ELECTRONICALLY FILED SEP 22, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–0838

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ZACHARY TYLER ZACARIAS,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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Authorities

Alcala v. Mariott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)
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II. Did the trial court err in prohibiting Zacarias from impeaching the victim with prior unsworn statements, when he did not ask her about those statements on cross-examination as Rule 5.613(b) requires?

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
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ROUTING STATEMENT

Zacarias seeks retention because of two issues that he identifies as substantial issues of first impression and questions of broad public importance. *See* Def's Br. at 12. He is correct that the Iowa Supreme Court has not issued a decision that adopts a definition of the term "object" in section 708.2(5). But that issue of statutory construction can be resolved by applying established legal principles. *See* Iowa R. App. P. 6.1101(3)(a). He also requests retention to consider claims that "involve the constitutionality and validity of recently amended Iowa Code § 814.7." *See* Def's Br. at 12. But he is appealing from a judgment and sentence filed on May 17, 2019—which means that amended version of section 814.7 does not apply, so that issue is not briefed or presented here. *See* Sentencing Order (5/17/19); App. 12. This case should be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case

This is Zachary Tyler Zacarias's direct appeal from his conviction for assault by penetration of genitals with an object, a Class C forcible felony, in violation of Iowa Code sections 708.1 and 709.3(1)(b) (2017). He was sentenced to an indeterminate ten-year term of incarceration and ordered to register as a sex offender.

In this direct appeal, Zacarias argues: **(1)** the evidence was legally insufficient to prove assault by penetration with an object because it could only establish that he penetrated the victim's genitals using parts of his own body, which should not be considered "objects"; **(2)** the trial court erred by excluding impeachment evidence of the victim's prior unsworn statements, which Zacarias failed to ask her about on cross-examination as required by Rule 5.613(b); and **(3)** his trial counsel was ineffective for failing to lay that required foundation for that impeachment evidence, and for failing to object to numerous instances of alleged prosecutorial misconduct, which mostly occurred during the State's rebuttal argument. Zacarias also argues that, under Article I, Section 10 of the Iowa Constitution, he should not have to establish *Strickland* prejudice to prove that his constitutional right to effective assistance of counsel was violated. Finally, Zacarias argues that cumulative error from his various claims requires a retrial.

Course of Proceedings

The State generally accepts Zacarias's description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 13–15.

Statement of Facts

The State's citations to the trial transcripts follow this table:

April 1, 2019	TrialTr.V1
April 2, 2019 (reporter: Burns)	TrialTr.V2
April 2, 2019 (reporter: Wheeler)	TrialTr.V3
April 3, 2019	TrialTr.V4
April 4, 2019	TrialTr.V5

On May 28, 2017, C.G. was 17 years old. She went to Big Creek with some of her friends to swim and grill out. *See* TrialTr.V4 12:10–14:5. Some other friends invited her to hang out in Ankeny, and they picked her up and took her to someone else's house, where they all watched a movie. Nobody was drinking. *See* TrialTr.V4 14:6–16:12. Around 8:30 or 8:45, C.G. started looking for a way to get home to her parents' house in Urbandale—she had a strict 10:00 curfew. *See* TrialTr.V4 16:13–17:4. C.G. was texting and snapchatting people to try to arrange a ride home. The only person who agreed to give C.G. a ride home was Zacarias. C.G. had only met him once and did not know him well—but she needed a ride home. *See* TrialTr.V4 17:5–19:16.

One of C.G.'s other friends gave C.G. a ride to Zacarias's house. They arrived a little after 9:00 p.m. *See* TrialTr.V4 19:17–20:25. C.G. knew that she would be waiting a little while, because Zacarias had

said that he needed to "sober up before he could take [her] home." *See* TrialTr.V4 21:4–11. The mutual friend who had introduced C.G. to Zacarias answered the door; he led C.G. down the stairs, into the basement, and into Zacarias's bedroom. *See* TrialTr.V4 21:7–22:4. C.G. said that everyone was drinking and watching TV, and there was a bottle of Grey Goose and some orange juice in Zacarias's bedroom. *See* TrialTr.V4 22:11–21. C.G. had already taken her Trazodone pill for that evening, because she had been expecting to go right to bed after she got home. *See* TrialTr.V4 23:3–23:25.

C.G. smoked marijuana wax out of a bong. *See* TrialTr.V4 34:21–35:16; TrialTr.V4 35:25–36:3. Then, Zacarias gave C.G. a drink in a red solo cup, which he said was "Grey Goose and orange juice."

> [I]n the beginning it was a little bit normal compared to what I've had before. But then in the middle it just had this chalky taste to it, but I thought it might have just been the pulp that was in the orange juice at the time.

See TrialTr.V4 24:1–16. On prior occasions, a single cup of that sort of drink had not made C.G. "tired or drunk"—but whether it was from this particular drink or from her Trazodone, C.G. became drowsy:

> I started to get a little bit tired, so I told Peyton that I was starting to get a little bit tired and, if I fell asleep, to wake me up. And I laid my head down on the couch, and I went into, like, the fetal position where you're curled up with my purse in between my arms.

See TrialTr.V4 24:24–26:5. C.G. fell asleep in that position, on the couch in Zacarias's bedroom. *See* TrialTr.V4 26:6–12. When she fell asleep, there was still an assortment of other people in the room.

When C.G. woke up, she was "a little foggy"—but she could tell that Zacarias was "on top of [her]" and he had "only his shirt on." *See* TrialTr.V4 26:17–27:13. As for C.G., she "had [her] swim suit top and tank top still on, but not the bottoms." *See* TrialTr.V4 27:14–20. C.G. was still on the couch, but she was no longer holding her purse—and Zacarias was "hovering above [her] with his knees pushed in on [her] thighs, and he was masturbating" with his penis close to her vagina. *See* TrialTr.V4 27:21–28:17. C.G.'s legs were being held apart by Zacarias's knees on her thighs, so that Zacarias could hold his penis close to her vagina as he masturbated. *See* TrialTr.V4 38:20–39:21. C.G. recalled that Zacarias's other hand was by her left shoulder. *See* TrialTr.V4 39:6–12. C.G. reacted by rolling over, hitting Zacarias "[o]n the bottom of his jaw line," and pushing him off of the couch with her leg. *See* TrialTr.V4 28:18–29:3; *see also* TrialTr.V4 47:4–12. C.G. "started screaming and yelling for help." *See* TrialTr.V4 29:6–13. As she did, Zacarias "kept repeating that nothing had happened yet." *See* TrialTr.V4 29:4–5.

C.G.'s clothes had been scattered across the room, and a dresser had been pushed in front of the door. C.G. grabbed her clothes and her purse, and she "ran to the door." *See* TrialTr.V4 29:14–30:2. The dresser was not very heavy, and C.G. had no trouble pushing it out of the way before she unlocked the door and "ran up the stairs." *See* TrialTr.V4 30:3–15. She ran "[o]ut the door and down the street," to her boyfriend's house, which was about a block away. *See* TrialTr.V4 30:19–31:5. C.G. remembered "someone yelling after [her]," but she did not remember who it was. *See* TrialTr.V4 31:6–17. When C.G. arrived at her boyfriend's house, she banged on the door. That woke up her boyfriend, who was sleeping on the couch. He let her in. Her boyfriend's parents called the police. *See* TrialTr.V4 32:13–33:1.

C.G. did not know what happened when she was asleep, but she experienced a "noticeable discomfort" in her vaginal area whenever she sat down. It was either from something being inserted into her vagina, or from being "hit hard" in that area. *See* TrialTr.V4 33:9–25; TrialTr.V4 50:12–23; *accord* TrialTr.V4 49:21–50:7. C.G. had never had any sort of interest in Zacarias, and she already had a boyfriend—and she was emphatic that she never would have consented to any sexual acts with Zacarias. *See* TrialTr.V4 39:22–40:18.

Meghan Storlie had never met C.G. before. Storlie's friend had received a Snapchat inviting them both to a party at Zacarias's house. *See* TrialTr.V2 90:17–92:23. When they arrived, someone answered the door and led them to the basement. *See* TrialTr.V2 92:24–93:9. They sat on the couch in the main room of the basement, socializing and drinking. *See* TrialTr.V2 93:10–95:23. Suddenly, Storlie heard a woman's voice from the adjacent room, screaming: "What are you doing to me? Why are my pants off?" *See* TrialTr.V2 96:13–97:8. Storlie watched as C.G. "ran out the door" to that bedroom and "ran upstairs." *See* TrialTr.V2 97:9–20. Storlie did not know C.G., but she still "ran after her to see if she was okay." *See* TrialTr.V2 97:21–98:3. As Storlie followed C.G. outside, Storlie asked C.G. if she was okay. C.G. responded "Ma'am, please don't touch me. Get away from me." *See* TrialTr.V2 98:4–10. Then, C.G. ran off, down the street. Storlie said C.G. seemed "[s]cared" and "shocked." *See* TrialTr.V2 102:5–9.

