

APPENDIX (TABLE OF CONTENTS)

Appendix A: State v. Kryger, #27869, 2018 S.D. 13, 907 N.W.2d 800

Appendix B: Order Denying Petition for Rehearing #27869

Appendix C: Petition For Rehearing #27869

Appendix D: Trial Court Transcript Selections Re: Motion in Limine Regarding Death Threats as Bias and Motive to Lie Evidence .

Appendix E: Order Excluding Johnson from Trial

907 N.W.2d 800
Supreme Court of South Dakota.

STATE of South Dakota, Plaintiff and Appellee,
v.
Christopher Dean KRYGER,
Defendant and Appellant.

27869

ARGUED ON JANUARY 9, 2018

OPINION FILED 02/07/2018

Rehearing Denied 03/15/2018

Synopsis

Background: Defendant was convicted in the Second Judicial Circuit Court, Minnehaha County, Mark E. Salter, J., of first-degree murder, first-degree burglary, and second-degree rape. Defendant appealed.

Holdings: The Supreme Court, Jensen, J., held that:

[1] order prohibiting defendant from cross-examination of victim's brother about threats brother made to harm or kill defendant and defense counsel did not violate defendant's right of confrontation;

[2] trial court did not abuse its discretion in admission of opinion testimony by county coroner who conducted victim's autopsy that injuries to victim's vaginal area were indicative of rough intercourse or assault, and not consensual sex;

[3] evidence regarding burn pit was relevant to demonstrate defendant's destruction of evidence connecting him to crimes;

[4] defendant was not prejudiced by trial court's admission of his statements to detectives during separate interviews about having criminal mind;

[5] evidence reference defendant's parole status and incarceration, in violation of order in limine excluding any such evidence, did not warrant mistrial;

[6] defendant's accidental encounter with jury while being escorted by two officers after trial proceedings had concluded for day did not warrant mistrial;

[7] trial court did not abuse its discretion in rejecting defendant's proposed instructions on statement of mind and speculation;

[8] defendant was not entitled to instruction on alibi defense;

[9] whether defendant had premeditated victim's killing presented question for jury; and

[10] whether injuries to victim's vagina indicated that intercourse was forced and nonconsensual presented question for jury.

Affirmed.

***804** APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, MINNEHAHA COUNTY, SOUTH DAKOTA, THE HONORABLE MARK E. SALTER, Judge

Attorneys and Law Firms

MARTY J. JACKLEY, Attorney General, ANN C. MEYER, Assistant Attorney General, Pierre, South Dakota, Attorneys for plaintiff and appellee.

MARK KADI and, AUSTIN VOS of Minnehaha County Office of the Public Advocate, Sioux Falls, South Dakota, Attorneys for defendant and appellant.

Opinion

JENSEN, Justice

***805** ¶[1.] Christopher Dean Kryger appeals his convictions for first-degree murder, first-degree burglary, and second-degree rape. He claims the circuit court erred in ruling on a number of issues and that these errors, both separately and in the aggregate, entitle him to a new trial. We affirm.

Background

[¶2.] At approximately 10:00 p.m. on Friday, March 14, 2014, Kari Kirkegaard returned to her home on South Garfield Avenue in Sioux Falls after having supper with her family. On Sunday, March 16, 2014, Kirkegaard's son's fiancée, Paetyn Haemze (Haemze), went to Kirkegaard's home after failed attempts to reach her via phone. Haemze noticed Kirkegaard's blue SUV parked in the driveway of the home and that the back door was unlocked. Upon entering the home, Haemze heard water running. She investigated the bathroom and found Kirkegaard's body lying naked on her side in a full bathtub with the water running.

[¶3.] Haemze first called Kirkegaard's son and then called 911. Sioux Falls Police Officer Pat Mertes responded to the scene and noted Kirkegaard's body in the bathtub facing toward the door. Officer Mertes did not notice anything else unusual. Additional fire, ambulance, and police personnel arrived shortly thereafter. Police took photographs of Kirkegaard's body, drained the bath water, removed the body, and checked the rest of the home. They found no apparent signs of forced entry, foul play, or physical trauma. None of the first responders reported any smell of bleach.

[¶4.] After emergency personnel left, Kirkegaard's brother, Brian Johnson (Johnson), punched a hole in the wall of Kirkegaard's bathroom. Family members noticed that Kirkegaard's bedsheets, purse, SUV keys, and towels and rugs from the bathroom were missing. They also noticed a strong smell of bleach. Police were called back to the scene approximately one hour after they had left. This time, officers interviewed family and friends present at the scene. The officers also noted a strong odor of bleach in the home at this time. Law enforcement then began a homicide investigation.

[¶5.] During police interviews, Kirkegaard's friends and family members described her as a homebody who stuck within a small circle of friends and family. Kirkegaard had previous romantic interests, but she was not in any relationships at the time of her death. It was soon discovered that a mosque located two lots north of Kirkegaard's home possessed camera surveillance footage between March 14, 2014, and March 16, 2014. The mosque's camera faced southeast and had captured a view of Kirkegaard's front lawn, driveway, Garfield Avenue, and Garfield Elementary School.

[¶6.] The footage showed Kirkegaard's SUV returning to her home on the night of March 14 after she had supper with her family. It also showed a bicyclist riding past Kirkegaard's residence heading north at 11:30 p.m. that evening. The bicyclist doubled back on the sidewalk of Kirkegaard's home, then slowed down. A person was seen crossing the street in front of the mosque around 2:30 a.m. on March 15. The person was wearing a plaid flannel coat, jeans, and dark shoes, and appeared to *806 have a shiny object in their hands. The person's face was not visible. After the individual left the view of the camera, Kirkegaard's vehicle was seen leaving her driveway and travelling north with the headlights off. Kirkegaard's SUV returned about an hour later, at 3:30 a.m. The driver missed Kirkegaard's driveway, then turned around in the parking lot of Garfield Elementary School. The SUV parked in Kirkegaard's driveway, and the same individual was seen leaving on a bicycle. None of the camera footage captured who was in the vehicle or showed anyone entering or leaving Kirkegaard's residence.

[¶7.] Police eventually released the mosque video to the public. After receiving several tips, they were led to interview Kryger's friend Michael Miller, Kryger's fiancée, Lori Nagel, and Kryger's uncle and employer Richard Foster. Nagel and Miller indicated that the person seen in the video could have been Kryger, as the person had a similar gait and wore similar clothing. They also confirmed Kryger typically used his bicycle for transportation around Sioux Falls. Nagel told police that she and Kryger had an argument the night of March 14. She stated Kryger returned to her home around 4:30 a.m. to reconcile. Miller stated that he ran into Kryger on March 15, and the pair visited Walmart where Kryger bought an engagement ring for Nagel, a new cell phone, and a cell phone plan.

[¶8.] Kryger was contacted by police and taken to the Sioux Falls law enforcement center for an interview. In the interview, Kryger stated he became upset with Nagel on the night of March 14 and decided to go on a long bike ride around Sioux Falls. Kryger claimed that during this ride, he was nearly struck by an SUV without its headlights on just north of Kirkegaard's home. He also stated that later in the evening, his bike slid into the river. Kryger maintained that he returned home to wash his dirty clothes and called Nagel to reconcile. He stated he then rode his bike to Nagel's home and remained there until morning. Kryger discussed seeing Miller on March

15 and confirmed that the pair had gone shopping at Walmart. Kryger denied ever having sex with Kirkegaard. Kryger also made comments about having a "criminal mind."

[¶9.] Police collected hundreds of items in the course of their investigation of Kirkegaard's death. Only some of the items were tested. An autopsy performed on Kirkegaard's body revealed ligature furrows across her neck in two parallel lines, petechial hemorrhages, numerous small abrasions, a fractured hyoid bone, and fractured thyroid cartilage. The examination also revealed small abrasions on the outside wall of Kirkegaard's vaginal vault. The coroner was unable to pinpoint a time of death but concluded Kirkegaard was asphyxiated and that the manner of death was homicide. A rape kit conducted on Kirkegaard's body tested positive for Kryger's sperm cell DNA.

