IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-0838

STATE OF IOWA,
Plaintiff-Appellee

vs.

ZACHARY TYLER ZACARIAS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY, JUDGE ROBERT B. HANSON

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. The State's interpretation of Iowa Code § 708.2(5) raises due process concerns.

The State contends that § 708.2(5) should be interpreted broadly. (Appellee Br. 25-40). The Court should reject the State's attempt to cover its speedy trial error by broadening a criminal statute in contravention of the rules of statutory construction and due process.

The State's arguments for a broad interpretation subverts general due process principles applied to protect a defendant's rights in a criminal case. The Court should not lose sight of those principles, because its role "is to apply the statute as it is written – even if we think some other approach might accord with good policy." *State v. Nicoletto*, 845 N.W.2d 421, 427 (Iowa 2014) (quoting *Burrage v. United States*, 571 U.S. 204, 218 (2014)), *superseded by statute as stated in In re J.C.*, 857 N.W.2d 495.

A. The overlap between the sex abuse and the assault by penetration statues is a problem here, where the State broadened a statute beyond its parameters to cover a speedy trial violation.

The State dismisses Zacarias' argument that the assault by penetration statute is meant to be interpreted differently from the sex abuse statute with the general contention that "overlap between criminal statutes frequently occurs – and that is not, in itself, problematic." (Appellee's Br. 34). But, is the overlap between criminal statutes meant to save the State from a speedy trial violation and give it two bites at the apple?

Zacarias was initially charged with sex abuse in the third degree in violation of Iowa Code §§ 709.1 and 709.4(1)(a) and/or 709.4(1)(d) on August 1, 2017, in Polk County Crim. No. FECR306652. (Trial Info. FECR306652, Aug. 1, 2017).[1] On August 23, 2018, the defense motion to dismiss for a speedy trial violation was granted (Ord. Dismissal, FECR306652, Aug.23, 2018), and the State did not appeal. The present case was refiled by criminal complaint shortly after the first case was dismissed. (App. p. 3).

When a charge is dismissed for speedy trial violations, it cannot be re-filed. *State v. Johnson*, 217 N.W.2d 609, 612 (Iowa 1974). Charging this case as assault by penetration of an object allowed the State to get around its speedy trial violation and refile this case

[1] Judicial notice may be taken on appeal pursuant to Iowa R. Evid. 5.201(f). "The rule permits a court to take judicial notice of adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Iowa R. Evid. 5.201(a)-(b); *State v. Washington*, 832 N.W.2d 650, 655-56 (Iowa 2013). Although "[t]he general rules is that it is not proper for the court to consider or take judicial notice of the records of the same court in a different proceeding without an agreement of the parties," *see Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 861 (Iowa 1990), these records are referenced only for context and they are not determinative of the outcome in this case.

without running afoul of the rule in *Johnson*. The State's broad interpretation of "object" allowed it to proceed in this case as if it were a sex abuse case and the speedy trial violation never happened. The State always presented and argued the case as a sex abuse case.[2] (TT II 75:19-76:23, 78:12-15, 79:11-14 ("no means no"); TT V 10:6-12, 12:12-13:3, 14:16-22, 36:17-24, 37:23-38:3, 38:20-39:5 ("If you're going to make a story up, wouldn't you make up that you remembered what happened, that you remembered that this guy is on top of you, that this guy is forcing sex acts."), 39:17-22, 40:10-14, 41:2-20).

These statutes do not violate the rule in *Johnson* when narrowly, properly construed – but the broader the definition of assault gets under Iowa Code § 708.2(5) grows, the more concerning the overlap gets. Broad definitions of criminal conduct do not just violate due process, they make it easier for the State to disregard other constitutional protections afforded criminal defendants, such as speedy trial rights and double jeopardy protections.

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[2] Both opening statements and closing arguments are revealing of a party's strategy. *State v. Fountain*, 786 N.W.2d 260, 267 (Iowa 2010).

B. Criminal statutes are not interpreted broadly.

It is a principal rule of statutory construction that "[i]n interpreting a criminal statute, provisions establishing the scope of liability are to be strictly construed with doubts resolved therein in favor of the accused." *Nicoletto*, 845 N.W.2d at 427 (collecting cases). This means that "where there is room for debate, one should not choose the construction that disfavors the defendant." *Burrage*, 571 U.S. at 218 (Ginsburg, J., concurring). This rule of construction holds true even when a narrow construction would require the state to prove more than just that the defendant was a bad actor. *See Nicoletto*, 845 N.W.2d 421 (State must prove that defendant is within the class of persons covered by the criminal statute, despite obvious policy reasons for prohibiting coaches from having sex with students they oversee); *State v. Halverson*, 857 N.W.2d 632, 635-38 (Iowa 2015) (in prosecution for possessing contraband in a halfway house under, a class "D" felony, State had to prove the halfway house was covered by statute limited to facilities "under the management of the department of corrections," despite obvious policy reasons for enhanced penalties for marijuana possessed in halfway houses).