Storlie went back into the house and confronted Zacarias. She asked him if he had raped C.G.; Zacarias said "no, we had a thing." *See* TrialTr.V2 98:19–100:11; TrialTr.V3 6:24–7:7; TrialTr.V3 9:8–23. Later, Storlie found C.G. on Facebook. Storlie sent her a message, offering to help. *See* TrialTr.V2 100:24–102:4. C.G. showed Storlie's

Facebook message to the police. *See* TrialTr.V4 37:5–38:3. C.G. also saw a video of Zacarias that he posted to his Facebook "story," in which Zacarias "was gloating that he had just did the best thing of his life." *See* TrialTr.V4 37:25–38:16.

Two police officers who spoke with C.G. at her boyfriend's house said that she was "upset" and "crying." *See* TrialTr.V3 16:7–18:1; *accord* TrialTr.V3 65:7–10 ("She seemed distraught. It was obvious that she had been crying, and she was shaken up."). After a brief conversation with C.G., those officers went over to Zacarias's house. Zacarias was waiting for them on his porch. Zacarias told the officers that he had asked all of his friends to leave his bedroom, so it was just him and C.G. there. *See* TrialTr.V3 26:7–27:7; TrialTr.V3 72:21–73:21. Zacarias said that he and C.G. had started "making out," and then he "remove[d] some articles of clothing." *See* TrialTr.V3 27:8–20; TrialTr.V3 73:22–74:4. But he said that, along the way, C.G. "fell asleep or blacked out for a while." *See* TrialTr.V3 28:2–22; *see also* TrialTr.V3 77:5–23 (stating that Zacarias said C.G. was "not asleep but not aware"). Zacarias said that they just "cuddled" while C.G. was asleep or blacked out. *See* TrialTr.V3 28:17–22. But at some point, Zacarias "removed her thong and [C.G.] had relaxed her legs." *See*

TrialTr.V3 28:23–29:1; *see also* TrialTr.V3 74:5–76:6. Zacarias said he "fingered her"—he said that meant he was "digitally penetrating her vagina" using his fingers. *See* TrialTr.V3 29:12–30:1; *see also* TrialTr.V3 57:3–17; TrialTr.V3 76:2–21. Zacarias also said that he tried to penetrate C.G. with his penis, but he "wasn't fully erect, and he couldn't find the hole." *See* TrialTr.V3 30:6–19; TrialTr.V3 81:25–83:20. Zacarias admitted C.G. was "not reciprocating the actions"—she did not help guide him or stimulate him, nor did she touch his body at all. *See* TrialTr.V3 30:23–32:3; TrialTr.V3 54:23–56:12; TrialTr.V3 81:9–81:24. When asked if C.G. consented to what he was doing, Zacarias replied: "yes and no." *See* TrialTr.V3 32:4–6. In terms of C.G.'s condition, Zacarias said that C.G. was "in and out of a state." *See* TrialTr.V3 32:7–17; *see also* TrialTr.V3 40:8–41:2. But Zacarias insisted that he did nothing wrong because "she never said no." *See* TrialTr.V3 36:10–37:10; TrialTr.V3 86:1–87:10. Zacarias said C.G. "freaked out" as he was trying to have sex with her. His description made it sound like C.G. was "waking up." *See* TrialTr.V3 83:21–84:13. Officers saw no indication that Zacarias was intoxicated—even though Zacarias said that he was "really drunk." *See* TrialTr.V3 33:23–34:14; TrialTr.V3 53:3–53:15; TrialTr.V3 85:13–25; TrialTr.V3 100:5–12.

Meanwhile, C.G. had gone to Broadlawns for an examination. *See* TrialTr.V4 33:5–8. Janie Pering performed a sexual assault exam on C.G., and Pering noted C.G.'s condition:

> She was very sleepy. She kept falling asleep during — while she was trying to give a statement. I had to wake her up because I'll ask a question, and when they respond, I have to write it down. So I had to keep waking her up multiple times during the exam.

See TrialTr.V3 114:15–115:14; *see also* TrialTr.V3 124:6–10. C.G. said she had taken a 50mg Trazodone, at about 9:00 p.m. *See* TrialTr.V3 115:21–116:15. Pering knew that Trazodone, when mixed with alcohol, can produce "excessive sedation." *See* TrialTr.V3 116:25–117:7.

Towards the end of his conversation with those two officers, Zacarias added that he had performed oral sex on C.G. *See* TrialTr.V3 88:5–89:7. He did not mention that in his earlier retellings of events; he only added it at the end of the conversation. A DNA analysis of a sample "taken from [C.G.]'s swimming suit/underwear that she had on the night that it happened" found saliva that was not C.G.'s:

> [T]here was two DNA profiles, one being the victim. And this [other] profile had tested positive for an enzyme that is produced in saliva, but that sample was not strong enough to be tested against the DNA of Mr. Zacarias.

See TrialTr.V4 62:13–63:16.

Additional facts will be discussed when relevant.

ARGUMENT

I. The trial court did not err when it overruled Zacarias's motion for judgment of acquittal or when it submitted Jury Instruction 28. It was correct to use and provide a definition of "object" for section 708.2(5) that does not exclude body parts that were used for penetration.

Preservation of Error

Zacarias moved for judgment of acquittal on the grounds that the State had not proven that he penetrated C.G. with anything other than his own body parts, and he argued that none of those qualified as an "object" under section 708.2(5). *See* TrialTr.V4 76:23–83:14. The trial court ruled on that claim and rejected it. *See* TrialTr.V4 88:6–11. Zacarias also objected to the submission of Jury Instruction 28, which defined "object" as "anything that is visible or tangible and is relatively stable in form." *See* TrialTr.V4 98:11–99:7; Jury Instr. 28; App. 11. The trial court overruled that objection. *See* TrialTr.V4 99:19–100:2. This is sufficient to preserve error for the legal sufficiency challenge that Zacarias is raising on appeal. *See State v. Williams*, 695 N.W.2d 23, 27–28 (Iowa 2005).

Standard of Review

When the correctness of a ruling on a sufficiency challenge turns on a question of statutory interpretation, review is for errors at law. *See State v. Alvarado*, 875 N.W.2d 713, 715–16 (Iowa 2016).

A ruling on whether a jury instruction correctly states the law is also reviewed for correction of errors at law. *See Alcala v. Mariott Int'l, Inc.*, 880 N.W.2d 699, 707–08 (Iowa 2016) (citing *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5, 11–14 (Iowa 2009)); *accord State v. Tipton*, 897 N.W.2d 653, 694 (Iowa 2017).

Merits

Iowa Code section 708.2(5) provides an enhanced penalty for assault where the assailant "uses any object to penetrate the genitalia or anus of another person." *See* Iowa Code § 708.2(5). Zacarias argues that any definition of "object" that includes his fingers or tongue is an overbroad definition, and that a better definition is: "a material thing other than any portion of the defendant's body or organs." *See* Def's Br. at 22. But the plain meaning of the term "object" includes any material thing that can be seen and touched. Unlike a narrower term like "inanimate object," it does not exclude people or other live beings. The purpose of the statute is undermined by narrowing the definition as Zacarias proposes: it criminalizes unwanted penetration, without regard to means or intent, and it does not intend to create exceptions for unwanted penetration by the assailant's body parts. And nothing in section 708.2(5) or chapter 709 conflicts with this construction.

A. The plain meaning of the term "any object" in section 708.2(5) is expansive. It includes anything that penetrates the victim—including body parts.

Zacarias is correct that statutory interpretation begins by asking whether the plain language of the statute clearly favors one reading over competing interpretations. If so, that ends the inquiry. *See State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017) ("If the language is unambiguous, our inquiry stops there."); *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996) ("When the text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction.").

Zacarias argues that "[a] person would not refer to themselves or their body parts as 'objects' in ordinary speech," and that "[t]he word 'object' does not imply the kind of agency that a person has over their own body." *See* Def's Br. at 23–24. The State has four responses.

