IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. SHANNA DESSINGER, Defendant-Appellant.	)))))))))	S.CT. NO. 18-2116

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WEBSTER COUNTY
HONORABLE ANGELA L. DOYLE, JUDGE (JURY TRIAL AND SENTENCING)

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the November 15, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Shanna Dessinger, 1028 Williams Drive, Apt. 1, Ft. Dodge, IA 50501.

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State v. Flesher, 286 N.W.2d 215, 217 (Iowa 1979)

Advisory Committee Note, Fed. R. Evid. 803

[1] Divisions I-III and V are adequately addressed in the original brief and, therefore, not taken up in this reply.

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Appealability:

State v. Albright, 925 N.W.2d 144, 162 (Iowa 2019)

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about October 11, 2019. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. The court erred in admitting D.A.J.'s out-of-court statements over Dessinger's hearsay objection. Alternatively, trial counsel rendered ineffective assistance in failing to properly object to such hearsay.

A). Error Preservation and Standard of Review:

Just as hearsay encompasses both verbal and nonverbal statements, a hearsay objection similarly encompasses and preserves error as to both verbal and nonverbal statements. See e.g., State v. Mueller, 344 N.W.2d 262, 266 (Iowa Ct. App. 1983) (counsel raised "Hearsay objections" which were overruled by the court; "Because the testimony of Ann Ernst regarding Phillip's nonverbal and oral assertions amounted to

hearsay,… the trial court erred in admitting such testimony over defense objections.") (emphasis added).

Moreover, the State's questioning that elicited the first defense hearsay objection was phrased in terms of what Gully "observed" when the child "showed [Gully]" what happened – it was therefore clear the defense hearsay objection was being made in response to the child's *demonstration* of what happened, and that it therefore encompassed the child's *nonverbal statements* ("what you observed" when the child "showed you what happened to him") in addition to the child's verbal statements. See (Tr.89:15-25) ("Q Now, when [defense attorney] was asking you questions, you indicated in your answer that [D.A.J.] *showed you* what happened to him? […] Q Could you tell us *what you observed*? [DEFENSE COUNSEL]: I object to hearsay. Q Your Honor -- THE COURT: Overruled.") (emphasis added). The court overruled that defense hearsay objection.

A second defense hearsay objection and ruling followed just after the above objection and ruling:

> Q Thank you, Your Honor. Could you tell us *what you observed [D.A.J.] demonstrating*?
>
> A He grabbed Cori by her neck and said that Shanna lifted him up.
>
> [DEFENSE COUNSEL]: Objection. Hear—
>
> THE COURT: This portion of the witness's testimony is hearsay if offered to prove the truth of the matter asserted. This witness can testify about her observations but not about statements which constitute hearsay.

(Tr.90:1-10) (emphasis added). The State, pointing to this second objection and ruling, complains that although defense counsel objected on grounds of "'hearsay', he did not raise any further objection when the court ruled the witness could 'testify about her observation'" so as to indicate that counsel "intended the hearsay objection to cover nonverbal assertions" in addition to verbal assertions. But this *second* hearsay objection and ruling came *after* the court had already overruled defense counsel's first and immediately preceding hearsay objection to the child's *nonverbal demonstration* (the State's inquiry into "what you observed" when the child

"showed you what happened to him"). The State's error preservation challenge should not be sustained. Error was adequately preserved.

Neither did Dessinger somehow open the door to or otherwise invite the hearsay statements. See (State's Br. p.17) (suggesting Dessinger "bears some responsibility for prompting the testimony about D.A.J.'s demonstration" and that she is "taking exception to demonstration evidence that was prompted by defense questioning"). Defense's counsel's inquiry into whether Gully "approached" D.A.J. after the assault related only to proving-up the foundation for, and emphasizing the significance of, Gully's statements that she did not *see any injuries* visible on the child when she did so:

> Q You're convinced there should have been marks on [D.A.J.]?
>
> A Yes.
>
> Q Did you go up to him and look at him closely?
>
> A No.
>
> Q *Did you even approach him again after that?*

A I – me and Cori both talked to him and asked him what happened and he showed us what happened, but no.

Q Okay. And after that, did you talk to him anymore?

A No.

Q But he was perfectly fine?

(Tr.79:10-19). This defense inquiry neither sought nor generated any hearsay response – Gully answered that she and Jewett both approached the child, "asked him what happened and he showed us what happened"; but she did not testify to the *content* of *what* the child indicated (either verbally or by demonstration) had happened. (Tr.79:14-16). Gully's hearsay-laden testimony (reciting the *content* of *what* the child indicated had happened by way of his nonverbal demonstrative conduct) was not given until later, when it was directly elicited by the State over defendant's objection. See (Tr.89:15-23) ("Q Now, when [defense counsel] was asking you questions, you indicated in your answer that [D.A.J.] showed

you what happened to him? […] Q Could you tell us what you observed? [DEFENSE COUNSEL]: I object to hearsay.").

