IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DERRIS L. SWIFT, Defendant-Appellant.	)))))))))	S.CT. NO. 18-2197

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY
HONORABLE HENRY W. LATHAM II, JUDGE (JURY TRIAL, MOTION FOR NEW TRIAL, AND SENTENCING)

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 Derris Swift No. 6635121, Clarinda Correctional Facility, 2000 N. 16th Street, Clarinda, IA 51632.

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the district court erred in admitting the prior statements of Ityleonia Watson, Ameshia Dixon, and Ashanti Dixon as impeachment evidence?

II. Whether trial counsel rendered Ineffective Assistance by failing to object to the Limiting Instruction, as it as it did not adequately convey the distinction between impeachment and substantive evidence?

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statements were then used not for a proper impeachment purpose but were instead used for an improper hearsay purpose – as substantive evidence.

Further, even aside from the Turecek violation, the State's recitation of Watson's prior statements, and the admission of Ashanti and Ameshia's prior taped statements (Exhibits 85, 87, and 88) after they'd already acknowledged the prior statements, was also itself improper impeachment.

II. Inadequate Limiting Instruction: Swift also respectfully urges that the limiting instruction set forth in ISBA Model Jury Instruction 200.42 fails to adequately convey to the jury the distinction between impeachment and substantive evidence.

STATEMENT OF THE CASE

Defendant-Appellant Swift seeks further review from the Court of Appeals decision affirming his jury trial convictions.

ARGUMENT

I. The district court erred in admitting the prior statements of Ityleonia Watson, Ameshia Dixon, and Ashanti Dixon as impeachment evidence.

A. <u>Preservation of Error</u>: Defense counsel filed a motion in limine seeking to prevent recitation of out-of-court hearsay statements, including hearsay received from witnesses during police interviews and hearsay within hearsay (such as Ameshia telling officers what Ashanti allegedly told her). The court reserved ruling until the matter arose at trial. (7/17/18 Def.Mot.Limine)(App.14-15); (Trial p.1 L.1-25, p.7 L.1-6, p.13 L.15-25, p.15 L.21-p.18 L.11).

During the course of trial, the prosecutor attempted to impeach the State's own witnesses (Ityleonia Watson, Ameshia Dixon, and Ashanti Dixon) by confronting them with their own prior inconsistent statements. Defense counsel objected to

such efforts during Ityleonia Watson and Ameshia Dixon's testimony as improper impeachment of the State's own witnesses, though counsel did not specifically reference "improper impeachment" as the basis for objection during Ashanti Dixon's testimony. See (Trial p.107 L.1-p.110 L.21) (Ityleonia Watson); (Trial p.309 L.16-p.310 L.14) (Ameshia Dixon); (Trial p.338 L.1-12, p.338 L.10-p.339 L.4, p.339 L.5-25) (Ashanti Dixon). Subsequently, when the State sought to admit video and audio recordings of the prior inconsistent statements of Ameshia and Ashanti Dixon (Exh.85, 87, and 88), defense counsel objected on grounds that the State was improperly seeking to impeach its own witnesses with prior inconsistent hearsay statements, and that the State was also improperly seeking to introduce extrinsic evidence of such prior hearsay statements. The court overruled all of the foregoing defense objections, and the State was permitted to thereby place before the jury the prior inconsistent statements of the State's own witnesses. (Trial p.352 L.20-p.363 L.10,

p.372 L.18-23, p.375 L.22-p.377 L.2, p.379 L.18-p.380 L.15, p.385 L.1-p.408 L.12, p.408 L.22-p.409 L.6, p.414 L.17-p.415 L.25, p.440 L.6-p.448 L.1, p.449 L.9-p.450 L.5).

As to the questions posed by the State to Ityleonia Watson and Ameshia Dixon as well as the State's admission of Exhibits 85, 87, and 88 into evidence, error was preserved by defense counsel's objections that the State was improperly impeaching its own witnesses.

