ELECTRONICALLY FILED DEC 06, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0295

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY MICHAEL FONTENOT,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE MARY E. CHICCHELLY, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case does not meet any of the criteria for retention by the Iowa Supreme Court under Iowa Rule of Appellate Procedure 6.1101(2) (a)-(f). As the defendant suggests, transfer to the Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case.

Timothy Michael Fontenot was charged with two counts of second-degree sexual abuse and four counts of indecent contact with a child, in violation of Iowa Code sections 709.3(1)(b) and 709.12(1) (2017), respectively. Trial Information; Amended Trial Information; App. 5-6, 34-36. The charges stemmed from allegations that Fontenot molested H.N., the young daughter of his brother's live-in girlfriend, and H.N.'s eleven-year-old best friend, E.M. *See* Minutes of Testimony.

After a trial, the jury could not reach a verdict on the sexual abuse counts, which pertained to H.N.; the jurors acquitted Fontenot on two counts of indecent contact involving her friend E.M., and convicted him on the indecent contact counts pertaining to H.N.

Verdict Forms; App. 40-43. Fontenot appeals his two convictions on an evidentiary ground.

Course of Proceedings.

The State agrees with the defendant's rendition of the case's procedural history. *See* Iowa R. App. P. 6.903(3).

Facts.

Mother of three Kim N. lived with her boyfriend, Joe Fontenot. Tr. Vol. III p. 20, lines 20-25. The couple had one child together, seven-year-old Kinnick. Tr. Vol. III p. 21, lines 1-7. Kim's two older children, H.N. – who was thirteen at the time of trial – and Jacob – who was sixteen at the time of trial – also lived with Kim N. and Joe Fontenot. Tr. Vol. III p. 21, lines 8-25.

Joe's brother, the defendant Timothy Fontenot, would often visit and occasionally stay at their home in Marion, Iowa. Tr. Vol. III p. 22, lines 13-25. Fontenot was closer to H.N. than to the other children, and he "spoiled her" by giving her gifts such as expensive UGG boots and a cell phone. Tr. Vol. III p. 26, line 22 – p. 28, line 12. At the beginning of their relationship, Kim thought Fontenot was "[g]ood, loving, what we wanted in an uncle, what we thought an uncle would be."

Late one night in July 2016, Kinnick would awaken her mother to tell her a secret: "[']Sissy said I'm not supposed to tell you.['] And I told her [']You need to tell me['], and she told me that Tim had been touching [H.N.]." Tr. Vol. III p. 39, line 19 – p. 40, line 7. Kim immediately went into H.N.'s bedroom and asked her if the defendant had been touching her. Tr. Vol. III p. 40, lines 1-7. H.N. originally denied the allegation, but admitted the abuse after her mother told her that she should tell her the truth so that she could help her. Tr. Vol. III p. 40, lines 1-10. The next day, Joe Fontenot confronted Tim Fontenot and then went to the police station to report his brother. Tr. Vol. III p. 40, lines 11 – p. 43, line 12. H.N. was interviewed and examined at a child protection center the following day. Tr. Vol. III p. 43, line 6 – p. 44, line 2.

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At trial, H.N. testified that her Uncle Tim was, at first, "funny" and "nice." Tr. Vol. II p. 121, lines 12-20. When she was six or seven and the family was camping in Minnesota, Fontenot "started rubbing her leg" late at night and she felt uncomfortable. Tr. Vol. II p. 123, lines 1-25. A year or two later at the family's home in Marion,

Fontenot began touching H.N. in her "private spot." Tr. Vol. II p. 124, line 12 – p. 125, line 25. Fontenot initially would rub H.N.'s leg and then "above [her] pants." Tr. Vol. II p. 125, lines 15-25. He told her that if she told anyone what he had been doing to her, they would think she was lying. Tr. Vol. II p. 126, lines 1-24.

A year or two after that, the abuse escalated, and Fontenot began to touch her vagina underneath her clothes and underwear. H.N. recalled that the last time Fontenot touched her, he inserted his finger inside her vagina, which was painful.[1] Tr. Vol. II p. 127, line 3 – p. 128, line 25. She also recounted other instances in which Fontenot would touch her when Jacob was in the room playing video games in a recliner while she and the defendant were on a couch, under a blanket, off to the side and behind the recliner. Tr. Vol. II p. 128, line 2 – p. 129, line 17. Fontenot touched H.N. over and under her underwear "more times than [she] could count." Tr. Vol. II p. 131, lines 10-15.