It is true that the district court's evidentiary ruling admitting the challenged hearsay may be upheld by the appellate court on an alternative theory of admissibility proposed by the State on appeal (such as under an exception to the hearsay rule) even if it was not asserted by the State in the district court proceedings below. See (State's Br. p.19) (citing DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002)). But the State, as the proponent of the hearsay, nevertheless retains the burden of proving the challenged evidence falls within an exception to the hearsay rule, including the obligation to lay any foundational facts necessary to invocation of the exception. State v. Long, 628 N.W.2d, 443 (Iowa 2001); State v. Reynolds, 746 N.W.2d 837, 841-843 (Iowa 2008).

Additionally, in reviewing a district court's evidentiary rulings for correction of errors at law, appellate courts will "give deference to the district court's factual findings and uphold such findings if they are supported by substantial

evidence." Long, 628 N.W.2d at 447. Such factual findings may be explicit or implicit, and would include the district court's implicit findings on whether the foundational facts necessary to the application of a hearsay exception were established by the State below. State v. Tangie, 616 N.W.2d 564, 569 (Iowa 2000).

In the present case, the district court ruled that the *verbal* statements made by D.A.J. during his demonstration to Gully and Jewett were inadmissible hearsay. Implicit in this ruling is the conclusion that no hearsay exception (including the excited utterance and present sense impression exceptions relied upon by the State on appeal) were established. That is, the district court made implicit factual finding that the foundational facts necessary to these hearsay exceptions were not established. Such factual findings must be upheld on appeal if supported by substantial evidence. See Long, 628 N.W.2d at 447; Tangie, 616 N.W.2d at 569.

The State requests that this court "should allow substantial leeway when considering alternative theories of

admissibility" for the challenged State's evidence. (State's Br.19). Specifically, the State argues that the prosecutor below would not have understood defendant's objections covered nonverbal statements in addition to verbal statements and that, if he had, he "would have offered hearsay exceptions to allow admission of the evidence." (State's Br.19). But the nonverbal statements challenged herein (the child's physical demonstration of what happened) were made *simultaneously* with any verbal statements of the child accompanying that demonstration. Any hearsay exception offered by the State would have applied or failed equally as to both categories of such statements (verbal and nonverbal). Yet, upon the defendant's hearsay objections (which the State appears to acknowledge the prosecutor would have understood covered, at minimum, verbal statements) and court's ruling that verbal statements would be excluded as hearsay, the State did not offer or attempt to prove up by the laying of additional foundation any applicable exceptions to the hearsay rule.

No particularly "substantial leeway when considering alternative theories of admissibility" is warranted. (State's Br.19). Rather, (1) a hearsay exception may be found on appeal only if the State met its burden to lay any and all foundational facts necessary to application of the exception; and, (2) the district court's implicit factual findings that such foundational facts were not established as to statements made during the child's demonstration to Gully and Jewett must be granted deference and upheld on appeal so long as they are supported by substantial evidence.

B). <u>Merits</u>:

1). D.A.J.'s (a) demonstration to Jewett and Gully, and (b) verbal statements to his father: not Excited Utterances, or Present Sense Impressions.

Here, substantial evidence certainly support's the district court's implicit findings that neither the excited utterance exception nor the present sense impression exception were applicable to D.A.J.'s statements made at the time of his demonstration.

The excited utterance exception requires a spontaneous statement made while "under the stress of excitement caused by the event or condition." Iowa R. Evid. 5.803(2) (2013). To be admissible under that exception, the statement must be "made as the spontaneous reaction to a startling event" rather than as "the product of reflection or deliberation in response to a question." State v. Tejeda, 677 N.W.2d 744, 753 (Iowa 2004).

The present sense impression exception requires a spontaneous statement made in "substantial contemporaneity" with the event being described. State v. Flesher, 286 N.W.2d 215, 217 (Iowa 1979). As with the excited utterance exception, the spontaneity of the statement is key:

> The underlying rationale of the "present sense" and "excited utterance" exceptions are very similar, i. e., the circumstances surrounding the declaration minimize the motive or opportunity to fabricate. "Spontaneity is the key factor in each instance, although arrived at by somewhat different routes."

Id. at 217-18 (quoting Advisory Committee Note, Fed. R. Evid. 803).

The statements at issue here do not fall within either of these exceptions – they were made after (1) a lapse of time (not in "substantial contemporaneity" with the event), (2) when the child was no longer under the stress of excitement of the event itself, and (3) in response to questioning by Jewett and Gully rather than in spontaneous response to the event itself.

It is not clear precisely how much time passed between the event and the subsequent demonstration by D.A.J., but it is clear the demonstration was not made in substantial contemporaneity with the event at issue. After the event occurred, Gully went to Jewett's office to report what she believed she saw. (Tr.73:20-74:19, 83:23-84:9). Jewett then went to the preschool room (where the incident allegedly happened), while Gully returned to the two-year-room. (Tr.73:20-74:19, 83:23-84:9). By the time Jewett got into the preschool room, D.A.J. was whimpering but no longer crying. (Tr.108:13-18).

