IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 23–1928
LEE (SOUTH) COUNTY NO. PCLA006528

Benjamin Trane,
Applicant-Appellee/Cross-Appellant,

v.

State of Iowa,
Respondent-Appellant/Cross-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR LEE COUNTY (SOUTH),
HONORABLE MICHAEL SCHILLING

DEFENDANT/APPELLANT'S REPLY BRIEF

Alfredo Parrish
Parrish Kruidenier Dunn Gentry
Brown Bergmann & Messamer L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email:aparrish@parrishlaw.com
ATTORNEY FOR
DEFENDANT/APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT

I. Trial Counsel Was Ineffective For Failing to Sever Trane's Criminal Counts, and Prejudice Resulted.

A. De Novo Review allows this Court to Consider Trial Counsel's Many Inconsistencies

Review of Trane's severance claim is *De Novo*. (State's Brief, at 19). While the State fails to rescue Trial Counsel from the errors identified in Trane's initial briefing, several specific flaws warrant emphasizing.

First, the State references Trane waving speedy trial on the record. (*Id.*, at 20). The State asserts that Trane's response makes "no sense because Trane was told on the record that he had the option of waiving speedy trial to give Schafer time to prepare a more effective defense". (*Id.*) (emphasis omitted). The State conflates what an attorney would know—that severance was an option—and what a

layman would know. The "contemporaneous evidence" of Trane's "expressed preferences" must be viewed through the lens of what Trane actually knew, not what some idealized and omniscient client might know. *Doss v. State*, 961 N.W.2d 701, 714 (Iowa 2021). Trial Counsel was unable to muster a shred of physical evidence to show that she ever informed him of the legal option of severance. Trane did not reject "*any* delay". (State's Brief, at 21) (emphasis in original). He only rejected the delays he was informed of. Based on what Trane knew, it was a trial on all counts now, or a trial on all counts later. His decision does not undercut his arguments on appeal.

The lack of record speaks volumes. Trial Counsel understood the need to document client decisions which might be imputed to her. Hence, the multiple notes, letters, and statements on the record relating to the speedy trial issue. If Trial Counsel discussed severance with Trane, his alleged 'decision' to proceed would have been just as well documented. By her own assertion, when she had "significant conversations about matters related to the case, [she] documented it either by email or [she] documented it by [her] time record." (D019, at 16:11-16). Trial Counsel cannot both assert that

she recorded significant matters when they were discussed with Trane, and then fail to produce this record.

B. The State's Theory for Merger and Lack of Prejudice is Groundless.

For counts to be properly tried together, they must be "based either on the same transaction or occurrence or a common scheme or plan". *State v. Romer*, 832 N.W.2d 169, 182 (Iowa 2013). The State fails to justify joinder.

The State asserts that joinder is proper because "these charges arose out of the same occurrence: while Trane was in charge of the day-to-day operation of Midwest Academy he implemented policies that isolated and starved some students, while keeping some other students within reach (but similarly at his mercy)." (State's Brief, at 24). This is preposterous. The events alleged in this case span from September 18, 2014, and January 31, 2016. (FECR009152 D0016). It is unlikely that the alleged victims ever saw each other, precisely because they were subject to *different* protocols used by Midwest Academy. For the State's breathtaking interpretation of transaction or occurrence to apply, it must reach every facet of Trane's actions, inactions, policy, and business judgment relating to the Academy for

more than a calendar year. That is not only unreasonable but illogical.

The State quotes *Romer* in support, missing the point of the case. Romer based "his argument on the contention that not all of the evidence was required in order to convict [him] on each individual count". 832 N.W.2d at 182. The State can generally join matters for economy's sake. *Id.* But *Romer* did not state that most of the evidence needed for the disparate counts needed to convict would be considered *prejudicial* in a solo trial on the other counts. The idea that no prejudice resulted from having a jury sit through testimony regarding the starvation of children (prejudicial in a trial on sexual misconduct) or sitting though "graphic descriptions of repeated sexual abuse" (prejudicial in a trial on Child Abuse not relating to sexual misconduct) is patently incorrect. *State v. Trane*, 934 N.W.2d 447, 454 (Iowa 2019). The probative value of either set of evidence on the other counts is nil—they are entirely different fact sets, for entirely different victims, in different places, at different times, and for different alleged reasons. *State v. Lacey*, 968 N.W.2d 792, 807 (Iowa 2021).

