ELECTRONICALLY FILED SEP 13, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0603

STATE OF IOWA,
Plaintiff-Appellant,

vs.

DEWAYNE MICHAEL VEVERKA,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JASPER COUNTY
THE HONORABLE THOMAS P. MURPHY, JUDGE

APPELLANT'S REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
tyler.buller@ag.iowa.gov

SCOTT NICHOLSON
Jasper County Attorney

PETER BLINK
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLANT FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW 5

RESPONSE TO DEFENDANT–APPELLEE'S ROUTING STATEMENT 6

ARGUMENT 7

I. The State Properly Invoked Appellate Jurisdiction. The District Court Erred at Law When It Departed from *Rojas*. 7

A. The defendant's complaints about "leading gestures" and suggestive questioning do not warrant exclusion of the recorded interview. The research supports the forensic interviewer's technique, as does a common-sense understanding of human communication. 15

B. The interviewer did not improperly invite speculation. She attempted to elicit information in as neutral a fashion as possible. 21

C. The interviewer did not mischaracterize or re-frame answers. She sought clarification appropriately. 22

D. The "bolstering" issue was not litigated below. It does not warrant exclusion of the interview. 24

CONCLUSION 25

CERTIFICATE OF COMPLIANCE 26

TABLE OF AUTHORITIES

State Cases

Edson v. Chambers, 519 N.W.2d 832 (Iowa Ct. App. 1994)...............15

Everly v. Knoxville Cmty. Sch. Dist., 774 N.W.2d 488 (Iowa 2009) .14

In re Marriage of Zahnd, 567 N.W.2d 684 (Iowa Ct. App. 1997)....... 9

State v. Long, 628 N.W.2d 440 (Iowa 2001) 10

State v. Mandecino, 509 N.W.2d 481 (Iowa 1993) 7

State v. Oetken, 613 N.W.2d 679 (Iowa 2000).................................. 7

State v. Paredes, 775 N.W.2d 554 (Iowa 2009) 14

State v. Rojas, 524 N.W.2d 659 (Iowa 1994) 15, 19, 20, 26

State v. Ross, 573 N.W.2d 906 (Iowa 1998).......................................14

State v. Tangie, 616 N.W.2d 564 (Iowa 2000)..................................12

State v. Warren, 216 N.W.2d 326 (Iowa 1974) 12

State v. Yodprasit, 564 N.W.2d 383 (Iowa 1997)............................... 7

Wailes v. HyVee, 861 N.W.2d 262 (Iowa Ct. App. 2014) 10

Williams v. Hedican, 561 N.W.2d 817 (Iowa 1997)...........................10

State Statutes

Iowa Code § 814.5(2)(b) 9, 10

Iowa Code § 814.6(1)(a) (2017)... 11

Iowa Const. Art. V, §4 7

State Rules

Iowa R. App. P. 6.102(2)... 9

Iowa R. App. P. 6.104(1) 9

Iowa R. App. P. 6.106(1) 9

Iowa R. App. P. 6.107.. 11

Iowa R. App. P. 6.108 11

Iowa R. App. P. 6.1002(5).. 8

Iowa R. Evid. 5.104(a) 10

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The State Properly Invoked Appellate Jurisdiction. The District Court Erred at Law When It Departed from *Rojas*.

Authorities

Edson v. Chambers, 519 N.W.2d 832 (Iowa Ct. App. 1994)
Everly v. Knoxville Cmty. Sch. Dist., 774 N.W.2d 488 (Iowa 2009)
In re Marriage of Zahnd, 567 N.W.2d 684 (Iowa Ct. App. 1997)
State v. Long, 628 N.W.2d 440 (Iowa 2001)
State v. Mandecino, 509 N.W.2d 481 (Iowa 1993)
State v. Oetken, 613 N.W.2d 679 (Iowa 2000)
State v. Paredes, 775 N.W.2d 554 (Iowa 2009)
State v. Rojas, 524 N.W.2d 659 (Iowa 1994)
State v. Ross, 573 N.W.2d 906 (Iowa 1998)
State v. Tangie, 616 N.W.2d 564 (Iowa 2000)
State v. Warren, 216 N.W.2d 326 (Iowa 1974)
State v. Yodprasit, 564 N.W.2d 383 (Iowa 1997)
Wailes v. HyVee, 861 N.W.2d 262 (Iowa Ct. App. 2014)
Williams v. Hedican, 561 N.W.2d 817 (Iowa 1997)
Iowa Code § 814.5(2)(b)
Iowa Code § 814.6(1)(a) (2017)
Iowa Const. Art. V, §4
Iowa R. App. P. 6.102(2)
Iowa R. App. P. 6.107
Iowa R. App. P. 6.108
Iowa R. App. P. 6.1002(5)
Iowa R. App. P. 6.104(1)
Iowa R. App. P. 6.106(1)
Iowa R. Evid. 5.104(a)