D.A.J. did not then immediately and spontaneously report what had happened. Rather, Jewett proceeded to have an exchange with Dessinger, who was told to leave, initially appeared to believe she was just being sent home early rather than being disciplined, was ultimately informed by Jewett of what had been reported, and tried to make some denial of the allegation, before she ultimately gathered her things and left the room. (Tr.106:25-107:4, 115:5-13, 116:4-8, 117:20-118:2,147:19-149:11,158:17-159:18, 167:5-168:5, 172:11-25). By the time Dessinger left, D.A.J. was off by himself in the room. (Tr.107:16-108:1, 108:19-109:8).

Sometime thereafter, Gully (who had initially gone into a different room) apparently joined Jewett in the preschool room. Gully and Jewett then together talked to D.A.J. Even then, D.A.J. did not immediately or spontaneously state what had occurred. Rather, he was asked by Gully and Jewett what had happened, and made his verbal and demonstrative statements in response to such questioning. (Tr.79:14-16).

Under these circumstance, substantial evidence certainly supports the district court's implicit findings that neither the excited utterance exception nor the present sense impression exception were applicable to statements made at the time of the demonstration.

2) D.A.J.'s statement to his father in Jewett's presence: Not Excited Utterance or Present Sense Impression

Again, it is not clear precisely how much time lapsed between the occurrence of the event and D.A.J.'s subsequent verbal recitation of the event to his father in Jewett's presence. However, it is clear that these verbal statements to D.A.J.'s father were made sometime *after* the earlier demonstration to Jewett and Gully which (as discussed above) the district court properly found fell under neither the excited utterance nor the present sense impression exceptions. It would appear that the statements to D.A.J.'s father were made not only after the demonstration, and still yet after Jewett had already reported the incident to DHS. (Tr.110:15-111:10, 113:119-114:10). The statements to D.A.J.'s father occurred after an even

greater lapse in time and with even less of an indication that they were spontaneously made while D.A.J. was under the stress of excitement, than the earlier (verbal and nonverbal) demonstration to Gully and Jewett.

3) Statements to Officer Samuelson: Not non-hearsay offered only to explain subsequent conduct

Officer Samuelson testified as follows concerning what he learned when he made contact with D.A.J. and his parents at the police department: "They reported that their child was at Tracey's Tots for daycare, and the child had been picked up and then put down. So basically a form of abuse that occurred from one of the workers at Tracey's Tots." (Tr.95:21-95:17).

It is true that "[w]hen an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay." State v. Mitchell, 450 N.W.2d 828, 832 (Iowa 1990). The scope of such testimony, however, must be strictly limited to that which is necessary to explain why the responsive actions were

taken. State v. Doughty, 359 N.W.2d 439, 442 (Iowa 1984). The crucial distinction is "between [a person] testifying to the fact that he spoke to a witness without disclosing the contents of that conversation and… testifying to the *contents* of the conversation." State v. Elliott, 806 N.W.2d 660, 668 (Iowa 2011) (emphasis added; quoting People v. Trotter, 626 N.E.2d 1104, 1112–13 (Ill. App. Ct.1993)).

In the present case, the mere fact that D.A.J.'s parents reported an allegation of "abuse" from a worker at Tracey's Tots was adequate to explain responsive investigative conduct by the Officer. The further recitation of the specific content of the parents' statement (that "the child had been picked up and then put down") was both unnecessary to explain subsequent conduct and was also "so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay." Doughty, 359 N.W.2d at 442 (quoting C. McCormick's Handbook on the Law of Evidence § 248, at 587 (2d ed. E. Cleary 1972)). See also State v. Sowder, 394 N.W.2d 368, 731 (Iowa 1986) ("By bringing out the specific statements

made, not merely focusing on the fact a conversation occurred, the State attempted to establish the truth of the facts asserted in the conversation….").

IV. The restitution aspect of the sentence concerning court costs and correctional fees fails to comport with the requirements of Albright and Coleman.

Appealability: Concerning 'second category' restitution, the appealability and enforceability of such restitution goes hand in hand. See State v. Albright, 925 N.W.2d 144, 162 (Iowa 2019) (restitution orders are "not appealable or enforceable" until final order of restitution, with attendant ability to pay determination). Where, as here, the district court has treated 'second category' restitution as immediately due and enforceable[2] against a defendant (despite the absence of any attendant ability to pay determination), it must also be immediately appealable by that defendant and subject to correction by this Court on appeal.

[2] As discussed in Defendant's original brief, the sentencing order, the financial page of the combined general docket, and the judgment/lien docket all demonstrate that 'second category' restitution of court costs was treated as immediately due and enforceable. See (Def. Br. p.89).

CONCLUSION

Under Divisions I-III and V, Dessinger respectfully requests a new trial.

Under Division IV, Dessinger respectfully requests: (1) that the restitution part of her sentencing order be vacated and remanded to the district court for resentencing on restitution; and (2) that the portion of the sentencing order relating to the obligation to pay sheriff's fees as set forth in any Room and Board Reimbursement Claim by the sheriff absent a request for hearing should be vacated and remanded for entry of an amended sentencing order omitting that language.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was $ 0 , and that amount has been paid in full by the State Appellate Defender.

VIDHYA K. REDDY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 2,665 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

/s/ Vidhya K. Reddy Dated: *11/15/19*

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