

In the Supreme Court
State of South Dakota

Appeal No. 30443

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DION BORDEAUX,

Defendant and Appellant.

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Robert Mandel
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellee, State of South Dakota, is referred to as “State.” The circuit court is referred to as “circuit court” or “court”. Defendant and Appellant, Dion Bordeaux, is referred to as “Dion.” The jury trial transcript in *State v. Dion Bordeaux*, Pennington County Crim. No. 20-3887, is denoted “JT Volume.” The evidentiary hearing relevant to this appeal is denoted “Evidentiary Hearing 11/16/2022”. All other documents filed are referenced by the document name followed by the date of its filing. “*App*” designates Appellant’s Appendix.

JURISDICTIONAL STATEMENT

In this appeal, Dion Bordeaux seeks review of the Court's order in which he was sentenced to life in the South Dakota State Penitentiary without the possibility of parole.

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

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Whether the circuit court abused its discretion in allowing inadmissible other acts evidence from an incident that had neither a similar victim nor a similar crime.

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

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

State v. Lassiter, 2005 S.D. 8, 692 N.W.2d 171

State v. Otophiale, 2022 S.D. 35, 976 N.W.2d 759.

STATEMENT OF THE CASE

On September 9th, 2020, Dion Bordeaux was indicted by a Pennington County Grand Jury for one count of first-degree murder. The Honorable Robert Mandel presided over this matter. On June 5th, 2023, Dion was found guilty of first-degree murder in violation of SDCL § 22-16-4(1). On August 2nd, 2023, Dion was sentenced to life with no possibility of parole in the South Dakota State Penitentiary.

FACTS

In the late hours of December 31st, 2019, and into the early hours of January 1st, 2020, Dion is celebrating the New Year with his girlfriend Jeanette Jumping Eagle (hereinafter "Jeanette") and his brother Giovanni Bordeaux (hereinafter "Giovanni") at the Microtel in Rapid City, South Dakota. All three are drinking throughout the night. *JT*

Volume 1, 74: 18-24. The hotel room is reserved in Jeanette's name. *Id.* 197: 4-6.

Throughout the night, people come to hang out but as it gets later, only the three remain in the hotel room. *Id.* 1-3.

Dion and Jeanette are not getting along. *Id.* 76: 10-13. It appears to Giovanni as if "they were on the verge of breaking up" and were calling each other names and making angry remarks. *Id.* 15-24. At one point Jeanette makes the statement that "I left my kids for you" to Dion. *Id.* 104: 6-8. Shortly before midnight, Giovanni decides he wants to leave the party so he starts looking for a ride and plans on getting picked up by his coworkers. *Id.* 79: 1-3. Dion had also shown interest in leaving and asked Giovanni if he could catch a ride with him, to which Giovanni said, that "would probably be fine." *Id.* 105: 2-12.

The hours pass and Giovanni, still waiting for his ride, steps into the bathroom. *Id.* 79: 9-12. At no point in the night does Giovanni see a gun anywhere in the hotel, but he did know Jeanette to carry one. *Id.* 105: 13-21. While using the bathroom, he hears "a really loud bang." *Id.* 79: 20-22. He opens the bathroom door and can smell gun smoke and sees Dion "standing next to the wall, I guess, freaking out." *Id.* 80: 4-14. Giovanni asks Dion what happened to which he replies, "I don't know. I don't know. I don't know." *Id.* 4-6. Dion stands within a foot or two of Jeanette, close enough to touch her. *Id.* 83: 7-10. Giovanni catches a glimpse of her sitting on the couch and sees "fluids coming out of her head." *Id.* 82: 24-25. Dion steps past Giovanni into the bathroom. *Id.* 85: 8-10.

Dion steps out of the bathroom panicking and tells Giovanni that they need to leave the hotel. *Id.* 88: 8-10. Dion does this, as he tells law enforcement, because he

believed that Jeanette was shooting at him. *JT Volume 1*, 43: 19-20. Giovanni and Dion leave the hotel together but split up when they get outside. *Id.* 89: 7-16.

At approximately 3:40 AM, while Dion and Giovanni are leaving the area, Dion calls 911 and tells dispatch that Jeanette had just shot herself. *Id.* 65: 23-25. He informs them where the shooting occurs. *Id.* 66: 11-13. He states, "I broke up with her and tried to leave her." *Id.* 8-10. He also provides details as to what he is wearing and where can be found. *Id.* 2-4.

Law enforcement arrive on scene and use a key from hotel staff to enter the hotel room. *Id.* 134: 11-13. The officers enter and immediately see Jeanette sitting on the couch. *Id.* 155: 3-8. Officers look for any signs of life but do not observe any. *Id.* Upon closer examination, officers see blood on Jeanette's right hand and the right side of her face. *Id.* 18-21. Law enforcement also locate a small drop of blood on the floor of the bathroom. *Id.* 155: 24-25. A pistol is found on Jeanette's right leg with her hand on it. *Id.* 211: 5-6. Stippling is noticed around the entry of the wound. *JT Volume 3*, 39, 3-6.

At some point, law enforcement recall taking the gun from underneath Jeanette's hand. *JT Volume 1*, 213: 22-24. The officer who allegedly grabs the gun then attempts to "make it safe." *Id.* 215: 7. In doing so, he was unable to eject the casing in the chamber of the gun. *Id.* 20-25. The reason being, as the officer recalled, was because the safety to the gun was still on. *Id.* 216: 6-10.

Law enforcement later locate Jeanette's vehicle in the hotel parking lot and upon searching it, they locate an empty leather holster for a small semiautomatic gun and a partially empty case of ammo for a Winchester nine-millimeter. *Id.* 209: 16-21. Controlled substances are also located within the vehicle. *Id.* 210: 1-2.

An officer responds to where Dion told dispatch he could be found and Dion is interviewed. *Id.* 182: 1-9. He consents to a PBT and the result was a .06. *Id.* 22-24. Dion becomes upset throughout the interview and is hard to understand. *Id.* 12-15. Throughout he asks if Jeanette is okay. *Id.* 177: 9-11. Eventually when he learns that Jeanette has died, he becomes emotional. *Id.* 171: 6-14.

Dion and Giovanni are transported to Rapid City's Criminal Investigation Division where they voluntarily speak further with law enforcement. *Id.* 196: 17-25. Both Dion and Giovanni also voluntarily consent to being processed and provide their clothes and personal belongings as well as buccal swabs. *Id.* 198: 1-11.

On January 16th, 2020, Dion speaks with law enforcement that his relationship with Jeanette was strained and that they were arguing most of the night leading up to her death. *JT Volume 3*, 120: 6-11. Dion told law enforcement that he was trying to leave Jeanette that night because when she drinks, she sometimes gets very insecure. *Id.* 135: 22-25. In the moments leading up to a gun being fired, he was knocking on the bathroom door to ask Giovanni about the status of their ride. *Id.* 120: 20-24. Just prior to the gun being fired, he recalled Jeanette saying "Fuck you then. I will just die." *Id.* 136: 5-7.

When the gun is fired, he tells investigators, he went over to Jeanette and "demonstrated like holding her head in his hand and saying 'baby, baby,' and checking to see if she was all right, and to see if there was anything that he could do to help." *Id.* 120: 7-11. Dion denied touching the gun and recalled seeing it in Jeanette's lap. *Id.* 14-17. He told law enforcement that after cradling Jeanette's head he does wash his hands in the bathroom. *Id.* 137: 4-6. When asked why he and Giovanni left the scene, Dion told investigators it was because he was concerned, mentioning the fact that she sold drugs.

Id. 21-23. Dion further recalled an incident earlier in the night in which he had shot Jeanette's gun by the railroad tracks near the Walmart in North Rapid City. 138: 1-7.

On September 9th, 2020, Dion is indicted on one count of First-Degree Murder in violation of SDCL § 22-16-4(1) in that he did kill, without authority of law, and with a premeditated design to effect the death of Jeanette Jumping Eagle.

Prior to trial, the State provided notice of intent to introduce Other Acts Evidence. *Appx. 3 Court's Order Granting Prior Acts Evidence*. The State's notice regarded two incidents from September and December of 2019 respectively.

An evidentiary hearing was held on November 16, 2022 to address the admissibility of the prior acts. *Id.* The proposed witness for the December 2019 hearing refused to testify at the time of the hearing but the court heard testimony as it related to the September 2019 incident. That incident pertained to Dion's previous conviction in Lincoln County for aggravated assault in violation of SDCL § 22-18-1.1(2). *Evidentiary Hearing 11/16/2022*, 17:23-25. Dion plead guilty and was convicted on August 3rd, 2020. *Id.* The State argued that the aggravated assault would be used to show intent and common scheme or plan to the events involving Ms. Jumping Eagle.

The State called the only eyewitness to the aggravated assault, Melissa Herrboldt (hereinafter "Melissa"), at the evidentiary hearing. At that hearing, Melissa testified that she had met Dion through her boyfriend, Kane Marshall (hereinafter "Kane"). *Evidentiary Hearing 11/16/2022*, 8; 1-3. Kane and Dion were cousins and best friends at the time. *Id.* Melissa recalled that Dion was in Sioux Falls and that he wanted to hangout and drink at Melissa and Kane's residence in Harrisburg. *Id.* 12-17. Between 2 and 3 in the morning, Melissa hears noises and after they continue, she gets up to see what was

going on. *Id.* 9: 15-22. She recalls walking out to Kane holding Dion up against the wall and Dion was continuously stabbing Kane. *Id.* 21-24. Counsel for defense cross-examined Melissa, specifically that when Melissa spoke to law enforcement in 2019 “at no time in those reports do you say that you ever saw Dion stabbing anyone, to include Kane.” *Id.* 14: 15-20.

