IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0457

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAWRENCE EUGENE WALKER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONORABLE JOHN D. TELLEEN, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tim.hau@ag.iowa.gov

MIKE WALTON
Scott County Attorney

KIMBERLY SHEPHERD
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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ROUTING STATEMENT

The State concurs with Walker that this case can be decided based on existing legal principles. Appellant's Br. 11. Transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

After trial, a jury convicted Larry Walker of sexual abuse in the second degree in violation of Iowa Code section 709.3 and lascivious acts with a child in violation of Iowa Code section 709.8. On appeal,

he challenges two evidentiary rulings made by the district court. He also raises interrelated claims his counsel was ineffective when the attorney failed to object to and solicited hearsay statements from a sexual abuse nurse examiner, Eliza Durr-Baxter. The Honorable John Telleen presided over the relevant proceedings.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Mark Walker, his fiancé, Kelley Roling and his children, J.W. and E.W., all lived together at 3712 Johnson Avenue in Davenport, Iowa. Trial Vol. III Tr. p.35 line 7–25. During the evening of June 20 2016, Mark was home and caring for the children as Kelley was working. Trial Vol. III Tr. p.36 line 7–p.37 line 7. Also at home that evening was J., Kelley's nephew. Trial Vol. III Tr. p.37 line 8–11. During the evening, one of Mark's brothers invited him out to go bowling. Trial Vol. III Tr. p.38 line 7–11. Mark had arranged childcare through another brother, Larry Walker. Trial Vol. III Tr. p.38 line 12–p.39 line 1. As Mark left, E.W. and J.W. were sleeping on the couch. Trial Vol. III Tr. p.39 line 3–16.

Prior to Mark returning home, Walker picked E.W. up and carried her to her parents' bedroom. Trial Vol. III Tr. p.127 line 16–p.128 line 1; p.151 line 3–5. Inside the bedroom, Walker removed the child's underpants. Trial Vol. III Tr. p.138 line 11–19; p.151 line 6–19; Exh. 1 10:14–11:25; 12:08–12:20. Walker removed his own shorts. Trial Vol. III p.138 line 3–10. Sometime later, he got E.W. a snack and returned the child to the couch. Trial Vol. III Tr. p.140 line 9–25.

The next afternoon, as Roling made the children lunch, E.W. told her something that made her take the child to the emergency room. Trial Vol. III p.47 line 9–p.24. There, E.W. told Durr-Baxter Walker had "touched my butt crack really deep and he had my—I had my underwear on so he took it off." Trial Vol. III Tr. p.57 line 1–5. E.W. also told her mother and a physician that "Larry touched her with his fingers in her—his fingers in her crotch." Trial Vol. III Tr. p.65 line 1–11; p.78 line 12–19. E.W. also indicated that Walker made her sit on his crotch and was "bouncing up and down again." Trial Vol. III Tr. p.57 line 1–7; p.77 line 9–p.78 line 5. Forensic tests were performed. DNA testing revealed a second DNA contributor within the swabs taken from E.W., but this second contributor sample was too weak for reliable comparison. Vol. III Tr. p.103 line 21–p.105 line

21. A spermatozoa cell was found within E.W.'s anal sample. Trial Vol. III tr. p.100 line 23–p.102 line 12.

Police interviewed Walker on July 14. When confronted with E.W.'s account Walker initially denied any improper conduct. Exh. 1 05:05–9:00. Walker agreed he had taken the child up to her parents' bedroom to sleep. While the two were in the room, he believed the child had had a urinary accident. He did not dispute he removed the child's underpants because he stated he attempted to clean her. Exh. 1 09:00–11:10. As the interview continued, the officer pressed Walker about the highly incriminating nature of E.W.'s account. Walker admitted E.W.'s account that he put her on his lap to "cuddle." Exh. 1 11:10–14:00; 15:58–17:10. He then admitted to touching E.W.'s vagina. Exh. 1 17:25–17:55; 20:35–20:50. When asked if he needed "help" for his behavior, Walker nodded in agreement. Exh. 1 17:55–18:04. As the officer closed the interview, she asked if there was anything else Walker wished to say, he offhandedly retorted "I didn't fuck her or anything like that." Trial Vol. III Tr. p.154 line 14–18.

Despite making damning criminal admissions during the recorded interview, Walker testified at trial and denied his earlier statements. He alleged he had only slept a few hours prior to his

morning interview with police and was feeling the influence of a few beers, Vicodin, and sleeping pills he consumed earlier. Trial Vol. III Tr. p.143 line 2–p.145 line 21; p.146 line 21–p.147 line 7. He explained he made the incriminating lies up because the detective was probing him and "wouldn't take no for an answer." Trial Vol. III p.147 line 8–p.149 line 11. The jury convicted Walker of both counts as charged.

ARGUMENT

I. Iowa Rule of Evidence 5.412 Excludes Evidence a Victim has been Previously Sexually Abused. The District Court Correctly Excluded Walker's Proposed Hearsay Testimony from E.W.'s Mother.

Preservation of Error

The State does not contest error preservation. The State filed two motions to exclude evidence Walker intended to present. 1/29/2018 Motion in Limine I; 1/30/2018 Motion in Limine II; App. 34–37. After considering the arguments of the parties, the district court granted the State's motion to exclude any evidence of E.W.'s parents' concern about E.W.'s eight-year-old brother, J.W. Although no accusation was ever made, there were questions whether J.W. had been previously sexually abused. As the district court noted, that past-sexual abuse of the victim fell under Iowa Rule of Evidence

5.412, and its probative value did not outweigh the evidence's inherently prejudicial nature:

> No notice was given, it's covered by the rape shield law, it is excluded and if we get into this it will be a trial within a trial as to what happened, when, with some eight year old and his sister. It misleads the jury, highly prejudice, confuses the issues and it's not—not even arguably if this eight year old did have some unwarranted or untoward attention to or interest in or perhaps abuse his sister, that doesn't explain what happened here.
>
> It's prejudicial and marginally relevant and it would confuse the issues and mislead the jury. The State's motion to exclude this evidence is granted.

Trial Vol. III p.18 line 19–p.19 line 4. This was sufficient to preserve error.

Standard of Review

Iowa's appellate courts review a district court's application of the Rape Shield Law for an abuse of discretion. *See State v. Knox*, 536 N.W.2d 735, 736 (Iowa 1995). "An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001) (citation and quotation marks omitted).

Merits

Walker seeks reversal of his conviction because in his view, the district court abused its discretion when it granted the State's motion in limine and prevented him from introducing testimony from E.W.'s parents that J.W., E.W.'s brother was previously sexually abused. Appellant's Br. 24–25. There was no abuse of discretion. The evidence was correctly excluded on several grounds.

