, the evidence must be relevant to her case, not simply evidence of another rape that occurred to someone else decades later. There is simply no connection of K.R.'s case to the above items. All of the above items were generated numerous years after K.R.'s complaints about Donnie and there was no similar evidence in K.R.'s case. There was no evidence that Donnie solicited any text messages, photographs, or videos from K.R. There was no evidence of communications between K.R. and Donnie that were sexually oriented or dealt with sexual acts or encounters. There were virtually no sexually explicit photographs sent to K.R. and K.R. had not sent Donnie any of these items either. There was no sex talk similar to what had occurred in M.S.'s case. There was no physical evidence of any nature or sort in K.R.'s case. All of the text messages, photographs, and videos occurred after M.S. was 18. There were no similar communications with K.R. after she was 18. The claims made by K.R. all occurred when K.R. was about 12 years old. The only connection between the two cases is that they were sexual in nature. This

similarity hardly elevates the above evidence to relevancy status so as to accord the evidence admissibility in a rape trial on K.R.'s case. Moreover, Donnie had not yet been convicted of the charges so the other evidence was not a shoo-in for K.R.'s trial. Had Donnie been acquitted in M.S.'s trial, the above evidence would have been highly prejudicial, extremely suspect, and its relevancy a nullity. Likewise, had the above evidence been admitted as other acts evidence instead of in a joint trial, Donnie would have had the benefit of cautionary jury instructions regarding the manner in which the jury was to consider the other acts evidence. *State v. Taylor,* 2020 S.D. 48, 948 N.W.2d 342; *State v. Carter,* 2023 S.D. 67, 1 N.W.3d 674. Clearly, the above evidence produced in M.S.'s case was not relevant to K.R.'s case.

If the other acts evidence is deemed relevant, then the balancing test is to be applied. Here, the text messages, photographs, and videos are highly prejudicial. These items show sexually explicit actions by M.S. The text messages contain sexually explicit talk between M.S. and Donnie. These actions all occurred when M.S. was over the age of 18 and simply do not constitute rape under the law. Given the nature of the above evidence, it was not a far step for the jury to conclude based solely upon the explicit nature of the text messages, photographs, and videos that Donnie was guilty of the crimes that occurred years before the items were produced by M.S. in her relationship with Donnie after she turned 18 even though they were not connected in any regard to K.R.'s case. Moreover, the evidence is not probative of "... motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" as required for admissibility under SDCL 19-19-404(b). *State v. Huber*, 2010 S.D. 63, ¶¶56-57, 789 N.W.2d 283. The above evidence does not fall within the definition of the any of the permissible uses of other acts evidence.

The prejudice to Donnie is clear and unequivocal. Absent the evidence on M.S., the only evidence in K.R.'s case was her testimony and the case was weak. With M.S.'s evidence to establish the relationship between her and Donnie after she was 18, the case involving K.R. was stronger because the evidence was so inflammatory and unfairly prejudicial. The admission of the text messages, photographs, and videos, deprived Donnie of a fair trial. This evidence was propensity evidence and the State used it to show that Donnie acted in conformance with the character evidence from M.S.'s case. This is impermissible under the governing law. The necessary showing of prejudice on a severance issue is that prejudice which denies Donnie of a fair trial. *Loeschke*, 2022 S.D. at 56, ¶26. A fair trial is one that is justly conducted and its results are reliable. *State v. Hirning*, 2023 S.D. 28, ¶17, 992 794. Here, the jury clearly was persuaded that Donnie was guilty of the claims made by K.R. because of the text messages, photographs, and videos were so overwhelming that they consumed the trial. The State argued the impact of the evidence and dwelled on the photographs, text messages, and videos to such a degree the jury could not ignore same. When Donnie testified, the State made him show many of the nude photographs of his daughter to the jury, referred to the sexually explicit videos she sent to him, and cross-examined him extensively on the text messages between him and M.S. *TT, pp. 631-657.* The State relied heavily on the above evidence in order to present its case against Donnie relative to the charges made by K.R.

In light of the above, the Findings of Fact by the trial court do not fully analyze the factors set out by *Loeschke* and certainly do not address the analysis of the other acts evidence as required by *Loeschke*. *Loeschke*, 2022 S.D. at 56, ¶19. Moreover, in light of the above, it is clear that the trial court abused its discretion in denying the motion to sever.

ISSUE 2: WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AS A RESULT OF JUROR BIAS WHICH CAUSED STRUCTURAL ERROR IN THE TRIAL

Donnie argues that structural error occurred in the trial relative to Juror #77. Juror #77 was selected to sit on the jury after voir dire was concluded. The juror came forward before the evidentiary portion of the trial began and advised the Clerk of Courts that she had not fully responded to the questions during voir dire relative to her past experiences regarding the sexual molestation of a relative. After Juror #77 approached the Clerk of Courts, she was questioned by the trial court out of the presence of the other jurors about her circumstances. The juror put the trial court and counsel in a very difficult position given the timing of her confession. Voir dire had concluded so counsel was prohibited from questioning the juror about her revelations so as to exercise a challenge for cause. Moreover, counsel was unable to exercise a preemptory challenge since jury selection was concluded. The trial court ultimately concluded it would excuse Juror #77 from the trial and proceed with the remaining jurors. The trial court relied upon SDCL 23A-20-29 to make its decision. This statute allows the trial court to excuse a juror if good cause exists to do so. *SDCL 23A-20-29.* The trial court determined that good cause existed to excuse Juror #77. The statute does not define good cause. Donnie moved for a mistrial based upon the juror misconduct and structural error. *TT, pp. 11-13, RA, p. 472.*

Structural error is error which "... so greatly affect[s] the framework of the trial ..." that it merits an "... automatic reversal." *State v. Arguello*, 2015 S.D. 103, ¶5, 873 N.W.2d 490. Structural error "... necessarily renders a trial fundamentally unfair ... [and] ... [a]s one court stated, '[a] structural error resists harmless error review

completely because it taints the entire proceeding.'" *State v. Guthmiller*, 2011 S.D. 62, ¶16, 804 N.W.2d 400. A party on appeal need not show any prejudice to secure a reversal due to structural error. *Arguello*, 2015 S.D. at 103, ¶5. Errors in the jury-selection process constitute structural error when there is "... a substantial failure to comply with jury selection statutes ..." because such error "... 'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *State v. Blem*, 2000 S.D. 69, ¶29, 610 N.W.2d 803.

When Juror #77 confessed failing to fully disclose her situation and that she could not set aside or overcome her prejudices, it had virtually no effect on the State. This is so because Juror #77 had propensities that were favorable to the State, i.e., she felt Donnie was guilty without having heard any evidence. Specifically, Juror #77 had a family member that had been sexually assaulted, the event was recent, and it created a prejudicial notion in Juror #77's mind. The effect on Donnie was overwhelming. Had Juror #77 disclosed her situation during voir dire, Donnie would have been able to further question her to determine if grounds existed for a challenge for cause. If Donnie was not able to establish a basis for challenging the juror for cause, then he would have been in a position to exercise a preemptory challenge. Under the circumstances, Donnie was denied both options. Moreover, the trial court determined the alternate jurors at the conclusion of voir dire and Juror #77 was not one of the alternate jurors. *TT, p. 266.* The key to any criminal jury trial is that it be fair and have a reliable result. *Ally v. Young*, 2023 S.D. 65, ¶ 33, 999 N.W.2d 237.

Clearly, the trial court abused its discretion when it denied Donnie's motion for a mistrial and Donnie was denied a fair trial.

ISSUE 3: WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AS A RESULT OF THE PROSECUTION QUESTIONING A WITNESS ABOUT THE DEFENDANT'S PAST WITHOUT THE PROPER HEARING HAVING BEEN HELD BY THE COURT

Under the standard of review for the denial of a motion for mistrial, this Court looks at whether or not the trial court abused its discretion. *Stone,* 2019 S.D. at 36, ¶16. In order to prevail on this issue, Donnie needs to show that the trial court made "...a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration is arbitrary or unreasonable.'" *Rudloff*, 2024 S.D. at 73, ¶32. Additionally, Donnie must also show that the error by the trial court was prejudicial." *Id.*, at ¶32.

Prior the trial, the Court heard motions relative to other acts evidence and made rulings thereon which identified what acts would be allowed and any limitations thereon. One issue the trial court ruled on was on the admissibility of certain text messages between K.R. and Katie Johnson (Johnson) relative to the allegations against Donnie. *TT, pp. 33-45.* These text messages were the subject of a motion in limine made by the State. *Id.; RA, p. 453.* The trial court ruled that the text messages may be admissible depending upon how the evidence came in at trial, but reference to the conversation as it related to K.R.'s credibility and Johnson's impression thereof would be allowed. Donnie called Johnson as a witness and engaged in limited direct examination of her consistent with the trial court's ruling. On cross examination, the State solicited testimony from Johnson that indicated Donnie had a "past." *TT, p. 510.* Donnie objected to the question and moved the trial court for a mistrial given the fact that the line of questioning opened up inadmissible other acts evidence and the trial court had not engaged in the appropriate analysis and balancing test for other acts evidence out of the presence of the jury before

the testimony was made as required by the governing case law. *Thomas,* 2019 S.D. at 1, ¶22. Although the trial court did examine the testimony out of the presence of the jury after it occurred, it was too late to un-ring the bell as the jury had already heard the testimony. A general statement about Donnie having a "past" can only be taken in one way and that is that Donnie had a bad character and that he acted in conformity with a propensity to engage in sexual assaults or rapes. This is especially so, given the context of the question and Johnson's answer and the totality of the evidence that had been received into evidence at the trial. Additionally, the Court had already ruled that certain uncharged other acts were not admissible, but soliciting information as to whether Donnie had a "past" certainly appears to be an effort to secure testimony that is not relevant and is highly prejudicial to Donnie. This is so in light of the argument and litigation associated with the other acts evidence regarding an allegation of rape against Donnie which allegedly occurred in Highmore, South Dakota. *TT, pp. 45-51.*

The comment that Donnie had a "past" clearly referenced Donnie's alleged bad character, alleged propensities, and is prior acts evidence. The law is clear as argued *supra* that the trial court is required to first determine if the evidence is relevant, and if so, then the trial court must balance the probative value of the evidence against the prejudicial effect thereof. The trial court did not engage in the proper inquiry, analysis, and consideration prior to the evidence being admitted. Moreover, the State did not provide notice that it intended to solicit testimony from Johnson in regard to whether or not Donnie had a "past" as required by the rules of evidence. *SDCL 19-19-404(b)(3).*

Under the above circumstances, the trial court abused its discretion and committed reversible error when it denied Donnie's motion for a mistrial on this issue.

CONCLUSION

In light of the above and foregoing, Donnie should be granted the relief requested in this appeal, the jury verdict should be vacated, the trial court decisions reversed, and Donnie should be granted a new trial on the severed charges.

REQUEST FOR ORAL ARGUMENT: Donnie hereby requests oral argument.

Dated this 18th day of April, 2025.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Appellant

CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant, hereby certifies that the Brief of Appellant complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Brief of Appellant contains 41,847 characters and 7,106 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Brief of Appellant

Dated this 18th day of April, 2025.

/S/ TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the Brief of Appellant on the attorneys for the Appellee at their e-mail addresses as follows:

Marty Jackley/Sarah Thorne
South Dakota Attorney General's Office
1302 E. Highway 14, Ste 1
Pierre, SD 57501-8501
atgservice@state.sd.us
Attorneys for the Appellees

Thomas P. Maher
Stanley County State's Attorney
204 N. Euclid Avenue
Pierre, SD 57501
tpm@maherlaw.org

by the UJS Odyssey System on the 18th day of April, 2025, at Lake Andes, South Dakota.

Further, the undersigned hereby certifies that the original of the above and foregoing Brief of Appellants was mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 on the 18th day of April, 2025.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for Appellant

APPENDIX

APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF STANLEY)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

DONNIE GAY EDWARDS,
Defendant.