Although counsel did not specifically reference "improper impeachment" as the basis for objection during Ashanti Dixon's testimony, Swift respectfully urges error was also adequately preserved as to the State's confrontation of Ashanti with prior statements during its questioning of Ashanti. Defense counsel "is not required to repeat objections to preserve his right on appeal when subsequent questions raise the same issue." State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976); State v. Padgett, 300 N.W.2d 145, 146 (Iowa 1981). "Repeated objections need not be made to the same class of

evidence." Kidd, 239 N.W.2d at 863 (citing State v. Miller, 229 N.W.2d 762, 768 (Iowa 1975) and State v. Miller, 204 N.W.2d 834, 841 (Iowa 1973)); Padgett, 300 N.W.2d at 146. The court's overruling of defense counsel's improper impeachment challenges during the testimony of Ityleonia Watson and Ameshia Dixon served to "adequately inform defense counsel that additional objections on the same ground to testimony of the same kind would be to no avail." Padgett, 300 N.W.2d at 146. Error should be deemed preserved as to the prior inconsistent statements introduced during Ashanti Dixon's testimony as well.

Further, trial counsel apparently believed he'd also objected to the State's confronting Ashanti with prior inconsistent statements as improper impeachment of its own witness. See (Trial p.399 L.14-20) ("[DEFENSE COUNSEL]: As you recall, *over my objection she [the prosecutor] was trying to impeach her own witness [Ashanti Dixon]*. Basically read into the record all the comments that we see in this interview here.

Asked her whether or not she had seen the interview an hour or so before and asked her whether or not she had said those things.") (emphasis added). The State nor the court appeared to disagree with defense counsel's assertion that he had raised the improper impeachment objection during Ashanti's Dixon's testimony as well. Given that the court repeatedly considered and overruled defense counsel's improper impeachment objections to the State's confronting its own witnesses with their prior inconsistent statements, "the goals of our error-preservation rules have been met". State v. Mann, 602 N.W.2d 785, 790 (Iowa 1999). Error should thus be deemed preserved as to the prior inconsistent statements introduced during Ashanti Dixon's testimony as well.

Alternatively, to the extent this Court determines error was not sufficiently preserved as to any of the evidence challenged herein, Swift respectfully requests such challenge be considered under the Court's familiar ineffective assistance

of counsel framework as discussed below in subsection 3. See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: Hearsay violations, including claims that hearsay evidence was improperly admitted under the guise of impeachment are reviewed for errors at law. State v. Long, 628 N.W.2d 440, 447 (Iowa 2001); State v. Wixom, 599 N.W.2d 481, 484 (Iowa Ct. App. 1999) (Turecek violation). If preserved, such errors warrant relief except where harmless. Wixom, 599 N.W.2d at 484.

1). Violation of Turecek.

Defense counsel's repeated objection that the State was improperly impeaching its own witnesses preserved a claim of a Turecek violation. See e.g., State v. Turecek, 456 N.W.2d 219, 225 (Iowa 1990) ("The right given to the State *to impeach its own witnesses*... is to be used as a shield and not as a sword."); State v. Wixom, 599 N.W.2d 481, 485 (Iowa Ct. App. 1999) ("It was error for the trial court *to allow the State to impeach its own witness* when it knew, prior to calling [the

witness], she was denying she made previous statements.") (emphasis added, citing Turecek, 456 N.W.2d at 225.). See also State v. Tracy, 482 N.W.2d 675, 679 (Iowa 1992) (hearsay objection properly preserved error on Turecek issue).

Generally, "Any party, including the party that called the witness, may attack the witness's credibility." Iowa R. Evid. 5.607. But "[t]he right given to the State to impeach its own witnesses" under Rule 5.607 is limited in that it must "be used as a shield and not as a sword." Turecek, 456 N.W.2d at 225. "The State is not entitled under rule [5.]607 to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible." Id.

This limitation was violated in the present case. In calling Ityleoni Watson, Ameshia Dixon, and Ashanti Dixon, the State put on the stand witnesses "who [were] expected to give unfavorable testimony", so it could then confront them with their otherwise inadmissible prior hearsay statements.