RESPONSE TO DEFENDANT–APPELLEE'S ROUTING STATEMENT

The defendant urges the Supreme Court to retain this case and overturn more than 20 years of case law regarding the standard of review for hearsay rulings on appeal. *Compare* Defendant's Proof Br. at 12, *with State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009) and *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). In *Hallum*, the Supreme Court recognized it had previously used the abuse-of-discretion standard and expressly chose to "adhere" to its more recent case law reviewing for correction of errors at law. *State v. Hallum*, 585 N.W.2d 249, 253–54 (Iowa 1998) (some internal citations omitted, *Ross* citation modified to short-form), *cert. granted, judgment vacated on other grounds,* 527 U.S. 1001 (1999).

For purposes of this case, the standard-of-review question is largely academic, for the standard of review will not determine the outcome. Incorrectly applying a legal rule is necessarily an abuse of discretion, and an abuse of discretion is necessarily a legal error. *Cf. State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006) ("any abuse of discretion necessarily results in a legal error"). Under either standard of review, the district court's ruling here should be reversed: it rests

on legally erroneous, clearly untenable grounds, and it rejects the core principles and holding of the Supreme Court's decision in *Rojas*.

ARGUMENT

I. The State Properly Invoked Appellate Jurisdiction. The District Court Erred at Law When It Departed from *Rojas*.

Jurisdiction[1]

The defendant's brief cites subject-matter-jurisdiction cases and urges that this Court lacks jurisdiction. Defendant's Proof Br. at 19 (citing *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000) for the proposition that "[o]bjections to subject matter jurisdiction can be raised at any time"); at 23 (citing *State v. Mandecino*, 509 N.W.2d 481, 482 (Iowa 1993) and quoting a section about subject-matter jurisdiction). The defendant's argument is erroneous and his reliance on those cases misplaced. This Court has subject-matter jurisdiction because this is a criminal case and the State seeks the correction of errors at law. *See* Iowa Const. Art. V, §4; *see also State v. Yodprasit*, 564 N.W.2d 383, 386 (Iowa 1997).

[1] This "jurisdiction" subheading responds to Division I of the defendant's brief. The "merits" subheading responds to Division II, consistent with the organization of the State's opening brief.

To the extent the defendant alternatively contends that the State failed to properly invoke this Court's appellate jurisdiction, the defendant is mistaken. The State filed an application for discretionary review, which the defendant did not resist, and which was granted by order of the Supreme Court. *See* 4/12/2019 Application for Discretionary Review; 5/2/2019 Order Granting Discretionary Review. The defendant's remedy if he disagreed with the Supreme Court's order was to seek three-justice review under Iowa Rule of Appellate Procedure 6.1002(5), not to raise the issue in briefing after the fact. The defendant has waived a challenge to the grant of discretionary review by not resisting the application for discretionary review or seeking three-justice review after the application was granted.

To the extent this case is retained by the Supreme Court and the Court considers the defendant's challenge to the single-justice order,[2] the State's application for discretionary review invoked this Court's appellate jurisdiction by reference to Iowa Code section 814.5(2)(b) (discretionary review of orders suppressing evidence), Iowa Rule of Appellate Procedure 6.104(1) (interlocutory appeal), and Iowa Rule of Appellate Procedure 6.106(1) (discretionary review). *See* 4/12/2019 Application for Discretionary Review, p. 1. Any or all of these grounds supply a basis for appellate jurisdiction. It is true that Iowa cases recognize that, "[i]f a ruling or decision is interlocutory, [the appellate courts] lack jurisdiction unless permission to appeal is granted." *In re Marriage of Zahnd*, 567 N.W.2d 684, 686 (Iowa Ct. App. 1997). But permission was expressly granted here: by order of

