IN THE SUPREME COURT OF IOWA

SUPREME COURT NO 19-1613

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL D. MONTGOMERY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR SIOUX COUNTY
THE HONORABLE JULIE SCHUMACHER
Sioux County District Court No. FECR016562

APPELLANT'S PROOF BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases:

Iowa Cases:

Statutes and Constitutional Provisions:

Rules:

Other Cases:

Other Authorities:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

Whether the jury's acquittal of lascivious acts with and child and conviction of sexual abuse in the second degree produced an inconsistent verdict. The district court erred when it failed to grant defendant's motion in arrest of judgment which claimed the verdict was inconsistent.

U.S. Supreme Court Cases:

Colautti v. Franklin, 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596, 609 (1979)

Dennis v. United States, 341 U.S. 494, 500, 71 S.Ct. 857, 862, 95 L.Ed. 1137, 1147 (1951)

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970)

Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983)

Morissette v. United States, 342 U.S. 246, 252, 72 S.Ct. 240, 244, 96 L.Ed. 288, 294 (1952)

United States v. Ragen, 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383, 391 (1942))

Iowa Cases:

City of Sioux City v. Iowa Dep't of Revenue & Fin.,666 N.W.2d 587, 590 (Iowa 2003)

McGill v. Fish, 790 N.W.2d 113, 119 (Iowa 2010)

State v. Aldrich, 231 N.W.2d 890, 894 (Iowa 1975)

State v. Halstead, 791 N.W.2d 805, 815 (Iowa 2010)

State v. Hunter, 550 N.W.2d 460, 462 (Iowa 1996)

State v. Lawr, 263 N.W.2d 747, 750 (Iowa 1978)

State v. Monk, 514 N.W.2d 448 (Iowa 1994)

State v. Pearson, 514 N.W.2d 452 (Iowa 1994)

State v. Price, 237 N.W.2d 813, 815 (Iowa 1976)

State v. Reiter, 601 N.W.2d 372, 373 (Iowa 1999)

State v. Watkins, 659 N.W.2d 526, 535 (Iowa 2003)

Statutes and Constitutional Provisions:

Iowa Code § 702.17

Other Cases:

Flink v. State, 683 P.2d 725 (Alaska Ct. App. 1984)

State v. Tobin, 602 A.2d 528 (R.I. 1992)

Other Authorities:

Oxford American Dictionary 622 (1980)

https://ahdictionary.com/word/search.html?q=sex

https://www.merriam-webster.com/dictionary/sex?src=search-dict-hed

II. Whether the trial court erred when it refused to provide proper instructions to the jury in response to the jury's request.

Supreme Court Cases:

Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)

Iowa Cases:

Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82, 86 (Iowa 1992)

Gordon v. Noel, 356 N.W.2d 559, 564-65 (Iowa 1984)

Lynch v. Saddler, 656 N.W.2d 104, 107 (Iowa 2003)

State v. Hogrefe, 557 N.W.2d 871, 881 (Iowa 1996)

State v. Kellogg, 542 N.W.2d 514, 516 (Iowa 1996)

State v. Martens, 69 N.W.2d 482 (Iowa 1997)

Rules:

Iowa R. App. P. 2.24(2)(b)

Other Cases:

Harrington v. Beauchamp Enters., 158 Ariz. 118, 761 P.2d 1022, 1025 (1988)

People v. Brouder,168 Ill.App.3d 938, 119 Ill.Dec. 632, 638, 523 N.E.2d 100, 106 (1988)

Stacks v. Rushing, 518 S.W.2d 611, 614 (Tex.Civ.App.1974)

Other Authorities:

485 citing 75 Am.Jur.2d *Trial* § 1109, at 632-33 (1991)

89 C.J.S. *Trial* § 475, at 118-19 (1955)

III. Whether the defendant was denied his constitutional right to present a defense to the crimes charged when the trial court refused to allow the defendant to offer evidence of the sexual acts committed by L.V. upon S.V. as an exception to Iowa's "rape shield law."