[1] As noted, the jury was hung on the two counts of second-degree sexual abuse; the State provides H.N.'s testimony in full for context.

The defendant coined his interactions with H.N. “tickle time.” Tr. Vol. II p. 130, lines 1-22. He bartered with the young girl he thought of as his niece, giving her gifts in exchange for molesting her:

> Q. With regards to the UGGs that Tim bought you, did he say why he was buying you the UGGs?
>
> A. So he could get extra tickle time.
>
> Q. And what does tickle time mean?
>
> A. To touch me inappropriately.
>
> Q. Where did the calling it tickle time come from?
>
> A. I don't know. I think he just made it up.
>
> Q. Did he buy you anything else in order to do tickle time?
>
> A. He bought me a phone.
>
> Q. And can you explain what was supposed to come out of buying you a phone for tickle time?
>
> A. Because if I wanted to -- like a 124-gigabyte plan, he would get more tickle time, and if I wanted the 64 gigabyte, he'd get less tickle time. So I chose the 64 gigabyte.
>
> Q. And did you end up getting touched by Tim because of him buying you this phone?
>
> A. Yeah.
>
> Q. What about the UGGs? What happened after he bought you the UGGs?

A. He touched me.

Tr. Vol. II p. 130, lines 1-22. The State presented evidence of Facebook Messenger exchanges in which Fontenot and the eleven-year-old discuss tickle time and birthday spankings, amid many other late-night messages from Fontenot ranging from coy and flirtatious to pouty to wildly affectionate. *See* Tr. Vol. III p. 160, line 15 – p. 168, line 11; Vol. IV p. 117, line 4 – p. 123, line 5; State's Exhibit 1A-1G (Facebook Messages).

Fontenot's behavior with H.N. finally came to light when H.N. had a conversation with her best friend, E.M. E.M. asked H.N. if the defendant had "ever done anything bad to [her]." Tr. Vol. II p. 136, line 25 – p. 138, line 8. As H.N. testified, "… at first I said no. And then she said, [']oh, because he's… touching me.['] And I said, [']what do you mean touching you?['] And then she said, [']like touching me in my private spot,['] and I said, [']yeah, he's doing that to me too.[']"[2] Tr. Vol. II p. 137, line 17 – p. 138, line 5. H.N. warned her younger sister, Kinnick, about Fontenot because she once heard Kinnick tell

[2] At trial, E.M. also testified. She stated that Fontenot briefly touched her twice over her clothes when he was rough-housing with her and flipping her over his shoulders. Tr. Vol. II p. 195, line 14 – p. 196, line 22. As indicated, the jury acquitted Fontenot of the two indecent contract charges involving E.M. Verdict Forms; App. 40-43.

the defendant she wanted “tickle time” and Fontenot told her she “wasn’t old enough yet.” Tr. Vol. II p. 138, lines 14-24. H.N. incorrectly believed that Kinnick, who was about five years old at the time, would not tell anyone else about what Fontenot had been doing to H.N. Tr. Vol. II p. 138, line 14 – p. 139, line 20. As noted, Kinnick reported H.N.’s secret to their mother. Tr. Vol. II p. 138, line 25 – p. 139, line 1.

Tim Fontenot testified in his own defense; he also called several witnesses who testified that he was with them on Independence Day weekend of 2016, contrary to other testimony indicating that he was in Clear Lake, Iowa with Joe and his family that weekend. *See*, *e.g.*, Tr. Vol. IV p. 34, line 11 – p. 36, line 23; p. 45, lines 9-23; p. 50, lines 7-23. Fontenot denied inappropriately touching H.N. and E.M. Tr. Vol. IV p. 72, lines 2-24; p. 119, lines 9-14; p. 125, lines 2-13. He acknowledged telling Officer Andrea Wilson that he may have accidentally touched the girls while flipping them onto his shoulders. Tr. Vol. IV p. 116, lines 3-9.

On rebuttal, the State called Joe Fontenot to testify about photographs he had that depicted his brother with H.N. and the family in Clear Lake on the Fourth of July weekend in 2016. Tr. Vol.

IV p. 126, line 9 – p. 131, line 20; *see also* State's Exhibit 6A-F (photographs).

As noted, the jury did not reach a unanimous decision on the sexual abuse charges, acquitted Fontenot on the indecent contact counts involving E.M., and convicted him of the indecent contact counts involving H.N. Additional facts will be discussed as relevant to the argument below.