[¶10.] Kryger was arrested and indicted on five counts of first-degree murder, one count of second-degree murder, one count of second-degree rape, one count of third-degree rape, and two counts of first-degree burglary. The jury convicted Kryger on all counts except third-degree rape. On February 25, 2016, Kryger was sentenced to life in prison for first-degree murder, 50 years for second-degree rape, and 25 years for first-degree burglary to run concurrently with the first-degree murder sentence, but consecutive to the sentence for second-degree rape. Kryger appeals his conviction and sentence, raising several issues for our review, which we combine and restate as follows:

- *807 1. Whether the circuit court erred by precluding questioning of Johnson concerning his bias against Kryger.
2. Whether the circuit court erred by admitting expert testimony expressed in terms of possibilities.
3. Whether the circuit court erred by admitting irrelevant evidence without a foundation of physical evidence from the State's investigation of Kryger.
4. Whether the circuit court erred by admitting Kryger's statements that he has a criminal mind.
5. Whether the circuit court erred by denying Kryger's motions for mistrial.
6. Whether the circuit court erred by denying Kryger's proposed jury instructions regarding Kryger's

statements about his criminal mind, speculation and conjecture, and an alibi defense.

7. Whether the circuit court erred by denying Kryger's motion for judgment of acquittal.
8. Whether the accumulation of the errors claimed by Kryger constitute reversible error.

Analysis

1. Whether the circuit court erred by precluding questioning of Johnson concerning his bias against Kryger.

[1] [¶11.] Kryger argues he was deprived of his due process and Confrontation Clause rights when the circuit court denied Kryger the opportunity to cross-examine Johnson concerning threats Johnson made toward Kryger and defense counsel prior to trial. This included a threat to defense counsel at the conclusion of a pretrial hearing where Johnson stated words to the effect that defense counsel had better be a light sleeper. Johnson also made comments to the media that he would torture and kill Kryger if Kryger were released or not convicted. On Facebook, Johnson suggested he would harm or kill Kryger and defense counsel. Johnson's actions prompted the circuit court to exclude Johnson from Kryger's trial, but the State was allowed to call Johnson as a witness.

[¶12.] Before Johnson's testimony, the State orally moved to preclude Kryger from referencing any threatening comments made by Johnson. The circuit court precluded Kryger from cross-examining Johnson about the threats. Kryger claims the circuit court's ruling totally deprived him of the ability to effectively cross-examine Johnson. He argues Johnson's bias created a motive for Johnson to fabricate and exaggerate his testimony. Kryger maintains that without the ability to question Johnson regarding his bias, he was denied the right to a fair trial.

[2] [3] [¶13.] "We review a circuit court's evidentiary rulings under an abuse of discretion standard with a presumption that the rulings are correct." *State v. Birdshead*, 2015 S.D. 77, ¶ 36, 871 N.W.2d 62, 75-76. A circuit court's decision to limit cross-examination will be reversed only if there is both an abuse of discretion and a showing of prejudice to the defendant. *State v. Carter*, 2009 S.D. 65, ¶ 31, 771 N.W.2d 329, 338. Prejudice exists only when "a reasonable jury probably would have a

significantly different impression if otherwise appropriate cross-examination had been permitted.” *Birdshead*, 2015 S.D. 77, ¶ 36, 871 N.W.2d at 76 (quoting *State v. Johnson*, 2007 S.D. 86, ¶ 35, 739 N.W.2d 1, 13).

[4] [5] [¶14.] Because a defendant’s right to present a defense is fundamental, we review limitations on cross-examination under the Confrontation Clause. See *808 *id.* ¶ 37. “The Confrontation Clause of the Sixth Amendment to the United States Constitution, as applied to South Dakota through the Fourteenth Amendment, requires that in all criminal cases, the defendant has the right ‘to be confronted with the witnesses against him.’” *State v. Spaniol*, 2017 S.D. 20, ¶ 24, 895 N.W.2d 329, 338 (quoting U.S. Const. amend. VI). The Confrontation Clause applies to witnesses testifying at trial, and is “generally satisfied when the defense is given a full and fair opportunity to probe and expose a witness’ infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.” *Id.* (quoting *State v. Carothers*, 2006 S.D. 100, ¶ 16, 724 N.W.2d 610, 617).

[¶15.] In limiting Kryger’s cross-examination, the circuit court recognized that the threats went to bias but had a “marginal degree of relation [to] this case.” The court noted that Johnson’s direct testimony was likely to be narrow and factual, and pertain only to the investigatory timeline of Kirkegaard’s death. Indeed, Johnson’s testimony was short and limited to describing Johnson’s relationship with Kirkegaard and Johnson’s factual observations immediately after Kirkegaard’s body was discovered. The circuit court also concluded that Johnson’s threats were not contemporaneous with the events Johnson was testifying about, and that the jury would be cognizant of Johnson’s bias because of Johnson’s close familial relationship with Kirkegaard. The circuit court noted that Kryger’s counsel could still impeach Johnson on bias or factual issues if there was a concern that Johnson was fabricating his story. After determining the threats had marginal relevance, the circuit court conducted a balancing test under SDCL 19-19-403. Under this test, the court determined the marginal probative value of the threats was substantially outweighed by the danger of unfair prejudice—including the possibility of jury confusion of the issues and a waste of time.

[6] [¶16.] The circuit court limited cross-examination only with respect to the specific threats made toward Kryger and his counsel, and Johnson’s belief of Kryger’s guilt. Kryger was not precluded from asking if Johnson held any bias against Kryger because of Johnson’s family relationship with Kirkegaard. Further, the jury heard about Johnson’s emotional reaction of punching the bathroom wall in Kirkegaard’s home immediately after learning of her death. Finally, Kryger also had the opportunity to question Johnson on any factual matters that were allegedly fabricated without referencing Johnson’s threats. “An individual is only guaranteed ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” *Spaniol*, 2017 S.D. 20, ¶ 29, 895 N.W.2d at 340 (emphasis omitted) (quoting *Milstead v. Smith*, 2016 S.D. 55, ¶ 13, 883 N.W.2d 711, 717).

[¶17.] We conclude that the circuit court did not abuse its discretion in limiting cross-examination on the specific threats made by Johnson toward Kryger and his counsel. We also determine that Kryger did not suffer any prejudice because of the circuit court’s decision to limit cross-examination. Johnson’s testimony was mostly limited to the events immediately after Kirkegaard’s body was found and the circumstances leading law enforcement to begin a homicide investigation. Other friends and family members testified to many of the same facts: namely, that they had smelled bleach or a very clean smell after police had left, that no one had done any cleaning after police had left, and that they noticed Kirkegaard’s purse and other *809 items from the house were missing. Further, none of the threats related to the subject areas of Johnson’s testimony.

2. Whether the circuit court erred by admitting expert testimony expressed in terms of possibilities.

[7] [¶18.] Before trial, Kryger filed a motion in limine seeking to prevent Dr. Kenneth Snell, the county coroner who performed Kirkegaard’s autopsy, from giving an opinion that the injuries to Kirkegaard’s vaginal area were indicative of those received from either consensual or non-consensual sex. The circuit court permitted Dr. Snell to testify that the trauma to Kirkegaard’s vaginal area could have been the result of either rough consensual intercourse or a sexual assault. Kryger claims this testimony was not relevant; it confused the jury and invited the jury to speculate as to Kryger’s guilt. Kryger also argues that

Dr. Snell's conclusion was not proper opinion testimony because it was phrased only as a possibility, and not to a reasonable degree of probability. He reasons that because Dr. Snell could not state definitively that the trauma was the result of or consistent with a sexual assault, it should have been excluded.

[8] [¶19.] "We afford broad discretion to circuit courts in deciding whether to admit or exclude evidence." *State v. Patterson*, 2017 S.D. 64, ¶ 12, 904 N.W.2d 43, 48 (quoting *Kurtz v. Squires*, 2008 S.D. 101, ¶ 3, 757 N.W.2d 407, 409). Thus, a circuit court also has broad discretion in deciding whether to admit expert testimony. *Id.* ¶ 22, 904 N.W.2d at 50.

[9] [¶20.] A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

SDCL 19-19-702. "There are no 'magic words' needed to express an expert's degree of medical certainty, and the test is only whether the expert's words demonstrate that he or she was expressing an expert medical opinion." *Stormo v. Strong*, 469 N.W.2d 816, 824 (S.D. 1991).

[¶21.] Here, the circuit court heard Kryger's motion in limine at a pretrial hearing. After arguments from counsel, the court opted not to rule fully on the motion until hearing Dr. Snell's testimony at trial. At trial, Dr. Snell testified that based upon his autopsy, Kirkegaard's injuries "would have been due to some object being forcibly put into the vaginal area." Because laboratory testing subsequently found the presence of semen in Kirkegaard's vagina, Dr. Snell also opined that the injuries were likely caused by intercourse. Dr. Snell concluded that these injuries to Kirkegaard's vaginal area were due to either "rough intercourse or an assault" and not to what the prosecutor classified as "normal, consensual sex." During cross-examination, Dr. Snell

acknowledged that he could not determine whether or not the sexual intercourse was consensual or nonconsensual because he was not present during the commission of the act.

