IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29159

STATE OF SOUTH DAKOTA,

Appellee,

vs.

SEAN LEADER CHARGE,

Appellant.

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

The Honorable John Brown, now retired

BRIEF OF APPELLANT

Notice of Appeal was filed on October 18, 2019

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Konrad Law, Prof. LLC
1110 E. Sioux Ave.
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Attorney for Defendant/Appellant
Sean Leader Charge

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PRELIMINARY STATEMENT

The following record citations will be used in this brief. Citations to the settled record will be denoted "SR" followed by the appropriate page number. Citations to the arraignment hearing transcript will be denoted "IAT" followed by the appropriate page number and line number. Citations to the voir dire transcript will be denoted "VDT" followed by the appropriate page number and line number. Citations to the motion for new trial evidentiary hearing transcript will be denoted "MHT" followed by the appropriate page number and line number.

JURISDICTIONAL STATEMENT

On April 30, 2019 Appellant was found guilty at jury trial of two counts of Sexual Contact with a Child in violation of SDCL 22-22-7. SR 149. Appellant was sentenced on July 24, 2019. SR 393. An Amended Judgment of Conviction and Order of Sentence was filed with the Mellette County Clerk of Court on September 4, 2019. SR 411. Appellant filed a notice of appeal on October 18, 2019. SR 523. This is an appeal from a final judgment of conviction and is an appeal of right pursuant to SDCL 23A-32-2.

STATEMENT OF THE ISSUE

I. Did the trial court err by denying Appellant's motion to remove juror thirty-one Donna Brandis for cause, even though she stated three times that she could not be an impartial juror, and she ultimately served on the jury that found Appellant guilty on all counts charged?

Relevant Cases:

State v. Flack, 89 N.W.2d 30 (S.D. 1958).

State v. Etzkorn, 1996 S.D. 99, 552 N.W.2d 824.

State v. Hansen, 407 N.W.2d 217 (S.D.1987).

Relevant Statutes/Constitutional Provisions:

S.D.Const. art. VI, § 7

SDCL 23A–20–13.1

STATEMENT OF THE CASE

On May 29, 2018 Appellant was indicted in Mellette county on two counts of Sexual Contact with a Child, in violation of SDCL 22-22-7. SR 1. Appellant was appointed counsel, Todd Love, attorney at law. SR 9. Appellant entered a plea of not guilty on June 11, 2018, with attorney Rose Ann Wendell appearing in place of attorney Todd Love. IAT 5:1-7. The case was set for jury trial. Several status hearings were held. Defense counsel Love did not file any substantive pretrial motions other than a motion to continue. SR 55. A jury trial commenced on April 29, 2019. VDT 2:1-2. After a two day trial, the jury found the Appellant guilty on the two counts charged in the indictment. SR 149. The Appellant was sentenced on July 24, 2020. SR 393 The trial court found that mitigating factors existed to depart from the mandatory minimum sentence required by SDCL 22-22-1.2. SR 393. Thereafter, Appellant filed a Motion for New Trial on August 15, 2019. SR 396. The motion was initially denied for timeliness; however upon the trial court reviewing Appellant's motion to reconsider, the Court granted a hearing on Appellant's motion for new trial. SR 402-409. An evidentiary hearing on Appellant's motion for new trial hearing was held on September 11, 2019. MHT 3:1-2. The Court denied the motion for new trial. SR 511. An Amended Judgment of Conviction and Order of Sentence was filed with the Mellette County Clerk of Court on September 4, 2019. SR 411. Appellant appeals from said amended judgment of conviction. The undersigned has filed a stipulation for extension of time to file

Appellant's brief and a motion to continue the deadline for filing Appellant's Brief. This motion was granted, and the Appellant's Brief is timely filed on March 31, 2020.

STATEMENT OF FACTS

The facts relevant to the appeal issue raised are set forth below.

As stated above, Appellant was indicted on Appellant's trial commenced on April 29, 2019. SR 1. A prospective jury panel was called. VDT 2:13-14. One of the jurors was juror number thirty-one, Donna Brandis. VDT 4:17. Defense counsel Love was allowed by Judge Brown to conduct his void dire first. VDT 12:21-24. After several preliminary questions were asked and answered, defense counsel Love, prospective juror Donna Brandis, and Judge Brown engaged in the following discussion on the record:

> Love: Ms. Brandis, what do you have going on?
>
> Brandis: I'm the City finance officer and I am the only person in my office.
>
> Love: Okay.
>
> Brandis: I got water bills, payroll. I know both sides of the family and I just don't feel I can be a fair juror.
>
> Love: So it sounds like the city of White River is going to stop if you're- -
>
> Brandis: Yeah, it will. These people won't get their water bills.
>
> Love: Well, you know, don't say that. They might ask me to keep you all week. But it sounds like it would put you quite a bit behind in your job?

Brandis: Yes, it would, sir.

Love: And in addition, something we haven't really gotten to yet but you said you know the family?

Brandis: Yeah. I deal with them when they come in my office.

Love: Is there anything about your interaction with the family that you think would make it difficult for you to be here today?

Brandis: The victim comes through my alley because I live right across from the high school. She goes to the playground and I visit with her. I just don't feel I can do this.

Love: You don't think you could be fair - -

Brandis: No.

Love: and judge this case based just on what you hear today?

Brandis: Right.

Love: I guess I would ask that Ms. Brandis be excused, Your Honor.

The Court (Judge Brown): Ma'am, I typically don't grant excuses for job-related reasons. Obviously, everyone is busy and I appreciate that there are Time frames to meet.

We've got people here that are in the middle of calving, important issues. There's always an excuse for that.

I guess what my question really is is we are trying to find a jury that can be fair and impartial and judge the facts of the case based solely on what comes in through the evidence presented here in court. I know that a job like you have, you're the only one. It would certainly be inconvenient for you. But you understand that the Defendant and the State are entitled to have a fair and impartial jury and is there any reason why you feel you cannot listen to the evidence here - -

Brandis: No - -

The Court (Judge Brown): and present a fair verdict?

Brandis: I can't.

The Court (Judge Brown): I'm going to deny the request to excuse then at this point. Thank you.

VDT 34:1-36:4. Ultimately, juror thirty-one Donna Brandis was left on the jury panel. VDT 80:2-10. Defense counsel Love did not use a peremptory challenge to remove Donna Brandis even though she spoke with the alleged victim at the playground and indicated that she could not be fair.

After a two-day trial that commenced on April 29, 2019, the jury found the Appellant guilty of both counts of sexual contact with a child as charged in the

indictment. SR 149. After the jury trial, Appellant retained new counsel, the undersigned. SR 170. Appellant was sentenced, after convincing the Court that the mandatory minimum sentences should not apply to Appellant. SR 393 and 411. After the judgement of conviction was filed, Appellant filed a motion for new trial based on the grounds of jury misconduct and irregularity. SR 396. An evidentiary hearing was conducted on September 11, 2019. MHT 3:1-2.

Mrs. Brandis was called as a witness at the evidentiary hearing on the Motion for New Trial. MHT 23:12-15. In her sworn testimony, she and the undersigned had the following exchange:

> Konrad: Did you answer honestly and truthfully all the questions that you were asked in the void dire process, which is where the attorneys ask the jurors questions? Did you answer those questions truthfully?
>
> Brandis: Yeah.
>
> Konrad: Do you recall having an open discussion with attorney Todd Love and Judge Brown in open court during that selection process?
>
> Brandis: I don't understand what you're saying.
>
> Konrad: Do you recall making a statement something to the effect that you work at the water company and that you also know both sides of the family and that you don't feel you can be a fair juror? Do you recall making that statement?

Brandis: No; I don't.

Konrad: Do you recall telling the judge that you can't be a fair juror?

Brandis: No, I don't remember that.

Konrad: And the jury trial would have been back in the end of April in this year; correct?

Brandis: Yep.

***

Konrad: Do you know the victim in this case?

Brandis: No.

MHT 27:2-28:15. Between end of April and the middle of September, Brandis forgot that she took part in the voir dire process and that she knew the victim. Her statements during voir dire process compared to the statements made at the evidentiary hearing are in direct contrast. From any point of view, her statements changed considerably. There appear to be consistency and credibility issues with her statements.

Appellant appeals from a final judgment of conviction as a matter of right.

STANDARD OF REVIEW

This Court reviews a trial court's decision to refuse to grant a "for cause" juror excusal under the "abuse of discretion standard." *State v. Darby*, 556 N.W.2d 311, 322, 1996 S.D. 127 ¶43.

The trial court has broad discretion in determining juror qualification. Actual, material prejudice resulting from the trial court's refusal to excuse a juror for cause must be shown for a reversal." *State v. Garza,* 1997 SD 54, ¶ 8, 563 N.W.2d 406 (citing *State v. Hansen,* 407 N.W.2d 217, 220 (S.D.1987)). However, "[a]s a policy matter, when challenges of venirepersons for actual bias arise, trial courts would be wise to err on the side of disqualification." *State v. Blue Thunder,* 466 N.W.2d 613, 620 (S.D.1991).

"Before we will reverse a trial court's refusal to disallow for cause potential jurors, the movant must show actual prejudice resulting from the trial court's decision." *Darby,* 1996 SD 127, ¶ 36, 556 N.W.2d at 321 (citing *State v. Blue Thunder,* 466 N.W.2d 613, 620 (S.D.1991)). " 'Reversible error exists only where defendant can demonstrate material prejudice.' " *Id.*

ARGUMENT

I. Did the trial court err by denying Appellant's motion to remove juror thirty-one Donna Brandis for cause, even though she stated three times that she could not be an impartial juror, and she ultimately served on the jury that found Appellant guilty on all counts charged?