Turecek, 456 N.W.2d at 225. See also Tracy, 482 N.W.2d at 679 (Turecek applies to witnesses "who it expects to give unfavorable testimony").

a). The witnesses were "expected to give unfavorable testimony":

Prior to trial, the prosecutor expressed concerns that Ashanti and her family were not responding to the State, and that the case might "ultimately nee[d] to be tried without [their] cooperation". (7/19/18 Mot.Continue)(App.19-21). Such continued concerns were again expressed by the prosecutor at the start of trial. (Trial p.19 L.6-17). And when Ashanti and Ameshia ultimately appeared on the day of their trial testimony, the prosecutor met with them both over an extended lunch recess confronting them with their prior recorded statements implicating Swift. (Trial p.252 L.4-6, p.266 L.13-19, p.267 L.13-20, p.269 L.9-24, p.295 L.10-p.296 L.6, p.298 L.6-17, p.309 L.25-p.310 L.2, p.310 L.16-25, p.311 L.13-16, p.313 L.21-p.314 L.3, p.316 L.21, p.317 L. 1-3, p.317 L.25-p.318 L.1, p.323 L.15-25, p.336 L.12-p.339 L.25, p.354

L.16-18, p.355 L.17-22). As to all three witnesses, but particularly Ashanti and Ameshia, it is apparent the State "expected [them] to give unfavorable testimony" but nevertheless placed them on the witness stand intending to impeach them with their prior statements. Turecek, 456 N.W.2d at 225. See also Tracy, 482 N.W.2d at 679. As to all three witnesses, but particularly Ashanti and Ameshia, it is apparent the State "expected [them] to give unfavorable testimony" but nevertheless placed them on the witness stand intending to impeach them with their prior statements. Turecek, 456 N.W.2d at 225. See also Tracy, 482 N.W.2d at 679.

b). The witnesses' prior statements were hearsay not otherwise admissible as substantive evidence:

As to the prior statement of Ameshia telling Officer Pojar that Ashanti said "Debo shot me" (captured on Exhibit 85), neither Ashanti's statement to Ameshia, nor Ameshia's statement to law enforcement fell within the excited utterance exception as found by the district court. The video capturing

Ameshia's demeanor at the time she spoke with law enforcement, demonstrates that she was not "under the stress of excitement" required to fall within the excited utterance exception to the hearsay rule. Iowa R. Evid. 5.803(2) (2017). Her demeanor was calm, and her statements were not spontaneous but instead made in response to police questioning (Trial p.359 L.8-21, p.357 L.6-15); (Exh.85 at 00:34-00:39). And as to the underlying statement from Ashanti to Ameshia, Ashanti had already driven to safety and knew police were on their way at the time she called her mother. Both Ashanti and Ameshia indicated Ashanti was not under the stress of excitement at that time. (Trial p.44 L.8-15, p.335 L.19-22, p.308 L.10-16, p.309 L.11-15, p.335 L.23-p.336 L.1, p.336 L.9-11, p.347 L.7-11, p.336 L.9-11, p.438 L.2-8). Thus, neither level of the double hearsay implicated in Ameshia's statement to law enforcement fell within the excited utterance exception.

As to prior remaining prior statements challenged herein, no hearsay exception was asserted or found below. (Trial p.107 L.1-p.110 L.21, p.380 L.2-15, p.385 L.1-p.409 L.6, p.414 L.17-p.416 L.3, p.440 L.6-p.450 L.5; Sent. p.13 L.8-17).

Turecek thus applied and prohibited the State from introducing the otherwise inadmissible prior hearsay statements under the guise of impeachment.

c). Not Harmless:

Reversal is here required, as the error was not harmless. Wixom, 599 N.W.2d at 484.

The strength of the State's case rested on its claim that Ashanti had recognized Swift as her shooter, but had deliberately and falsely testified at trial that it was not Swift. The challenged prior statements of the witnesses were crucial to proceeding on this theory. Absent Ashanti's purported recognition of Swift as the shooter, the State's case against Swift was not strong or overwhelming. There was no physical evidence tying Swift to the shooting. No evidence tied him to a

gun before or after the shooting. No fingerprint or DNA evidence tied him to the shell casings. No gunshot residue or other forensic testing indicated his recent firing of a weapon. Defendant was located in the vicinity but explained that he had merely heard the shots and (like others in the area) fled in fear for his safety. Law enforcement acknowledged that Swift's clothing and appearance did not match the clothing and appearance of the shooter as described by various witnesses.

2). Even if no violation of Turecek, still improper impeachment as to Ityleonia Watson and the Admission of Exhibits 85, 87, and 88.