ARGUMENT

I. The Trial Court Correctly Admitted H.N.'s Child Protection Center Interview Under *State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994) and the Residual Exception to the Rule Against Hearsay, As Well As Under Iowa Rule of Evidence 5.801(d)(1)(b) As a Prior Consistent Statement.

Standard of Review.

In recent years, the Iowa Supreme Court has held that hearsay rulings are reviewed for the 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). The State believes the better statement of the law is contained in other decisions of the court that span nearly six decades: that hearsay, like all other evidentiary objections, should be reviewed for an abuse of discretion. *See*, *e.g.*,

State v. Weaver, 554 N.W.2d 240, 247 (Iowa 1996) ("The court has broad discretion in deciding evidentiary issues, including admissibility of hearsay evidence under rule 803(24)."); *State v. Williams*, 305 N.W.2d 428, 432 (Iowa 1981) ("The Court's review is limited to abuses of discretion, and a ruling by the trial court will be upheld so long as there is one hearsay theory of admission applicable under the circumstances."); *Pride v. Interstate Bus. Men's Acc. Ass'n of Des Moines*, 216 N.W. 62, 66 (Iowa 1927) ("No hard and fast rule has ever been laid down to determine what hearsay statement may or may not be deemed as res gestæ. The question is one which is addressed very largely to the sound discretion of the trial court."). The State nonetheless acknowledges that under *Paredes*, review is for the correction of errors at law.

Preservation of Error.

The defendant preserved error by unsuccessfully challenging the admissibility of the recorded interview at trial when it became apparent the State intended to use the recording. *See* Tr. Vol. III p. 185, line 5 – p. 194, line 24.

Merits.

Timothy Fontenot contends that the trial court erred in admitting evidence of H.N..'s taped forensic interview. Because the interview was admissible under the residual exception to the rule against hearsay pursuant to *State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994) and as a prior consistent statement under Iowa Rule of Evidence 801(d)(1)(b), Fontenot is unentitled to relief.

A. *State v. Rojas* and the Residual Exception to the Rule Against Hearsay.

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Iowa R. Evid. 5.801. Hearsay is generally not admissible unless it falls under one of numerous recognized exceptions. *See State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003); Iowa R. Evid. 5.802. In addition to the specific enumerated exceptions, the residual exception to the rule against hearsay permits admission of a hearsay statement if the interests of justice will be served and the trial court determines that the statement is evidence of a material fact that is more probative than other available evidence. Iowa R. Evid. 5.807; *State v. Neitzel*, 801 N.W.2d 612, 622-23 (Iowa Ct. App. 2011).

In *State v. Rojas*, the Iowa Supreme Court interpreted Iowa Code section 915.38(3) and the residual hearsay exception,[3] and concluded that forensic interviews of child sex abuse victims may be admitted under that exception. *See Rojas*, 524 N.W.2d at 663; *see also* Iowa Code § 915.38(3) (providing that recorded statements of child sexual abuse victims may be admitted into evidence if the statements substantially comport with the requirements of the residual exception). To invoke the residual hearsay exception, the offering party must meet five requirements: trustworthiness, materiality, necessity, service of the interests of justice, and notice. *Id.* at 662–63. Here, the *Rojas* factors have been satisfied.

1. Trustworthiness.

In *Rojas*, the Iowa Supreme Court reviewed the tape of a forensic interview similar to the one in this case and concluded it had "sufficient circumstantial guarantees of trustworthiness." *Rojas*, 524 N.W.2d at 663. The *Rojas* court based its conclusion on several

[3] Former Rules of Evidence 5.803(24) and 5.804(b)(5) were in effect when *Rojas* was decided. These rules were consolidated in 2009 into Rule 5.807, and "cases decided under either former Iowa Rule 5.803(24) or 5.804(b)(5) should provide authority with respect to interpretation of the new Iowa Rule 5.807." *See* Laurie Kratky Doré, 7 Iowa Practice Series, Evidence § 5.807:1.

factors: (1) “[t]he interviewer asked [the victim] open-ended, non-leading questions”; (2) the victim provided corroborating details, such as where other family members were when the abuse happened; (3) the victim described matters beyond the normal understanding of “the average ten-year-old,” such as how “something white c[ame] from her father’s penis”; (4) the victim’s statements were consistent; and (5) the videotape was “more reliable than many other forms of hearsay because the trier of fact could observe for itself how the questions were asked, what the declarant said, and the declarant's demeanor.” *Rojas,* 524 N.W.2d at 663.

