

IN THE SUPREME COURT OF IOWA

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

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

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APPELLANT'S APPLICATION FOR FURTHER REVIEW  
OF THE DECISION OF THE IOWA COURT OF APPEALS  
FILED MAY 13, 2020

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## **CERTIFICATE OF SERVICE**

On June 2, 2020, 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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VKR/vkr/08/19

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## QUESTION PRESENTED FOR REVIEW

Upon Dessigner's timely hearsay objection to D.A.J.'s out-of-court demonstration to his teachers, did the district court commit reversible error by excluding only the *verbal* assertions uttered during the demonstration, but refusing to exclude the (identical) *nonverbal* assertions simultaneously expressed by the child's demonstrative *conduct*?

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## **STATEMENT IN SUPPORT OF FURTHER REVIEW**

***Nonoral Hearsay (Preserved)***: During his out-of-court demonstration to teachers Gully and Jewett, the child made identical statements by both (a) verbal utterance, and (b) simultaneous nonverbal conduct. On defendant's timely hearsay objection, the district court excluded the child's *oral* statements from the demonstration, but erroneously declined to exclude his simultaneous *nonoral* statements (the child's demonstrative *conduct*).

The child's nonoral demonstrative conduct was both *identical in content to* and *expressed simultaneously with*, the verbal assertions made by the child during the same demonstration; and the district court had properly determined these simultaneous *verbal* assertions from the child's demonstration must be excluded as inadmissible hearsay. Oral and nonoral statements are treated identically under the hearsay rules – both for purposes of determining whether the statement is hearsay, and for purposes of determining if any hearsay exceptions or exclusions apply thereto. The child's

nonoral demonstrative conduct was required to be excluded as inadmissible hearsay in the same manner as the child's simultaneous verbal statements.

***Harmless Error Analysis:*** The Court of Appeals correctly determined error was preserved as to the child's nonverbal demonstrative statements (Ct.App.Opin.5), and that such demonstrative statements amounted to hearsay (Ct.App.Opin.6-8). However, the Court of Appeals erroneously held the error harmless, mistakenly concluding the objected-to demonstrative statements testified to by Gully and Jewett were "merely cumulative" to verbal assertions later testified to by Jewett and Officer Samuelson without objection. See (Ct.App.Opin.8) ("As Desinger acknowledges, the substance of D.A.J.'s demonstration was the same as D.A.J.'s verbal assertions. [...] So we find testimony about D.A.J.'s demonstration was merely cumulative.").

It is correct that the verbal statements uttered by the child *at the time of the demonstration* were the same as (and would have been merely cumulative to) the child's

simultaneous nonoral demonstrative conduct – but these simultaneous *verbal utterances from the demonstration* were properly objected-to and *excluded by* the district court. See e.g. (Ct.App.Opin.5) (“...[W]hen Gully [and Jewett] testified about D.A.J.’s *verbal* statement [from the demonstration], the court *sustained* the defense’s objection) (emphasis in original).

The subsequent *unobjected-to verbal utterances* testified to by Jewett and Officer Samuelson did not recite the assertions (oral or nonoral) made by the child during his demonstration – instead, they related to *wholly separate* verbal utterances (one by the child, and one by his parents) made at later points in time, and they did not reveal the content of the child’s account from his demonstration. The child’s account of the incident with Dessinger came in *only* by way of the objected-to demonstrative hearsay testimony of Gully and Jewett. The objected-to demonstrative hearsay was thus neither merely cumulative nor harmless.

## STATEMENT OF THE CASE

**Nature of the Case:** Defendant-Appellant Shanna Dessinger seeks further review from the Court of Appeals' affirmance of her jury trial conviction for Child Endangerment, an Aggravated Misdemeanor in violation of Iowa Code sections 726.6(1)(a) and 726.6(7).

### **Background Facts:**

#### **a). *The Unobjected-to Testimony (from Jewett and Officer Samuelson).***

The unobjected-to testimony from Cori Jewett consisted of the following, concerning the child's (post-demonstration) verbal statement to his father as overheard by Jewett:

Q Without saying what DJ said, was DJ able to tell his father what had happened to him?

A Yes.

Q *Was that consistent with what he had demonstrated to you?*

A Yes.

(Tr.114:5-10) (emphasis added).

The unobjected-to testimony from Officer Samuelson consisted of the following, concerning the parents' subsequent reporting of an incident to police, triggering a police investigation:

Q Okay. And what was it they were trying to report to you?

A *They reported* that their child was at Tracey's Tots, goes there 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.95:14-17) (emphasis added).