Both the South Dakota and the United States Constitutions guarantee trial by an impartial jury. S.D.Const. art. VI, § 7; U.S.Const. amend. VI; *Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492, 502 (1992); *State v. Rhines,* 1996 SD 55, ¶ 41, 548 N.W.2d 415, 430; *State v. Hansen,* 407 N.W.2d 217, 220 (S.D.1987). "Jury selection is an important means of ensuring this right. The voir dire process is designed to eliminate persons from the venire who demonstrate they cannot be fair to either side of the case." *Rhines,* 1996 SD 55, ¶ 41, 548 N.W.2d at 430

Pursuant to SDCL 23A–20–13.1, juror challenges for cause may be taken on the following grounds:

* * *

> (11) The prospective juror has knowledge of some or all of the material facts of the case, and has an unqualified opinion or belief as to the merits of the case.
> (12) The prospective juror has a state of mind evincing enmity against, or bias to or against an attorney, the defendant, the prosecution, the alleged victim or complainant in the case.
>
> * * *
>
> (21) A challenge for actual bias showing the existence of a state of mind on the part of a prospective juror, in reference to the case or to the defendant, the prosecution, alleged victim, or complainant that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially, without prejudice to the substantial rights of the party challenging.

In a criminal trial, the judge has the primary responsibility to make certain that a fair and impartial jury has been selected. *State v. Etzkorn,* 1996 SD 99, 552 N.W.2d 824. The mere expression of a predetermined opinion regarding guilt during voir dire does not disqualify a juror per se. *State v. Hansen,* 407 N.W.2d 217, 220 (S.D.1987); *State v. Muetze,* 368 N.W.2d 575 (S.D.1985). However, a potential juror should be excused for cause if that juror is not able to set aside preconceptions and render an impartial verdict. *Hansen,* 407 N.W.2d at 220; *Muetze,* 368 N.W.2d at 585. *State v. Darby,* 1996 SD 127, ¶ 34, 556 N.W.2d 311, 320.

A review of the voir dire questioning of Brandis shows a clear abuse of discretion by the trial court's in refusing to excuse her for cause. Juror Donna Brandis stated "I know both sides of the family, and I just don't feel I can be a fair juror." VDT 34:6-8. The alleged victim in the case was a young child. VDT 46:19-23. Brandis went on to say in voir dire: " The victim comes through my alley because I live right across from the high school. She goes to the playground and I visit with her. I just don't feel I can do this." VDT 34:24-35:2. After this discussion was made, attorney Love for the Appellant

moved to excuse Brandis for cause citing her inability to be fair and impartial. VDT 35:8-9.

Judge Brown, before ruling on the motion to excuse for cause, asked Brandis the following question: "But you understand that the Defendant and the State are entitled to have a fair and impartial jury and is there any reason why you feel you cannot listen to the evidence here - - and present a fair verdict". VDT 35:20-23. The record then becomes a bit confusing as Brandis interrupts the judge stating: "No, I can't." The question proposed by Judge Brown is compound and poorly worded. At first he asks her if she is aware of the right that the State and Defendant have to an impartial jury. VDT 35:20-23. Then, in the same breath and same question, he asks her if there is any reason why she cannot sit on the jury and be impartial. VDT 35:20-23.

Rather than exploring the reasons for Brandis's impartiality as stated three times prior, Judge Brown asks a confusing question. Brandis's answer does not make any sense in the context of the question. Judge asks a yes or no question, and she responds with " No, I can't." VDT 35:24-36:1 Unfortunately, Judge Brown did not seek any clarification of this answer to a confusing question. He denied the request to excuse. VDT 36:2-3.

Because of the ambiguity of the question and answer. It is important to look at the context. Previously Ms. Brandis had stated "I just don't think I can be fair," "I just don't feel I can do this," and she denied the ability to be fair.

Judge Brown's subsequent questioning does nothing to expand the record or delve into the stated partiality. Judge could have engaged in a side-bar meeting or some sort of discussion about the basis for her family knowledge or her specific reasons for partiality.

Rather, Judge Brown treated this matter as an employment related matter, which does not make sense in the context of the answer. No matter how look at the question proposed by Judge Brown, it is bound to result in an answer that calls for both a "yes" and a "no" answer in the same question. There is *never* an unequivocal statement from juror Brandis stating that she is able to serve as a fair and impartial juror after stating three previous times that she is unfit to be a juror on this case.

Nevertheless, it is clear from the record that Brandis stated her impartiality at least 3 times, and the subsequent questioning by Judge Brown did nothing to clarify her responses or restore her to a point where she felt she could be an impartial juror. Given her expressed inability to be fair in impartial, it would be a logical leap to suggest that anything in Judge Brown's questioning would have changed her mind on her impartiality. The question posed by Judge Brown only makes the situation ambiguous at best.

"Although a potential juror may express a predetermined opinion during voir dire, once she has declared under oath that she can act fair and impartial, she should not be disqualified as a juror." *State v. Knoche*, 515 N.W.2d 834, 840 (S.D.1994). In this case, juror Brandis never declared under oath that she can act in a fair and impartial manner on the jury. She was never asked again in the voir dire process about her ability to render an impartial verdict. Ultimately, she was not excused for cause, and neither party struck her with a peremptory challenge.

In addition to failing to proving error concerning juror thirty-one Donna Brandis, the Appellant must also prove prejudice. *State v. Daniel*, 2000 SD 18 at ¶ 17, 606 N.W.2d at 535. To prevail, the Appellant must establish both error and prejudice.

In *Etzkorn*, prospective jurors and were asked numerous times by defense counsel whether or not they could set aside their personal opinions about drunk driving, and presume the defendant innocent. The jurors stated that they could not. The voir dire transcript is published in the *Etzkorn* opinion. The prospective jurors were asked multiple questions concerning their ability to set aside their personal opinions and follow the law. Much like this case, the prospective jurors indicated several times that they would have issues setting their personal opinions aside. The counsel for Defendant renewed his request for removal for cause, but the trial court denied the motion. The defendant was convicted at trial and appealed. This Court held that the trial court erred when it improperly failed to excuse two potential jurors for cause for failure to set aside preconceptions about the case. The This Court also found that prejudice resulted from said err because Defendant was required to use his peremptory challenges to remove a juror that should have been removed for cause.

The *Etzkorn* case is analogous to this case in that a potential juror stated several times that she could not be impartial. In *Etzkorn,* the defendant was able to strike the two jurors that showed partiality with peremptory challenges, but upon appeal, supplemented the record with a list of other potential jurors he would have struck had he not had to use peremptory challenges on jurors that should have been excused for cause. The *Etzkorn* court found that prejudice resulted from the court's error.

In contrast, this case is unique in that defense counsel, nor the state for that matter, removed juror Brandis by preemptory strike. For this reason, she was allowed to remain on the jury, and she was not ultimately the alternate. Juror Brandis sat throughout the trial, heard evidence, deliberated, and agreed in the final verdict, all the while stating

multiple times to the Court that she could not be impartial. In this case, the prejudice to Appellant is greater than if Brandis was removed by peremptory challenge. The error made my Judge Brown ultimately allowed Brandis to serve on the final selected jury. Juror Brandis was not the alternate juror. The Appellant exercised all ten of his statutory peremptory challenges. 79:25.

As stated above, the undersigned was not counsel of record at trial. While the defense counsel's reasoning for striking the jurors is not part of the record, one logically can conclude that defense counsel wanted other potential jurors removed viewed to be more damaging than Brandis. Obviously, the state did not use its preemptory challenges on Brandis. Ultimately, and somewhat uniquely, Brandis was left on the jury. There is no rule that requires a defense counsel to strike certain jurors. The decision concerning utilization of peremptory challenges is left to the sound decision of the trial attorney.

In *State v. Flack,* 89 N.W.2d 30 (S.D. 1958), the Defendant in that case moved the trial Court to excuse three potential jurors for cause. The trial court denied the motions, and the Defendant chose to use three peremptory challenges on those same potential jurors. The defendant made motion for additional peremptory challenges and that motion was denied. The defendant was convicted of cattle theft and appealed.

This Court stated:

> A defendant should not be compelled to use his peremptory challenges upon prospective jurors who should have been excused for cause.
>
> Prejudice will be presumed if a disqualified juror is left upon the jury in the face of a proper challenge for case, so that defendant must either use one of his peremptory challenges or permit the juror to sit. Prejudice results when defendant is required to, and does, exhaust all of his allowable peremptory challenges.

State v. Flack, 89 N.W. 2d 30, 32 (S.D. 1958).

Given the reasoning in *Flack* and *Etzkorn,* it follows that the trial court's error in failing to remove Brandis for cause, results in presumable prejudice. Defendant was faced with having to use up a valuable peremptory challenge or allow Brandis to sit on the jury. Trial counsel, for whatever reason, chose the latter. The reasoning in *Flack* suggests that the Defendant should never be "compelled" to make that same decision as a result of a trial court error.

Appellant has conclusively shown, based upon the the voir dire transcript, that the twelve final jurors who heard the evidence and convicted Appellant based upon that evidence were not impartial. *State v. Darby,* 1996 SD 127 at ¶ 43, 556 N.W.2d at 321. Appellant made a proper motion to the trial court to exclude juror Brandis for cause; however, Judge Brown's subsequent questioning did nothing to remedy the juror's stated impartiality, and in addition, further complicated the record. Juror Brandis, after raising at least three statements regarding her partiality, never stated under oath or affirmation that she could serve as an impartial juror. Judge Brown left her on the jury panel.