Counsel for Dion objected to the use of other acts evidence arguing that it was not admissible for either intent or common scheme or plan. The Court overruled the objection and granted State’s request, holding that:

The acts of the charged offense and proffered evidence are sufficiently similar to be admissible other acts evidence. In both the charged offense and the incident of September 2019, the Defendant is alleged to have been drinking alcohol with a victim with whom he had a close, even familial, relationship. In both instances the Defendant and victims are alleged to have been alone together before argument ensued resulting in an unsuspected, violent attack by the Defendant. The probative value of the other acts evidence may be heightened given the lack of eyewitnesses to the charged offense. A jury could find by a preponderance that the other act occurred, and that the defendant was the actor. Furthermore, the proffered evidence is relevant to a material issue in the case, and its probative value is not substantially outweighed by the danger of unfair prejudice.

Appx. 3, Court’s Order Granting Prior Acts Evidence.

Trial commenced on May 30th, 2023, in Pennington County. The State began opening statements by asserting, “[l]adies and gentlemen, the defendant, Dion Bordeaux, is a violent individual when he is drinking.” *JT Volume 1*, 41: 22-24. The State extrapolates this theory, informing the jury they will hear about the prior bad act. “We believe [Melissa] will tell you about a time a few years earlier, another incident with [Dion]...She will tell you that she came out to see

that [Kane] had been stabbed multiple times by [Dion], because [Dion] is a violent individual when drinking.” *Id.* 45: 11-20.

The State heavily focuses on Dion’s conduct immediately after the shooting, “pay attention as the evidence comes it and as you see it, and how it makes sense for someone who just lost a significant other...I want you to watch his actions, and I want you to compare that as he is saying on the body cam that he thought she was shooting at him.” *Id.* 43: 10-21.

Finally, the State emphasized to the jury the evidence that would prove their case:

And then I want you to really pay attention to the physical evidence in this case, and the forensic evidence in this case that you will hear...the photos of Jeanette that he will see with one gunshot wound above the right eyebrow. Photos of the gun near her hand, her hand that has a phone charger wrapped around it. A gun that when law enforcement goes to check and make safe, has the safety on. A bullet in the top above her eyebrow that will show you that gunshot did not occur with the gun pressed against to the skin. And you will see photos with the rod. And pay attention to the angle of the gunshot wound in the front of her head that’s not pressed against her skin...Now, we know she didn’t move. That she is dead and sitting on a couch in that room. And when you put all this together, Ms. Jumping Eagle did not take her own life.

Id. 44-45: 12-25; 1-10.

Defense counsel’s theory focuses on Jeanette’s death being a suicide. “She threatened to kill herself, put the gun to her head and pulled the trigger, and he panicked.” *Id.* 49: 19-24. “You will hear the 911 call. And you will be able to hear Dion’s demeanor. He is frantic. He is panicked. And he is clear, although you have to listen carefully, because he’s talking in a fast-paced voice, a high-pitched voice, and clearly appears to be crying.” *Id.* 49: 3-8. Defense also explains the differences in Dion’s accounts, “[n]ow, did he call from the hotel

room? No. That would be clear.... You will hear Dion when he visits with Detective Trainer some two weeks later that he was panicked; he was scared to death. He didn't know what to do when it happened." *Id.* 12-18.

As trial proceeds, the jury hears from the 911 operator who confirms that Dion is the one to call in the shooting and that he says, "I broke up with her and tried to leave her...She shot herself." *Id.* 66: 8-12. Testimony is also elicited that the call to 911 comes in at approximately 3:40 A.M. *Id.* 64: 23.

Giovanni is called to testify, recollecting that after hearing the singular gunshot he saw Dion panicking and that the room smelt of gunpowder. *Id.* 80: 7-14. Law enforcement recalls being dispatched to the hotel room for a suicide. *Id.* 151: 7-8. They testify to the blood on Jeanette's right hand as well as on the right side of her face. *Id.* 155: 19-21.

During trial, conflicting testimony arises as to who is the first to touch the gun used in the shooting. One of the reporting detectives testifies that he is the first one to touch the gun. "The first thing I did was I kind of grabbed the gun from the topside and pulled it out from underneath her arm, her hand, to try and not to disturb her hand or roll her hand around and that kind of stuff." *Id.* 213: 22-25. Later, while the forensic examiner is testifying, she is asked "before collecting those items did another law enforcement officer have contact with the firearm to render it safe?" *JT Volume 2*, 79: 23-25. The examiner responds that she was the one who collected the gun, only after she had taken photographs because "you are not supposed to manipulate anything before it is photographed." *Id.* 80: 1-4. The examiner continues that after photographing the

scene, she collected the firearm as well as collecting “the magazine ammo that was inside the magazine. And there was also a round in the chamber.” *Id.* 80: 12-17.

The Forensic Examiner is further asked about collecting the gun on cross-examination and she reiterates that she was the first one to touch the gun and that had anyone else touched it, “that information would be passed on generally, and I was not told that someone had touched it.” *Id.* 157: 8-10. When asked about the importance of knowing whether someone had touched the gun previously, she provides:

Because it does make a difference. When someone is touching something, we need to know how it was handled. Let’s say, for instance, if they are not wearing gloves, and if an item is sent for fingerprint processing or biological evidence collection, they would have—we would collect their sample, too, since they have touched it. And it is important to know how, especially a weapon possibly used in an incident that is important to know how it was originally located.

Id. 157: 13-22.

As the trial proceeds, an expert in gunshot residue (hereinafter “GSR”) is called. She testifies to testing 12 samples in relation to this case. *JT Volume 2*, 239: 3-5. She continues, providing that GSR was located on the back of Jeanette’s right hand as well as the back and palm of her left hand. *Id.* 6-18. Two component particles were found on Jeanette’s right palm. *Id.* As to Giovanni, his right and left palms contained a two-component particle. *Id.* 241: 21-25. The back of his left hand contained GSR. *Id.* 24-25. Finally, she testified that Dion had GSR located on his right palm as well as the back of his left hand. *Id.* 242-243: 24-25; 1.

The State calls an expert to speak about blood transfer stains. When asked to define a blood transfer stain, they provided it “is a blood stain that is created because of a non-bloody surface coming into contact with a bloody surface.” *Id.* 279: 22-25. The expert opined that the blood present on Jeanette’s hand did not originate naturally and instead it occurred because of blood transfer. *Id.* 282: 19-20.

The forensic pathologist is called and testifies that Jeanette died of a singular gunshot wound to the head, “right above her right eyebrow... When I looked at this wound you could tell that this—you know, that the range of fire, that the tip of the barrel was fairly close to the [skin] surface, but not directly upon the skin surface.” *JT Volume 3*, 38: 15-21. The forensic pathologist further testifies to stippling from the gun around the entrance wound and what would cause that to have occurred, that it’s caused by unburned powder particles that are thrust out the barrel of the gun. *Id.* 39, 13-16. The pathologist explains that the existence of stippling around the wound suggests that the gun was not pressed against Jeanette’s skin when the gun was fired. *Id.* 40: 9-13. The pathologist further explained, “[b]ut if you pull the tip of the gun back a little bit, then it has a chance to escape into the air and it gets on the skin surface.” *Id.* 14-16. The pathologist further testifies that the bullet’s trajectory was at a downward angle. *Id.* 43, 9-10. Finally, when asked if he could rule out that this was a suicide, the pathologist could not, providing that “I think you have two, possibly even three choices. You could say this was a suicide, it was a homicide, or you could throw accident in there.” *Id.* 52: 22-25.

Outside the presence of the jury, counsel for defense renewed its objection as it pertained to the other acts evidence.

As [the State] indicated in opening statements, the State called this witness with the intent to show that Mr. Bordeaux acted in conformity with his conduct on a previous occasion in that he got drunk and became violent...The only evidence elicited was to establish that he was provided a PBT and there was no concern about his intoxication or ability to cooperate with law enforcement. So I believe that absent that important piece of evidence in comparing the relevant test under 404(b) that the only purpose for offering this evidence from the State at this point is to try to place [Dion] in a light of having bad character or for a mere protensity (sic) because the status as initially anticipated by the Court and analyzed under the Court's Order is not what the status of what the record is at trial at this point.

Id. 86-87: 5-25; 1-11. When asked by the court for the purpose of the other acts evidence, the State reiterated that Dion "can be violent when he is drinking alcohol. There is evidence that he was drinking alcohol on the night of this incident when [Jeanette] was shot." *Id.* 88: 18-22. Defense counsel restated its contention that the State's explanation does not meet the standard for motive or opportunity or any other permissible purpose. *Id.* 89: 5-7. Defense Counsel further asked the court to sustain the objection because "any potential prejudice is outweighed by the probative value in the Sioux Falls incident. Frankly, the facts are extremely dissimilar." *Id.* 8-10. The court overruled counsel's objection and allowed the evidence in. *Id.* 91: 18-20.

The State subsequently called Melissa who testified to the September 2019 occurrence in which Kane was stabbed 9 times. *Id.* 100: 19-20. She recalls seeing the knife in Dion's hand going in and out of Kane's body. *Id.* 97: 16-20. At some point in the altercation, the two fell to the floor and were wrestling and ended up towards her, "Kane was able to subdue him. And he was like squirting

blood while he was on top of him.” *Id.* 98: 1-4. Melissa continued, recalling trying to get the knife out of Dion’s hand but “[Dion] was afraid that Kane was going to retaliate.” *Id.* 18-20. “Eventually, [Dion] let go...I think that they were just so wasted that they didn’t really realize what was going on, because Dion immediately started apologizing. *Id.* 98-99: 23-25; 1-2. Immediately after the incident, Dion helped Kane get to the hospital. *Id.* 99:9-18. Melissa further testified that while Dion and Kane went to the hospital, she cleaned up the house and the blood, noticing a “a 30 packet of Silver Bullets empty, Coors Light cans everywhere” around her apartment. *Id.* 101: 2-3.

The trial proceeds with law enforcement testifying to security footage of Dion and Giovanni leaving the hotel room. *Id.* 128: 3-5. From the camera, law enforcement testify that Dion and Giovanni can be seen leaving the hotel at 3:34 A.M. *Id.* 128: 16. Law enforcement further testify that Dion was wearing a black puma jacket while leaving the hotel room and that Jeanette’s blood was found on that jacket. *Id.* 133: 17-23.

