IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1878

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KURT ALLEN KRAAI,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR OSCEOLA COUNTY
THE HONORABLE DON E. COURTNEY, JUDGE

# APPELLEE'S BRIEF

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**I. Did the court err in overruling Kraai's objection to a jury instruction that correctly stated the principle that there is no corroboration requirement that applies to a complainant's testimony about acts of sexual abuse?**

Authorities

*People v. Welch*, No. 90–00008A, 1990 WL 320365 (D. Guam Oct. 30, 1990)
*Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016)
*Commonwealth v. Barney*, No. 1460 MDA 2014, 2015 WL 7433518 (Pa. Super. Ct. Mar. 27, 2015)
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*Gaxiola v. State*, 119 P.3d 1225 (Nev. 2005)
*Gutierrez v. State*, 177 So.3d 226 (Fla. 2015)
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*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*Ludy v. State*, 784 N.E.2d 459 (Ind. 2003)
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*Odegard v. Gregerson*, 12 N.W.2d 559 (Iowa 1944)
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*People v. Harper*, No. 283509, 2009 WL 1362330 (Mich. Ct. App. May 14, 2009)
*People v. Smith*, 385 N.W.2d 654 (Mich. Ct. App. 1986)
*Pitts v. State*, No. 2019-KA-00275-SCT, 2020 WL 1060615 (Miss. Mar. 5, 2020)
*Pitts v. State*, No. 77192, 2019 WL 6840116 (Nev. Dec. 13, 2019)
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*State v. Altmayer*, No. 18–0314, 2019 WL 476488 (Iowa Ct. App. Feb. 6, 2019)
*State v. Anderson*, 38 N.W.2d 662 (Iowa 1949)
*State v. Barnhardt*, No. 17–0496, 2018 WL 2230938 (Iowa Ct. App. May 16, 2018)

*State v. Clayton*, 202 P.2d 922 (Wash. 1949)
*State v. Dukette*, 444 A.2d 547 (N.H. 1982)
*State v. Feddersen*, 230 N.W.2d 510 (Iowa 1975)
*State v. Fields*, 730 N.W.2d 777 (Minn. 2007)
*State v. Garza*, 231 P.3d 884 (Wyo. 2010)
*State v. Hanes*, 790 N.W.2d 545 (Iowa 2010)
*State v. Harrison*, 914 N.W.2d 178 (Iowa 2018)
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*State v. Jarrett*, No. 17–0091, 2018 WL 1099268 (Iowa Ct. App. Feb. 21, 2018)
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*State v. Marti*, 732 A.2d 414 (N.H. 1999)
*State v. Mathias*, 936 N.W.2d 222 (Iowa 2019)
*State v. Milliken*, 204 N.W.2d 594 (Iowa 1973)
*State v. Osborn*, No. 18–0303, 2019 WL 2871411 (Iowa Ct. App. July 3, 2019)
*State v. Plain*, 898 N.W.2d 801 (Iowa 2017)
*State v. Proost*, 281 N.W. 167 (Iowa 1938)
*State v. Retterath*, No. 16–1710, 2017 WL 6516729 (Iowa Ct. App. Dec. 20, 2017)
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## ROUTING STATEMENT

Kraai seeks retention. *See* Def's Br. at 7. But this is not really an issue of first impression, for two reasons. First, it is at the intersection of two well-established points of law. *See, e.g.*, *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (quoting *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994)) ("Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions."); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The law has abandoned any notion that a rape victim's accusation must be corroborated."). Second, this challenge has already been rejected by the Iowa Court of Appeals, on more than one occasion. *See State v. Altmayer*, No. 18–0314, 2019 WL 476488, at *5 (Iowa Ct. App. Feb. 6, 2019); *State v. Barnhardt*, No. 17–0496, 2018 WL 2230938, at *4 (Iowa Ct. App. May 16, 2018). This claim can be resolved by applying established legal principles, and transfer to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

## STATEMENT OF THE CASE

### Nature of the Case

This is Kurt Allen Kraai's direct appeal from his conviction for second-degree sexual abuse, a Class B felony, in violation of Iowa Code sections 709.1 and 709.3(1)(b) (2017).

Kraai's sole claim in this appeal is his challenge to the ruling that overruled his objection to Jury Instruction 16, which stated: "There is no requirement that the testimony of a complainant of sexual offenses be corroborated." *See* Jury Instr. 16; App. ____.

**Course of Proceedings**

The State generally accepts Kraai's description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 8–9.

**Statement of Facts**

Kraai was charged with engaging in a sex act with his daughter, N.K. in January or February of 2017, when she was under 12 years old. At the time of trial in 2019, N.K. was thirteen years old. *See* TrialTr.V2 15:12–16:15; TrialTr.V2 17:21–18:3.

N.K. testified that, on multiple occasions when she and Kraai were alone in a bedroom at her grandmother's house, Kraai would "pull up some naughty things on the computer" and then use his hand to make N.K. "touch his private parts" with her hand. *See* TrialTr.V2 23:20–27:9. She clarified that she was talking about his penis, and she said it felt "slimy and disgusting." *See* TrialTr.V2 26:22–27:14. N.K. said that she would try to run away, but she was scared to tell anyone because Kraai "told [her] something would happen" if she did.

*See* TrialTr.V2 27:15–28:4. N.K. was afraid of Kraai because he would often hit her and her brother, and threaten their grandmother. *See* TrialTr.V2 29:14–31:1; TrialTr.V2 50:21–51:8. N.K. also did not tell anyone because she "thought every other girl's dad was doing it." *See* TrialTr.V2 51:16–52:2.

