

IN THE SUPREME COURT OF IOWA

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SUPREME COURT NO. 19-1878  
Osceola County No. FECR006380

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STATE OF IOWA  
Plaintiff - Appellee.

vs.

KURT ALLEN KRAAI,  
Defendant - Appellant,

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On Appeal from the District Court of Osceola County  
Honorable Don E. Courtney, District Judge

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REPLY BRIEF FOR THE APPELLANT

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## **PROOF OF SERVICE AND CERTIFICATE OF FILING**

I certify that on the 28<sup>th</sup> day of May, 2020, I electronically filed the foregoing with the Clerk of the Supreme Court using electronic filing system (EDMS) and sent notification of such filing to Kurt Allen Kraai, Defendant-Appellant, via U.S. Mail at the address listed below.

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## STATEMENT OF THE FACTS

Appellee's Statement of Facts requires some clarifications. The Appellee represents that "N.K. denied that any adult told her to make this up, and she had no real reason to fabricate." (Appellee's Brief p. 14, referencing the Trial Transcript II at 62:17-63:4). While she does answer that no "grownup" told her to lie, this passage does not support the proposition that there was no "real reason to fabricate." *See* Brief of Appellee p. 14, Trial Transcript II p. 62-63. Just one possible reason for possible fabrication, not wanting to go to her father's house, was addressed there. *Id.*

N.K. testified that her father's penis had "a ring on it" as described. (Appellee's Brief p. 13). Her testimony regarding the placement of the ring was "I think it was on the tip." (Trial Transcript II p. 48). The Appellee's Brief then goes on to quote not N.K. but Lt. Seth Hofman of the Osceola County Sheriff's Office regarding the placement as "underneath the head of the penis." *See* Trial Transcript II p. 87). (Appellee's Brief p. 13). The following is the exchange on redirect when N.K. is asked about the ring:

Q. And knowing about him having that ring on his penis, how is it that you know that that was there?

A. He told me, and I saw it.

Q. When he made you put your hands on it?

A. Yes.

(Trial Transcript II p. 78). N.K. did not say that she felt it although she did answer the State's leading question about her hands affirmatively regarding how she knew about the penis ring. *See generally* Trial Transcript II, Appellee's Brief p. 13.

No testimony was provided by any of the witnesses regarding the placement of the penis ring on the "frenulum." *See generally* Trial Transcript II, *see* Appellee's Brief p. 40. Nor was there any testimony or other evidence presented regarding whether such a placement was "unique." *See generally* Trial Transcript II, *see* Appellee's Brief p. 41. There was similarly no testimony or other evidence that the ring would have been visible only when the penis was erect. *Id.* The ring clearly is visible as shown in the photograph identified as Exhibit 4. (App. I 17).

## **STATEMENT OF ISSUES**

- I. ERROR WAS NOT INVITED BY COUNSEL'S EFFORT TO IMPROVE THE ERRONEOUS INSTRUCTION**
  
- II. KRAAI WAS PREJUDICED BY THE ERROR WHICH WAS NOT HARMLESS**

## ARGUMENT

### I. ERROR WAS NOT INVITED BY COUNSEL'S EFFORT TO IMPROVE THE ERRONEOUS INSTRUCTION

Trial Counsel objected to the inclusion of Instruction 16, thus preserving error in this case. (Trial Transcript II 218-220). Changing the proposed instruction to use the word “complainant” instead of “victim” was originally suggested by counsel for the State after Kraai’s objection. *Id.* p. 219 – 220. After Kraai’s objection was overruled, he asked that the instruction be changed as had been suggested by counsel for the State. *Id.* 222. Counsel’s efforts to mitigate the damage to his client did not invite error regarding the admission of this instruction.

Kraai also requested additional language that would provide the jury with another correct statement of the law, namely that Kraai’s testimony should be considered on par with that of the other witness. *Id.* p. 219. No explanation is given as to why the Defendant’s proposal for equivalency in the way the testimony was viewed was rejected yet the State faults the Defendant for the language chosen. It was reasonable for Kraai to request that his testimony would be considered in the same manner as that of the complainant. “He said, she said” situations may be difficult to sort but it was unfair to Kraai to suggest to the jury that only complainant’s testimony

did not need corroboration to be believed. The trial court refused to include the additional language requested by Kraai. *Id.* p. 229-230.