[¶22.] Dr. Snell's medical opinions in his testimony were clear and were based upon a reasonable degree of medical certainty. His opinion was supported by an adequate foundation in the record and assisted the jury in considering the evidence presented *810 in the case. Thus, Dr. Snell's challenged testimony was admissible and there was no abuse of discretion.

3. Whether the circuit court erred by admitting irrelevant evidence without a foundation of physical evidence from the State's investigation of Kryger.

[10] [¶23.] During the investigation of Kirkegaard's death, police were alerted to the presence of a burn pit in Sioux Falls, which law enforcement believed to be connected to Kryger. The State presented testimony describing the burn pit and how it was investigated, and showed photographs to the jury. Kryger objected to that evidence on foundation and relevance grounds, arguing that neither the burn pit nor any items found there were forensically tested to determine any connections to him. Kryger claims that by permitting this evidence, the circuit court misapplied the rules of relevant evidence and abused its discretion.

[11] [¶24.] "Evidence is relevant if: (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact is of consequence in determining the action." SDCL 19-19-401. "It is well settled that photographs are generally admissible where they accurately portray anything that a witness may describe in words ... [and] when they are helpful in clarifying a verbal description of objects and conditions. They must, however, be relevant to some material issue." *State v. Hemminger*, 2017 S.D. 77, ¶ 33, 904 N.W.2d 746, 757 (quoting *State v. Owens*, 2002 S.D. 42, ¶ 89, 643 N.W.2d 735, 756-57).

[¶25.] Here, evidence of the burn pit was relevant, as it made it more probable that Kryger had destroyed evidence associated with Kirkegaard's murder. Police became aware of the burn pit when they responded to a tip from a concerned member of the public shortly after the crime had occurred. The witness indicated he had seen the burn pit in a remote area near the Big Sioux River

and that “fabric in the fire” had caught his attention, so he contacted police. Miller testified that Kryger told him he burned his plaid flannel jacket after the mosque video footage had been released to the public. Further, the photographs of the burn pit portrayed what police and other witnesses had seen during their investigation of Kryger. Sioux Falls Police Officer Chad Winkel testified he had investigated the burn pit, that he believed it was fresh, but he noted police could not determine a source or identify any items that had been burned as belonging to Kryger. The fact that none of the items related to the burn pit were forensically tested went to the weight of this evidence, not its admissibility. The evidence revealed a sufficient link between Kryger and the burn pit, and therefore, the circuit court did not abuse its discretion in admitting it.

4. Whether the circuit court erred by admitting Kryger’s statements that he has a criminal mind.

[12] [¶26.] During the investigation, Kryger was interviewed by Sioux Falls Police Detectives Robert Forster and Martin Hoffman. In both interviews, Kryger made references about having “a criminal mind.” In the interview with Detective Forster on March 16, 2014, Kryger expressed concern for the safety of his fiancée living in the area where Kirkegaard had been killed. In response, Detective Forster told Kryger that law enforcement was advising people to lock their doors and use the buddy system for protection. Kryger then stated he did not believe that would work because “if I actually have a criminal mind ... if I want to get into a *811 place, I’ll just kick the door in ... and ... that’s not stopping [inaudible] nobody.” During the interview with Detective Hoffman on March 20, 2014, Kryger was asked about whether he could identify the SUV that he claimed almost ran into him with its lights off. Kryger responded that he had “a criminal mind” and did not pay attention to those things.

[¶27.] Before trial, Kryger moved to exclude both statements on the basis that they were inadmissible character evidence. The State argued Kryger’s statements were admissible to prove Kryger had the requisite intent or state of mind. The circuit court denied Kryger’s motion, holding the statements were not character evidence, but rather, statements against interest. The circuit court reasoned that because the statements were Kryger’s own voluntary admissions, they did not pertain to character and the jury could consider them as evidence

of his involvement. The circuit court also balanced the statements under Rule 403 and determined their relevance was not substantially outweighed by the danger of unfair prejudice.

[¶28.] In determining that these statements were admissions against interest by Kryger, the circuit court did not explain why they were probative to the case. Kryger asserts that if the statements were admissions, they were admissions about his character, which were inadmissible under SDCL 19-19-404(a)(1). *See also State v. Janis*, 2016 S.D. 43, ¶ 38 n.3, 880 N.W.2d 76, 87 n.3. Kryger also argues the probative value of these statements were outweighed by the danger of unfair prejudice toward him and that the jury confused his statement as admitting the mens rea elements of the crimes with which he was charged. The State responds that the circuit court correctly allowed the statements as admissions that the jury could consider and that they were relevant to the crimes charged.

[¶29.] Kryger’s statement to Detective Forster appears to be stated hypothetically that precautions recommended by law enforcement would not protect against himself or someone with a criminal mind from committing the offense. In the interview with Detective Hoffman, Kryger directly stated he had a criminal mind. The statements are ambiguous in their meaning. It is possible that the jury could have considered the statements as evidence that Kryger knew something about the crime or how to commit the crime. However, it is also possible that the jury may have considered the statements as admissions by Kryger about his character; that he was the *kind* of person who would have committed this crime.

[13] [¶30.] Kryger claims the admission of these statements is reversible error. However, “[t]o obtain a new trial due to erroneously admitted evidence, ‘a defendant must prove not only that the trial court abused its discretion in admitting the evidence, but also that the admission resulted in prejudice.’ ” *Patterson*, 2017 S.D. 64, ¶ 13, 904 N.W.2d at 48 (quoting *State v. Reay*, 2009 S.D. 10, ¶ 31, 762 N.W.2d 356, 366). Prejudice must have produced an effect on the final result of a trial and affected the rights of the party claiming the prejudice. *Id.*

[¶31.] Kryger has failed to show prejudice in the admission of these statements. Both statements were general in nature and were not expounded on further during

either interview. The statements were made without any context as to whether Kryger had committed similar offenses or had ever been previously convicted of any crime. Although the State referenced Kryger's statements in closing arguments, such argument was limited and was neither the theme nor central focus. Most importantly, there was substantial independent evidence, apart from the two statements, establishing Kryger's guilt. Kryger has failed to show that the admission of his two voluntary statements had an effect on the outcome of the verdict. Thus, there was no prejudice.

5. Whether the circuit court erred by denying Kryger's motions for mistrial.

[¶32.] Prior to trial, the circuit court granted several of Kryger's motions to exclude any evidence or reference to his criminal record or incarceration status. Kryger claims that the circuit court's pretrial orders were violated on three occasions during the trial. First, Detective Forster testified he had received Kryger's cell phone number from Kryger's parole officer. Second, as the jury was hearing an audio recording of a phone call between Kryger and Nagel, it also heard an automated message indicating that Kryger was incarcerated. Finally, Kryger accidentally encountered the jury while being escorted by two officers after trial proceedings had concluded for the day. Kryger claims the circuit court's refusal to grant a mistrial for each of these errors deprived him of his right to a fair trial.

[14] [¶33.] "Motions for mistrial are within the discretion of the trial judge." *State v. Ball*, 2004 S.D. 9, ¶ 16, 675 N.W.2d 192, 197 (quoting *State v. Johnson*, 2001 S.D. 80, ¶9, 630 N.W.2d 79, 82). Therefore, "denial of a motion for mistrial will not be overturned unless there is an abuse of discretion." *Id.* Here, the circuit court reserved ruling on each of the motions for mistrial until the conclusion of the case so that the court could consider the potential impact of any violations in light of the entire record.

[15] [¶34.] The circuit court immediately addressed Detective Forster's reference to Kryger's parole officer during the trial. The circuit court acknowledged that the testimony was a violation (although unintentional) of the court's order. To neutralize the impact of the testimony, the court instructed the jury to disregard the source of Kryger's cell phone number; and the court warned Detective Forster in chambers not to make any more references to Kryger's parole status, prison time, or criminal history. At the end of the trial, the court denied

the motion for mistrial, reasoning that a mistrial would be an extreme remedy in light of the innocuous nature of Detective Forster's remark and its limited potential to influence the jury.

[16] [¶35.] The circuit court also considered Kryger's motion for mistrial concerning the automated portion of the phone call improperly played for the jury. The circuit court noted the mechanized voice message did not specifically mention why Kryger was incarcerated, the nature of Kryger's past involvement with the criminal justice system, or any inadmissible other-acts evidence. The circuit court also presented a limiting instruction to the jury directing it to disregard the entire automated portion of the message.