The State called a detective that extracted data from cell phones connected to this case. The State introduced messages from an iPhone belonging to Jeanette. Specifically, the State introduced messages from a conversation between Jeanette and another phone number whose identity could not be confirmed. *Id.* 210-211: 23-25; 1-2. The date those messages were sent was December 20th, 2019. *Id.* 216: 8-10. The first message, received by Jeanette, was “Bitch, I love you, dot, dot, now I got to kill you, with a frowning face.” *Id.* 211: 20-23. The next two messages sent by Jeanette read “I ain’t dumb, and I ain’t

scared” and “W my own gun, K.” *Id.* 212: 16-25. The final message highlighted by the state was sent to Jeanette and stated “I did fucking cheat, but, okay Jen. *Id.* 213: 6-7.

After the state rested, counsel for defense made a motion for judgment of acquittal, arguing that “there is ample evidence in this record from the State’s witnesses that this is as likely a suicide as it was a homicide.” *JT Volume 4*, 4: 19-21. Defense points to the inconsistency with collection of the gun:

[Forensic Examiner] testified rather clearly that that handgun was transported by her in a car to the evidence building as it was found, and it was there that she removed the magazine and unloaded the weapon. [Detective] says no, I did that myself on scene. No supporting evidence brought by the State solves this dichotomy. Obviously, it has to be one or the other. That indicates that that gun may have well been off safe, or that it was on safe, but it’s – it’s not clear at all from this record and it doesn’t negate the defense.”

Id. 6: 11-22. Defense continues:

[T]here is no indication whatsoever that the timeline provides room to commit a premeditated murder and cover it up with the precision of a trained operative and hightail it out of the Microtel. That, from Giovanni’s testimony, that could not have lasted more than two or three minutes at best, and probably more like 30 seconds in terms of a young man taking a leak in the bathroom, hearing a gunshot and stepping outside the room.

Id. 7: 9-18. The court denies the motion for judgment of acquittal, holding “I think there are some inconsistencies in the evidence, but they are the type of inconsistencies the jury is there to resolve.” *Id.* 9: 21-25.

After denying the motion, counsel for defense rested its case. The case is handed to the jury and return a verdict of guilty to first-degree murder.

On August 2, 2023, Dion is sentenced to life with no possibility of parole in the South Dakota State Penitentiary with 856 days credit plus each day served in the Pennington County jail. *Appx. 1 Judgment of Conviction*

STANDARD OF REVIEW

This Court reviews a circuit court’s decision to admit or deny other act evidence under SDCL § 19-19-404(b)(Rule 404(b)) for an abuse of discretion. *State v. Nohava*, 2021 S.D. 34, ¶ 13, 960 N.W.2d 844, 849 (citing *State v. Phillips*, 2018 S.D. 2, ¶ 13, 906 N.W.2d 411, 415). “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable.’” *State v. Holler*, 2020 S.D. 28, ¶ 10, 944 N.W.2d 339, 342 (quoting *State v. Delehoy*, 2019 S.D. 30, ¶ 22, 929 N.W.2d 103, 109).

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING INADMISSIBLE OTHER ACTS EVIDENCE FROM AN INCIDENT THAT HAD NEITHER A SIMILAR VICTIM NOR A SIMILAR CRIME.

This is a trial where the State’s own expert could not rule out Jeanette’s tragic death as a suicide, where legitimate concerns exist of a tainted crime scene, and where the State’s evidence of premeditation was circumstantial at best. Regardless, the jury’s first impression of Dion was that he “is a violent individual when he is drinking.” *JT Volume 1*, 41: 22-24. That is the kind of propensity evidence this Court precludes, evidence of other crimes to prove conduct through an inference about the defendant’s character. *State v. Lassiter*, 2005 S.D. 8, ¶ 24, 692 N.W.2d 171, 179. The State’s only use of the September 2019 crime was to smuggle forbidden evidence of propensity to the jury. *Id.* (quoting 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5240, at 480 (1978)). The circuit court

abused its discretion in allowing the State to illicit propensity evidence from Dion's prior conviction as it was improper 404b evidence, provided no probative value whatsoever, and was therefore detrimentally more prejudicial. For all the foregoing reasons, this Court must reverse Dion's conviction of first-degree premeditated murder.

"Generally, evidence of crimes or acts other than the ones with which the defendant is charged are inadmissible, unless certain exceptions apply." *State v. Moeller*, 1996 S.D. 60, ¶ 12, 548 N.W.2d 465, 471. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that [the person] acted in conformity therewith." *State v. Birdshead*, 2015 S.D. 77, ¶ 57, 871 N.W.2d 62, 81 (quoting SDCL 19-19-404(b)(2)).

"Other act evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* To determine the admissibility of other act evidence, the circuit court must "'conduct a two-part balancing test on the record' ... [it] must first determine that the 'other-act evidence is relevant to some material issue in the case other than character (factual relevancy). Second, the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice (logical relevancy).'" *State v. Otohiale*, 2022 S.D. 35, ¶ 24, 976 N.W.2d 759, 769 (quoting *Birdshead*, 2015 S.D. 77, ¶ 24, 871 N.W.2d at 769) (citing *State v. Scott*, 2013 S.D. 31, ¶ 28, 829 N.W.2d 485, 468).

"To obtain a new trial, a defendant must prove not only that the circuit court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice." *Lassiter*, 2005 S.D. 8, ¶ 13, 692 N.W.2d at 175. "If the other act evidence is

‘similar in nature and relevant to a material issue, and not substantially outweighed by its prejudicial impact,’ it is admissible.” *Evans*, 2021 S.D. 12, ¶ 26, 956 N.W.2d 68, 79. “Prejudice does not mean infliction of damage to the opponent’s case that results from the legitimate probative force [of] the evidence; rather, it refers to the capacity of the evidence to persuade the jury by illegitimate means.” *State v. Smith*, 1999 S.D. 83, ¶ 19, 599 N.W.2d 344, 349-50 (quoting *State v. Iron Shell*, 336 N.W.2d 372, 375 (S.D. 1983)).

A. The Circuit Court Abused its Discretion in Admitting Dion’s Prior Conviction of Aggravated Assault

The circuit court found that the September 2019 incident was admissible to show Dion’s intent. In allowing other acts to prove intent, there are two important factors that this Court must consider: (1) similar victims and (2) similar crimes. *Novak v. McEldowney*, 2002 S.D. 162, ¶ 15, 655 N.W.2d 909, 914.

The circuit court allowed the prior acts evidence and in doing so made limited findings:

The acts of the charged offense and proffered evidence are sufficiently similar to be admissible other acts evidence. In both the charged offense and the incident of September 2019, the Defendant is alleged to have been drinking alcohol with a victim with whom he had a close, even familial, relationship. In both instances the Defendant and victims are alleged to have been alone together before argument ensued resulting in an unsuspected, violent attack by the Defendant. The probative value of the other acts evidence may be heightened given the lack of eyewitnesses to the charged offense. A jury could find by a preponderance that the other act occurred, and that the defendant was the actor. Furthermore, the proffered evidence is relevant to a material issue in the case, and its probative value is not substantially outweighed by the danger of unfair prejudice.

Appx. 3, Court’s Order Granting Prior Acts Evidence. This Court must hold that the circuit court abused its discretion in allowing the evidence at trial as the two incidents do not include similar victims nor similar acts of violence.

1. The Circuit Court erred in finding that Kane and Jeanette are similar victims.

While the circuit court rationalizes that a cousin and romantic partner may be considered similar victims, this Court has not provided guidance to that conclusion. In its motion to the court, the State attempts to analogize Dion's case to that of the defendant in *State v. Evans*. There, this Court allowed the use of other acts for purposes of motive, intent, and common scheme or plan. *Evans*, 2021 S.D. 12, ¶ 33, 956 N.W.2d at 82. In *Evans*, the two incidents involved romantic partners of the defendant. This Court held that sufficient similarity existed, both were "members of the same class of victims-women who suffered domestic abuse at the hands of [defendant]." *Id.* 2021 S.D. 12, ¶ 32, 956 N.W.2d at 81. This Court continues, citing defendant's conduct towards both victims was in essence to "exert power and instill fear in an attempt to regain control of a relationship, and if that failed, to punish each woman for ending it." *Id.* at ¶ 33.

Here, Jeanette and Kane are not similar victims consistent with this Court's holding in *Evans*. The circuit court's rationale that victims are similar because both chose to drink alcohol with Dion and they shared "a close, even familial, relationship" with him is incredibly broad and misinterprets controlling authority in South Dakota. This Court has not expanded its ruling in *Evans* to any extent that would suggest a romantic partner and a cousin could be considered similar victims for the purpose of including other acts evidence.

Further, the court erred in categorizing both the relationships as "close" and "familial." Melissa does testify at both the evidentiary hearing and at trial that Dion and Kane were "cousins and best friends." *Evidentiary Hearing 11/16/2022*, 8: 1-3.

However, the testimony suggests that the pair only saw each other on occasion, and when they got together, it was to drink alcohol. *Id.* 12-17. While technically related, the relationship between the two is that of a long-distance friendship. Additionally, there is no evidence whatsoever to suggest that the incident between Dion and Kane results from any sort of previous disagreement. Melissa’s testimony supports this fact as she did not recall any bad blood between Dion and Kane. As she testified, both were highly intoxicated and hadn’t really realized what was going on. *JT Volume 3*, 98-99: 23-25; 1-2.

In contrast, while testimony was elicited that Dion and Jeanette were in a romantic relationship, it was abundantly clear they had disagreements and seemingly were going to be ending their relationship. Giovanni recalled that throughout the night of the incident, Dion and Jeanette were not getting along and “were on the verge of breaking up.” *JT Volume 1*, 76: 10-24. Moreover, Jeanette is heard telling Dion “I left my kids for you.” *Id.* 104: 6-8. While it is accurate to define Dion and Jeanette’s relationship as a romantic one, it was error to consider it similar to that of his relationship with Kane.

The facts of the present case are distinguishable from those in *Evans*. Kane and Jeanette are not similar, let alone members of the same class of victims. For this reason, the Court should find that the circuit court erred in finding that the prior act included a similar victim.