Even if there was no Turecek violation, the State's recitation of Ityleonia's prior statements, and the admission of Ashanti and Ameshia's prior taped statements (Exhibits 85, 87, and 88) after they'd already acknowledged the prior statements was improper and did not fall within the limits of proper impeachment. See State v. Gilmore, 259 N.W.2d 846, 852 (Iowa 1977) (discussing limits of proper impeachment).

a). Ityleonia Watson Statements:

In response to Ityleonia Watson's direct examination testimony that she did not remember certain matters (Trial p.102 L.23-p.103 L.5, p.103 L.22-p.104 L.2, p.104 L.18-p.105 L.16), the prosecutor (over defendant's objection) confronted her with the specific substance of numerous prior statements she allegedly made. Ityleonia did not recall the statements, but the prosecutor's questions recited the prior statements and thereby placed them before the jury. (Trial p.106 L.15-17, p.107 L.1-p.110 L.23).

The district court erred in overruling defense counsel's objection of improper impeachment. The witness's prior statements were not used for a proper impeachment purpose but were instead used for an improper hearsay purpose.

The prosecutor improperly recited, in detail, the witness's prior out-of-court statements when questioning the witness. In detailing the content of the prior statements, the State attempted to use the prior statements for the truth of the

matter asserted. See State v. Sowder, 394 N.W.2d 368, 371 (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," exceeding mere impeachment.). The witness denied making the statements, and no other witness testified that she had in fact made the prior statements recited by the prosecutor in her questioning. But by reciting the specific content of the prior hearsay statements in the questions themselves, the prosecutor improperly placed those prior statements before the jury. Once recited and detailed in the prosecutor's questions, it did not much matter what the witness said in response; whether she acknowledged or denied the prior statements, they were nevertheless placed before the jurors and considered by them.

It is well-established that:

> The State is not permitted by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of

> evidence which is otherwise not admissible and thereby prevent the defendant from having a fair trial.

State v. Carey, 165 N.W.2d 27, 32 (Iowa 1969)(quoting State v. Haney, 18 N.W.2d 315, 317 (Minn. 1945)). "An attorney should not suggest in his questions facts that may be prejudicial unless there is or will be evidence of such facts." Carey, 165 N.W.2d at 33 (other citation omitted). The prosecutor's questions placed before the jury otherwise inadmissible "backdoor hearsay". State v. Huser, 894 N.W.2d 472, 497 (Iowa 2017). "While the form of the question and answer does not produce hearsay in the classic or textbook sense," in that the witness denied the prior statements, "it is nevertheless designed to circumvent the hearsay rule and present the jury with information from unsworn, out-of-court sources." Schaffer v. State, 721 S.W.2d 594, 597 (Tex. Ct. App. 1986).

Further, impeachment by confronting a witness with prior inconsistent statements is not authorized where the

witness at trial merely fails to *remember the underlying facts* of the incident, as distinct from testifying the incident occurred in a manner different and contrary to the way she previously said it occurred. Gilmore, 259 N.W.2d at 852. In such a case, "[t]he State [is] free to try to make her admit she remembered the underlying facts… but [is] not free to read into evidence the prior statement." Id. at 857.

Here, because the witness's trial testimony was that she could not remember the underlying facts after Z. was brought inside (and not that the underlying facts had occurred in a manner differently than she'd stated in her prior statement), "[t]he State was free to try to make her admit she remembered the underlying facts… but was not free to read into evidence the prior statement." Id.

The error was not harmless. The strength of the State's case rested on its claim that Ashanti had recognized Swift as her shooter, but had deliberately and falsely testified at trial that it was not Swift. The suggestion that Ashanti had

deliberately changed her story to protect Swift was bolstered by the State's implication that her family members (Ameshia and Ityleonia) had similarly done so. As to Ityleonia, this implication was created by confronting Ityleonia with (and thereby placing before the jury) her inadmissible prior hearsay statements reciting damaging details left out of her trial testimony.

Further, Ityleonia testified (as had Eziah), that after receiving the phone call from Ashanti, Ameshia told her only that Ashanti had been shot but not by whom. (Trial p.105 L.8-14). The State's improper impeachment of Ityleonia with inadmissible prior hearsay statements improperly undermined Ityleonia corroboration as to this important point of contention.

In light of the prejudicial impact of the erroneously admitted evidence, Swift must be afforded a new trial on Counts 1, 2, and 4.

b). Ashanti and Ameshia Dixon's statements as captured on Exhibits 85, 87, and 88.

