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

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: April 14, 2021)

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QUESTION PRESENTED FOR FURTHER REVIEW

Jury Instruction 16 said: "There is no requirement that the testimony of a complainant of sexual offenses be corroborated."

The Iowa Court of Appeals held that it was error to submit this instruction, even though it was an "accurate statement of law." Then, after holding that it was error to submit this instruction, it affirmed the conviction—in part because it found that the jury instructions as a whole "fairly guided the jury's decision making." The Court of Appeals has approved similar no-corroboration instructions in prior cases.

(1) Is it error to submit a no-corroboration instruction?

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STATEMENT SUPPORTING FURTHER REVIEW

On April 14, 2021, the Iowa Court of Appeals affirmed Kraai's conviction for second-degree sexual abuse. *See State v. Kraai*, No. 19–1878, 2021 WL 1400366 (Iowa Ct. App. Apr. 14, 2021). But in doing so, it disavowed at least one of its two unpublished opinions that had approved the use of similar no-corroboration instructions. *See State v. Barnhardt*, No. 17–0496, 2018 WL 2230938 (Iowa Ct. App. May 16, 2018); *cf. State v. Altmayer*, No. 18–0314, 2019 WL 476488 (Iowa Ct. App. Feb. 6, 2019). This threatens the validity of convictions in other cases where no-corroboration jury instructions were given, in reliance on *Barnhardt*. And it is wrong on the merits because the instruction correctly states the law and does not comment on evidence—and it is relevant to the jury's central inquiry. Courts in other states are divided on this issue; a majority permit the instruction. *See* SlipOp. at *11–13; *see also State v. Haid*, 721 S.E.2d 529, 539–41 (W. Va. 2011). This Court should grant further review to resolve the conflict between Iowa cases and provide much-needed guidance on this issue. *See* Iowa R. App. P. 6.1103(1)(b)(1)–(4). And it should also clarify that when the jury instructions, as a whole, accurately convey the applicable law, that means there is *no error*—not harmless error.

STATEMENT OF THE CASE

Nature of the Case

The Court of Appeals held that the trial court erred in submitting a jury instruction that was modeled on the instruction that it approved in *State v. Barnhardt*: "There is no requirement that the testimony of a complainant of sexual offenses be corroborated." *See* Jury Instr. 16; App.V2, 17; *Barnhardt*, 2018 WL 2230938, at *4 (approving similar jury instruction that said "alleged victim" instead of "complainant"). It found that error was harmless, so it affirmed Kraai's conviction for second-degree sexual abuse. *See* SlipOp. at *15–17. The State seeks further review, because this holding has profound ramifications.

Statement of Facts

The underlying facts about this sexual abuse are adequately summarized in the en banc opinion. *See* SlipOp. at *2 and *15–16. Key facts about the jury instruction will be discussed when relevant.

ARGUMENT

I. It was not error to submit Jury Instruction 16.

The Court of Appeals agreed with both parties that this instruction was "an accurate statement of law." *See id.* at *7–8; *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) (citing *State v. Feddersen*, 230 N.W.2d 510, 514–15 (Iowa 1975)) ("The law has abandoned any notion that a rape victim's accusation must be corroborated."). And it also agreed that "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." SlipOp. at *7 (quoting *Eisenhauer ex rel. T.D. v. Henry Cnty. Health Ctr.*, 935 N.W.2d 1, 10 (Iowa 2019)). Still, the Court of Appeals held that submitting this jury instruction was error. The State can parse out four reasons for its holding: **(1)** the instruction was not relevant to the jury's function; **(2**) it violated section 709.6; **(3)** it was confusing, in part because "corroboration" was not defined; and **(4)** it highlighted or "singled out" N.K.'s testimony, which commented on the evidence. But all of its critiques were misplaced, and it failed to recognize the pressing need for this no-corroboration instruction. Moreover, its finding of harmless error is really a finding that there was *no* error.

A. The instruction was relevant to the jury's function as the finder-of-fact.

The Court of Appeals held this instruction was "not relevant to the jury's function." *See* SlipOp. at *8. That is incorrect. This instruction is *so* relevant to the jury's function in sex-abuse prosecutions that the State must seek further review, even though this opinion *affirmed* Kraai's conviction. If this opinion becomes the law, Iowa courts will reject instructions that provide a much-needed clarification of the law that juries must apply in assessing the sufficiency of the evidence—their essential function. This instruction is relevant, and it is needed.