FILE NO. 58CRI22-103

NOTICE OF APPEAL

****

TO: THOMAS P. MAHER, STANLEY COUNTY STATE'S ATTORNEY, 204 N. EUCLID AVENUE, PIERRE, SD 57501; AND THE HONORABLE MARTY J. JACKLEY ATTORNEY GENERAL, 1302 E. HWY. 14, STE #1, PIERRE, SD 57501:

HEREBY TAKE NOTICE, that pursuant to SDCL 23A-32-15, et seq., the above named Defendant, Donnie Gay Edwards, appeals to the Supreme Court of South Dakota from the final Amended Judgment of Conviction rendered in the above entitled action on the 14th day of November, 2024, which Amended Judgment of Conviction was filed of record on November 14, 2024. The appeal in this matter is from the entire Amended Judgment of Conviction entered by the Court. A copy of said Amended Judgment of Conviction is attached hereto.

Dated this 18th day of November, 2024.

TIMOTHY R. WHALEN, Bar #1821
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: (605)487-7645
Attorney for the Defendant
whalawtim@cme.coop

A-1

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF STANLEY	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	58 Cri. 22-103
Plaintiff,	)	
	)	
v.	)	**AMENDED**
	)	JUDGMENT OF CONVICTION
	)	
DONNIE GAY EDWARDS,	)	
DOB: 5/29/1978	)	
	)	
Defendant.	)	

An Indictment was filed with this Court on the 24th day of October, 2022, charging the Defendant with the crimes of Count 1: Criminal Pedophilia, in violation SDCL 22-22-30.1, a Class 1 Felony, to have been committed on or about the month of December 2003; and Count 2: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about the month of November 2007; and Count 3: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about the month of December 2007; and Count 4: Sexual Contact with a Child Under Sixteen, in violation of SDCL 22-22-7, a Class 3 Felony, to have been committed on or about or between October of 2013 and October 13, 2015; and Count 5: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about or between October 2013 and October 13, 2014; and Count 6: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about or between October 2013 and October 13, 2014; and Count 7: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, to have been committed on or about or between

A-1

October 2013 and October 13, 2014; and Count 8: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, to have been committed on or about or between October 2013 and October 13, 2014; and Count 9: Fourth Degree Rape, in violation of SDCL 22-22-1(5), a Class 3 Felony, to have been committed on or about or between September 1, 2018 to October 13, 2018; and Count 10: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony, to have been committed on or about or between September 1, 2018 to October 13, 2018; and Count 11: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony, to have been committed on or about August 2022.

The Defendant was arraigned on said Indictment on the 8th day of November, 2022. The Defendant, the Defendant's attorney, Brad Schreiber, and Brent Kempema, Chief Deputy Attorney General, appeared at the Defendant's arraignment. The Court advised the Defendant of his constitutional and statutory rights pertaining to the charges that had been filed against him including, but not limited to, the right against self-incrimination, the right of confrontation, and the right to a jury trial. The Defendant pled not guilty to the charges in the Indictment. The Defendant requested a jury trial on the charges contained in the Indictment. Prior to trial, the State dismissed Count 1 of the Indictment.

A jury trial commenced on July 25, 2024, and concluded on August 1, 2024. During the trial and prior to submitting the case to the jury for deliberation, the State dismissed Count 10 of the Indictment. On August 1, 2024, **the Stanley County Jury returned a verdict finding Defendant**

A-3

Guilty as to Count 2: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 3**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 4**: Sexual Contact with a Child Under Sixteen, in violation of SDCL 22-22-7, a Class 3 Felony; **and Guilty as to Count 5**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 6**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 7**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony; **and Guilty as to Count 8**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony; **and Guilty as to Count 9**: Fourth Degree Rape, in violation of SDCL 22-22-1(5), a Class 3 Felony; **and Guilty as to Count 11**: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony. It is therefore,

ORDERED that **a Judgment of Guilty is entered as to** the following which occurred in Stanley County, South Dakota: **Count 2**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about the month of November 2007; **and Count 3**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about the month of December 2007; **and Count 5**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 6**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 4**: Sexual Contact with a Child Under Sixteen, in violation of SDCL 22-22-7, a Class 3 Felony,

A-4

which occurred on or about or between October of 2013 and October 13, 2015; **and Count 7**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 8**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 9**: Fourth Degree Rape, in violation of SDCL 22-22-1(5), a Class 3 Felony, which occurred on or about or between September 1, 2018 to October 13, 2018; **and Count 11**: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony, which occurred on or about August 2022

SENTENCE

On the 1st day of November, 2024, the Defendant, the Defendant's attorney, Timothy Whalen, and Brent Kempema, Chief Deputy Attorney General, and Nolan Welker, Assistant Attorney General, appeared for Defendant's sentencing. The Court received Defendant's evidence and heard argument of counsel and the statements of the Defendant and the victims and then asked whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

It is hereby ORDERED that **as to Count 2**: First Degree Rape, the Defendant shall pay **a fine of fifteen thousand dollars ($15,000)** and **be incarcerated in the South Dakota State Penitentiary for a period of twenty (20) years, with the execution of five (5) years suspended**, there to be kept fed, and clothed according to the rules and discipline governing the prison;

AJ

It is further ORDERED that **as to Count 3**: First Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of fifteen (15) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 5**: First Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of twenty (20) years, with the execution of five (5) years suspended**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 6**: First Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of fifteen (15) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 4**: Sexual Contact with a Minor Under the Age of Sixteen, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of fifteen (15) years, with the execution of five (5) years suspended**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 7**: Aggravated Incest, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of ten (10) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

A.6

It is further ORDERED that **as to Count 8**: Aggravated Incest, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of ten (10) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 9**: Fourth Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of five (5) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 11**: Incest, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of five (5) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **Counts 2 and 3 shall run concurrently to each other**;

It is further ORDERED that **Counts 5 and 6 shall run concurrently to each other but consecutively to Counts 2 and 3**;

It is further ORDERED that **Count 4 shall run consecutively to Counts 5 and 6**;

It is further ORDERED that **Counts 7 and 8 shall run concurrently to each other and consecutively to Count 4**;

It is further ORDERED that **Counts 9 and 11 shall run concurrently to each other and consecutively to Counts 7 and 8**;

A-7

It is further ORDERED that Defendant shall receive **credit for one hundred and thirty-four (134) days served** on the above sentence;

It is further ORDERED that **Defendant shall pay court costs totaling eight hundred and eighty-nine dollars ($889)** broken down by count as follows: Count 2 – seventy-three dollars ($73); Count 3 – seventy-three dollars ($73); Count 5 – one hundred and four dollars ($104); Count 6 – one hundred and four dollars ($104); Count 4 – one hundred and four dollars ($104); Count 7 – one hundred and four dollars ($104); Count 8 – one hundred and four dollars ($104); Count 9 – one hundred and six dollars and fifty cents ($106.50); Count 11 – one hundred and sixteen dollars and fifty cents ($116.50);

It is further ORDERED that **Defendant shall pay the costs of his psychosexual evaluation in the amount of** three thousand two hundred dollars (**$3,200**) **and the costs of his court-appointed private investigator in the amount of** ten thousand two hundred ten dollars and thirty-nine cents (**$10,210.39**) **and the costs of digital forensic examinations in this case in the amount of** one thousand six hundred and fifteen dollars (**$1,615**) **and the costs of his court-appointed attorney** in an amount to be determined **and restitution in the amount of** eight hundred and twelve dollars (**$812**) to the Crime Victim's Compensation Fund;

It is further ORDERED that all above amounts of costs, fines, fees, and restitution shall be paid to the Stanley County Auditor according to a payment plan to be developed with the Department of Corrections and the Board of Pardons and Paroles;

A8

It is further ORDERED that the Department of Corrections is recommended to adopt as part of its supervision of Defendant during incarceration and on parole all of the recommendations of the psychosexual evaluation to include the following:

(a) Complete standard, intensive, group-based outpatient sex offender specific treatment with an ATSA qualified provider for no less than forty-eight (48) months;

(b) Treatment providers should focus on helping Defendant assume full responsibility for his offending behaviors, as well as his motivations for doing so and treatment providers should also work on building Defendant's empathy, intimacy, and social skills and capabilities to include considerable work with effective intervention strategies and focused treatment techniques to address domestic violence and power and control dynamics within relationships;

(c) Defendant is recommended for a graduated transitional half-way housing program rather than discharging to the community directly to include GPS monitoring until he is deemed stable enough for removal of that containment measure;

(d) Defendant's treatment should include the use of polygraph examinations. These examinations should include an instant offense polygraph, a sexual history polygraph, and maintenance polygraphs on the order of every three to six months, with particular attention paid to sexual contact with force and sexual contact with persons who did not give consent;

(e) Defendant should not be allowed any exposure to pornography, erotica, or unapproved access to the Internet and Defendant should not be allowed to use or possess any technological media that may afford him unmonitored access to the Internet until his treatment provider and supervising agent deem this to be appropriate – once deemed appropriate, accountability software should be used and Defendant should be required to disclose any use of social media or dating applications and make disclosures regarding his sexual pursuits;

(f) Defendant should not be allowed to live, work, or congregate in areas where children are present and should be required to have comprehensive safety plans in place to address areas of risk before being given permission for recreational activities or functions where

A-9

minors are likely to be present; Defendant is not recommended for contact with any of his children or child relatives unless considerable progress has been made in his program and all parties involved support such a measure; safety measures for such contact should be required to include a qualified chaperone; Defendant's relationships should be closely monitored and a disclosure staffing that serves as an ethical duty to warn should take place prior to allowing Defendant to cohabitate with any partner while on supervision; moreover, Defendant should under no circumstances date anyone who has children or grandchildren in the home due to the outsized risk he poses within these home dynamics;

(g) Defendant should not be allowed to consume or possess alcohol or non-prescribed medications while in treatment; providers should require frequent and random urinalysis, breathalyzers, alcohol "scans", or other measures of substances abuse to ensure maximum accountability;

(h) Defendant would benefit from adjunct individual counseling;

(i) Defendant is recommended for regular consultation with a physician to better screen for the appropriateness of psychopharmacological interventions and to monitor his progress/needs on an ongoing basis;

It is further ORDERED that the Court expressly reserves the right to amend any or all of the terms of this Order at any time.

Dated **11/14/2024 3:46:00 PM**

BY THE COURT:

Christina Klinger

Christina Klinger
Circuit Court Judge

Attest:
Marshall, Stephanie
Clerk/Deputy

A-10

NOTICE OF RIGHT TO APPEAL

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

A-11

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF STANLEY	)	SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	58 Cri. 22-103
Plaintiff,	)	
	)	
v.	)	**AMENDED**
	)	JUDGMENT OF CONVICTION
	)	
DONNIE GAY EDWARDS, DOB: 5/29/1978	)	
	)	
Defendant.	)	

An Indictment was filed with this Court on the 24th day of October, 2022, charging the Defendant with the crimes of Count 1: Criminal Pedophilia, in violation SDCL 22-22-30.1, a Class 1 Felony, to have been committed on or about the month of December 2003; and Count 2: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about the month of November 2007; and Count 3: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about the month of December 2007; and Count 4: Sexual Contact with a Child Under Sixteen, in violation of SDCL 22-22-7, a Class 3 Felony, to have been committed on or about or between October of 2013 and October 13, 2015; and Count 5: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about or between October 2013 and October 13, 2014; and Count 6: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, to have been committed on or about or between October 2013 and October 13, 2014; and Count 7: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, to have been committed on or about or between

A-12

October 2013 and October 13, 2014; and Count 8: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, to have been committed on or about or between October 2013 and October 13, 2014; and Count 9: Fourth Degree Rape, in violation of SDCL 22-22-1(5), a Class 3 Felony, to have been committed on or about or between September 1, 2018 to October 13, 2018; and Count 10: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony, to have been committed on or about or between September 1, 2018 to October 13, 2018; and Count 11: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony, to have been committed on or about August 2022.

The Defendant was arraigned on said Indictment on the 8th day of November, 2022. The Defendant, the Defendant's attorney, Brad Schreiber, and Brent Kempema, Chief Deputy Attorney General, appeared at the Defendant's arraignment. The Court advised the Defendant of his constitutional and statutory rights pertaining to the charges that had been filed against him including, but not limited to, the right against self-incrimination, the right of confrontation, and the right to a jury trial. The Defendant pled not guilty to the charges in the Indictment. The Defendant requested a jury trial on the charges contained in the Indictment. Prior to trial, the State dismissed Count 1 of the Indictment.