First, although people generally perceive their own body parts as extensions of themselves (and not as objects), that does not mean that specific parts of the defendant's body cannot qualify as "objects" used in particular ways to commit a crime. If the defendant's hands were not "objects," then they probably could not be an "instrument or device" and could not be dangerous weapons. *See* Iowa Code § 702.7.

And yet, the Iowa Supreme Court still held that "[t]he hands and fists of the defendant . . . constituted an instrument likely to produce death and were dangerous weapons," when they were "violently used to strangle and beat [the victim] to death." *See State v. Heinz*, 275 N.W. 10, 21 (Iowa 1937); *see also State v. Bey*, No. 13–1312, 2014 WL 7343234, at *5 (Iowa Ct. App. Dec. 24, 2014) (holding that jurors "could have found Bey's use of his hands and feet to punch and kick Proplesch rendered them dangerous weapons"); *accord State v. Zangrilli*, 440 A.2d 710, 711–12 (R.I. 1982) (upholding finding that Zangrilli's hands qualified as dangerous weapons because of "[t]he manner in which he used his hands on [the victim]'s throat," which was sufficient proof that "the object was used in such a way that it had the capability of producing serious bodily harm"). Thus, parts of the defendant's own body are not in a separate category, when it comes to instrumentalities of crime—they can be weapons if they are used like weapons, and they can be penetrating objects if used for penetration.

Second, the defendant might not refer to *his own* finger or tongue as an object—but a victim of penetrative assault would likely use that term, particularly if they do not know what penetrated them. *See, e.g.*, *State v. Morsie*, No. CA2012-07-064, 2014 WL 217296, at *1

(Ohio Ct. App. Jan. 21, 2014) (summarizing victim testimony that "[a]s [she] drifted in and out of consciousness, . . . she glanced back over her shoulder when she saw Morsie penetrating her vagina first with an unknown object"). When someone says that they saw or felt "an unknown object," that does not mean that the speaker is excluding the possibility that what they saw or felt was another person or part of another person's body.[1] This matters because victims are sometimes aware that they are being penetrated (or that they were penetrated, at a previous point), but unable to identify the penetrating object.

> Bobbi Jo testified she was sleeping on her stomach when she woke up suddenly, feeling pressure in her vagina and anus. She was unable to stand up or kick her legs, and she started screaming. . . . Bobbi Jo testified that she saw Bratcher step back from behind her and into her line of vision and the pressure stopped.

See State v. Bratcher, No. 14–2058, 2016 WL 1677997, at *2 (Iowa Ct. App. Apr. 27, 2016). A victim in that situation would perceive that they are being penetrated by *some object*—and the fact that it might

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[1] Likewise, when someone says there is an unknown object in the roadway, it does not mean that they are certain that it is not a person. *See, e.g.*, *Wimsatt's Adm'x v. Louisville & N. R. Co.*, 31 S.W.2d 729, 733 (Ky. Ct. App. 1930) ("It is not required of those in charge of a railroad train that they slacken the speed of the train upon the discovery of some object on or near the track not known to be a human being, but, upon the discovery of such an object, the trainmen should observe it . . . until they may . . . determine whether it is a human being.").

be a person's fingers, hand, or other body part would not change the common-sense perception that they are being penetrated by some unknown object. And that formulation is even more common when the victim awakens *after* the assaultive penetration—knowing that it occurred, but completely lacking any other information about it. *See, e.g.*, Sabrina Rubin Erdely, *The Date-Rape 'Doctor' They Could Not Convict*, NBC NEWS (Nov. 21, 2008), *cached version available at* https://perma.cc/4BTE-C7US (recounting victim experiences with a serial rapist who drugged victims into unconsciousness, and noting that common experience among victims was waking up to discover that they were naked from the waist down, "bleeding and hurting").

Third, there are situations where the victim is unable to explain what happened, and events must be reconstructed from some kind of physical evidence. This may occur if the victim is a young child. *See, e.g.*, *State v. Stickrod*, No. 17–0509, 2018 WL 1433065, at *1–2 (Iowa Ct. App. Mar. 21, 2018) (recounting evidence of vaginal penetration of an infant child, which showed "inflicted trauma" from an object that might have remained a mystery, except for the infant child's DNA on the fly of the defendant's boxers); *State v. Lopez*, No. 18646, 2001 WL 1597974, at *1 (Ohio Ct. App. Dec. 14, 2001) ("The treating physician

indicated that the genital examination was consistent with forcible vaginal penetration, with some unknown object."). Or it may occur if the victim is deceased. *See Reilly v. State*, 355 A.2d 324, 328 (Conn. 1976) (noting variety of injuries found during victim's autopsy, which included "a deep penetration of her vagina with an unknown object"). It is natural, in those situations, to say that the victim was penetrated with an unknown object (even when that is followed by a description of the object's likely size and shape). That statement does not exclude the possibility that the "object" was a part of the defendant's body.

Finally, Zacarias focuses exclusively on defining the term "object" on its own—but section 708.2(5) uses the phrase "any object." An Iowa court must "assess not just isolated words and phrases, but statutes in their entirety." *See In re Estate of Melby*, 841 N.W.2d 867, 879 (Iowa 2014); *accord* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012), *quoted in State v. Doe*, 943 N.W.2d 608, 610 (Iowa 2020) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."). The term "object" must be construed in light of the

surrounding phrase in section 708.2(5), which penalizes an assault where the assailant "uses any object to penetrate" another's genitalia. Using the term "any object"—rather than *an* object—signals that the legislature intended an expansive and flexible construction. *See, e.g.*, *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 137 (Iowa 2010) (noting that the word "any" is "commonly understood to have broad application," and inferring legislative intent from decision to "us[e] a word with an expansive import" in the statute); *State v. Owens*, 635 N.W.2d 478, 486 (Iowa 2001) (quoting *Webster's Ninth New Collegiate Dictionary* 93 (1986)) (rejecting limited interpretation which "would be incompatible with the legislature's choice of the modifier 'any' which means 'one selected without restriction'"). Thus, the broadest possible definition of the term "object" is the correct one to apply.

This Court should hold that the plain meaning of "any object" in section 708.2(5) encompasses *anything* that penetrates the victim's genitalia or anus, because the common understanding and usage of this phrase, in the context of penetration, does not exclude body parts. Using the phrase "any object" instead of "an object" is a clear directive to give the term "object" its broadest possible meaning—which, in this context, would expand to include any body parts used for penetration.

B. Zacarias's definition of "object" adds new words to the statute. The State's definition does not reduce the words "by an object" to surplusage. Rather, it gives that language its intended effect.

Zacarias argues that including body parts in the definition of the term "object" reduces it to surplusage. *See* Def's Br. at 27–28. But this is why it is important to consider the entire phrase. If the statute applied to assaults where a person "penetrates" another's genitalia, it would be susceptible to a reading that would *only* include body parts, to match the common use of the term "penetration" describing certain sexual acts with specific parts (like intercourse or digital penetration). Instead, section 708.2(5) penalizes assaults where a person "uses any object to penetrate" the victim's genitalia. That does not exclude acts that are colloquially described as "penetration"—rather, this phrase *includes* those acts, because it includes any assaultive penetration by *any object*. This broad construction does not create surplusage—it is the only way to give effect to the language chosen by the legislature. *See State v. Halverson*, 857 N.W.2d 632, 637 (Iowa 2015) (explaining presumption that use of additional phrases to expand applicability "is not mere surplusage, but is included in the statute to ensure coverage that would not otherwise result"). Zacarias's preferred construction might give effect to language that penalized assault by penetration of

genitalia with *an* object—that hypothetical statute could be said to *limit* the applicability of the penalty to assaultive penetrations that involve things classically described as "inanimate objects," and to exclude any other kinds of penetrative assaults. But section 708.2(5) applies to penetration using *any* object—which is a more expansive phrase that includes any actual penetration of the victim. Indeed, this language only makes sense as a way to broaden the statute's reach to penalize both kinds of conduct. Penetration with body parts would have been covered by the simpler term "penetrates"—but that would arguably exclude penetration by inanimate objects. On the other hand, penetrative acts using inanimate objects would be covered the phrase "uses an object to penetrate"—but that would arguably exclude any penetrative acts that used body parts. Only this formulation, which applies to penetrative assaults using *any* object, succeeds in making this enhanced penalty applicable to both kinds of penetrative assault.