1. Whether the jury can convict in reliance on uncorroborated testimony is a question of law with a clear answer that is relevant to the jury's deliberations, so the instructions should give it.

The Court of Appeals noted that Washington appellate courts have held that trial courts may give no-corroboration instructions. But it also quoted recommendations from the Washington Supreme Court Committee on Jury Instructions that said: "Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel." *See* SlipOp. at *13 n.7. Certainly, trial courts ought to leave it to counsel to offer evidence and argument that helps

jurors decide whether they *should* believe uncorroborated testimony; that is "a factual problem, not a legal problem." *See id*. But whether jurors *can* accept uncorroborated testimony is a pure question of law with a very clear answer: they can. Any "argument of counsel" to the contrary would misstate the law. Refusing to instruct the jury on this relevant point of law would be an abdication of the trial court's "duty to instruct fully and fairly" on "all issues raised by the evidence." *See State v. Schuler*, 774 N.W.2d 294, 297 (Iowa 2009) (quoting *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995)); *State v. McCall*, 754 N.W.2d 868, 872 (Iowa Ct. App. 2008) (quoting *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa Ct. App. 1993)) (explaining that trial court has "the duty to ensure the jury understands . . . the law it must apply"). The argument against this instruction "is really an argument to keep jurors from finding out what the law is." *See* Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 TULSA L. REV. 1, 17–18 (2017). That is especially problematic because this instruction clarifies the law that jurors must apply in assessing the sufficiency of the evidence to establish proof beyond a reasonable doubt—which is why it is relevant to the jury's function. *See People v. Gammage*, 828 P.2d 682, 687–88 (Cal 1992).

The Court of Appeals compared this to giving an instruction that a particular witness's testimony did not require corroboration because that witness was not an accomplice. *See* SlipOp. at *9 n.5. The hidden premise of that comparison is that there is no reason to believe that jurors may apply an implicit corroboration requirement to testimony from "John Doe," without that instruction. But if jurors naturally treated testimony from children testifying about sex abuse like they treated testimony from "John Doe," then the State would not request this instruction. While most jurors intuitively understand that credible testimony from "John Doe" can prove a key fact, jurors often harbor mistaken beliefs about criminal law that cause them to require corroboration for testimony from "J.D."—as this record illustrates.

2. Voir dire established that there was a need for a no-corroboration instruction in this case.

The Court of Appeals dismissed the State's arguments about the need for this instruction by replying: "nothing in our instant record supports the assertion that jurors harbored misconceptions about the corroboration requirement," and that research showing that jurors are likely to bring those misconceptions into the courtroom "is not the type of fact that we can judicially notice." *See* SlipOp. at *15 n.9. Both of those premises are incorrect. This section is about the first one.

The record from voir dire showed that misconceptions about uncorroborated complainant testimony regarding sexual abuse had already crept into the courtroom. The prosecutor asked panelists if they could convict on the basis of testimony that described abuse:

> **PROSECUTOR**: [I]f you believed a child, if . . . at the end of their testimony, "I think that happened," can that be enough for you to convict somebody?
>
> **PANELIST G**: No.
>
> **PROSECUTOR**: Let's go to [panelist W]. . . . What do you think about that? Would that be enough?
>
> **PANELIST W**: I think I need evidence.

See TrialTr.V1 37:12–39:1. Later, another panelist said that even if he believed the child's testimony about the alleged abuse, he would still need "evidence" to convict. *See* TrialTr.V1 40:23–41:13. All of the panelists agreed that testimony counted as evidence. *See* TrialTr.V1 41:14–19. But that panelist clarified that he meant *different* evidence.

> **PROSECUTOR**: . . . So if a child came in and told you what happened to them and you believed that child, would that be enough?
>
> **PANELIST A**: Not really.

TrialTr.V1 41:20–42:1. Even after acknowledging that his approach would mean that some victims of sexual abuse would never be able to hold their abusers accountable, that panelist was unmoved:

> **PROSECUTOR**: . . . I just need to know, if you need more than just what a child has to say, because that's usually all we have.
>
> **PANELIST A**: I need more.