A definition of "object" that includes body parts is not consistent with a narrow interpretation of the statute, despite the State's proffered policy reasons for criminalizing penetration by genitalia or hands under Iowa Code § 708.2(5). (*See, e.g.* Appellee's Br. at 38, concerns about "tickle fights" not being criminal). The Court must determine what the words of the statute mean. As argued in Zacarias' brief, and before the trial court below, "object" does not mean body parts.

C. The State's interpretation is not consistent with the cannon of construction against surplusage.

Zacarias has demonstrated that defining the word "object" to include body parts would render the word "object" in § 708.2(5) superfluous and violate the cannon against surplusage: i.e., if the statute was meant to include body parts, it would simply read "A person who commits an assault, as defined in § 708.1, and who penetrates the genitalia or anus of another person, is guilty of a class "C" felony." The State responds that this version of the statute would *only* apply to penetration with body parts. (Appellee's Br. 31). This (1)

isn't a logical reading of the statute, and (2) misses the point of the construction against surplusage.

The State's concern about a (hypothetical) statute that would only penalize assaultive penetration of the genitalia if it occurs using a body part is misplaced. Nothing about the word "penetration" by itself suggests that it has to occur using a body part. Without any narrowing words (such as "uses any object") following the object of the sentence (genitalia), there is no reason to limit the definition of how the verb acts upon the object. Zacarias' construction of the statute complies with the cannon of construction against surplusage because when the legislature adds the words "uses any object" to the statute, those words must have meaning. *See, e.g. Maguire v. Fulton*, 179 N.W.2d 508, 510 (Iowa 1970). Applying § 708.2(5) to all instances of penetration strips those words of meaning. The State's interpretation of the statute is wrong.

D. Burden-shifting is disfavored in criminal statutes. The State can still charge defendants with felonies under Zacarias' interpretation.

The State's concern that, under Zacarias' interpretation of the statute, it will have to prove that the penetrating object is *not* a body

part is misplaced. (Appellee's Br. 39). The State always carries the burden of proof in criminal prosecution. The Fifth Amendment and Art. I, § 10 of the Iowa Constitution "force[] [the State] to prove every beyond a reasonable doubt every fact necessary to constitute the crime charged." *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (cleaned up).

The fact that the State will be required to prove something that may be inconvenient to it is no reason to adopt the State's preferred interpretation of a statute. See *Nicoletto*, 845 N.W.2d 421 (State must prove that defendant is within the class of persons covered by the criminal statute, despite obvious policy reasons for prohibiting coaches from having sex with students they oversee); *Halverson*, 857 N.W.2d at 635-38 (in prosecution for possessing contraband in a halfway house, a class "D" felony, State had to prove the halfway house was covered by statute limited to facilities "under the management of the department of corrections," despite obvious policy reasons for enhanced penalties for marijuana possessed in halfway houses). "The mere fact a variety of defenses is available to, or proof is peculiarly within control of, a defendant is not sufficient

to transfer the burden of persuasion, absent express language" placing the burden of establishing an affirmative defense on the defendant. *State v. Wilt*, 333 N.W.2d 457, 463 (Iowa 1983).

The State's concerns about the level of offenses and punishments available to it under Zacarias' interpretation of the statute are also irrelevant to the matter of statutory interpretation. It could avoid both the (alleged) issue of uncertainty about *what* was used to penetrate the genitalia as well as its perceived need for a greater term of imprisonment by charging both the sex abuse and the assault by penetration statutes (or by not violating the defendant's speedy trial rights on the sex abuse case and charging assault to cover its error). Or it could charge assault causing serious injury, a class "D" felony, in violation of Iowa Code § 708.2(4), and prove that the assault caused the victim a disabling mental illness under Iowa Code § 702.18(1)(a). Or it could charge that the offense was sexually motivated and argue that the defendant be required to register as a sex offender under Iowa Code § 708.15.

In conclusion, the Court should reject the State's broad interpretation of Iowa Code § 708.2(5) and find that, under the

correct interpretation of the statute, there was insufficient evidence to convict Zacarias of assault by penetration of the genitalia with an object, and dismiss the case.