U.S. Supreme Court Cases:

Taylor v. Illinois, 484 U.S. 400, 409, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988)

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967)

Iowa Cases:

State v. Alvey, 458 N.W.2d 850, 852 (Iowa 1990)

State v. Clark, 814 N.W.2d 551, 561 (Iowa 2012)

State v. McKettrick, 480 N.W.2d 52, 55 (Iowa 1992)

State v. Russell, 897 N.W.2d 717, 731 (Iowa 2017)

State v. Walker, No. 18-0457

State v. Weaver, 608 N.W.2d 797, 802 (Iowa 2000)

Statutes and Constitutional Provisions:

U.S. Const. Amend VI

Iowa Const. art. I, § 10

Rules:

Iowa R. App. P. 2.24(2)(b)(9)

Iowa R. Ev. 5.412

Iowa R. Ev. 5.412(b)(1)

Iowa R. Ev. 5.412(c)(1)

IV. Whether the The prosecuting attorney engaged in prejudicial misconduct during closing arguments.

Iowa Cases:

Reed v. State, No. 18-0561 (Iowa Ct. App., July 3, 2019)

State v. Boggs, 741 N.W.2d 492, 509 (Iowa 2007)

State v. Carey, 709 N.W.2d 547, 559 (Iowa 2006)

State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003)

State v. Halstead, 791 N.W.2d 805, 815 (Iowa 2010)

State v. Leuty, 247 Iowa 251, 258, 73 N.W.2d 64, 69 (1955)

State v. Martens, 521 N.W.2d 768, 772 (Iowa Ct. App. 1994)

State v. Piper, 663 N.W.2d 894, 913 (Iowa 2003)

State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017)

Rules:

Iowa R. Crim. P. 2.24(2)(b)(5)

V. Whether the evidence was insufficient to support the jury's verdict or the verdict was otherwise contrary to the weight of the evidence.

Iowa Cases:

Graham v. Chicago & Northwestern Ry. Co., 143 Iowa 604, 119 N.W. 708 (1909)

State v. Gay, 526 N.W.2d 294, 295 (Iowa 1995)

State v. Nitchter, 720 N.W.2d 547, 559 (2006)

State v. Shanahan, 712 N.W.2d 121, 135 (Iowa 2006)

State v. Smith, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993)

State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997)

Rules:

Iowa R. Crim. P. 2.24(2)(b)(6)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. The appellant/defendant was acquitted of lascivious acts with a child, but was convicted of sexual abuse in the second degree. The defendant is requesting that this court overturn the holding of *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) and find that a "sex act" be defined to require that the defendant act with the intent to sexually gratify himself or the victim.

This court should follow the directive of Justice Carter in his partial dissent opined in *Pearson*, 514 N.W.2d at 457 ("…by not recognizing sexual gratification as an element of sexual contact, the majority prohibits a defendant from attempting to negate the charge by urging lack of such intent. I believe that this is unrealistic and unfair.") (J. Carter concurring in part and dissenting in part.). Thus, this case presents a substantial question of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101(2)(f).

The record in this case shows that the jury was confused about the definition of a sex act and in particular sought clarification on the "sexual in nature" standard announced in *Pearson* which the trial court failed to provide to the jury. This confusion produced an inconsistent verdict and juries all across Iowa continue to be confused when considering sex abuse charges because there is no clear direction from this court or the legislature as to whether the definition of a sex act requires

that the act be committed with the intent to sexually gratify one's self or the victim. The "sexual in nature" standard announced in *Pearson* is vague and actually permits juries to convict persons of sexual abuse for innocent contact. Thus, this case presents a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the supreme court. *See* Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

Defendant/Appellant appeals his conviction and sentence for sexual abuse in the second degree claiming the jury's verdict was inconsistent, the trial court erroneously refused to instruct the jury, the trial court erroneously disallowed material evidence to be presented, the trial court failed to order a new trial due to prosecutorial misconduct, and that there was insufficient evidence produced to sustain the conviction of the defendant or the verdict was otherwise contrary to the weight of the evidence.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Factual Background

S.V. is the granddaughter of Michael Montgomery, the defendant. Trial tr. Day 1, pg. 150. S.V. claimed that while she was in the third and fourth grade, she would stay overnight by her grandparents in Hospers, Iowa and the defendant would touch her sexually. *Id.*

S.V. gave many different ages as to when she claimed the abuse started. She testified in her deposition to four different ages: 7, 8, 9, and 10. *See* Trial tr., Day 1, pg. 161. S.V. told her friend, A.P., that it began when she was ages 3-5. *See* Trial tr., Day 2, pg. 22. S.V. claimed that the defendant committed these acts, which included licking her vagina while her grandmother was also in the bed. Trial tr., Day 1, pp. 164-65. S.V. testified that sometimes she would try to get away and her grandpa would pull her back, but when asked how he would do that she said he pushed her off the bed really hard. Trial tr., Day 1, pg. 165.