The ”danger of its prejudicial or wrongful effect upon the triers of fact” was enormous. *State v. Einfeldt*, 914 N.W.2d 773, 784 (Iowa 2018). This spill over tainted both sets of Counts. This can be observed in the jury's decision to hand down a “compromise verdict” of the lesser included offense of Assault with Intent to Commit Sexual Abuse. *Trane*, 934 N.W.2d at 454. It certainly complicated Trane's wholly unrelated Child Abuse claims, as K.S.'s own testimony about her alleged sexual assaults took almost an entire day, alongside State's experts summoned for the sole purpose of vouching for her. (D0167, at 157-279; D0168, at 1-111, 190-234). While this gratuitous testimony helped the State convict Trane of Child Abuse, it did so by having an “undue tendency to suggest a decision on an improper basis”. *Lacey*, 968 N.W.2d at 807. The only use of such evidence is to show that Trane had a general propensity to being a bad person. *State v. Cox*, 781 N.W.2d 757, 772 (Iowa 2010) (admitting evidence of a defendant's sexual abuse of other victims based only on its value as general propensity evidence improper).

The State cannot add days' worth of prejudicial testimony in on the faint theory that Trane did it all because he 'was god-like' or

wanted 'absolute control'. (State's Brief, at 25). If that is all it takes to justify a merger, then any two crimes committed by anyone should merge based on whatever personality trait the State thinks fits. The fact it happened in this case, and the demonstrable impact it had on the result, prejudiced Trane.

II. The District Court Correctly Determined that Jury Instructions 31 and 33 were fatally flawed, and that Trial Counsel's Failure to Object Prejudiced Trane.

When the jury is improperly instructed, a new trial must be granted. *See* Iowa R. Crim. P. 2.24(2)(b)(7). As to Count III, child endangerment, the jury in this case was instructed that it could render a guilty verdict on *one* charge of child endangerment based on evidence related to *two* alleged victims, without an accompanying special interrogatory. The lower court recognized this error and ordered a new trial.

"Iowa law requires a court to give a requested jury instruction" only if "it correctly states the applicable law and is not embodied in other instructions." *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (citations omitted). Although Iowa courts do not require perfect jury instructions, instructions cannot confuse or

mislead the jury. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 902 (Iowa 2015); *Anderson v. Webster City Comm. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000). Prejudice is automatic when the trial court's instruction confuses or misleads the jury. *Webster City Comm. Sch. Dist.*, 620 N.W.2d at 268.

Here, Instruction 31 stated:

> Under Count III of the Trial Information, the State must prove all of the following elements of Child Endangerment:
>
> 1. On or about September 18, 2014, and January 31, 2016 the defendant was the person having custody or control of *B.V. and/or A.H.*
> 2. *B.V. and/or A.H.* were under the age of fourteen years.
> 3. The defendant knowingly acted in a manner that he was creating a substantial risk to *B.V. and/or A.H.*'s physical or mental or emotional health or safety.

(D0147, at 22) (emphasis added). Instruction 33 clarified the State's burden as to the defendant's mental state in creating "a substantial risk[ ] to *B.V. and/or A.H.*'s" health or safety. (Id., at 23) (emphasis added).