A. The district court correctly excluded the evidence under Iowa Rule of Evidence 5.412 because Walker intended to introduce it for an impermissible purpose.

Iowa's Rape Shield Law was "enacted to (1) protect the privacy of victims, (2) encourage reporting, and (3) prevent time-consuming and distracting inquiry into collateral matters." *State v. Mitchell*, 568 N.W.2d 493, 497 (Iowa 1997). Generally speaking, rape shield laws "evolved from society's recognition that a rape victim's prior sexual history is irrelevant to issues of consent or the victim's propensity for truthfulness." *State v. Awbery*, 367 P.3d 346, 349 (Mont. 2016). These laws "reflect[] a compelling state interest in keeping a rape trial from becoming a trial of the victim." *Id.*

The rule excludes reputation or opinion evidence offered to prove that a complaining witness engaged in other sexual behavior, in

addition to evidence of a complaining witness's "other sexual behavior other than reputation or opinion evidence." Iowa R. Evid. 5.412(a). When reviewing this rule of evidence, the Iowa Supreme Court has concluded that "'past sexual behavior' means a volitional or non-volitional physical act that the victim has performed for the purpose of the sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person." *State v. Baker*, 679 N.W.2d 7, 10 (Iowa 2004). This includes prior sexual abuse upon the complaining witness. *See State v. Jones*, 490 N.W.2d 787, 790 (Iowa 1992) ("We think the term past sexual behavior as it is used in the rule clearly encompasses prior sexual abuse perpetrated upon the victim. Many other state and federal courts have found 'rape shield' rules, identical or highly similar to Iowa Rule of Evidence [5.412], applicable to evidence of previous sexual abuse of a child victim.").

Defense counsel urged this testimony was relevant because it suggested J.W. had previously sexually abused E.W.—rather than Walker. On appeal, Walker argues the district court abused its discretion when it excluded the evidence for two reasons. First,

because the evidence would suggest that J.W. had been sexually abused, 5.412's rule of exclusion was inapplicable because the allegation involved J.W., not E.W., the complaining witness. Appellant's Br. 24. Second, because "The evidence from the child's mother makes no reference to actual sexual contact, thus it does not constitute sexual activity within the meaning of the rape shield law." Appellant's Br. 24.

But Walker's arguments fail on both counts for the same reason. This is because the entire purpose of admitting the evidence of J.W.'s abuse was always impermissible under rule 5.412—the purpose of admitting this evidence was in effort to place before the jury the idea J.W. had previously sexually assaulted E.W.:

> Defense Counsel: Obviously Mr. Walker denies sexually abusing E.W. in this case. Which raises the obvious question where is EW coming up with her knowledge of sexual activities or claiming that something sexual happened to her. We believe this evidence is relevant to—for two reasons: One, how E.W. at 4 years of old learned about sexual matters and, number 2, the possibility that she was sexually abused by someone else and due to her age, whatever circumstances, has in her mind gone to Mr. Walker perpetrating the abuse rather than someone else.
>
> . . .

> I think it's pretty obvious if E.W.'s older brother has been sexually abused, they are in the same household and the older brother is engaging in behavior that make the parents concern, they won't leave the children alone together and want the children to have clothing on at the time and I think that's probative certainly how E.W. learned about sexual matters at the age of 4 and also if sexual abuse actually occurred it suggests a different perpetrator and the jury is free to conclude that it's possible that a 4 year old would confuse who the perpetrator actually was.

Trial Vol. III tr. p.10 line 14–23; p.12 line 13–23. This is the very sort of evidence 5.412 was intended to exclude. *See Jones*, 490 N.W.2d at 790. *But see Stamper v. State*, No. 00-1794, 2002 WL 571409, at *3 (Iowa Ct. App. Mar. 13, 2002) (distinguishing *Jones* where identity of perpetrator was at issue, where reports victim was abused by another person were made forty days prior to incident and a sheriff's incident report was filed a few months after). The district court correctly found that the rule applied and excluded Walker's proposed evidence.

B. In applying rule 5.412, the district court correctly applied the relevance vs prejudice analysis to exclude the evidence.

The district court also correctly excluded the evidence because under the appropriate 5.412 analysis, the evidence's probative value did not outweigh its inherently distracting nature.

Even after a party establishes their initial required showing under Rule 5.412, the district court is still required to apply a probative-versus-prejudicial balancing test prior to admitting the evidence. Iowa R. Evid. 5.412(c)(2)(C). Textually, this analysis is not the same as 5.403's balancing test—which excludes evidence if its prejudicial effect outweighs its probative nature. Here, evidence *is only admitted* so long as its probative nature outweighs its prejudicial impact. *See* Laurie Kratky Dorè, 7 *Iowa Practice: Evidence* § 5.412:1, at 377–80, at 378–80 n.34 (2015–16 ed.) ("[T]he admissibility requirement that 'probative value outweigh unfair prejudice' is actually the *reverse* of the Rule 5.403 balancing process."); *compare* Iowa R. Evid. 5.403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice . . .") *and* Iowa R. Evid. 5.412(c)(2)(C) ("If the court determines that the evidence is relevant and that the probative value outweighs the danger of unfair prejudice, the evidence will be admissible to the extent the court specifies . . ."). *But see Mitchell*, 568 N.W.2d at 498 ("Utilizing the balancing test of Iowa Rule of Evidence 403 [now 5.403], which mirrors the test in rule 412(c)(3) [now 5.412(c)(3)]

used by the district court here . . .”); *Edouard*, 854 N.W.2d 449 (same).

As the county attorney noted the material about J.W.’s alleged abuse was distracting, it would inject a mini-trial into the proceedings. Trial Vol. III tr. p.8 line 16–p.9 line 10. The question presented to the jury would no longer be whether the State had established if Walker had committed the crime; the jury would not be also tasked with determining whether J.W. had been previously assaulted and if so, if he was the actual perpetrator of the crime against E.W. Trial Vol. III tr. p.8 line 16–p.9 line 10; p.10 line 14–23; p.12 line 13–23. The district court made the correct relevance versus prejudicial impact analysis and excluded the evidence. Trial Vol. III Tr. p.19 line 2–4.