S.V. testified that when the defendant was licking her vagina he would take her hand make her put his hand on his private part. Trial tr., Day 1, pg. 166. At trial S.V. suddenly claimed that the defendant had taken a shower with her after she had met with the county attorney and he brought the subject up to her. Trial tr., Day 1, pp. 177-78. S.V. also claimed on re-cross-examination that the defendant threatened to hurt her if she told anyone about the alleged abuse, however, she denied any such threat in her deposition testimony. Trial tr., Day 1, pp. 188-89.

The state did not show any physical evidence to corroborate the testimony of S.V. The state also did not produce any witnesses to the alleged events described by S.V. The state called Teresa Den Hartog in an attempt to show that Mr. Montgomery made some type of incriminating statements to her while they were

fishing at a pond. However, the record shows that Ms. Den Hartog lied under oath both to the jury and in her deposition stating that she wrote her testimony on a form which she gave to the police. In fact, S.V.'s mother wrote the statement for Ms. Den Hartog. S.V.'s mother, Rebecca Waranke, is the person who informed Teresa Den Hartog of the allegations that S.V. had made. *See* Trial tr., Day 2, pp. 9 -13.

Prior to the defendant's arrest he voluntarily submitted to an interview with Sioux County Sheriff deputies. Mr. Montgomery denied committing any sexual acts with S.V. Mr. Montgomery informed the deputies that on one occasion, S.V. crawled into bed next to him in the middle of the night with the defendant and his wife, S.V.'s grandmother, and while lying next to the defendant, S.V. grabbed Mr. Montgomery's hand and placed it on her "crotch area." Defendant immediately withdrew his hand and scolded S.V. Moments later S.V. did the same thing and Mr. Montgomery again immediately removed his hand and ordered S.V. to get out of the bed and go to her room. *See* video interview of Michael Montgomery with Sioux County Sheriff deputies marked State's exhibit 5.

L.V. is the step-brother of S.V. About 5 years prior to the trial S.V. and her mother moved in with L.V's father at their farm. *See* testimony of L.V., trial tr.

Day 2, pp. 26 line 10 – 27 line 13. At the time of his trial testimony L.V. was 16. *See* trial tr. Day 2, pg. 26 line 1-4.

S.V. testified that sexual abuse from L.V. committed upon her began when she was age 9. Trial tr. Day 1, pg. 195 line 10 – 17. S.V. reported to the CAC forensic interviewer that the abuse from L.V. continued until 4-5 days before her interview with the CAC interviewer. *See* offer of proof, pg. 1 (App__). *See also* Summary of CAC forensic interview, pg. 28 of minutes of testimony (App__).

S.V. also reported to the CAC forensic interviewer that she felt bad that she was going to tell on her brother. *See* Offer of proof, pg. 2 (App__) citing Summary of CAC forensic interview, pg. 28 of minutes of testimony (App__). S.V. also claimed to the CAC interviewer that when the defendant began the abuse she told L.V. about it and S.V. "thinks that is why [L.V.] started doing it to her." *See* Offer of proof, pg. 2 (App__) citing Summary of CAC forensic interview, pg. 27 of minutes of testimony (App__). All of this was confirmed by S.V. at the trial. Trial tr. Day 1, pp. 195 – 196. S.V. also testified that she reported to the CAC worker that the acts committed by L.V. were the same type and kind that were committed upon her by her grandpa, the defendant. Trial tr. Day 1, pg. 195 line 18-22.

O'Brien County deputy Steven Vander Veen conducted an investigation of the allegations that S.V. made concerning sexual abuse committed upon her by

L.V. During deputy Vander Veen's interview with L.V. he admitted to committing the sexual acts with S.V. *See* trial tr. Day 3, pp. 2-4. *See also* exhibit 109 (App__) and 110 (App__).

Brenda Montgomery, the defendant's wife and grandmother of S.V. also testified. Brenda testified that, at most, it was only two or three times that S.V. and the other grandkids would lay in bed with Brenda and the defendant to watch a movie. Trial tr. Day 3, pg. 28. Brenda has chronic pain issues and, consequently, doesn't get much sleep. Brenda never observed any inappropriate activity happening with her grandkids and her husband Michael. Trial tr. Day 3, pp. 26 line 23 – 29 line 2.