Consequently, the trial court did err and abuse its discretion by denying Appellant's request to remove juror Donna Brandis. This error by the court resulted in presumable prejudice against the Defendant, as it is clear from the record that he was convicted by a a jury that was *not* fair and impartial, in violation of his constitutional rights.

CONCLUSION

Appellant requests that this Court reverse the trial court's ruling on Appellant's motion to remove juror thirty-one Donna Brandis for cause, vacate the judgment of conviction and verdict, and grant Defendant a new trial

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument on all issues and matters raised in this appeal.

Dated this 31st day of March, 2020.

Konrad Law, Prof. LLC

By _____

Robert Thomas Konrad
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Attorney for Defendant/Appellant
Sean Leader Charge

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellee's Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief is 18 pages and was prepared using Apple Pages and uses proportionally spaced font [Times New Roman] in 12-point type. Based on the word-count feature of the Apple Pages processing system, the Brief contains 3,685 words and 24,815 characters counting spaces.

_____
Robert Thomas Konrad

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Brief of Appellant, with attached Appendix, was sent by e-mail for electronic filing and service to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk
E-mail: scclerkbriefs@ujs.state.sd.us

Mr. Brigid Hoffman
E-mail: atgservice@state.sd.us and brigid.hoffman@state.sd.us

on March 31, 2020.

The original and two copies of the Brief of Appellant, with attached Appendix, were mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

on March 31, 2020.

Robert Thomas Konrad

APPELLANT'S APPENDIX

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*** All items in the appendix are numbered at the bottom, center of each page, consecutive to the numbers inAppellant's Brief, starting at page 19. The page number denoting the page of the settled record is on the bottom, left of each page.

APPELLANT'S APPENDIX

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*** All items in the appendix are numbered at the bottom, center of each page, consecutive to the numbers inAppellant's Brief, starting at page 19. The page number denoting the page of the settled record is on the bottom, left of each page.

STATE OF SOUTH DAKOTA COUNTY OF MELLETTE	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff, vs. SEAN LEADER CHARGE, DOB: 07/03/1999 Defendant.	47CRI:18-26 **JUDGMENT OF CONVICTION** **&** **ORDER OF SENTENCE**

CONVICTION

The above mentioned defendant was arraigned in court on June 11, 2018 on an indictment charging the Defendant with the crimes of:

Count (1) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

Present at the arraignment hearing were the following parties: Zachary Pahlke, prosecuting attorney; Sean Leader Charge, defendant; Todd Love, defense counsel. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges. The Defendant pled not guilty to the Indictment and requested a jury trial.

A jury trial commenced at the Mellette County Courthouse in White River, South Dakota, on April 30, 2019. At trial, the Defendant was represented by his attorney Todd Love and the State of South Dakota was represented by Mellette County State's Attorney Zachary J. Pahlke. On May 1, 2019 the Mellette County jury found the defendant guilty of:

Count (1) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony; and

Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

Upon the request of the defendant the finding of guilt was initially withheld pending a request for a suspended imposition of sentence. On July 24, 2019 at the sentencing hearing the court denied the request for a suspended imposition of sentence and imposed the finding of guilt. It is, therefore, the JUDGEMENT of this Court that the Defendant, Sean Leader Charge, is GUILTY of the crimes of:

Count (1) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony; and

Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

SENTENCE

On July 24, 2019 a sentencing hearing was held. Present at the arraignment hearing were the following parties: Zachary Pahlke, prosecuting attorney; Sean Leader Charge, defendant; Rob

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Konrad, defense counsel. The Court asked the Defendant if any legal cause existed to show why sentence should not be pronounced, there being none, the Court made the following findings.

Mitigating Factors:

1) The defendant is a young man;
2) There is no history of violence
3) The defendant has a good work history;
4) The defendant is committed to his family and has provided for them;
5) The defendant has good family support in the community;
6) The facts of this case are less serious compared to other cases with this same charge;
7) The defendant has been assessed a low risk in his psychosexual evaluation;

Upon noting several mitigating factors the Court pronounced the following sentence:

Count (1) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

ORDERED that the Defendant shall be sentenced to the South Dakota Penitentiary for a period of ten (10) years, with credit for eighty-five (85) days in County Jail, there to be kept, fed and clothed according to the rules and discipline governing said penitentiary;

ORDERED that five (5) years of the sentence shall be suspended;

ORDERED that the Defendant pay court cost in the amount of one-hundred and four ($104) dollars. Said cost and fees shall be paid to the Mellette County Clerk of Courts;

Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

ORDERED that the Defendant shall be sentenced to the South Dakota Penitentiary for a period of ten (10) years, with credit for eighty-five (85) days in County Jail, there to be kept, fed and clothed according to the rules and discipline governing said penitentiary;

ORDERED that five (5) years of the sentence shall be suspended;

ORDERED that the Defendant pay court cost in the amount of one-hundred and four ($104) dollars. Said cost and fees shall be paid to the Mellette County Clerk of Courts;

ORDERED that count 1 and count 2 shall be considered a single transaction and the sentences for these charges shall be ran ***concurrently*** and that the following are to be applied to each count ***concurrently***.

ORDERED that the Defendant reimburse Mellette County through the Mellette County Clerk of Courts for the cost of his court appointed attorney fees.

ORDERED that the Defendant pay restitution to the juvenile victim's family (A.R.) Latasha Ryan, being the mother of the victim, in amount of $5,101.20 for travel expenses incurred attending counseling to address the trauma inflicted by this crime;

ORDERED that the Defendant pay prosecution cost as follows:

a. $3152.50 for the Psychosexual Evaluation;
b. $98.80 for Transcript Cost;
c. $991.06 in professional witness fees;

ORDERED the following conditions;

(1) The Defendant shall maintain a good disciplinary record and comply with all programming required by the Department of Corrections and Board of Pardons and Paroles pursuant to SDL 23A-27-18.6;

(2) The Defendant shall participate in any evaluations and/or treatment as required by the Department of Corrections and the Board of Pardons and Parole;

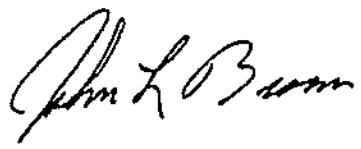
(3) The Defendant shall pay all financial obligations imposed in this judgment and any outstanding financial obligations in any other criminal file in the State circuit court or magistrate court according to a payment plan with the Department of Corrections and Board of Pardons and Paroles.

IT IS FURTHER ORDERED that the Defendant be transported to the South Dakota Penitentiary by the Mellette County Sheriff's Office for execution of this sentence.

IT IS FURTHER ORDERED that the Defendant shall be further credited for any time served in county jail from the date of sentencing through the date of actual transport to the State Penitentiary.

Dated: August 1, 2019, **nunc pro tunc** July 24, 2019.

BY THE COURT:



John L. Brown
Circuit Court Judge

NOTICE OF RIGHT TO APPEAL

You, Sean Leader Charge, 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 Mellette County and by filing a copy of the same, together with proof of such service with the Clerk of Courts of Mellette County within thirty (30) days from the date that this Judgment is filed with said Clerk.

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STATE OF SOUTH DAKOTA COUNTY OF MELLETTE	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA Plaintiff, vs. SEAN LEADER CHARGE, DOB: 07/03/1999 Defendant.	47CRI:18-26 **AMENDED** **JUDGMENT OF CONVICTION** **&** **ORDER OF SENTENCE**

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Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

Present at the arraignment hearing were the following parties: Zachary Pahlke, prosecuting attorney; Sean Leader Charge, defendant; Todd Love, defense counsel. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges. The Defendant pled not guilty to the Indictment and requested a jury trial.

A jury trial commenced at the Mellette County Courthouse in White River, South Dakota, on April 30, 2019. At trial, the Defendant was represented by his attorney Todd Love and the State of South Dakota was represented by Mellette County State's Attorney Zachary J. Pahlke. On May 1, 2019 the Mellette County jury found the defendant guilty of:

Count (1) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony; and

Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

Upon the request of the defendant the finding of guilt was initially withheld pending a request for a suspended imposition of sentence. On July 24, 2019 at the sentencing hearing the court denied the request for a suspended imposition of sentence and imposed the finding of guilt. It is, therefore, the JUDGEMENT of this Court that the Defendant, Sean Leader Charge, is GUILTY of the crimes of:

Count (1) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony; and

Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

SENTENCE

On July 24, 2019 a sentencing hearing was held. Present at the arraignment hearing were the following parties: Zachary Pahlke, prosecuting attorney; Sean Leader Charge, defendant; Rob

Konrad, defense counsel. The Court asked the Defendant if any legal cause existed to show why sentence should not be pronounced, there being none, the Court made the following findings.

Mitigating Factors:

1) The defendant is a young man;
2) There is no history of violence;
3) The defendant has a good work history;
4) The defendant is committed to his family and has provided for them;
5) The defendant has good family support in the community;
6) The facts of this case are less serious compared to other cases with this same charge;
7) The defendant has been assessed a low risk in his psychosexual evaluation;

Upon noting several mitigating factors the Court pronounced the following sentence:

Count (1) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

ORDERED that the Defendant shall be sentenced to the South Dakota Penitentiary for a period of ten (10) years, with credit for eighty-five (85) days in County Jail, there to be kept, fed and clothed according to the rules and discipline governing said penitentiary;

ORDERED that five (5) years of the sentence shall be suspended;

ORDERED that the Defendant pay court cost in the amount of one-hundred and four ($104) dollars. Said cost and fees shall be paid to the Mellette County Clerk of Courts;

Count (2) SEXUAL CONTACT WITH CHILD UNDER 16, SDCL 22-22-7, class 3 felony;

ORDERED that the Defendant shall be sentenced to the South Dakota Penitentiary for a period of ten (10) years, with credit for eighty-five (85) days in County Jail, there to be kept, fed and clothed according to the rules and discipline governing said penitentiary;

ORDERED that five (5) years of the sentence shall be suspended;

ORDERED that the Defendant pay court cost in the amount of one-hundred and four ($104) dollars. Said cost and fees shall be paid to the Mellette County Clerk of Courts;

ORDERED that the sentences for count 1 and count 2 of this file shall be ran ***concurrently*** and that the following are to be applied to each count ***concurrently***.