At some point, Kraai moved to Sibley. N.K. would occasionally have visits with Kraai at his house. *See* TrialTr.V2 31:23–33:11. N.K. said the touching incidents did not stop—Kraai would still make N.K. touch him and would show her "naughty things," but he used the TV instead of a computer. *See* TrialTr.V2 34:22–36:15; TrialTr.V2 64:6–65:22. N.K. said that Kraai showed her magazines too, and left all of it out in the open: "Some would be scattered all over the house, like some would be in the couch and like DVD cases or just laying around." *See* TrialTr.V2 36:16–37:5; State's Ex. 11–12; App. ___; TrialTr.V2 40:15–41:10; State's Ex. 20; App. ___; TrialTr.V2 42:25–43:7. Investigators found pornography DVDs in plain view in Kraai's home, near the couch in the living room. *See* TrialTr.V2 89:10–22; State's Ex. 11–12; App. ___; State's Ex. 20; App. ___.

N.K. said that Kraai would wear pants with a hole in them, and would move them around while he was seated on the couch with her

"so it could come out," so that he could make her touch his penis. *See* TrialTr.V2 46:6–48:17; State's Ex. 2–3; App. ___; State's Ex. 13; App. ___. N.K. said that Kraai's penis had "a ring on it" that was "silver," and was "on the tip." *See* TrialTr.V2 48:18–50:5. Sure enough, Kraai has a penis piercing: a silver ring "underneath the head of the penis." State's Ex. 4–5; App. ___; TrialTr.V2 86:6–88:25. N.K. said that she and Kraai used different bathrooms when she stayed with Kraai, and she had never accidentally seen him undressed—she only knew about that because she saw and felt it when Kraai made her touch his penis. *See* TrialTr.V2 75:10–25; TrialTr.V2 77:17–78:6.

N.K. also said that "[s]ometimes [she] would wake up with no clothes on," meaning that she would "go to sleep with pajamas on and wake up with no clothes on"—and that never happened when she slept at locations where Kraai was not present. *See* TrialTr.V2 28:19–29:7; TrialTr.V2 50:6–20.

N.K. reported when she was in fourth grade, not long after another touching incident occurred. *See* TrialTr.V2 52:9–53:10; TrialTr.V2 56:11–25. There had been a presentation at school about "parts of our body, like what shouldn't be touched"—and N.K. decided to tell a close friend about what Kraai had been doing. *See* TrialTr.V2

58:14–59:25. N.K.'s friend told her to tell someone, so she told her teacher, who sent her to tell a counselor. *See* TrialTr.V2 60:1–61:8. When interviewed, N.K. had reported that Kraai had "covered the windows up and locked the front door and made [her] touch his private part." *See* TrialTr.V2 57:1–58:8.

N.K. denied that any adult told her to make this up, and she had no real reason to fabricate. *See* TrialTr.V2 62:17–63:4. She testified that she did not get to see other members of her father's side of the family anymore, and that made her sad. *See* TrialTr.V2 63:5–64:5.

Kraai testified in his own defense. He said the pajama pants were likely worn under his jeans while farming, and then had been torn by getting "caught in barbed wire" or "just going over a fence." *See* TrialTr.V2 166:14–167:12. But he also said that he never wore any underwear because, in 2009, he "got [his] nuts twisted around." *See* 174:5–24. Even so, he would continue to wear pants with holes over the crotch and no underwear, even when continuing to work around the same hazards that tore the crotch of his pants in the first place. *See* TrialTr.V2 175:2–25; *see also* TrialTr.V2 206:16–207:3.

Kraai denied ever showing N.K. pornography, showing N.K. his penis, or making N.K. touch his penis. *See* TrialTr.V2 170:18–171:3.

He implied that N.K. may have found his pornographic DVDs when she was alone in his house. *See* TrialTr.V2 185:7–188:10. As for how N.K. could see his penis, he said N.K. and her brother had "gone into the bathroom fighting before, lots of times, when [Kraai was] in the shower or going to the bathroom." *See* TrialTr.V2 194:7–22.

Kraai testified that the room that N.K. identified as the site of the sexual abuse at her grandmother's house only had "[h]alf a door," so that room could never have been used to conceal sexual abuse. *See* TrialTr.V2 169:18–170:7; TrialTr.V2 173:12–174:4. But Kraai had also admitted that he had access to the internet in that room, and watched pornography in that room while other people were in the house. *See* TrialTr.V2 171:11–172:8; TrialTr.V2 177:7–21. That led to this exchange:

> **STATE**: You were able to find time in that room with that door that was easy to walk through to masturbate even when other people were home, correct?
>
> **KRAAI**: Well, people like to sleep at night so it's easy to do it at night.
>
> **STATE**: Okay. Be easy to touch your daughter at night too then, wouldn't it?
>
> **KRAAI**: I still didn't do it so —
>
> **STATE**: Okay. So the idea that the door is open didn't stop anything from sexual — anything sexual from happening in that room?
>
> **KRAAI**: I guess not.

TrialTr.V2 197:11–198:11. More facts will be discussed when relevant.

## ARGUMENT

### I. The trial court did not err in overruling Kraai's objection and submitting Jury Instruction 16, which correctly stated the law.

#### Preservation of Error

Kraai objected to this jury instruction. *See* TrialTr.V2 218:17–220:8. The trial court overruled that objection and submitted the instruction (after granting Kraai's objection to replace the word "victim" in the original version with "complainant," and accepting other requests from Kraai on alternative wording). *See* TrialTr.V2 222:3–11; TrialTr.V2 224:2–230:11; *accord* Jury Instr. 16; App. ____. The ruling that overruled Kraai's objection to the inclusion of that instruction is sufficient to preserve error. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). However, the precise wording of the instruction was chosen by Kraai's counsel, subject to his objection that it should not be submitted at all. *See* TrialTr.V2 228:22–230:5. Kraai can still allege error in the ruling that overruled his objection to inclusion of a non-corroboration instruction, but any challenge to the specific wording that he selected for this jury instruction would be predicated on invited error. *See Jasper v. State*, 477 N.W.2d 852, 856 (Iowa 1991) ("Applicant cannot deliberately act so as to invite error and then object because the court has accepted the invitation.").