Procedural background

The defendant was charged by way of trial information (App__) with sexual abuse in the second-degree and with lascivious acts with a child. Prior to trial commencing, the defendant filed a timely motion to admit evidence (App__) and Offer of Proof (App__) requesting that he be allowed to offer evidence regarding the sexual abuse committed by L.V. upon S.V. that was described above. The court entered a ruling denying the motion to admit evidence. *See* Ruling on State's First Motion in Limine and Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412 (App__).

Trial by jury commenced on July 9, 2019. *See* trial tr. Day 1, pg. 1. While the jury was deliberating, they sent a note to the court which stated, "We would like clarification of Instruction No. 16 in regards to the final sentence."[1] *See* Jury Question No. 1 (App__). A record was made and the defendant, through his counsel, asked the court to provide clarification to the jury and specifically requested the court to instruct the jury that for the act to be sexual in nature it must have been committed for the purpose of satisfying the sexual desire of the defendant. *See* Trial tr. Day 3, pg. 113 line 1-22. The court entered an order which read as follows, "The court finds no clarification is necessary in regard to Instruction No. 16 and would direct the jury to review the instructions as a whole in reaching their verdict and follow the instructions previously given by the court." *See* Trial tr. Day 3, pg. 114 line 2-13.

Later the jury advised the court that it had reached a verdict on count II, lascivious acts with a child, but the jury was unable to reach a unanimous verdict

[1] Jury Instruction No. 16 read as follows:

> Concerning element No. 1 of Instruction No. 14, "sex act" means any sexual contact:
>
> Between the mouth of one person and the genitals of another; or
> Between the finger or hand of one person and the genitals or anus of another person.
>
> You may consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in nature.

on count I, sexual abuse in the second-degree. The court instructed the jury to continue deliberations. Trial tr. Day 3 pp. 115 line 15 – 116 line 13. Approximately 30 minutes later the jury returned its verdict. *Id*. at 117. The jury found the defendant guilty on count I, sexual abuse in the second-degree and found the defendant not guilty on count II lascivious acts with a child. *See* Verdict of the Jury (App__). The defendant filed a motion for new trial and/or motion in arrest of judgment and motion for judgment of acquittal. *See* (App__). The trial court denied the defendant's motion. *See* Order filed September 19, 2019 (App__).

The trial court sentenced the defendant to the custody of the department of corrections for an indeterminate term not to exceed 25 years with a mandatory minimum of 70% of the maximum term. *See* Judgment and Sentence (App__). The defendant filed a timely Notice of Appeal. *See* (App__).

ARGUMENTS

I.

The jury's acquittal of lascivious acts with and child and conviction of sexual abuse in the second degree produced an inconsistent verdict. The district court erred when it failed to grant defendant's motion in arrest of judgment which claimed the verdict was inconsistent.

A. Standard of Review

An inconsistent jury verdict has constitutional implications because a jury verdict involving compound inconsistency insults the basic due process

requirement that guilt must be proved beyond a reasonable doubt. *See State v. Halstead*, 791 N.W.2d 805, 815 (Iowa 2010) citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970). Thus, because constitutional issues are raised, review is de novo. *Halstead*, 791 N.W.2d at 807.

B. Preservation of Error

The defendant filed a timely motion in arrest of judgment following the jury's verdict arguing that judgment could not be pronounced against him due to the inconsistent verdict. Defendant has, therefore, preserved error.

C. Discussion

The jury was instructed that the state was required to prove the following elements for the crime of lascivious acts with a child:

1. On or between February 1, 2015 and August 16, 2016, Michael Montgomery with or without S.V.'s consent:

    a. Fondled or touched the pubes or genitals of S.V.; or

    b. Permitted or caused S.V. to fondle or touch Michael Montgomery's pubes or genitals;

2. Michael Montgomery did so with the specific intent to arouse or satisfy the sexual desires of himself or S.V.

3. Michael Montgomery was 18 years of age or older.

4. S.V. was then under the age of 14 years.

5. Michael Montgomery and S.V. were then not married to each other.

See Jury Instruction No. 15 (App__). The jury acquitted the defendant of this charge. *See* Verdict of the Jury (App__). The jury was also instructed that the state was required to prove the following elements of the crime of sexual abuse in the second degree:

1. On or between February 1, 2015 and August 16, 2016, Michael Montgomery did commit a sex act with S.V.

2. Michael Montgomery performed the sex act while S.V. was under that age of 12 years.

See Jury Instruction No. 14 (App__). The jury was also instructed on the definition of a sex act as follows:

> Concerning element No. 1 of Instruction No. 14, "sex act" means any sexual contact:
>
> Between the mouth of one person and the genitals of another; or
> Between the finger or hand of one person and the genitals or anus of another person.
>
> You may consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in nature.