C. The district court correctly found Walker failed to comply with the notice requirement of Rule 5.412.

Additionally, the district court correctly found that Walker did not comply with Iowa Rule of Evidence 5.412(c)(1). This portion of Iowa’s Rape Shield creates a notice requirement and procedural mechanism for offering evidence. First, the rule requires the party to file a motion to introduce the evidence in writing “not later than 15

days before the date on which the trial in which such evidence is to be offered is scheduled to begin," with an exception for newly discovered evidence. Iowa R. Evid. 5.412(c)(1). The rule also requires the proponent to accompany the written notice with a "written offer of proof." Iowa R. Evid. 5.412(c)(2). If the district court finds that the material within the offer contains evidence covered by rule 5.412(b), the matter is to be set for hearing. *Id.*

Failure to comply with the notice requirement of Rule 5.412(c) is not trivial. The notice requirement serves important policy interests, particularly for the victims of sexual assault. *Michigan v. Lucas,* 500 U.S. 145, 153–54 (1991) ("The notice-and-hearing requirement [of a rape shield law] serves legitimate state interests in protecting against surprise, harassment, and undue delay."); *see State v. Lajoie*, 849 P.2d 479, 484 (Or. 1993) ("The 'shield' in a rape shield statute like [Iowa R. Evid. 5.412] is for the benefit of the alleged victim."). The notice requirement "protects against harassment," as a sex-abuse prosecution "requires the alleged victim to discuss painfully intimate matters in front of strangers and to allow others to discuss these matters." *Lajoie*, 849 P.2d at 484. "A notice requirement such as the one contained in [Iowa R. Evid. 5.412(c)]

protects the alleged victim against surprise and needless anxiety by ensuring adequate warning of the extent of the ordeal that he or she will face at trial." *Id.* at 484. In short, the notice requirement is an important substantive component of Rule 5.412—not a meaningless procedural hurdle.

Other jurisdictions' appellate courts interpreting identical or similar language within their rape shield laws have concluded that failure to provide adequate notice—standing alone—is a valid basis to exclude evidence. *See, e.g., Mayo v. Com.*, 322 S.W.3d 41, 49 (Ky. 2010) (noting a "trial court ha[s] the discretion to rely upon the lack of notice alone to exclude testimony about the victim's sexual history [under the rape shield law.]"); *Roberson v. State*, 61 So. 3d 204, 221 (Miss. Ct. App. 2010) (affirming exclusion of arguably false prior allegations based on untimely motion that was not served on victim); *State v. Poitra*, 785 N.W.2d 225, 234 (N.D. 2010) (affirming exclusion of evidence because defendant did not file timely motion and did not provide notice to victim); *United States v. Seymour*, 468 F.3d 378, 387 (6th Cir. 2006) (finding failure to provide notice under Rule 412(c)(1) rendered evidence "inadmissible"); *United States v. Ramone*, 218 F.3d 1229, 1235 (10th Cir. 2000) (affirming district

court's rejection of Rule-412 evidence based on untimely notice, also finding no Sixth Amendment violation); *United States v. Eagle Thunder,* 893 F.2d 950, 954 (8th Cir. 1990) (failure to timely serve notice was sufficient, on its own, to allow district court to exclude proffered Rule 412 evidence). This Court should come to the same conclusion.

It should do so because the State became aware of a defense strategy to introduce the evidence of J.W.'s abuse the night prior to the start of evidence at trial. 1/30/2018 State's Motion in Limine II p.1; App. 36. Walker never complied with section 5.412(c)(1)'s notice requirement. Defense counsel conceded he did not provide notice of his intent to offer this evidence fifteen days before trial and did not serve the victim. *See* Iowa R. Evid. 5.412(c)(1); Trial Vol. III tr. p.14 line 10–p.19 line 11. Nor did he comply with 5.412(c)(2)'s required offer of proof, aside from discussing the general nature of the parents' suspicions and their conduct based on those suspicions. *See* Iowa R. Evid. 5.412(c)(2); Trial Vol. III Tr. p.5 line 3–p.7 line 7. Walker's appellate brief does not address why his failure to comply with the notice requirement does not foreclose his claim. His failure to comply

with Iowa Rule of Evidence 5.412(c)(1)'s notice requirement provides an additional, independent basis to affirm.

D. Any evidentiary error was harmless. The evidence of Walker's guilt was strong.

Finally, even if Walker's complaint has merit and the vague allegations of assault upon J.W. were admissible, the State's case was very strong. Any error from excluding the evidence was harmless. Error arising from an evidentiary ruling is harmless unless a party's substantial rights have been affected or there has been a miscarriage of justice. *See State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998).

Walker intended to admit unclear evidence that J.W. was potentially abused previously and accordingly E.W.'s parents were nervous about leaving the child alone with him or undressed around him. Trial Vol. III Tr. p.5 line 3–p.7 line 7. But consider the evidence the State presented at trial.

Although E.W. had difficulty recalling specifics at the time of trial, shortly after the incident she repeatedly described to others Walker's acts of making her sit on his crotch and "bouncing up and down again." Trial Vol. III Tr. p.57 line 1–7; p.77 line 9–p.78 line 5. And Walker confirmed E.W.'s account that he put her on his lap. Exh. 1 15:58–17:10. As E.W. described it to Nurse Durr-Baxter, Walker

"touched my but crack really deep and he had my—I had my underwear on so he took it off." Trial Vol. III Tr. p.57 line 1–5. Walker confirmed he had removed E.W.'s underpants. Exh. 1 10:14–11:25; 12:08–12:20. E.W. also told her mother and Harre that "Larry touched her with his fingers in her—his fingers in her crotch." Trial Vol. III Tr. p.65 line 1–11; p.78 line 12–19. Walker confirmed this fact, too. Exh. 1 17:25–17:55; 20:35–20:50. When confronted with E.W.'s account and asked if he needed "help" for his behavior, Walker nodded in agreement. Exh. 1 17:55–18:04. DNA testing revealed a second contributor within the swabs taken from E.W., but this contributor's material was too weak for reliable comparison. Trial Vol. III Tr. p.103 line 21–p.105 line 21. Finally, a spermatozoa cell was found within E.W.'s anal sample. Trial Vol. III tr. p.100 line 23–p.102 line 12.

Taken together, the State's evidence strongly weighed in favor of the jury's verdict. There is no reason to believe that Walker's vague and unproven allegation that J.W. had previously been sexually assaulted and in turn assaulted E.W. would have altered the jury's calculus. Any error from excluding this distracting evidence was harmless. This Court should affirm.

II. E.W.'s Out-of-Court Statements to Dr. Harre were Admissible Under the Medical Treatment Exception to the Hearsay Rule Within Iowa Rule of Evidence 5.803(4).

Preservation of Error

The State does not contest error preservation. Although error is not ordinarily preserved through a motion in limine, a district court's ruling on an issue within a motion in limine can preserve error where the court indicates it is making a final ruling on the issue. *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa Ct. App. 1997); *see also State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979). Walker raised a pre-trial challenge to admitting testimony from Dr. Harre as to E.W.'s statements about sexual abuse. 1/20/2018 Def. Motion in Limine p.4-5; App. 12–13. The matter was set for hearing and the parties offered arguments. The district court initially reserved ruling, but ultimately entered a final ruling prior to trial that Dr. Harre could testify to E.W.'s statements at trial. 1/26/18 Hearing Tr. p.4 line 2–p.8 line 20; Trial Vol. I Tr. p.3 line 1–25. This was sufficient.