In her trial testimony, Ameshia acknowledged that she had previously told officers on January 24 that Ashanti said "Debo shot me." (Trial p.310 L.25-p.311 L.25, p.312 L.13-p.314 L.16, p.315 L.13-p.317 L.18). Further, in her trial testimony, Ashanti acknowledged she had previously told Calvin Davis during a jail call, in reference to Swift, "Had he not shot me, he could have had me" and "Who the fuck tries to kill your girlfriend over some dumb shit?" (Trial p.336 L.12-p.339 L.25). Given that the witnesses' trial testimony acknowledged making these prior inconsistent statements, there was no contrary testimonial assertion to impeach with the extrinsic evidence of those statements (the Exhibit 85 and 87 recordings). See State v. Berry, 549 N.W.2d 316, 319 (Iowa Ct. App. 1996) ("If the witness admits to making the prior statement" extrinsic evidence is not necessary to impeach); State v. Wolfe, 316 N.W.2d 420, 422 (1981) (once the witness "admits making the prior inconsistent statement, then that prior statement is not admissible."). Because the purportedly

impeaching prior inconsistent statements were already acknowledged by Ameshia and Ashanti, the inconsistency was already placed before the jury. At that point, playing the actual video for the jury served only to heighten the danger that the prior inconsistent statements (both those acknowledged during the witnesses' testimony and those recited again in the recordings) would have been treated by the jury as *substantive evidence* rather than only *impeaching evidence*. See Berry, 549 N.W.2d at 318 (impeachment evidence is not admissible to prove its truth but only "to demonstrate the witness is not reliable.").

As to the Exhibit 88 recorded interview, Ashanti initially did not remember telling Detective Robinson "that everything was covered except for the eyes", saying instead at trial that "His face was still covered." Ashanti also initially did not recall telling Detective Robinson "I don't have no doubt in my mind it was probably Debo"; she insisted, "I strictly remember saying that the person who shot me was in all black." (Trial p.347

L.5-p.349 L.25). However, on cross-examination, she acknowledged that even if she had made such statements to Detective Robinson, it was at a time she knew law enforcement had concluded Swift to be the perpetrator, having arrested and charged him. (Trial p.349 L.2-p.350 L.21). Defendant urges that this was a sufficient acknowledgement of the prior statements, so that no further extrinsic evidence of the prior statement (Exhibit 88) was properly admissible for impeachment purposes. The inconsistency was already placed before the jury, and the fact that the witness sought to explain such inconsistency does not amount to a denial. See Berry, 549 N.W.2d at 319 (once acknowledging the prior statement, the witness is allowed to explain the inconsistency).

However, even if this Court concludes Ashanti did not sufficiently acknowledge or admit making the prior inconsistent statements relating to her January 29 interview (that "everything was covered except for the eyes" and "I don't have no doubt in my mind it was probably Debo"), the proper

course was to have Detective Robinson testify that these particular statements were made – not to place into the record the entire nearly 30-minute long videotaped interview during which both Ashanti and Ameshia made numerous other statements. This alternative course was specifically urged by defense counsel below, but denied by the court. (Trial p.393 L.L.19-p.394 L.11, p.401 L.8-11, p.402 L.19-p.402 L.1).

The Exhibit 88 recorded interview included a number of statements (other than the above-quoted impeaching statements) that were not otherwise in the record.

The video contained statements by Detective Robinson purporting that that Ashanti had earlier identified Swift as the shooter when he spoke with her at the hospital on the day of the shooting prior to surgery. (Exh.88 at 14:13-14:26).[1] The

[1] During subsequent cross-examination by the Defense, Detective Robinson acknowledged that Ashanti told him at the hospital that she did not recognize her shooter. In response, Detective Robinson "explained to [Ashanti] that we had Defendant in custody and asked her what he did." He also "presented Ashanti with the information" that her mother (Ameshia) told officers at the scene that Ashanti called from

State relied on this aspect of the video, in particular, during its closing argument. (Trial p.554 L.10-16).