A jury trial commenced on July 25, 2024, and concluded on August 1, 2024. During the trial and prior to submitting the case to the jury for deliberation, the State dismissed Count 10 of the Indictment. On August 1, 2024, **the Stanley County Jury returned a verdict finding Defendant**

Guilty as to Count 2: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 3**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 4**: Sexual Contact with a Child Under Sixteen, in violation of SDCL 22-22-7, a Class 3 Felony; **and Guilty as to Count 5**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 6**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony; **and Guilty as to Count 7**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony; **and Guilty as to Count 8**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony; **and Guilty as to Count 9**: Fourth Degree Rape, in violation of SDCL 22-22-1(5), a Class 3 Felony; **and Guilty as to Count 11**: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony. It is therefore,

ORDERED that **a Judgment of Guilty is entered as to** the following which occurred in Stanley County, South Dakota: **Count 2**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about the month of November 2007; **and Count 3**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about the month of December 2007; **and Count 5**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 6**: First Degree Rape, in violation of SDCL 22-22-1(1), a Class C Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 4**: Sexual Contact with a Child Under Sixteen, in violation of SDCL 22-22-7, a Class 3 Felony,

which occurred on or about or between October of 2013 and October 13, 2015; **and Count 7**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 8**: Aggravated Incest, in violation of SDCL 22-22A-3(1), a Class 3 Felony, which occurred on or about or between October 2013 and October 13, 2014; **and Count 9**: Fourth Degree Rape, in violation of SDCL 22-22-1(5), a Class 3 Felony, which occurred on or about or between September 1, 2018 to October 13, 2018; **and Count 11**: Incest, in violation of SDCL 22-22A-2, a Class 5 Felony, which occurred on or about August 2022

SENTENCE

On the 1st day of November, 2024, the Defendant, the Defendant's attorney, Timothy Whalen, and Brent Kempema, Chief Deputy Attorney General, and Nolan Welker, Assistant Attorney General, appeared for Defendant's sentencing. The Court received Defendant's evidence and heard argument of counsel and the statements of the Defendant and the victims and then asked whether any legal cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

It is hereby ORDERED that **as to Count 2**: First Degree Rape, the Defendant shall pay **a fine of fifteen thousand dollars ($15,000)** and **be incarcerated in the South Dakota State Penitentiary for a period of twenty (20) years, with the execution of five (5) years suspended**, there to be kept fed, and clothed according to the rules and discipline governing the prison;

A-15

It is further ORDERED that **as to Count 3**: First Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of fifteen (15) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 5**: First Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of twenty (20) years, with the execution of five (5) years suspended**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 6**: First Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of fifteen (15) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 4**: Sexual Contact with a Minor Under the Age of Sixteen, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of fifteen (15) years, with the execution of five (5) years suspended**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 7**: Aggravated Incest, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of ten (10) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 8**: Aggravated Incest, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of ten (10) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 9**: Fourth Degree Rape, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of five (5) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **as to Count 11**: Incest, the Defendant shall **be incarcerated in the South Dakota State Penitentiary for a period of five (5) years**, there to be kept, fed, and clothed according to the rules and discipline governing the prison;

It is further ORDERED that **Counts 2 and 3 shall run concurrently to each other**;

It is further ORDERED that **Counts 5 and 6 shall run concurrently to each other but consecutively to Counts 2 and 3**;

It is further ORDERED that **Count 4 shall run consecutively to Counts 5 and 6**;

It is further ORDERED that **Counts 7 and 8 shall run concurrently to each other and consecutively to Count 4**;

It is further ORDERED that **Counts 9 and 11 shall run concurrently to each other and consecutively to Counts 7 and 8**;

A-17

It is further ORDERED that Defendant shall receive **credit for one hundred and thirty-four (134) days served** on the above sentence;

It is further ORDERED that **Defendant shall pay court costs totaling eight hundred and eighty-nine dollars ($889)** broken down by count as follows: Count 2 – seventy-three dollars ($73); Count 3 – seventy-three dollars ($73); Count 5 – one hundred and four dollars ($104); Count 6 – one hundred and four dollars ($104); Count 4 – one hundred and four dollars ($104); Count 7 – one hundred and four dollars ($104); Count 8 – one hundred and four dollars ($104); Count 9 – one hundred and six dollars and fifty cents ($106.50); Count 11 – one hundred and sixteen dollars and fifty cents ($116.50);

It is further ORDERED that **Defendant shall pay the costs of his psychosexual evaluation in the amount of** three thousand two hundred dollars (**$3,200**) **and the costs of his court-appointed private investigator in the amount of** ten thousand two hundred ten dollars and thirty-nine cents (**$10,210.39**) **and the costs of digital forensic examinations in this case in the amount of** one thousand six hundred and fifteen dollars (**$1,615**) **and the costs of his court-appointed attorney** in an amount to be determined **and restitution in the amount of** eight hundred and twelve dollars (**$812**) to the Crime Victim's Compensation Fund;

It is further ORDERED that all above amounts of costs, fines, fees, and restitution shall be paid to the Stanley County Auditor according to a payment plan to be developed with the Department of Corrections and the Board of Pardons and Paroles;

A-18

It is further ORDERED that the Department of Corrections is recommended to adopt as part of its supervision of Defendant during incarceration and on parole all of the recommendations of the psychosexual evaluation to include the following:

(a) Complete standard, intensive, group-based outpatient sex offender specific treatment with an ATSA qualified provider for no less than forty-eight (48) months;

(b) Treatment providers should focus on helping Defendant assume full responsibility for his offending behaviors, as well as his motivations for doing so and treatment providers should also work on building Defendant's empathy, intimacy, and social skills and capabilities to include considerable work with effective intervention strategies and focused treatment techniques to address domestic violence and power and control dynamics within relationships;

(c) Defendant is recommended for a graduated transitional half-way housing program rather than discharging to the community directly to include GPS monitoring until he is deemed stable enough for removal of that containment measure;

(d) Defendant's treatment should include the use of polygraph examinations. These examinations should include an instant offense polygraph, a sexual history polygraph, and maintenance polygraphs on the order of every three to six months, with particular attention paid to sexual contact with force and sexual contact with persons who did not give consent;

(e) Defendant should not be allowed any exposure to pornography, erotica, or unapproved access to the Internet and Defendant should not be allowed to use or possess any technological media that may afford him unmonitored access to the Internet until his treatment provider and supervising agent deem this to be appropriate – once deemed appropriate, accountability software should be used and Defendant should be required to disclose any use of social media or dating applications and make disclosures regarding his sexual pursuits;

(f) Defendant should not be allowed to live, work, or congregate in areas where children are present and should be required to have comprehensive safety plans in place to address areas of risk before being given permission for recreational activities or functions where

minors are likely to be present; Defendant is not recommended for contact with any of his children or child relatives unless considerable progress has been made in his program and all parties involved support such a measure; safety measures for such contact should be required to include a qualified chaperone; Defendant's relationships should be closely monitored and a disclosure staffing that serves as an ethical duty to warn should take place prior to allowing Defendant to cohabitate with any partner while on supervision; moreover, Defendant should under no circumstances date anyone who has children or grandchildren in the home due to the outsized risk he poses within these home dynamics;

(g) Defendant should not be allowed to consume or possess alcohol or non-prescribed medications while in treatment; providers should require frequent and random urinalysis, breathalyzers, alcohol "scans", or other measures of substances abuse to ensure maximum accountability;

(h) Defendant would benefit from adjunct individual counseling;

(i) Defendant is recommended for regular consultation with a physician to better screen for the appropriateness of psychopharmacological interventions and to monitor his progress/needs on an ongoing basis;

It is further ORDERED that the Court expressly reserves the right to amend any or all of the terms of this Order at any time.

Dated **11/14/2024 3:46:00 PM**

BY THE COURT:

Christina Klinger

Christina Klinger
Circuit Court Judge

Attest:
Marshall, Stephanie
Clerk/Deputy

A-20

NOTICE OF RIGHT TO APPEAL

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

A-21

STATE OF SOUTH DAKOTA : SS COUNTY OF STANLEY	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, v. DONNIE EDWARDS, DOB: 5/29/1978 Defendant.	)	58CRI22-103 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE DEFENDANT'S MOTION FOR SEVERANCE

The above-entitled matter came before the Court at the Hughes County Courthouse on June 21, 2024, pursuant to Defendant's Motion for Severance and the State's Response to Defendant's Motion for Severance and Notice of Intent to Introduce 404(b) Evidence. The State appeared by and through Nolan Welker, Assistant Attorney General, and Brent Kempema, Chief Deputy Attorney General. The Defendant and Defendant's counsel, Tim Whalen, both appeared telephonically. Defendant waived personal appearance and waived holding the hearing in the Stanley County Courthouse. The Court, having reviewed Defendant's Motion and the State's Response and Notice, and having heard the arguments of the parties, and having been fully advised on the premises, hereby now enters and files the following FINGINGS OF FACT and CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. The Defendant, Donnie Edwards, has been charged by Indictment with Counts 1-11. The State, having motioned to dismiss Count 1, has elected to proceed to trial on Counts 2-11 of the Indictment only.

A-22

2. In Counts 2 and 3, the alleged victim is K.R. (DOB 6/15/1995). The timeframes at issue in Counts 2 and 3 are November and December 2007, respectively.

3. During and around the timeframes in Counts 2 and 3, K.R. was the pre-teen or teenage stepdaughter of Defendant and was living in Defendant's Stanley County home.

4. The allegations in Counts 2 and 3 are that Defendant used his fingers to penetrate K.R.'s vagina.

5. The State has proffered that when Defendant perpetrated Counts 2 and 3:

a. Defendant physically isolated K.R. in his Stanley County home; and

b. Defendant verbally threatened K.R. to remain quiet about the sexual abuse or else Defendant would prevent K.R. from ever seeing her family again.

6. The State has proffered that during and around the time periods alleged in Counts 2 and 3:

a. Defendant made verbal comments to K.R. regarding her body and attractiveness;

b. Defendant sent sexually explicit images to K.R. or attempted to take sexually explicit images of K.R. with his phone; and

c. Defendant rummaged through K.R.'s phone if Defendant suspected that K.R. might have a boyfriend or other sexual partner.

A-23

7. In Counts 4-11, the alleged victim is M.S. (DOB 10/14/2002). The timeframes at issue in Counts 4 through 8 start in October of 2013 and end at times varying between October 13, 2014, and October 13, 2015. Counts 9 and 10 run from September 1, 2018, to October 13, 2018. The timeframe in Count 11 is about August 2022.

8. During and around the timeframes in Counts 4 through 11, M.S. was the pre-teen or teenage biological daughter of Defendant and was living in Defendant's Stanley County home or as a member of Defendant's Stanley County household while away at college.

9. The allegations in Counts 4 through 11 are that Defendant used his hands to touch M.S.'s breasts or used his hands or penis to touch or penetrate M.S.'s vagina. All allegations are sexual in nature.

10. The State has proffered that when Defendant perpetrated Counts 4 through 11:

a. Defendant physically isolated M.S. in his Stanley County home, RV camper in which he was living, or other suitable isolated place;

b. Defendant verbally threatened M.S. to remain quiet about the sexual abuse or else Defendant would prevent M.S. from ever seeing her family again.

11. The State has proffered that during and around the time periods alleged in Counts 4 through 11:

a. Defendant made verbal comments to M.S. regarding her body or attractiveness;

b. Defendant sent sexually explicit images to or requested sexually explicit images or videos from M.S.;

c. Defendant rummaged through M.S.'s phone if Defendant suspected that M.S. might have a boyfriend or other sexual partner.

12. Defendant gained access to, perpetrated against, groomed, controlled, physically isolated, and socially isolated both K.R. and M.S. in substantially similar ways.

13. Counts 2 through 11 are substantially similar in method, execution, victim, plan, intent, and motive.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter herein.

2. "[T]wo or more offenses may be charged in the same indictment" if they are "of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." SDCL 23A-6-23.

3. Under SDCL 23A-6-23, there are three separate tests which permit joinder of offenses: (1) the same or similar character test; (2) the same act or transaction test; and (3) the acts which constitute a common plan or scheme test. *State v. Loeschke*, 2022 S.D. 56, ¶ 19, 980 N.W.2d 266, 272 (citation omitted); *State v. Shape*, 517 N.W.2d 650, 654-55 (S.D. 1994).