Standard of Review

Unlike other evidentiary claims, Iowa appellate courts review a decision admitting or excluding hearsay for correction of errors at law. *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009). Normally,

hearsay must be excluded, but the Iowa Rules of Evidence provide several exceptions to this rule. *See* Iowa Rs. Evid. 5.802, .803, .804, .807. Because "the question whether a particular statement constitutes hearsay presents a legal issue," the trial court possesses no discretion to admit or deny admission. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003).

Merits

Walker's brief alleges that the district court erred in denying his pre-trial hearsay challenge to Dr. Harre's testimony. Appellant's Br.41. He also alleges his counsel was ineffective for both not objecting to and eliciting hearsay testimony from Nurse Durr-Baxter. For the sake of clarity, the State will address Dr. Harre's testimony under this subdivision, turning to Walker's ineffective assistance of counsel claims in subdivision III. For the reasons that follow, the district court correctly admitted Harre's testimony pursuant to the medical treatment exception in Iowa Rule of Evidence 5.804(3).

A. Iowa Rule of Evidence 5.803(4)—the medical treatment exception to the hearsay rule.

"Hearsay is not admissible except as provided by the Constitution of the state of Iowa, by statute, by the rules of evidence, or by other rules of the Iowa Supreme Court." Iowa R. Evid. 5.802;

Dullard, 668 N.W.2d at 589. Iowa Rule of Evidence 5.803(4) is an exception to the rule excluding hearsay for

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The exception is premised on a belief that a declarant-patient's statements to a doctor for purposes of medical diagnosis or treatment are "likely to be reliable because the patient has a selfish motive to be truthful." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.06[1], at 803-41 to -42 (Mark S. Brodin 2d ed. 2015); *see* 7 Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.803:4, at 951–52 (2015–2016 ed.).

In *State v. Tracy*, the Iowa Supreme Court considered this hearsay exception and adopted the holding of *Renville,* an Eighth Circuit case. *State v. Tracy*, 482 N.W.2d 675, 681 (Iowa 1992) (citing *United States v. Renville,* 779 F.2d 430 (8th Cir. 1985)). *Renville* set forth a two-pronged test for determining whether the declarant's statements fell under 5.804(3). The first prong of the test requires "the declarant's motive in making the statement must be consistent

with the purposes of promoting treatment." *Tracy*, 482 N.W.2d at 681 (quoting *Renville*, 779 F.2d at 436). The second requires "the content of the statement be such as is reasonably relied on by a physician in treatment or diagnosis." *Id.* As the Iowa Supreme Court explained, "child abuse often involves more than physical injury, [and] the physician must be attentive to treating the emotional and psychological injuries which accompany this offense." *Id.*

Walker contends that the testimony in this case demonstrates that E.W.'s statements to Harre fail both prongs of the *Tracy*/*Renville* test. Appellant's br. 49–50. He is mistaken.

B. The statements E.W. made to Harre fell under Rule 5.803(4)'s medical treatment hearsay objection.

Walker challenges the district court's conclusion that E.W.'s statements to Dr. Harre satisfied the *Tracy*/*Renville* test. Appellant's Br. 41, 49–50. He alleges that the record does not support a finding that either prong of the test is satisfied. A review of the record demonstrates that E.W. understood Harre's role as a doctor and that E.W.'s statements were used for treatment purposes.

1. The State provided foundation establishing that E.W. understood the treatment purpose of Dr. Harre's examination.

Walker contends the record does not establish E.W.'s statements to Dr. Harre satisfy the first prong of the *Tracy*/*Renville* test—that they were consistent with the purposes of promoting treatment. *See Tracy*, 482 N.W.2d at 681. In his view, E.W.'s hearsay statements could not be admitted through Dr. Harre's testimony because there was no indication E.W. understood the difference between the truth and a lie, no indication Dr. Harre explained the importance of telling the truth, and an insufficient showing E.W. understood the medical purpose of the examination. Appellant's Br. 49.

But as Harre testified, prior to examining E.W., Harre spoke with the child independently of her parents. There, she introduced herself and explained her role. Trial Vol. III tr. p.73 line 4–p.74 line 17. Based on their conversation, she identified the child's speech and language development. Trial Vol. III tr. p.74 line 1–5. According to Harre, E.W. understood Harre's role and indicated she was comfortable interacting with doctors—with the exception of shots. Trial Vol. III Tr. p.74 line 8–24.

Harre then engaged the child in a "review of symptoms approach" in which she did an overall examination of the child, interjecting additional questions on specific issues as the exam continued. Trial Vol. III tr. p.75 line 3–19. As she was proceeding through her array of questions, E.W. would quickly respond—indicative that she understood the question and its purpose. Trial Vol. III tr. p.76 line 19–20. However, when Harre inquired "did anything come into contact with your back, bottom, did something hurt you or come into contact there[?]", E.W. did not respond. Trial Vol. III Tr. p.76 line 19–p.77 line 8. Harre continued to the next question: "any trouble with burning or pain with urination" and E.W. again promptly responded. Trial Vol. III Tr. p.76 line 19–p.77 line 8. Harre then asked E.W. if anything had touched her that made her uncomfortable. Again, the child failed to respond. Trial Vol. III tr. p.77 line 1–3. When Harre followed up with the question whether "anything made her uncomfortable," E.W. responded that Larry "doing this" and began "gyrating, humping, moving back and forth, bouncing." Trial Vol. III tr. p.77 line 18–p.78 line 5.

While Dr. Harre did not testify she specifically admonished E.W. to be truthful during the exam, this is not dispositive. *See* 7

Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.803:4, 958 n.23 (2015–2016 ed.) (indicating the importance of telling the patient to be truthful is not a strict requirement "[In *Tracy*,] [n]othing in the record indicated that the statements to the physician were anything other than a standard patient/doctor dialogue for diagnosis and treatment purposes. The first part of the test was thus satisfied."); *see also State v. Overstreet*, No. 15-1704, 2016 WL 7403728, at *6 (Iowa Ct. App. Dec. 21, 2016) ("Dr. Harre testified she believed T.O. was aware she was having this conversation with Dr. Harre to aid Dr. Harre in treating her. While we note Dr. Harre testified she did not instruct T.O. not to lie, there is no indication in the record T.O.'s motive in making the statements to Dr. Harre 'was other than as a patient responding to a doctor's questioning for prospective treatment.' We conclude the statements fall within the rule 5.803(4) exception." (quoting *Tracy*, 482 N.W.2d at 681)). Nor is the district court required to conduct a competency hearing prior to receiving the hearsay statement. *See State v. Woolison*, No. 01-1071, 2003 WL 1966446, at *2 (Iowa Ct. App. Apr. 30, 2003) (rejecting appellant's claim that first prong of *Renville* was not satisfied because the a three-year-old declarant lacked the "selfish motive" which