These instructions are not supported by a plain reading of the statute. It is for this reason that the Uniform Iowa Criminal Jury

Instructions require the State to name the alleged victim in a charge of Child Endangerment. The uniform instruction states:

> 1. On or about the _____ day of _____, 20___, the defendant was the [{parent} {guardian} {person having custody or control} of (name) {or a member of the household in which (name) resided}].
>
> 2. (Name) was [under the age of fourteen years] [a mentally or physically handicapped minor under the age of eighteen].
>
> 3. The defendant acted with knowledge that [he] [she] was creating a substantial risk to (name)'s [physical] [mental] [emotional] health or safety.
>
> 4. The defendant's act resulted in serious injury to (name).

Iowa State Bar Ass'n, Iowa Criminal Jury Instructions 2610.1 (updated through June 2017) (emphases added); see *State v. Hickman*, 576 N.W.2d 364, 368–69 (Iowa 1998). Courts are generally "slow to disapprove of the uniform jury instructions." *State v. Ambrose*, 861 N.W.2d 550, 559 (Iowa 2015).

The District Court correctly identified the error these instructions invited: "different jurors could reach guilty verdicts based upon different victims, and there would not have to be a unanimous verdict by all jurors as to one victim." (D0133, at 14-15). The District Court relied on the settled law of *State v. Duncan* to

conclude that this was improper. Simply put, a jury can disagree over exactly how a crime happened, but it cannot be asked to convict if they don't agree over which crime occurred.

The State works to contort the straightforward law of *Duncan*, to no avail. *Duncan* notes the extent of the unanimity requirement in Iowa: if evidence "support[s] each alternative method of committing *a single crime*, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required." *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981) (emphasis added). Per *Duncan*, the State must charge a single offense, though it is allowed to prove this *single crime* through alternative theories. *Id.* To put it as the District Court did: "Duncan is an 'alternative means' case; it is not an 'alternative acts' case with multiple alleged victims. This is a critical distinction." (D0133, at 13).

The State attempts to refute this by conflating the Trial Court's 'alternative means' vs. 'alternative acts' distinction. The resulting twenty-page treatise of out-of-state cases, concurrences, and dissents do not change Iowa law. (State's brief, at 39-58) (providing extensive review of unrelated law). In *Iowa*, in order for a jury to

convict a Defendant based on alternative theories of offense, the underlying offense must be "a single crime". *Duncan*, 312 N.W.2d at 523. Iowa's Child Endangerment statute does outline a number of alternative theories under which a Defendant may commit Child Endangerment. Iowa Code § 726.6(1)(a-i). If Trane's jury had, say, split 50/50 over whether Trane had committed Child Endangerment against B.V. by "[k]nowingly act[ing] in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety" or by "[a]bandon[ing] the child or minor to fend for the child or minor's self, knowing that the child or minor is unable to do so", then there would be no issue. Iowa Code § 726.6(1)(a, f). However, the state proposed only one statutory theory of offense, ("[k]nowingly act[ing] in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety"). Instead of alleging multiple means to commit a single offense, which is entirely allowed, the State argues it can mash together multiple offenses and hope to convince a jury that the Defendant committed some crime, against someone, at some time.

The *charging statute* rather than the whims of the State decide what constitutes a single offense. The Iowa Supreme Court has provided instructions on how to determine this:

> The first step is to determine whether the statute defines a single offense that may be committed in more than one way or instead defines multiple offenses. When a single offense is defined, the second step is to determine if the alternative modes are consistent with and not repugnant to each other.

State v. Bratthauer, 354 N.W.2d 774, 776 (Iowa 1984). Here, the answer is found in the first step. A review of Iowa's Child Endangerment Statute notes that:

> A person who is the parent, guardian, or person having custody or control over a child . . . commits child endangerment when the person does any of the following:
>
> a. Knowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety.
>
> [. . .]
>
> i. Knowingly provides direct supervision of a person under section 724.22, subsection 5, while intoxicated as provided under the conditions set out in section 321J.2, subsection 1, paragraph "a", "b", or "c".