ORDERED that the Defendant reimburse Mellette County through the Mellette County Clerk of Courts for the cost of his court appointed attorney fees.

ORDERED that the Defendant pay restitution to the juvenile victim's family (A.R.) Latasha Ryan, being the mother of the victim, in amount of $5,101.20 for travel expenses incurred attending counseling to address the trauma inflicted by this crime;

ORDERED that the Defendant pay prosecution cost as follows:

a. $3152.50 for the Psychosexual Evaluation;
b. $98.80 for Transcript Cost;
c. $991.06 in professional witness fees;

ORDERED the following conditions;

(1) The Defendant shall maintain a good disciplinary record and comply with all programming required by the Department of Corrections and Board of Pardons and Paroles pursuant to SDL 23A-27-18.6;

(2) The Defendant shall participate in any evaluations and/or treatment as required by the Department of Corrections and the Board of Pardons and Parole;

(3) The Defendant shall pay all financial obligations imposed in this judgment and any outstanding financial obligations in any other criminal file in the State circuit court or magistrate court according to a payment plan with the Department of Corrections and Board of Pardons and Paroles.

(4) ***The Defendant shall make no contact with the victim (A.R.) or her mother Latasha Ryan.***

IT IS FURTHER ORDERED that the Defendant be transported to the South Dakota Penitentiary by the Mellette County Sheriff's Office for execution of this sentence.

IT IS FURTHER ORDERED that the Defendant shall be further credited for any time served in county jail from the date of sentencing through the date of actual transport to the State Penitentiary.

Dated: September 4, 2019 **nunc pro tunc** July 24, 2019.

BY THE COURT:

John L. Brown
Circuit Court Judge

NOTICE OF RIGHT TO APPEAL

You, Sean Leader Charge, 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 Mellette County and by filing a copy of the same, together with proof of such service with the Clerk of Courts of Mellette County within thirty (30) days from the date that this Judgment is filed with said Clerk.

SR413

STATE OF SOUTH DAKOTA) SS COUNTY OF MELLETTE)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. SEAN LEADER CHARGE, Defendant.	47CRI 18-26 TRANSCRIPT OF VOIR DIRE

BEFORE: THE HONORABLE JOHN L. BROWN, Circuit Court Judge of the Sixth Judicial Circuit, in White River, South Dakota, on the 29th day of April, 2019.

APPEARANCES:

MR. ZACH PAHLKE
State's Attorney
PO Box 432
Winner, South Dakota 57580;

Counsel for the State.

MR. TODD LOVE
Attorney at Law
PO Box 9087
Rapid City, South Dakota 57709;

Counsel for the Defendant.

Mona G. Weiger
Official Court Reporter
PO Box 1238
Pierre, SD 57501
605-773-3971

SR561

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where I put my glasses. Ms. Brandis, what do you have going on?
PROSPECTIVE JUROR: I'm the city finance officer and I am the only person in my office.
MR. LOVE: Okay.
PROSPECTIVE JUROR: I got water bills, payroll. I know both sides of the family and I just don't feel I can be a fair juror.
MR. LOVE: So it sounds like the city of White River is going to stop if you're --
PROSPECTIVE JUROR: Yeah, it will. These people won't get their water bills.
MR. LOVE: Well, you know, don't say that. They might ask me to keep you all week. But it sounds like it would put you quite a bit behind in your job?
PROSPECTIVE JUROR: Yes, it would, sir.
MR. LOVE: And in addition, something we haven't really gotten to yet but you said you know the family?
PROSPECTIVE JUROR: Yeah. I deal with them when they come in my office.
MR. LOVE: Is there anything about your interaction with the family that you think would make it difficult for you to be here today?
PROSPECTIVE JUROR: The victim comes through my alley because I live right across from the high school. She goes

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to the playground and I visit with her. I just don't feel I can do this.
MR. LOVE: You don't think you could be fair --
PROSPECTIVE JUROR: No.
MR. LOVE: -- and judge this case based just on what you hear here today?
PROSPECTIVE JUROR: Right.
MR. LOVE: I guess I would ask that Ms. Brandis be excused, Your Honor.
THE COURT: Ma'am, I typically don't grant excuses for job-related reasons. Obviously, everyone is busy and I appreciate that there are time frames to meet. We've got people here that are in the middle of calving, important issues. There's always an excuse for that.
I guess what my question really is is we are trying to find a jury that can be fair and impartial and judge the facts of the case based solely on what comes in through the evidence presented here in court. I know that a job like you have, you're the only one. It would certainly be inconvenient for you. But you understand that the Defendant and the State are entitled to have a fair and impartial jury and is there any reason why you feel you cannot listen to the evidence here --
PROSPECTIVE JUROR: No --
THE COURT: -- and present a fair verdict?

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PROSPECTIVE JUROR: -- I can't.
THE COURT: I'm going to deny the request to excuse then at this point. Thank you.
MR. LOVE: Good try.
Is there anybody else who I missed who again for whatever reason you've got going on at home and in your personal life, that being here for potentially two days would, you believe, make it difficult for you? Yes, ma'am.
PROSPECTIVE JUROR: Not only do I take care of Patsy Kindle, but my own husband is a disabled person also and I go between taking care of Patsy Kindle and my husband, Franklin Yellow Hawk.
And the other reason that I'm asking for you to consider is that my opinion, my personal opinion on anyone that molests a child, I can't stand it. And the reason that I say that is because I'm not from this area. I'm originally from Nevada. Okay. And I was raised by my grandparents and my uncles and nobody ever did anything to me.
But when I came out to this area, it seems like it's common knowledge for them to say, oh, well, they're going to have sex anyway, you know, even though they're a child, but the child doesn't have a chance. And see, that's my personal opinion and I don't think I could be fair in judging something like this and it makes me so very

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uncomfortable.
MR. LOVE: Let me address a couple things and just for the record, it's Ms. Rogers; correct?
PROSPECTIVE JUROR: Um-hum.
MR. LOVE: You know, let me address a couple of things. First of all, a couple of comments about how the trial is going to go. Okay.
You know, I think everybody realizes that, you know, the 12 chairs that end up getting filled up there probably aren't the most comfortable things in the world and neither are the pews. So believe it or not, we do try to move things along as much as we can.
The judge does take fairly regular breaks throughout the trial, give you folks some stand-up time. We do take a lunch break.
Now, things are -- you know, we always -- you know, I never guarantee anything because I don't run the show. But I can tell you that in my experience, you know, if it looks like we're going to go into day two, you know, we'll be pretty good about taking a break right around five o'clock for the day and so we're not going to be sitting here all night.
Judging just from the things you have to do with your husband, if we have a schedule like that where you get to take a lunch break and we're done around five o'clock, are

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29159

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SEAN LEADER CHARGE,

Defendant and Appellant.

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

THE HONORABLE JOHN L. BROWN
Retired Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed October 18, 2019

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 29159

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

SEAN LEADER CHARGE,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Sean Leader Charge, is referred to as "Leader Charge." Plaintiff and Appellee, State of South Dakota, is referred to as "State." References to documents are designated as follows:

Mellette County Criminal File No. 18-26.....SR

Initial Appearance Transcript.....IA

Voir Dire Transcript.....VD

Jury Trial Transcript Volume 1.....JT1

Jury Trial Transcript Volume 2.....JT2

Motion for a New Trial Hearing Transcript.....MNT

Appellant's Brief.....AB

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

JURISDICTIONAL STATEMENT

This is an appeal of an Amended Judgment of Conviction and Order of Sentence filed September 4, 2019, by the Honorable John L. Brown, Circuit Court Judge, Sixth Judicial Circuit, Mellette County. SR 411. Prior to the filing of the Amended Judgment, Leader Charge filed a Motion for a New Trial on August 15, 2019. SR 396. On September 19, 2019, the court signed an Order and Findings of Fact and Conclusions of Law denying Leader Charge's Motion for a New Trial. SR 517-18. A Notice of Appeal was filed October 18, 2019. SR 523. The Court has jurisdiction pursuant to SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED WHEN IT DENIED LEADER CHARGE'S REQUEST TO REMOVE JUROR DONNA BRANDIS FOR CAUSE?

The circuit court denied Leader Charge's request to remove juror Donna Brandis for cause during jury selection.

State v. Darby, 1996 S.D. 127, 556 N.W.2d 311

State v. Moeller, 2000 S.D. 122, 616 N.W.2d 424

State v. Owens, 2002 S.D. 42, 643 N.W.2d 735

State v. Rhines, 1996 S.D. 55, 548 N.W.2d 415

STATEMENT OF THE CASE

On May 29, 2018, a Mellette County Grand Jury indicted Leader Charge for two counts of Sexual Contact with a Child Under 16, a Class 3 felony, in violation of SDCL 22-22-7. SR 1. A Superseding

Indictment was filed on June 11, 2018. SR 25. Leader Charge was arraigned June 11, 2018. *See generally* IA.