See TrialTr.V1 42:2–43:5. Another panelist was less resolute, but still unsure whether credible testimony from a child victim would suffice:

> **PROSECUTOR**: [A]nd I'll preface this by, if you believe the child. Because if you didn't, then you didn't. But if you believe them, could it be enough if it was just what she had to tell you?
>
> **PANELIST B**: That's tough. . . . It's tough to say.

See TrialTr.V1 44:5–25. Yet another panelist had instinctively drawn a distinction between a child's testimony that described sexual abuse and an ordinary person's testimony that they had been shoved while walking down the street. When asked to explain the difference, he had no explanation whatsoever. *See* TrialTr.V1 45:15–46:9 ("I don't know that there's a really good answer. I don't know there's a difference.").

To be sure, other panelists said they understood that they could rely on testimony that they believed as proof that abuse occurred. *See* TrialTr.V1 45:1–14; TrialTr.V1 102:2–104:14. But the prevalence and stubbornness of that misconception among this panel was remarkable. Indeed, this voir dire established that this misconception was lurking just beneath the surface—*all* of these jurors stood to benefit from an instruction that would dispel it. Just like jurors who disavow racism

may still be affected by implicit racial bias, even jurors who agreed that they could convict on the basis of belief in uncorroborated testimony still benefitted from an instruction that made it unambiguously clear. *See State v. Williams*, 929 N.W.2d 621, 639 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part) ("[R]esearch portends that implicit bias will influence jurors unless the court expressly brings the subject to the jurors' attention."); *accord Gammage*, 828 P.2d at 687.

3. Research has established that misconceptions about victim testimony and the burden of proof in sex abuse prosecutions are widespread. A court may give a no-corroboration instruction without a case-specific record on juror beliefs.

The Court of Appeals was incorrect that "nothing in our instant record supports the assertion that jurors harbored misconceptions about the corroboration requirement." *See* SlipOp. at *15 n.9; *accord* State's Brief at 21. It was also incorrect when it said that it could not consider social science research that was not in the record. Courts may do that whenever "judicial decision-making involves crafting rules of law based on social, economic, political, or scientific facts." *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009). In this regard, an appellate court is not really limited by the rules of evidence, by the record below, or even by the advocacy of the parties—the court must

find and consider "the most compelling data in order to give needed intellectual legitimacy to the law or rule crafted by the court." *See id.*; *State v. Henze*, 356 N.W.2d 538, 540 n.1 (Iowa 1984); Laurie Kratky Doré, *Iowa Practice Series: Evidence*, § 5.201:1 at n.6–n.11 (2020).

There are plenty of examples. In *Booth-Harris*, both the majority and the dissent considered social science research that was not in the underlying record of adjudicative facts, in assessing jury instructions on eyewitness identifications. *See State v. Booth-Harris*, 942 N.W.2d 562, 578–80 (Iowa 2020); *id.* at 583–90 (Appel, J., dissenting). In *Plain*, two special concurrences diverged on the conclusions to draw from social science research on implicit-bias instructions. *See State v. Plain*, 898 N.W.2d 801, 830–34 (Iowa 2017) (Appel, J., concurring specially) ("Research suggests that the problem of implicit bias may be moderated by attention to the issue."); *id.* at 839–41 (Waterman, J., concurring specially) ("[N]o empirical study has been cited that an implicit-bias jury instruction improves juror decision-making."). And in *Linn*, the court provided an overview of battered partner syndrome that drew from more than 35 different secondary sources, leading it to hold that there was a dispute of material fact as to whether Linn's trial counsel was ineffective for failing to consult a BWS expert (with

no adjudicative facts beyond Linn's testimony at her criminal trial), and that the PCR court erred in denying Linn's motion to appoint a BWS expert. *See Linn v. State*, 929 N.W.2d 717, 731–54 (Iowa 2019). Along the way, *Linn* cited "[e]mpirical research" demonstrating that jurors harbor "myths and misconceptions about BWS victims [that] affect our criminal justice system," together with empirical research that suggested "that expert testimony on BWS is useful to jurors." *See id.* at 742–46. None of that research was in the underlying record (nor did it come from the parties, who cited almost no secondary authority in their briefing and argument). This illustrates that Iowa courts are not barred from reaching outside the record of adjudicative facts to make use of research on the prevalence of common misconceptions and on their potential effect on jury deliberations, if left unaddressed.