II. The prosecutorial misconduct during closing argument was not invited by defendant's arguments.

In response to Zacarias' claim of prosecutorial misconduct, the State argues that Zacarias *invited* the State to comment on his exercise of the right to remain silent by suggesting that law enforcement didn't thoroughly investigate this case. (Appellee's Br. 55-56). The cases cited by the State excusing their violation of Zacarias' constitutional right to remain silent do not extend so far as to cover the comments that occurred in this case, both during testimony and during closing arguments.

In *State v. Lindsey*, No. 10-1812, 2011 WL 6076544 (Iowa Ct. App. Dec. 7, 2011), the prosecutor commented:

> [The defendant] says to Deputy Kivi "I didn't do this." *That's the extent of the statement.* "I didn't do it. Prove it. Prove it. I don't have to prove anything. You have to prove something. Prove it."
>
> And he's right. We do have to prove it.

Id. at 5. The Court of Appeals noted that, in context, the prosecutor was talking about the State meeting its burden of proof beyond a reasonable doubt, and not commenting on the defendant's exercise of his right to remain silent. *Id.*

The statements made regarding Zacarias have no such favorable context. The prosecutor directly criticized Zacarias' exercise of his right to remain silent by not cooperating in the investigation. The first instance occurred when the State elicited testimony, during its case in chief, on direct examination, that Zacarias had declined to speak with the detectives after the initial interview the night the crime was reported. (TTIV 58:21-60:17). When this came up again during closing arguments, the prosecutor was directly complaining about Zacarias' refusal to talk to law enforcement. (TTV 35:25-36:12 ("The defendant spoke to the detective twice, scheduling an appointment and never showing up. And all of the defendant's friends never even bothered to call the detective back.")). Zacarias (and his friends, for that matter) had a constitutional right not to speak to law enforcement. These statements, "in context, would naturally and

necessarily be understood by a jury to be a comment on the failure of the accused to testify." *State v. Taylor*, 336 N.W.2d 721, 727 (Iowa 1983).

The remaining cases also fail to support the State's argument. In *Brewer v. State*, 444 N.W.2d 77 (Iowa 1989), the prosecution called attention to the fact that a co-conspirator testified: "You know, I don't like Mr. Pennock, I don't like anything about it, but at least he testified as to what the facts and circumstances were. He testified and you had an opportunity to hear him testify." *Id.* at 84. Although the defendant argued that discussing co-conspirator testimony would lead the jury to infer that he was guilty because he didn't testify, commenting on the co-conspirator's decision to take the stand is just not the same as commenting on a defendant's decision to take the stand. *Id.* Likewise, in *State v. Bishop*, 387 N.W.2d 554, 562-63 (Iowa 1986), the objected to comments were only barely indirectly commenting on the defendant's silence: "[Defense counsel] did not put the defendant on trial" and "[T]he defendant had the opportunity to put on evidence if he chose to." These indirect comments, requiring significant inferences to connect them to the defendant's right to

remain silent, are not comparable to the direct comments made against Zacarias.

The defense strategy of arguing reasonable doubt based on the investigation did not mean that the prosecutor could directly call Zacarias out for exercising his constitutional rights. The direct nature of the comments on Zacarias' rights prejudiced his trial, and were not responsive to defense strategy. The investigation in this case was lacking not because Zacarias exercised his rights, but because law enforcement did not bother to corroborate C.G.'s story. Criticizing Zacarias' silence is also not a counter-argument to the argument that C.G. was not credible. The comments – particularly when made in closing argument – would naturally lead the jury to question why Zacarias wouldn't cooperate with the police. The comments were not harmless beyond a reasonable doubt, and they require reversal. *State v. Nelson*, 234 N.W.2d 368, 372 (Iowa 1975).

III. The error under *State v. Turecek* is preserved, because trial counsel was prevented from recalling C.G. to impeach her.

The State refuses to concede error preservation on the *State v. Turecek*, 456 N.W.2d 219 (1990), issue related to impeaching C.G.,

because "[t]he trial court's ruling was limited to enforcing Rule 5.613(b) and its foundational requirement for impeachment by prior unsworn statements. The trial court did not rule on any request by Zacarias to recall C.G." (Appellee's Br. 42). This is not an accurate statement of the record.