The video also contained additional statements and speculation concerning Swift's clothing, that was not otherwise in the record. Detective Robinson states on the video that when Ashanti identified Swift on Wednesday (the day of the shooting) Ashanti hadn't said mentioned his face being covered up, and he asked if she knows what he was covered up with. Ashanti responded that "He has another black jacket that he bought" and she "guess[ed]" that's what he could have had to cover his face up. Detective Swift asked "So that was the black jacket that was around his red sweatshirt" and Ashanti responded "I'm guessing so, because it wasn't the one

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the Gas Depot and told her "Debo shot me". Ashanti responded that "the only thing she said was she told her mother that she was shot, she claims she never told her mother that Swift was the person responsible for the shooting." Again, "At this point of the interview, Ashanti said she never saw Swift with a gun and never saw him shoot her." (Trial p.469 L.3-473 L.20).

in the car, because he had another black jacket and his phone in the car" that got left behind with her. (Exh.88 at 11:22-11:57). Later on there are statements by Ashanti and her mother referencing a hooded jacket that zips all the way up and covers the area above the mouth and below the nose, like "ninja hood" jacket, a "ski mask" jacket, or something that is worn to go hunting out in the woods. (Exh.88 at 15:27-15:39, 18:51-19:25). These unclear and speculative statements by Ashanti and Ameshia concerning clothing were not otherwise in the record before the jury. They were heard by the jury in Exhibit 88, which was admitted only as impeachment evidence and not as substantive evidence. But the fact that this exhibit contained so much additional information *not otherwise in the record* rendered it an inevitability that the jury would have viewed and treated the prior statements as substantive evidence.

Additionally, Ashanti and Ameshia can be heard on the video construing Swift's statements on the January 26 jail call

as being apologetic but careful to avoid self-incrimination. (Exh.88 at 15:52-16:36). Swift's statements on the jail call itself (Exhibit 86) are not inherently or explicitly admissions by Swift; but when colored by such a construction by Ashanti and Ameshia in the Exhibit 88 video, the jury would perceive or construe Swift's jail call in that way as well.

The video also contains a reference by Ameshia, following Ashanti's statement that she doesn't know why he might perpetrate the shooting, speculating that Swift was on drugs. (Ex.88 at 22:14-22:28). While it was certainly in record evidence that Swift was located with a small amount of marijuana in his pocket, given the fact that marijuana is not typically viewed as triggering violent outbursts, the jury would likely have inferred Swift's involvement in other drug use.

Finally, the Exhibit 88 video also includes statements from Ameshia characterizing Swift's demeanor that morning as "a different type of mad" and "a furious mad" like "at that precipice at that moment just when you're furious at that

moment, that's the kind of look he had in his eyes, you know like when he was talking" it "just looked like he wasn't himself" during the argument that morning. (Exh.88 at 22:26-23:00). This characterization of Swift was not otherwise in evidence at trial but would likely link up Swift in the jury's mind with witness Christine Baehre's testimony that the shooter wearing a "horrif[ying]" expression of "[c]omplete madness", "insanity", and "anger" like she'd never seen before. (Trial p.52 L.10-23, p.57 L.13-p.62 L.5).

For the reasons discussed above, even if there was no Turecek violation, the introduction of the Exhibit 85, 87, and 88 recordings of Ashanti and Ameshia's prior statements was not within the scope of proper impeachment. They should not have been admitted into evidence and placed before the jury. The sheer volume of prior hearsay statements placed before the jury thereby rendered it inevitable that the jury would view the prior statements as substantive evidence and not only for the limited impeachment purpose of evaluating witness

credibility. Swift must be afforded a new trial on counts 1, 2, and 4.

3). Ineffective Assistance of Counsel Alternative.

If error was not preserved as to the improper impeachment evidence challenged above, counsel rendered ineffective assistance of counsel thereby. See U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015).

Counsel has the duty to know the applicable law and to protect the defendant from conviction under a mistaken application of the law. State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998). Trial counsel also has a duty to protect defendant from conviction under improper or inadmissible evidence, including hearsay statements improperly admitted as impeachment evidence. State v. Tracy, 482 N.W.2d 675 (Iowa 1992).

For the reasons argued above, the evidentiary challenges asserted herein were meritorious and counsel had a duty to properly object and obtain exclusion of the improper evidence. Further, for the reasons argued above, Swift was prejudiced by the improper admission and use of this evidence. The degree of prejudice generated by the improperly admitted evidence satisfies even the heightened Strickland standard. There is at least a reasonable probability that, but for counsel's failure to properly procure exclusion of the challenged evidence, the outcome of the trial would have been different. Confidence in the outcome is undermined, and Swift should be afforded a new trial on Counts 1, 2, and 4. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

II. Trial counsel rendered Ineffective Assistance by failing to object to the Limiting Instruction, as it did not adequately convey the distinction between impeachment and substantive evidence.