[17] [¶36.] Finally, the circuit court considered the encounter between Kryger and the jury. The circuit court heard in-chambers testimony from the bailiff present during the incident. The bailiff indicated the meeting was accidental and had occurred when the jury stopped in an elevator on the same floor as Kryger as he was waiting for a ride. The two deputies who were escorting Kryger were wearing civilian clothes and were not armed or carrying restraints. The circuit court noted Kryger was in civilian clothes and was not visibly restrained. Additionally, the circuit court drew attention to the fact that the encounter was after hours and that the jurors were accustomed to seeing participants in the case. The court also stated that the jury could already draw a reasonable inference that Kryger was being escorted by law enforcement given the nature of the case.

[¶37.] The circuit court's review of these three occurrences and the decision to deny Kryger's motions for a mistrial were well-reasoned. The circuit court also took adequate measures to minimize the impact of these errors and considered their import at the conclusion of the trial in light of all the evidence. There is no showing that any of the errors were intentional, and none of the errors went directly to the question of Kryger's guilt. The circuit court was in the best position to consider the impact of these errors on the jury and determined that the errors did not deprive Kryger of a fair trial. This decision is supported by the record, and there was no abuse of discretion.

6. Whether the circuit court erred by denying Kryger's proposed jury instructions regarding Kryger's

statements about his criminal mind, speculation and conjecture, and an alibi defense.

[¶38.] Kryger challenges the circuit court's decision to reject several of his proposed jury instructions. Kryger's first set of proposed instructions stated: "Evidence that the Defendant described himself as having a criminal mind does not in itself mean the Defendant possessed a [depraved mind/premeditated design]. You must consider any such evidence in conjunction with all other evidence presented." Kryger claimed the instruction was needed to mitigate the statements admitted regarding Kryger's criminal mind.

[¶39.] Kryger also proposed five alternative jury instructions that he claimed defined speculation and conjecture. He contended these jury instructions were needed to respond to testimony from Dr. Snell, the testing procedures used during the investigation of Kirkegaard's death, and the large number of items of evidence collected by police during the investigation. The circuit court rejected Kryger's instructions, and instructed the jury as follows:

Instruction No. 58. It is your duty to decide from the evidence what the facts are and whether the defendant is guilty or not guilty of the crimes charged. You must base that decision on the facts and the law.

First, you must determine the facts from the evidence received in the trial and not from any other source. You are entitled to consider the evidence in the light of your own observations and experiences in the affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. However, your verdict must not be based upon speculation, guess or conjecture.

Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way, arrive at your verdict. You must accept and follow the law as I state it to you, whether or not you agree with the law.

[¶40.] Finally, Kryger proposed an alibi jury instruction. The circuit court ruled that Kryger was not entitled to an alibi instruction and instead instructed the jury as follows:

Instruction No. 16. The indictment charges that the offense was committed "on or about" a certain date. The proof need not establish

with certainty the exact date of the offense alleged. It is sufficient if the evidence establishes beyond a reasonable doubt that the offense *814 was committed on a date reasonably near the date alleged.

[18] [19] [20] [21] [¶41.] "A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard." *Spaniol*, 2017 S.D. 20, ¶ 49, 895 N.W.2d at 345 (quoting *State v. Whistler*, 2014 S.D. 58, ¶ 13, 851 N.W.2d 905, 910). Jury instructions are considered as a whole. *State v. Jensen*, 2007 S.D. 76, ¶ 19, 737 N.W.2d 285, 291. If they "correctly state the law and inform the jury, they are sufficient." *Id.* (quoting *State v. Johnston*, 478 N.W.2d 281, 283 (S.D. 1991)). A circuit court does not err simply by refusing "to amplify instructions which substantially cover the principle embodied in the requested instruction." *State v. Klautt*, 2009 S.D. 71, ¶ 20, 772 N.W.2d 117, 123.

[22] [¶42.] As to Kryger's proposed state-of-mind instructions, the circuit court pointed out that Kryger's statements about criminal mind were couched in ordinary, conversational terms and that Kryger's proposed instructions would only highlight the statements to the jury. The circuit court also noted Kryger had a full opportunity to challenge the nature of his own remarks through the cross-examination of Detectives Hoffman and Forster, and could further challenge these statements in closing arguments. Moreover, the circuit court provided proper instructions to the jury explaining the elements of the crimes and the intent necessary for each one.

[23] [¶43.] The circuit court rejected Kryger's instructions on speculation and conjecture because it believed Instruction 58 was a better and more accurate statement of South Dakota law. The court further noted that Kryger's proposed instructions suggested that the amount of evidence available in a case was more important than the force of the evidence—which the court believed to be incorrect. Finally, the court noted Kryger could still argue to the jury that it could not or should not speculate about evidence even without the additional instructions.

[24] [¶44.] Finally, the circuit court reexamined evidence of Kryger's whereabouts around the time of Kirkegaard's

death to determine whether he was entitled to an alibi defense. Based on the mosque video, which placed Kryger in the vicinity of Kirkegaard's home, the fact that Kryger was only able to partially explain his whereabouts on the night of March 14, 2014, and because Kryger had not complied with timely notice of alibi under SDCL 23A-9-1, the court determined that the evidence did not warrant an alibi instruction.

[¶45.] The circuit court thoroughly analyzed each of Kryger's proposed instructions and provided adequate reasoning for rejecting them. Additionally, the instructions provided to the jury were proper and accurate statements of the law. Therefore, there was no abuse of discretion by the circuit court in denying Kryger's proposed instructions.

7. Whether the circuit court erred by denying Kryger's motion for judgment of acquittal.

[¶46.] Kryger claims the lack of proof present in the record demonstrated that he was convicted in error based on speculation by the jury. Specifically, Kryger argues the State failed to prove the premeditated design required for first-degree murder, the depraved mind required for second-degree murder, and the intent required for first-degree burglary. He also argues that the evidence was insufficient for the jury to find force, coercion, or *815 threats required for rape. He maintains the circuit court erred in denying his motion for judgment of acquittal because "the evidence [was] insufficient to sustain a conviction of the offense or offenses." See SDCL 23A-23-1.

[25] [26] [27] [28] [¶47.] We review a denial of a motion for judgment of acquittal de novo. *State v. Bosworth*, 2017 S.D. 43, ¶ 11, 899 N.W.2d 691, 694.

When reviewing whether evidence is sufficient to sustain a conviction, we "consider the evidence in a light most favorable to the verdict. A guilty verdict will not be set aside if the State's evidence and all favorable inferences that can be drawn therefrom support a rational theory of guilt. We do not resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of an explanation, or weigh the evidence."

Id. (quoting *State v. Janklow*, 2005 S.D. 25, ¶ 16, 693 N.W.2d 685, 693).

[29] [30] [¶48.] The evidence in this case does not match Kryger's assertion that his conviction was based on speculation and conjecture. Both direct and circumstantial evidence existed linking Kryger to Kirkegaard's death. Kryger's sperm cell DNA was found in Kirkegaard's vagina after he initially denied knowing Kirkegaard or having sex with her. Kirkegaard lived alone and the evidence suggested that she did not have a relationship or any prior contact with Kryger. Further, Kirkegaard returned home on the night of her death shortly after a family gathering, diminishing the likelihood that she had brought Kryger into her home from another location. Kryger admitted riding his bike during the timeframe that Kirkegaard was killed, and he was seen on the mosque video riding his bike in the immediate vicinity of Kirkegaard's home around the time of Kirkegaard's death. Three people identified Kryger in the mosque video.

[¶49.] Kirkegaard's autopsy revealed ligature marks indicating strangulation. She also had numerous other traumatic injuries, including a fractured hyoid bone and thyroid cartilage, and multiple red marks in her vagina. These injuries indicated a deliberate use of force, as well as an imminently dangerous act done with a depraved mind.

[¶50.] Kirkegaard's purse was discovered missing from her home. The day after her death, Kryger suddenly had enough money to buy an engagement ring for his girlfriend, a cell phone, and a calling plan. After his DNA was found on the body, Kryger claimed in a phone call to Nagel that he had consensual sex with Kirkegaard. However, the injuries to Kirkegaard and the circumstances surrounding the night of Kirkegaard's death provide no explanation or possibilities as to how or why that consensual sex would have occurred.

[¶51.] In the aggregate, and in a light most favorable to the guilty verdict, the evidence is sufficient to sustain Kryger's conviction on all crimes. The State's evidence and all favorable inferences support a rational theory of guilt in this case and the jury's ability to make that determination on each of the charges. Kryger was not entitled to a judgment of acquittal and the circuit court did not err.