**b). *The Objected-to testimony: D.A.J.'s Demonstration to Gully and Jewett.***

The objected-to hearsay testimony from Gully consisted of the following, detailing the child's earlier demonstration to Gully and Jewett:

Q Now, when [defense counsel] was asking you questions, you indicated in your answer that [D.A.J.] showed you what happened to him?

A Yes. I actually told [Jewett] what happened, but we all were right there.

Q So you observed it?

A Yes.

*Q Could you tell us what you observed?*

*[DEFENSE COUNSEL]: I object to hearsay.*

*Q Your Honor –*

*THE COURT: Overruled.*

*Q Thank you, Your Honor. Could you tell us what you observed DJ 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.*

*Q Without saying anything that anyone might have said, what did you observe DJ demonstrating?*

*A He grabbed Cori by her neck and lifted, acted as if he was lifting himself up.*

*Q Okay. Would you characterize that as a choking?*

*A Yes.*

(Tr.89:15-90:16) (emphasis added).

The objected-to hearsay testimony from Jewett consisted of the following concerning the same demonstration by the child to Gully and Jewett:

Q Okay. Now, previous testimony has told us that there was a -- DJ demonstrated what his teacher did to him to you. Do you remember that?

A Yes.

Q Without saying any words, can you describe for me what DJ did to demonstrate what his teacher did to him?

A Without using any words?

Q Without saying what he was saying. You can use your words but just don't say what DJ was saying.

A Okay.

*Q What did he show you?*

*A He showed me with his hands like this and then he went like this.*

*Q On his own neck or on your own?*

*A He did it around his own neck.*

Q Okay. Did you notice anything about his thumbs?

A No, no.

*Q How would you describe what he showed you?*

*A I would describe it as that somebody had put their hands around his throat and choked him.*

*Q Okay. After describing or visualizing that someone had put hands around his neck and choked him, did he indicate that anything else had occurred after that?*

*A That he was picked up –*

*MR. PARKER: Objection. Hearsay.*

*MR. DRISCOLL: Asking physical demonstration, not verbal explanation, Your Honor.*

*THE COURT: The witness may answer without saying what DJ actually said.*

*A Okay.*

*THE COURT: If you're able to answer the question, please do so.*

*MR. DRISCOLL: Maybe I'll ask a cleaner question.*

*THE COURT: Go ahead.*

*MR. DRISCOLL:*

*Q After demonstrating that he had, in your words, been choked, did he demonstrate that his teacher had done anything else to him physically? Did he demonstrate physically anything else?*

*A He didn't physically demonstrate, no.*

(Tr.112:1-113:15) (emphasis added).

## ARGUMENT

**I. Upon Dessigner’s timely hearsay objection to D.A.J.’s out-of-court demonstration to his teachers, the district court committed reversible error by excluding only the *verbal* assertions uttered during the demonstration, without also excluding the (identical) *nonverbal* assertions simultaneously expressed by the child’s demonstrative conduct.**

**a). Error:**

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Iowa R. Evid. 5.801(c) (2017). A “statement”, in turn, includes oral, written, or *nonverbal* assertions. State v. Dullard, 668 N.W.2d 585, 590 (Iowa 2003) (“A statement is defined under our rules of evidence as ‘(1) an oral or written assertion or (2) *nonverbal conduct of a person, if it is intended by the person as an assertion.*’”) (quoting Iowa R. Evid. 5.801(a); emphasis added).

Hearsay statements are not admissible unless they fall within a recognized exception as permitted by constitution, statute, or rule. Iowa R. Evid. 5.802 (2017). The State, as the proponent of the hearsay, has the burden of proving it falls

within an exception to the hearsay rule. State v. Long, 628 N.W.2d 440, 443 (Iowa 2001). The State's burden includes the obligation to lay any foundational facts necessary to invocation of the exception. State v. Reynolds, 746 N.W.2d 837, 841-843 (Iowa 2008).

Here, during his out-of-court demonstration to teachers Gully and Jewett, the child made identical statements by both (a) verbal utterance, and (b) simultaneous nonverbal conduct. Dessinger timely raised a hearsay objection to the demonstration. The district court agreed that the child's *verbal* statements from the demonstration was inadmissible hearsay, but ruled that the child's simultaneously expressed *nonverbal assertive conduct* was not. The court's failure to also exclude the nonverbal demonstrative conduct as inadmissible hearsay amounted to reversible error.

Hearsay rules apply equally to both verbal and nonverbal statements. See e.g., State v. Dullard, 668 N.W.2d 585, 590 (Iowa 2003); State v. Mueller, 344 N.W.2d 262, 264 (Iowa Ct. App. 1983) (child psychologist's testimony concerning three-

year-old nonverbal conduct with dolls depicting sex act “was offered in the belief that [the child] intended to assert what had happened to him, so his conduct amounted to a ‘statement’ for purposes of the hearsay rule.”).