A. Preservation of Error: A claim of ineffective assistance of counsel is an exception to the general rule of

error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

B. Standard of Review: A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland v. Washington, 466 U.S. 668, 694 (1984); State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015). Constitutional claims of ineffective assistance of counsel are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). To establish an ineffective assistance claim, a defendant must demonstrate both (1) a breach of essential duty, and (2) prejudice in the form of a reasonable probability of a different result sufficient to undermine confidence in the outcome. State v. Carrillo, 597 N.W.2d 497, 500 (Iowa 1999); Strickland, 466 U.S. at 694.

C. Discussion: It is well-established that "impeachment evidence" may be used "only for the purpose of undermining the witness' credibility, and not as substantive evidence." State v. Belken, 633 N.W.2d 786, 794 (Iowa 2001). That is,

where a prior statement is admitted only for an impeachment purpose, it cannot be used as evidence of "the truth of the matter asserted" in the prior statements. Brooks v. Holtz, 661 N.W.2d 526, 530-31 (Iowa 2003). See also State v. Berry, 549 N.W.2d 316, 318 (Iowa Ct. App. 1996).

The jury was provided the following instruction concerning the use of the prior unsworn statements for impeachment, modeled after Iowa Criminal Jury Instruction 200.42 (Contrary Statements – Non-Party – Witness Not Under Oath):

> You have heard evidence claiming Ashanti Dixon, Ameshia Dixon and Eziah Dixon made statements before this trial while not under oath which were inconsistent with what the witnesses said in this trial.
>
> Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witnesses.
>
> Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so.

> Do not disregard the testimony if other evidence you believe supports it, or if you believe it for any other reason.

(Jury Instruction 15). See also *Iowa State Bar Ass'n, Iowa Criminal Jury Instruction* No. 200.42 (2018). Defense counsel did not object or request different language in this instruction. (Trial p.494 L.1-12, p.497 L.5-13).

Defendant respectfully urges that the foregoing language would not adequately inform a jury concerning the limitations placed on the impeachment evidence admitted in this case. The instruction advises the jury that it may "use [the prior statements] only to help you decide if you believe the witnesses." But this does not convey or inform the jury that they cannot use the evidence *as substantive evidence*, or as *evidence of the truth of the matter asserted in the prior statements*. The instruction should more explicitly advise that: "Any prior inconsistent statements made by a witness can be considered only to evaluate the credibility of the witness. The prior statements cannot be treated as evidence

of the truth of the matter asserted in the statement, or as themselves substantive evidence supporting the elements of the offense." These principles are well-established in Iowa Law. See e.g., Belken, 633 N.W.2d at 794; Brooks, 661 N.W.2d at 530-31; Berry, 549 N.W.2d at 318.

Uniform instructions are not "preapproved" by the Iowa Supreme Court. See State v. Robinson, 859 N.W.2d 464, 490 (Iowa 2015) (Wiggins, J., dissenting) ("we can never delegate the formulation of the law to the instruction committee"). Because the jury instruction herein did not adequately convey the distinction between impeachment and substantive evidence and the limited use to which impeachment evidence could be put, trial counsel was ineffective for failing to object to the instruction.

Swift was prejudiced by his attorney's failure. In the present case, numerous prior out-of-court statements were placed before the jury for impeachment purposes, but the jury was not adequately informed of the limited use it could put

such statements to. A number of the prior statements, moreover, related specifically to the matter of whether Ashanti had recognized her shooter as Swift. Particularly to the prior statements of Ashanti and Ameshia identifying Swift as the shooter, the above instruction would do little to inform the jury *that they cannot use such prior statements for the truth of the matter asserted* – that Swift was the shooter. As discussed above, the State's case rested substantially on Ashanti's purported recognition of Swift as the shooter based on the prior out-of-court statements. There is a reasonable probability that, but for counsel's failure to procure a jury instruction properly advising the jury of the limitations placed on prior statements, the jury would have found the State failed to prove Swift's identity as the shooter. Confidence in the outcome is undermined, and a new trial should be granted on Counts 1, 2, and 4.

CONCLUSION

Defendant-Appellant Swift respectfully requests a new trial on Counts 1, 2 and 4.

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 $1.80 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 5,516 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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