Conclusion

[¶52.] The circuit court did not commit prejudicial error in any of the issues raised by Kryger, and thus, we need not address Kryger's final argument that accumulation of the court's errors warrants a new trial. The evidence in the record is sufficient to sustain Kryger's convictions on all counts. We affirm.

[¶53.] GILBERTSON, Chief Justice, and ZINTER, SEVERSON, and KERN, Justices, concur.

All Citations

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

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

IN THE SUPREME COURT

MAR 15 2018

OF THE

STATE OF SOUTH DAKOTA

Shirley A. Jameson-Fergel
Clerk

* * * *

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

CHRISTOPHER DEAN KRYGER,
Defendant and Appellant.

) ORDER DENYING PETITION FOR
) REHEARING
)
)
)
)
)
)
)

#27869

A petition for rehearing in the above cause having been filed February 16, 2018, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the Justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 15th day of March, 2018.

BY THE COURT:

ATTEST:

David Gilbertson

David Gilbertson, Chief Justice

Shirley A. Jameson-Fergel
Clerk of the Supreme Court

By

Laura J. Evans
Chief Deputy Clerk
(SEAL)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Appellee,

v.

No. 27869.

PETITION FOR
REHEARING

CHRISTOPHER DEAN KRYGER,

Appellant.

COMES NOW, the Appellant, Christopher Kryger, pursuant to SDCL 15-30-4, petitions this court for a rehearing in the above entitled matter, and to grant further relief to include supplemental briefing and argument. The Appellant respectfully alleges that points of fact and law were overlooked or misapprehended by the Court:

1. THIS COURT APPLIED THE WRONG LEGAL TEST TO EXAMINE PREJUDICE CAUSED BY LIMITING CROSS EXAMINATION OF BRIAN JOHNSON IN CONTRAVENTION OF DUE PROCESS, CONFRONTATION AND SUPREMACY CLAUSE RIGHTS.

The trial court excluded testimony concerning witness Brian Johnson's bias and motive at the time of trial. Prejudice from excluded evidence examined in Confrontation Clause cases focuses on the effect of limiting examination of a particular witness in question to affect the jury's

conclusion that a particular witness may be lying or biased, and not the result of the jury's verdict. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). Analyzing the effect on a jury's verdict becomes more problematic when evidence is erroneously excluded than when admitted in error. *Id.* This Court chose to examine whether the jury's verdict may have differed rather than a jury's evaluation of Johnson as a witness. State v. Kryger, 2018 S.D. 13, at ¶13.

By focusing on the result of exclusion of testimony in terms of the final verdict, instead of the effect on the witness, the Court employed the wrong test to determine whether the trial court's error was reversible or harmless. See Van Arsdall, 475 U.S. at 680. Van Arsdall demonstrates that the Chapman v. California harmless error analysis should be applied in cases where cross-examination is limited by the trial court. *Id.* The "correct inquiry is whether, assuming that the damaging potential of the cross-examination was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Id.* at 681. The test further focuses on exclusion of testimony concerning an "event" (i.e. bias stated against the Appellant and his counsel) versus a

topic area of discussion (i.e. general support for the prosecution). Id. at 679.

Applying Van Arsdall factors, the bias and threat evidence could have strengthened the Petitioner's case. If a witness prior to trial possessed the will to kill or to even consider killing the Appellant or his counsel, subsequent misstatements of facts such as the denial of bleach enhanced crime scene clean-up activities might not be beneath him during subsequent testimony at trial. Reasonable doubt existed as to whether exclusion of such testimony was harmless error. Id. at 681. This Court erred applying the wrong standard and reaching the wrong legal conclusion.

The Chapman harmless error test is a function of Constitutional Law of the United States. The federal test is supreme to state standards of review regarding state evidence law. U.S.Const. Art.VI, §2; U.S.Const.Amend. V, XIV. This Court's failure to use a test required by the Constitution in this case (and others (State v. Bausch, 2017 S.D. 1)) where Constitutional issues were raised by the Appellant, and not merely state evidence issues, constitutes prejudicial error. See Zemina v. Solem, 438 F.Supp. 455, 467 (D.S.D. 1977) ("state adjudications of law are not binding, for the state court 'may have misconceived

a federal constitutional right.'"). The Appellant respectfully requests that this Court reconsider this issue, and others subsequently stated in this Petition.

2. THIS COURT IMPROPERLY RESTATED ERRORS ASSIGNED BY THE APPELLANT RAISING CONSTITUTIONAL ISSUES IN SUCH A MANNER AS TO LIMIT APPEAL ISSUES TO THOSE CONCERNING STATE LAW ONLY INHIBITING FUTURE MEANINGFUL FEDERAL REVIEW.

This Court indicated the Appellant "raised several issues for our review, which we combine and restate as follows". Kryger at ¶10. The first restated issue was phrased as "[w]hether the circuit court erred by precluding questioning of Johnson concerning his bias against Kryger". Id. The Appellant had raised as its first issue, "WHETHER THE TRIAL COURT ERRED BY COMPLETELY PRECLUDING QUESTIONING OF THE DECEDENT'S BROTHER CONCERNING HIS BIAS AGAINST THE DEFENDANT AND MOTIVE TO FABRICATE IN VIOLATION OF KRYGER'S DUE PROCESS AND CONFRONTATION CLAUSE RIGHTS." Appellant's Brief at 1.

In contrast to this Court's restatement, the Appellant presented federal rights prominently in the assigned error. The effect of the alteration caused the significance of the federal subject matter assigned to be minimized and eclipsed by issues of state law. The subsequent effect of this action changed whether de novo or abuse of discretion

standards of review were utilized to resolve the federal issues.

This Court may resolve questions raised by Appellant-Defendant on state law grounds. However, a conclusion that a state law issue raised would not demonstrate error does not end this Court's inquiry. It must also address matters of federal Constitutional law raised as well, per Staub v. City of Baxley, 355 U.S. 313 (1958). In Staub, a defendant appealed his conviction of a city ordinance precluding soliciting members for membership in organizations, unless a permit was granted by the mayor (per his discretion following payment of a license fee). Staub, 355 U.S. at 315. The defendant asserted before the trial court that the ordinance violated his First and Fourteenth Amendment rights. *Id.* The government argued for dismissal of the appeal "based upon state procedural grounds [which therefore rested] upon an adequate nonfederal basis,". *Id.* at 318.

The United States Supreme Court disagreed noting that, "[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law and, where a case coming from a state court presents that question, this court must determine *for itself* the

sufficiency of the allegations displaying the right or defense, and *is not concluded by the view taken of them by the state court.*" *Id.* (emphasis added). The defendant's objections and assigned constitutional errors controlled issues ultimately resolved in the Staub case despite the state appellate court's initial under inclusive analysis regarding state law issues.

Appellate courts generally decide assignments of error presented to them on appeal which is otherwise perfected. See Irvin v. Dowd, 359 U.S. 394, 402 (1959) (state appeals court was required per state law to "pass on the merits of the petitioner's assignment of error"). This Court, after choosing to "restate" the issue on appeal, decided the Appellant's assigned error as a matter of state law. It determined the outcome of the Court's restated issue through an abuse of discretion standard of review, an arguably "more forgiving" standard to be utilized when Constitutional errors are present. *Kryger*, at ¶13. See also, Fry v. Pliler, 551 U.S. 112, 116 (2007).

Where a state has created an appeal as "of right from the trial court's judgment, it cannot infringe on this right to appeal in a manner inconsistent with due process or equal protection" to deny meaningful appellate review.

Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 22 (1987) (*concurring opinion*). The Appellant's right to appeal, stating issues addressing federal concerns, encountered a violation of his due process rights when this Court overlooked federal concerns via resolving the case under-inclusively by purportedly resorting to state evidentiary law alone. This chosen course steered the Appellant's case away from a de novo standard of review utilizing beyond a reasonable doubt harmless error test that focuses on effects of questioning limitations on witnesses, and not the jury's verdict. See also Haywood v. Drown, 556 U.S. 729 (2009) ("although states retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies"); Wayside Church v Van Buren County, 847 F.3d 812 (6th Cir. 2017) (*state jurisdictional rule cannot be used as device to undermine federal law*). Per Staub, the Petitioner was entitled to resolution of federal issues he appropriately raised to this Court.

3. DE NOVO REVIEW SHOULD BE APPLIED TO EVALUATION OF CONFRONTATION CLAUSE BIAS AND MOTIVE ISSUES WHICH ALSO MAY ENCOMPASS STATE LAW EVIDENTIARY ISSUES.