4. The first test involves offenses with the same or similar character and requires offenses to be closely related in time, location, and manner of execution. *Loeschke*, 2022 S.D. 56, ¶ 19, 980 N.W.2d at 272. When the offenses are closely related in location and manner of execution, the close in time requirement has been broadly construed. *Loeschke*, 2022 S.D. 56, ¶ 19 980 N.W.2d at 273; *see, e.g., State v. Thompson*, 1997 S.D. 15, ¶ 18, 560 N.W.2d 535, 539 (offenses multiple months apart are nonetheless sufficiently similar under the first test for joinder), *State v. Solis*, 2019 S.D. 36, ¶ 22, 931 N.W.2d 253, 259 (same), and *State v. Loftus*, 1997 S.D. 131, ¶¶ 2-4, 573 N.W.2d 167, 168-171 (same).

5. The offenses in Counts 2 through 11 are all closely related in location and manner of execution. Each allegation occurred in or around Defendant's Stanley County home. Each allegation involves a victim that is a daughter or stepdaughter who was living with Defendant as a member of his household. In each allegation, Defendant gained access to, perpetrated, groomed, controlled, and isolated each alleged victim by similar methods.

6. The offenses in Counts 2 and 3 are closely related in time to each other – being alleged on or about November 2007 and December 2007, respectively. *State v. Thompson*, 1997 S.D. 15, ¶ 18, 560 N.W.2d 535, 539.

7. The offenses in Counts 2 and 3 are not closely related in time to the offenses in Counts 4 through 11 which occurred at varying times between October 2013 to August 2022. There is approximately a six-year gap between

the alleged time frames in Count 3 (the last count against K.R.) and Count 4 (the first count against M.S.).

8. Even though Counts 2 through 11 are all closely related in location and manner of execution, the gap in time between Counts 2 and 3 and Counts 4 through 11 prohibit joinder of all counts under the first test of SDCL 23A-6-23.

9. The second test of SDCL 23A-6-23 requires the joined counts to be a part of the same act or transaction. *State v. Loeschke*, 2022 S.D. 56, ¶ 19, 980 N.W.2d 266, 272 (citation omitted); *State v. Shape*, 517 N.W.2d 650, 654-55 (S.D. 1994). The State is not alleging that the acts underlying Counts 2-11 are part of the same act or transaction. Therefore, the second test for joinder under SDCL 23A-6-23 is inapplicable.

10. The third test for joinder under SDCL 23A-6-23 permits joinder in the same Indictment when the offenses charged are based on acts which constitute a common scheme or plan. *Loeschke*, 2022 S.D. 56, ¶ 19, 980 N.W.2d at 273. A common scheme under this test may be shown by evidence that would be admissible to show anything other than propensity under SDCL 19-19-404(b). *Loeschke*, 2022 S.D. 56, ¶ 23, 980 N.W.2d at 274 (*citing Solis*, 2019 S.D. 36, ¶ 23, 931 N.W.2d at 259).

11. The acts underlying the allegations of Counts 2 through 11 constitute a common plan or scheme and would be relevant and admissible under SDCL 19-19-404(b) as to each Count to show Defendant's plan. Specifically, Counts 2 through 11 indicate Defendant's plan to gain access to,

A-27

groom, control, isolate, and sexually perpetrate against young girls living within his household and to whom he is related by either blood or marriage. *State v. Guzman*, 2022 S.D. 70, ¶ 49, 982 N.W.2d 875, 892.

12. The acts underlying Counts 2 through 11 are also relevant and admissible as to each Count to show Defendant's intent and motive under SDCL 19-19-404(b). "Proof of similar acts may be particularly relevant to crimes where the State has the burden to prove specific intent." *State v. Taylor*, 2020 S.D. 48, ¶ 30, n.2, 948 N.W.2d 342, 352. In addition, evidence under SDCL 19-19-404(b) can demonstrate the existence of a motive when there is a relationship between the victims. *State v. Evans*, 2021 S.D. 12, ¶ 31, 956 N.W.2d 68, 81. Such motive is typically in the nature of hostility, antipathy, hatred, or jealousy. *Id.* However, when a sex crime is charged, motive may be proven by other acts involving different sexual acts by a defendant. *State v. Steichen*, 1998 S.D. 126, ¶ 21, 588 N.W.2d 870, 875.

13. The probative value of the evidence underlying each Count to be admitted for the above purposes is *not* substantially outweighed by any prejudicial effect such evidence may have. *State v. Huber*, 2010 S.D. 63, ¶ 56, 789 N.W.2d 283, 301. As such, the balance has tipped emphatically in favor of admission and Defendant has not met his burden to establish that any trial concerns in Rule 403 substantially outweigh the probative value. *Id.*; *State v. Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d 792, 799 (other citations omitted).

14. Given that the evidence underlying Counts 2 through 11 may be permissibly admitted in trial as other act evidence against each other Count as

A-28

identified above, the Counts are properly joined together in the same Indictment under the third test of SDCL 23A-6-23. *State v. Waugh*, 2011 S.D. 71, ¶ 14, 805 N.W.2d 480, 484 (noting a trend that "the most important consideration is whether evidence of one offense would have been admissible at a trial of the other offense").

15. Since the State has satisfied the third test for joinder, the burden now shifts to Defendant to establish sufficient prejudice to justify severance. *Loeschke*, 2022 S.D. 56, ¶ 26, 980 N.W.2d at 274. The prejudice Defendant must show is substantial and must be more than a "showing of a better chance of acquittal at a separate trial. *Loeschke*, 2022 S.D. 56, ¶ 26, 980 N.W.2d at 274-75. Such a high burden is meant to offset the purpose of joinder, judicial efficiency. *Id.*; *Waugh*, 2011 S.D. 71, ¶ 13, 805 N.W.2d at 484 (citation omitted).

16. The burden which Defendant must meet "is unsustainable when evidence of one crime is admissible in the trial of the other crime" since Defendant cannot therefore be substantially prejudiced from joinder. *Loeschke*, 2022 S.D. 56, ¶ 26, 980 N.W.2d at 274-75 (*citing State v. Goodshot*, 2017 S.D. 33, ¶ 12, 897 N.W.2d, 346, 350).

17. Defendant has not identified any prejudice other than a better chance of acquittal at trial. Further, the Court has determined that evidence under each Count would be admissible as evidence under SDCL 19-19-404(b) in a trial of the other Counts. As such, Defendant has not met his burden to

establish substantial prejudice arising from joinder of the offenses in Counts 2 through 11. *State v. Zakaria*, 2007 S.D. 27, ¶ 13, 730 N.W.2d 140, 144.

18. Joinder of the offenses in the same Indictment and at trial is not unfair. *See Wright*, 1999 S.D. 50, ¶ 15, n.5, 593 N.W.2d at 799 (noting that evidence must be unfairly prejudicial to be excluded – meaning that it must have the capacity to persuade in an unfair or illegitimate manner).

19. Any Findings of Fact deemed to be a Conclusion of Law or vice versa is hereby re-designated as such and incorporated into the Findings of Fact or Conclusions of Law as the case may be.

For the reasons set forth in the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW and based upon the Motion and Response submitted, the arguments of the parties, and the entire proceedings of these matters, the Court orders that Defendant's Motion for Severance is DENIED and that joinder of the offenses in the Indictment and for trial is proper.

7/2/2024 9:13:40 AM

BY THE COURT:

Christina Klinger

The Honorable Christina Klinger
Circuit Court Judge

Attest:
Killian, Julie
Clerk/Deputy

A-30

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30905

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DONNIE GAY EDWARDS,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
6th JUDICIAL CIRCUIT
STANLEY COUNTY, SOUTH DAKOTA

THE HONORABLE CHRISTINA L. KLINGER
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL
Paul S. Swedlund
SOLICITOR GENERAL
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
E-Mail: atgservice@state.sd.us
ATTORNEYS FOR APPELLEE

TIMOTHY R. WHALEN
Whalen Law Office
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
E-mail: WHALAWTIM@CME.COOP
ATTORNEY FOR APPELLANT

Notice of Appeal Filed November 18, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING EDWARDS' MOTION TO SEVER?

State v. Loeschke, 2022 SD 56, 980 N.W.2d 266

State v. Ondricek, 535 N.W.2d 872 (S.D. 1995)

The trial court denied Edwards' motion to sever two counts relating to one victim from eight counts relating to a second victim.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING EDWARDS' MOTION FOR A MISTRIAL DUE TO DISMISSAL OF A BIASED JUROR?

Piper v. Young, 2019 SD 65, 936 N.W.2d 793

The trial court dismissed the biased juror, seated an alternate and denied Edwards' motion for a mistrial.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING EDWARDS' MOTION FOR A MISTRIAL DUE TO A PROSECUTORIAL COMMENT CONCERNING EDWARDS' "PAST?"

State v. Pasek, 2004 SD 132, 691 N.W.2d 301

The trial court denied Edward's motion for a mistrial.

PRELIMINARY STATEMENT

The trial transcript will be referenced as TRIAL followed by citation to the volume and page/line of the transcript. The designated record will be cited as RECORD followed by citation to the pertinent page.

STATEMENT OF THE CASE AND FACTS

Edwards was charged and convicted of sexual offenses against his stepdaughter K.R. and his biological daughter M.S. The evidence at trial revealed that Edwards groomed the girls and initiated sexual contact with

them as preteens and sexually abused them through their teenaged years, continuing his sexual relationship with M.S. into her early adulthood.

K.R.

K.R. turned 8 at the time her mother married Donnie Edwards. TRIAL 1 at 258/7. At age 12, Edwards started making comments about K.R.'s developing body, like how certain clothing made "her butt look nice." TRIAL 1 at 260/11, 263/15; RECORD at 1414. On the pretext of helping K.R. recover from a school gymnastics injury, Edwards started giving her "massages" when her mother was at work. TRIAL 1 at 261/7, 262/21, 270/5, 270/13; EXHIBIT 5, Transcript at 77/20, 78/2, 80/7. Edwards' "massages" soon ranged beyond her back and shoulders to her butt and breasts and ultimately to him inserting his fingers into K.R.'s vagina. TRIAL 1 at 261/7, 262/12, 262/17, 263/11; RECORD at 1414. When interviewed by DCI, Edwards stated that if any contact with K.R.'s breast or butt happened during these massages it was purely "accidental." EXHIBIT 5, Transcript at 48/6-30.

Edwards, the household "authoritarian," told K.R. to keep her "mouth shut" about the "massages" or she would not be allowed to see her sisters again. TRIAL 1 at 258/25, 264/11, 271/22, 284/2; RECORD at 1386, 1414. K.R. feared that Edwards would hurt her or her mother or father if she talked about the "massages." TRIAL 1 at 267/7; RECORD at 1387. K.R. would not invite friends to the house because she did not

want them to know about "the control, the abuse, the manipulation in [the] house." TRIAL 1 at 285/14.

In an apparent effort to groom and sexualize K.R., Edwards sent pornographic images to K.R.'s phone which he would later delete. RECORD at 1386. Around age 16, Edwards started taking pictures of K.R. nude stepping out of the shower through a gap between the door and frame of the bathroom door. TRIAL 1 at 265/12. Edwards gave K.R. approximately 100 "massages" until K.R. turned 18 and moved out of the house to attend college. TRIAL 1 at 264/25-265/1, 272/12, 273/3. Soon after K.R. left for college, her stepsister, M.S., moved into the house. TRIAL 1 at 265/1.

While at college, Edwards continued "controlling" K.R., shutting her phone off or threatening to take her phone if she did something that displeased him like visiting her sister's house or not immediately answering his calls or texts. TRIAL 1 at 266/1. As an adult, K.R. informed her OB/GYN in 2018 (four years before Edwards' arrest) that she had a history of being sexually assaulted by a member of her household. TRIAL 1 at 266/16, 278/15; TRIAL 3 at 20. Examination revealed that K.R. had a condition relating to her pelvic muscles consistent with trauma. TRIAL 1 at 266/20; RECORD at 1387, 1411. K.R. disclosed her history of abuse by Edwards to law enforcement for the first time after DCI contacted her as part of their investigation of Edwards' abuse of M.S. TRIAL 1 at 279/9, 280/22.