[2] If this case is transferred to the Court of Appeals, the Court of Appeals lacks authority to rule on the issue of discretionary review. Under our deflective routing system, only the Supreme Court can grant or deny discretionary review. Iowa R. App. P. 6.102(2) ("*The supreme court* may grant discretionary review…" (emphasis added)). The Court of Appeals is bound by that determination, for neither the Code nor the rules of appellate procedure give the Court of Appeals authority to act in this area. Asking the Court of Appeals to deny discretionary review is at least as improper as a litigant in the district court asking the Court of Appeals to grant an application for discretionary review. The decision of whether to grant or deny applications for discretionary review belongs exclusively to the Supreme Court.

the Supreme Court. *See* 6/2/2019 Order Granting Discretionary Review.

For purposes of section 814.5(2)(b), the State seeks review of an order on the admissibility of evidence because the order was issued following the State's motion for a ruling under Iowa Rule of Evidence 5.104(a). A Rule-5.104(a) ruling is an accepted method by which to obtain a pre-trial ruling that is subject to appellate review before final judgment. *See Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). A Rule-5.104(a) motion is not, as the defendant suggests, a motion in limine. The purpose of a motion in limine is to alert the district court to potential evidentiary issues and impose procedural steps before the admission of objectionable evidence. *Wailes v. HyVee*, 861 N.W.2d 262, 264 (Iowa Ct. App. 2014). In contrast, the purpose of a Rule-5.104(a) motion is to obtain a pretrial ruling on evidentiary issues that require the submission of evidence by the proponent or opponent of evidence—as was required for the recorded forensic interview required here. *See State v. Long*, 628 N.W.2d 440, 446 (Iowa 2001) ("As rule 104(a) envisions, it has been common for courts to use the rule to preliminarily determine the

admissibility of proffered evidence.”). The State correctly invoked appellate jurisdiction by means of discretionary review.

To the extent the defendant argues that the State did not obtain a “final” order and judgment in the sense those terms are used in Rule 6.103, no one disputes that. The only “final” order in a criminal case is the “final judgment of sentence.” Iowa Code § 814.6(1)(a) (2017). All other rulings are interlocutory to varying degrees. But this does not bar appellate review. To the extent the Court believes the Order Granting Discretionary Review could have more appropriately been captioned as an order granting interlocutory review, the Court can treat it as such. *See* Iowa R. App. P. 6.108 (cases initiated in improper form “shall not be dismissed, but shall proceed as though the proper form of review had been requested). The same reasoning would permit this Court to act in its corrective function and issue a petition for writ of certiorari to correct the evidentiary ruling below. *See* Iowa R. App. P. 6.107.

Sound public policy requires this Court to conduct review at this juncture. When a criminal defendant is denied discretionary review before trial, then ultimately loses at trial, the defendant may appeal to this Court for the correction of legal error as a matter of right. Iowa

Code 814.6(1)(a) (2019). The State cannot do so. When the State loses at trial, appeal and retrial are barred by principles of Double Jeopardy. *See, e.g., State v. Warren*, 216 N.W.2d 326, 327 (Iowa 1974). Particular to this case, if the State is forced to go to trial, and the district court's legal error persists and leads to exclusion of the forensic interview, the defendant is likely to be acquitted and the State will be without recourse. In other words, this legal error must be reviewed now or never. And absent review, it is likely that a pedophile avoids prosecution and remains at large in the community.

The State correctly invoked this Court's appellate jurisdiction, whether the case is captioned as a discretionary review, interlocutory appeal, or petition for certiorari. The defendant's arguments to the contrary are unavailing and this Court should act in its corrective function to reverse the district court's ruling on the admissibility of the forensic interview.

Preservation of Error

The defendant's first contention regarding error preservation, like his argument on jurisdiction, misunderstands fundamentals related to appellate practice. He cites *State v. Tangie,* 616 N.W.2d 564, 568–69 (Iowa 2000), and claims that the failure to obtain a

“definitive ruling regarding the admissibility of evidence waives the argument on appeal.” Defendant’s Proof Br at 24. This is a rule that applies to appeals following final judgment, not to review of a pre-trial ruling. The district court ruled on the hearsay question not once but twice—first following a defense motion in limine and then again following the State’s subsequent 5.104 motion. *See* 10/9/2018 Ruling; App. 97–101; 3/13/2019 Ruling; App. 142–149. Error was preserved.