"guarantees the trustworthiness of the statements" to the medical professional; "statements to his health care providers were 'made during a dialogue with a health care professional' and were 'not prompted by concerns extraneous to the patient's physical or emotional problem.'" (quoting *State v. Tornquist*, 600 N.W.2d 301, 304 (Iowa 1999)). As several other Iowa courts have noted, circumstances within the record—such as the physician-patient diagnostic dialogue—may support a finding that the complaining witnesses' statements were made with knowledge that they were for the purpose of medical treatment. *See State v. Lucier*, No. 15-1559, 2017 WL 4570531, at *2 (Iowa Ct. App. Oct. 11, 2017); *Overstreet*, 2016 WL 7403728, at *6; *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]here a child's statements are made during a dialogue with a health care professional and are not prompted by concerns extraneous to the patient's physical or emotional problem, real or perceived, the first prong of the *Renville* test is satisfied.").

The circumstances were sufficient for the judge to reasonably conclude that the dialogue between Dr. Harre and E.W., coupled with the lack of motive for E.W. to identify Walker for any extraneous purpose beyond receiving the proper treatment, was sufficient to

ensure truthfulness. E.W.'s statements to Harre satisfied the first prong of *Tracy*/*Renville*.

2. *Dr. Harre Relied on E.W.'s Statements for Diagnosis and Prescribing Future Treatment.*

Walker also contends that the second *Renville* prong was not satisfied because E.W. was referred to Dr. Harre "due to suspected sexual abuse, not because of active medical concerns." Appellant's Br. 49. This Court may make short work of the claim. It is not supported by the record and the Iowa Supreme Court and the Iowa Court of Appeals have previously rejected highly similar arguments.

First, the record reveals that E.W. met with Harre to diagnose her physical, emotional, and psychological needs, if any. There are dangers beyond immediate physical harm that are important for treatment, including identifying potential sources of long-term psychological and emotional trauma. *Hildreth*, 582 N.W.2d at 169. Thus, "ascertaining the identity of the abuser is a matter that may assist in diagnosis or treatment of an emotional or psychological injury." *Id.*; *see also Tracy*, 482 N.W.2d at 681–82 ("[When the] alleged abuser is a member of the victim's immediate household, statements regarding the abuser's identity are reasonably relied on by a physician in treatment or diagnosis."); *Renville*, 779 F.2d at 438

("Information that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment which includes removing the child from the home."). "[S]tatements made to a social worker in connection with diagnosis or treatment of emotional trauma may fall within the purview of rule [5.]803(4) if the social worker is sufficiently qualified by training and experience to provide that diagnosis and treatment." *Hildreth*, 582 N.W.2d at 169. There was no question as to Dr. Harre's expertise and qualification to provide such a diagnosis.

As Harre testified, she was a physician with significant training in child maltreatment. Exh. 5 p.2–4; App. 38–41. Harre observed that it was regular operating procedure at the child protective center to "obtain detailed history about any concerns that the child may have and we also offer comprehensive medical assessments for concerns about medical, behavioral, emotionally, things that may be related to those concerns." Trial Vol. III tr. p.69 line 14–24. The purpose of examining E.W. was not solely to acquire evidence, it was to provide comprehensive treatment, including "any additional labs or X-rays or other referrals or support, what type of follow-up" as necessary. Trial Vol. III tr. p.72 line 25–p.73 line 3. Sexual abuse is not merely a

physical phenomenon; the trauma of such abuse includes lasting psychological and emotional components as well. *See generally Tracy*, 482 N.W.2d at 681. Harre's testimony indicated that her approach was appropriately comprehensive:

> [I]f a child comes into be seen for maybe genital or sexual concerns, is there concerns about physical issues within the family that need to be addressed. Are there chemical issues to be addressed because they can be very important in having this child in a vulnerable environment, I'm looking for those other concerns as well.

Trial Vol. III Tr. p.75 line 24–p.76 line 5. During this process, Harre spoke with E.W.'s mother to "get the background of the child's health history, their development, social history relationships, any concerns that the parent may have." Trial Vol. III tr. p.72 line 7–11. The fact that such a comprehensive assessment occurred eighteen days after E.W.'s initial hospital visit does not render the second evaluation purely investigatory. And E.W. remained a patient of Dr. Harre's up to trial, reinforcing the fact E.W.'s statements to Harre were for treatment purposes. Trial Vol. III tr. p.50 line 1–13; *compare State v. Smith*, 876 N.W.2d 180, 189–90 (Iowa 2016) (noting there was "no evidence that the protocol questions prompted any response to the injuries or were asked in order to make a diagnosis relating

specifically to domestic assault over other types of assault . . . there was nothing from the circumstances at the hospital to reasonably indicate M.D.'s treatment or diagnosis would have been different if she had not mentioned the identity of her perpetrator in describing how she was injured.").

Second, Iowa and other courts have already rejected substantially similar arguments. For example, in *State v. Woolison*, the Iowa Court of Appeals rejected a substantially similar claim that Dr. Harre served an investigatory role rather than treating physician:

> Woolison asserts [the victim's] statements to Dr. Harre should have been excluded because Dr. Harre was part of a multi-disciplinary team whose main function was investigatory. We disagree. A review of Dr. Harre's testimony and description of her job function demonstrates that she makes medical assessments, identifies illness and injury, and recommends treatment in cases such as this. She clearly qualifies as health care professional, and her conversation with [the victim] was for the purpose of promoting treatment.

Woolison, 2003 WL 1966446, at *1. Also, Iowa courts have repeatedly affirmed the admission of testimony made to participants of similar multidisciplinary teams. *See, e.g., State v. Neitzel*, 801 N.W.2d 612, 622 (Iowa Ct. App. 2011) (statements made to a sexual assault nurse

examiner and a counselor at a Child Advocacy Center); *Hildreth*, 582 N.W.2d at 169 (statements made to a social worker and "sex therapist" with the Des Moines Child and Adolescent Guidance Center); *Tracy*, 482 N.W.2d at 680 (statements made to "developmental pediatrician" at a "Child Protection Center").