See Jury Instruction No. 16 (App__).

While the jury was deliberating, they sent a note to the court which stated, "We would like clarification of Instruction No. 16 in regards to the final sentence." *See* Jury Question No. 1 (App__). A record was made and the defendant, through his counsel, asked the court to provide clarification to the jury and specifically

requested the court to instruct the jury that for the act to be sexual in nature it must have been committed for the purpose of satisfying the sexual desire of the defendant. *See* Trial tr. Day 3, pg. 113 line 1-22. The court entered an order which read as follows, "The court finds no clarification is necessary in regard to Instruction No. 16 and would direct the jury to review the instructions as a whole in reaching their verdict and follow the instructions previously given by the court." *See* Trial tr. Day 3, pg. 114 line 2-13. The jury was obviously seeking guidance and clarification as to what it means for contact to be "sexual in nature."

1. *State v. Pearson* – The "sexual in nature" standard.

In *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) the issue in the case centered around whether contact of the specified body parts described in the sex act statute that occurred while clothing covered those body parts could be considered sexual contact. *Id*., 514 N.W.2d at 455.

In *Pearson*, the court established the requirement that, in order for an act that is perpetrated on a victim to be considered a "sex act" for purposes of the sexual abuse statute, the act must be "sexual in nature." *Pearson*, 514 N.W.2d at 455 ("Not all contact is a 'sex act.' The contact must be between the specified body parts (or substitutes) and must be *sexual* in nature."). The court then went on to describe this "sexual in nature" requirement and provided a non-exhaustive list of

circumstances which a jury can take into account when attempting to determine if a particular act is "sexual in nature". In that case the court reasoned as follows:

> The sexual nature of the contact can be determined from the type of contact and the circumstances surrounding it. For example, in *Phipps*, the sexual nature of the contact was shown by evidence that the defendant rubbed the victim's genitalia, placed the victim's hand on the defendant's genitalia and ejaculated. *Phipps*, 442 N.W.2d at 612. The fact that no nonsexual purpose for the contact was discernible also demonstrated the sexual nature of the contact.
>
> On the other hand, the contact between an adult and a child bouncing on his or her lap would not be sexual in nature unless the circumstances surrounding it suggested it was. Such circumstances certainly include whether the contact was made to arouse or satisfy the sexual desires of the defendant or the victim. However, the lack of such motivation would not preclude a finding of sexual abuse where the context in which the contact occurred showed the sexual nature of the contact. Other relevant circumstances include but are not limited to the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact.

See id. at 455 (emphasis added). Thus, in *Pearson*, the court allowed for the possibility that a person can commit a sex act against another person without ever having any intent or motive to sexually gratify one's self or the victim, but can be

found guilty of sexual abuse merely from contact occurring among specified body parts.

It is the defendant's position that the reasoning in *Pearson* is unsound, confusing, and unworkable and this court should overrule *Pearson* to the extent that *Pearson* holds that a lack of sexual motivation can constitute a finding of sexual abuse and further hold that a jury must be instructed that "sexual contact" requires that the defendant act with the intent or motive to sexually gratify himself or the victim.

The majority's unsound reasoning in *Pearson* was criticized from the very beginning. Justice Carter issued a partial dissent to the decision in *Pearson* and explained how the criteria used by the majority opinion to determine whether an act is "sexual in nature" was illogical. Justice Carter's critique was as follows:

> I believe that it is axiomatic that any time two persons are moving about in close proximity to one another innocent contact may occur between sexual parts. The majority recognizes this and attempts to distinguish prohibited sexual contact from innocent contact. The majority includes, as a criterion for determining sexual contact, "the purposefulness of the contact." At the same time, it disavows any requirement that there be an intent to act based on sexual gratification of either the perpetrator or the victim. The circumstances that the majority would consider in determining whether sexual contact has occurred would also be relevant to show an intent to act based on sexual gratification. However, by not

> recognizing sexual gratification as an element of sexual contact, the majority prohibits a defendant from attempting to negate the charge by urging lack of such intent. I believe that this is unrealistic and unfair.