The defendant goes on to complain about the specific remedy the State requests on appeal. Defendant’s Proof Br at 24. In its opening brief, the State requested this Court either “remand … with directions to admit the recording at trial” or “direct that, once the victim testifies that she cannot remember the abuse or that it did not happen, the recording shall be admitted at trial.” State’s Opening Br. at 53. This Court could choose to limit its review to four of the five *Rojas* factors, and remain silent on the question of necessity when crafting its directions on remand. But, given the state of the record, doing so does not further the interests of justice or judicial economy. There is little question that the victim’s testimony at trial will either be that she cannot remember (which is what she said at depositions)

or that the report was false because she "wanted [her] dad to get help" (which is what she said in a letter the State believes to have been coerced). *See* S.V. Depo; 3/29/2018 S.V. Letter; App. 93. This Court can either direct that the tape be admitted based on the current state of the record or remand with directions contingent on the victim's testimony at trial. Either way, error was preserved related to the district court's evidentiary ruling and review is warranted.

Standard of Review

Iowa case law is clear that the standard of review is for correction of errors at law. *See, e.g., State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009); *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). If this case is transferred to the Court of Appeals, those cases control.

If the Supreme Court retains the case, whether the issue presented here is reviewed for errors at law or abuse of discretion is largely academic. Under either standard, the district court erred in its application of this Court's decision in *Rojas*. Refusing to follow or misapplying controlling case law constitutes both an abuse of discretion and an error at law. *See, e.g., Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009) ("Although our review

is for an abuse of discretion, we will correct erroneous applications of law."); *Edson v. Chambers*, 519 N.W.2d 832, 834 (Iowa Ct. App. 1994) ("In the face of the court's refusal to follow precedent, we are compelled to find an abuse of discretion.").

Merits

Although the State's opening brief adequately addresses why this Court should reverse the district court's order excluding the recorded forensic interview, a response is warranted to some of the contentions raised in the defendant's brief regarding the trustworthiness analysis, as guided by *State v. Rojas* 524 N.W.2d 659, 662–63 (Iowa 1994).

A. The defendant's complaints about "leading gestures" and suggestive questioning do not warrant exclusion of the recorded interview. The research supports the forensic interviewer's technique, as does a common-sense understanding of human communication.

The defendant, apparently unable to find strong examples of leading *questions* during the interview, complains about what he calls leading *gestures*. Defendant's Proof Br. at 37–38. He specifically notes that the interviewer gestured to her shirt when asking whether the defendant touched the victim over the clothes, gestured toward her mid-section when she referenced genitals, and made a squeezing

gesture when she asked about "squeezing." Defendant's Proof Br. at 37–38. These gestures are not leading. Hand gestures are a normal part of human communication. It would be artificial and wooden—as well as bizarre and unsettling—to require an interviewer to ask questions of a child without ever moving her hands or body. None of these gestures were coercive or introduced new topics of conversation. Rather, they were used in conjunction with follow-up questions to ensure the interviewer understood the child-victim's disclosure of sexual abuse.

The defendant goes on to complain that the interviewer initiated "topics" that were not raised by S.V. Defendant's Proof Br. at 38. The defendant's understanding of a topic is unduly narrow and unrealistic. The examples the defendant finds objectionable are the interviewer asking S.V. if something went inside her body, if anything happened to either the defendant or S.V.'s mouth, and whether the defendant said anything during the molestation. Defendant's Proof Br. at 38–39. These questions all came after the victim's initial disclosure of abuse to the interviewer, when she explained that the defendant had been "sexually … touching" her by moving her clothes and putting his hands on her when she was laying down. *See* Exhibit

101: CPC Interview, at approx. 13:40:00–13:41:30. The questions were both appropriate and non-suggestive, as reflected by the defendant's own description of the interview: S.V. responded that the defendant sometimes put his finger inside of her; denied anything happening to anyone's mouths; and explained that she was not sure, but the defendant might have told her not to tell anyone. *See* Defendant's Proof Br. at 38–39. By the defendant's own admission, the victim was able to understand the questions and differentiate between "yes" or "no" answers based on her experiences; if the victim was being coerced by leading questions and a suggestive interviewer, she would have consistently answered in the affirmative. The interviewer's neutral fact-gathering questions did their job here, which was to elicit information from the victim about what happened, based on her personal experiences.