Here, the district court explicitly ruled that any verbal assertions by D.A.J. during the demonstration would constitute inadmissible hearsay. (Tr.89:22-90:10). However, the court mistakenly believed that D.A.J.’s assertive conduct which simultaneously but nonverbally demonstrated what he claimed to have happened would not fall under the hearsay rules. But if D.A.J.’s verbal statements constituted inadmissible hearsay, his simultaneous nonverbal statements (in the form of assertive conduct or demonstration) to the same effect were also inadmissible hearsay. That is, any hearsay exception offered by the State would have applied or failed equally as to both categories of statements (verbal and nonverbal) from the child’s demonstration.

For same reasons that the child’s *verbal* assertions from the demonstration were (properly) excluded as inadmissible

hearsay, the *simultaneous nonverbal* assertions of the child (expressing the very same content through demonstrative conduct) was also required to be excluded as inadmissible hearsay. See Long, 628 N.W.2d at 447; State v. Tangie, 616 N.W.2d 564, 569 (Iowa 2000) (district court’s implicit factual findings concerning foundational facts will be given deference on appeal). The district court’s failure to sustain defendant’s hearsay objection to Gully and Jewett’s testimony reciting D.A.J.’s nonverbal statements (his assertive conduct from the out-of-court demonstration) was error.

***b). Not Harmless:***

Where preserved, “admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established.” State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984). Reversal is required unless the error was harmless beyond a reasonable doubt. State v. Sowder, 394 N.W.2d 368, 372 (Iowa 1986).

The Court of Appeals erred in concluding the objected-to admission of the child’s nonoral demonstration was harmless.

This conclusion of harmlessness appears to have been reached on a mistaken belief that the objected-to demonstrative statements testified to by Gully and Jewett were the “same as”, and thus “merely cumulative” to, verbal assertions later testified to by Jewett and Officer Samuelson without any defense objection. (Ct.App.Opin.8) (“As Dessinger acknowledges, the substance of D.A.J.’s demonstration was the same as D.A.J.’s verbal assertions. And, as explained, Jewett and Officer Samuelson testified without objection about D.A.J.’s verbal statements. So we find testimony about D.A.J.’s demonstration was merely cumulative.”).

It is true the verbal statements uttered by the child *at the time of the demonstration* were the same as (and would have been merely cumulative to) the child’s simultaneous nonoral demonstrative conduct – but such verbal utterances *from the demonstration* were properly objected-to and excluded by the district court. See e.g. (Ct.App.Opin.5) (“...[W]hen Gully [and Jewett] testified about D.A.J.’s *verbal* statement [from the

demonstration], the court *sustained* the defense's objection) (emphasis in original).

The *unobjected-to* (and thus unexcluded) verbal utterances testified to by Jewett and Officer Samuelson did *not* recite the assertions made by the child during his demonstration – instead, they related to *wholly separate* verbal utterances (one by the child, and one by his parents) made at later points in time. And this unobjected-to testimony of Jewett and Officer Samuelson *did not* inform the jury of what the child had asserted during his demonstration (the challenged nonoral demonstrative hearsay). If the objected-to demonstrative hearsay had been properly excluded, the unobjected-to testimony referencing later verbal utterances would not independently convey to the jury the *content* of the child's account of the incident. It was thus neither merely cumulative nor harmless.

Specifically, the unobjected-to testimony from Cori Jewett consisted of the following, concerning the child's (post-

demonstration) verbal statement to his father as overheard by

Jewett:

Q Without saying what [D.A.J.] said, was [D.A.J.] able to tell his father what had happened to him?

A Yes.

**Q Was that consistent with what he had demonstrated to you?**

**A Yes.**

(Tr.114:5-10) (emphasis added). This testimony conveyed the fact that a statement was made by the child, but it did not independently convey the *content* of that statement. Rather, the *content* of the child's verbal statement to his father was conveyed only by reference to it's being "consistent with" the child's earlier demonstrative statements to his teachers. If the earlier demonstrative hearsay had been properly excluded by the district court as requested by defendant's timely objection, the same evidence (the content of the child's account) would not have reached the jury through the unobjected-to testimony outlined above.

The unobjected-to testimony from Officer Samuelson consisted of the following, concerning the parents' reporting of an incident to police, triggering a police investigation:

Q Okay. And what was it they were trying to report to you?