While the State's interpretation gives effect to every word of the enactment, Zacarias's construction would "add words to the statute, contrary to our rules of statutory interpretation." *See Alvarado*, 875 N.W.2d at 720; *accord State v. Hesford*, 242 N.W.2d 256, 258 (Iowa 1976) (stating "[n]o court, under the guise of judicial construction,

may add words of qualification to the statute"). Zacarias essentially replaces the broad phrase "any object" with the narrower phrase that he prefers: "inanimate object." If the Iowa legislature had wanted to limit the applicability of this penalty to assaultive penetration by using inanimate objects, it could have used language to that effect. But it did not—it used a modifier that *broadened* the application of the term "object," instead of one that constrained it. That deliberate choice must be given effect, and this Court should reject Zacarias's attempt to inject new words into the statute to limit its application. *See State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994) (rejecting argument for narrow definition of "sex act" because "[t]here is no language in the statute which would limit its scope in this way").

C. Zacarias's interpretation runs counter to the purpose of section 708.2(5), which is to penalize *all* penetrative assault—even if it is not sexual, and even if the penetrating object is unknown.

Zacarias argues that "[d]efining a defendant's hand as an object under Iowa Code § 708.2(5) would create substantial and unnecessary overlap" between that offense and sexual abuse, "and further blur the line between sex abuse and assault that merely involves genitalia." *See* Def's Br. at 26–27. But a construction that creates an overlap is preferable to one that creates an obvious gap, especially when it is

clear that the legislature intended to close that specific gap through this particular enactment. Indeed, overlap between criminal statutes frequently occurs—and that is not, in itself, problematic.

> When a single act violates more than one criminal statute, the prosecutor may exercise discretion in selecting which charge to file. This is permissible even though the two offenses call for different punishments. It is common for the same conduct to be subject to different criminal statutes.

Alvarado, 875 N.W.2d at 718 (quoting *State v. Perry*, 440 N.W.2d 389, 391–92 (Iowa 1989)). Moreover, Zacarias's approach does not avoid overlap, because using inanimate objects for penetration can also qualify as a sex act. *See* Iowa Code § 701.17(5) (defining "sex act" to include "use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus"); *cf. State v. Thede*, No. 15–0751, 2016 WL 5930417, at *3 (Iowa Ct. App. Oct. 12, 2016) ("The factfinder may reasonably view the [electric] razor as an artificial sexual organ akin to a vibrator *or, alternatively*, as a substitute for an actual sexual organ, like a penis or female genitalia.").

Zacarias identifies the legislature's motive for criminalizing penetrative assault, following *State v. Monk*: "[t]he requirement that an act be sexual in nature to prove sex abuse under Chapter 709 creates an unfortunate gap in coverage for Iowa victims." *See* Def's

Br. at 25–26 (citing *State v. Monk*, 514 N.W.2d 448 (Iowa 1994)). In *Monk*, the defendant and his cohorts wrestled one of their friends to the ground and inserted a broom handle into that friend's anus. He was convicted of sexual abuse. The Iowa Supreme Court reversed that conviction because the jury was not instructed that "a sex act requires sexual contact," beyond just contact with genitalia—and a jury that was properly instructed "could have concluded that the incident was not sexual in nature." *See Monk*, 514 N.W.2d at 450–51. That meant that "horseplay" involving penetration of the victim's anus would amount to nothing more than assault causing bodily injury (if that), which is only a serious misdemeanor. *See* Iowa Code § 708.2(2). That would be an unjust and absurd result, because the harm to the victim is not diminished (and may even be magnified) if the assaultive penetration is committed to amuse the assailants, rather than to arouse them.

The language that became section 708.2(5) was added by enactment in 2003. *See* 2003 Iowa Acts ch. 132, § 2 (codified at Iowa Code § 708.4A (2003)). That was less than ten years after *Monk* was decided, and only three years after the Iowa Court of Appeals applied *Monk* to reverse another sexual abuse conviction. *See State v. Doyle*, 98–2087, 2000 WL 145039, at *1–2 (Iowa Ct. App. Feb. 9, 2000). It

is clear from the context that this subsection is meant to criminalize any penetrative assault, regardless of whether it was sexual in nature. In order to apply it to the full range of penetrative assaults that may be quasi-sexual (but where the sexual nature of the act is difficult or impossible to prove), it must be read to encompass penetration by a body part. After all, the "horseplay" penetration in *Monk* would have been equally despicable if the assailants had laughed while inserting fingers or other body parts into the victim's anus to humiliate him for their own enjoyment—so using Zacarias's narrow definition of "object" would create an absurd result by excluding nearly identical conduct that the legislature surely intended for section 708.2(5) to criminalize. *See* Iowa Code § 4.4(3) ("In enacting a statute, it is presumed that . . . [a] just and reasonable result is intended."); *accord State v. Paye*, 865 N.W.2d 1, 7 (Iowa 2015) (quoting *State v. Gonzalez*, 718 N.W.2d 304, 308 (Iowa 2006)) (explaining that, in construing ambiguous legislation, Iowa courts "look for a reasonable interpretation that achieves the statute's purposes and avoids absurd results"). Zacarias is incorrect to assert that "contact between a defendant's body and the victim's genitalia is already criminalized as a sex act under § 702.17." *See* Def's Br. at 29. That is true when such contact is sexual in nature,

under *Pearson*. But *Monk* illustrates that penetrative contact is not always sexual in nature—sometimes it only humiliates the victim, amuses an onlooker, or serves some other instrumental purpose.

Zacarias points to *State v. Vulich* as an example of a case where assault by penetration with an object was properly charged, because Vulich inserted an ice cube into the victim's vagina. *See* Def's Br. at 27 (citing *State v. Vulich*, No. 15–1851, 2017 WL 363234, at *1–2 (Iowa Ct. App. Jan. 25, 2017)). But Zacarias misses the fact that *Vulich* had two separate *kinds* of contact. Vulich's hand stayed in contact with the victim's vagina, after Vulich penetrated her with the ice cubes—the sexual nature of that contact was obvious (especially given that Vulich already made "sexually suggestive comments" to the victim), and it was a sex act that supported a charge of third-degree sex abuse. *See Vulich*, 2017 WL 363243, at *1–2. Vulich maneuvered himself into position for that contact, even with the victim's older sister present, under the pretense of the "ice fight." Inserting those ice cubes into the victim's vagina was also arguably sexual in nature—but Vulich offered testimony from the victim's older sister, who said that "the incident was just joking around." *See id.* The State could have charged Vulich with sexual abuse for that contact, as well, since he used ice cubes as a

penetrative item that substituted for a sexual organ. *See* Iowa Code § 702.17(5). But it could also charge this as a penetrative assault, and that charge had a better alignment with these facts. Using ice cubes to penetrate the victim's vagina was perceived by the victim's sister as non-sexual and joking, and it had instrumental value in facilitating the hand-to-genital contact that ensued—so the sexual nature of that ice-to-genital contact was less obvious. Thus, that penetrative act was better aligned with section 708.2(5), which does not require any proof that penetrative contact was sexual in nature.

But imagine that Vulich had never used an ice cube—imagine that this was a "tickle fight," not an "ice fight," and that Vulich had somehow convinced the victim's sister that it was uproariously funny to tickle the victim on the inside of her vagina, using a finger. If the victim's sister penetrated the victim with her finger, while convinced (in the jury's estimation) that the act was non-sexual and that she was acting only to amuse herself and Vulich, it would not be a sex act. But it would still be a penetrative assault, producing about the same harm that would result from penetrative assault with an ice cube. Zacarias's reading would punish that penetrative "tickle" as a mere misdemeanor, which would be absurd and would disregard the legislative intent to

close the coverage gap that *Monk* exposed. *Cf. State v. Whetstine*, 315 N.W.2d 758, 760–61 (Iowa 1982) ("It would not be logical to allow a defendant to be convicted of sexual abuse for using a plastic penis, or a similar inanimate object as a substitute for the plastic penis, but to prohibit his conviction if he used his fingers or hand.").

There is another profound problem with Zacarias's reading. Zacarias insists on a construction where the State needs to prove that the victim was penetrated by an inanimate object, and not by part of the defendant's body. *See* Def's Br. at 30–31. But the point of using this wording is to relieve the State (and the victim) of the burden of identifying the specific object that the assailant used to penetrate the victim's genitals or anus. Any interpretation of the term "any object" that included some means of penetration and excluded others would make it impossible to prove the offense without some way to identify the penetrating item—which is sometimes impossible to do:

> The complainant testified that she did not know for sure how the sex act was accomplished. She could only state that "[s]omething went inside me." . . . In the [examining] physician's opinion, . . . the complainant's injuries were consistent with penetration of the vagina by an object the size of a finger or penis, ...