This Court applied an abuse of discretion standard to the restated first issue. Kryger, at ¶13. The Appellant argued that such evidence was in fact relevant as to bias and motive, Appellant's Brief 13-17. These arguments implicated constitutional issues concerning due process, fundamental fairness, the right to present a complete defense, fair trials, and confrontation rights in addition to rules of relevancy. Davis v. Alaska, 415 U.S. 308, 316 (1974) (defendant was only permitted to ask if witness was biased, but no inquiry permitted further as to why witness was biased); State v. Huber, 2010 S.D. 63, 789 N.W.2d 283. The United States Supreme Court utilized de novo review in Davis, to decide Confrontation Clause issues regarding excluded testimony raised by the defendant as that Court noted, "[w]e cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury." Davis, 415 U.S. at 318. The conclusion arrived at by the state appellate court clearly constituted a legal decision. The U.S. Supreme Court's determination it could not accept the lower court's legal determination constitutes a form of de novo review.

This Court professes to apply de novo review regarding issues of Constitutional Law. State v. Medicine Eagle, 2013

S.D. 60, ¶27, 835 N.W2d 886, 896 (2013); See also Good Lance v. Black Hills Dialysis, 2015 S.D. 83, at ¶8, 871 N.W.2d 639, 643; State v. Johnson, 2009 S.D. 67, ¶10, 771 N.W.2d 360, 365; State v. Selalla, 2008 S.D. 3, ¶18, 744 N.W.2d 802, 807. This Court recently reiterated this principle in a Sixth Amendment context in State v. Spaniol, 2017 S.D. 20, at ¶24, citing Crawford v. Washington, 541 U.S. 36 (2004). Where Confrontation Clause rights are asserted, this Court acknowledged the issue becomes "whether [a defendant's] Sixth Amendment right to confrontation was violated is a constitutional question, which we review de novo." Spaniol, 2017 S.D. at ¶23. The Appellant explicitly advocated for use of de novo review pursuant to Spaniol. Appellant's Brief at 14. This Court, however, utilized an abuse of discretion review in contradiction of Spaniol. The Appellant respectfully requests that this Court reconsider its opinion using de novo review.

4. THIS COURT'S APPLICATION OF DE NOVO OR ABUSE OF DISCRETION REVIEW VIOLATES THE APPELLANT'S EQUAL PROTECTION RIGHTS AND THE RIGHTS OF SIMILARLY SITUATED DEFENDANTS CONVICTED OF RAPE THAT ASSERT A DEPRIVATION OF CONSTITUTIONAL CONFRONTATION CLAUSE RIGHTS.

In addition to due process rights, the Appellant-Defendant possesses a right to equal protection of the

laws, U.S.Const.Amend. XIV. For a law to withstand an equal protection challenge from an incarcerated defendant, the law "applies to all those 'convicted of an offense, and sentenced to confinement therefor in the penitentiary' ". Graham v. West Virginia, 224 U.S. 616, 630 (1912). This Court has not equally applied standards of review among similarly situated rape convicts who assert federal constitutional assignments of error. See also Smith v. Bennett, 365 U.S. 708, 712-13 (1961) (legal remedy (habeas corpus) available to some prisoners but not others based on ability to pay filing fee violates equal protection).

This Appellant was convicted of Rape and other charges. He was sentenced to the penitentiary. On appeal, he specifically raised constitutional issues and advocated for use of de novo review to resolve them per Spaniol. This Court resolved the issue using an abuse of discretion standard and affirmed the trial court's decision.

In Spaniol, the defendant was convicted of Rape and was sentenced to the penitentiary. On appeal, this Court examined constitutional error per the Confrontation Clause regarding the trial court's decision to not admit evidence from an alleged unavailable witness. Spaniol, 2017 S.D. at ¶23-24. Unlike this present case, this Court applied de novo review in resolving the issue noting the

constitutional issue created an exception to use of standard abuse of discretion analysis. Id.

In State v. Bausch, 2017 S.D. 1, the defendant was convicted of rape and sentenced to the penitentiary. Bausch, at ¶37. The defendant raised issues framed in terms of alleged violations of his Confrontation Clause rights and advocated use of de novo review. See State v. Bausch II, 2017 S.D. 86. Unlike Spaniol, this Court applied abuse of discretion review to the issue.

In State v. McKinney, 2005 S.D. 75, the defendant was convicted of rape and sentenced to the penitentiary. McKinney, 2005 S.D. at ¶8. The defendant raised issues framed in terms of alleged violations of the Confrontation Clause. Id. at ¶18. Unlike Bausch, this Court applied de novo review to the issue. The differing applications of either de novo or abuse of discretion review in response to Confrontation Clause issues raised by Appellants in the new millennium, and its application to this Appellant, justify additional briefing and argument.

5. DUE PROCESS AND FAIR TRIAL RIGHTS REQUIRED USE OF AN ALIBI INSTRUCTION IN LIGHT OF EVIDENCE ESTABLISHED AT TRIAL

The trial court possessed the discretion to waive the notice of alibi requirement for good cause shown. SDCL 23A-9-5. In the present case, the Appellant established at

trial that a bike rider was travelling north on South Garfield Avenue simultaneously with the decedent's SUV travelling south on the same street, at 3:36:19 a.m. on March 15, 2014. EG; E46-47; T11:40-41; T11:36-50. Detective Hoffman concluded the suspect driving the SUV and bicyclist could not be the same person. T11:44. This conclusion by the State's lead detective, *stated for the first time at trial*, constituted new evidence justifying use of the trial court's discretion to instruct the jury regarding an alibi defense. Good cause was shown. The absence of the instruction denied the Appellant his right to a fair trial.

6. THIS COURT DID NOT RULE ON WHETHER THE TRIAL COURT ERRED ADMITTING "CRIMINAL MIND" STATEMENTS DEPRIVING THE DEFENDANT OF MEANINGFUL FEDERAL REVIEW.

The Appellant objected to the admission of his statements that he had a criminal mind. Appellant's Brief at 24. On appeal, he argued that their admission was prejudicial error depriving him of a fair trial. Appellant's Brief at 27. This Court did not specifically rule on whether the trial court erred in admitting such evidence. Rather, it jumped ahead to examine its prejudicial effect, with no conclusion stated as to whether the trial court erred.

This Court noted two *possibilities* as to the meaning of the statements. "It is possible that the jury could have considered the statements as evidence that Kryger knew something about the crime or how to commit the crime. However, it is possible that the jury may have considered the statements as admissions by Kryger about his *character*; that he was the *kind* of person who would have committed this crime." Kryger, at ¶29 (*emphasis added, "kind" emphasis original*).

The *possibility* that Kryger knew something about the crime does not make it more *probable* he knew something about the crime or how to commit the crime, therefore constituting relevant evidence. SDCL 19-19-401(a). The probative value of a possibility is zero. See Paulsen v. State, 541 N.W.2d 636, 643 (NE 1996). The Court's second remaining possibility acknowledges that the statements could be used as character evidence, which is inadmissible per SDCL 19-19-404(1). The trial court erred weighing the evidence per SDCL 19-19-403 in that evidence with zero probative value should have no weight to be balanced against the substantially unfair prejudice of the only other possibility that such evidence would be viewed as character evidence.

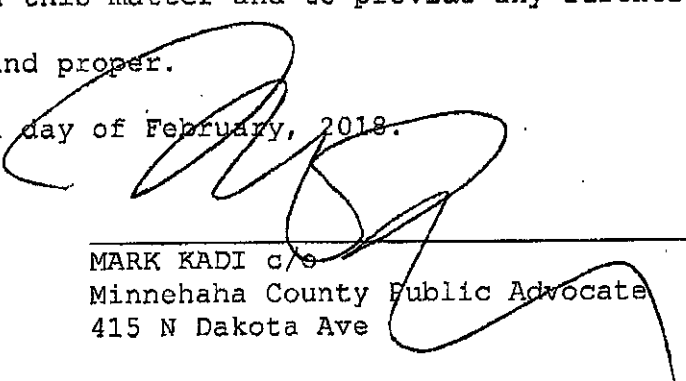
The trial court erred excluding such evidence.

Although this observation can be gleaned from the Kryger opinion, this Court's treatment of that issue does not alert anyone of that procedural fact. Practitioners reading this Court's opinion may wrongfully assume that statements of character, if characterized as "hypothetical" statements, may now be readily admitted in light of their possible interpretation and ambiguous meaning.