It is well settled that a defendant's testimony should be treated fairly by the court as the testimony of any other witness. *See, e.g., State v. Bester*, 167 N.W.2d 705, 710 (Iowa 1969). The trial court clearly favored the testimony of the complainant over the testimony of the Defendant in its instructions to the jury and error was preserved on this issue.

## **II. KRAAI WAS PREJUDICED BY THE ERROR WHICH WAS NOT HARMLESS**

The Appellee argues that any error would be harmless for two reasons. Appellee argues that error was harmless because the complainant knew about her father's pierced penis and that any error was obviated by the closing arguments of the parties. An error in giving an instruction will not lead to reversal unless the error was prejudicial. *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010)(citing *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010)).

### **A. Kraai was prejudiced by the error despite testimony regarding the penis ring.**

Although it was clear from the evidence that the complainant knew of her father's penis ring, Appellee oversteps to educate regarding this device.

Appellee relies on testimony drawn from a leading question from the prosecutor about the penis ring in the first instance and then gives detail provided by the officer, not the complainant. *See* Appellee's Brief p. 13. There is nothing in the record regarding the location of the penis ring at issue being associated with the "frenulum" as described by Appellee. *See generally* Trial Transcript II, *see* Appellee's Brief p. 40. Nor does the record provide information about whether the ring might have been visible to the complainant only if the penis was erect when viewed, as advanced by Appellee. *Id.*

Somehow Appellee manages to be more "precise" here than was found in the record before the trial court. *Id.* Any facts to support the discussion about when the ring would be visible was absent from the trial court record. *See generally* Trial Transcript II, *see* Appellee's Brief p. 41. It does seem though the ring is clearly visible as displayed for the officer in the photograph. Exhibit 4. (App. I 17). Was the placement of the penis ring "unique?" Again, there is nothing in the record regarding the placement of this particular penis ring which might support an assertion that such placement was "unique". *See generally* Trial Transcript II, *see* Appellee's Brief p. 41.

The characterization of all this extrajudicial information as “strong corroboration” of the complainant’s testimony is without explanation in the record before us. It seems the argument for harmless error analysis turns on the strength of “undeniable corroboration” that is not found in this record. *See Appellee’s Brief* at p. 41. Perhaps this was a uniquely placed penis ring in the frenulum which is close to the tip when the penis is erect and which is observable only when the penis is in that state but there is nothing in the record here to support those assertions. If so, perhaps it would provide undeniable corroboration but no testimony in this record provides that and the record we do have demonstrates the penis ring to be readily observable as shown in Exhibit 4. (App. I 17).

**B. Closing arguments did not cure the harm caused by**

**Instruction 16.**

Kraai’s closing argument could not overcome the strength of the trial court’s instruction favoring the testimony of the complainant over that of Mr. Kraai. The advocacy of both parties dispelled any possible confusion per the Appellee’s brief but the instructions of the court are certainly more persuasive to the jurors than anything these advocates may have advanced in their arguments and the instructions favored the State. The State argued that Instruction 16 was a correct statement of the law and faults Kraai for failing

to challenge the trial court's ruling on that point. (Appellee's Brief p. 17). But Kraai objected to the instruction because it unfairly preferred the complainant's testimony over that of Mr. Kraai. Kraai asked for equivalency, not favor which was given to the State's witness.

If it is appropriate to provide a non-corroboration instruction to a jury deciding a sexual abuse trial in Iowa, then the instruction should have explained that the complainant's testimony should be considered in the same manner as other witnesses, including Kraai. As Kraai argued below, his accuser's testimony should not have been promoted by the trial court through its instructions over that of the other witnesses. The use of this instruction prejudiced his right to a fair consideration of his evidence and the error was not harmless.

## **CONCLUSION**

For all of the reasons discussed above, Defendant-Appellant Kurt Allen Kraai respectfully requests that the conviction be set aside, and the case be remanded for a new trial to a properly instructed jury.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
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/s/ Pamela Wingert  
Pamela Wingert  
Attorney for Appellant

**COST CERTIFICATE**

I hereby certify that the cost of printing Appellant's Brief and Argument was the sum of \$6.50.

/s/ Pamela Wingert  
Pamela Wingert  
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