**Standard of Review**

A ruling on whether a jury instruction correctly states the law and must be submitted in some form is reviewed for correction of errors at law. *See Alcala*, 880 N.W.2d at 707–08 (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**

Jury Instruction 16 stated: "There is no requirement that the testimony of a complainant of sexual offenses be corroborated." *See* Jury Instr. 16; App. ___. Kraai challenges the trial court's ruling that overruled his objection to giving a non-corroboration instruction, but none of his arguments undermine the central rationale for the ruling, which was that such instructions correctly state the law.

**A. Non-corroboration instructions correctly state the law, so the court was required to submit one.**

The most important fact about Jury Instruction 16 is that it was a true statement of the law. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (stating that "the alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt," and observing that "[t]his court has held that a rape victim's accusation need not be corroborated by physical evidence"); *State v. Kirchner*,

600 N.W.2d 330, 334 (Iowa Ct. App. 1999) ("Melanie's description of events clearly satisfies the definition of a sex act. The State was not required to supply corroborating evidence of her testimony."); Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of victims shall not be required."). Kraai argues that this instruction was improper for various reasons, but he recognizes that what it says is true: "Iowa law allows a jury to convict a defendant of sexual abuse based solely on the uncorroborated testimony of the complaining witness." *See* Def's Br. at 15 (quoting *State v. Jarrett*, No. 17–0091, 2018 WL 1099268, at *6 (Iowa Ct. App. Feb. 21, 2018)). That is fatal to Kraai's challenge.

"Iowa law requires a court give a requested instruction as long as the instruction is a correct statement of law, is applicable to the case, and is not otherwise embodied elsewhere in the instructions." *See Eisenhauer ex rel. T.D. v. Henry County Health Center*, 935 N.W.2d 1, 10 (Iowa 2019); *accord State v. Plain*, 898 N.W.2d 801, 816 (Iowa 2017) (quoting *Alcala*, 880 N.W.2d at 707) ("Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions."). That point of law is applicable to this case, where a complainant testified about sex abuse (especially because her testimony was the only proof that it occurred).

Kraai admits this instruction accurately states the law, but he argues that it "is a legal statement of the reviewing court's standard of review of such evidence and it is not relevant to the jury's function." *See* Def's Br. at 15. But that is not correct—in reality, the existence or non-existence of a corroboration requirement necessarily impacts the fact-finding inquiry. That is why juries receive instructions defining corroboration requirements in contexts where they *do* apply. *See, e.g.*, ISBA Model Criminal Jury Instr. 200.4 ("The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime."); *State v. Anderson*, 38 N.W.2d 662, 665 (Iowa 1949) ("It is prejudicial error to fail to instruct even without request on the requirement of corroboration where the jury could find the only witness against defendant was an accomplice."); *see also* ISBA Model Criminal Jury Instr. 200.5, 500.1, & 500.3 (giving similar requirement with respect to solicited persons, applicable to solicitation offenses); *cf.* ISBA Model Criminal Jury Instr. 200.16 ("The defendant cannot be convicted by confession alone. There must be other evidence the defendant committed the crime."). Iowa courts do not conceal those requirements and apply them on the back end—jurors must receive and apply the relevant law *during* deliberations.

This specific principle is unique in that it elevates sex abuse victims to stand on equal footing with any other witness when describing their victimization, and gives them a meaningful chance to obtain justice when their testimony is the only evidence of the defendant's crime. *See generally State v. Feddersen*, 230 N.W.2d 510, 515 (Iowa 1975) ("In eliminating the requirement of corroboration of a rape victim's testimony, the legislature rejected this concept [of a heavier burden] as a discredited anachronism."). It is especially pernicious for Kraai to insist this principle can only be mentioned on appeal, knowing that protections against double jeopardy will preclude an appeal if jurors acquit on the basis of a mistaken belief that victim's testimony cannot "prove" anything on its own. *See State v. Kramer*, 760 N.W.2d 190, 197 (Iowa 2009) (quoting *State v. Taft*, 506 N.W.2d 757, 760 (Iowa 1993)) ("[A] verdict of acquittal cannot be reviewed for *any* reason without violating the Double Jeopardy Clause."). If jurors cannot be instructed on this principle in cases where it may apply, it vanishes into thin air.

This instruction was critical because jurors may have assumed that N.K.'s testimony about sex acts could not prove they occurred beyond a reasonable doubt unless they believed her *and* found that her testimony was corroborated by some other supporting evidence.

Jurors sometimes believe that conflicting testimony, without more, creates a "he said, she said" situation that precludes conviction, and that complainant testimony alone (even when wholly believed) is not enough evidence to convict on a beyond-a-reasonable-doubt standard. Indeed, some potential jurors voiced that same belief during voir dire, before this trial. *See* TrialTr.V1 34:24–47:20; TrialTr.V1 102:2–104:14.