2. The circuit court erred in finding that the September 2019 aggravated assault was similar to the 2020 incident

In finding that the two acts were similar, it held that in both instances Dion “and victims are alleged to have been alone together before argument ensued resulting in an

unsuspected, violent attack by the defendant.” *Appx. 3, Court’s Order Granting Prior Acts Evidence*. The court errs in this finding. The two incidents are significantly distinguishable both in the facts and the crimes alleged to have occurred.

This Court held in *Evans* that the prior act and charged crime must have sufficient points in common. 2021 S.D. 12, ¶ 30, 956 N.W.2d at 80 (quoting *State v. Wright*, 1999 S.D. 50, ¶ 18, 593 N.W.2d 792, 800). Further, the other act “evidence must demonstrate ‘not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained.’” *Wright*, 1999 S.D. 50, ¶ 19, 593 N.W.2d at 800-01 (internal citations omitted). This Court further held in *Evans* that because the State had to prove defendant acted with specific intent that his prior acts were probative to show his similar intent when carrying out the charged acts. *Evans*, 2021 S.D. 12, ¶ 33, 956 N.W.2d at 81.

Dion was convicted of the September 2019 aggravated assault in violation of SDCL 22-18-1.1(2) on August 3rd, 2020. *Evidentiary Hearing 11/16/2022*, 17:23-25. One is guilty of aggravated assault if they “attempt to cause, or knowingly causes, bodily injury to another with a dangerous weapon.” As Melissa testified, she walked out to see Kane holding Dion up against the wall of her apartment and Dion continuously stabbing Kane. *Id.* 9: 21-24. While the circuit court found that the stabbing was the result of an argument and that it was unsuspected, there are not facts to support this finding. Neither at the evidentiary hearing nor at trial is Melissa ever asked to opine why the aggravated assault occurred.

By contrast, when the jury convicted Dion of first-degree murder, they found beyond a reasonable doubt that he did kill, without authority of law, and with a

premeditated design to cause the death of Jeanette Jumping Eagle. In doing so, the State needed to prove that Dion had the specific intent to effect Jeanette's death. The State's theory was that Dion shot and killed Jeanette and attempted to make it look like a suicide and called witnesses to support their theory. This included law enforcement testifying that the gun's safety was engaged and that the blood on Jeanette's hand did not naturally appear.

The two events are distinguishable and should not have been found similar for purposes of admissibility of other acts evidence. In September 2019, it is undisputed both Dion and Kane were highly intoxicated at the time of the aggravated assault. *JT Volume 3*, 98-99: 23-25; 1-2. On the night of Jeanette's death, it was established that Dion provided a PBT of 0.06. *JT Volume 1*, 210: 22-24. In 2019, there is nothing to suggest that a fight or disagreement between Kane and Dion lead to the assault. In 2020, there was evidence to support trouble in Dion and Jeanette's relationship. In 2019 Melissa never testifies that Dion did anything to cover up the crime and to the contrary, Dion immediately started apologizing and helped ensure Kane got to the hospital. *JT Volume 3*, 99: 9-18. In 2020, the State's case revolved around the steps Dion would have had to complete immediately after the shooting occurred.

The present facts are analogous to *State v. Lassiter*. There, this Court held that the prior acts evidence should not have been included in part because no "commonalities" existed between the prior acts and present charge. *Lassiter*, 2005 S.D. 8, ¶ 25, 692 N.W.2d at 179 (distinguishing *Johnson v. Wyoming*, 936 P.2d 458 (Wyo.1997)). This Court concluded that a prior assault on a different partner of defendant

was inadmissible because “any connection” between the two assaults were too remote so therefore to allow evidence about a prior assault. *Id.* at ¶ 23.

The circuit court erred when it found that the 2019 aggravated assault was a similar event to the alleged shooting in 2020.

B. Dion was severely prejudiced by the court’s abuse of discretion when it allowed the prior acts testimony.

As the circuit court noted, inconsistencies exist in the State’s case against Dion. *JT Volume 4*, 9: 21-25. Regardless of all the unanswered questions and contradictions in their case, the propensity evidence, masked as other acts evidence, severely prejudiced Dion and lead to his conviction. When the State was asked at trial for the probative value of the September 2019 assault, they all but confirmed it was being used for propensity. That Dion “can be violent when he is drinking alcohol. There is evidence that he was drinking alcohol on the night of this incident when [Jeanette] was shot.” *JT Volume 3*, 88: 18-22. The September 2019 assault should not have been allowed at trial and the circuit court’s abuse of discretion severely prejudiced Dion and lead to his conviction.

“Admission of other act evidence may result in some prejudice, but to be inadmissible that prejudice must be unfair.” *State v. Boe*, 2014 S.D. 29, ¶ 24, 847 N.W.2d 315, 321. However, this Court outlined the dangers of allowing propensity evidence in *State v. Lassiter*. This Court rationalized that allowing testimony of a previous assault “only tended to prove that because defendant had done it before, he must have done it again.” *Lassiter*, 2005 S.D. ¶ 23, 692 N.W.2d at 179. This Court continued, prejudice existed as the court “allowed [victim] to testify about inflammatory matters that had no bearing on the present offense...Considering these inflammatory

matters, we conclude that the error in admitting the evidence was prejudicial.” *Id.* at ¶ 26.

Throughout trial, significant issues arose with the theory of the State’s case in proving premeditated murder. First, Jeanette’s death could not be ruled out as a suicide by the forensic pathologist. *JT Volume 3, 52: 22-25*. Second, the testimony by Giovanni impairs the State’s theory of the case. For Dion to have committed this murder, he would have had to find Jeanette’s gun, fire it, place it in Jeanette’s hand, and then move back all in the time that it took Giovanni to hear the gunshot and exit that bathroom. Finally, at the close of evidence the State could not say with certainty what occurred in the hotel room because their witnesses cannot provide who is the first to manipulate Jeanette’s body to collect the firearm. The forensic examiner, who was adamant she was the first to collect the gun, explained that any previous manipulation would taint the crime scene. *JT Volume 2, 157: 13-22*. This creates issue with the State’s contentions that the safety was engaged on the gun at the time law enforcement collects and the reliability of the blood transfer stains.

Regardless, with all the inconsistencies in the State’s case, the jury convicted Dion of first-degree murder. The significance and the prejudice of the September 2019 aggravated assault testimony cannot be overlooked. The prior act did not include a similar victim, nor a similar crime. Yet, based upon the circuit court’s ruling to include the other acts evidence, the jury was told from the start of opening statements that Dion was violent when he drank. This propensity evidence cannot be forgotten and surely weighed on every single juror’s mind while asked to determine what happened in the

early hours of January 1st, 2020. There is no question whatsoever that the outcome of trial would have been different without the prior acts evidence.

CONCLUSION

For all these reasons, this Court must reverse Dion's conviction. Dion was not entitled to a fair trial based upon the circuit court's abuse of discretion in allowing the propensity evidence. There is no question that the severely prejudicial evidence elicited by the State directly lead to Dion's conviction.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellant Bordeaux respectfully requests that he be allowed to present oral argument on this issue.

Respectfully submitted this 20th day of May 2024.

/s/ Kyle D. Beauchamp
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Telephone: (605) 718-2330
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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 6,847 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word processing program to prepare this certificate.

Dated this 20th day of May 2024.

/s/ Kyle D. Beauchamp
Kyle Beauchamp
Attorney for Appellant

CERTIFICATE OF SERVICE

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

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Dated this 20th day of May 2024.

/s/Kyle D. Beauchamp
Kyle Beauchamp
Colbath and Sperlich
Attorney for Appellant

APPENDIX

Tab 1- Judgment of Conviction.....Appx. 1-2

Tab 2- Indictment.....Appx. 3-4

Tab 3- Court’s Order Granting Prior Acts Evidence.....Appx. 5-6

STATE OF SOUTH DAKOTA,)
)SS
COUNTY OF PENNINGTON,)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
Plaintiff,)
)
vs.)
)
DION NOEL BORDEAUX,)
DOB: 12/25/94)
Defendant.)

File No. CR120-3887

JUDGMENT

Appearance at sentencing:
Prosecution: Kevin J. Krull Defense attorney: Angela Colbath

Date of sentence: August 2, 2023
Date of offense: January 1, 2020
Charge: First Degree Murder
Class: A Felony SDCL: 22-16-4(1)
Guilty by jury on: June 5, 2023

CRIME QUALIFIER: (CHECK IF APPLICABLE):

- Accessory 22-3-5 Aiding or Abetting 22-3-3 Attempt 22-4-1
 Conspiracy 22-3-8 Solicitation 22-4A-1

Habitual offender admitted on: _____
 SDCL 22-7-7 SDCL 22-7-8 SDCL 22-7-8.1

Part 2 Information (DUI) admitted on _____
 Third Offense; SDCL 32-23-4 Fourth Offense; SDCL 32-23-4.6
 Fifth Offense; SDCL 32-23-4.7 Sixth or Subsequent Offense; SDCL 32-23-4.9

Part 2 Information (ASSAULT) admitted on _____
 SDCL 32-23-4.9

The Defendant having been found guilty at jury trial and the Court having asked whether any legal cause existed to show why judgment should not be pronounced, and no cause being offered:

IT IS HEREBY ORDERED THAT the Defendant is sentenced to serve:

Life with an possibility of parole in the South Dakota State Penitentiary with 856 days credit plus each day served in the Pennington County jail and that the Defendant pay fines imposed in the amount of \$5,000.

- That Defendant pay court costs of **5106.58**,
 That Defendant's attorney's fees will be a civil lien pursuant to SDCL 23A-40-11.
 That Defendant pay prosecution costs: **Expert Witness Costs and Fees \$7,430.68**, Drug Test \$50.00, Blood \$ __, SART Bill \$ __; Transcript \$84.18.

JG
8/1/23

Other Conditions:

Pursuant to agreement of the parties, the State's Attorney is dismissing all remaining counts to include any Part II information, if applicable.