Iowa Code § 726.6. Iowa Code section 726.6 outlines nine different means by which a jury could find a defendant had committed Child

Endangerment. The legislature chose to make Child Endangerment a crime against "*a* child or *a* minor". *Id.* (emphasis added). It did not make Child Endangerment a crime that can be committed against 'children' or 'minors'. The statute does not use the term "children" or "the children." *Id.* Instead, the legislature chose to use the article "a," which "is used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified." *State v. Kidd*, 562 N.W.2d 764, 765 (Iowa 1997).

Compare Iowa Code 726.6's use of the singular 'a child' with the broader use of "another person, or within an assembly of people" in Iowa's Intimidation with a Dangerous Weapon offense. Iowa Code § 708.6. The use of a plural creates the unit of prosecution; that is, the scope of who can be subject to the different ways a crime can be committed, before it becomes a separate crime. This was the crux of *State v. Ross*, which noted that "the general assembly decides which acts to criminalize", not the prosecutor. 845 N.W.2d 692, 702 (Iowa 2014). After examining the actual language of the criminal statute, the *Ross* court concluded that in addition to allowing for intimidation

of a single person, "[u]nder the second alternative method included in section 708.6, the general assembly has defined the crime of intimidation with a dangerous weapon with intent as the act of committing an assault on a group of people, rather than an assault on an individual.". *Id.* This second alternative method is what is missing in Iowa Code section 726.6, despite the State's attempts to shoehorn it in.

Child Endangerment is a crime that occurs when "a child" is subjected to one of the nine statutorily outlined alternative methods of committing the offense. Iowa Code § 708.6.(1)(a-i). As presented to the jury, there can be no real confidence that the jury unanimously found Trane guilty of committing a crime against B.V., or a crime against A.H. Iowa's laws demand more.

A. The State's theory allowing multiple counts to be proven together creates wider problems with Iowa Law.

While the State makes noise about a number of edge case counterfactuals which did not happen in this case and are not before this Court for consideration, it is notably silent about how what actually happened here invites disaster if endorsed.

The State's argument runs contrary to the obligations it has from the start of any criminal case to articulate a clear theory of offense. To initiate a case, the State must file an indictment or information providing, among other things, "[a] brief statement of the time and place of the offense, if known" and "[w]here the means by which the offense is committed are necessary to charge the offense, a brief statement of the acts or omissions by which the offense is alleged to have been committed". Iowa R. Crim. P. 2.4(4); 2.5(5). If the State fails to reasonably identify the who, what, where, how, and why of a charged offense, it will be subject to a request for bill of particulars. Iowa R. Crim. P. 2.11(7).

This built-in measure is triggered when "an indictment or information charges an offense, but fails to specify the particulars of the offense sufficiently to fairly enable the defendant to prepare a defense", so that the Defendant will know "such particulars as may be necessary for the preparation of the defense." *Id.* Allowing the State to file, try, and seek conviction on such broad theories as 'you endangered x or y child, at some point, somehow' is the exact problem Rule 2.11(7) is designed to weed out from the start. If this Court

decides to entertain the State's abstract theories, it should likewise consider this—the State's endorsement of cobbling together an offense on the back end of a trial has the grave risk of fundamentally denying a Defendant the capacity to prepare a defense. Iowa R. Crim. P. 2.11(7).

To justify the error here, the State creates a strawman argument about how any decision here may create a "super-unanimity requirement[]" (States Brief, at 55). This bogey-man, of course, would emerge only if the State is first incompetent in crafting its charging instrument or evidence. It is true that "prosecutors have long been allowed to allege facts in the alternative to meet the contingencies of proof" but that cannot mean that the State gets to invite all of the logic problems it bemoans in its own briefing. The solution to the State's argument that a juror might conclude a "either A or B—but that it's impossible to know which"? (*Id.*). The simple solution would have been to charge multiple counts. The heightened requirement that the "jurors are required to agree on 'just what a defendant did'"? (*Id.*, at 56). Again, the State could have presented a cogent theory in its instructions which allowed the jurors to agree with what the

Defendant did to commit child endangerment against a child—within the scope of the many ways that a defendant can commit that crime. All the bad law the State discusses in its briefing is the product of sloppy charging and sloppy proofs. The desire to secure a conviction here does not justify inviting that sort of shoddy workmanship into this State, with all its attendant problems.