Similar misconceptions were mentioned in *Barnhardt*, where the Iowa Court of Appeals rejected a claim that a non-corroboration instruction violated section 709.6 by "cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or any other offense." *See Barnhardt*, 2018 WL 2230938, at *4 (quoting Iowa Code § 709.6 (2016)). While that jury instruction only mentioned testimony from alleged victims, it described the *same* standard that applied to all testimony—so its only real effect was to dispel a "rape myth" that lurked in the background:

> [T]he implicit effects of institutionalized sexism and anti-victim bias persist in the hearts and minds of jurors. The research shows that myths about sex-assault victims are pervasive, continually reinforced by rape culture and false stereotypes. One of those rape myths, still held today, is the erroneous belief that a sexual assault victim's testimony is not enough to find a defendant guilty. Potential jurors, misled by rape culture biases and the media, believe they cannot convict when cases do not have corroborating evidence such as DNA or eyewitnesses.

*See Barnhardt*, 2018 WL 2230938, at *4 (quoting Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 TULSA L. REV. 1, 2–3 (2017)). Just like in *Barnhardt*, "concerns about the instruction lessening the State's burden in obtaining a conviction for sexual assault ring false." *See id*. The State still needed to carry its burden of proving all elements beyond a reasonable doubt—but it was entitled to an instruction to explain that it *did not* have the burden of offering additional evidence that would corroborate N.K.'s testimony, if jurors believed it was true. After all, that is the applicable law.

*Alcala* clarified that, in this context, "[t]he verb 'require' is mandatory and leaves no room for trial court discretion" on whether to submit a requested jury instruction with applicability to the case. *See Alcala*, 880 N.W.2d at 707. The State was entitled to submission of a jury instruction that communicated the concept that, if believed, complainant testimony could be proof beyond a reasonable doubt of the occurrence of sex acts that the complainant described. *See* Jury Instr. 16; App. ____. That instruction serves the same purpose as any other jury instruction: to help the jury apply the relevant law during its fact-finding inquiry, and to understand the parameters of its role as the primary finder of fact. Thus, Kraai's challenge has no merit.

### B. Kraai's arguments that attack the wording of this particular non-corroboration instruction cannot be treated as preserved. Kraai selected language that he preferred, and invited the court to use it.

Kraai points to the instruction that was given in *Altmayer* as an instruction that would have been less prejudicial. *See* Def's Br. at 16. In *Altmayer*, the jury received a longer instruction on this topic:

> You should evaluate the testimony of N.D. the same way you evaluate the testimony of any other witness. The law does not require that the testimony of N.D. be corroborated in order to prove that she was sexually abused. You may find the Defendant guilty of Sexual Abuse if N.D.'s testimony convinces you of guilt beyond a reasonable doubt.

*Altmayer*, 2019 WL 476488, at *5. Kraai argues "the instruction approved in *Altmayer* did not suffer the same fatal flaws" that are present in Jury Instruction 16, because the instruction in *Altmayer* also "provided exactly the equivalency between the testimony of the complainant and the other witnesses that Kraai requested." *See* Def's Br. at 16. This is why the State needed to comment on invited error in its error-preservation section. The parties discussed both *Altmayer* and *Barnhardt* after the trial court ruled that a non-corroboration instruction should be given. *See* TrialTr.V2 222:3–11; TrialTr.V2 224:2–230:11. After that, the State did not resist alternate wordings that conveyed the same underlying concept, and it explained that the

unique language used in *Altmayer* and *Barnhardt* was "the result of some requests by defendants in court," made in response to the State's proposed instruction. *See* TrialTr.V2 225:24–226:14. And counsel for the State reiterated that "if we have changes, that's fine"—as long as some version of a non-corroboration instruction would be given. *See* TrialTr.V2 226:15–20. Then, when the court asked Kraai's counsel for his preferred wording for the instruction, he chose to use *Barnhardt* as his starting point—not *Altmayer*. *See* TrialTr.V2 228:21–230:5. The trial court submitted a jury instruction that mirrored the exact wording that Kraai selected. *Compare* TrialTr.V2 229:18–21, *with* Jury Instr. 16; App. ___. If Kraai wanted additional language from *Altmayer*, he knew where to find it and he could have asked for it. But instead, Kraai invited the trial court to use a shorter instruction.

"[A] litigant cannot invite error by asking the court to give a requested instruction and thereafter claim error if the court gives such an instruction." *See Odegard v. Gregerson*, 12 N.W.2d 559, 562 (Iowa 1944); *accord Jasper*, 477 N.W.2d at 856. Kraai can attack the trial court's adverse ruling on his objection to giving *some kind of* non-corroboration instruction, but he cannot argue that the court erred by submitting this particular version, because he selected it.

### C. Most courts to consider this issue have held that non-corroboration instructions are proper.

Kraai argues that "[o]ther states have held that similar jury instructions regarding corroboration in a sexual abuse case are improper," and he correctly identifies cases from Florida, Indiana, South Carolina, and Texas. *See* Def's Br. at 17 (citing *Gutierrez v. State*, 177 So.3d 226 (Fla. 2015); *Ludy v. State*, 784 N.E.2d 459 (Ind. 2003); *State v. Stukes*, 787 S.E.2d 480 (S.C. 2016); *Veteto v. State*, 8 S.W.3d 805 (Tex. Ct. App. 2000), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (Tex. Ct. Crim. App. 2008)). But most other courts to consider this issue have reached the same conclusion that the Iowa Court of Appeals reached in *Altmayer* and *Barnhardt*: that a non-corroboration instruction may be given because it correctly states the applicable law. *See Altmayer*, 2019 WL 476488, at *5; *Barnhardt*, 2018 WL 2230938, at *4. Here are some examples:

- In *People v. Gammage*, the California Supreme Court rejected a challenge to a non-corroboration instruction and held "there remains a continuing vitality in instructing juries that there is no legal requirement of corroboration"—and for any juries that may have already understood that principle, "no harm is done in reminding juries of the rule." *See People v. Gammage*, 828 P.2d 682, 687 (Cal. 1992). It noted that other instructions still assign the burden of proof beyond a reasonable doubt to the State—so even when the jury receives a non-corroboration instruction, uncorroborated testimony must still carry "a heavy burden of persuasion." *See id.*

- In *Mency v. State*, the Georgia Court of Appeals held that a similar non-corroboration instruction "which was coupled with instructions regarding the burden of proof, was an appropriate statement of relevant law to give to the jury." *See Mency v. State*, 492 S.E.2d 692, 699–700 (Ga. Ct. App. 1997); (citing *Harris v. State*, 375 S.E.2d 122 (Ga. Ct. App. 1988)).