Empirical research tends to show that jurors still "erroneously believe that a conviction cannot be had without corroboration." *See* Buller, *Fighting Rape Culture*, 53 TULSA L. REV. at 15 & n.119–20; *id.* at 18 & n.137–39. A recent study asked over 1,000 potential jurors whether they would be able to convict on various criminal charges in the absence of scientific evidence, but with testimony from the victim or other eyewitnesses. For most charges, a majority of potential jurors

could convict if they believed a victim's testimony, standing alone. But "in the case of rape," they wanted corroboration: "Only 14 percent of respondents said that they would find a defendant guilty in a rape case if the victim's testimony was presented without any scientific evidence." *See* Donald Shelton, *The 'CSI Effect': Does It Really Exist?*, 259 NAT'L INST. OF JUSTICE J. 1, 5 & n.1 (2008). The authors of that study went into more detail on that finding in another publication:

> [I]n cases charging rape or other sexual misconduct, a significant number of respondents (26.5 percent) stated that they would find the defendant not guilty if there was no scientific evidence, even where the alleged victim testifies to the assault. Further, in such cases a significant number of respondents (21.5 percent) said that they would acquit the defendant unless the scientific evidence specifically included DNA evidence. . . . This finding may reflect a general hesitancy to find guilt in what jurors perceive as a "he said/she said" situation.

Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the 'CSI Effect' Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 360 (2008). That striking effect did not exist for any other type of charge. But for some reason, jurors took a very different approach to rape charges: they "mistakenly assume[d] that they [could not] base their decision on one witness's testimony even if the testimony establishe[d] every material element of the crime." *See Gaxiola v. State*, 119 P.3d 1225, 1233 (Nev. 2005).

When Shelton's team replicated their study with a larger sample, they continued to find "a similar pattern of trusting factual witnesses" in most criminal prosecutions—but, yet again, that pattern "did not extend to rape cases, where the jurors appeared to demand scientific evidence as a condition of finding guilt." *See* Donald E. Shelton et al., *An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors' Expectations for Scientific Evidence*, 12 VAND. J. ENT. & TECH. L. 1, 20–21 (2009).

That is consistent with scholarship explaining that Americans tend to forswear any capacity to resolve "he said/she said" disputes about sexual abuse—no matter how believable those statements are.

> Two of the stickiest judgments that circulate in response to claims by women of sexual violence are "he said/she said" and "nobody really knows what happened." . . .
>
> . . . Yet, again, "nobody knows what really happened" is the starting point of a trial. Like the presumption of innocence, it names a suspension of judgment . . . . Only in cases of sexual violence do people feel virtuous, objective, and fair when they claim that the conditions that typically initiate and guide a legal proceeding moot it from the outset.

Leigh Gilmore, TAINTED WITNESS: WHY WE DOUBT WHAT WOMEN SAY ABOUT THEIR LIVES, 6–7 (2017). Jurors need to be instructed that a "he said/she said" is not a dead-end, and that they may resolve it if they are firmly convinced that uncorroborated testimony is truthful.

Section 709.6 was meant to be "the final nail in the coffin of Lord Hale instructions." *See* SlipOp. at *6. But a nail must be driven into place. "One can draft the most faithfully pro-victim statute, and it will not matter a bit if the jury still convicts or acquits according to the same old biases." *See* Courtney Fraser, Comment, *From 'Ladies First' to 'Asking for It': Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141, 186 (2015). And those same old misconceptions about the insufficiency of uncorroborated testimony as proof of sexual abuse still follow jurors into the courtroom. Even without the empirical research, voir dire from this case would still be enough to illustrate that those same misconceptions still lurked in the minds of these panelists—and that they could be particularly difficult to dislodge. *See* TrialTr.V1 38:3–39:25; TrialTr.V1 40:23–43:5. And even if every one of these jurors had rejected those misconceptions by the end of voir dire, "no harm is done in reminding juries of the rule" in an instruction that they can reference during deliberations. *See Gammage*, 828 P.2d at 687. After all, the jury must decide whether the evidence has proven the charge beyond a reasonable doubt, and the trial court has a duty to instruct fully and fairly on applicable law that defines the parameters for that inquiry. Jury Instruction 16 was

relevant to the jury's function because it instructed on a point of law that was applicable to the sufficiency-of-the-evidence question that jurors needed to answer. *See State v. Malone*, 582 P.2d 883, 884–85 (Wash. Ct. App. 1978) (approving similar instruction and noting that "[w]hether the alleged victim's testimony required corroboration was an issue raised by the circumstances"). This is not a proper subject for argument of counsel, nor should Iowa courts be content to let those pernicious misconceptions fester. The trial court correctly identified a need for this instruction; the Court of Appeals erred when it missed it.