The considerations that led the *Rojas* court to find the statements to be trustworthy are present here. For example, the trained forensic interviewer, Rachel Haskin, asked broad and open-ended questions. *See generally* Court’s Exhibit 1. She asked H.N. why she was there, and H.N. brought the subject of her “uncle” and his inappropriate touching into the conversation. *See* Court’s Exhibit 1. Moreover, H.N. provided various corroborating details, including the locations of the touching and the presence of family members in the home. *See* Court’s Exhibit 1. H.N.’s description of the molestation was beyond the ken of a typical eleven-year-old. *See*

Court's Exhibit 1 (H.N. describes Fontenot putting his finger inside of her vagina, touching her chest at the same time, and touching his own genitals periodically while touching her). Further, the victim's statements were consistent throughout the interview. *See* Court's Exhibit 1. Finally, as in *Rojas*, H.N.'s statements to Rachel Haskin were more reliable than other forms of hearsay because the factfinder could observe the actual out-of-court statements. The taped forensic interview allowed the jury to evaluate the credibility of the victim's statements by assessing her tone, tenor, body language, and demeanor in the very context in which the statements were made and were therefore "more reliable than many other forms of hearsay." *See Rojas*, 524 N.W.2d at 633.

2. Materiality.

The evidence of H.N.'s statements to forensic interviewer Rachel Haskin recounting the molestation was material. *See* Doré, Evidence § 5.807:1 ("Although the cases have not yet fully explored the meaning of this requirement, materiality probably requires only relevance to prove a non-trivial fact."). As the court said in *Rojas*, "Because the videotape contained [the victim's] statement that [the

defendant] sexually abused her, the materiality requirement is clearly met." *Rojas*, 524 N.W.2d at 663.

3. Necessity.

While the evidence of H.N.'s taped interview was not the only evidence recounting Fontenot's sexual misconduct, it was in some respects more detailed than her trial testimony two years later. The statements to Rachel Haskin were more specific and were obviously made closer in time to the molestation, containing details such as the description of clothing she and Fontenot were wearing two days earlier at the time of the last touching incident. *See* Court's Exhibit 1. The more detailed contemporaneous statements in the recorded interview made it the most probative evidence on the subject, and thus necessary. *See Neitzel*, 801 N.W.2d at 623 ("The admission of the evidence was necessary because [the victim] was of a young age when the abuse occurred and unable to testify to the abuse at trial years later, making the close-in-time video recitation from [the victim] the most probative evidence of the abuse that occurred."); *accord Rojas,* 524 N.W.2d at 663 (finding evidence necessary where victim recanted); *State v. Kone*, 562 N.W.2d 637, 638 (Iowa Ct. App. 1997) (same); *see also People v. Katt*, 662 N.W.2d 12 (Michigan

2003) ("…as time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks. It is for that reason that the tender-years rule prefers a child's first statement over later statements. By analogy, the child's second statement is preferable to still later statements. Similarly, if [the victim's] mother had a motive to induce her son to lie, she would have had much more opportunity to influence him before trial than before the [forensic] interview."). The fact that H.N. did not recant her allegations or retreat at trial does not make the CPC interview unnecessary:

> While [the victim] was able to answer most of the State's questions on direct examination, her answers were brief and provided only the basic details of the alleged abuse. [The victim] was unable to answer or clearly answer more specific and detailed questions, particularly those advanced during cross-examination. … Having viewed the videotape, we agree with the district court's assessment that the videotaped interview provided some responses that could not be successfully elicited from [the victim] during trial, and served to clarify and place in context other answers.

State v. Green, No. 04-0339, 2005 WL 1629993, at *2 (Iowa Ct. App. July 13, 2005); *State v. Pantaleon*, No. 15-0129, 2016 WL 740448, at *2 (Iowa Ct. App. Feb. 24, 2016) ("There was no physical evidence to

support the child's report and [the defendant] testified the child was lying… Consistency of the child's statement and the child's demeanor were key in assessing the child's credibility, making the video necessary.") The same is true in this case.