- In *People v. Smith*, the Michigan Court of Appeals rejected a challenge to a standard non-corroboration instruction, and remarked that it was particularly applicable "in this case since defense counsel vigorously argued in closing that, because of the strength of the alibi defense, the jury should insist on some corroborative evidence." *See People v. Smith*, 385 N.W.2d 654, 657 (Mich. Ct. App. 1986); *accord People v. Garcia*, No. 289432, 2010 WL 2431913, at *2 (Mich. Ct. App. June 17, 2010); *People v. Harper*, No. 283509, 2009 WL 1362330, at *2 (Mich. Ct. App. May 14, 2009).

- In *Pitts v. State*, the Mississippi Supreme Court rejected a similar challenge to a non-corroboration instruction and held that it "constitutes an accurate statement of the law applicable to this case and did not improperly comment on the evidence." *See Pitts v. State*, No. 2019-KA-00275-SCT, 2020 WL 1060615, at *5–6 (Miss. Mar. 5, 2020); *accord Willard v. State*, 219 So. 3d 569, 576 (Miss. Ct. App. 2017); *Parks v. State*, 228 So. 3d 853, 871 (Miss. Ct. App. 2017).

- In *Gaxiola v. State*, the Nevada Supreme Court rejected a similar challenge and concluded that "[a] 'no corroboration' instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law." *See Gaxiola v. State*, 119 P.3d 1225, 1231–32 (Nev. 2005). It also noted that such instructions are useful for dispelling misconceptions about the law that jurors may otherwise take into deliberations: "[j]urors mistakenly assume that they cannot base their decision on one witness's testimony even if the testimony establishes all of the material elements of the crime." *Id.* at 1232–33; *accord Pitts v. State*, No. 77192, 2019 WL 6840116, at *4 (Nev. Dec. 13, 2019).

- In *State v. Marti*, the New Hampshire Supreme Court rejected an argument that a non-corroboration instruction might have confused jurors into believing they *must* convict or *must* believe the alleged victim's testimony. It held that, read in context with the other jury instructions, "the court's instruction that the victim's uncorroborated testimony was sufficient to prove the State's case did not mean that the jury *should* convict if they believed her testimony, but that they *could* convict on the basis of her uncorroborated testimony"—and that was "merely a correct statement of law." *See State v. Marti*, 732 A.2d 414, 420–21 (N.H. 1999); *see also State v. Dukette*, 444 A.2d 547, 549 (N.H. 1982).

- In *State v. Malone*, the Washington Court of Appeals held it was not error and was not "a comment on the evidence" to give a non-corroboration instruction that stated: "In order to convict the defendant of the crime of rape in any degree, it shall not be necessary that the testimony of the alleged victim be corroborated." *See State v. Malone*, 582 P.2d 883, 884–85 (Wash. Ct. App. 1978). It held that the phrasing of this instruction "does not convey an opinion of the alleged victim's credibility." *See id.* at 885. Additionally, it reiterated the rule that "it is the duty of the court to instruct the jury on pertinent legal issues," and it noted that "[w]hether the alleged victim's testimony required corroboration was an issue raised by the circumstances" of that particular case. *Id.*; *accord State v. Clayton*, 202 P.2d 922, 923–25 (Wash. 1949).

- Various lower courts in other jurisdictions have rejected similar challenges on the same grounds. *See, e.g.*, *People v. Welch*, No. 90–00008A, 1990 WL 320365, at *1 (D. Guam Oct. 30, 1990); *Commonwealth v. Barney*, No. 1460 MDA 2014, 2015 WL 7433518, at *3 (Pa. Super. Ct. Mar. 27, 2015).

While a split does exist, the majority of courts to consider the issue have concluded that non-corroboration instructions are proper and should be given. *Altmayer* and *Barnhardt* are in good company.

### D. Other jury instructions foreclosed the possibility that Jury Instruction 16 could have misled jurors into believing they were required to believe N.K.

Kraai quotes *Ludy v. State*, where the Indiana Supreme Court worried that "[j]urors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of events." *See* Def's Br. at 18 (quoting *Ludy*, 784 N.E.2d at 461–62). Both Kraai and *Ludy* take "a rather dim view of jurors' reading comprehension." *See* Buller, *Fighting Rape Culture*, 53 TULSA L. REV. at 26. But Iowa courts take a different view: no matter how long the instructions are and no matter how many instructions are given, Iowa courts "presume juries follow the court's instructions," to the point where a reference to any particular matter in jury instructions will generally be presumed to have "caused the jury members to consider it." *See State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010); *see also State v. Veal*, 930 N.W.2d 319, 335 (Iowa 2019) ("Jurors didn't fall off the turnip truck and into the courtroom."). This matters because jurors were given instructions that expressly entrusted them with power to assess witness credibility and choose what testimony to believe in reaching their verdict:

> Decide the facts from the evidence. Consider the evidence using your observations, common sense, and experience. Try to reconcile any conflicts in the evidence; but if you cannot, accept the evidence you find more believable.
>
> In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witness's testimony.