B. The instruction did not violate section 709.6.

Section 709.6 states: "No instruction shall be given in a trial for sexual abuse 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* Iowa Code § 709.6. The Court of Appeals held that section 709.6 "prohibits courts from instructing jurors to use a less rigorous or more relaxed standard for appraising the testimony of an alleged sexual-abuse victim than other witnesses." *See id.* at *6–7. That is true. But Jury Instruction 16 did not do that: it explained that there was no artificial corroboration requirement for N.K.'s testimony.

This was not a different standard for N.K.'s testimony, because there was no corroboration requirement for *any* witness's testimony.

"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*, 119 P.3d at 1232; *accord Gammage*, 828 P.2d at 687 (holding similar no-corroboration instruction does not "create a preferential credibility standard for the complaining witness" and also does not "suggest that that witness is entitled to a special deference"); *Barnhardt*, 2018 WL 2230938, at *4. Giving this no-corroboration instruction did not violate section 709.6.

C. The instruction was not misleading or confusing.

The Court of Appeals 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* SlipOp. at *9 (quoting *Ludy v. State*, 784 N.E.2d 459, 462 (Ind. 2003)). But that would conflict with *other* instructions they received about their role in assessing credibility and weighing the evidence. *See, e.g.*, Jury Instr. 10 ("[A]ccept the evidence you find more believable. . . . You may believe all, part or none of any

witness's testimony."); Jury Instr. 9 ("Give all the evidence the weight and value you think it is entitled to receive."). And no reasonable juror could interpret Jury Instruction 16 to override everything else they had been told about their role as the finders of fact. *See* Jury Instr. 5, 7, 18; *accord State v. Veal*, 930 N.W.2d 319, 335 (Iowa 2019) ("Jurors didn't fall off the turnip truck and into the courtroom.").

Iowa courts presume that jurors are sharp—to the point where we presume that they compare the wording of different instructions and derive meaning from exclusion by omission. *See State v. Davis*, 951 N.W.2d 8, 19 & n.1 (Iowa 2020). The Court of Appeals believed jurors would infer "that the testimony of other witnesses, particularly the accused, *did* require corroborating evidence to be believed." *See* SlipOp. at *7. But no juror could misread Jury Instruction 16 to mean that they could not credit Kraai's testimony without corroboration, because they were expressly told that they could "accept the evidence [they] find more believable," and "[they] may believe all, part or none of any witness's testimony." *See* Jury Instr. 10. The Court of Appeals agreed that "the jury was not left to decipher the noncorroboration instruction in a vacuum" and "[t]he instructions as a whole, including the description of the State's burden of proof, fairly guided the jury's

decision making." *See* SlipOp. at *17. But that means the instructions *as a whole* were not misleading or confusing, which means there was no error. *See State v. Tipton*, 897 N.W.2d 653, 694–95 (Iowa 2017).

The observation that jurors were properly instructed on the State's burden of proof beyond a reasonable doubt is critical. When a victim testifies and describes all elements of an offense, jurors should convict *if and only if* they believe that testimony and are convinced of the defendant's guilt beyond a reasonable doubt. Jury Instruction 16 clarified that jurors could rely on N.K.'s testimony, if they believed it. But then, those jurors had to decide whether *that* was enough to prove Kraai's guilt beyond a reasonable doubt—and reasonable doubt could arise from any evidence (or lack of evidence) that stood out to them. *See* Jury Instr. 11; *accord* Jury Instr. 4, 13. In light of the instructions on the State's burden of proof, this instruction "did not mean that the jury *should* convict if they believed [the victim's] testimony, but that they *could* convict on the basis of her uncorroborated testimony and all the other evidence" if it left them firmly convinced of Kraai's guilt, beyond a reasonable doubt. *See State v. Marti*, 732 A.2d 414, 420–21 (N.H. 1999). While Jury Instruction 16 correctly stated that there was no corroboration requirement for complainant testimony, it did not

relieve the State of its burden of proof beyond a reasonable doubt—"a full and fair consideration of all of the evidence" was still required, and any reasonable doubt as to the believability of N.K.'s testimony about the offense would still preclude conviction. *See* Jury Instr. 11.