M.S.

M.S. came to live in the Edwards household at age 10 around the time K.R. left. M.S.'s mother had relinquished her parental rights when M.S. was an infant and left her in the care of her maternal grandparents. TRIAL 1 at 110/6, 110/23. When living with her grandparents became untenable, M.S. was placed in the care of her biological father, Donnie Edwards. TRIAL 1 at 111/3. Edwards picked up with M.S. where he had left off with K.R.

At age 11, Edwards started tickling M.S.'s arms and rubbing her back. TRIAL 1 at 113/3; RECORD at 1378. Edwards' hands soon ranged from "tickling" her arms to fondling her breasts and butt. TRIAL 1 at 113/7, 114/4; RECORD at 1378. Before long, Edwards was "tickling" M.S.'s vagina with his fingers and then his penis. TRIAL 1 at 114/9, 115/7, 184/15. Edwards had M.S. perform oral sex on him multiple times as well. TRIAL 1 at 199/14; RECORD at 1379. Edwards told M.S. "You can't fucking tell anybody" or she would not be allowed to see her friends, siblings or grandparents again. RECORD at 1378, 1379. Edwards also threatened to kill her if she disclosed the abuse. RECORD at 1379.

Edwards raped M.S. dozens of times when Edwards' wife was at work or asleep. RECORD at 1379, 1412. By age 15, M.S. was being treated for anxiety and depression, but Edwards continued having sex

with her. TRIAL at 116/3, 117/6. After she graduated from high school, M.S. moved away to attend college at SDSU. TRIAL 1 at 117/14.

Edwards contrived reasons for M.S. to come home every weekend so he could have sex with her. TRIAL 1 at 118/1; RECORD at 1379. At age 19, M.S. tested positive for chlamydia and was prescribed antibiotics. TRIAL 1 at 121/1. Edwards demanded that M.S. give him half of the prescription because he was concerned that he might pass chlamydia on to his wife. TRIAL 1 at 121/7. Edwards demanded she be "faithful" to him, as in be "a lover to him" and him alone. TRIAL 1 at 122/2; TRIAL 3 at 643/18. Edwards had M.S. install a Life 360 app to her phone, which is a geolocator that allowed him to track her movements. When the app showed that M.S. was not in her dorm room, Edwards would call and text her demanding to know where she was and who she was with, and badgering her to stay "faithful," like some possessive boyfriend. TRIAL 1 at 133, 145-146, 147/24, 151/11; TRIAL 3 at 643/18; RECORD at 1384.

With M.S. no longer at home, this period of Edwards' sexual predations is well documented in text exchanges on their respective phones. Edwards was constantly demanding that she text photos of herself naked, in sexual positions, exposing her genitalia, or performing sexual acts on herself. TRIAL 3 at 640/17, 644/16, 644/22, 649/13, 651/7, 653/7. A representative but by no means exhaustive list includes:

EXHIBIT 3, Pages 18-20 – At Edwards' request, M.S. texted him a video of her masturbating her clitoris. Unsatisfied, Edwards called her and asked her to send him "a better video." M.S. then sent him a video of herself "closer up doing sexual things." TRIAL 1 at 136-138; EXHIBIT 72.

EXHIBIT 3, Page 21 – Edwards texted M.S. a picture of a girl with "her butt up in the air" and "spreading her legs" and asked M.S. "Can you do this for me, with a picture." Edwards often sent M.S. pictures of girls in provocative poses and sexual positions with a request that she send him a picture of herself mimicking the poses and positions. TRIAL 1 at 138-139; EXHIBIT 73.

EXHIBIT 3, Page 24 – Edwards apparently gave M.S. his wife's vibrator and had her text him a video of M.S. "using the sex toy" on herself. TRIAL 1 at 139-140; TRIAL 3 at 641/22; EXHIBIT 74. This vibrator was later found in the center console of Edwards' truck. EXHIBITS 53, 54.

EXHIBIT 3, Page 34 – Edwards FaceTimed M.S. and asked her to perform sexual acts for him. After she complied, Edwards screenshot a page from the FaceTime of M.S. naked and texted it back to her with the message "Love you." TRIAL 1 at 143-144; EXHIBIT 75.

EXHIBIT 3, Page 123, 168, 252 – In a series of texts, Edwards exhorts M.S. to keep "one man" in her life – him. TRIAL 1 at 158-159. At another point, Edwards demands to know "who else" – besides him

– she is seeing. TRIAL 1 at 168/25. When Edwards suspected M.S. might be seeing someone else, he texted "Fuck you, cunt. You're so fucking stupid . . . . Don't bother coming to my house this weekend. Have fun, whore." TRIAL 1 at 252/18; EXHIBIT 5, Transcript at 60/3; RECORD at 1379.

EXHIBIT 3, Page 148 – At Edwards' request to "Send pics," M.S. sent Edwards pictures of her breasts and her exposed vagina. EXHIBITS 76, 77.

EXHIBIT 3, Page 157 – After Edwards believed M.S. had not been "faithful" to him, Edwards texted to tell her "I'm going get checked for STDs since" he had been "around her" afterwards. TRIAL 1 at 161/2. Edwards admitted that "the only reason that [he] would be worried about getting an STD is if [he] had intercourse with [his] daughter." TRIAL 3 at 656/2, 655/19.

EXHIBIT 3, Page 206 – Edwards demands that M.S. "Hurry up, take pics" of herself showering. Unsatisfied by a picture she sent of her breasts, Edwards asked that she send a "Full body pic 😊." TRIAL 1 at 171/10; TRIAL 2 at 399/3; EXHIBIT 82.

Eventually, M.S. came forward, telling a friend and a cousin, and then law enforcement, about Edwards' abuse. TRIAL 1 at 123/15, 126/1, 205/14; RECORD at 1381.

EDWARDS

When interviewed by DCI, Edwards denied any sexual relationship with either K.R. or M.S. EXHIBIT 5, Transcript at 77/48, 78/9, 78/32, 83/28. Edwards knew that DCI was already aware of one full-frontal nude photo of M.S. on his phone that his wife had previously discovered, so he admitted to this photo and explained it as having been intended for her boyfriend and sent to him accidentally. TRIAL 3 at 550/17-551/16; EXHIBIT 5, Transcript at 64-68. Edwards denied having any other photos of M.S. on his phone or any images that could be "misconstrued" to suggest a sexual relationship between them. EXHIBIT 5, Transcript at 51/11, 74/42, 75/37, 79/2. Edwards' phones told a different story.

Edwards' phones contained scores of nude and semi-nude photos of M.S. EXHIBITS 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 21, 23, 25, 26, 27, 29, 30, 32, 33, 34, 35, 38, 39, 40, 41, 42, 49, 61, 62. Some photos were more sexually explicit:

EXHIBIT 17 – Close-up photo of M.S.'s vagina in a seated position with her labia spread open by fingers. TRIAL 2 at 330/18.

EXHIBIT 20 – A full frontal nude of M.S. apparently taken by Edwards. TRIAL 2 at 334/1.

EXHIBITS 22, 24, 26 – Semi-nude and nude screenshots of M.S. from a FaceTime call between M.S. and Edwards. As the originator of the call, Edwards' face appears in a small frame in the upper left corner of one of the screenshots. TRIAL 2 at 338/15.

EXHIBITS 28, 31 – Close-up photos of M.S.'s vagina including one of fingers in her vagina apparently taken, like many of the photos found on Edwards' phone, while M.S. was in the dormitory shower at SDSU. TRIAL 2 at 322/24, 341/8, 343/22.

EXHIBIT 36 – Close-up photo of M.S.'s vagina being spread open by a pair of fingers. TRIAL 2 at 344/25, 345/3. Photographic forensic analysis of the ridge detail of the prints on the fingertips revealed the two fingers to be Edwards' right hand middle and ring fingers. TRIAL 2 at 345/5, 349/1, 351/23, 469/18.

Edwards testified in his defense. His defense was to admit to everything that he could not possibly deny but deny everything else. In other words, Edwards' defense was "Yeah, I had my daughter supply me with photos of herself nude and performing sexual acts on herself, and my fingers are in a photo spreading her labia, but I *never* had sex with her. That's a lie!" TRIAL 3 at 613-618, 620/8, 644/16, 652/16.

Needless to say, the jury did not buy this ludicrous defense and convicted Edwards of seven counts of sexual contact, rape and incest involving M.S. and two counts of rape involving K.R. Edwards now appeals.

ARGUMENT

Edwards now raises three claims of error: (1) that the charges relating to M.S. should have been tried separately from the charges relating to K.R., (2) that the trial court should have declared a mistrial

when a juror whose granddaughter had been an abuse victim asked to be excused after *voir dire* because she felt she could not be impartial, and (3) that the trial court should have declared a mistrial over a prosecution question concerning Edwards' "past" during cross-examination of one of Edwards' witnesses.

1. Severance Claim

Edwards claims prejudice from the denial of his motion to sever the M.S. charges from the K.R. charges. According to Edwards, dissimilarities between the circumstances of the charges involving M.S. and K.R., and the sexually explicit nature of the evidence introduced in connection with the M.S. charges, prejudiced his trial on the K.R. charges. The trial court denied the motion on the ground that the acts perpetrated against K.R. and M.S. were part of a common scheme or plan. APPELLANT'S APPENDIX at 27. As this court has found, when a "defendant denies doing the charged act, evidence of a common scheme or plan to achieve the act is directly relevant to refute this general denial." *State v. Steichen,* 1998 SD 126, ¶ 23, 588 N.W.2d 870, 875.

A defendant may be charged and tried for different offenses which are part of a common scheme or plan. SDCL 23A-6-23; *State v. Loeschke,* 2022 SD 56, ¶ 19, 980 N.W.2d 266, 272. A common scheme or plan may be proven by evidence that would be admissible to show motive, intent, opportunity and lack of accident or mistake under SDCL 19-19-404(b). *Loeschke,* 2022 SD 56 at ¶ 26. When proven by 404(b) evidence, a

defendant's burden of demonstrating prejudice from joinder is "unsustainable" because "whether the charges are joined or not, a jury would hear about both events." *Loeschke,* 2022 SD 56 at ¶¶ 23, 31; *State v. Waugh,* 2011 SD 71, ¶ 17, 805 N.W.2d 480, 484 ("no undue prejudice because the evidence of each incident could have been admitted in the trial of the other").

The trial court found that the charges against K.R. and M.S. constituted a common scheme or plan to groom, isolate, sexually perpetrate on and control his daughters by marriage and blood by substantially similar means. APPELLANT'S APPENDIX at 25. The trial court also found that the evidence of K.R.'s abuse would be admissible under 404(b) in a trial for Edwards' abuse of M.S., and *vice versa,* to prove motive and intent. APPELLANT'S APPENDIX at 28. These findings and conclusions are not an abuse of the trial court's discretion in light of the evidence at trial that Edwards sexually perpetrated on two similar victims using similar methods as part of a common scheme and plan to gratify his interest in incestuous sex with pre-teen and teenaged girls. *State v. Roden,* 380 N.W.2d 669, 670 (S.D. 1986)(other acts evidence admissible to show "intent or objective by Roden to satisfy his sexual urges with children").