But even if these questions were leading or suggestive, that alone would not render them improper. "[L]eading questions are sometimes unavoidable if the interviewer wishes the learn the full scope of the child's experience." Exhibit 100: National Children's Advocacy Center, Child Forensic Interview Structure, p. 7; App. 122. In other words, appropriate follow-up questions are both necessary to

fully understand a child's initial disclosure and an accepted part of the forensic interview. Sometimes these questions necessarily involve asking for a yes/no when seeking clarification. The Child Forensic Interview structure, admitted as Exhibit 100 at the 5.104(a) hearing, addresses this topic directly:

> **5.5 Yes/No Question**
>
> Yes/no questions serve different purposes in a forensic interview. Yes/no questions can be used to ask the child about specific information not included in the child's narrative in a manner that respects that the child may or may not have information to share (i.e. "Did he say anything to you?") as opposed to ("What did he say to you?"). The initial yes/no question reminds the child that they should only answer questions where they know the information (Ceci & Bruck, 1995). To be of benefit, these questions should be followed by an invitation to elaborate, (i.e. "Tell me more about that") (Faller, 2007; Orbach & Pipe, 2011; Saywitz & Camparo, 2009; Saywitz et al., 2002, 2011, 20 1 7).

Exhibit 100: National Children's Advocacy Center, Child Forensic Interview Structure, p. 6; App. 121. One of the questions the defendant complains about on appeal—asking the child-victim whether the offender said anything during the abuse—is a textbook-proper question. *Id.* at p. 6; App. 121 ("Did he say anything to you?"). The NCAC materials actually caution against asking the open-ended

version of that question, likely because asking "What did he say to you?" pre-supposes that something was said. *See id.*; App. 121. The structure goes on to recommend that interviewers should be cautious about using yes/no questions and that a response may be inconclusive "[w]ithout additional narrative description or clarification." *Id.* at p. 6; App. 121. The interviewer appropriately sought additional narrative description or clarification here: the interviewer asked S.V. whether the defendant talked about the abuse on other occasions, which S.V. answered in a narrative format. *See* CPC Interview, at approx. 13:45:10–13:46:30.

As the research identifies, "children at times require more direct prompts and scaffolding of their responses to assist in organizing their accounts into a 'story model' format and to enable them to talk about embarrassing topics." Exhibit 100: National Children's Advocacy Center, Child Forensic Interview Structure, p. 4; App. 119. That is what the interviewer did here. Moreover, the research confirms the common-sense notion that leading questions are "less risky with a child who has already demonstrated the ability to provide narrative description and is not prone to suggestion (i.e. can say 'No' or 'I don't know' or can correct the interviewer)." *Id.*, p. 7; App. 122.

Even the defendant admits S.V. was able to respond "no" to questions here. *See* Defendant's Proof Br. at 38–39. The questions were not suggestive.

Given the dissection of the interviewer's questions in the defendant's appellate brief, he apparently wishes that the interviewer did not ask any questions beyond a single open-ended prompt to discuss what happened. But this is unworkable and runs counter to the research. "Children are not raised to be witnesses and may not relate all stored information about a remembered event without the direction of a specific question." Exhibit 100: National Children's Advocacy Center, Child Forensic Interview Structure, p. 5; App. 120. This may be particularly true for events that are embarrassing, or cause fear and shame. *See id.* Sexual abuse perpetrated by a family member is plainly the kind of topic most children are unwilling to discuss, even when they are capable of delivering a comprehensive narrative on other topics. The forensic interviewer questioned S.V. appropriately here, consistent with both the expert testimony elicited at the 5.104(a) hearing and the materials submitted as Exhibit 100.

B. The interviewer did not improperly invite speculation. She attempted to elicit information in as neutral a fashion as possible.

The defendant also claims the forensic interviewer invited speculation by asking whether the defendant wanted something to happen to his body and why the victim's mother asked her whether she was being abused. Defendant's Proof Br. at 40. These questions were attempts at neutrally eliciting information about the defendant's actions and whether sexual abuse had been reported in the home.