State v. Knox, 536 N.W.2d 735, 742 (Iowa 1995). A person should not be able to escape liability for penetrative assault by unknown means.

Penetration by any object—even an inanimate object—can be a sex act if the evidence establishes that the act was sexual in nature. *See Thede*, 2016 WL 5930417, at *3–4. Zacarias's interpretation does not eliminate the overlap between this crime and sexual abuse, which is not inherently problematic to begin with. *See Alvarado*, 875 N.W.2d at 718 (quoting *Perry*, 440 N.W.2d at 391–92). And Zacarias's reading creates two big problems. First, assaultive penetration by a body part that is not sexual in nature would be exempted from section 708.2(5), and would only be punishable as a misdemeanor assault—which is precisely the kind of outcome that the legislature hoped to prevent, when it created this penalty for penetrative assaults. *Cf. Whetstine*, 315 N.W.2d at 763 (rejecting attempt to create a "distinction between inanimate and animate objects" for purpose of defining sexual abuse). Second, defendants would escape this enhanced penalty in situations where penetrative assault was committed by unknown means—which would make it impossible to apply this enhanced penalty in cases that involved young victims, intoxicated victims, or deceased victims. *See, e.g.*, *Knox*, 536 N.W.2d at 742; *Morsie*, 2014 WL 217296, at *1; *Lopez*, 2001 WL 1597974, at *1. Because Zacarias's reading would subvert the legislature's intent and lead to absurd results, it should be rejected.

II. The trial court did not err in applying Rule 5.613(b) to prohibit Zacarias from impeaching C.G. with prior unsworn statements, without offering her a chance to confirm, deny, or explain them.

Preservation of Error

Zacarias argued that he should be able to present C.G.'s prior statements that were inconsistent with her testimony to impeach her, and he made an offer of proof by cross-examining two witnesses who testified to hearing C.G. make those prior statements. *See* TrialTr.V4 75:8–18; TrialTr.V4 90:19–91:13. The State objected because Zacarias had not confronted C.G. with those prior statements and asked her to confirm, deny, or explain the fact that she made them, as required by Iowa Rule of Evidence 5.613(b). *See* TrialTr.V4 65:1–66:18. The State also argued that Zacarias could not recall C.G. for the sole purpose of confronting her with those statements, because of *State v. Turecek*, 456 N.W.2d 219 (Iowa 1990). *See* TrialTr.V4 66:19–69:1. Additionally, Zacarias had "already released [C.G.] on the record." *See* TrialTr.V4 67:12–15; *accord* TrialTr.V4 51:7–18. The trial court determined that Rule 5.613(b) "applies equally to both sides," and so it sustained the State's objection to testimony from those two witnesses about C.G.'s prior unsworn statements. *See* TrialTr.V4 69:25–72:9. That ruling preserves error for arguments that it considered and rejected—which

would be arguments that Rule 5.613(b) did not apply to defendants, or that Zacarias should have been permitted to cross-examine those witnesses about C.G.'s prior unsworn statements that were part of his offer of proof without needing to confront her with those statements as required by Rule 5.613(b). *See State v. Greene*, 592 N.W.2d 24, 28 (Iowa 1999) (explaining that, when trial court excludes the evidence following offer of proof, that ruling preserves error for any arguments that the trial court rejected as to why it should admit that evidence).

The 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., either before or after the State rested. As a result, error is not preserved for arguments that the trial court misapplied *Turecek* to prohibit Zacarias from recalling C.G. to lay foundation for use of those prior unsworn statements to impeach her. An appellant cannot challenge a ruling that was never made. *See Lamasters v. State*, 821 N.W.2d 856, 863–64 (Iowa 2012) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)) (explaining that a party must obtain a ruling to preserve error on specific grounds for challenge on appeal and must alert trial court to issues it failed to rule upon, if necessary).

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *See State v. Brodene*, 493 N.W.2d 793, 795–96 (Iowa 1992); *see also State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001).

Merits

Zacarias alleges that he should have been permitted to impeach C.G. by presenting evidence of her prior unsworn statements, which he outlined in two offers of proof. This was his first offer of proof:

> **DEFENSE**: When you spoke to [C.G.], she told you that she hadn't taken her medication on the 28th or 29th prior to drinking; correct?
>
> **DET. ANDERSON**: Correct.
>
> **DEFENSE**: And she also told you that when she woke up, Mr. Zacarias' arm was across her chest holding her down?
>
> **DET. ANDERSON**: That it was on her chest. I'm not sure if it was across for sure.
>
> **DEFENSE**: Well, but she did say that she was being held down, nonetheless?
>
> **DET. ANDERSON**: I believe so.

TrialTr.V4 75:8–18. And this was his second offer of proof:

> **DEFENSE**: Mr. Gallaher, when you spoke to [C.G.], she gave you an account of the event that had taken place earlier that night?
>
> **OFFICER GALLAHER**: Yes, sir.
>
> **DEFENSE**: And in that account she said that she woke up with her pants around her ankles, didn't she?
>
> **OFFICER GALLAHER**: Yes, sir.

> **DEFENSE**: And she also alleged that she had fallen asleep in the main room of the basement?
>
> **OFFICER GALLAHER**: She said on the couch in the main room of the basement.
>
> **DEFENSE**: And she also told you that she hadn't used any drugs that night?
>
> **OFFICER GALLAHER**: Correct.
>
> **DEFENSE**: And, despite that, you still observed or believed that she was under the influence of a substance?
>
> **OFFICER GALLAHER**: Correct.
>
> **DEFENSE**: And part of your reason for believing that was that you looked at her, something about her eyes told you?
>
> **OFFICER GALLAHER**: Correct.

TrialTr.V4 90:19–91:13. Zacarias did not (and does not) dispute that he did not ask C.G. if she made those prior unsworn statements, as Rule 5.613(b) requires. The purpose of this requirement is "to avoid unfair surprise by giving the opposing counsel an opportunity to draw out an explanation from the witness on further examination, give the witness an opportunity to explain the apparent discrepancy, and save time"—and when that requirement is not met, it is not an abuse of discretion to exclude the offered impeachment evidence. *See State v. Berry*, 549 N.W.2d 316, 318–19 (Iowa Ct. App. 1996); *accord State v. Oshinbanjo*, 361 N.W.2d 318, 322 (Iowa Ct. App. 1984) ("A showing of a proper foundation is a prerequisite to a successful appeal on the grounds that the trial court excluded a prior inconsistent statement.").

Zacarias is not actually challenging the trial court's ruling on the arguments and offer of proof that he presented. Instead, he argues that he should have been allowed to recall C.G. to lay missing foundation, or alternatively he should have been permitted to use this evidence to impeach C.G. without laying that foundation because "it was in the interests of justice to permit him to do so." *See* Def's Br. at 36–39. But Zacarias did not actually make any request to recall C.G., nor did he argue that the "interests of justice" exception applied. *See* TrialTr.V4 65:16–71:25; TrialTr.V4 74:19–77:2; TrialTr.V4 89:24–94:16. There is no ruling to review on either hypothetical claim of error, and Zacarias cannot challenge the rejection of arguments that he never raised in a ruling that was never made. *Cf. State v. Senseman*, No. 05–0829, 2006 WL 1229987, at *5–6 (Iowa Ct. App. Apr. 26, 2006) (holding that trial court did not abuse its discretion in excluding impeachment where similar foundation was not laid, and rejecting argument about interest-of-justice exception by explaining that "although Senseman stated to the court that 'justice otherwise requires' the admission of Davis's testimony, he did not elaborate on or make an argument as to why the court should apply this exception to the rule in this case"). Zacarias has not shown error in the ruling that was actually issued.

III. Zacarias's trial counsel was not ineffective.

Preservation of Error

Ineffective assistance of counsel can be "an exception to the general rules of error preservation" when failure to preserve error is part of the basis for a claim. *See State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003). For appeals from judgments of conviction that were entered before July 1, 2019, Iowa appellate courts are permitted to address these claims on direct appeal "when the record is sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005); *see also State v. Majors*, 940 N.W.2d 372, 386 & n.1 (Iowa 2020); Sentencing Order (5/17/19); App. 12. But inadequacy of the record on direct appeal still justifies preserving claims for PCR proceedings, especially when counsel has not yet had "a full opportunity to explain [his] actions." *See State v. Trane*, 934 N.W.2d 447, 465 (Iowa 2019). Here, trial counsel may have had strategic reasons for declining to interrupt the prosecutor's rebuttal argument to object. And if any of these ineffective-assistance claims are preserved for PCR, then *all* such claims should be preserved in order to "facilitate consideration of 'the cumulative effect of the prejudice arising from all the claims.'" *See id.* (quoting *State v. Clay*, 824 N.W.2d 488, 501 (Iowa 2012)).