The Appellant is entitled to meaningful appellate review. Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 22 (1987). Errors regarding application of state evidence laws can still raise federal questions regarding due process and right to a fair trial. See Sweet v. Delo, 125 F.2d 1144, 1157 (8th Cir. 1997). The unwillingness to rule on the objection inhibits the Appellant's ability to present the issue when pursuing further federal relief and review, resulting in a denial of Due Process.

WHEREFORE, the Appellant requests that this Court grant a rehearing on this matter and to provide any further relief deemed just and proper.

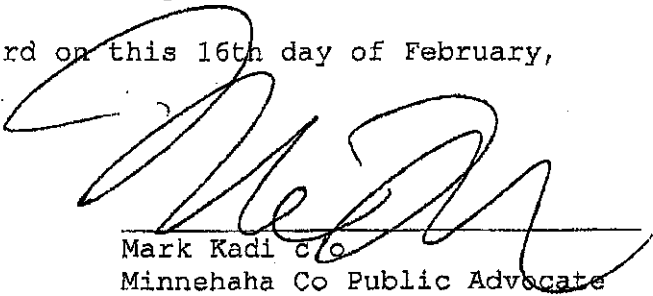
Dated this 16th day of February, 2018.


MARK KADI c/s
Minnehaha County Public Advocate
415 N Dakota Ave

Sioux Falls, SD 57104
(605) 367-7392
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Petition for Rehearing in the matter of State of South Dakota v. Christopher Dean Kryger was served by email, upon, Attorney General Marty Jackley and Minnehaha County States' Attorney Aaron McGowan, at their email addresses of record on this 16th day of February, 2018.



Mark Kadi
Minnehaha Co Public Advocate
415 N Dakota Ave
Sioux Falls, SD 57104
(605) 367-7392

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 :SS
 2 COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT
 3 *****
 4 State of South Dakota
 5 Plaintiff, Jury Trial
 Volume 6
 6 vs. CR 14-1956
 7 Christopher Dean Kryger
 8 Defendant.
 9 *****
 10 BEFORE: The Honorable Mark Salter,
 Circuit Court Judge
 11 in and for the
 Second Judicial Circuit,
 12 State of South Dakota,
 Sioux Falls, South Dakota.
 13
 14 APPEARANCES: Eric Johnson
 Mandi Mowery
 Abby Roesler
 15 —Deputy State's Attorney
 415 North Dakota Avenue
 16 Sioux Falls, South Dakota 57104
 17
 For the Plaintiff;
 18 Mark Kadi
 Austin Vos
 19 Assistant Public Advocate
 415 North Dakota Avenue
 20 Sioux Falls, South Dakota 57104
 21
 For the Defendant.
 22
 23 PROCEEDINGS: The above-entitled proceeding commenced
 at 8:30 A.M.
 24 On the 10th day of October, 2016,
 in courtroom 5B at the
 25 Minnehaha County Courthouse,
 Sioux Falls, South Dakota.

1 INDEX

2	WITNESS	PAGE
3	Paetyn Haemze	
	Direct examination	46
4	Cross-examination	65
	Redirect examination	74
5		
6	Nicholas Kirkegaard	
	Direct examination	75
7	Cross-examination	83
8	Brian Johnson	
	Direct examination	108
9	Cross-examination	118
10	Dave Gabriel	
	Direct examination	124
11	Cross-examination	134
	Redirect examination	138
12		
	Sheila Wassom	
13	Direct examination	141
	Cross-examination	146
14	Redirect examination	157
15	Ross Plucker	
	Direct examination	158
16	Cross-examination	165
17	Perry Echkhoff	
	Direct examination	170
18	Cross-examination	176
19		
20		
21		
22		
23		
24		
25		

1 stated, I think, in defense opening are going to require us
2 to call at least one certain witness we discussed.

3 THE COURT: Case in chief or rebuttal or...

4 MR. JOHNSON: Case in chief I would say.

5 THE COURT: Okay. Understood. That seems to give you
6 more time, but you've got two witnesses. Do you think we'll
7 get to a third witness this morning?

8 MS. MOWERY: Yes.

9 MR. JOHNSON: I suppose it largely depends on how -- I'm
10 sure that our direct will not take up all that time, but it
11 just depends on how long cross takes.

12 THE COURT: Well, I guess what I'm leading up to is, do
13 we want to address what I anticipate will be a motion in
14 limine from the State -- or what was described as that
15 anyway -- an oral motion that we could take up now, or if not
16 now, we'll need to take it up probably before we reconvene, I
17 would think.

18 MR. JOHNSON: We can take it up now if we're -- since
19 we're already here and talking about it unless the Court
20 would rather wait.

21 THE COURT: I'm okay taking it up right now.

22 Mr. Kadi, are you ready?

23 MR. KADI: Yes.

24 THE COURT: Okay. Off the record briefly we had a
25 discussion out of the presence of the jury -- counsel and I

1 did, we did -- right before the trial began today, and the
2 topic was the testimony of Brian Johnson. He's been excluded
3 from the trial based upon past behavior and that's a decision
4 I made. The State, however, had identified him as a witness,
5 and in my view, the State has the right to call him as their
6 witness, and so I want to talk about how we're going to
7 handle that just logistically. That prompted, I think, the
8 topic of the scope of cross-examination for Mr. Johnson to
9 arise and nothing decided, and sort of left it at that, and I
10 said, I think we need to deal with this on the record,
11 because I think it requires a ruling.

12 Who is handling that for the State?

13 MR. JOHNSON: I can, Your Honor.

14 THE COURT: Go ahead, please, Mr. Johnson.

15 MR. JOHNSON: Judge, based on comments that we just
16 recently learned about, the State's making an oral Motion in
17 Limine to preclude defense from making any reference to any
18 post-incident, I guess I would call comments by Brian Johnson
19 regarding any sort of threats towards defense counsel or the
20 defendant. I think they're wholly irrelevant to the
21 Indictment in this case, and are, thus, not relevant evidence
22 and should be excluded in their entirety.

23 THE COURT: Mr. Kadi.

24 MR. KADI: Your Honor, I think I should be permitted to
25 cross-examine on that topic. It goes to bias which is --

1 bias is a constitutional confrontation issue. It goes to Mr.
2 Johnson's bias against myself or my client. Substance issues
3 contain, I believe, an order including them talking about in
4 November when we were all present, Mr. Johnson made a comment
5 something to the effect of, I should hope that I sleep
6 lightly. I think that comment goes to a number of potential
7 issues, but bias is one of them. That's it.

8 THE COURT: Mr. Johnson.

9 MR. JOHNSON: I guess, I don't see how it is possibly
10 relevant if Mr. Johnson were biased against Defense Counsel,
11 frankly his testimony is fact testimony based on his
12 knowledge of Kari Kirkegaard prior to this incident, and his
13 knowledge of facts related to this incident. As of,
14 essentially, his testimony would end on March 16, 2014,
15 chronologically. We're talking months and even years past
16 that and even if it were somehow relevant, which it is
17 clearly not, any prejudice would clearly outweigh any
18 probative nature of that. So we again would reiterate this
19 is wholly irrelevant and inadmissible.

20 THE COURT: Two things that I'm looking at as I evaluate
21 the issue. One is a matter of rules of evidence is this
22 impeachment 608 or impeachment rule. I'll evaluate it under
23 the provisions of rules of evidence.

24 Then there's the suggestion that this line of proposed
25 cross-examination implicates Mr. Kryger's constitutional

1 right under both the United States Constitution and South
2 Dakota Constitution of confrontation. I think the
3 impeachment rules, 608, is still subject to balancing under
4 Rule 403. So even if it were some relevance, you could be
5 excluded if the probative force of that evidence was
6 substantially outweighed by any of the 403 considerations
7 including unfair prejudice, confusion of issues, presentation
8 of the testimony, waiting time. And the other 403 bases are
9 identified in the rule.

10 The other rule that I'm going to reference before I make
11 a ruling just so that in the event there is ever a reviewing
12 court that's examining this record, they'll have a clear idea
13 of what rules I'm applying here.