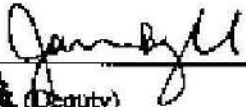
Dated this 7th day of August, 2023, effective the 2nd day of August, 2023.

BY THE COURT:

HON. ROBERT MANDEL CIRCUIT JUDGE

ATTEST:


Amber Watkins, Clerk of Courts

 
(Deputy)

You are hereby notified you have a right to appeal as provided for by SDCL 23A-32-15. Any appeal must be filed within thirty (30) days from the date that this judgment is filed.

FILED
Pennington County, SD
IN CIRCUIT COURT

AUG -7 2023

Amber Watkins, Clerk of Courts
By  Deputy

STATE OF SOUTH DAKOTA)
) SS.
 COUNTY OF PENNINGTON)
 STATE OF SOUTH DAKOTA)
)
 Plaintiff,)
 vs.)
)
 DION BORDEAUX, and)
 GIOVANNI BORDEAUX)
 Defendant.)

IN CIRCUIT COURT
 SEVENTH JUDICIAL CIRCUIT
 File No: CRI 20- 3887

COUNT 1: C-A-FEL - DEATH/MAND.LIFE/50
 COUNTS 2-3: C-5-FEL = 5/10
 INDICTMENT FOR
 COUNT 1: FIRST DEGREE MURDER
 COUNTS 2-3: ACCESSORY TO A CRIME

THE PENNINGTON COUNTY GRAND JURY CHARGES:

COUNT 1: That on or about the 1st day of January, 2020, in the County of Pennington, State of South Dakota, DION BORDEAUX did commit the public offense of **FIRST DEGREE MURDER** in that (s)he did kill, without authority of law, and with a premeditated design to effect the death of Jeannette Jumping Eagle, or any other person, including an unborn child, in violation of SDCL 22-16-4(1), and

COUNT 2: That on or about the 1st day of January, 2020, in the County of Pennington, State of South Dakota, GIOVANNI BORDEAUX did commit the public offense of **ACCESSORY TO A CRIME**, in that s(he) did, with intent to hinder, delay or prevent the discovery, detection, apprehension, prosecution, conviction or punishment of Dion Bordeaux for the commission of a felony, render assistance to Dion Bordeaux, by obstructing anyone by force, intimidation, or deception in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of Dion Bordeaux, in violation of SDCL 22-3-5(4); and

IN THE ALTERNATIVE:

COUNT 3: That on or about the 1st day of January, 2020, in the County of Pennington, State of South Dakota, GIOVANNI BORDEAUX did commit the public offense of **ACCESSORY TO A CRIME**, in that s(he) did, with intent to hinder, delay or prevent the discovery, detection, apprehension, prosecution, conviction or punishment of Dion Bordeaux for the commission of a felony, render assistance to Dion Bordeaux, by concealing, destroying or altering any physical evidence that might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of Dion Bordeaux, in violation of SDCL 22-3-5(5); or

contrary to statute in such case made and provided against the peace and dignity of the State of South Dakota.

Dated this 9th day of September, 2020, at Rapid City, Pennington County, South Dakota.

A True Bill
 "A TRUE BILL"

Pennington County, S.D.
 FILED
 IN CIRCUIT COURT
 SEP 9 2020
 Clerk of Courts
 Deputy

STATE OF SOUTH DAKOTA,)
COUNTY OF PENNINGTON)SS
STATE OF SOUTH DAKOTA,)
Plaintiff,)
vs.)
DION BORDEAUX,)
Defendant.)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

51CRI20-3887

ORDER

This matter comes before this Court upon the State's Notice of Intent to use Other Acts evidence. The State's Notice proposes the use of other acts evidence from two distinct incidents which are alleged to have occurred in September and December of 2019. A hearing was held on the matter on November 16, 2022, where counsel for both parties were present and witness testimony was received by Zoom. The first witness, Melissa Herrboldt, testified as to the September incident. A second witness, a thirteen-year-old girl, was expected to testify as to the December incident but refused at the time her testimony was to be taken. The September incident took place at Ms. Herrboldt's residence in Harrisburg, South Dakota, where she lived with her boyfriend, and the Defendant's friend and cousin, Kane Marshall. The Defendant came to stay at their apartment and spent the evening drinking with Marshall. Ms. Herrboldt testified that she was awoken by the men arguing in the early hours of the morning and went into the kitchen where she witnessed the Defendant stabbing Marshall numerous times. Ms. Herrboldt got the knife away from the Defendant and then asked her neighbor to drive Marshall to the hospital.

In determining the admissibility of other acts evidence, a court must first determine whether the "evidence is relevant to some material issue in the case other than character[.]" and secondly, "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice[.]" *State v. Birdsheed*, 2015 S.D. 77, ¶ 57, 871 N.W.2d 62, 81. "Prejudice does not mean infliction of damage to the opponent's case that results from the legitimate probative force [of] the evidence; rather, it refers to the capacity of the evidence to persuade the jury by illegitimate means." *State v. Smith*, 1999 S.D. 83, ¶ 19, 599 N.W.2d 344, 349-50 (quoting *State v. Iron Shell*, 336 N.W.2d 372, 375 (S.D. 1983)). "Another consideration in the potential admission of 404(b) evidence is the availability of other evidence." *Smith*, 1999 S.D. 83, ¶ 21, 599 N.W.2d at 350 (holding probative value of evidence is heightened where no third party witnessed charged

act). Assessing the relevance of 404(b) evidence and weighing whether its probative value outweighs its prejudicial effect is within the sound discretion of the trial court. *State v. Snodgrass*, 2020 S.D. 66, ¶ 27, 951 N.W.2d 792, 802.

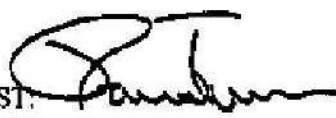
To prove intent, a court must consider whether the prior acts involved similar victims and similar crimes. *Novak v. McEldowney*, 2002 S.D. 162, ¶ 15, 655 N.W.2d 909, 914 (citing *Moeller*, 1996 S.D. 60, ¶ 25, 548 N.W.2d at 475). The acts of the charged offense and proffered evidence are sufficiently similar to be admissible other acts evidence. In both the charged offense and the incident of September 2019, the Defendant is alleged to have been drinking alcohol with a victim with whom he had a close, even familial, relationship. In both instances the Defendant and victims are alleged to have been alone together before argument ensued resulting in an unsuspected, violent attack by the Defendant. The probative value of the other acts evidence may be heightened given the lack of eyewitnesses to the charged offense. A jury could find by a preponderance that the other act occurred, and that the defendant was the actor. Furthermore, the proffered evidence is relevant to a material issue in the case, and its probative value is not substantially outweighed by the danger of unfair prejudice. For these reasons it is hereby

ORDERED that the State's Motion use Other Acts evidence is **GRANTED** with respect to the incident outlined in its Notice which occurred in September of 2019.

DATED this 25th day of May 2023.

BY THE COURT:



HONORABLE ROBERT MANDEL
CIRCUIT COURT JUDGE

ATTEST: 
Clerk of Courts

By: 
Deputy



Pennington County, SD
FILED
IN CIRCUIT COURT
MAY 26 2023

Ranae Truman, Clerk of Courts
By:  Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30443

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DION BORDEAUX,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
7th JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT MANDEL
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed August 24, 2023

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

DID THE TRIAL COURT ABUSE ITS DISCRETION ADMITTING OTHER ACTS EVIDENCE?

State v. Lassiter, 2005 SD 8, 692 N.W.2d 171

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

State v. Reyes, 2005 SD 46, 695 N.W.2d 245

State v. Richmond, 2019 SD 62, 935 N.W.2d 792

The trial court admitted evidence of a prior assault by Bordeaux against a close family member under similar circumstances.

STATEMENT OF THE CASE AND FACTS

Dion Bordeaux shot his girlfriend, Jeanette Jumping Eagle, in the forehead on New Year's Eve then clumsily staged it to look like a suicide. Bordeaux, his brother Giovanni and Jeanette had been celebrating the coming year in a room at the Microtel hotel on North Lacrosse Street in Rapid City. But as the night wore on, Bordeaux and Jeanette were arguing about alleged infidelity in the relationship more than they were celebrating. It appeared to Giovanni that the two were breaking up. TRIAL 1 at 76/15, 103/20, 115/15, 169/21. Feeling like a third wheel in the presence of this lovers' quarrel, Giovanni called coworkers to come pick him up and take him away from the hotel. TRIAL 1 at 103/23.

Jeanette was sitting on a couch in the room when Giovanni went into the bathroom and closed the door. TRIAL 1 at 79/12. While in the bathroom, he heard a gunshot and came out. According to Giovanni, he

asked what was going on and Bordeaux was across the room from Jeanette (allegedly) in a panic saying "I don't know, I don't know." TRIAL 1 at 81/4, 86/6, 110/6. Bordeaux then stepped in front of Jeanette and stood with his back to Giovanni. During this time, Giovanni could not see Jeanette or what Bordeaux was doing with his (or her) hands. TRIAL 1 at 81/24, 82/6, 83/12, 84/3, 86/14, 87/4, 108/23. Bordeaux then went into the bathroom to wash his hands. TRIAL 1 at 84/7.

Bordeaux and Giovanni decided to leave the scene. TRIAL 1 at 88/10. They left the hotel and walked down Lacrosse Street. Bordeaux was saying "I'm sorry, I'm sorry, I'm sorry" and "I fucked up." TRIAL 1 at 92/3. Bordeaux and Giovanni split up, Bordeaux heading south on, and Giovanni west from, Lacrosse Street. TRIAL 1 at 89/14. Bordeaux then called 911 and told dispatch that he had broken up with his girlfriend and that she had shot herself. He asked for help and told dispatch that he could be found by the Runnings store on Lacrosse Street. TRIAL 1 at 66/11.

Police officers arrived and questioned Bordeaux about what had happened. He told the officers that he and Jeanette were arguing and that he heard a loud bang. TRIAL1 at 170/18. Bordeaux said he "thought she had shot at" him and so he took off running out of the hotel room. TRIAL1 at 177/18. While talking to Bordeaux, one of the officers informed him that they had learned over the radio that Jeanette was dead; Bordeaux asked the officer in (feigned) disbelief if he was joking,

put on a big (feigned) display of grief (rolling around on the ground and clawing at the snow), and then said he wanted to go see her. TRIAL 1 at 171/13.