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. *See, e.g.*, *State v. Webster*, 865 N.W.2d 223, 231 (Iowa 2015).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *See State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

A. Trial counsel was not ineffective for failing to impeach C.G. with her prior unsworn statements.

Zacarias is correct that his trial counsel did not lay foundation for admission of C.G.'s prior unsworn statements by confronting her on cross-examination and asking her to confirm, deny or explain them. *See* Def's Br. at 40–41. This did not appear to be strategic, based on subsequent arguments about Rule 5.613(b). *See* TrialTr.V4 65:6–72:10; TrialTr.V4 74:19–76:2; TrialTr.V4 89:24–91:13. But impeaching C.G. with these prior statements could not have changed the outcome.

Other than generic arguments that C.G.'s credibility mattered in assessing the evidence, Zacarias's specific argument about the value of this impeachment evidence is limited to this explanation:

> If C.G. was not asleep as a result of ingesting Trazadone, as she reported, this would affect the validity of Zacarias' conviction. It would be evidence from which the jury could infer that the encounter was consensual, rather than assaultive.

See Def's Br. at 38. But it does not really matter *why* C.G. was asleep; if she was asleep when Zacarias penetrated her vagina, then he could not have gotten her consent. And the evidence that C.G. was asleep was very strong: Storlie's testimony about C.G.'s sudden shriek was extremely strong evidence that C.G. was surprised when she woke up. *See* TrialTr.V2 96:13–97:20. Even Zacarias described the same thing. *See* TrialTr.V3 35:12–24; TrialTr.V4 83:21–84:84:7 ("Basically, his description was that she was waking up."). On top of that, Pering saw that C.G. was struggling to stay awake (and failing) when they talked, later that evening. *See* TrialTr.V3 114:15–115:14; TrialTr.V3 124:6–10.

Some of C.G.'s prior unsworn statements that Zacarias offered for impeachment were made to Officer Gallaher, directly after C.G. reported the assault to the police and before C.G. went to Broadlawns for an exam. *See* TrialTr.V3 63:20–65:10; TrialTr.V4 90:19–91:13.

But Officer Gallaher already testified that C.G. could not provide an "in-depth" account, and that she was "not completely" aware of what had happened to her. *See* TrialTr.V3 66:24–67:14. So it would not be surprising to discover that C.G. was foggy on some details that she was subsequently able to remember with better clarity—especially when she was still "distraught" and still potentially intoxicated. *See* TrialTr.V3 65:7–10; TrialTr.V3 68:6–21.

C.G. met with Detective Anderson on June 6, which was about a week after this incident. *See* TrialTr.V4 54:24–56:3. But even then, C.G. did not have a lot of memory of that evening and early morning. *See* TrialTr.V4 56:4–11. This trial occurred in April 2019, almost two years later—so if C.G. were asked to explain this discrepancy, it would have been simple for her to explain that she had pieced together more details over time. Additionally, C.G. may have been able to point to facts that helped her realize what really happened—for example, she may have counted her remaining Trazodone pills and discovered that she *had* taken one that evening, which may have jogged her memory. On this record, it is impossible to know what C.G. would have said in response to evidence of that prior statement—and her explanation might have even *strengthened* the State's case. *See Leggett v. State*,

No. 10–0233, 2011 WL 2695760, at *5 (Iowa Ct. App. July 13, 2011) (noting that claim had been preserved for PCR "to allow the court to answer the question it could not answer on direct appeal: whether Officer Batcheller would have testified he told the truth in the prior unrelated case" if confronted with purportedly impeaching evidence).

Zacarias argues that *Millam v. State* establishes that failure to impeach a victim-witness in a sexual assault case is prejudicial. *See* Def's Br. at 50 & 53–54 (quoting *Millam v. State*, 745 N.W.2d 719, 723–24 (Iowa 2008)). But *Millam* involved previous allegations of sexual abuse by the same victim, which she subsequently recanted. *See Millam*, 745 N.W.2d at 723–24; *cf. State v. Alberts*, 722 N.W.2d 402, 412 (Iowa 2006) ("By denying Alberts the opportunity to prove to the court R.M. made a prior false claim of sexual misconduct, the court hampered Alberts' ability to argue R.M. accused another man of improper conduct to disguise her own questionable behavior."). Here, unlike in *Millam*, this evidence would not have "greatly impugned [C.G.'s] credibility." *See Millam*, 745 N.W.2d at 723. Rather, it would only establish minor variations between C.G.'s earlier retellings (in the hours and days after this extremely disorienting event) and her subsequent testimony at trial (after she had time to reflect on it). And

trial counsel was already able to impeach C.G. with minor variations between her deposition and her trial testimony. *See* TrialTr.V4 44:15–47:3. But it did not make a difference—neither that impeachment nor the excluded impeachment evidence could meaningfully diminish the believability of C.G.'s testimony or undercut the State's other evidence.

None of that impeachment evidence would change the fact that Zacarias told officers that C.G. was "asleep or unconscious" while he was penetrating her, and that she did not reciprocate or give consent in any meaningful way. *See* TrialTr.V3 106:21–107:3; *accord* TrialTr.V3 30:23–32:14 (stating that Zacarias said C.G. was "not reciprocating the actions" and was not touching his body at all, and that "she was in and out of a state"); TrialTr.V3 77:5–23 (stating that Zacarias said C.G. was "not asleep but not aware"). C.G.'s reaction, as described by Storlie, would make no sense if C.G. had consented to sexual contact but wanted to avoid damaging her relationship with her boyfriend—she could have just remained calm, gone home, and said that nothing had happened. Alternatively, if C.G. had been trying to manipulate people with a fabricated accusation, there would be no reason for her to leave without reciting a brief version of that accusation to Storlie. *See* TrialTr.V2 97:21–98:10. C.G.'s reactions—and her subsequent

inability to remember exact details with any consistency—only make sense within the sequence of events that she gave in her testimony: C.G. passed out in Zacarias's room (from some combination of her Trazodone, marijuana wax, vodka, or some unexpected agent in the drink that Zacarias gave her), and she woke up to discover Zacarias had removed her clothing to gain access to her vagina (which he had apparently penetrated, as C.G. surmised from her later discomfort). *See* TrialTr.V4 22:19–33:25; *accord* TrialTr.V2 96:13–97:20.

This evidence made it very clear that this was an assaultive, non-consensual penetration, and introducing this evidence of C.G.'s prior unsworn statements would not have meaningfully detracted from the strength of the State's proof that Zacarias penetrated C.G. without her consent, before she woke up and reacted to what was happening with astonishment and alarm. Thus, Zacarias cannot show that admitting this impeachment evidence would have created any reasonable probability of a different result. *See King v. State*, 797 N.W.2d 565, 572 (Iowa 2011) (citing *Strickland*, 466 U.S. at 693–94) (noting that prejudice requires that the likelihood of a different result must be "must be substantial, not just conceivable"). Thus, Zacarias cannot establish prejudice for this ineffective-assistance claim.

B. No prosecutorial misconduct occurred during the State's rebuttal argument, so trial counsel was not ineffective for declining to object.

Zacarias argues that his trial counsel was ineffective for failing to object to prosecutorial misconduct during the State's rebuttal (and on one occasion during examination of Detective Anderson, which is about the same subject matter as one his other misconduct claims). *See* Def's Br. at 55–58. None of these are objectionable misconduct.

First, Zacarias argues that the prosecutor "[d]isparaged defense counsel for 'just yell[ing]' and 'attack[ing] the police' investigation." *See* Def's Br. at 56 (citing TrialTr.V5 35:10–13). Zacarias argues that this is prosecutorial misconduct because it is a personal attack on defense counsel, not an attack on the defense theory or advocacy. *See* Def's Br. at 57 (citing *State v. Coleman*, 907 N.W.2d 124, 140 (Iowa 2018)). But that misreads *Coleman*, where the Iowa Supreme Court explained that it was not misconduct for a prosecutor to say that the defense was trying to "blow a lot of smoke around the law, make it as fuzzy as possible"—it explained that "these statements did not amount to alleged prosecutorial misconduct because they were made to attack the defense's theory of the case rather than defense counsel personally." *See Coleman*, 907 N.W.2d at 138–140.