Pearson, 514 N.W.2d at 457 (J. Carter, concurring in part and dissenting in part).

On the same day that the court issued its opinion in *Pearson*, it also issued its opinion in *State v. Monk*, 514 N.W.2d 448 (Iowa 1994). In *Monk*, the defendant was convicted of sexual abuse when he engaged in "horse play" by inserting a broom handle into the rectum of one of his friends while at a party with others, however, no evidence existed of a sexual motivation. *Monk*, 514 N.W.2d at 451. The court reversed Monk's conviction because the trial court did not instruct the jury that the prohibited contact was required to be "sexual" contact. *Id*. Since, the jury could have concluded that Monk's behavior was not sexual in nature, the jury should have been instructed that the contact was required to be sexual contact. *Id*. The court remanded the case for a new trial because of the trial court's failure to instruct the jury and did not find that Monk's motion for judgment of acquittal should have been granted because the court found there was sufficient evidence to submit the charge to the jury. *Id*.

Justice Ternus, who wrote for the majority in *Pearson*, issued a concurring opinion and maintained her same reasoning espoused in *Pearson* concluding that, "[t]he fact that Monk was not sexually aroused by his actions is not dispositive of

whether the contact itself was sexual." *Monk*, 514 N.W.2d at 452 (J. Ternus, concurring). However, in *Monk*, two justices dissented criticizing the *Pearson* "sexual in nature" criteria that Justice Ternus advanced.

Justice Carter dissented arguing that Monk's motion for judgment of acquittal should have been granted because no sexual motivation had been established as he advocated should be a required element of a sex act in *Pearson*. *See Monk*, 514 N.W.2d at 452 (J. Carter, dissenting).

Justice Snell also dissented arguing that Monk's motion for judgment of acquittal should have been granted. Justice Snell offered a more critical analysis of the holding in *Pearson* for its "sexual in nature" reasoning. Justice Snell stated the following:

> The majority relies on *State v. Pearson*, decided this month, from which I dissented, as authority for its result. In *Pearson*, where no one disputed that sex was involved, the majority found that because the act was sexual in nature, contact occurred. A gratuitous statement of law was then adopted, although completely extraneous to the facts of the case and without any supporting authority, that a sexual motivation is not necessary for a sex act to occur. Thus, the aura of sex controls the meaning of "contact" and causes motivation to disappear.
>
> In the instant case, the antithesis of *Pearson*, it is undisputed that sex is not involved. Nevertheless, a sexual abuse is held to be possible because under *Pearson*, a sexual motivation is not required. The unfounded dicta

> of *Pearson* is now bootstrapped into a holding of law that decides the instant case.
>
> The holdings in *State v. Pearson* and *State v. Monk* have transformed our sex abuse statutes into general assault statutes where the assault has some effect on the reproductive or excretory organs of the victim or defendant. I believe these constructions of our statutes are unwise and go well beyond any recognizable legislative intent to protect victims against sex abuse.

Monk, 514 N.W.2d at 452 (J. Snell, dissenting).

2. Iowa's "sex act" definition.

Instruction No. 16 in this case was based on the definition of a sex act found in Iowa Code § 702.17.[2] Generally, courts presume words used in a statute have their ordinary and commonly understood meaning. *City of Sioux City v. Iowa Dep't of Revenue & Fin.*,666 N.W.2d 587, 590 (Iowa 2003). Although "sex act" is defined in the statute, the word "sex" is not defined nor is the word "sexual" defined. The statute focuses its attention on defining the "act" as opposed to defining the meaning of "sex." The court relies on the dictionary as one source to

[2] Section 702.17 states:
The term "sex act" or "sexual activity" means any sexual contact between two or more persons by any of the following:
1. Penetration of the penis into the vagina or anus.
2. Contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person.
3. Contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 148C, 151, or 152.
4. Ejaculation onto the person of another.
5. By use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

determine the meaning of a word left undefined in a statute. *McGill v. Fish*, 790 N.W.2d 113, 119 (Iowa 2010).