The State argued at trial that "the defense cannot call [C.G.] back for the purpose of impeachment by way of *State v. Turecek*, and Iowa Supreme Court ruling that specifically states that you cannot call a witness for the sole purpose of impeachment." (TTIV 66:19-23). Therefore, the State contended, "there is no way for the defense at this point to cure this issue." (*Id.* at 66:24-25). The State repeated this point: "you cannot call any witness for the sole purpose of impeachment, period. . . . So by Iowa Supreme Court case law as well as the rules of evidence as well as the defendant's own releasing this witness on the record in front of this jury, there's – we're not calling her back." (*Id.* at 67:17-18, 21-24). Trial counsel explained his "understanding is that it wouldn't be calling them solely for the purpose of impeachment." (*Id.* at 68:2-4).

The trial court began explaining its ruling, then asked a point of clarification:

> THE COURT: Well, let's put it this way. I'm certainly not seeing any authority that suggests that the rule only applies to the State.
>
> So from that standpoint, Mr. Van Cleaf, unless you can show me some authority on that, then I'm going to adopt the State's position and rule that the Rule 5.613, specifically subsection (b), applies equally to both sides.
>
> Now – well, yeah. That's all I'm going to say at this point.
>
> So we can go ahead with the witness's cross-examination, but we won't be getting into – did we have any inconsistent statements that [C.G.] was confronted with?

(*Id.* at 69:25-70:13). After the parties clarified that point, the Court re-explained its ruling:

> THE COURT: All right. Then I'm going to permit – you can go ahead with your cross-examination of the witness. But to the extent that you want to try to get into some purported inconsistent statement of the victim, then I'm not going to allow it.
>
> So we're not going to go there; right? If you want to make an offer of proof, you can do something like that.

(*Id.* at 71:21-72:3).

The court's ruling made it clear that Zacarias would not be recalling C.G. to the stand to lay the proper foundation for

impeachment. The preservation of error rule requires that an issue be presented to, and ruled upon, by the court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). However, the error preservation rule is not a rule of "perfect" preservation. "The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it." *Id.* at 540 (cleaned up). This rule

> is not concerned with the substance, logic, or detail in the district court's decision. If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is incomplete or sparse, the issue has been preserved.

Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012).

The record revealed that the court was aware of Zacarias' request to recall C.G. for impeachment purposes, and his argument that *Turecek* did not apply. The court carefully considered whether a proper foundation had been laid for impeachment under 5.613. The court could've been clearer in elucidating its ruling, but that is not the question for error preservation. The record demonstrates that the court "considered the issue" of whether C.G. could be impeached through recalling her. The court stated: "we're not going to go there."

(TTIV 72:1). The court necessarily rejected the plan to call C.G. back. This Court should address the entirety of Zacarias' claims related to impeaching C.G.

IV. Zacarias was prejudiced by trial counsel's failure to properly impeach C.G.

The State argues that even if the district court erred in denying Zacarias the opportunity to impeach C.G., or if trial counsel was ineffective for failing to properly impeach C.G., Zacarias is not entitled to relief because of the strength of the evidence against him. To reach this conclusion, the State speculates as to whether or not C.G. would be able to explain the inconsistencies that Zacarias has highlighted. (*See* Appellee's Br.49-50 "So if C.G. were asked to explain this discrepancy, it would have been simple for her to explain. . .).

The State's reliance on *Leggett v. State*, No. 10-0233, 2011 WL 2695760 (Iowa Ct. App. Jul. 13, 2011) is misplaced. In *Leggett*, the Court of Appeals declined to find prejudice because it did not know how the law enforcement officer would respond to impeachment by proof that he had testified falsely in an unrelated matter. *Id.* at *5. Here, C.G. was not being impeached based on her false statements

made in an unrelated procedure – she was being impeached based on inconsistencies in her report of the events between herself and Zacarias from the beginning to the end of the night. Unlike in *Leggett*, where the false statement was collateral to the case at issue, the false or inconsistent statements from C.G. went to the heart of Zacarias' case. Speculation about whether she would have been able to explain the inconsistencies is not sufficient to overcome the fact that Zacarias was prevented from putting on a defense.

CONCLUSION

The Court should reject the State's attempt to cover its speedy trial error by broadening a criminal statute in contravention of the rules of statutory construction and due process. Because there was insufficient evidence to convict Zacarias of assault by penetration with an object, the case against him must be reversed. In the alternative, the judgment against him must be reversed for the other errors identified in Zacarias' brief and here.

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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 7,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains 3,405 words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Bookman Old Style.

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Zachary Zacarias
Defendant-Appellant

/S/ *Andy Dunn*
Dated: October 7, 2020
Andy Dunn