*See* Jury Instr. 10; App. ____; *accord* Jury Instr. 5; App. ____ ("My duty is to tell you what the law is. Your duty is to accept and apply this law and to decide all fact questions."); Jury Instr. 7; App. ____ ("Nothing I have said or done during the trial was intended to give any opinion as to the facts, proof, or what your verdict should be."); Jury Instr. 9; App. ____ ("Give all the evidence the weight and value you think it is entitled to receive."); *see also* Jury Instr. 12; App. ____ ("Consider expert testimony just like any other testimony. You may accept it or reject it."); Jury Instr. 18; App. ____ ("Remember, you are judges of the facts. Your sole duty is to find the truth and do justice."). Just like in *Barnhardt*, "[w]hen the instructions are read as a whole, it is clear that the State had the burden of proving [the defendant]'s guilt beyond a reasonable doubt." *Barnhardt*, 2018 WL 2230938, at *5; Jury Instr. 11; App. ____; *accord Marti*, 732 A.2d at 420–21 (rejecting similar argument that non-corroboration instruction could be read to require a certain credibility finding, contradicting other instructions).

Kraai points to an instance where that presumption was overcome by facts establishing that a jury did *not* understand its instructions: in *State v. Stukes*, the South Carolina Supreme Court reversed after a jury had received a non-corroboration instruction and then sent a question to the judge during deliberations, asking if it meant they were *required* to believe the complainant's testimony. *See* Def's Br. at 19 (citing *Stukes*, 787 S.E.2d at 482). But the problem in *Stukes* was that the trial court did not just answer "no"—instead, it "simply recharged the general law on credibility determinations." *See Stukes*, 787 S.E.2d at 482; *see also* Buller, *Fighting Rape Myths*, 53 TULSA L. REV. at 27 ("[T]he judge answering 'no' or informing the jury 'they may, but are not required, to believe the victim's testimony' would have adequately conveyed the law without confusion."). And *Stukes* could only reach *that* conclusion by ignoring the specific excerpt from the original jury instruction that the court reiterated in its answer. *See Stukes*, 787 S.E.2d at 484–85 (Kittredge, J., dissenting) (noting that actual language of both the original credibility charge and the answer are "conspicuously absent from the majority opinion"). The original instruction included this language, which was reiterated to answer the jury's question: "[Y]ou must determine the credibility of *all* witnesses

who have testified in this case. . . . [Y]ou may believe one witness over several witnesses, or several witnesses over one witness." *Id.* at 484. Thus, the majority opinion in *Stukes* is inconsistent with Iowa cases that "review jury instructions as a whole to determine whether the jury instructions correctly state the law." *See Tipton*, 897 N.W.2d at 694 (citing *Hanes*, 790 N.W.2d at 559); *accord State v. Harrison*, 914 N.W.2d 178, 188 (Iowa 2018) ("We do not consider an erroneous jury instruction in isolation, but look at the jury instructions as a whole."). Even jurisdictions that disapprove of non-corroboration instructions usually find them harmless if they accompany standard instructions that correctly assign the burden of proof and empower jurors to make their own credibility findings. *See State v. Garza*, 231 P.3d 884, 891 (Wyo. 2010) (reiterating holding from 1986 Wyoming case that ruled that non-corroboration instructions were improper, but holding any error was harmless because "the district court expressly instructed the jury that it must reach a verdict on the charged crimes beyond a reasonable doubt after examining all the evidence produced at trial," and concluding "we do not believe the jury was confused or misled by Instruction 17 as to its duty with respect to the trial evidence and its assessment of Garza's criminal culpability").

There is no way to read this entire instructional package and conclude that Jury Instruction 16 is a command to find N.K. credible. Taken as a whole, these jury instructions place the burden of proof beyond a reasonable doubt on the State, and they empower jurors to determine what testimony they believe and to weight it accordingly. *Accord Gammage*, 828 P.2d at 687; *Mency*, 492 S.E.2d at 699–700; *Pitts*, 2020 WL 1060615, at *5–6. Thus, Kraai's challenge fails.

### E. This instruction did not unfairly emphasize the weight or significance of any evidentiary fact.

Kraai argues that this instruction unfairly emphasized the significance of N.K.'s testimony over his own, and he claims "[t]he trial court clearly favored the testimony of the complainant over the testimony of the Defendant in its instructions to the jury." *See* Def's Br. at 15; *see also* Def's Br. at 19–20 (quoting *Gutierrez*, 177 So.3d at 229–30). He quotes from *State v. Milliken*, which stated "[t]he court should not emphasize or give undue prominence to evidentiary facts, the existence or nonexistence of which must be settled by the jury." *See* Def's Br. at 20 (quoting *State v. Milliken*, 204 N.W.2d 594, 596 (Iowa 1973) (quoting *State v. Proost*, 281 N.W. 167 (Iowa 1938))). In *Milliken*, the trial court submitted jury instructions (over objection) that catalogued specific items of evidence that the jury "should take

into consideration" in determining "whether [Milliken] was under the influence of an alcoholic beverage," as charged—including "the odor of liquor or alcohol on the defendant's breath at the time of his arrest." *See Milliken*, 204 N.W.2d at 595–96. That was improper, because:

> [I]nstructions reciting facts militating against one party, without a recitation of facts favorable to his contention, are improper and erroneous; and likewise reveals that an instruction which gives undue prominence to evidentiary facts to be determined by the jury is erroneous, as it thereby unduly magnifies the importance of the particular testimony thus selected for specific mention.

*See id.* at 596 (quoting *Proost*, 281 N.W. at 170). Thus, *Milliken* held that those instructions improperly emphasized evidence that favored the State. Moreover, they were unnecessary in light of generalized jury instructions that conveyed the applicable law. *See id.* at 596–97.