A ***They reported*** that their child was at Tracey's Tots, goes there 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.95:14-17) (emphasis added). If the child's demonstrative hearsay had been properly excluded by the district court as timely requested by defense counsel's objection, substantially the same content would not be independently conveyed the jury by way of Officer Samuelson's unobjected-to testimony. The jury would neither understand the meaning of the parents' statement as referencing a specific allegation of choking, nor (most importantly) would the jury attribute this *statement from the parents* to being the child's *own personal* statement or account of the incident. See e.g., (Tr.113:19-114:2) (Jewett related her and Gully's account to D.A.J.'s father); (Tr.99:11-18) (Officer received information only from

the parents, not from D.A.J.). Indeed, absent knowledge of the child's demonstration to Gully and Jewett (the objected-to evidence), the jury would understand Officer Samuelson's brief reference to the parents' reporting not as hearsay offered for truth of the matter asserted (e.g., as substantive proof of a choking or strangulation) but instead as only a nonhearsay statement explaining responsive conduct of Officer Samuelson (e.g., the reporting of an incident, triggering a police investigation). See State v. Mitchell, 450 N.W.2d 828, 832 (Iowa 1990); Iowa R. Evid. 5.801(c).

The child's own personal account of the incident came in *only* by way of the objected-to demonstrative hearsay – that is, the testimony of Gully and Jewett detailing the child's demonstration. If the objected-to demonstrative hearsay testimony<sup>1</sup> had been excluded as requested by defendant's

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<sup>1</sup> See (Tr.89:15-90:16) (Gully's testimony, over objection, that D.A.J. demonstrated what allegedly happened with Dessinger by "grabb[ing] [Jewett] by her neck and lift[ing], act[ing] as if he was lifting himself up", which Gully characterized as "a choking"); (Tr.112:1-113:15) (Jewett's challenged testimony: that D.A.J. demonstrated what allegedly happened by

timely objection in the district court, substantially the same evidence (the child's own alleged account of the incident) would not have been conveyed by the unobjected-to testimony of Jewett and Officer Samuelson recited above. Thus, the objected-to testimony was not "merely cumulative". See Hawkins v. Grinnell Reg'l Med. Ctr., 929 N.W.2d 261, 267 (Iowa 2019) (not merely cumulative where objected-to hearsay evidence goes well beyond what is otherwise in the record); Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 184 (Iowa 2004) (same).

And the jury's receipt of the content of the child's account cannot be deemed harmless under the circumstances of this case. The dispute at trial centered on the nature of the interaction between Dessinger and D.A.J. The State alleged Dessinger had intentionally choked and pushed the child, while Defendant vigorously denied any choking or intentional

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"show[ing] me with his hands like this and then he went like this", motioning "around his own neck", which Jewett testified she would "describe... as that somebody had put their hands around his throat and choked him").

assault but testified she may have accidentally knocked the child over when stumbling against a bookshelf. No objective proof of the interaction between Dessinger and D.A.J., as by surveillance video, was available or introduced. Nor were any injuries ever visible on the child, as might corroborate the State's allegations. Of the three State's witnesses presented at trial, only Gully claimed to have actually observed the incident – and that was not from the same room but instead through a window from an adjoining room where she and another provider had been supervising a room of two-year-olds, such that her attention would not have been focused on Dessinger at the outset. The incident itself would have occurred very quickly, and the defense urged Gully had incorrectly interpreted what she saw, apparently mistaking Dessinger's stumble for assaultive conduct. Further, the jury did not appear to find this an easy case to decide, deliberating for three hours into the evening (until 7:58 p.m.) before returning the following morning to reach a verdict (Tr.184:11-14, 201:6-202:8; Verdict Tr.2:1-3:17).

On this record, the improper demonstrative hearsay statements from the child would have carried a heavy impact, and the jury would certainly have relied on such hearsay statements in ultimately deciding to credit the State's claim of intentional assault over Dessinger's claim of an accidental stumble. Indeed, the State emphasized the challenged demonstrative statements, not only during the testimony of Gully and Jewett, but also during the State's cross-examination of Dessinger, and the State's closing argument. See e.g., (Tr.169:19-24) (State's cross-examination of Dessinger: "Why would [D.A.J] indicate to other individuals *by demonstration* that you choked him....?") (emphasis added); (Tr.185:20-25) (State's closing argument: "we heard from both Ms. Gully and Cori Jewett,... the child *demonstrated* what his teacher, the defendant, did to him, which was put her hands on his neck and squeeze, which is choking.") (emphasis added); (Tr.199:4-14) (State's rebuttal closing argument: "[Defense Counsel] keeps conveniently forgetting that we have both Ms. Gully and Cori Jewett explain what [D.A.J.] *showed*

on his own body or on their bodies”, which “was this and he squeezed.”) (emphasis added).

The error was not harmless. A new trial must be granted.

### **CONCLUSION**

Dessinger respectfully requests a new trial.

### **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$2.41, and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR  
FURTHER REVIEWS**

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,147 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Vidhya K. Reddy

Dated: 6/2/20

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