A jury trial was held April 29-30, 2019. *See generally* VD, JT1, JT2. At the close of evidence, Leader Charge moved for a Motion of Judgment of Acquittal, which was denied. JT1 83-84. The jury returned a verdict of guilty to both counts. JT2 114; SR 149.

A sentencing hearing was held July 24, 2019, and the court filed an Amended Judgment of Conviction and Order of Sentence on September 4, 2019. SR 411. The court found seven mitigating factors in pronouncing its sentence. SR 412. As to each count of Sexual Contact with a Child Under 16, the court sentenced Leader Charge to ten years in the penitentiary with five years suspended, with credit for eighty-five days served, with the counts to run concurrently. SR 412.

On August 15, 2019, Leader Charge filed a Motion for a New Trial on the grounds of juror misconduct. SR 396. A hearing was held September 11, 2019, and the court denied the motion. MNT 44; SR 517. Its Order Denying Defendant's Motion for a New Trial and Findings of Fact and Conclusions of Law were both filed September 19, 2019. SR 517-18. A Notice of Appeal from the Amended Judgment of Conviction and Order of Sentence was filed October 18, 2019. SR 523.

STATEMENT OF THE FACTS

A. Juror Brandis's Voir Dire

During voir dire, the following exchange took place between Leader Charge's trial counsel, juror Donna Brandis, and the circuit court:

> MR. LOVE: . . . Ms. Brandis, what do you have going on?
>
> PROSPECTIVE JUROR: I'm the city finance officer and I am the only person in my office.
>
> MR. LOVE: Okay.
>
> PROSPECTIVE JUROR: I got water bills, payroll. I know both sides of the family and I just don't feel I can be a fair juror.
>
> MR. LOVE: So it sounds like the city of White River is going to stop if you're –
>
> PROSPECTIVE JUROR: Yeah, it will. These people won't get their water bills.
>
> MR. LOVE: Well, you know, don't say that. They might ask me to keep you all week. But it sounds like it would put you quite a bit behind in your job?
>
> PROSPECTIVE JUROR: Yes, it would, sir.
>
> MR. LOVE: And in addition, something we haven't really gotten to yet but you said you know the family?
>
> PROSPECTIVE JUROR: Yeah. I deal with them when they come in my office.
>
> MR. LOVE: Is there anything about your interaction with the family that you think would make it difficult for you to be here today?
>
> PROSPECTIVE JUROR: The victim comes through my alley because I live right across from the high school. She goes to

> the playground and I visit with her. I just don't feel I can do this.
>
> MR. LOVE: You don't think you could be fair –
>
> PROSPECTIVE JUROR: No.
>
> MR. LOVE: -- and judge this case based just on what you hear here today?
>
> PROSPECTIVE JUROR: Right.
>
> MR. LOVE: I guess I would ask that Ms. Brandis be excused, Your Honor.
>
> THE COURT: Ma'am, I typically don't grant excuses for job-related reasons. Obviously, everyone is busy and I appreciate that there are time frames to meet. We've got people here that are in the middle of calving, important issues. There's always an excuse for that. I guess what my question really is is we are trying to find a jury that can be fair and impartial and judge the facts of the case based solely on what comes in through the evidence presented here in court. I know that a job like you have, you're the only one. It would certainly be inconvenient for you. But you understand that the Defendant and the State are entitled to have a fair and impartial jury and is there any reason why you feel you cannot listen to the evidence here –
>
> PROSPECTIVE JUROR: No –
>
> THE COURT: -- and present a fair verdict?
>
> PROSPECTIVE JUROR: -- I can't.
>
> THE COURT: I'm going to deny the request to excuse then at this point. Thank you.

VD 34-36. Following both parties passing the jury panel for cause and exercising their maximum peremptory challenges allowed by statute, Brandis was selected to serve on the jury. VD 72, 74, 79-80; SDCL 23A-20-20. She served on the jury for the entire case. *See* JT2 113.

B. Facts Established at Trial

The following facts were established at trial. In March 2018, Taylor Mednansky and her boyfriend, Leader Charge, babysat ten-year-old A.R. at the house Mednansky and Leader Charge shared in White River, South Dakota. JT1 15-16. Mednansky is A.R.'s older sister. JT1 54. A.R.'s younger sister and her infant niece would also be present. JT1 7-8. On two occasions, Mednansky left the residence, leaving Leader Charge to care for the children. JT1 7, 10. It was at these times that Leader Charge inappropriately touched A.R.

A.R. testified regarding these incidents at trial. One time, after Mednansky left the house, Leader Charge touched A.R.'s "private spot" through her clothes with his hand while they were sitting on couches in the house. JT1 7, 9. She indicated that her private spot was "the front area" opposite of her butt. JT1 9. A.R. told Leader Charge to stop or she would call her mom. *Id.* A.R. also described a second, similar incident. JT1 10. The morning of the second incident, A.R. had taken a shower, put on jeans and a t-shirt, and sat on the couch. JT1 10-11. Leader Charge began touching A.R.'s "private spot" again. *Id.* A.R. told her family about Leader Charge touching her and law enforcement was contacted. JT1 17, 25-26.

A forensic interview in which A.R. participated was played for the jury. JT1 43-44. In the interview, a soft-spoken and nervous A.R. described two incidents of inappropriate touching. State's Exhibit 3.

A.R. stated that after Mednansky left, she took a shower and put her clothes on—a pink t-shirt, a tank top under her shirt, jeans, and underwear. *Id.* She then went into the living room. *Id.* Leader Charge put the younger children down to sleep in another room. *Id.*

A.R. described that after Leader Charge came back into the living room, he started touching her butt. *Id.* He also touched her "in front." *Id.* This touching occurred with Leader Charge's hands over her clothes. *Id.* Leader Charge rubbed his hands on her chest over her tank top and her shirt pulled down. *Id.* The touching occurred while she was laying down on the couch and he placed himself over her. *Id.* These actions made her feel "gross" and "trapped." *Id.* A.R. recalled that while this was happening, she heard her sister crying in the background. *Id.* She told him to stop or she would tell her mom. *Id.* Leader Charge told her not to tell her. *Id.*

During the interview, A.R. also described a second incident. *Id.* This incident also happened in the living room when she was laying on the couch. *Id.* On this occasion, her younger sister had been put to bed, but her niece was still present in the living room. *Id.* Leader Charge placed himself over A.R. and touched the same parts of her body through her clothing—her butt, her front, and her chest—although A.R. said that this time her shirt almost came off. *Id.* Leader Charge complimented her clothes, calling them "beautiful." *Id.* A.R.'s pants slipped down, and Leader Charge said that her underwear was

"pretty." *Id.* A.R. said that Leader Charge's pants were "going off" on this occasion. *Id.* A.R. also remembered that when she heard her sister crying in the other room, she said she had to go check on her, but Leader Charge told her she was fine. *Id.* A.R. described feeling "disgusting" when Leader Charge touched her. *Id.*

During the interview, A.R. was asked to indicate what she meant by butt, front, and chest by circling body parts on a diagram of a young girl without clothes on. *Id.* On the diagram, A.R. circled the girl's buttocks, genitals, and breast area. *Id.*

Other matters were addressed at trial. On cross-examination, A.R. was questioned about an incident in which she got in trouble the same day she told her family about being touched by Leader Charge. JT1 13. A.R.'s mother, Latesha Ryan, testified that someone from the school in White River spoke to her about A.R. writing things on the playground the day A.R. told her family about the touching. JT1 19-21. Sheriff Mike Blom also stated he was aware of this incident. JT1 32-33.

Sheriff Blom also testified briefly about an encounter between Leader Charge and A.R.'s family when he responded to their report. A number of A.R.'s family members were present when Sheriff Blom responded to their call, including a visibly upset Latesha, her boyfriend, Aaron Moran, and Latesha's brother Dwayne Ryan. JT1 26. Sheriff Blom heard "a commotion" outside between Leader Charge and Moran while he was attempting to interview A.R. at her home. JT1 26-27.

Sheriff Blom then determined it would be best to drive Leader Charge home. JT1 27. Leader Charge described the confrontation in his testimony as well. JT1 76-77. He described how various individuals, including Moran, accused him of touching A.R. and threatened him. JT1 77.

C. Motion for a New Trial

Following trial, Leader Charge obtained new counsel. After sentencing, he motioned for a new trial based on juror misconduct. SR 396. Specifically, Leader Charge argued that Brandis had failed to disclose knowledge that she had about the case prior to trial and had engaged in communication with a witness during trial.[1] SR 396. While Leader Charge does not directly challenge the court's ruling on this motion, he did raise his arguments regarding voir dire at the hearing. MNT 36-39.[2]

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[1] Regarding the communication with a trial witness claim, Mednansky testified that during a break at trial while she was waiting to be called in as a witness, she saw Brandis mouth the words "I don't want to do this," in the hallway outside the courtroom. MNT 6-7. Mednansky read her lips, but they did not engage in any conversation. MNT 11. Brandis denied having a conversation with Mednansky in the hallway outside the courtroom during the trial. MNT 24. The bailiff who served during the case also testified that he had never heard any of the jurors engaging in conversations with others during the trial. MNT 31. The court found that "[a]ny presumption of prejudice as to inappropriate contact between a juror and a witness has been adequately rebutted and shown to be harmless." SR 521. Leader Charge does not raise this issue on appeal.