On a related note, two of Zacarais's other claims of misconduct allege that the State was vouching for the police. One statement that Zacarias targets was: "This isn't the cop's fault. They did their job, period." *See* Def's Br. at 56 (quoting TrialTr.V5 36:11–12). He also targets a statement that the police "did their job perfectly." *See* Def's Br. at 57 (quoting TrialTr.V5 40:24–25). This is not vouching. It is not an expression of personal belief in the truth of their testimony. Rather, it is a fair argument from the evidence that established the course of the investigation. Zacarias cites *Graves* as support for his argument that this is vouching—but nothing in *Graves* supports that mistaken assertion. *See State v. Graves*, 668 N.W.2d 860, 879–80 (Iowa 2003) (explaining that misconduct arose from comments about credibility of officer testimony that "went beyond any evidence in the case, implying that the prosecutor knew something the jurors did not").

It is particularly unfair for Zacarias to argue these statements are prosecutorial misconduct because his own closing argument focused on attacking the quality of the police officers' investigative work. *See* TrialTr.V5 18:8–19:11. Zacarias was arguing that each of the officers "didn't bother to do his job" because "they weren't really conducting an investigation" and had already "came to a conclusion that [he]

clearly was guilty." *See* TrialTr.V5 19:20–20:16. Zacarias repeatedly proposed possible versions of events and asked the jury whether they happened, and then answered: "we don't know because [the officers] didn't ask." *See* TrialTr.V5 20:17–26:4.

"A prosecutor is not required to sit mute and let the defendant's interpretation of evidence go unchallenged," and arguments that are responsive will get "additional leeway because it was the defendant's own new argument that prompted the prosecutor's response." *See State v. Thornton*, 498 N.W.2d 670, 676–77 (Iowa 1993); *accord Wycoff v. State*, 382 N.W.2d 462, 468 (Iowa 1986) (quoting *State v. Wright*, 309 N.W.2d 891, 893 (Iowa 1981)). And it is not misconduct for a prosecutor's closing arguments to include "statements aimed at the theory of the defense." *See Coleman*, 907 N.W.2d at 140.

One fact about the investigation that became important was the fact that none of Zacarias's friends who were at the party (except for Storlie) would speak with police, and Zacarias never came in for the voluntary interviews that he scheduled. *See* TrialTr.V4 56:12–60:23. Zacarias argues that it was misconduct to present that testimony and to mention that fact in argument, because it is "[c]ommenting on [his] exercise of the right to remain silent and not talk to law enforcement."

See Def's Br. at 55–58 (citing TrialTr.V4 58:21–60:17 and TrialTr.V5 36:8–9). But this was a fair response to Zacarias's attacks on the investigation: he argued that officers had decided what they believed and did not bother attempting to collect evidence. It was fair game to remind jurors that the evidence (which came in without objection) established that it was impossible to take certain investigative steps that would have addressed Zacarias's complaints, because Zacarias and his friends decided not to cooperate. *See* TrialTr.V4 56:12–60:23.

This was not argued as substantive proof of Zacarias's guilt—instead, it was presented to show that police looked into all possible sources of information about what happened at that party:

> The officers did their job. They documented everything he said; right? And then it was referred to detectives, and then detectives went to go follow up; right? And they called all the witnesses they could find.
>
> [C.G.] came in. [Detective Anderson] even talked with Meghan, the one person that was kind of a random person at this party that didn't really know many people, talked to her. The defendant spoke with 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. This isn't the cops' fault. They did their job, period.

TrialTr.V5 35:25–36:12. Iowa courts will not find remarks to be an impermissible comment on the invocation of a right to remain silent "when an equally plausible explanation exists for the comments." *See*

State v. Lindsey, No. 10–1812, 2011 WL 6076544, at *5 (Iowa Ct. App. Dec. 7, 2011) (citing *Van Hoff v. State*, 447 N.W.2d 665, 675 (Iowa Ct. App. 1989)); *accord Brewer v. State*, 444 N.W.2d 77, 84 (Iowa 1989) (finding that no prosecutorial misconduct occurred when "the comments were not directed at Brewer's failure to testify, but at general prosecutorial frustration over developing evidence when the crime scene is controlled by the perpetrator of the crime"); *State v. Bishop*, 387 N.W.2d 554, 564 (Iowa 1986) (finding no misconduct occurred when "this prosecutor's statement advanced his asserted strategy to thwart defendant's effort to divert the focus to the State and to impeach the credibility of the State's witnesses"). The State was entitled to prove and argue that police really made a good-faith effort to interview everyone involved and gather all of the facts, and any doubt as to whether that was fair game would have been dispelled when Zacarias made the alleged deficiencies in the investigation into one of his primary theories of the defense.

Zacarias argues that the prosecutor was "[d]isparaging defense counsel for impeaching C.G. or arguing that she was not credible" by stating: "For whatever reason, towards the end they decide they want to attack [C.G.] by saying she's making things up." *See* Def's Br. at 56

(quoting TrialTr.V5 38:20–22). Again, this is not objectionable because this was aimed at the defense theory; it was not a personal attack on defense counsel. *See Coleman*, 907 N.W.2d at 138–140.

Finally, Zacarias claims the prosecutor committed misconduct by "[a]rguing that a 'tongue' could be an object when there was no evidence to suggest that a tongue was involved in this case, and claiming that Zacarias stated he performed oral sex on C.G." *See* Def's Br. at 56–57 (citing TrialTr.V5 41:12-20); *see also* Def's Br. at 22 n.4. Zacarias is wrong. An officer testified that Zacarias told them that he performed oral sex on C.G., but not until his fourth or fifth retelling. *See* TrialTr.V3 88:5–89:15. Also, there was evidence that saliva from someone other than C.G. was found in a sample taken from C.G.'s bikini bottoms. *See* TrialTr.V4 62:13–63:16.

Even if any of these were objectionable misconduct, Zacarias would need to establish prejudice through the five-factor *Graves* test. *See Graves*, 668 N.W.2d at 876–77. He has not built that advocacy, and the State has nothing to respond to. This Court should decline to build that advocacy on Zacarias's behalf. *See Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996); *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974); Iowa R. App. P. 6.903(2)(g)(3).

If Zacarias had made any argument to try to establish prejudice, the State would point out that the jury was instructed that closing arguments were not evidence, and they were told to decide the case solely on the evidence that was presented through testimony and exhibits. *See* Jury Instr. 11; App. 10. That minimizes the impact of any impermissible argument because jurors are presumed to have followed that instruction, and they are presumed to have reached their verdict on the basis of the evidence presented—rather than arguments. *See State v. Musser*, 721 N.W.2d 734, 756 (Iowa 2006); *accord State v. Towney*, No. 14–1673, 2016 WL 530262, at *5 (Iowa Ct. App. Feb. 10, 2016) (finding alleged misconduct did not deprive defendant of a fair trial when "the jury was instructed it should base its verdict only on the evidence and that the statements, arguments, questions, and comments by the lawyers were not evidence"). And the misconduct that Zacarias identifies is mostly confined to rebuttal, and was responsive to the defense closing—so the first and fifth factors of the *Graves* framework would weigh against finding prejudice. Finally, the evidence from C.G.'s testimony, from Storlie's testimony, and from Zacarias's own statements was very strong evidence of guilt. Zacarias could not show prejudice for these claims, even if he had tried to.

C. Zacarias cannot show that Article I, Section 10 provides a right to more effective counsel than Iowa precedent already guarantees.

Zacarias argues that "the bar to relief set by *Strickland*'s interpretation of the 'prejudice' prong requires a closer look under the Iowa Constitution." *See* Def's Br. at 42–50. He argues that Iowa should adopt a constitutional harmless error standard for all claims of ineffective assistance of counsel—which really means adopting that standard for all unpreserved claims of error. *See* Def's Br. at 49–50. The Iowa Supreme Court recently denied retention and further review in appeals where litigants raised identical arguments. *See, e.g.*, *Hicks v. State*, No. 18–1625, 2019 WL 4297874, at *2 & n.3 (Iowa Ct. App. Sept. 11, 2019); *Beloved v. State*, No. 17–1908, 2019 WL 1300224, at *1 (Iowa Ct. App. Mar. 20, 2019). And it also frequently reiterates:

> To establish prejudice in the context of an ineffective-assistance-of-counsel claim, a defendant must show a reasonable probability that the result of the trial would have been different. The likelihood of a different result must be substantial, not just conceivable. A defendant must show the probability of a different result is sufficient to undermine confidence in the outcome. This standard requires us to consider the totality of the evidence, identify what factual findings would have been affected, and determine if the error was pervasive or isolated and trivial.