As to asking whether the defendant wanted anything to happen to his body, the interviewer was attempting to ask a neutral question to investigate whether the defendant made statements about his desires or took any specific actions during the abuse to indicate desire. This is reflected by the victim's answer, which is that she did not know for sure, but she believed the defendant may have wanted her to do something because he inched closer and closer to her during the abuse. Defendant's Proof Br. at 40 (citing Exhibit 101: CPC Interview, at 13:49:40). It would have arguably been suggestive for the interviewer to have asked a direct question that assumed facts about the defendant's behavior: "Did he inch closer to you?" or "Did he want you to touch his penis?" The interviewer was attempting to

ask these questions in a more open-ended fashion, and she returned to the topic later, in a non-suggestive way, to ensure she understood the victim's answers. *See* Exhibit 101: CPC Interview, at approx. 13:56:35–13:57:50 ("**[Bibbins]:** When it comes to the question did something happen to his body, remind me of your answer?"). Nothing about this exchange was improper.

To the extent the Court might find that any particular sentences uttered in the interview are speculation, the remedy would be exclusion of those sentences or a limiting instruction—not wholesale exclusion of the interview. This supports the State's argument for vacating the ruling below; it does not suggest the ruling should be affirmed.

C. The interviewer did not mischaracterize or re-frame answers. She sought clarification appropriately.

In his appellate brief, the defendant misrepresents an inquiry by the interviewer regarding how the defendant treated the victim, claiming that the interviewer "recharacterized her [the victim's] statement." Defendant's Proof Br. at 42. In fact, the interviewer was appropriately seeking to clarify a somewhat ambiguous statement by the victim. This is the full exchange:

[Interviewer]: Okay. What's your relationship – what *was* your relationship like with your dad before this happened?

[S.V.]: He used to help me with everything, tease me like my brothers would. Kind of like a playful tease.

Q: Okay.

A: And he pretty much spoiled me like a princess almost. And so – it was different from what I was used to, kind of.

Q: Okay, what was different?

A: Like, usually, when I asked for something at the store, he'd say "no" and stuff like that. Even if it was like chapstick, if my lips were chapped. And then he'd start going to the store, asking me if I needed this or this, or if I needed more food at home, and stuff like that – like snack foods and stuff and so, like, he started buying more things and we didn't know why.

Q: After this started happening?

A: A little bit before, and then after too.

Q: Okay. Okay. So after things started happening, he started doing things a little bit more?

A: Yeah.

Q: But you said that he treated you like a princess before?

A: A little bit before, yeah.

Q: And then it just got a little bit more intense, after?

A: Mm-hmm [nods head in the affirmative].

Q: Okay. Alright […]

Exhibit 101: CPC Interview, at approx. 14:04:45–14:05:59. Contrary to the defendant's claim, there was nothing inappropriate about the interviewer's question here. The timeline provided by the child-victim was somewhat ambiguous, the interviewer asked follow-up or clarifying questions, and the child responded appropriately. Nothing about this exchange warranted excluding the interview. Consistent with the forensic interview structure, the interviewer "repeat[ed] back a portion of the child's earlier statement and follow[ed] with [a] question focusing on the topic of interest[.]" Exhibit 100: National Child Advocacy Center, Forensic Interview Structure, p. 5; App. 120.

D. The "bolstering" issue was not litigated below. It does not warrant exclusion of the interview.

The defendant on appeal also lodges additional objections, not litigated below, to what he calls "bolstering." Defendant's Proof Br. at 42. The district court did not rule on this bolstering issue, so it is difficult to assess in this appellate action. On remand, the defendant could allege in the first instance that specific instances of using the word "truthful" are objectionable, and ask that those be redacted from the interview or subject to a limiting instruction. That said, the

statements the defendant identifies on appeal are not bolstering—a declarant averring that they are telling the truth does not vouch for someone else, but rather is a relevant consideration in assessing the veracity of that declarant's statement. Nor can there be any serious question that there are misperceptions among many community members that teenagers aren't truthful. In any event, as with the alleged instances of speculation discussed above, this unpreserved objection provides no basis for excluding the entirety of the forensic interview. Even if "bolstering" had been the basis of the district court's ruling below, excluding the CPC interview in its entirety was an error at law and must be corrected.

CONCLUSION

In *State v. Rojas,* 524 N.W.2d 659, 662-63 (Iowa 1994), the Supreme Court addressed nearly identical facts and found that the residual hearsay exception permits the admission of forensic interviews completed at a Child Protection Center, provided certain foundation is laid. That foundation was laid here. It was error for the district court to reject *Rojas* and this Court should reverse.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@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:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,972** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: September 13, 2019

TYLER J. BULLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
tyler.buller@ag.iowa.gov