[2] In any event, the standard of review for denial of a juror for cause and denial of a motion for a new trial are the same—abuse of discretion. *See State v. Thomas*, 2019 S.D. 1, ¶ 27, 922 N.W.2d 9, 17.

At the hearing, Mednansky testified regarding a brief discussion she had with Brandis prior to trial. Mednansky was familiar with Brandis through Brandis's job as the city finance officer. MNT 5. Mednansky testified that on one occasion when she went in to pay a bill, about a month before the trial, "[Brandis] told me that it was a bunch of shit and then she went and said that I hope you guys have good luck or something like that." MNT 6; *see also* SR 400.

Natasha Bear Heels, who worked in the same building as Brandis, also testified regarding casual conversations she had with Brandis prior to trial. MNT 13-16. Bear Heels testified that her conversations with Brandis began a few days after the initial allegations became known in the community and occurred during a month-and-a-half period, a year prior to trial. MNT 14-15, 19-20.

She provided details of only one specific conversation during the hearing and in an affidavit. MNT 14-15; SR 399. Bear Heels and Brandis were aware of the general character of the allegations. SR 399. Bear Heels indicated that she had told Brandis information she learned from a conversation with Leader Charge's mother concerning the confrontation that took place between Moran, Dwayne Ryan, and Leader Charge after the accusations were reported. MNT 14. According to Bear Heels's Affidavit, during this conversation she also told Brandis a theory that A.R. had made the allegations in response to getting in trouble. SR 399. Bear Heels stated that Brandis indicated to

her during these conversations that Brandis believed the case was "phony, more or less[.]" MNT 16.

Brandis testified at the hearing as well, and while she denied speaking to Bear Heels about the case, she stated that she had spoken to Mednansky in passing and asked her if the "court stuff settled[.]" MNT 23-24. When Mednansky said it had not, Brandis stated that she said, "Well, that sucks." MNT 24. Brandis stated that she did not know what the "court stuff" was about. *Id.* While Brandis did not remember the specific details of voir dire, she recalled asking the court to be excused from jury duty. MNT 27, 29. She also affirmed that she only took into consideration evidence that had been presented at trial in reaching a verdict. MNT 24.

Based upon the voir dire transcript made available to the court and parties shortly before the hearing and the testimony of Mednansky, Bear Heels, and Brandis, Leader Charge argued that he was entitled to a retrial. MNT 36-39. The court denied Leader Charge's Motion, determining that at voir dire, Brandis was most concerned with not being able to attend to her job duties, did not demonstrate knowledge of the facts of the case, and had not demonstrated that she had "preconceived notions as to the guilt or innocence of the Defendant." MNT 45. The court explained that he interpreted Brandis's response during voir dire to his final question as indicating that she could be a fair juror. MNT 45-46.

Furthermore, even when considering Mednansky's and Bear Heels's testimony in a light most favorable to Leader Charge, Brandis had tended to favor Leader Charge's position prior to trial and that could not be considered prejudicial to his case. MNT 46. The court found there was no indication that the jury had considered anything other than the evidence presented at trial. MNT 47. The court also stated jurors need not be ignorant of all the facts of the case if they can still render a fair verdict, which was the case here. MNT 48.

In its written Findings of Fact and Conclusions of Law, the court incorporated its oral findings and specifically concluded that "[a]s to misconduct occurring as a result of knowledge of the case there has been no material prejudice shown either at the time of Voir Dire or at this time." SR 521. Furthermore, the court found "[a]ny presumption of prejudice as to the juror's ability to be fair and impartial has been adequately rebutted and shown to be harmless[]" and "[a]ny presumption of prejudice as to knowledge of the case has been adequately rebutted and shown to be harmless." SR 521.

ARGUMENT

THE CIRCUIT COURT DID NOT ERR WHEN IT DENIED LEADER CHARGE'S REQUEST TO REMOVE JUROR BRANDIS FOR CAUSE.

A. Standard of Review and Introduction

A review of a trial judge's determination of juror qualifications is reviewed under the abuse of discretion standard. *State v. Darby*, 1996

S.D. 127, ¶ 36, 556 N.W.2d 311, 321. "An abuse of discretion is discretion exercised to an end or purpose not justified by and clearly against, reason and evidence." *State v. Thomas*, 2019 S.D. 1, ¶ 21, 922 N.W.2d 9, 15. Not only must a defendant demonstrate that the trial court committed error, but the defendant must also show material prejudice. *Darby*, 1996 S.D. 127, ¶ 36, 556 N.W.2d at 321.

"Both the United States and South Dakota Constitutions guarantee trial by an impartial jury." *State v. Rhines*, 1996 S.D. 55, ¶ 41, 548 N.W.2d 415, 430; *see also* U.S. Const. Amend. VI; S.D. Const. Art. VI, § 7. It is the trial court's responsibility to ensure that a fair and impartial jury is selected for trial. *State v. Verhoef*, 2001 S.D. 58, ¶ 12, 627 N.W.2d 437, 440.

Expressing "a predetermined opinion regarding guilt during voir dire does not disqualify a juror per se." *Darby*, 1996 S.D. 127, ¶ 34, 556 N.W.2d at 320. Rather, "[a] potential juror should be excused for cause if that juror is unable to set aside preconceptions and render an impartial verdict." *Id.* "Determination of a juror's qualifications must be based upon the whole voir dire examination[.]" *Id.*

B. The Circuit Court Did Not Err by Declining to Dismiss Brandis For Cause

A reasonable reading of the entire exchange between defense counsel, the court, and Brandis demonstrates that it is was proper for the court to believe Brandis could be fair and impartial. While jurors

may initially appear unfair when first questioned, further clarification and questioning regarding what is required of jury service may demonstrate that the juror is actually impartial. *See State v. Moeller*, 2000 S.D. 122, ¶ 31, 616 N.W.2d 424, 435-36; *see also State v. Knoche*, 515 N.W.2d 834, 839-40 (S.D. 1994).

Such was the case in *Moeller*, in which several jurors were challenged for cause by defense counsel regarding their "strong propensity to automatically impose the death penalty." 2000 S.D. 122, ¶ 31, 616 N.W.2d at 435-36. Following the defense's challenges, the State or the court offered clarification on the sentencing phase of a death penalty trial, after which the jurors stated that they could follow the judge's instructions regarding death penalty trial procedure. *Id.* ¶¶ 34, 36-37, 39. On appeal, this Court affirmed the trial court's denial of defense counsel's requests to dismiss these jurors for cause. *Id.* ¶¶ 43,47.

A similar exchange occurred here. While Brandis initially expressed doubts about her impartiality when questioned by defense counsel, the court then explained what was required of her. The court informed her that it could not dismiss her for purely job-related reasons because that was a difficulty faced by everyone. The court correctly stated that the key question was whether Brandis could be fair and impartial and judge the case based on the evidence presented. The court's final question for Brandis was, ". . . is there any reason why

you feel you cannot listen to the evidence here and present a fair verdict?" VD 35. Brandis responded, "No, I can't." VD 35-36.

This exchange can be reasonably construed as indicating that Brandis understood the court's instructions that she should be fair and impartial and only judge the case based on the evidence. When she understood this, she could not think of a reason why she could not listen to the evidence and present a fair verdict. Because Brandis stated under oath that she could not think of a reason why she could not be fair, there was no reason to dismiss her for cause. *Knoche*, 515 N.W.2d at 840 ("Although a potential juror may express a predetermined opinion during voir dire, once she has declared under oath that she can act fair and impartial, she should not be disqualified as a juror.").

While Leader Charge offers an alternative interpretation of this exchange, a trial court has broad discretion determining whether a jury is qualified. *Rhines,* 1996 S.D. 55, ¶ 52, 548 N.W.2d at 432. In deference to that discretion, "[t]he ruling of the trial court will not be disturbed, except in the absence of any evidence to support it[.]" *Id.* "When the evidence of each juror is contradictory in itself, and is subject to more than one construction, a finding by the trial court either way upon the challenge is conclusive on appeal." *Id.*[3]

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[3] These holdings in *Rhines* relied, in part, upon *State v. Flack*, 89 N.W.2d 30 (S.D. 1958). As discussed below, a portion of *Flack* has (continued . . .)

Furthermore, despite an unclear record, deference should be paid to trial judges who see and hear jurors. *See id.* ¶ 51.

A trial court can only be overturned for an abuse of discretion if its determination is clearly against reason and evidence. *Thomas*, 2019 S.D. 1, ¶ 21, 922 N.W.2d at 15. There is no reason to overturn the circuit court's ruling here. There is evidence to show that the circuit court reasonably believed Brandis could be fair and impartial. Brandis said that she could not think of a reason why she could not be fair and impartial in response to the circuit court's explanation of what was required of her jury service.

C. Leader Charge Has Not Demonstrated Prejudice

In addition to an abuse of discretion, Leader Charge must demonstrate that he suffered material prejudice due to Brandis's inclusion on the jury. *Darby*, 1996 S.D. 127, ¶ 36, 556 N.W.2d at 321. Relying upon *State v. Etzkorn*, 1996 S.D. 99, 552 N.W.2d 824, and *State v. Flack*, 89 N.W.2d 30 (S.D. 1958), Leader Charge asserts that he suffered "presumable prejudice" because he was forced to use his peremptory challenges on jurors other than Brandis. AB 14. In *Etzkorn*, this Court held that "[a] defendant should not be compelled to use his peremptory challenges upon prospective jurors who should

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(. . . continued)
been overruled. The *Flack* holdings relied upon in *Rhines* relating to a trial court's discretion in juror qualification remain good law.

have been excused for cause." 1996 S.D. 99, ¶ 16, 552 N.W.2d at 829 (quoting *Flack*, 89 N.W.2d at 32).