14 Though the defendant has a right to confront his
15 excuser -- this is a right of confrontation -- this is an
16 opportunity for an effective cross-examination to disclose
17 bias and confrontation can be thought of as manifesting
18 itself at least in that way. There are other ways that
19 confrontation can manifest itself. This is one of them. The
20 right of effective cross-examination to expose bias.
21 However, that right's not absolute, and what is required is
22 the opportunity for effective cross-examination, not
23 cross-examination in whatever way and to whatever extent the
24 defendant wishes. To say it another way, the trial court
25 still has the ability in his or her discretion to limit

1 cross-examination even where considerations of constitutional
2 right of confrontation are implicated or are argued to the
3 implicated. If I'm understanding the proposed testimony --
4 excuse me -- proposed cross-examination correctly as it
5 relates to comments that Brian Johnson had made during the
6 pendency of this case. Threatening harm or suggesting in a
7 direct or a veiled way harm against Mr. Kryger, which is I
8 think directly stated, and in some ways, somewhat more veiled
9 comments regarding defense counsel, but I am familiar with
10 the comments and the record will reflect that I've made a
11 record of them, actually, and they figured into my decision
12 not to allow Mr. Brian Johnson to be here during the balance
13 of the jury trial. However, I think that those threats,
14 those comments by Brian Johnson have a marginal degree of
15 relation for this case. As I understand it -- and I have
16 heard him testify, but if his testimony is factual, then, um,
17 he can still be impeached, but if it's narrow in scope and
18 factual in nature, if it's confined to a point along the
19 investigatory timeline, that does not, in my view, seem to
20 implicate his more recent comments during the pendency of
21 this case about defense counsel and about Mr. Kryger. I
22 don't think, in other words, that that direct examination --
23 and I'll listen to it it, and if you want to renew your
24 motion you can, Mr. Kadi, but if what I'm hearing plays out,
25 I don't think that that sort of information that Mr. Johnson

1 was at a particular time at the Kirkegaard house discovered
2 something, had a role in how long the continuum of discovery
3 leading up to or perhaps including investigation, I don't
4 think it implicates the sort of cross-examination that you
5 are proposing, Mr. Kadi, to expose the sort of bias against
6 you personally, or against your client. He's being called by
7 the State as a State's witness. He is a surviving brother of
8 Kari Ann Kirkegaard, and marginal relevance about showing of
9 bias, I think is, when viewed in context, not all that
10 illuminating for the jury, which I think will fairly conclude
11 that Mr. Johnson is appearing for the State. He is a
12 surviving brother, and he may well be bipartisan in this case
13 already.

14 So I've analyzed under the rules of evidence any
15 relevance that this evidence or proposed cross-examination
16 has is outweighed, so any probative force is, substantially,
17 outweighed by the danger of the presentation of unnecessary
18 testimony, the danger of confusion of issues. In other
19 words, my concern is that the jury would feel as though the
20 real issue is whether Brian Johnson has strong feelings about
21 Mr. -- Mr. Kryger or the defense counsel. That in my mind is
22 a collateral issue that I think could confuse the jury as it
23 evaluates his testimony. And I think there's a risk of
24 unfair prejudice and delay -- unnecessary delay. In viewing
25 it under the constitutional principle as right of

1 confrontation, I think that I can impose this limitation
2 consistent with constitutional rights of confrontation to the
3 extent that they are implicated, I think, prohibiting this
4 testimony which I view as very much removed from the
5 incidents upon which Mr. Johnson is going to testify, I view
6 this as a reasonable restriction, one that does not impact or
7 deny Mr. Kryger's opportunity for effective cross-examination
8 under the Constitutions of our state or United States
9 Constitution.

10 So Motion in Limine is granted.

11 Let's reconvene in about quarter to 11.

12 (Short recess was taken)

13 (Exhibit No. 1-125 were marked for identification)

14 THE COURT: Reconvening in State versus Kryger. Defense
15 counsel is here. The State is here as well. The jury is
16 not. We are outside the presence of the jury.

17 The case is one that's been followed by the press, and
18 you know, that's, I think, been the case along the way in
19 fact. This was one of the reasons why we spent the time we
20 spent last week during jury selection carefully vetting
21 jurors to find out what they knew, how they knew it, and what
22 effect it had, if any, upon them.

23 I've entered a couple of orders in this case. One is a
24 media order that governs in general terms some coverage-type
25 rules. No cameras above third floor, that sort of thing.

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

CHRISTOPHER DEAN KRYGER,

Defendant.

CRI 14-1956

ORDER EXCLUDING
RONALD JOHNSON
AND
BRIAN JOHNSON
FROM THE JURY TRIAL

This matter is before the court upon its own motion to consider excluding two members of the family of Kari Ann Kirkegaard from the jury trial in this case. The court previously excluded two members of Ms. Kirkegaard's family, Ronald Johnson and Brian Johnson, for the jury selection process, reserving further ruling.

The court has carefully considered the provisions of SDCL Chapter 23A-28C and the public policy that allows those defined as victims under our state law to, among other things, be present at the trial. The court has also considered its solemn responsibility to ensure a fair and orderly trial for all parties, free of the prospect of disruptions or threats of violence. There is tension between these two considerations as it relates to Messrs. Johnson.

Brian Johnson has been disruptive in some previous pretrial hearings and also engaged in behavior that threatens violence against the defendant and the defense attorneys. At an October 26, 2015, hearing, the court marked several exhibits that illustrated its concerns. Among them was a Facebook post indicating that the defense attorneys in this case had made

Mr. Johnson's "casket list." Mr. Johnson had previously advised one of the defense attorneys that he hoped "he was a light sleeper."

Acting on the court's invitation to submit an objection or written statement about the possibility of exclusion from the trial, Brian Johnson submitted a hand-written letter which began with a statement expressing an apology for his disruptive behavior. He wrote of other difficulties experienced by his family in the recent past and indicated his desire to attend the trial.

The letter was well-written, and the court can appreciate the difficulties experienced by Mr. Johnson's family. However, the possibility that there will be further disruptions or that Mr. Johnson's previous behavior will cast a pall of intimidation over those in the courtroom is real. The mere specter of vigilante justice or the idea taking the law into one's own hands is antithetical to the deepest and most well-established concepts in our system of laws. Simply put, it has no place in this or any other case.

Ronald Johnson was disruptive at the October 26, 2015 hearing, and the court excluded him from the trial "until further order of the court." Ronald Johnson appears to have difficulty hearing and was using headphones provided by the court to assist him. The headphones apparently did not address the issue well enough in Mr. Johnson's view, and he ripped them from his head, threw them and stormed out of the courtroom. Everything stopped, and every person in the courtroom was keenly aware of what had happened. For this period, courtroom decorum was significantly and negatively impacted. Mr. Johnson has used headphones before at other hearings without this sort of reaction. The court can sympathize with hearing difficulties, but the disruption which occurred at the October 26th hearing is unacceptable on general principles and, specifically, it reflects an unacceptable means of seeking a more effective accommodation.

As the court considered the possibility of allowing Brian and Ronald Johnson to attend the jury trial, it noted that the disruptions and behavior to date have occurred at pre-trial stages and featured court sessions of

relatively short duration and without much development of the evidentiary record relating to the current charges. The trial will be different. It will last a significant period of time, and the court anticipates the State will seek to develop its theory of the case with specific and detailed evidence and the defense will work equally hard to advance its cause.

Under the circumstances, the risk that that further disruption or other behavior will occur is too great to permit the attendance of Brian Johnson or Ronald Johnson. If the court were to allow either or both of these men to attend the trial and an incident occurred, it could jeopardize the fairness of the trial for all parties.

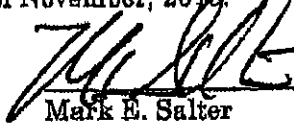
The court is very much aware of the fact this this ruling prevents two members of Ms. Kirkegaard's family from attending the trial against their wishes. The decision is truly a last resort for the court and not its first impulse, and the court has considered providing other alternative means for viewing the trial. In this regard, the court has arranged for a video link from the courtroom to a remote site in the Lincoln County Courthouse.

It is, therefore, ordered:

1. That Brian Johnson and Ronald Johnson are excluded from the jury trial in this matter, to include exclusion from the Minnehaha County Courthouse and the Minnehaha County Administration Building during the trial;
2. That notwithstanding the foregoing, Brian Johnson has been identified as a witness for the State and may, for the purposes of testifying or preparing to testify, be in Courtroom 5B of the Minnehaha County Courthouse or the State's Attorney's Office or points in between if part of his direct route in connection with his testimony and if accompanied by a member of the State's Attorney's Office;
3. That Brian Johnson and Ronald Johnson may view the jury trial, if not a subject to witness sequestration order, at the Lincoln County Courthouse in a room to be designated by the Circuit Administrator;

4. That this remote access is available only to Brian Johnson and Ronald Johnson;
5. That no part of the video or audio transmission of the trial to the remote site may be recorded by any means; and
6. The Circuit Administrator is designated as the point of contact for all logistical and technical arrangements and will work with the victim/witness specialist from the State's Attorney's Office to implement the provisions of this order.

Dated this 9th day of November, 2015.


Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk

By: 