B. The District Court was Correct in Concluding Trane Was Prejudiced.

This issue has been a long time coming. In Trane's first appeal, the Iowa Supreme Court noted the likely error in Trane's jury instructions. *Trane* 934 N.W.2d at 465 ("Lastly, from our vantage point, we have concerns about the 'and/or' marshaling instruction on child endangerment"). The Supreme Court noted that the use of this language generated multiple concerns, as it:

> could have allowed the jury to find that the defendant had custody or control of B.V. while knowingly acting in a manner that created a substantial risk to A.H.'s physical, mental or emotional health or safety . . . [o]r it could have allowed different jurors to reach a guilty verdict as to different victims.

Id. at 466. This glaring error occurred because Trial Counsel failed to submit her own jury instructions. (D0159, at 18:6-25; 19:1-14). Her

rationale upon deposition was that defendants only usually provide instructions "if there are particular issues that are not addressed in the stock instructions" (*Id.* at 18:3-5). But, as noted *supra*, the proposed instruction deviated from the stock instruction. Compare Instruction 31 (D0147, at 22) with Iowa State Bar Ass'n, Iowa Criminal Jury Instructions 2610.1.

Trial Counsel asserted that her failure to either submit a proper instruction or to object to the District Court's flawed selection was because the matter was charged and litigated as "one general course of conduct, not conduct specific to each of them, because the allegations were similar with regard to each of them." (D0159, at 24:5-8). This is, of course, the precise potential error identified by the Supreme Court. *Trane*, 934 N.W.2d at 466. In effect, the jury instructions were Trial Counsel's last chance to stop the State from improperly fusing the different crimes together to reduce its burden of proof. She failed in this.

Prejudice resulted. Given the competent evidence presented that Trane's level of control over the OSS system was insufficient to show his actions could be imputed to the alleged harms suffered by

the minors, whether they could find for either is questionable. There can be no confidence in the Jury's conviction of Trane for Child Endangerment, as "error in instructing the jury is presumed prejudicial unless the contrary appears from a review of the whole case." *State v. Sloan*, 203 N.W.2d 225, 227 (Iowa 1972). The District Court conducted such a review, and was unimpressed:

> The Court does not find the evidence of Trane's guilt with respect to both victims under Count III to be overwhelming. Trane vigorously contested the evidence on element number 3 under Instruction No. 31. The final arguments of counsel reflect the vigorous advocacy on element number 3. . .
>
> Next, Trane's defense to Count III was not implausible. *State v. Kuhse*, 937 N.W.2d 622, 624 (Iowa 2020) . . .
>
> Third, the critical error occurred in the marshaling instruction. "The marshaling instruction is the crown jewel of the court's instructions in a criminal case." *Kuhse*, 937 N.W.2d at 633 (Appel, J., concurring specially).

(D0133, at 20). Where it is impossible whether the jury relied on proper claims to reach its verdict, error is not harmless—neither should the prejudice created be ignored. *State v. Schlitter*, 881 N.W.2d 380, 391 (Iowa 2016). This creates a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Id.* Mr. Trane's conviction for Count III must be set aside.

PARRISH KRUIDENIER DUNN GENTRY BROWN BERGMANN & MESSAMER L.L.P.

By: /s/ Alfredo Parrish.
Alfredo Parrish AT0006051
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com
ATTORNEY FOR PLAINTIFF-APPELLANTS

CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 6,500 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains 3,613 words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Bookman Old Style.

I hereby certify that on December 30, 2021, I did serve Defendant-Appellant's Page Proof Brief on Appellant by e-mailing one copy to:

Benjamin Trane,

Defendant-Appellant

/S/ Alfredo Parrish .

Dated: May 13, 2024

Alfredo Parrish