This Court has clarified that this standard regarding peremptory challenges set forth in *Etzkorn* and *Flack* is no longer applicable:

> We have recently overruled prior authority which permitted the establishment of prejudice simply by a defendant's use of all peremptory challenges. *State v. Verhoef*, 2001 S.D. 58, ¶ 18, 627 N.W.2d 437, 440 (overruling *State v. Etzkorn*, 1996 S.D. 99, 552 N.W.2d 824). A defendant must now show prejudice arising from the seating of jurors who actually served. *Id.* at ¶ 14, 627 N.W.2d at 440.

State v. Owens, 2002 S.D. 42, ¶ 23, 643 N.W.2d 735, 744. Moreover, the United States Supreme Court reaffirmed in *United States v. Martinez-Salazar* that the use of peremptory challenges, which are based in common law, "are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment [they] are not of federal constitutional dimension." 528 U.S. 304, 311 (2000).

Relying upon *Martinez-Salazar*, this Court determined that there was no reason to interpret the rights afforded by the South Dakota constitution in a different manner than the United States Constitution. *Verhoef*, 2001 S.D. 58, ¶ 18, 627 N.W.2d at 441–42. Therefore, because prejudice is not presumed, Leader Charge must still demonstrate that he suffered material prejudice based upon the jurors who served. *Moeller*, 2000 S.D. 122, ¶ 47 n.8, 616 N.W.2d at 441 n.8; *Verhoef*, 2001 S.D. 58, ¶ 19, 627 N.W.2d at 442; *Owens*, 2002 S.D. 42,

¶ 23, 643 N.W.2d at 744; *see also Piper v. Young*, 2019 S.D. 65, ¶ 62, 936 N.W.2d 793, 813.

A review of the record demonstrates that Leader Charge did not suffer prejudice due to Brandis serving on the jury. A lack of prejudice is demonstrated by first considering the voir dire transcript. Most importantly, Brandis stated that she could not think of a reason why she could not be fair and impartial. Brandis's primary concern was her employment responsibilities and a fear that the community would not receive their water bills in a timely fashion if she served on the jury. This was not a proper reason to dismiss Brandis for cause. *See* SDCL 23A-20-13.1.

At voir dire, Brandis indicated that she had contact with both sides of the family through her work at the city office. But she did not suggest that she tended to favor some family members over others or knew any of them intimately through this professional contact. Despite an indication that Brandis possibly knew A.R., there was no indication that A.R. had spoken to Brandis about the allegations or that she had an intimate familiarity with the case. Brandis did not suggest that she would automatically believe A.R.'s allegations.

Finally, Brandis did not indicate at voir dire that she had already reached an unqualified opinion regarding the merits of the case. Rather, she seemed uncomfortable with the prospect of reaching a verdict when she was familiar with many of the people involved in the

case, but, without more, does not support a challenge for cause. *See* SDCL 23A-20-13.1.

Next, the testimony presented at the motion for a new trial hearing further demonstrates that Leader Charge did not suffer prejudice, even if all testimony is taken in a light most favorable to Leader Charge. At most, Brandis knew that the case was ongoing but was not aware of anything beyond what was presented at trial. It is unsurprising that Brandis would have some knowledge in this case due to the small population of the town of White River. In any event, knowledge of a case does not necessarily require a juror to be disqualified because "[a] potential juror's high degree of familiarity with a case is not, by itself, dispositive." *Owens*, 2002 S.D. 42, ¶ 19, 643 N.W.2d at 744.

The brief exchange that Brandis had with Mednansky suggests that Brandis was aware a case was ongoing. The same is true regarding the conversations between Bear Heels and Brandis. Bear Heels's testimony suggested that, if anything, Brandis had generalized knowledge about the case that did not delve into the specific circumstances, nor did it go beyond anything presented at trial. Indeed, the subjects of their conversation as recalled by Bear Heels—the confrontation that involved Leader Charge and members of A.R.'s family and A.R. getting in trouble—were raised at trial.

The jury was instructed that it should decide the case based on the evidence presented at trial and not on prejudice or sympathy towards Leader Charge. SR 90, 116. Beyond Brandis testifying that she followed this instruction, it is presumed that a jury follows these instructions when reaching a verdict. *State v. Stone*, 2019 S.D. 18, ¶ 20, 925 N.W.2d 488, 496; *see also State v. Brim*, 2010 S.D. 74, ¶ 18, 789 N.W.2d 80, 86. There is no indication that Brandis's foreknowledge made her impartial or played any role in juror deliberations. *See Brim*, 2010 S.D. 74, ¶ 18, 789 N.W.2d at 86.

Additionally, despite pre-trial conversations with members of the small-town community of White River, there is no showing that Brandis was prejudiced against Leader Charge and had decided he was guilty prior to hearing the evidence presented at trial—facts that Leader Charge would have to prove to show he suffered prejudice. Even considering the facts most favorably to Leader Charge's position, Mednansky and Bear Heels suggested Brandis was skeptical of the allegations.

Even if Brandis had an opinion of the case during her conversations with Mednansky and Bear Heels, there is no indication that *at the time of trial* that her opinions were so unqualified and fixed as to make her an impartial juror. She did not indicate any clear opinion about the merits of the case and she stated to the court that she could not think of a reason why she could not be fair and impartial

following the court explaining what was required of her jury service. The conversation recounted by Bear Heels occurred a year before trial, while the brief conversation with Mednansky was a month before trial. For these reasons, Leader Charge has not demonstrated error or prejudice.

CONCLUSION

Based upon the foregoing arguments and authorities, State respectfully requests that Leader Charge's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 4,722 words.

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

Dated this 11th day of May 2020.

_____
Brigid C. Hoffman
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this June 11, 2020, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Sean Leader Charge* was served via electronic mail upon Robert Konrad at rob@xtremejustice.com.

_____
Brigid C. Hoffman
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29159

STATE OF SOUTH DAKOTA,

Appellee,

vs.

SEAN LEADER CHARGE,

Appellant.

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

The Honorable John Brown, Retired Circuit Court Judge

APPELLANT'S REPLY BRIEF

Notice of Appeal was filed on October 18, 2019

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PRELIMINARY STATEMENT

The following record citations will be used in this Reply Brief. Citations to the voir dire transcript will be denoted "VDT" followed by the appropriate page number and line number. Citations to the motion for new trial evidentiary hearing transcript will be denoted "MHT" followed by the appropriate page number and line number. Pursuant to SDCL 15-26A-63, the Appellee will be referred to as "State" or "The State," and the Appellant will be referred to as "Defendant," always capitalized.

REPLY ARGUMENT

The State starts off by arguing that its reading of the voir dire transcript is "reasonable," implying that the interpretation of the transcript by Defendant is somehow unreasonable. Defendant, for brevity sake, will not herein restate the entire voir dire dialog with juror thirty-one Donna Brandis, hereinafter referred to as "juror Brandis." The Defendant urges this Court to review the entire exchange and pay careful attention to the statements made by juror Brandis for the entirety of the exchange. On at least three separate occasions she indicates to the trial court that she cannot sit on the jury and be impartial. Brandis never once indicates to the trial court that she is capable of sitting impartially. As the State cites: "[a] potential juror should be excused for cause if that juror is unable to set aside preconceptions and render an impartial verdict." *State v. Darby,* 1996 S.D. 127, ¶ 34, 556 N.W.2d 311, 320.

In this case, Defendant's trial counsel believed based upon the exchange that juror Brandis was not capable of rendering an impartial verdict. For that reason, trial counsel for Defendant moved to excuse the juror for cause. VDT 35:8-9. The trial court denied that motion, and allowed juror Brandis to sit on the jury that ultimately decided the case.

The State next cites to *State v. Moeller*, 2000 S.D. 122, ¶ 31, 616 N.W.2d 424, 435-36. In *Moeller,* the defendant therein argued that certain written answers in the jury questionnaires indicated that several jury members were predisposed to impose the death penalty without considering other options. *Id.* During the voir dire process in that case, the trial court engaged in an a colloquy with several of the jurors. It appears that the dialog and questions terminated when the prospective jurors indicated that they could look at other options, be open, and apply the jury instructions from the court. In conclusion, this Court in *Moeller* found that the defendant could not show that any of the proposed jurors "possessed strong inclination in favor of the death penalty." *Id.* at ¶43.

The Defendant points to this same reasoning in support of his request for new trial. While in *Moeller* the trial court engaged in a lengthy discussion with the prospective jurors and ultimately received an answer confirming the jurors's pledge to be impartial and listen to the evidence; a similar discussion did *not* take place in this case. Juror Brandis indicated to the trial court three separate times (VDT 34:6-8, 34:24-35:2; and 35:3-7) that she could not be impartial. Brandis stated on those three occasions that "I just don't feel I can be a fair juror"; "I just don't feel like I can do this"; and that she cannot be fair and impartial. After the last of these statements trial counsel for Defendant moved to excuse juror Brandis for cause. The trial court then proceeds to ask juror Brandis about her employment and the reasons why an employment excuse is typically not granted by the court. VDT 35:10-14.

The questioning from the trial court misses the point. The request by Defendant's trial counsel to excuse the juror for cause comes after he questioned juror Brandis about her impartiality. While the State would like this Court to believe that juror Brandis made

an employment related excuse, it is simply not the case. It is true that her job was discussed at first; however, juror Brandis stated at least three times that she cannot sit impartially on the jury.