Back at the hotel room, officers found Jeanette seated on the sofa, a gun on her right thigh with her right hand laying atop the gun.

EXHIBITS 14, 15. Jeanette's cell phone charging cord was looped around the little finger of her right hand and the cord was plugged into her phone. EXHIBIT 15; TRIAL 1 at 214/11-19; TRIAL 2 at 86/13; TRIAL 3 at 115/18, 145/7. After the scene was photographed, Detective Justin Gizzi slid the gun out from under Jeanette's hand. In the process of prepping the gun to be bagged for evidence, Detective Gizzi discovered that the safety switch was engaged, which would have rendered the gun incapable of firing. TRIAL 1 at 213/22, 216/9, 220/6, 225/18; TRIAL 3 at 71/12, 153/3.

When he was interviewed two weeks later, Bordeaux's story changed from what he had told the officers right after the shooting. TRIAL 3 at 118/23. Bordeaux now said he was knocking on the bathroom door to ask Giovanni if he could catch a ride with him and his coworkers when Jeanette supposedly said "Fuck you then, I will just die," and then he heard the gunshot. TRIAL 3 at 120, 136/6. Bordeaux said he went over to Jeanette and cradled her head in his hands, (allegedly) saying "baby, baby," (allegedly) checking if she was alright, (allegedly)

seeing if she could be helped. Bordeaux said the gun landed in Jeanette's lap beneath her hand and that he did not touch it or anything other than Jeanette's face after the shot was fired. TRIAL 3 at 121/7-15, 126/17, 137/5. Seeing Jeanette was dead, Bordeaux went into the bathroom and washed his hands and then he and Giovanni left the room. TRIAL 3 at 122/1, 127/8, 137/5.

A text exchange between Bordeaux and Jeanette eleven days before the shooting reflects that she was done with him. Bordeaux protested "I didnt fucking cheat, but okayyyy jen." EXHIBIT 95. Jeanette replied "U did. I ain't dumb." EXHIBIT 95. Bordeaux told Jeanette "Your mine." EXHIBIT 95. Jeanette replied "Nahhhh." EXHIBIT 95. Bordeaux told her "Bitch i love you . . Now i gotta kill you." EXHIBIT 95. Jeanette responded "I ain't scared" and references the fact that she has her "own gun." EXHIBIT 95. These exchanges reflect that Jeanette was not distraught over losing Bordeaux; but losing Jeanette had turned Bordeaux's thoughts to violence. These texts, and the story told by the hotel room where Jeanette died, point to murder, not suicide.

ARGUMENT

Bordeaux argues that the trial court erred in admitting evidence of an assault he committed against a close family member three months earlier under similar circumstances.

A. Standard Of Review

Review of evidentiary questions is limited to whether the trial court abused its discretion. *State v. Birdshead*, 2015 SD 77, ¶ 50, 871 N.W.2d 62, 80. While evidence of other acts offered for the sole purpose of establishing a propensity to commit a crime is irrelevant and inadmissible, to obtain a new trial a defendant must prove not only that the trial court abused its discretion in admitting the evidence but also that he was prejudiced as a result. *Birdshead*, 2015 SD 77, ¶ 64, 871 N.W.2d at 83. “The other acts rule is one of ‘inclusion, not exclusion.’” *State v. Huber*, 2010 SD 63, ¶ 56, 789 N.W.2d 283, 301. The question on review “is not whether, had [this court] been the trial judge, would [it] have admitted the prior . . . acts evidence but whether the trial court sitting in the case abused its discretion by doing so.” *Huber*, 2010 SD 63 at ¶ 56, 789 N.W.2d at 301. “[E]vidence of past abusive conduct in a domestic situation is highly relevant in murder cases.” *Huber*, 2010 SD 63 at ¶ 57, 789 N.W.2d at 302.

Erroneous admission of other acts evidence does not require reversal if the error was harmless. *Birdshead*, 2015 SD 77, ¶ 64, 871 N.W.2d at 83. Error is harmless if the evidence was unimportant relative to, and the alleged prejudice outweighed by, “the overall strength of the prosecution’s case.” *State v. Richmond*, 2019 SD 62, ¶ 36, 935 N.W.2d 792, 802.

B. The Trial Court Properly Admitted The Other Act Evidence

The other act evidence concerned an assault with a deadly weapon/attempted murder similar to the murder in question. Three months before Jeanette's murder, Bordeaux was at the house of his cousin and girlfriend, Kane and Melissa. TRIAL 3 at 94/19. Bordeaux and Kane were "best friends." TRIAL 3 at 93/11. They were drinking into the early hours and arguing. TRIAL 3 at 95/2, 97/8, 105/18. While Melissa was out of the room, a fight erupted. She entered the living room to see Bordeaux repeatedly stabbing Kane in the torso with a knife – nine times deliberately, not one time accidentally. TRIAL 3 at 97/16, 111/21.

Despite his wounds, Kane overpowered and disarmed Bordeaux. TRIAL 3 at 97/24-98/25. Bordeaux became immediately apologetic and formulated a plan to cover up the incident. TRIAL 3 at 99/2-15. The story became that Kane had been "drunk and had fallen on some coffee table, or something to that effect." TRIAL 3 at 109/24. Melissa had a friend drive Kane and Bordeaux to the hospital. TRIAL 3 at 100/8. After they left, Melissa returned to a living room strewn with empty beer cans and bits of flesh and blood "everywhere." TRIAL 3 at 100/25. She cleaned up the scene and disposed of the knife. TRIAL 3 at 108/24. Kane was seriously and nearly fatally wounded and was in the hospital for five days. TRIAL 3 at 101/14. Naturally, law enforcement did not buy the coffee table story and Bordeaux was arrested. He pled guilty to aggravated assault. TRIAL 3 at 91/1.

The trial court properly admitted this other act evidence. The court found that the incidents were similar in that in both the other act and the charged offense Bordeaux had “been drinking alcohol with a victim with whom he had a close, even familial, relationship.” APPELLANT’S APPENDIX at 6. In both incidents, Bordeaux and his victims were drinking “alone together before argument ensued resulting in an unsuspected, violent attack” by Bordeaux. APPELLANT’S APPENDIX at 6. The trial court found the evidence relevant to intent and that it had high probative value in light of “the lack of eyewitnesses” to Jeanette’s shooting. APPELLANT’S APPENDIX at 6.

Though the other act and the charged offense “need not be identical,” here they are. *State v. Lassiter*, 2005 SD 8, ¶ 16, 692 N.W.2d 171, 176. In both incidents Bordeaux had been drinking with his victim into the early morning hours and had been arguing with the victim before suddenly and violently attacking the victim with a deadly weapon. Afterward, Bordeaux became contrite and apologetic and engaged in a cover up. The only differences are that Kane was Bordeaux’s cousin rather than his girlfriend and the weapon Bordeaux employed was a knife rather than a gun. But these distinctions are without a difference here.

Bordeaux had a direct familial relationship with both Kane and Jeanette. And in both incidents Bordeaux sought to settle a drunken argument with deadly force. The fact that he did not succeed in

murdering Kane was sheer luck considering how close the knife came to Kane's heart and lung. TRIAL 3 at 101/14. This attempt to kill Kane evidences Bordeaux's intent to kill Jeanette and identifies him as her killer. *State v. Reyes*, 2005 SD 46, ¶ 15, 695 N.W.2d 245, 251.

The trial court's admission of Bordeaux's prior assault is similar to *State v. Wright*, 1999 SD 50, 593 N.W.2d 792, where this court found that the trial court had properly admitted a prior act of excessive discipline by Wright against his daughter in a prosecution of Wright for child abuse of his son. *Wright*, 1999 SD 50 at ¶ 21, 593 N.W.2d at 801. *Wright* reasoned that the jury "could infer from Wright's past two instances of child punishment that [his discipline in the case of the charged offense] was 'unreasonable' and not 'rendered necessary,' but was part of an overall plan or design to abuse his children when given any provocation." *Wright*, 1999 SD 50 at ¶ 21, 593 N.W.2d at 801. Here, as in *Wright*, Bordeaux's shooting of Jeanette was consistent with a design to assert dominance in familial settings through violence. *Wright*, 1999 SD 50 at ¶ 21, 593 N.W.2d at 801 (noting probative value of prior assaults because they "occurred within the same familial setting"). And here, as in child abuse cases where victims "often cannot speak for themselves," Bordeaux's attack on Kane was relevant because Jeanette cannot speak for herself. *Wright*, 1999 SD 50 at ¶ 23, 593 N.W.2d at 802; APPELLANT'S APPENDIX at 6 (finding probative value stemming from of "the lack of eyewitnesses").

Likewise, in *Louisiana v. Colby*, 244 So.3d 1260 (Ct.App.La.2nd), the court held that testimony concerning armed, assaultive behavior by Colby against two patrons of a bar owned by Colby's girlfriend was admissible in his trial for shooting his girlfriend to death with a Colt .45. In two prior incidents involving arguments with bar patrons, Colby physically assaulted and threatened to kill the patrons, and pulled his Colt .45 and fired it into the air or floor to back up his threat. *Colby*, 244 So.3d at 1266. The *Colby* court affirmed the admission of these prior incidents as evidence of intent because both "involved the defendant losing his temper at perceived and insignificant threats, and using a gun against the object of his anger." *Colby*, 244 So.3d at 1274. *Colby* found that "[t]he probative value of the defendant's prior acts of violence against [the bar patrons] was substantial, as they show that the defendant had a pattern and practice of reacting violently to seemingly insignificant stressors, and that he is quick to display a weapon." *Colby*, 244 So.3d at 1275-1276. These acts tended "to show that [Colby] would be more likely to kill or seriously injure [his girlfriend] when he was angry with her . . . and that he had used the gun on others was relevant to show intent, pattern and plan." *Colby*, 244 So.3d at 1276. Bordeaux, like Colby, had a practice of reacting violently during disagreements with familial relations and was quick to use a deadly weapon against them. As in *Colby* (and *Huber*), the evidence of Bordeaux's attempted murder of

Kane was relevant in that it made the possibility of murder of Jeanette “more likely.” *Colby*, 244 So.3d at 1276; *Huber*, 2010 SD 63 at ¶ 57.