As other courts have recognized, the fact that a trained pediatrician may realize that patients' statements can be used in a later prosecution does not convert the doctor into a police officer. For example, the U.S. Air Force Court of Criminal Appeals has recognized that even when a doctor "fully appreciate[s] the potential evidentiary value of [victim] statements to him and made his notes with a view toward making a clear record in the event they would be introduced at a trial," the hearsay exception in Federal Rule 803(4) is satisfied so long as the patient was providing the information for purposes of medical treatment. *See United States v. Ureta*, 41 M.J. 571, 577 (A.F. Ct. Crim. App. 1994), *aff'd,* 44 M.J. 290 (C.A.A.F. 1996). Similarly, the Ninth Circuit has recognized that a trained sexual assault nurse examiner is a medical professional, not a police investigator: "True, she was collecting evidence, but that forensic function did not obliterate her role as a nurse, in a hospital, performing a medical

examination of a victim of a sexual assault." *United States v. Gonzalez*, 533 F.3d 1057, 1062 (9th Cir. 2008). The same logic applies here.

Walker's reliance on *Coates v. State*, 930 A.2d 1140, 1163 (Md. Ct. Spec. App. 2007) is misplaced. Appellant's Br. 50. In the case, a Maryland court found that the complaining witness's statements to a pediatric nurse practitioner did not fall under Maryland's medical treatment hearsay exception. *Coats*, 930 A.2d at 1163–64. After canvassing opinions touching on the issue, the court reasoned that because the examination occurred fourteen months after the assault when the victim was not displaying any physical or psychological symptoms, the medical treatment rationale for the examination was diminished and the "questions seemed to have an 'overarching investigatory purpose.'" *Id.* at 1162 (quoting *State v. Snowden*, 867 A.2d 314 (Md. Ct. App. 2005)). Additionally, questions as to the identity of the perpetrator were not relevant to the child victim's needs—it was already known the child had not had contact with the assailant for over a year. *Id.* at 1162–63. Troubled by the fact the child inquired whether the nurse "would find Coates," the Maryland court concluded that the complaining witness did not comprehend that the

examination was for medical purposes, thus her statements to the nurse were not admissible under the exception. *Id.* at 1163.

But *Coates*'s logic is inapplicable here. Harre examined E.W. only eighteen days after the assault. Trial Vol. III Tr. p.47 line 9–p.48 line 16; p.71 line 1–22. During this time, police had not met with Walker. Trial Vol. III tr. p.142 line 24–p.143 line 1. He remained at liberty and was a member of the E.W.'s family. *See Coates*, 930 A.2d at 1145–46 (noting that complaining witness's mother had broken up with Coates over a year earlier). Harre's examination was for the purposes of treatment; E.W. remained her patient even at trial. Trial Vol. III tr. p.79 line 20–21.

In sum, because E.W.'s statements to Harre satisfy both prongs of the *Tracy*/*Renville* test, it was properly admitted by the trial judge.

C. Even if the State's foundation was insufficient, any error in admitting E.W.'s statements was harmless error. Harre's Testimony was cumulative of other evidence at trial.

Even if this Court were to find that E.W.'s hearsay statements to Harre should not have been admitted, any error was harmless. The majority of the content of E.W.'s statements to Harre also came in at trial through E.W.'s testimony and Walker's recorded admissions. *Compare* Trial Vol. III Tr. p.76 line 13–p.79 line 16 *with* Exh. 1 11:10–

18:00 *and* Trial Vol. III p.126 line 1–p.128 line 25; *see Hildreth*, 582 N.W.2d at 170 (finding the "erroneous admission of hearsay" was not prejudicial because it was "merely cumulative" with the testimony of the child or a social worker). This case was not a credibility contest between E.W. and Walker. Rather, it was a credibility contest between Walker on July 14 and Walker at trial. Attacking the recording was the centerpiece of the defense:

> The best evidence is Larry's own words when he is at the Davenport Police Department when he was speaking with Detective Hammes, he says I touched her sexually and admitted to the crime. The confession was false, he says, it is not true and it did not happen. The question is why would you believe that was true? Why would you believe that he would admit to doing something sexual to Emily Walker if he didn't really do it?

Trial Vol. III Tr. p.179 line 10–19; *see also* Trial Tr. Vol. III Tr. p.179 line 20–p.185 line 15. No unfair prejudice occurred from the admission of the cumulative medical statements when the most damning statements were Walker's own validly admitted concessions.

Walker's reliance on *United States v. Bercier*, 506 F.3d 625 (8th Cir. 2007) is misplaced in the context of this case. Appellant's Br. 55. It is true that there, the Eight Circuit concluded that improperly

admitted and cumulative hearsay resulted in prejudice. *See Bercier*, 506 F.3d at 633. But in *Bercier* the court highlighted that the determinative facts were the credibility challenge between the complaining witness and the defendant and the fact that the physician's hearsay testimony and notes confirmed the complaining witness's testimony and added additional prejudicial information the defendant "had a history of violence and substance of abuse." *Id.* at 633. The court concluded that the Government's only purpose in entering the cumulative testimony through the doctor was to bolster the complaining witness's credibility. *Id.* In the court's view, "this tipped the scales unfairly." *Id.* But here—noted above—the credibility challenge at trial was largely between Walker and his past statements. Even if this Court found Harre's testimony was improperly admitted it did not "unfairly tip the scales." It was cumulative and any error in its admission was harmless. *See State v. Moore*, No. 10-1283, 2012 WL 3194116, at *3 (Iowa Ct. App. Aug. 8, 2012) (rejecting *Bercier*'s application and defendant's claim that cumulative hearsay was "'an extra helping of evidence' so prejudicial as to warrant a new trial"). This Court should affirm.

III. This Court Cannot Grant Walker Relief on his Claims of Ineffective Assistance. The Record Suggests Counsel Strategically Avoided Objecting on Hearsay Grounds and Intentionally Elicited Hearsay Statements. The Challenged Testimony was Cumulative, Undercutting any Prejudice.

Preservation of Error

As Walker concedes, none of these issues were preserved. Appellant's Br. 26, 58. The State cannot contest error preservation, claims of ineffective assistance of counsel fall under an exception from the normal rules of error preservation. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

Standard of Review and Framework

Because the right to counsel at one's criminal trial is constitutional in origin, Iowa courts review an ineffective assistance of counsel claim de novo. *See State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

To prevail on a claim of ineffective assistance of counsel, Walker has the burden to establish his trial counsel's performance fell below an objective standard of reasonableness such that his lawyer was not functioning as "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The test is two-fold. First, Walker must prove counsel breached an essential duty—

that his attorney was so deficient they did not function as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687; *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). Second, he must establish counsel's breach resulted in prejudice—that there is a reasonable probability but for counsel's error, the result of the trial would have been different. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). "The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable." *King v. State*, 797 N.W.2d 565, 572 (Iowa 2011).