Defendant urges this Court to pay special attention to the exchange between juror Brandis and the trial court in the voir dire transcript 35:15-36:3. From 35:15-35:25, the trial court asks a confusing, two-part question. The trial court asked: "But you understand that the Defendant and the State are entitled to have a fair and impartial jury and is there any reason why you feel like you cannot listen to the evidence here … and present a fair verdict?" This is a two part question. The question asks first if she understands and then secondly if she can render an impartial verdict. Brandis's answer is "No, I can't." VDT 35:24-36:1. Juror Brandis's answer of "No, I can't." is her only spoken phrase after stating to the trial court on three different occasions that she cannot be impartial. Furthermore, the answer of "No, I can't" is not an acceptable answer to either of the questions asked by the trial court.

The State wants this Court to believe that "No, I can't" is enough of an answer to indicate that the Brandis was capable of being an impartial juror. The fact is that, juror Brandis was never properly rehabilitated by the trial court or the State, and she was wrongly allowed to sit on the the jury panel, despite the fact that the had expressed her inability to serve a total of four times.

In *Meoller,* the trial court engaged in long discussions with the proposed jurors about where their feelings came from, how they would think in potential scenarios, and the trial court explained the importance of listening to the case fairly. None of that occurred in this case. Brandis never "declared under oath that she can act fair and

impartial." *State v. Knoche*, 515 N. W.2d 834, 840 (S.D. 1994). For this reason the trial court abused its discretion in denying Defendant's motion to strike juror Brandis for cause. The trial court never engaged in any discussion about that would develop the facts surrounding juror Brandis's reason for impartiality, and she never indicated she could fairly serve on the jury.

The State next next relies upon *State v. Rhines*, 1996 S.D. 55, ¶ 52, 548 N.W.2d at 432. The State denies that there are two possible constructions for the exchange between the trial court and juror Brandis. The State merely characterizes one as "reasonable" and the other apparently unreasonable. For reasons stated herein, the construction offered by Defendant is not only reasonable, but logical in its approach. The only thing unreasonable is the denial of the motion to excuse for cause. "The ruling of the trial court will not be disturbed, except in the absence of any evidence to support it." *Id. (*quoting *State v. Flack*, 89 N.W. 2d 30 (S.D. 1958). This is a situation where there does not appear to be any evidence that supports the trial court's decision, therefore, Defendant would argue that this Court is in a position to review and scrutinize the exchange between trial counsel for Defendant, the trial court, and juror Brandis.

The State then argues the Defendant has shown no prejudice. Defendant acknowledges that *State v. Etzkorn*, 1996 S.D. 99, 552 N.W.2d 824, has been overruled in part. The State mischaracterizes Defendant's argument. Defendant never argued that it was forced to use a peremptory challenge. In fact, Defendant stated in Appellant's Brief that this case is different that *Etkorn.* As stated in Appellant's brief, juror Brandis was allowed to sit on the jury even though she expressed to the Court several times that she was not capable of being impartial. Defendant suffered presumable prejudice and actual

prejudice as a result of trial court's abuse of discretion in denying Defendants's motion to excuse juror Brandis for cause.

The The State relies upon *State v. Owens,* 2002 S.D.42, 643 N.W.2d 735, in its argument that Defendant did not suffer any damages. The State then mischaracterized Defendant's argument as being overruled and inapplicable in light of the decision in *State v. Verhoef,* 2001 S.D. 58, 627 N.W.2d 437. The state argues that the arguments made by Defendant do not amount to prejudice because "presumed prejudice" no longer exists. However, a careful reading of *Verhoef* reveals a glaring distinction:

> We find no just cause that would have warranted the removal of any of the challenged jurors. However, were we to find the trial court erred in failing to remove a potential juror for cause, we would still reject Moeller's argument that the failure to remove the challenged jurors forced him to exhaust his peremptory challenges. The United States Supreme Court recently held that *if a defendant elects to cure the erroneous refusal of a trial judge to dismiss a potential juror for cause by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any right under the Federal Rules of Criminal Procedure or the Constitution. United States v. Martinez–Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000).

State v. Verhoef, 2001 S.D. 58, ¶ 17, 627 N.W.2d at 441. [emphasis added]

This Court in *Verhoef* adopted the reasoning in *Martinez-Salazar* and was unable to find a "convincing argument as to why these state rights are to be interpreted in a different manner than the corresponding federal constitutional guarantees." *Id.*

However, as expressly pointed out several times in Appellant's Brief, Defendant is not arguing that he was forced to use his peremptory challenges. This is as case where the trial court abused its discretion in denying Defendant's motion to excuse juror Brandis for cause, therefore the Brandis was not only allowed to remain on the jury

panel, but she was seated on the jury. This case is not analogous to *Martinez-Salazar* where defendant remedied that abuse of discretion by using and exercising a peremptory challenge. Therein lies the important difference, as set forth in Appellant's Brief. Defendant previously stated in his initial brief on page 13 and 14:

> While the defense counsel's reasoning for striking the jurors is not part of the record, one logically can conclude that defense counsel wanted other potential jurors removed viewed to be more damaging than Brandis. Obviously, the state did not use its preemptory challenges on Brandis. Ultimately, and somewhat uniquely, Brandis was left on the jury. There is no rule that requires a defense counsel to strike certain jurors. The decision concerning utilization of peremptory challenges is left to the sound decision of the trial attorney.

Appellant's Brief, p. 13-14.

Eztkorn has been overruled as its applies to a an instance where a defendant cures the abuse of discretion by peremptory challenge. The State is unable to cite a case where the abuse of discretion is *not* cured by either party, and the impartial juror is left on the jury. Likewise, the The State cannot point to any caselaw requiring a defendant to necessarily use his peremptory challenge to cure an abuse of discretion by the court. Not all of *Flack* has been overruled. "A defendant should not be compelled to use his peremptory challenges upon prospective jurors who should have been excused for cause." *State v. Flack,* 89 N.W.2d 30 (S.D. 1958).

The State next contends that the later statements made by Brandis in the hearing on the Defendant's Motion for New Trial somehow show that juror Brandis was not impartial. However, a simple reading of the motion hearing transcript shows that Brandis was less than truthful, and at a minimum conflicted and contradictory.

Prejudice in general is very difficult to pinpoint in any jury trial. The fact is, not one person other than the jurors knows what took place in the jury room. There were no

notes from the jury that could be interpreted as prejudicial. The jury does not speak at trial to the attorneys or parties, and is in fact prohibited from doing so. The best way to gain insight as to every juror is in the voir dire process. Without rehashing, Defendant has clearly stated his position on the juror Brandis exchange with the trial court.

On top of that, Brandis knew the alleged victim in this case. The The State on page 18 of its brief states: "Despite an indication that Brandis possibly knew A.R…". This is not an accurate summary of the facts. Juror Brandis clearly stated during voir dire that "The victim comes through my alley because I live across from the high school. She goes to the playground and I visit with her. I just don't feel I can do this." VDT 34:24-35:2. It is not just Defendant's hunch that the alleged victim and Brandis knew each other, juror Brandis confirmed that fact.

Interestingly, juror Brandis indicated she new the "victim" before the alleged victim's name was even stated out loud in court. Previously, the person was only identified by protected initials. Even so, juror Brandis referred to a potential trial witness as a "victim" even before the trial started, which shows her state of mind as to guilt or innocence. The State argues that juror Brandis never stated in voir dire that she had reached a final opinion on the case. However, two things are for certain : Brandis stated at least three times she could not sit impartially on the jury; and the Defendant was convicted. At an absolute minimum, Defendant was convicted by a partial jury. The prejudice to Defendant is abundant, as his constitutional right to a trial by impartial jury was clearly violated.

The State glosses over the fact that juror Brandis testified very poorly at the hearing on the motion for new trial. Juror Brandis does not recall any questioning during

the voir dire process, but she is certain she answered truthfully. MHT 27:2-21. Next, she states that she does not know the alleged victim, even though she stated previously that they talked. MHT 27:14-15. It appears juror Brandis's testimony at the motion hearing was disingenuous.

Taylor Mednansky testified at the motion hearing that juror Brandis "looks at me and mumbles something about, 'I don't want to do this,' and she's shaking her head." MHT 6:23-7:1. There is nothing in the record to suggest that Taylor was not a credible witness. This exchange took place in the hall outside the courtroom as the jury was excused for a break during trial. MHT 7:3-17.

Defendant argues that because of at least three statements made by juror Brandis, taken in the context of the entire voir dire exchange, the trial court abused its discretion by denying Defendant's motion to excuse for cause. Additionally, Defendant has suffered presumed and actual prejudice as it is clear from the record that an impartial juror took part in his guilty verdict. After stating numerous times that she cannot be fair and impartial, juror Brandis voted to convict Defendant. Juror Brandis was disingenuous at the motion hearing and testified contrary of her voir dire exchange. Defendant's argument is of first impression as his trial counsel did not exercise a peremptory challenge to remove juror Brandis prior to the start of the jury trial.

CONCLUSION

Wherefore, Appellant requests that this Court grant the relief sought in Appellant's Brief.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument on all issues and matters raised in this appeal.

Dated this 10th day of June, 2020.

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By _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The brief is 10 pages and was prepared using Apple Pages and uses proportionally spaced font [Times New Roman] in 12-point type. Based on the word-count feature of the Apple Pages processing system, the Brief contains 2,600 words and 15,221 characters counting spaces.

_____
Robert Thomas Konrad

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Reply Brief, was sent by e-mail for electronic filing and service to:

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on June 10, 2020.

The original and two copies of the Appellant's Reply Brief were mailed, by U.S. mail, postage prepaid, to:

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