4. Service of the Interests of Justice.

Admission of the forensic tape under the residual exception also advanced the interests of justice and the general purposes of the rules of evidence. As the *Rojas* court concluded, admission of the taped interview "advances the goal of truth-seeking…" *See Rojas*, 524 N.W.2d at 663; *see also, e.g., State v. Cagle*, No. 17-1663, 2019 WL 1936271, at *7 (Iowa Ct. App. May 1, 2019); *Pantaleon*, *id.*; *State v. Hopwood*, No. 13-1479, 2015 WL 6509746, at *5 (Iowa Ct. App. Oct. 28, 2015); *State v. Olds*, No. 14-0825, 2015 WL 6510298, at *7–8 (Iowa Ct. App. Oct. 28, 2015); *State v. Green*, No. 04-0339, 2005 WL 1629993, at *2 (Iowa Ct. App. July 13, 2005); *In re A.J.S.*, No. 03-1675, 2004 WL 796185, at *2 (Iowa Ct. App. Apr. 14, 2004). In short, providing jurors with the recording of a minor victim's forensic interview furthers the interests of justice in a child sex abuse prosecution and did so here.

5. Notice.

Finally, the State gave notice of its intention to present evidence of H.N.'s recorded interview early on in the case. February 28, 2018 State's Notice of Intent to Present Victim ['s] Video Statement Pursuant to Iowa Code § 915.38(3); App. 20-22. Although the prosecutor indicated at the start of trial that he did not intend to use the CPC interview, he reserved the right to present the recording if the circumstances changed at trial; he noted that he would inform the court in chambers if that were the case, which he did after H.N. was cross-examined. Tr. Vol. I p. 16, lines 9-21; Vol. III p. 185, line 5 – p. 194, line 24.

In sum, each of the *Rojas* factors was satisfied here. The court properly admitted evidence of H.N.'s forensic interview under the residual exception to the hearsay rule and Iowa Code section 915.38(3). Fontenot's contention to the contrary should be rejected.

B. Iowa Rule of Evidence 801(d)(1)(b).

The evidence of the CPC interview was also admissible as a prior consistent statement. As Professor Laurie Doré has explained:

> To be admissible under Rule 5.801(d)(1)(B), the party seeking to admit the prior consistent statement must establish the following four elements: (1) the declarant must testify at trial

> and be subject to cross-examination concerning the prior statement; (2) there must be an express or implied charge of recent fabrication or improper influence or motive against the declarant; (3) the prior statement must be consistent with the declarant's challenged in-court testimony; and (4) the prior consistent statement must be made before the alleged motive to fabricate or improper influence arose. Thus, if cross-examination expressly or impliedly suggests that the witness' in-court testimony results from an improper motive or influence or is the product of recent fabrication, an out-of-court statement consistent with the in-court testimony may be admissible on the issue of credibility and as substantive evidence.

Doré, *Evidence* § 5.801:7 (2017) (footnotes omitted); Iowa R. Evid. 801(d)(1)(b); *State v. Johnson*, 539 N.W.2d 160, 164–65 (Iowa 1995) (adopting framework set out in *Tome v. United States*, 513 U.S. 150, 163–66 (1995) regarding timing of the motive to fabricate).[4]

[4] Although prior consistent statements under Rule 5.801(d)(1)(b) are deemed to be non-hearsay and are therefore admissible as substantive evidence, the court here admitted the CPC interview "not… for the truth of the matter asserted." Tr. Vol. III p. 194, line 13 – p. 195, line 5; Vol. V p. 4, line 2 – p. 7, line 17 (the trial court and the parties discuss and the defendant objects to Jury Instruction 12, which distinguishes between statements made under oath and statements not made under oath, which may be used "only… as a basis for disregarding all or any part of the witness's testimony"); *See* Jury Instruction 12; App. ––. Although this instruction incorrectly prohibited the jury's consideration of the CPC interview as substantive evidence, the error inured to the defendant's benefit. Further, as a concession to the defendant, the court also admitted

In this case, when defense counsel cross-examined H.N., he challenged her credibility by questioning her about her forensic interview and her deposition testimony. For instance, counsel pointed out that H.N. "never mentioned this camping trip story" during her CPC interview with Rachel Haskin, and counsel discussed H.N.'s prior statements in detail. Tr. Vol. II p. 143, line 18 – p. 155, line 25. He challenged the concept that her memory was "getting better" over time and wondered aloud whether she was just guessing when she said that she thought she told the forensic interviewer about the camping trip. Tr. Vol. II p. 148, line 11 – p. 149, line 4. Counsel continued with this theme during his closing argument:

> Her allegations are inconsistent about the times that she brought up. Again, with the idea of the camping and whether her breasts were touched. She brought up some story about a recliner here that she never mentioned in the CPC interview or in her deposition.
>
> The most important thing I'd like to point out about [H.N.]'s testimony is you can say, you can say that she's a child, and she is. And you can say it would be natural for a child to forget things or be uncomfortable or be uncertain, but why does her memory get better over time? She goes from talking about certain incidents on the CPC tape, that she doesn't mention here in

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H.N.'s deposition. Tr. Vol. III p. 188, line 15 – p. 194, line 24; Vol. IV p. 23, line 7 – p. 24, line 11 (H.N.'s deposition read into the record).