The Court of Appeals was also concerned that this instruction did not define "corroboration." *See* SlipOp. at *5. But no definition seemed necessary when Kraai's counsel asked a witness if he found any corroborating evidence. *See* TrialTr.V1 113:24–114:7. Jurors did not need a definition to understand this common term. In cases where accomplice testimony must be corroborated to support a conviction, a definition of "corroboration" is relevant to the jury's function, because jurors must assess the sufficiency of corroborating evidence. *See, e.g.*, *State v. Ware*, 338 N.W.2d 707, 710 (Iowa 1983) ("The existence of corroborative evidence is a legal issue, but its sufficiency is ordinarily a question of fact for the jury."). But this instruction did not require jurors to determine whether any particular standard of corroboration was met. Instead, it clarified that there was no such requirement—so long-winded explanations of corroboration requirements that apply in other contexts would have been superfluous. There is nothing wrong with using "plain language" that jurors would understand. *See Tipton*,

897 N.W.2d at 695–96. And the lack of a definition of "corroboration" did not stop the Court of Appeals from finding that, *as a whole*, these instructions were *not* confusing or misleading—which means that the trial court did not abuse its "rather broad discretion" in accepting the shorter version of the *Barnhardt* instruction that the parties selected. *See id.* (quoting *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994)); *cf.* TrialTr.V2 228:21–230:5 (adopting shorter wording by request).

D. The instruction did not impermissibly highlight or "single out" N.K.'s testimony.

The Court of Appeals ruled that Jury Instruction 16 "singles out the alleged victim for special treatment in the minds of the jurors," in a manner that "highlighted the testimony of just the child," and "was improper because of that asymmetry." *See* SlipOp. at *11 & *14. It is true that jury instructions should not *comment* on evidence. But this instruction merely *refers* to evidence—which is common. *See State v. Clayton*, 202 P.2d 922, 923 (Wash. 1949) (rejecting similar challenge and noting "[t]he trial court is not forbidden to make reference to the evidence, but is only forbidden to comment thereon"). Instructions often refer to specific evidence, to anchor explanations of how jurors may use it (and how to decide whether to use it). The jury received an instruction on how to assess and use expert testimony—but nobody

would contend that it was improper to "highlight" or "single out" the testimony of the only expert witness. *See* Jury Instr. 12. Whenever a witness is impeached with prior inconsistent statements, any party may demand a jury instruction that references that impeachment and instructs on its potential evidentiary value. *See State v. Hardin*, 569 N.W.2d 517, 521 (Iowa Ct. App. 1997). Most sets of jury instructions will *reference* evidence; that does not make them improper, as long as they do not *comment* on the evidence by giving "undue prominence to evidentiary facts to be determined by the jury." *See State v. Milliken*, 204 N.W.2d 594, 596 (Iowa 1973) (quotation omitted).

The Court of Appeals suggested that Jury Instruction 16 may "swing the pendulum too far the other direction" from the Lord Hale instructions that used to "caution juries to scrutinize the testimony of alleged rape victims more closely than the words of other witnesses." *See* SlipOp. at *14. That drew a parallel to another part of the opinion that discussed *Fedderson*, which rejected those Lord Hale instructions in part because they were a "comment on the evidence." *See id.* at *6 (quoting *Fedderson*, 230 N.W.2d at 515). This is a false equivalence. The instruction in *Fedderson* was not a "comment on the evidence" simply because it mentioned testimony from one particular witness.

The impermissible comment in that instruction was that "[t]he charge of rape against a person is easy to make, difficult to prove, and more difficult to disprove." *See Fedderson*, 230 N.W.2d at 515. That clause qualifies as an impermissible comment on the evidence "because it suggests the rape victim's testimony is more likely to be false than that of other witnesses." *Id.* But Jury Instruction 16 did not imply that N.K.'s testimony was more likely to be *true*, nor did it highlight or give undue prominence to any particular fact in evidence.