Substantial similarity does not require Edwards' means and methods be identical, only that they have sufficient features in common to evidence a common scheme or plan. *Steichen,* 1998 SD 126 at ¶ 30;

State v. Guzman, 2022 SD 70, ¶49, 982 N.W.2d 875, 892. The evidence at trial reveals sufficient commonalities between Edwards' perpetration of sexual acts on M.S. to evidence motive and intent to perpetrate on K.R. under 404(b) and, by extension, a common scheme or plan under SDCL 23A-6-23:

- Edwards was a father figure to both victims. Evidence that Edwards perpetrated on his daughter, M.S., would have been admissible as evidence of motive and intent in K.R.'s case. *State v. Ondricek*, 535 N.W.2d 872, 876 (S.D. 1995)(evidence that defendant perpetrated on more than one of his nieces admissible under 404(b)); *State v. Champagne*, 422 N.W.2d 840, 844 (S.D. 1988)(evidence that defendant selected victims from within "the family circle" admissible under 404(b)); *Steichen*, 1998 SD 126 at ¶¶ 10-14, 31 (evidence that defendant perpetrated on his stepchildren admissible under 404(b)); *State v. Big Crow*, 2009 SD 87, ¶¶7, 16, 773 N.W.2d 810, 812, 815 (evidence that defendant used influence as family elder to perpetrate on nieces admissible under 404(b)).
- Grooming of both victims was initiated with ostensibly innocent physical contact like massages or tickling which then progressed to fondling of breasts and buttocks and ultimately to genital contact. Evidence that Edwards "tickled" M.S. as a preface to abuse would have been admissible in K.R.'s case to show the motive and intent

behind his "massages" of K.R. and that his contact with K.R.'s breasts and buttocks during these "massages" was not "accidental" as Edwards claimed. *Ondricek*, 535 N.W.2d at 876 (evidence that defendant "massaged" his victims as a predicate to sexual contact admissible under 404(b)); *Guzman*, 2022 SD 70 at ¶ 3 (evidence that defendant groomed victims by allowing them to sit on his lap while driving and steer his car admissible under 404(b)).

- Edwards initiated his abuse of both victims at approximately the same age. Evidence that Edwards targeted M.S. at age 11 and perpetrated on her through her teenage years would have been admissible as evidence of motive and intent behind initiating his abuse of K.R. when she was 12 and molesting her until she was 18. *Ondricek*, 535 N.W.2d at 873, 876 (evidence that defendant selected children aged 4, 6 and 8 as victims admissible under 404(b)); *State v. Perkins*, 444 N.W.2d 34 (S.D. 1989)(evidence that defendant selected babysitting-aged teenaged girls as victims admissible under 404(b)); *State v. Christopherson*, 482 N.W.2d 298, 300-301 (S.D. 1992)(evidence that defendant selected pubescent boys for victims admissible under 404(b)).
- Edwards physically isolated both his victims when he perpetrated on them to avoid detection. Evidence that Edwards perpetrated on M.S. when he was home alone with her would have been admissible as evidence of motive and intent behind "massaging"

K.R. when her mother was at work. *Ondricek*, 535 N.W.2d at 876 (evidence that defendant arranged to be alone with his victims during overnight stays admissible under 404(b)); *Champagne*, 422 N.W.2d at 841 (S.D. 1988)(evidence that defendant isolated his young victims by taking them out on remote gravel roads to teach them how to drive admissible under 404(b)); *Perkins*, 444 N.W.2d at 36-37 (evidence that defendant isolated victims by hiring them to babysit overnight admissible under 404(b)); *Steichen*, 1998 SD 126 at ¶¶ 10-14, 31 (evidence that defendant perpetrated on his stepchildren when their mother was out of the house or asleep admissible under 404(b)); *Big Crow*, 2009 SD 87 at ¶ 16 (evidence that defendant perpetrated "when alone with young nieces who were sleeping or resting in familial homes" admissible under 404(b)); *Guzman*, 2022 SD 70, ¶¶9, 10, 48, 50 (evidence that defendant obtained access to his victims during sleepovers admissible under 404(b)).

- Edwards socially isolated both his victims to prevent them from forming attachments to males their age or friends that might disrupt his pattern of perpetration. Evidence that Edwards shamed M.S. about having a boyfriend and demanding she be "faithful" would have been admissible as evidence of motive and intent behind similar efforts to socially isolate and control K.R. TRIAL 1 at 252/18.

- Edwards used his and his victims' phones as an instrument for perpetrating on them. Evidence that Edwards photographed M.S. on his phone would have been admissible as evidence of motive and intent behind the pornography Edwards sent to K.R.'s phone and photos that he took of her while she was showering. *Guzman*, 2022 SD 70, ¶¶ 5, 9 (evidence that defendant showed his victims pornography on his phone admissible under 404(b)).
- Edwards threatened his victims with physical harm, separation from family and loss of privileges as a means of keeping his abuse secret. TRIAL 152/5, 173/13-23, 200/20, 207/3, 234/17, 265/2; *Ondricek*, 535 N.W.2d at 877 (victims' fear that speaking out would "destroy family ties" explained delay in disclosure of abuse); *Steichen*, 1998 SD 126 at ¶¶ 3, 4, 12, 13 0-14, 31 (evidence that defendant threatened to kill his victims if they told anyone what he had done to them was admissible under 404(b)).

The circumstances of the M.S. and K.R. charges have sufficient points in common to serve as evidence of both motive and intent under 404(b) and a common scheme or plan per SDCL 23A-6-23.

Edwards claims prejudice on the ground that the M.S. charges are too remote in time from the K.R. charges to form a common scheme or plan. While it is true that six years separate the first M.S. charges from the K.R. charges, this does not render the M.S. charges too remote to form a common scheme or plan.

This court has "chosen not to set a rigid time limitation when determining whether bad acts are too remote," particularly where perpetrators have victimized family members over whom they exercise authority and influence. *Ondricek*, 535 N.W.2d at 877. Also, this court has recognized that schemes and plans to sexually abuse minors generally necessitate that that such acts "be spread out over time" due to the time needed to groom victims or replace them when, as here, one of Edwards' victims grew up and aged out after years of silent abuse. *Ondricek*, 535 N.W.2d at 877. Thus, in *Ondricek* the defendant's sexual abuse of two of his nieces between 1970 and 1978 (who were between the ages of 6 and 12 at the time) was admissible to demonstrate a common scheme or plan in connection with Ondricek's abuse of two other nieces between 1983 and 1985 (who were between the ages of 6 and 9 at the time).

Likewise, in *Christopherson* evidence concerning the molestation of three young boys which occurred up to seventeen years before Christopherson's trial for molesting a fourth young boy was not too remote to form a common scheme or plan. *Christopherson*, 482 N.W.2d at 300-301. *Christopherson* noted that lengthy time intervals are permitted in child sexual abuse cases because a perpetrator must take time to cultivate his victims. *Christopherson*, 482 N.W.2d at 302. Also, in *Steichen* evidence concerning sexual abuse dating from 1989 and 1992 was not deemed too remote to be introduced in relation to charges

of abuse perpetrated in 1996 and 1997 when "the victims of Steichen's other acts were subject to sexual abuse of the same nature as the crimes charged" that had been perpetrated in similar ways. *Steichen,* 1998 SD 126 at ¶¶ 29, 31; *Big Crow,* 2009 SD 87 at ¶ 18 (molestation of three different nieces over approximately 16-year period not too remote).

While the K.R. charges relate only to the first acts of abuse in October and November of 2007, which were the events K.R. could most clearly pinpoint to a specific time, Edwards perpetrated on K.R. from 2007 until 2013 when she moved out of the house. TRIAL 1 at 264/25-265/1, 272/12, 273/3. M.S. moved into Edwards' house that same year and Edwards' soon started perpetrating on her. TRIAL 1 at 114/9, 115/7, 184/15; *Ondricek,* 535 N.W.2d at 877. Thus, while a six-year temporal interval separates the K.R. charges from the first M.S. charges, Edwards' scheme and plan to perpetrate on his daughters was continuous and ongoing from 2007 until 2022. *Christopherson,* 482 N.W.2d at 300-301.

Edwards also argues prejudice from the fact that there was no forensic evidence of abuse of K.R. or M.S. when they were minors. While true, the lack of forensic evidence makes the 404(b) evidence *more* not less probative of motive and intent. When, as in *Steichen,* "the intent to commit rape cannot be conclusively established" by forensic evidence, evidence of Edwards' other acts is especially probative of motive and intent. *Steichen,* 1998 SD 126 at ¶ 21.

As found by the trial court, Edwards has not identified substantial prejudice, just a frustrated belief that he had a better chance of being acquitted in separate trials. APPELLANT'S APPENDIX at 29. This is not enough. *Loeschke,* 2022 SD 56 at ¶26. Accordingly, the trial court did not abuse its discretion in denying Edwards' motion for severance.

2. Juror Claim

Edwards claims that the trial court should have granted a mistrial when, after *voir dire* but before the start of the trial, Juror 77 belatedly asked to be excused. Juror 77 reported that she doubted her ability to be impartial toward Edwards because her granddaughter had once been sexually abused. TRIAL 1 at 7/22, 8/13. Finding that there had been no communication between Juror 77 and the other jurors which might potentially have tainted the remaining seated jurors, the court excused this juror. TRIAL 1 at 17/10-20. Alternate Juror 85 took Juror 77's place among the seated jurors. TRIAL 1 at 11/14. This left one alternate, Juror 86.

Juror 5 notified the court that he was feeling sick but felt able to serve provided the court could accommodate his potential need for additional bathroom breaks. TRIAL 1 at 6/7. Juror 5 did not ask to be excused and remained on the jury. Juror 8 notified the court that his father had entered hospice care that morning and asked to be excused. When questioned by the court, Juror 8 stated that, in spite of the situation, he believed he would be able to stay focused and stay alert and

was willing to do his civic duty. TRIAL 1 at 26/14, 27/21, 27/25. Given that the court had lost one alternate already, the court asked Juror 8 to remain on the jury with the caveat that if the situation with Juror 8's father deteriorated, he could be excused and the alternate would step in. TRIAL 1 at 27/5. There was no suggestion of improper bias on the part of Jurors 5, 8 or 85.

This issue is controlled by *Piper v. Young,* 2019 SD 65, 936 N.W.2d 793. As in *Piper,* Edwards argues that he lost the ability to strike Juror 77 if not for cause then peremptorily. TRIAL 1 at 16/7; APPELLANT'S BRIEF at 18, 19. But, as this court noted in *Piper,* a criminal defendant is entitled to "a fair and impartial jury, but not a fair and impartial venire." *Piper,* 2019 SD 65 at ¶60. The "analysis focuses upon the jury that heard the case – not those prospective jurors who may have been included in the venire." *Piper,* 2019 SD 65 at ¶60.

Here, as in *Piper,* there is no suggestion or evidence that the jurors who ultimately sat and decided Edwards' case, Jurors 5, 8 and 85 included, were not impartial. *Piper,* 2019 SD 65 at ¶65. When dismissing Juror 77 did not cause the seating of a biased juror, the trial court did not abuse its discretion in exercising its authority under SDCL 23A-20-29 to excuse Juror 77. *Piper,* 2019 SD 65 at ¶¶60, 65.

3. "Past" Claim

Edwards claims that the court should have granted a mistrial in response to a prosecutorial question about Edwards' "past." The

question was directed at defense witness Katie Johnson, M.S.'s cousin by blood and K.R.'s cousin by marriage. The defense called Johnson to testify to a Facebook text conversation she had had with K.R. about M.S.'s allegations *before* K.R. had disclosed her past abuse by Edwards to anyone except her OB/GYN. TRIAL 3 at 510/4, 529/18. K.R. had kept her abuse secret, even from family.

Johnson was an Edwards partisan who put a pro-Edwards spin on her conversation with K.R. On direct examination, Johnson testified that there was nothing "unusual about [K.R's] manner, demeanor, or anything of that nature in the language that was used" during the text conversation that suggested to Johnson that K.R. herself was also a victim. TRIAL 3 at 505/13. Johnson testified that she did not "get any indication from [K.R.] in the communication that she was uncomfortable discussing the topic." TRIAL 3 at 505/19. Johnson testified that there had been nothing about the conversation that gave her the impression that "[K.R.] had been a victim herself." TRIAL 3 at 506/7. Johnson also testified that, after K.R.'s allegations surfaced, she found it "odd that [K.R.] wasn't uncomfortable in her discussions" about Edwards with Johnson. TRIAL 3 at 3. In other words, Johnson opined that K.R.'s "demeanor" and "language" were inconsistent with a history of abuse by Edwards

Edwards' objection stemmed from a segment of the text discussion in which Johnson mentioned that M.S. might be "crying wolf," but then

mentioned that "donnie does have a past." This prompted K.R. to ask "What do you mean by 'Donnie has a past?'" RECORD at 465. Johnson then said she was referring to allegations concerning a third person. RECORD at 466.