> court, to not being sure about anything in her deposition, to then coming here ten months after that and being sure about everything. How come she got better -- how come her memory got better?

Tr. Vol. V p. 33, line 19 – p. 34, line 8.

The criteria of Rule 5.801(d)(1)(b) were satisfied here. The timing of the express or implied recent fabrication allegation comports with the requirements of the rule. In *State v. Johnson*, the Iowa Supreme Court overruled *State v. Gardner*, 490 N.W.2d 838, 840-42 (Iowa 1992), and concluded that a statement is admissible as a prior consistent statement only if it was made "before the alleged recent fabrication, improper influence or motive to fabricate arose." *Johnson,* 539 N.W.2d at 165; *United States v. Beaulieu*, 194 F.3d 918, 920 (8th Cir. 1999) (statements by sex abuse victim made to her mother, friend, nurse and psychologist were not admissible as prior consistent statements because "defense counsel simply argued S.L. had made up the story from the start").

Fontenot contends that his case is indistinguishable from *Johnson*. Defendant's Brief, p. 17. In *Johnson*, however, the motive to fabricate arose at the inception of the allegations. The thirteen-year-old victim was having difficulty getting along with Johnson – her

adoptive father – and her mother, both of whom disapproved of the victim's boyfriend. *Johnson*, 539 N.W.2d at 161. Because the victim's mother had sent her to live with Johnson and Johnson was considering sending his daughter away to the Masonic Children's Home in Illinois, his theory of defense was that she concocted false sexual allegations against him to win freedom from her strict and disapproving parents. *Id.*

Here, in contrast, the defense sought to impeach the victim by suggesting that she was adding allegations or *changing* her story, starting from the initial disclosure to the forensic interview to the deposition, and culminating in her trial testimony. The defendant's suggestions that the victim's memory was getting better and better by the time of trial is a different theory of defense than Johnson's, and it puts her recorded statements squarely in the category of prior consistent statements admitted to rebut an express or implied charge of recent fabrication. The charge of fabrication in this case was that the victim was lying at trial, and her earlier CPC statements were admissible to establish that she made the same allegations in substance from the outset. The CPC interview was properly admitted.

C. Harmless Error.

Although the State maintains that evidence of the forensic interview in this case was necessary and properly admitted, it alternatively argues that if this court disagrees, it should find the admission of the recorded CPC interview harmless. "This court has a long history of not reversing [convictions] on the ground of technical defects in procedure unless it appears in some way they have prejudiced the complaining party." *State v. Negrete*, 486 N.W.2d 297, 299 (Iowa 1992) (internal citation omitted). The State can establish harmless error by showing that the rights of the complaining party have not been so injuriously affected that a miscarriage of justice occurred. *State v. Traywick*, 468 N.W.2d 452, 454-55 (Iowa 1991). Courts "consider a variety of circumstances in determining the existence of harmless error, including the existence of overwhelming evidence of guilt." *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). Here, the allegations that H.N. made during her CPC interview, while more specific, were largely consistent with her trial testimony. Given her credible testimony at trial, it is unlikely that the jurors would have reached a different conclusion had they not heard the CPC interview. *See Pantaleon*, *id.* at *2 ("Finally, even

if the [CPC] video evidence was unnecessary, the evidence was merely cumulative and therefore not prejudicial.”). If the court finds that the evidence was unnecessary or otherwise inadmissible, it should also conclude its admission was harmless. Fontenot’s convictions for indecent contact with a child should be affirmed.

CONCLUSION

For the reasons discussed above, the State respectfully requests that the court affirm Timothy Michael Fontenot’s convictions for two counts of indecent contact with a child.

REQUEST FOR NONORAL SUBMISSION

The defendant has requested nonoral submission. The State agrees that the issues presented are fully addressed in the briefs and can be decided without further elaboration. In the event that the court grants the defendant argument, however, the State asks to be heard as well.

Respectfully submitted,

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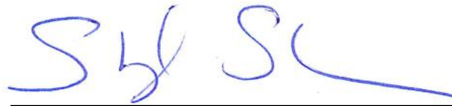

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