Unlike *Milliken*, the challenged instruction in this case did not emphasize any specific evidentiary facts or suggest facts that should receive more weight or consideration. *See* Jury Instr. 16; App. ____. The instruction simply informed jurors that a complainant's account does not require corroboration—and under *Milliken*, it is still proper for instructions "to state the rule of law applicable and pertinent to the matter to be determined." *Milliken*, 204 N.W.2d at 596 (quoting *Proost*, 281 N.W. at 170–71). Even *Milliken* forecloses Kraai's claim.

This undue-emphasis argument is the basis for most decisions that prohibit non-corroboration instructions. *See, e.g.*, *Stukes*, 787 S.E.2d at 483 ("By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak."); *Gutierrez*, 177 So.3d at 229–30 (holding that non-corroboration instruction, "although it correctly states the law, is improper because it constitutes a comment on the testimony presented by the alleged victim"). That concern is misplaced because simple non-corroboration instructions (like the instruction used here) do not flag particular facts that make complainant testimony credible or give any comment on the complainant's credibility—which is just what the Mississippi Court of Appeals noted in *Parks*:

> [J]ury instruction S–6 did not comment on the weight of the evidence or tell the jury how to weigh the credibility of Stringer's testimony. Nor did the instruction mention any aspect of Stringer's testimony relative to a determination of credibility. . . . Instead, instruction S–6 simply conveyed to the jury that, if they found Stringer's testimony true, even if no corroborating evidence existed, they could find that the testimony supported Parks's conviction.

*Parks*, 228 So. 3d at 871; *see also Gaxiola*, 119 P.3d at 1232; *Malone*, 582 P.2d at 885; *accord Altmayer*, 2019 WL 476488, at *5.

Kraai's claim that he "was prejudiced by the favoritism shown by the trial court to the complainant in Instruction 16" is unsupported by the actual text of the instruction. *See* Def's Br. at 20. It was simple and straightforward: "There is no requirement that the testimony of a complainant of sexual offenses be corroborated." *See* Jury Instr. 16; App. ____. It was submitted to dispel a common misconception about evidentiary sufficiency and to explain how to apply the law—but it left it to jurors to find the facts and determine whether N.K.'s testimony was credible enough and believable enough to prove anything at all, within the framework described by other jury instructions. *See, e.g.*, *Gaxiola*, 119 P.3d 1232 ("A 'no corroboration' instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law."). And when read together with other jury instructions, it remained clear that jurors had sole responsibility for the task of assessing each witness's credibility and determining whether the testimony that they believed had proved each element of the charge, beyond a reasonable doubt. *See Gammage*, 828 P.2d at 687; *accord Barnhardt*, 2018 WL 2230938, at *4. Thus, it was not error to submit this non-corroboration instruction, which correctly stated the applicable law, and Kraai's challenge fails.

### F. Error in submitting this jury instruction would be rendered harmless by closing arguments, which repeatedly emphasized that jurors had to decide if they believed N.K.'s testimony.

When jury instructions are problematic, Iowa courts may find harmless error if counsel for both sides present closing arguments that direct the jury's inquiry in a way that obviates the error. *See, e.g.*, *State v. Thorndike*, 860 N.W.2d 316, 323–24 (Iowa 2015) (holding that "confidence in the jury's verdict is not undermined" by submission of unsupported alternative theory in marshalling instruction for the charge because "the State effectively removed that alternative from the jury's consideration during its closing argument"); *State v. See*, 805 N.W.2d 605, 607 (Iowa Ct. App. 2011) (finding due process rights not violated by submission of three identical marshalling instructions on three counts of sexual abuse because "the closing arguments of both the prosecution and the defense, . . . were in complete agreement" as to which alleged sex act was charged in each count); *State v. Osborn*, No. 18–0303, 2019 WL 2871411, at *7 (Iowa Ct. App. July 3, 2019) (explaining that "although the better practice is to provide some discernable distinction in each marshalling instruction for each count for the benefit of the jury and our review, we find no error where the State clearly identified the four separate acts in closing arguments").

Here, both sides made it clear to jurors that it was their responsibility to determine whether they believed N.K.'s testimony. The State told the jury, in framing the case in its closing argument: "[y]our job is to determine whether or not you believe the little girl." *See* TrialTr.V2 231:19–232:2. And the State made sure to explain that the concept described in Jury Instruction 16, while clarifying that it was still up to the jury to determine whether it believed N.K.:

> And you do not need more than [N.K.]'s word to convict. That's also very important because, when I did jury selection, it was obvious — because people think this way, it was obvious that if I came in and said something happened, "Oh, okay. Well, I could just believe that." But if a kid did, maybe I need more. Well, why? Why do you need more, if you didn't need it from an adult?
>
> [. . .]
>
> So what does this really come down to? It comes down to credibility. I think that — And it just make[s] me cringe every time that he-said/she-said because that is again just another way to try and push out there, "Hey, you know —" It's never he-saidhe-said or one person versus another. It's he-said/she-said like somehow women and girls can't be believed just simply because they're — they're female.
>
> But it does come down to she said it happened, he said it didn't. Okay. That doesn't mean that we turn our heads and we say, "Oh, you know, reasonable doubt because, oh, well, two different people said two different things." It happens all the time, right? I mean, in a murder case we have all these witnesses that say, "I saw this guy, and he was holding a gun after the victim was dead." And the guy gets up and says, "Nope, wasn't me." Same exact thing. You decide which one to believe.