See State v. Kuhse, 937 N.W.2d 622, 628 (Iowa 2020) (quoting *State v. Ambrose*, 861 N.W.2d 550, 557–59 (Iowa 2015)).

Zacarias is correct that *State v. Young* did describe Article I, Section 10 as "double-breasted"—but that refers to its *scope*, and that does not imply any divergence in the *substance* of the protections or guarantees it affords. *See* Def's Br. at 45; *State v. Young*, 863 N.W.2d 249, 256–57 (Iowa 2015). It is not relevant that Article I, Section 10 reaches "cases involving the life, or liberty of an individual" because Zacarias is only claiming that his right to counsel was violated during a criminal prosecution. *See State v. Green*, 896 N.W.2d 770, 775 n.1, 778 n.3 (Iowa 2017). Nor is it relevant that the Iowa Supreme Court has construed this provision of the Iowa Constitution (or others) in ways that differ from constructions given to analogous provisions of the United States Constitution. Even when a litigant quotes the most uplifting language ever written about the Iowa Constitution and its historical importance, "[w]e should not simply 'reflexively find in favor of any new right or interpretation asserted.'" *See State v. Storm*, 898 N.W.2d 140, 149 (Iowa 2017) (quoting *Commonwealth v. Gary*, 91 A.3d 102, 126 (Pa. 2014)). And the *Strickland* dissent has been available since the opinion was published—its concerns are not new, and they have turned out to be overblown. *See* Def's Br. at 47–48 (quoting *Strickland*, 466 U.S. at 710–11 (Marshall, J., dissenting)).

Justice Marshall worried that counsel's ineffectiveness will result in an incomplete record that lacks the very evidence that could illustrate the impact of counsel's alleged ineffectiveness—but Iowa law allows convicted defendants to file PCR actions to build that record, with the assistance of new counsel (as authorized by Iowa statutes, not by any constitutional provision). And Justice Marshall's concerns that trials should be conducted by "fundamentally fair procedures" are valid, but they are properly reserved for the kind of ineffective assistance that could amount to *structural* error. *See Strickland*, 466 U.S. at 710–11 (Marshall, J., dissenting). If Zacarias prevails in showing that there was a single meritorious objection that could have been raised to a single misstep in the prosecutor's rebuttal, surely that would not warrant a presumption that the entire trial was fundamentally unfair.

It is ironic to argue that *Strickland* is antithetical to some powerful constitutional tradition in Iowa, because Iowa had already adopted a *more* demanding prejudice standard before *Strickland*: Iowa courts held that prejudice "cannot be found unless the error constitutes a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." *See State v. Miles*, 344 N.W.2d 231, 234 (Iowa 1984).

Indeed, *Miles* approved of the description of the prejudice standard provided in the Fifth Circuit's opinion in *Washington v. Strickland*—that breach needed to create "actual and substantial disadvantage"—before the U.S. Supreme Court softened that standard in *Strickland*. *See id.* at 234–35 (quoting *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. 1982), *rev'd by Strickland*, 466 U.S. 668). It would not make sense for the Iowa Constitution to demand *less* from litigants claiming a deprivation of this constitutional right to effective counsel, when the Iowa Supreme Court was previously comfortable with a standard that imposed a slightly *heavier* burden than *Strickland*. *See, e.g.*, *Fryer v. State*, 325 N.W.2d 400, 414 (Iowa 1982) (explaining that prejudice is not shown "[w]hen there is no reasonable possibility that the error complained of might have contributed to the conviction"); *cf. Halverson*, 857 N.W.2d at 640 (Mansfield, J., concurring specially) (noting that most jurisdictions that use non-*Strickland* frameworks "had pre-*Strickland* ineffective-assistance standards under their state constitutions that they simply kept after *Strickland* was decided").

Requiring *Strickland* prejudice furthers legitimate interests in finality and in avoiding unnecessary retrials. If a litigant identifies a breach but cannot show prejudice, then confidence in the ultimate

fairness of the trial is not undermined. *E.g.*, *King*, 797 N.W.2d at 576 (finding no *Strickland* prejudice because "it is hard to see how these relatively minor issues had a reasonable probability of affecting the outcome of this case"). Article I, Section 10 does not guarantee a perfect trial—it guarantees a *fair* trial. There is no reason to toss out a conviction if it was obtained following a fair trial, no matter how many unpreserved errors can be identified with the benefit of hindsight.

Adopting a presumed-prejudice standard for these claims would eliminate all incentive to lodge timely objections during trial, when corrective action can be taken. If defendants were not disadvantaged by failure to preserve error at trial, it would become advantageous to sandbag claims, gamble on a favorable jury verdict, and subsequently ambush the trial court with those unpreserved claims on appeal if the jury verdict is unfavorable. *See State v. Jonas*, 904 N.W.2d 566, 583 (Iowa 2017) (discussing importance of discouraging litigants from "engaging in a sandbagging approach of awaiting the results of a jury verdict before crying foul"). That would be fundamentally unfair. *See DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) (quoting 5 AM.JUR.2D *Appellate Review* § 690, at 360–61 (1995)). Iowa courts will presume prejudice for structural error, which usually means constructive or

actual denial of counsel. *See, e.g.*, *Krogmann v. State*, 914 N.W.2d 293, 322–25 (Iowa 2018). But claims that, if preserved, would only allege trial error (i.e., failure to admit certain impeachment evidence) do not establish a constitutional violation of similar magnitude and, as such, require a showing that trial counsel's breach undermined confidence in the outcome or that the trial was rendered substantively unfair. Any other approach would disregard the State's interest in finality.

There is no reason to discard *Strickland* when Iowa courts have applied *Strickland* "expansively." *See Halverson*, 857 N.W.2d at 640 n.3 (Iowa 2015) (Mansfield, J., concurring specially); *accord Rhoades v. State*, 848 N.W.2d 22, 33–34 (Iowa 2014) (Mansfield, J., concurring specially). Zacarias cannot overcome decades of Iowa precedent that applied *Strickland* to vindicate the right to effective counsel under Article I, Section 10 of the Iowa Constitution. *See generally State v. Ondayog*, 722 N.W.2d 778, 784–87 (Iowa 2006) (applying *Strickland* to review claim under Article I, Section 10 and collecting Iowa cases that did the same); *Ledezma*, 626 N.W.2d at 141–45 (reviewing Iowa precedent and explaining adoption of *Strickland* prejudice standard). It is not unconstitutional to require a showing of *Strickland* prejudice to obtain relief. Zacarias cannot make that showing, so his claims fail.

D. Zacarias cannot establish cumulative error.

Finally, Zacarias argues that cumulative error from all of his allegations of error, misconduct, and ineffectiveness had the effect of depriving him of a fair trial. *See* Def's Br. at 59–60. The State stands on its responses to each individual claim of error. Moreover, Zacarias is incorrect when he argues that "[t]ogether, these errors created the impression that Zacarias *had no defense* to the allegations against him, and that the trial was a formality." *See* Def's Br. at 60. His trial counsel put on a spirited defense—he did his best to emphasize the aspects of Zacarias's statements, the police investigation, and C.G.'s testimony that could have given rise to a reasonable doubt about whether any penetration occurred and whether it was consensual. *See* TrialTr.V5 17:23–35:3. But there is one critical piece of evidence that neither trial counsel's closing argument nor Zacarias's appellate brief even dared to mention, and that is Storlie's testimony that she heard C.G. screaming "like someone who's scared," and heard her say: "What are you doing to me? Why are my pants off?" *See* TrialTr.V2 96:13–97:16. There is simply no way for Zacarias to overcome this evidence that a stranger heard C.G.'s scream and knew just what it meant. There is no way to counter that damning evidence that this was *never* consensual.

Even if Zacarias succeeded in establishing breach for every single one of his ineffective-assistance claims, he would be unable to establish *Strickland* prejudice. That is because the only reasonable explanation for what had happened, given what Storlie had heard and seen, was the same conclusion that Storlie reached: Zacarias did something to C.G. while she was unconscious or unaware of what was happening, which is why C.G. "ran out scared, not knowing what was going on." *See* TrialTr.V2 97:25–99:19; *accord* TrialTr.V2 100:24–101:17. Thus, none of Zacarias's claims in this division, whether taken individually or together, can establish a reasonable probability of a different result if trial counsel had done something differently. Thus, his claims fail.

CONCLUSION

The State respectfully requests that this Court reject Zacarias's challenges and affirm his conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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