Johnson's testimony concerning this exchange created the misimpression that K.R.'s "demeanor" and "language" during the text conversation was consistent with only a cousin "just getting . . . information" about a family matter, "not as if [K.R.] had been a victim herself." TRIAL 3 at 506/7. Accordingly, the state sought to impeach this misimpression by pointing out an interpretation of K.R.'s question that was consistent with a history of abuse by Edwards, *i.e.* that K.R. was probing to find out if the family had found out that she also had been sexually abused by Edwards. TRIAL 3 at 514/19, 516/13, 517/4, 523/13-16, 524/11, 524/22. Edwards moved for a mistrial.

"Trial courts have considerable discretion not only in granting or denying a mistrial but also in determining the prejudicial effect of a witness' statements. Only when this discretion is clearly abused will this court overturn the trial court's decision. To justify the granting of a mistrial, an actual showing of prejudice must exist. Prejudicial error for purposes of determining whether error constitutes grounds for mistrial is error 'which in all probability must have produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'" *State v. Pasek*, 2004 SD 132, ¶ 15, 691 N.W.2d 301, 308.

Denial of a mistrial is reviewed for an abuse of discretion. *Pasek*, 2004 SD 132 at ¶ 15.

After hearing counsel's respective arguments, the trial court denied the motion. Rather than look at the reference to Edwards' "past" in isolation, the court looked at the "entire communication" for whether the context of K.R.'s question could, as the state suggested, be construed to be probing what family rumors might be circulating about herself. TRIAL 3 at 523/4. The court noted that Johnson had "testified to her impression of the conversation" with K.R. and to her belief that the fact that K.R. "didn't disclose being a victim" was "inconsistent with her being a victim." TRIAL 3 at 517/10, 517/23, 521/12, 521/23, 522/4, 523/6, 523/14. The court ruled that Johnson's testimony concerning her subjective belief as to how K.R. *should* have acted if she had been a victim had "open[ed] the door somewhat," though not "wide," to cross-examination concerning whether Johnson's "impression" of K.R.'s "demeanor" and "language" had overlooked the possibility that K.R. was indirectly asking about herself and, therefore, K.R. was in fact acting consistent with a victim. TRIAL 3 at 523/13-16, 524/11, 524/22.

Out of an abundance of caution, the trial court sustained the objection as to the original question about Edwards' past, instructed the jury to disregard it, but allowed the prosecutor to question whether "Johnson knew of [K.R.'s] allegations" and to "focus on [K.R.'s] past and what she was concerned with, not Mr. Edwards' past." TRIAL 510/8,

524/9, 527/11, 529/13. The state then asked Johnson whether K.R. had "left [her] with the impression that she was asking if you knew about her past with the defendant?" TRIAL 3 at 529/23. Johnson answered "No." TRIAL 3 at 529/24. But Johnson did admit that K.R. "was asking questions about what knowledge [Johnson] may or may not have had" which, in combination with the previous question, framed K.R.'s question as indirectly asking about herself consistent with being a secret victim. TRIAL 3 at 530/4.

Under the circumstances, the trial court did not abuse its discretion in denying Edwards' motion for a mistrial. The court conducted the requisite "balancing" of the evidence against "all of the evidence at trial." TRIAL 3 at 523/21, 525/10. After Edwards as much as admitted to sexual intercourse with his daughter when he texted her that he was going to get himself checked for STDs after he believed she had not been "faithful" to him, after admitting that his concept of "faithful" was her "staying faithful to [his] sexual relationship" with her, after admitting that his fingers can be seen in a photo on *his* phone parting M.S.'s labia, and after admitting that he "enjoyed" the sexual attentions of his daughter, it is highly unlikely that the reference to Edwards' "past" history of sexual abuse of K.R. as impeachment of the pro-Edwards spin Johnson placed on her text exchange with K.R. influenced the jury to convict where it otherwise would not have. *Pasek*,

2004 SD 132 at ¶ 15; TRIAL 1 at 161/2; TRIAL 3 at 614/21, 616/25, 643/18, 656/2; EXHIBIT 3 at 157.

CONCLUSION

The jury did not convict Edwards because of the joint trial of K.R.'s and M.S.'s allegations, or venire bias, or some reference to Edwards' "past." Edwards' convictions are the result of the gross error of his ways, not any error at trial. Accordingly, this court can comfortably affirm Edwards' convictions.

Dated this 28th day of May 2025.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund

Paul S. Swedlund
SOLICITOR GENERAL
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
Email: atgservice@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 5,509 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 28th day of May 2025.

Paul S. Swedlund
Paul S. Swedlund
SOLICITOR GENERAL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served on Tim Whalen via Odyssey file and serve at whalawtim@cme.coop.

Dated this 28th day of May 2025.

Paul S. Swedlund
Paul S. Swedlund
SOLICITOR GENERAL

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

REPLY BRIEF OF APPELLANT DONNIE GAY EDWARDS

STATE OF SOUTH DAKOTA
Plaintiff/Appellee

vs.

DONNIE GAY EDWARDS
Defendant/Appellant

DOCKET #30905

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

HONORABLE CHRISTINA L. KLINGER
Presiding Circuit Judge

Timothy R. Whalen, Esq.
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
whalawtim@cme.coop
Attorney for Defendant/Appellant

Marty J. Jackley/Paul S. Swedlund
South Dakota Attorney General's Office
1302 E. Highway 14, Ste. 1
Pierre, SD 57501
atgservic@state.sd.us
Attorneys for Plaintiff/Appellee

Thomas P. Maher
Stanley County State's Attorney
204 N. Euclid Avenue
Pierre, SD 57501
tpm@maherlaw.org

NOTICE OF APPEAL FILED NOVEMBER 18, 2024

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

PRELIMINARY STATEMENT

As in the Appellant's Brief, Appellant shall be referred to herein as "Donnie;" the Appellee shall be referred to herein as "State; " The victims of the crimes will be referred to herein by their initials only even though they are over the age of majority. References to the Register of Actions shall be by "RA" followed by the page number thereof. References to the jury trial transcript shall be by "TT" followed by the page number of the transcript and the line number, if necessary. References to motion hearings shall be by "MH" followed by the date of the hearing, the page number of the transcript, and line number, if necessary. References to any exhibits from the jury trial shall be by "TT" followed by "Exh." and the exhibit number or letter.

The Jurisdictional Statement, Statement of the Legal Issues, Statement of the Case, and Statement of the Facts will not be restated herein, but will be relied upon in the form and content set forth in the Appellant's Brief. Donnie disputes the State's Statement of the Facts to the extent same is inconsistent or contrary to Donnie's Statement of Facts.

The State makes a comment in the Preliminary Statement portion of the Appellee's Brief that the "... designated record will be cited as RECORD followed by citation to the pertinent page." *Appellee's Brief, p. 1.* The State further makes a number of citations within the Appellee's Brief to the "RECORD" with page numbers following the citation. The record referred to by the State is the Presentence Investigation Report (PSI) prepared by a Court Services Office for the Unified Judicial Circuit pursuant to the Order for PSI/PHSCS & Psychosexual (Adult & Juveniles) entered by the Honorable Judge Christina L. Klinger. *RA, p. 1141.* The documents cited to by the State in the PSI are not part of the official record and are not part of the proceedings which constitute the

official record on appeal. The State sought access to the PSI for purposes of preparing its brief as per the representations made by counsel for the State on appeal. Donnie did not object to the State's request for access to the PSI because it merely requested access to the PSI and no effort by the State was made to make the PSI part of the official appellate record. The Circuit Court granted the State's request and allowed the State access to the PSI. The State did not seek nor did Donnie stipulate or agree that the PSI would be made part of the official record for appeal or a supplement to the record on appeal. In fact, no motion to supplement the record was made for the PSI nor was any order supplementing the record entered for the PSI. Moreover, in many instances the State cites to the RECORD for information contained in law enforcement officer reports or other similar documents which were not exhibits in the trial or part of any of the proceedings below. The content of the officer reports were not testified to by any witness at trial and were not offered into evidence at trial by any party. Consequently, Donnie objects to all citations made by the State to the "RECORD" in the Appellee's Brief and moves the Supreme Court to disregard said citations in all respects.

ARGUMENT

The Standard of Review as to each issue on appeal was addressed in detail in the Appellant's Brief and will not be restated herein, but will be referred to in support of Donnie's reply brief and the arguments herein as may be needed.

ISSUE 1: WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SEVER THE CHARGES.

The law is clear, as argued in Donnie's initial brief, that when considering a motion to sever, it is important for the Court to consider the factors which allow joinder of charges in the indictment. In this regard, there are three tests that allow for the joinder

of offenses

> ... The first test, involving offenses with the same or similar circumstances, permits joinder 'where separately charged offenses are closely related in time, location, and manner of execution.' ... When the 'separately charged offenses are closely related in location and manner of execution,' the close in time requirement 'has been broadly construed.' ... The second test asks whether the charges are 'based on the same act or transaction' ... and the third test examines whether the charges constitute 'parts of a common scheme or plan.' (Citations omitted).

State v. Loeschke, 2022 S.D. 56, ¶19, 980 N.W.2d 266.

The trial court's Findings of Fact and Conclusions of Law RE: Defendant's Motion for Severance analyzed the *Loeschke* tests and addressed each test. *RA, p.292.* The trial court concluded that the State did not meet the first test under *Loeschke* and joinder of the charges in the Indictment under the first test was prohibited. *RA, p. 292; Appx. Appellant's Brief, p. A-26, ¶8.* In the trial court's analysis of the first *Loeschke* test it is important to note the three factors involved in this test are in the conjunctive and all three factors must be present for a successful joinder of charges to occur under the first test. *Loeschke*, 2022 S.D. at 56, ¶19, The trial court analyzed the first test in detail and concluded that while the counts against Donnie were related in location and manner of execution, they were not closely related in time and the time gap prohibited the joinder under the first test. Consequently, issues associated with the first *Loeschke* test are not subject to appellate review, but are important for the discussion on the relevancy issue *infra*.

The trial court then analyzed the severance issue under the second *Loeschke* test which required that the charges be part of the same act or transaction. *RA, p. 292; Appx. Appellant's Brief, p. A-26, ¶9.* The trial court quickly concluded that the State had not argued nor presented any evidence as to the charges being part of the same act or

transaction and concluded that the second *Loeschke* test was inapplicable. *RA, p. 292; Appx. Appellant's Brief, p. A-26, ¶9.* Since the State did not present any evidence on the second *Loeschke* test at the motion hearing and did not argue that issue at the trial court level, it is foreclosed from arguing this issue on appeal. *State v. Mesa*, 2004 S.D. 68, ¶15, 681 N.W.2d 84.