Iowa courts' scrutiny of counsel's performance is highly deferential, and reviewing courts indulge a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *See Ondayog*, 722 N.W.2d at 785; *see also Strickland*, 466 U.S. at 689. A defendant is entitled to representation within the range of normal competency, not what the illusory flawless practitioner might have done. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981). "Improvident trial strategy, miscalculated tactics, mistakes, carelessness, or inexperience do not necessarily amount to ineffective assistance of counsel." *State v. Aldape*, 307 N.W.2d 32, 42

(Iowa 1981) (*quoting Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972)); s*ee also Sallis v. Rhoads*, 325 N.W.2d 121, 123 (Iowa 1982).

Merits

Within his discussion of the medical treatment hearsay exception, Walker raises three claims that counsel was ineffective. He first alleges that his counsel was ineffective for not objecting to Durr-Baxter's testimony as to E.W.'s description of the abuse because in his view the statement was "hearsay and not admissible under the hearsay exception for statements made for purposes of medical diagnosis and treatment." Second, he alleges that counsel failed to object to Durr-Baxter's recollection of Roling's statements about E.W.'s disclosures. Third, he argues that counsel further breached an essential duty by "delving further while cross-examining [Durr-Baxter]." Walker cannot prevail because he fails to prove breach or prejudice.

The State first addresses the question of breach in two headings, (1) the challenge to E.W.'s statements to Durr-Baxter, and (2) the challenge to counsel's failure to object and inquiry into Roling's statements to E.W. Finally, the State addresses why Walker cannot show prejudice on any of the claims he presents.

A. Walker has not shown the statements E.W. made to Durr-Baxter could not fall under the medical treatment hearsay objection.

Walker's first ineffective assistance claim cannot be resolved on this record. He alleges that counsel should have objected to the nurse's testimony about statements E.W. made when initially examined at the emergency room. Appellant's Br. 38–41. Like E.W.'s statements to Harre, he contends her description of abuse did not fall under the medical treatment hearsay objection because the State failed to establish that E.W.'s statements were consistent with the purpose of treatment required under the first prong of the *Tracy*/*Renville* test. *See* Appellant's Br. 31–41; *see Tracy*, 482 N.W.2d at 681 (quoting *Renville*, 779 F.2d at 436). As the Iowa Supreme Court noted in *Tracy*,

> when the record reveals that the examining doctor emphasized to the alleged victim the importance of truthful responses in providing treatment and the record further indicates that the child's motive in making the statements was consistent with a normal patient/doctor dialogue, the first element of the two-part test will typically be satisfied.

Id. at 681.

Durr-Baxter indicated at trial that she ordinarily would ask her patients if they know why they were at the hospital or "what brought

you in to see me today." Trial Vol. III Tr. p.59 line 22–p.60 line 1. When Durr-Baxter asked whether E.W. knew why she was at the hospital, E.W. responded that "Larry did this to me and she bounced up and down" with arms in fists straight out in front of her. Trial Vol. III p.56 line 1–24.

But because no objection was raised below, no additional foundation for the statements was made. Walker's breach argument cannot be resolved on this record. Had the objection been timely made, it is possible a proper foundational record could have been built. *See, e.g.*, *State v. Richardson*, No. 16–1235, 2017 WL 2461562, at *3 (Iowa Ct. App. June 7, 2017) ("[W]e cannot say whether counsel's lack of objection was ineffective assistance. If counsel had objected, it is possible the State would have asked another question or called another foundational witness and remedied the issue. Additionally, counsel may have known or anticipated this and made a strategic choice not to put additional emphasis on the phone call." (citation omitted)). Counsel may not have objected knowing full well the State could meet this showing.

The record shows defense counsel knew how to argue statements did not fall under rule 5.803(4)'s exception. 1/26/2018

Hearing Tr. p.5 line 13–p.6line 14; 1/20/2018 Motion in Limine p.4–5; App. 12–13. Discussed in the next section, the State believes the reason counsel never raised a hearsay challenge was because getting E.W.'s statements before the jury was part and parcel of the defense strategy.

B. Counsel did not breach an essential duty. Counsel's decision to inquire about E.W.'s and Roling's statements with Durr-Baxter was reasonable trial strategy.

In addition to the claim above, Walker also urges that counsel breached an essential duty by not objecting to and eliciting other hearsay statements from Durr-Baxter made by E.W. and Roling. Appellant's Br. 57–58. This Court should reject all three arguments because the record suggests that this was a strategic decision.

At the time of the January 26, 2018 hearing, defense counsel was well aware that E.W.'s credibility could be challenged by the very nature of her statements:

> Here, we have [a] four year old during her interview with Elsa Durr when she went to the ER after the alleged offense, as noted in the file, October 6, 2016, E.W. told the nurse that the defendant broke her ankles, broke both of them, during her interview while she was being treated at the ER in connection with the alleged abuse. The child's ankles were not broken, in the muscular skeletal reports they

> were fine. For some reason she told the SANE nurse he broke her ankles.
>
> I think that goes a long way to demonstrating at age four E.W. has no real conception of importance of giving accurate information to a medical care provider. Not that she's a bad person, she's four. She's making things up during her statements to medical care providers.

1/26/2018 Hearing tr. p.5 line 21–p.6 line 9. And defense counsel capitalized on these statements at trial:

> Defense Counsel: Good morning, ma'am. I want to start with the ankles. You mentioned that Emily told you that her Uncle Larry broke her ankles and then you asked her how and she showed you a twisting motion of her ankles?
>
> Durr-Baxter: Yes.
>
> Defense Counsel: Her ankles were not broken?
>
> Durr-Baxter: Correct.
>
> Defense Counsel: You interpreted her use of the phrase broke the ankles to mean a twisting motion. Is it possible that her ankles were broken?
>
> Durr-Baxter: I asked her to clarify when she said her ankles were broken and she showed me the twisting motion and the squeezing motion for the other ankle.
>
> Defense Counsel: Is it possible that when she said her ankles were broken she actually

> meant that they were broken even though they weren't?
>
> Durr: When I asked her to clarify—when I asked her to clarify that's not what she clarified.

Trial Vol. III Tr. p.62 line 9–p.63 line 6. Defense counsel also sought to capitalize on the fact that the State had unwittingly opened the door to Roling's statements to Durr-Baxter. Trial Vol. III Tr. p.58 line 14–20; p.60 line 2–10; p.63 line 23–p.65 line 8; p.66 line 1–p.68 line 10.

The counsel's reason for eliciting these statements may have been multi-faceted. First, it served to undercut E.W.'s credibility generally. Her obviously mistaken description of her "broken ankles" could have led the jury to doubt the accuracy of the abuse allegation. Trial Vol. III Tr. p.57 line 1–p.58 line 13.