One common dictionary meaning of "sex" is "sexually motivated phenomena or behavior" *See* https://www.merriam-webster.com/dictionary/sex?src=search-dict-hed, Noun, entry 2. The American Heritage Dictionary defines sex as "The sexual urge or instinct as it manifests itself in behavior: *motivated by sex*." *See* https://ahdictionary.com/word/search.html?q=sex, n. para. 1(b). The legislature obviously was aware what sex meant when it defined "sex act". Thus, it is clear that the legislature intended that a "sex act" be one that is motivated by sexual desire and the jury in this case should have been so instructed.

In *Pearson*, the court expanded the definition of a "sex act" beyond what the legislature intended from the commonly understood meaning of "sex" by imposing this vague "sexual in nature" standard that permits a jury to find that a sex act has occurred without the defendant having any sexual motive whatsoever. Such a liberal interpretation far exceeds what can reasonably be concluded to be the intent of the legislature and does not comply with this court's standards of statutory interpretation.

It is well established that penal statutes must give fair warning of the conduct prohibited. *See State v. Reiter*, 601 N.W.2d 372, 373 (Iowa 1999) citing *State v. Price*, 237 N.W.2d 813, 815 (Iowa 1976), and are to be construed strictly, with doubt resolved in favor of the accused. *Reiter*, 601 N.W.2d 373 citing *State v. Lawr*, 263 N.W.2d 747, 750 (Iowa 1978). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983); *accord State v. Watkins*, 659 N.W.2d 526, 535 (Iowa 2003).

Statutory terms meet this constitutional test if their meaning "is fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning." *State v. Aldrich*, 231 N.W.2d 890, 894 (Iowa 1975). In considering whether the statute is unconstitutionally vague, the supreme court will presume "the statute is constitutional and give it any reasonable construction necessary to uphold it." *State v. Hunter*, 550 N.W.2d 460, 462 (Iowa 1996).

Here, the problem is not that the language of the statute is vague when applying the commonly understood meaning of the words. The problem here is that the supreme court, since *Pearson*, has applied an extraordinary meaning of the word "sex" or "sexual" beyond what is commonly understood that those words mean. The court has, instead, applied this amorphous "sexual in nature" standard without giving it any meaning and only offering a non-exclusive list of circumstances to take into consideration to make a determination whether certain conduct is "sexual in nature". Circumstances which are not even instructed to the jury. *See* Instruction No. 16 (App__). No ordinary person can reasonably be expected to understand that the statutory language defining a sex act is to be interpreted according to this vague "sexual in nature" standard which may allow a person to be convicted of sexual abuse when no sexual motive exists.

3. Other jurisdictions

The Alaska Court of Appeals wrestled with the statutory meaning of the phrase "sexual contact" in *Flink v. State*, 683 P.2d 725 (Alaska Ct. App. 1984) where, like Iowa's statute, the statutory language was silent as to whether an intent to gratify one's self or the victim was a required necessary element of the word "sexual".

In *Flink*, the defendant was convicted of sexual abuse of a minor. *See id*. at 728. The Alaska statute, like Iowa's statute, required the defendant to have had "sexual contact" with a minor.[3] The defendant challenged the constitutionality of the statute under which he was convicted as being vague and not providing him with fair notice of the prohibited conduct and further argued that the statutory language punished innocent as well as culpable conduct. *Id*. Flink argued, as does the defendant in the case at bar, that the phrase "sexual contact" should be interpreted to require a sexual motive or purpose. *Id*. at 729.

After conducting a thorough examination of the legislative history of the statute at issue and determining that there was no clear legislative directive, the Alaska Court of Appeals concluded that, like the law in Iowa regarding statutory construction of penal laws, "[A]mbiguities in penal statutes must be narrowly read and construed strictly against the government." *Flink* at 733. In applying that standard of construction to the statutory definition of "sexual contact" the court of appeals reasoned that:

> When we construe the phrase "sexual contact" strictly in favor of the defendant, we note that sexual abuse requires *sexual* contact. While any intentional touching of a person's genitalia involves "contact", certain results are required to render that contact "sexual". The adjective

[3] At the time of Flink's offense, Alaska defined "sexual contact" as "the intentional touching, directly or through clothing, by the defendant of the victim's genitals, anus, or female breast." *See Flink*, 683 P.2d at 730 n. 3.

> "sexual", which is not specifically defined in the code, is defined in general usage as: "1. of sex or the sexes or the relationship or feelings etc. between them. 2. (of reproduction) occurring by fusion of male and female cells." *Oxford American Dictionary* 622 (1980).
>
> …
>
> We therefore conclude that genital contact in order to be "sexual contact" must be intended to result in either the sexual arousal or sexual gratification of the actor or the victim.