The trial court then analyzed the charges under the third *Loeschke* test by utilizing the 19-19-404(b) other acts analysis. The other acts analysis requires that the trial court first determine whether or not the other acts are relevant. *SDCL 19-19-403; State v. Thomas,* 2019 S.D. 1, ¶22, 922 N.W.2d 9. If relevant, then the trial court must engage in a balancing test to determine whether the probative value of the evidence is substantially outweighed by the 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; State v. Thomas,* 2019 S.D. 1, ¶22, 922 N.W.2d 9. Although the trial court held that the State did not meet its burden under the first two *Loeschke* tests, Donnie's argument on those tests is applicable and useful on the third *Loeschke* test regarding the relevancy issue under the other acts analysis. Given the trial court's determination that joinder could not occur under the first two *Loeschke* tests, one is hard-pressed to see how the evidence can be relevant under the third *Loeschke* test. This is the point of the extensive review and argument in Donnie's initial brief and remains pertinent to the third *Loeschke* test herein. In the first *Loeschke* test, the evidence can be sufficient for joinder "... where separately charged offenses are closely related in time, location, and manner of execution ..." *Loeschke*, 2022 S.D. at 56, ¶19. If the State cannot meet this test, then the evidence should not be determined to be relevant under the law in the other acts analysis. Clearly, based upon Donnie's

arguments as set forth in his initial brief, the evidence in M.S.'s case is not relevant to the issues in K.R.'s case and vice-versa. The trial court's analysis of the third *Loeschke* test is further flawed, as is the State's argument on this issue as well. This is so because the key analytical point on this issue is that in order for the other acts of domestic violence or assault to be admissible under the common scheme or plan theory, the other acts must be against the same victim and perpetrated by the same perpetrator. *State v. Solis,* 2019 S.D. 36, ¶23, 931 N.W.2d 253; *Loeschke*, 2022 S.D. at 56, ¶23 . In *Solis* and *Loeschke* the Supreme Court specifically held and approved the use of other acts evidence to support joinder under the common scheme or plan theory in domestic cases and stated:

> … Domestic abuse often has a history highly relevant to the truth-finding process. When an accused had a close relationship with the victim, prior aggression, threats or abusive treatment of the **same victim by the same perpetrator** is admissible when offered on relevant issues under Rule 404(b). The rationale for admissibility is that an accused's past conduct in a familial context tends to explain later interactions between the same persons. (Emphasis added)

Solis, 2019 S.D. at 36, ¶23; *Loeschke*, 2022 S.D. at 56, ¶23. Clearly, the hinge pin on admission of joinder of charges under the third *Loeschke* test in domestic abuse cases is that the other acts are perpetrated by the same perpetrator against the same victim. Here the other acts evidence of the charges against M.S. involved a different victim, K.R. and vice-versa. Moreover, as argued extensively at the trial court level and here, there was no evidence to support a crossover of the evidence in each victim's trials. The State's brief focuses on the evidence that Donnie engaged in with each of the victims as it relates to their practices at home and cites case law that supports the admission of other acts evidence as to those facts, but it ignores the elephant in the room. The State relied heavily at trial on the photographs, text messages, videos, and other evidence of the activities associated with M.S. after she was 18 years old on K.R.'s case for charges that

were alleged to have occurred when she was a young teen. The cases cited by the State on this issue did not involve the same type of extensive and substantial evidence of activity with a victim when she was 18 years of age and older in order to prove charges that occurred with an unrelated victim when she was a young person. It was an abuse of discretion and prejudicial error to admit the photographs, videos, and text messages of M.S. in evidence in K.R.'s case. Crucial to this analysis is the fact that there was no physical or forensic evidence of any of the crimes against K.R. and there was no such evidence for any of the crimes against M.S. before she was 18 years old either. Moreover, other than the victims, there were no witnesses called to verify the sexual assault claims made by either of them when they were in their young teens.

While there are cases where prior sexual acts or encounters with other persons may be admitted at the trial of the principal offense, those cases are not domestic abuse cases and are distinguishable from the case at bar on this point as well as argued *supra*. See, *State v. Taylor*, 2020 S.D. 48, 948 N.W.2d 342. This is particularly true since the State here has argued a specific fact pattern which it claimed justified the joinder under the third *Loeschke* test and the court relied upon the facts presented in this respect to deny the severance motion. Key to that decision was the grooming aspect of the case which is very rarely present in rape cases outside of the familial setting. This evidence, however, as argued *supra* was not the key evidence, but, rather, the photographs, videos, and text messages were the evidence that sealed the deal on K.R.'s case even though it was not relevant to her case and did not involve her in any regard.

Additionally, the trial court erred when it determined that the probative value of the other acts evidence was not substantially outweighed by the unfair prejudice to Donnie. The prejudice against Donnie is apparent and egregious. The only real evidence

the State had against Donnie was the videos, photographs, and text messages regarding M.S. when she was over the age of 18 years. The importance of this evidence is clear from the weight the State placed on same during the trial and in closing argument. Absent the above evidence, the only evidence against Donnie in either case is the statement from the victims, M.S. and K.R. The State presented no other evidence of the crimes which occurred while M.S. and K.R. were minors. Clearly, absent the physical evidence in M.S.'s case generated when she was over the age of 18 there is little chance of a conviction in K.R.'s case. Likewise, the evidence in M.S.'s case does not substantiate the claim that the crimes against M.S. or K.R. were part of a common scheme or plan.

In light of the above, the trial court clearly abused its discretion and committed reversible error when it denied Donnie's motion to sever the charges.

ISSUE 2: WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AS A RESULT OF JUROR BIAS WHICH CAUSED STRUCTURAL ERROR IN THE TRIAL.

The State misapprehends the *Piper v. Young* case it cited as controlling authority on this issue. 2019 S.D. 65, 936 N.W.2d 793. *Piper* was a habeas corpus case wherein the defendant did not properly preserve a voir dire issue either on direct appeal or in his challenge to the effectiveness of his trial counsel, but only raised the issue for the first time in the second habeas corpus appeal. *Piper*, 2019 S.D. at 65, ¶¶57-60. Moreover, this Court analyzed the voir dire issue under the dictates and legal principles espoused in the *Strickland* case relative to ineffective assistance of counsel claims in habeas corpus cases. *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d. 674 (1984). Additionally, the voir dire issue in *Piper* was not the same issue as in the case at bar, but dealt with counsel's questioning of potential jurors during voir

dire. *Piper* focused on prospective jurors, whereas Juror #77 was already seated on the jury and the trial was set to begin. Additionally, it is well settled law that "... [t]he United States Constitution and the South Dakota Constitution guarantee an accused the right to an impartial jury. *State v. Leader Charge,* 2021 S.D. 1, ¶9, 953 N.W.2d 672. The first step in a fundamentally fair and constitutionally impartial trial is the "...[v]oir dire examination ..." which is intended to "...enable counsel to determine whether any prospective jurors ... are possessed of beliefs which would cause them to be biased in such a manner as to prevent ..." a defendant from "... obtaining a fair and impartial trial." *Id.*, at ¶9. The State disregards this legal principle in favor of *dicta* in *Piper* that it argues supports the contention that Donnie is entitled to a fair trial only, not a fair venire. This is preposterous! The State's interpretation of *Piper* ignores the most fundamental aspect of a jury trial – the jurors.

Donnie asserts structural error in the matter involving Juror #77 because he was denied a basic fundamentally fair trial as a result of Juror #77's actions and the manner in which the trial court handled the matter. There is nothing more fundamental to a trial than jury selection. Voir Dire is the process by which the parties determine whether or not any prospective jurors have any preconceived notions, or inherent biases or prejudices. *SDCL 23A-20-6; Leader Charge*, 2021 S.D. at 1, ¶ 9. This process relies heavily upon the honesty of the prospective jurors. At the conclusion of voir dire, the parties and the trial court determined who the alternate jurors would be. *TT, p. 266.* Juror #77 was not one of the alternates. Juror #77 was set to serve as a juror until she revealed her bias and prejudices that she failed to disclose during voir dire. Donnie was unable to voir dire Juror #77 because the voir dire process had concluded. Donnie was denied the chance to have Juror #77 excused for cause and voir dire other prospective

jurors in her place. Donnie was not able to exercise a preemptory challenge to Juror #77 because the time had passed for such action. The initial phase of the jury trial was tainted by the refusal of Juror #77 to be forthright and honest, and Donnie was unable to remedy that taint.

Structural error is error which "... so greatly affect[s] the framework of the trial ..." that it merits a "... automatic reversal." *State v. Arguello*, 2015 S.D. 103, ¶5, 873 N.W.2d 490. Structural error "... necessarily renders a trial fundamentally unfair ... [and] ... [a]s one court stated, '[a] structural error resists harmless error review completely because it taints the entire proceeding.'" *State v. Guthmiller*, 2011 S.D. 62, ¶16, 804 N.W.2d 400. Juror #77's actions were egregious in nature. The trial court should have granted Donnie's motion for mistrial.

In light of the above, the trial court clearly abused its discretion when it denied Donnie's motion for mistrial and committed reversible error on this issue.

ISSUE 3: WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AS A RESULT OF THE PROSECUTION QUESTIONING A WITNESS ABOUT THE DEFENDANT'S PAST WITHOUT THE PROPER HEARING HAVING BEEN HELD BY THE COURT.

The State asserts in its brief that K.R. had identified Donnie as the perpetrator of the sexual molestation when she was a minor to her physician and that the medical records substantiate this fact. This is untrue. Dr. Jessica Rasmussen testified at trial about the statements made by K.R. relative to the molestation claims. *TT, pp. 495-498.* Dr. Rasmussen testified that K.R. had not identified the perpetrator of the sexual molestation when she was young, nor did she indicate her age at the time she was molested. *Id.* Further, Dr. Rasmussen indicated that K.R. had said that she was molested by a household member, but was no longer living with the person. *Id.* The identity of the

person was never revealed by testimony or the medical records. Furthermore, K.R. testified that she mentioned to Dr. Rasmussen that she had been molested, but she confirmed that she did not tell Dr. Rasmussen who had molested her, only that it was a family member. *TT, p. 278.* Moreover, K.R. had testified that she was previously molested by her biological father when she was younger. *TT, p. 272.* At the time of the examination by Dr. Rasmussen, K.R. was not living with her biological father or Donnie. Consequently, the State's representation that K.R. had identified Donnie as the person who molested her to her physician is not supported by the evidence.

Before and during the trial, the trial court rendered decisions on what other acts evidence could be used and what evidence was prohibited. The State never brought the comment about Donnie's past to the trial court before trial for a ruling on its admissibility. Additionally, the State never provided any notice that it intended to use the statement about Donnie having a past in any part of its case or for impeachment purposes. Consequently, the trial court did not have the opportunity to hear, consider, and rule on this evidence before the bell was rung in court in the presence of the jury. The State's failure to provide notice deprived not only Donnie, but also the trial court of the opportunity to prevent an inadvertent disclosure of inadmissible evidence at trial. This is one of the purposes of the statutory requirement for notice of the intended use of other acts evidence at trial. *SDCL 19-19-404(b)(3).*

Moreover, when other acts evidence is be considered by the trial court, it must first determine whether or not the evidence is relevant and then engage in a balancing test to determine if the probative value of such evidence 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; State v. Thomas,* 2019 S.D. 1, ¶22, 922 N.W.2d 9. Absent the above procedure by the trial court the evidence is not admissible at trial for any purpose. Finally, if other acts evidence is admitted at trial, then the trial court must give the jury a special instruction relative to the proof of the other act and the impact such evidence may have on the issues at trial. *State v. Taylor,* 2020 S.D. 48, ¶39, 948 N.W.2d 342. The trial court did not give the jury the other acts evidence instruction.

The State argues that the bell can be unrung on the comment about Donnie's past because the evidence is overwhelming against him. All of the evidence relied upon by the State in this regard occurred with M.S. and it occurred when she was over the age of 18. None of the evidence referred to by the State on this issue occurred with K.R. or even when K.R. lived with Donnie. Furthermore, the State essentially argues that the trial court was required to balance the comment about Donnie's past against all of the evidence at trial, but the State failed to cite the authority for this legal principle. The standard for admission of other acts evidence does not require the trial court to balance the other acts evidence against all the other evidence at trial. The totality of the evidence approach is not the proper analytical tool for this issue. Donnie was entitled to the analysis and procedure which is clearly and unequivocally set forth in the law governing other acts evidence. He was denied this process and such denial constitutes reversible error.

In light of the above, the trial court clearly abused its discretion when it denied Donnie's motion for mistrial and committed reversible error on this issue.

CONCLUSION

In light of the above and foregoing, Donnie should be granted the relief requested in this appeal, the jury verdict should be vacated, the trial court decisions reversed, and

Donnie should be granted a new trial on the severed charges.

Dated this 27th day of June, 2025.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Appellant

CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant, hereby certifies that the Appellant's Reply Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellant's Reply Brief contains 18298 characters and 3793 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellant's Brief.

Dated this 27th day of June, 2025.

/S/ TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the Appellant's Reply Brief on the attorneys for the Appellee at their e-mail addresses as follows:

Marty Jackley/Paul S. Swedlund
South Dakota Attorney General's Office
1302 E. Highway 14, Ste 1
Pierre, SD 57501-8501
atgservice@state.sd.us
Attorneys for the Appellees

Thomas P. Maher
Stanley County State's Attorney
204 N. Euclid Avenue
Pierre, SD 57501
tpm@maherlaw.org

by the UJS Odyssey System on the 27th day of June, 2025, at Lake Andes, South Dakota.

Further, the undersigned hereby certifies that the original of the above and foregoing Appellant's Reply Brief was mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 on the 27th day of June, 2025.

/S/TIMOTHY R. WHALEN
Whalen Law Office, P.C.
P.O. Box 127
Lake Andes, SD 57356
Telephone: 605-487-7645
whalawtim@cme.coop
Attorney for the Appellant