Second, it was part of a larger strategy to compare E.W.'s statements to Durr-Baxter and Harre in order to undercut the force of Walker's admissions to Hammes. Defense counsel was aware how damning the admissions in the video were. Counsel sensibly made defanging those admissions the aim of closing argument:

> The best evidence is Larry's own words when he is at the Davenport Police Department when he was speaking with Detective

> Hammes, he says I touched her sexually and admitted to the crime. The confession was false, he says, it is not true and it did not happen. The question is why would you believe that was true? Why would you believe that he would admit to doing something sexual to Emily Walker if he didn't really do it?

Trial Vol. III Tr. p.179 line 5–19. In order to challenge Walker's admissions, counsel focused on contrasting E.W.'s out-of-court statements to medical professionals with those admissions:

> Look what he admitted to. This is a confession, he is admitting to something. What did he actually admit. He repeated what Detective Hammes said about putting on the lap and told her he touched her and admits that he touched her vagina with the hand. That's what he admits. That's not what Emily ever said. In any statement Emily made to her mother to Elsa Durr-Baxter to Dr. Harre to on the stand yesterday she never said that Larry touched her on the vagina with the hand. That is nowhere in the statements. That is not what —Emily accused him of a bunch of different things, it keeps changing. From Elsa Durr-Baxter, the SANE nurse at the hospital up in DeWitt, she talked to Kelley Roling, Emily's mother, and Emily told Kelley that Larry did this to me and the bouncing up and down, pulled my underwear down to the ankles and touched the crotch and Larry touched her in the crotch or the butt crack and told her mom that Larry hurt her. That is talking about the butt, nothing to do with the vagina.

When Elsa Durr-Baxter talked to her at the hospital, Emily said he did this to me, this bouncing up and down, sitting on the crotch and did this, that's what she accuses him of. Again it's all involving her but nothing about using his hand to touch her vagina. When we get to Dr. Harre a few weeks later, when Dr. Harre is talking to Emily, what did she do? Ms. Shepherd summarizes that's humping or gyrating or bouncing motion again having to do with the butt. She did say Larry touched her with the finger but not where and Larry touched her with the penis and pointed at her crotch and Dr. Harre is basically talking about her body or Larry's—no, Larry touched Emily with his front genital area. Everything that she talked about with Dr. Harre involved her butt and the penis, there is nothing in the statement to Elsa Durr, nothing in her statement to her mom nothing in the statement to Dr. Harre about Larry touching her vagina with his fingers, never happens.

Then we come to yesterday and the story changes again. We have a new accusation that doesn't match what she said before, no statements she made before yesterday, we have State's Exhibit number 8, 9 and where she circled the front genital area. Nothing to do with the butt. Larry touched her genitals, nothing about the hand, this is brand new, nothing had been claimed before and doesn't match what Larry said. His statement doesn't match, agreeing that he put Emily on his lap and that's what Detective Hammes asked him if he did and he never said he bounced her up and down. His confession does not match the accusations and that should give you a pause whether that was real or panicking and freaking out if his life is ruined and saying

> whatever he has to say that somehow this is an opportunity to help.

Trial Vol. III Tr. p.183 line 14–p.185 line 15. Although Walker now makes conclusory assertions that counsel's decision to allow the testimony into the trial was a breach of an essential duty, the record strongly suggests this was part and parcel of the defense strategy to defuse more damning evidence—Walker's admissions. This is the sort of trial strategy Iowa's appellate courts are slow to second-guess. *See Anfinson v. State*, 758 N.W.2d 496, 501 (Iowa 2008) (noting that appellate courts do not "assume the role of Monday morning quarterback in condemning counsel's judgment in choosing between what are frequently equally hazardous options.") (quoting *State v. Newman*, 326 N.W.2d 788, 795 (Iowa 1982). Simply because this strategy did not win the day does not make it ineffective. *See, e.g.*, *Hall v. State*, 360 N.W.2d 836, 838 (Iowa 1985) ("In evaluating ineffective assistance claims, it is axiomatic that the fact that the defense was not successful does not mean that counsel was ineffective."). Lacking a breach of an essential duty, Walker's ineffective claim fails, and this Court should affirm.

C. Walker cannot establish prejudice on this record.

This Court should also reject Walker's prejudice argument outright. Even accepting Walker's argument that some of E.W.'s statements to Durr-Baxter and from E.W.'s mother should have been objected to and excluded, this evidence was cumulative to E.W.'s testimony, her statements to Dr. Harre, and Walker's own admissions. *Compare* Trial Vol. III p.55 line 25–p.58 line 20 *with* p.77 line 9–p.79 line 16 *and* p.125 line 15–p.127 line 11 *and* Exhs. 1, 8, 9; Conf.App. 4–5.

Even in the absence of the nurse's testimony the State's evidence remained very strong. E.W. took the stand and testified that her Uncle Larry had done a "[r]eally, really bad thing" when she was four; Uncle Larry had lifted her up and down on his private. Trial Vol. III tr. p.125 line 15–p.127 line 11; Exhs. 8, 9; Conf.App. 4–5. Although she could not remember everything Walker did, she recounted that he carried her upstairs to her parents' bedroom—consistent with her prior accounts. Trial Vol. III tr. p.128 line 8–p.129 line 11.

Although he was now disputing them, Walker's recorded admissions included statements he had taken E.W. upstairs to her parents' bedroom, removed her underpants, and rubbed his four-

year-old niece's vagina with his hand—an unambiguous admission of guilt on both counts. Exh. 1 17:17–17:40; Instrs. 17, 18, 19; App. 42–44. He also admitted to putting E.W. on his lap, consistent with E.W.'s testimony. Exh. 1 14:30–18:00. Although he testified at trial that these statements were not true, the jury watched Walker's mannerisms as he testified, compared this to his recorded statements, weighed the two versions and ultimately rejected his claim of innocence. Trial Vol. III Tr. p.149 line 19–20.

Finally, the State's evidence included highly incriminating scientific evidence. An additional unknown DNA contributor was found in swabs taken from E.W.'s underwear. Trial Vol. III Tr. p.103 line 21–p.105 line 21. A male spermatozoa was found on four-year old E.W.'s anal swab. Trial Vol. III tr. p.101 line 21–p.102 line 17.

Given the foregoing, excluding a few reiterative accounts of Walker's conduct would have had no effect on the jury's verdict. Walker has not met his burden to prove counsel was ineffective, and this Court should affirm.

CONCLUSION

The district court correctly relied upon Rule of Evidence 5.412 to exclude Walker's untimely attempts to inject immaterial and

confusing issues into the trial. E.W.'s out-of-court statements to Harre were properly admitted pursuant to the medical treatment hearsay exception. Defense counsel pursued a reasonable strategy, and Walker has not met his burden to prove counsel was constitutionally deficient. This Court should affirm Walker's convictions.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission. If the Court orders oral argument, the State would be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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TIMOTHY M. HAU
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tim.hau@ag.iowa.gov