And in *Godbolt v. Mississippi*, 2024 WL 976588 (Miss.), where the court affirmed the trial court’s admission of evidence of Godbolt’s abuse of his first wife and stepdaughter during Godbolt’s trial for the murders of his second wife and her family. The *Godbolt* court found that the evidence of “Godbolt’s controlling and abusive nature toward his immediate family . . . show[ed] Godbolt’s motive for committing the crimes.” *Godbolt*, 2024 WL 976588 at ¶¶ 39, 114. This evidence “allowed the jury to grasp the complete story of the events and to better understand why the situation” with Godbolt’s second wife escalated to murder. *Godbolt*, 2024 WL 976588 at ¶¶ 114. Here, as in *Godbolt*, evidence of Bordeaux’s prior murderous attack precipitated by a drunken argument with a close family member provided the jury with a more complete picture of Bordeaux and a better understanding of his motives the night Jeanette died.

Bordeaux relies heavily on *Lassiter* but it is readily distinguishable from this case. *Lassiter* found that the other act and charged offense victims were not similar because *Lassiter* had no direct relationship with the victim of the charged offense; here Bordeaux had a direct relationship with both Kane and Jeanette. *Lassiter*, 2005 SD 8 at ¶ 25, 692 N.W.2d at 179. Also, in *Lassiter* the circumstances of the other act and charged offense crimes were not similar; in the latter *Lassiter* broke into his

victim's house with the intent to commit assault, but in the former *Lassiter* and his victim had been sitting in a car together when the situation escalated into an assault. *Lassiter*, 2005 SD 8 at ¶¶ 11, 18, 692 N.W.2d at 175, 177. Here both the other act and charged offense crimes were functionally identical.

Unlike in *Lassiter*, Bordeaux's suicide defense placed identity in issue in this case. *Reyes*, 2005 SD 46, ¶ 15, 695 N.W.2d at 251 (alibi defense put identity of rapist in issue). So, whereas the probative value of the other act evidence in *Lassiter* was low because the victim could identify his assailant, here it was high because Jeanette could not identify her shooter. *Lassiter*, 2005 SD 8 at ¶ 6, 692 N.W.2d at 174. And because identity was not in issue in *Lassiter*, the prejudicial effect in that case was high, and was made higher because the prosecution had the other acts witness testify about matters extraneous to the prior assault for which *Lassiter* had been convicted – such as the facts that he carried a gun and stalked her the day after the assault. Here, by contrast, the prejudicial effect is low in comparison to the forensic and other evidence that Bordeaux staged Jeanette's murder as a suicide, and because the other acts witness testified only to matters relating to the prior assault for which Bordeaux had been convicted. *Lassiter*, 2005 SD 8 at ¶ 26, 692 N.W.2d at 179; TRIAL 3 at 97-112. Accordingly, the trial court here did not abuse its discretion in admitting the other act evidence.

C. Bordeaux Experienced No Prejudice In Light Of The Convincing Evidence Of Guilt

Admission of the contested evidence caused Bordeaux no prejudice. Prejudice depends on the importance of the testimony to the prosecution's case, whether the defense had a fair opportunity to cross-examine the other act witness, whether the testimony was cumulative, and the overall strength of the prosecution's case. *Richmond*, 2019 SD 62 at ¶ 36, 935 N.W.2d at 802.

Dion Bordeaux was the sole source of the self-serving suicide narrative. But the crime scene – and Bordeaux himself when first confronted by police – told a much different story. The story told by the crime scene was murder staged as suicide:

- The gun was fired from above Jeanette's forehead at a downward angle. TRIAL 2 at 137/3; TRIAL 3 at 43/9; EXHIBITS 69, 70. Fragments of the bullet found in the base of Jeanette's skull were consistent with this downward trajectory. EXHIBIT 88; TRIAL 2 at 127/24.
- Typically, suicides place the gun against their skin to control aim, creating a contact wound. TRIAL 3 at 10/5, 47/22. Here, the absence of a contact wound showed the gun was fired a short distance from Jeanette's forehead. TRIAL 3 at 38/20-23, 39/20.
- Jeanette's cell phone cord was wrapped around the little finger of her right hand. EXHIBIT 15.

- Bordeaux's suicide scenario required Jeanette to have lifted the gun above her forehead with her cell phone dangling in her face from the charging cord wrapped around her little finger and taken uncertain aim at herself a short distance from her forehead from an awkward, downward angle. A real suicide would have untangled the phone from her finger and placed the gun in contact with her head, likely at the temple, in order to effectively aim the gun to accomplish its purpose. The downward trajectory, absence of a contact wound and encumbrance of Jeanette's hand with the cell phone cord are, however, consistent with Bordeaux standing over Jeanette and firing the gun into her forehead from a few inches away while she was seated on the couch plugging the charger cord into her cell phone.
- Law enforcement found the gun's safety switch engaged when it removed the gun from her lap. Jeanette did not engage the safety after (allegedly) shooting herself, so the gun was handled after the shooting. It is likely that Bordeaux inadvertently engaged the safety when he positioned the gun in her lap.¹

¹ Bordeaux argues that the safety was engaged by the forensic examiner, who he argues handled the gun before Detective Gizzi prepped it for evidence. The forensic examiner testified that she had no memory of prepping the firearm for evidence or touching it before it was prepped and ready for transport to the lab. TRIAL 2 at 164/12-25. The forensic examiner also testified that if Detective Gizzi's report reflected that he had prepped the firearm, which it does, then she believed that he was the one who had prepped it. The forensic examiner's report reflects that she simply "transported it" to the evidence locker after it had been prepped. TRIAL 2 at 165/14. In any event, the question of how the safety came to

- Bordeaux had gunshot residue on his right hand, even though he had washed his hands after the shooting. TRIAL 2 at 242/8, 242/24, 243/4, 244/2.
- To explain the gunshot residue on his hand, Bordeaux said he had been firing the gun earlier that evening down by the railroad tracks behind the hotel by the Wal-Mart on Lacrosse Street. TRIAL 3 at 125/3, 138/2. But this also means that Bordeaux could have had possession of Jeanette’s gun the entire evening. No retrieving the gun from her backpack, alerting her to danger, was required. Bordeaux needed only to whip the gun from his pocket and shoot Jeanette while she sat on the couch.
- A gun doesn’t stay in a person’s hand after shooting themselves in the head. All motor control ceases, the hand loses grip, the arm drops like a marionette cut from its strings and the gun falls free of the hand, usually to the floor, not neatly into a person’s lap beneath the hand. TRIAL 3 at 50/24, 51/1. The notion of a suicide found with a telltale gun in hand is a “television” crime show idea that, in real life, is an indicium of murder staged as a suicide. TRIAL 2 at 306/3.
- Giovanni’s testimony established that Bordeaux had the opportunity to tamper with the crime scene when Bordeaux stood over Jeanette

be engaged was for the jury and had no bearing on the trial court’s analysis of whether to admit the other act evidence.

with his back to Giovanni and Giovanni (allegedly) could not see what Bordeaux was doing with his or Jeanette's hands.

- Bordeaux claimed that he never touched the gun after the shooting but the gun had a blood transfer stain near the trigger. TRIAL 2 at 287/23; TRIAL 3 at 146/17. The back of Jeanette's right hand was covered with transfer staining that had to come from lying palm up in a pool of blood, likely in the gore on the seat of the couch to her right. EXHIBITS 15, 45, 46; TRIAL 2 at 280/6, 282/21, 284/5, 300/11-24, 312/23; TRIAL 3 at 145/4-25, 146/15, 151/23. There were transfer stains on the inside the arm of the couch. TRIAL 2 at 284/16, 286/1, 287/5, 289/20, 303/7, 305/19, 327/20-24.

Jeanette's right sleeve was saturated with blood. EXHIBITS 45, 46; TRIAL 3 at 115/12. Jeanette had a bloody C-shaped impression in the palm of her right hand which had to have been made after her hand came in contact with blood and therefore after she was shot.

EXHIBITS 64, 65. But the object that made the impression was not beneath the palm of her hand where it supposedly fell. TRIAL 2 at 328/15, 329/17.

- Because the drainage of blood from Jeanette's head could not have caused the transfer stains on her hand, the gun or the inside of the arm of the couch, or the C-shaped impression on her palm, the story told by the pattern of transfer staining is that the gun and Jeanette's arm and hand "all have to be moved" after the shooting. TRIAL 2 at

306/22, 319/16. Jeanette’s “hand was picked up and placed on top of” the gun and, in the process, her bloody right sleeve brushed against the fabric on the inside of the arm of the couch. TRIAL 2 at 305/16, 306/12; EXHIBITS 45, 46.

- To explain the blood on his hands that he washed off in the bathroom, Bordeaux claims that he cradled Jeanette’s head in his hands and shook her head in the hope of reviving her. But there are no bloody handprints, or spatter patterns from being shaken, on Jeanette’s face or head to corroborate Bordeaux’s claim. TRIAL 2 at 330/16; EXHIBIT 51. The blood on Bordeaux’s hands came from moving her bloody right arm and the gun to stage the “suicide.”
- Contrary to Bordeaux’s claim of running in fear from the room because he thought Jeanette was shooting at him, the hotel’s CCTV video shows Bordeaux and Giovanni “just walking” down the hall from the room on their way out the door. TRIAL 3 at 117/20.