*See* TrialTr.V2 237:14–239:1. The State's rebuttal, similarly, focused on the question of whether the jury believed N.K.'s testimony. *See* TrialTr.V2 265:6–17 ("You're here to determine whether or not you believe the allegations."); TrialTr.V2 271:6–272:12 ("I mean, again, this does come down to, Do you believe this child or not?"); *accord* TrialTr.V2 274:6–12 (discussing parts of Kraai's trial testimony that included potentially innocuous explanations for his decision to leave the state after N.K. reported sexual abuse, and noting "[t]hat's up to you to decide what his real reason was").

Kraai's closing, likewise, focused on persuading jurors *not* to believe N.K.'s testimony. *See* TrialTr.V2 246:5–250:3. And it ended by discussing the State's burden of proof beyond a reasonable doubt, and explaining that "[e]ach one of you on this jury has the right and the responsibility and the duty and the obligation to stand up and say, 'No,' if there is one doubt left in your mind" during deliberations. *See* TrialTr.V2 260:17–261:19. The State referenced that in rebuttal, but leveraged it to explain how Jury Instruction 16 applied:

> . . . The law also understands that you do not need to have more than what [N.K.] told you. And I will agree with defense on this. You have the right back there if anybody is saying, "Well, I believe her but —" make them explain. Because you know what? If you believe her, you don't have reasonable doubt.

*See* TrialTr.V2 273:2–10. Again, the critical issue was *whether* jurors believed N.K.—the non-corroboration instruction was only useful for determining the *effect* of a finding that N.K. was telling the truth, and it did not relieve jurors of the duty to resolve that underlying question nor indicate, one way or another, what the answer should be. *See* Jury Instr. 16; App. ___; *accord Marti*, 732 A.2d at 420–21.

There is no way to read those closing arguments and speculate that jurors believed they were required to believe N.K.—the advocacy presented by both parties dispelled any possible confusion and made it clear to jurors that they were required to determine whether they believed N.K.'s testimony. Thus, even if it giving this instruction was an error, it was harmless. *See State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (assuming without deciding that non-corroboration instruction should not have been given, but finding that "inclusion of the instruction was harmless beyond a reasonable doubt" because of other instructions on presumption of innocence and burden of proof, and because "[t]he instruction did not under any circumstances mandate that the jury draw any particular inference, and the parties were free to argue for any conclusion they pleased"). Any potential misunderstanding about this instruction would have been dispelled.

### G. Any error would be wholly harmless because N.K. accurately described Kraai's penis piercing, and Kraai could not explain that away. This record affirmatively forecloses any showing of prejudice.

Other courts that reject non-corroboration instructions will still affirm a conviction, despite submission of such an instruction, if the trial record contains some corroboration of the victim's testimony. *See Ludy*, 784 N.E.2d at 462–63 ("Clearly the testimony of the victim was not uncorroborated. . . . The instruction error did not affect the defendant's substantial rights."); *Garza*, 213 P.3d at 891 ("Since there was some corroboration of the victim's testimony, the challenged instruction, in essence, pertained to a moot point."). Here, the fact that N.K. described Kraai's penis piercing as a silver ring "on the tip" was clear corroboration of her testimony. *See* TrialTr.V2 48:18–50:5. Kraai's penis was, in fact, pierced with a silver ring "underneath the head of the penis" *See* TrialTr.V2 86:6–88:25. To be precise, it was a ring in the frenulum—which is close to the tip when the penis is erect, but on the underside when it is flaccid. *See* State's Ex. 4–5; App. ___. This matters for two reasons. First, Kraai's explanation was that N.K. and her brother had "gone into the bathroom fighting before, lots of times, when [he was] in the shower or going to the bathroom." *See* TrialTr.V2 194:7–22. But a small, silver frenulum ring would have

been concealed by a flaccid penis from the front view, and difficult to see from a distance at any angle (especially if Kraai was either moving or making any attempt to cover his genitals from his children). Second, N.K.'s description of the piercing as being "on the tip" of Kraai's penis (and not on the underside) means that she saw it erect—not flaccid—which corroborates her testimony that she saw and felt it when Kraai made her touch his penis while he viewed pornography. *See* TrialTr.V2 48:18–50:5; TrialTr.V2 75:10–25; TrialTr.V2 77:17–78:6. Thus, the unique placement of Kraai's penis piercing undermines his attempt to provide an innocuous explanation, while simultaneously providing strong corroboration for N.K.'s testimony. *Accord State v. Retterath*, No. 16–1710, 2017 WL 6516729, at *5 (Iowa Ct. App. Dec. 20, 2017) (explaining "C.L.'s credibility was bolstered by his accurate drawing of the sword tattoo on Retterath's penis, something he would not have been able to remember if Retterath was truthful in his total denial").

This was undeniable corroboration that would cause any court that prohibits non-corroboration instructions to affirm the conviction on harmless error. *See Ludy*, 784 N.E.2d at 462–63; *Garza*, 213 P.3d at 891. It also satisfies Iowa's generalized test for non-constitutional harmless error, because erroneously overruling Kraai's objection to

this jury instruction could not possibly have affected the outcome, in the face of this strong evidence that N.K. had knowledge about the existence and location of Kraai's hidden piercing that corroborated her testimony by proving that she interacted with his erect penis. *See* TrialTr.V2 48:18–50:5; *accord State v. Mathias*, 936 N.W.2d 222, 226 (Iowa 2019) ("Even when the instruction is erroneous, we will not reverse unless prejudice resulted."); *Hanes*, 790 N.W.2d at 550–51. Thus, even if Kraai's challenge to the non-corroboration instruction had merit in the abstract, it would not justify reversal in this case. *See Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988) (noting, for most errors, "this court should reverse only when justice would not be served by allowing the trial court judgment to stand").

## CONCLUSION

The State respectfully requests that this Court reject Kraai's challenge 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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