"[A] supplemental instruction that properly assists the jury in the correct application of the law to the facts is not error," even when the instruction references particular evidence to which it applies. *See Smith v. Koslow*, 757 N.W.2d 677, 681–82 (Iowa 2008). This short instruction did not highlight evidentiary facts that would push jurors towards a particular view of the evidence. *See Pitts v. State*, No. 77192, 2019 WL 6840116, at *4 (Nev. Dec. 13, 2019) (rejecting challenge that no-corroboration instruction was a comment on the evidence because "the plain language of the instruction was devoid of case facts"). This instruction only *referenced* complainant testimony to clarify that it was not subject to additional corroboration requirements. Therefore, it did not amount to an impermissible comment on the evidence.

E. The fact that other instructions guided the jury in how to assess the evidence and hold the State to its burden of proof beyond a reasonable doubt means there was *no* error, not harmless error.

The Court of Appeals still affirmed, because it found that any error in submitting Jury Instruction 16 was harmless. It was correct that the facts overwhelmingly established Kraai's guilt. But it is key to note that it also found that the jury instructions "as a whole, including the description of the State's burden of proof, fairly guided the jury's decision making." *See* SlipOp. at *17. That means *there was no error*.

"When a single instruction is challenged," Iowa courts assess it "in context with other instructions relating to the criminal charge, not in isolation." *See State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). Iowa courts "consider the jury instructions as a whole rather than in isolation to determine whether they correctly state the law." *See State v. Benson*, 919 N.W.2d 237, 242 (Iowa 2018). If they do, then there is no error, and there is no need to assess whether error was harmless. When the Court of Appeals found that these instructions *as a whole* were fair and accurate (and not confusing or misleading), that should have been the end of it: there was no instructional error at all, and so there was no need to assess the strength of the State's evidence or the contents of counsel's arguments to determine if error was harmless.

This Court recently rejected a challenge to a similar instruction in *Donahue*, where the only argument against the instruction was that it referenced "sexual offenses" when Donahue had only been charged with a single offense. As the Court of Appeals noted, *Donahue* did not rule on whether it is proper to give no-corroboration instructions—it only addressed that specific challenge. *See* SlipOp. at *4 n.2. But the analysis from *Donahue* illustrates something important: a challenge like this "fails on the merits" if the jury instructions, as a whole, still fairly and accurately convey the applicable law.

> [W]e find his claim of instructional error fails on the merits. We read jury instructions as a whole to determine their accuracy. . . . [T]he instructions read as a whole do not imply that Donahue was being charged with multiple offenses.
>
> . . . Given the complete context of the instructions, we think the jury would not have been misled by the use of the plural term "sexual offenses" in Instruction No. 20.

State v. Donahue, No. 18–2239, 2021 WL 1149140, at *7 (Iowa Mar. 26, 2021). It did not assess the impact of error by reviewing evidence or arguments presented during the trial, because it found that there was *no error*, even if that plural noun was a technical misstep. *Accord Eisenhauer*, 935 N.W.2d at 15–16 (holding that jury instructions had "sufficiently encompassed" all claims when "[v]iewed as a whole," so that the court "need not reach [the challenger]'s claim of prejudice").

This may seem like an academic distinction, but it matters for two reasons. First, the next case may be factually closer, and a panel might be tempted to find error was *not* harmless. But in a close case, if the jury instructions as a whole were accurate and "fairly guided the jury's decision making," a reviewing court must let the verdict stand—that means the jury *has decided* a close case. Indeed, a "close case" without any corroborating evidence is where this jury instruction is most needed. It would be absurd to find that informing the jury that corroboration is not required is problematic *only* in cases where there was no corroboration at all, where the instruction is clearly needed—but this opinion lays the groundwork for that paradoxical outcome.

Second, both victims and jurors deserve a fair jury instruction that explains this concept. Even after everything else that the Court of Appeals said, it still found these jury instructions were fair, accurate, not misleading, and not confusing. The State should be able to rely on that. But if this opinion stands, risk-averse trial courts will refuse to give similar instructions because the Court of Appeals said that it was "error" to submit one. That might have been the whole point. But the finding that these jury instructions *as a whole* were fair and accurate should mean that these instructions are permissible—not prohibited.

CONCLUSION

The State respectfully requests this Court grant further review, hold that submitting Jury Instruction 16 was not error, and affirm Kraai's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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