Under the circumstances, the other act evidence caused Bordeaux no prejudice. The forensic evidence of a staged suicide was the heart of the prosecutor’s case. Compared to the forensic evidence, Bordeaux’s diametrically contradictory stories about the shooting, and his text message threat to kill Jeanette, the other act evidence was a minor feature of the state’s case. *Richmond*, 2019 SD 62 at ¶ 36, 935 N.W.2d at 802 (no prejudice when other act evidence is unimportant relative to “the overall strength of the prosecution’s case”). The other act evidence was

also cumulative of the mountain of forensic evidence identifying Bordeaux as the shooter. And Bordeaux's counsel were able to fully cross-examine the other act witness, and counter the argument that Bordeaux is violent when he is drunk with evidence – the PBT result of .06 – that Bordeaux wasn't drunk. TRIAL 1 at 182/24. Because the other act evidence caused Bordeaux no prejudice, its admission is not grounds for reversal.

CONCLUSION

Zero objective evidence supports Bordeaux's suicide story. The other act evidence was relevant to proving motive, intent and identity. The trial court did not abuse its discretion admitting it. Moreover, it caused no prejudice to Bordeaux in light of the strength of the forensic evidence of a staged suicide, Bordeaux's inconsistent stories and his text message threat to kill Jeanette. Here, the balance of the evidence showed that Bordeaux was guilty beyond a reasonable doubt. *State v. Muhm*, 2009 SD 100 ¶ 35, 775 N.W.2d 508, 521. Accordingly, the state requests that Bordeaux's conviction be affirmed.

Dated this 25th day of June 2024.

Respectfully submitted,

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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 4,185 words.

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

Dated this 25th day of June 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served on Kyle Beauchamp via Odyssey file and serve at kyle@acolbathlaw.com.

Dated this 25th day of June 2024.

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In the Supreme Court
State of South Dakota

Appeal No. 30443

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DION BORDEAUX,

Defendant and Appellant.

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Robert Mandel
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed August 24th, 2023

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ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ALLOWING INADMISSIBLE OTHER ACTS EVIDENCE FROM AN INCIDENT THAT HAD NEITHER A SIMILAR VICTIM NOR A SIMILAR CRIME

Similar to its argument at trial, the State cannot help but utilize the other act as inadmissible propensity evidence. It argues that Dion's "attempt to kill Kane evidences [his] intent to kill Jeanette and identifies him as her killer." This Court continuously holds consistent with SDCL § 19-19-404(b) that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *State v. Reyes*, 2005 SD 46, ¶ 13, 695 N.W.2d 245, 250. "In this country it is a settled and fundamental principle that persons charged with crimes must be tried for what they allegedly did, not for who they are." *State v. Moeller*, 1996 SD 60, ¶ 6, 548 N.W.2d 465, 471 (citations omitted).

While convenient for its argument, the State's depiction of the "admissible" prior act is not supported by the facts heard at trial. The State represents to this Court that "Bordeaux became immediately apologetic and formulated a plan to cover up the incident" and "[t]he story became that Kane had been 'drunk and had fallen on some coffee table.'" *Appellee's Brief*, Pg. 6. The testimony does not support a "cover up." Melissa testifies that Dion helps Kane get up, walk outside and get to the hospital. *JT Volume 3*, 99: 16-18. The "story" about a coffee table was a lie perpetuated solely by Melissa to law enforcement. *Id.* 109: 22-25.

This is significant because the State contends the other act and charged offense are identical. That is not the case. No testimony was elicited about Dion "covering up"

the other act and so this Court should disregard all argument made by the State to that end.

What this Court is left with is two dissimilar victims. One of which is a cousin, the other an intimate partner. The State argues this Court's holding in *State v. Wright* is analogous, however this contention is misplaced. There, this Court held that the trial court had not abused discretion in allowing testimony from defendant's daughter in a case of child abuse against his son. *State v. Wright*, 1999 SD 50, ¶ 26, 593 N.W.2d 792, 803. This Court rationalized that the other act "would establish a plan or design to use excessive physical force as punishment, bearing on the probability that the present discipline was unreasonable." *Id.* at 1999 SD 50, ¶ 21, 593 N.W.2d at 802.

The State argues that both incidents show Dion's intent "to assert dominance in familial settings through violence." *Appellee's Brief*, Pg. 8. This once again mischaracterizes the prior act. There was nothing testified to about why the fight occurred or Dion's intentions. To the alternative, Melissa could not opine any reason as to what caused the fight. The State cannot establish the relevancy as it was presented to the jury so instead it is interjecting facts and perspective not in the record.

The State sidesteps the argument all together that a male cousin akin to a good friend is in anyway similar to a romantic partner. While technically related to Kane, the relationship between the two is that of a long-distance friendship. This is obviously very dissimilar to the romantic relationship between Dion and Jeanette. The State rests the necessary relevance by misapplying this Court's holding in *Wright*.

For similar reasons, the State's reliance on *Louisiana v. Colby* and *Godbolt v. Mississippi* is misplaced. The State contends that *Colby* is analogous because like the

defendant, “[Dion] had a practice of reacting violently during disagreements with familial relations and was quick to use a deadly weapon against them... [T]he evidence of [Dion’s] attempted murder of Kane was relevant in that it made the possibility of murder of Jeanette ‘more likely.’”

Colby is distinguishable. There, the defendant argued that he had shot the victim in self-defense. *Louisiana v. Colby*, 244 So.3d 1260, 1271 (Ct.App.La.2nd). The court explained that the affirmative defense made the prior incidents relevant “to show intent and to negate any claim of self-defense by the defendant.” *Id.* at 1274. Further, the defendant’s modus operandi was to use a gun. *Id.* at 1276. The court rationalized that the defendant’s use of the murder weapon, a Colt .45, was relevant to show, among other things, intent because the evidence at trial showed the “defendant carried a Colt .45 on his person, that the murder weapon was a Colt .45 owned by the defendant, and that he had used the gun on others. *Id.*

In the present case, nothing supports the State’s contention that Dion reacted violently during a disagreement. Nothing in the record supports that the stabbing stemmed from a familial disagreement. As Melissa testified, both Dion and Kane were highly intoxicated and hadn’t really realized what was going on. *JT Volume 3*, 98-99; 23-25; 1-2.

Similarly, the State’s reliance on *Godbolt v. Mississippi* is distinguishable. There, the Mississippi court held consistent controlling and abusing nature towards immediate family was admissible as to allow the jury to grasp the complete story of the events and to better understand why the situation occurred. *Godbolt*, 2024 WL 976588 at ¶ 115.

Here, there are not the same similarities. In the 2019 incident, Dion was highly intoxicated. *JT Volume 3*, 98-99: 23-25; 1-2.1 On the night of Jeanette's death, he provided a PBT of 0.06. *JT Volume 1*, 210: 22-24. In 2019, there is nothing to suggest that a fight or disagreement between Kane and Dion lead to the assault. In 2020, there was evidence to support trouble in Dion and Jeanette's relationship. In 2019 Melissa never testifies that Dion did anything to cover up the crime and to the contrary, Dion immediately started apologizing and helped ensure Kane got to the hospital. *JT Volume 3*, 99: 9-18. In 2020, the State's case revolved around the steps Dion would have had to complete immediately after the shooting occurred.

The State next attempts to distinguish this Court's holding in *State v. Lassiter* based upon the similar relationships Dion had with both Kane and Jeanette. *Appellee's Brief* Pg. 10. Such as this Court dealt with in *Lassiter*, in neither the victims nor the events, do commonalities exist. *State v. Lassiter*, 2005 S.D. 8, ¶ 25, 692 N.W.2d 171, 179.

The State does not challenge the differences between aggravated assault and first-degree murder. One is guilty of aggravated assault in violation of SDCL § 22-18-1.1(2) if they "attempt to cause, or knowingly causes, bodily injury to another with a dangerous weapon." The crime is a general intent crime. By contrast, one is guilty of first-degree murder in violation of SDCL § 22-16-4(1) if they "did kill, without authority of law, and with a premeditated design to cause the death" of an individual. The State does not have an argument as to the similarities between a general intent and specific intent crime. *Lassiter* is analogous.

Finally, the State argues that defense placed identity in question. However, this Court in *Reyes* held that in order for prior acts evidence to be admissible regarding identity, “the acts need not be identical, but they must be of such close similarity that an inference can be drawn that the same person committed the acts.” *Reyes*, 2005 S.D. 46, ¶ 15, 695 N.W.2d 245, 251. The dissimilarities have been argued at length above. Further, the circuit court made no finding as to allowing the prior act to show identity.

DION WAS SEVERLY PREJUDICED BY THE COURT'S ABUSE OF DISCRETION WHEN IT ALLOWED THE PRIOR ACTS TESTIMONY

Dion was absolutely prejudiced by the admission of the prior acts. Such as in *Lassiter*, based upon the circuit court’s ruling, the state was able to introduce evidence that “only tended to prove that because defendant had done it before, he must have done it again.” 2005 S.D. ¶ 23, 692 N.W.2d at 179. It allowed the State to get into “inflammatory matters that had no bearing on the present offense.” *Id.* at ¶ 26.

The State can attempt to highlight the strength of their case all it wants but severe and significant issues existed throughout. As outlined in Appellant’s Brief, those include the forensic examiner unable to rule out suicide, contradictory testimony by Giovanni, and mishandling evidence by law enforcement. Even with all the of the issues, the State was given the green light to put probative evidence at the forefront of their case. That “Dion Bordeaux, is a violent individual when he is drinking.” *JT Volume 1*, 41: 22-24.

The circuit court’s ruling could not be undone and assuredly stuck with each and every juror throughout the pendency of trial. Based upon the State’s case, coupled with the prior acts evidence, it is an absolute certainty that the outcome of trial would have been different without the prior acts evidence.

CONCLUSION

For all the reasons in Appellant's brief and reply brief, this Court must reverse Dion's conviction. Dion was entitled to a fair trial. Based upon the circuit court's abuse of discretion in allowing the propensity evidence, he did not receive that fair trial. There is no question that the severely prejudicial evidence elicited by the State directly lead to Dion's conviction.

Respectfully submitted this 24th day of July 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 1,518 words from the Argument through the Conclusion. I have relied on the word count of a word processing program to prepare this certificate.

Dated this 24th day of July 2024.

/s/ Kyle D. Beauchamp
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CERTIFICATE OF SERVICE

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

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