Flink, 683 P.2d at 733.

The above reasoning by the Alaska appellate court is sound and persuasive. This court should follow the reasoning in *Flink* and interpret "sexual contact" as set forth in Iowa Code § 702.17 to be contact intended to result in either the sexual arousal or sexual gratification of the actor or the victim. This court should abrogate the holding in *Pearson* and *Monk* and abandon the vague and confusing "sexual in nature" standard for a *mens rea* standard that can be logically and reasonably inferred by a jury from the conduct that is proven by the state.

Further support for the defendant's position is found in the Rhode Island Supreme Court's decision in *State v. Tobin*, 602 A.2d 528 (R.I. 1992). In *Tobin*, the defendant challenged the constitutionality of his conviction for second degree sexual assault. *Tobin*, 602 A.2d at 534. The Rhode Island statute stated that "[a] person is guilty of a second-degree sexual assault if he or she engages in sexual

contact with another person …." *Id*. Another Rhode Island statute defined "sexual contact" as:

> "the intentional touching of the victim's or accused's intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification or assault."

Id. The court concluded that, "[a] literal reading of this statute, without more, allows criminal liability without proof of mens rea." *Id*.

In *Tobin*, the court emphasized how deeply rooted the *mens rea* requirement has been in the American criminal justice system holding that, "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *See id*. quoting *Dennis v. United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 862, 95 L.Ed. 1137, 1147 (1951). The court in *Tobin* also noted that the U.S. Supreme Court has observed that this notion is so deeply rooted in American law that as the states codified their common-law crimes, even if the enactments were silent on intent, courts assumed that the omission was not indicative of disapproval of the notion but "merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Tobin* at 534 quoting *Morissette v. United States*, 342 U.S. 246, 252, 72 S.Ct. 240, 244, 96 L.Ed. 288, 294 (1952).

Additionally, the *Tobin* court observed that the U.S. Supreme Court has held that the "constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea.*" *Id.* quoting *Colautti v. Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596, 609 (1979). *Tobin* noted that in *Colautti* the court struck down a statute devoid of a mens rea requirement, stating that it "[was] little more than `a trap for those who act in good faith.'" *Id.* citing *Colautti* at 395, 99 S.Ct. at 685, 58 L.Ed.2d at 609 (quoting *United States v. Ragen*, 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383, 391 (1942)).

Thus, the court in *Tobin* reversed the trial court holding it committed reversible error in refusing to instruct the jurors that they were required to find beyond a reasonable doubt that the defendant's contact with his niece was for the purpose of the defendant's sexual arousal, gratification, or assault, in order to convict under the second-degree sexual-assault statutes. *Tobin*, 602 A.2d at 535. The court reasoned that, "[a]bsent such instruction the jury may have convicted defendant because he simply touched his niece, without finding that his intention in touching was to arouse himself or to gratify himself sexually." *Id.*

Likewise, even though Iowa's statutory definition of a sex act is silent on *mens rea*, history and tradition in the American justice system and logic would

dictate that for contact to be "sexual" it must involve a motive or intent to gratify or arouse one's self or the other person sexually.

4. Analysis

Here, the jury acquitted Mr. Montgomery of the crime of lascivious acts with a child and found him guilty of sexual abuse in the second degree. Those two findings are logically inconsistent within the context of the case. At trial S.V. testified that her grandpa would touch her sexually and this would take place while she was in his bed. Trial tr., Day 1, pg. 150 line 19 – 24. S.V. testified this touching would take place after the defendant would take S.V.'s pajamas and underwear off and the touching of her vagina would either be with the defendant's finger or tongue. *Id*. pg. 152 line 15 – 23.

Lascivious acts with a child required the state to prove that the defendant touched the pubes or genitals of S.V. with the specific intent to arouse or satisfy the sexual desires of himself or S.V. *See* Instruction No. 15 (App__). Given the jury's acquittal of the defendant on the lascivious acts charge, it is clear that the jury did not find S.V.'s testimony to be credible.

At trial S.V. alleged that Mr. Montgomery licked her vagina and touched her vagina with his finger. S.V. did not describe different times, places or circumstances where the defendant would sometimes perform oral sex and other

times would touch her pubic area with his hand. According to S.V., it all happened at the same place and times, in Mr. Montgomery's bedroom on his bed at night.

Based on the jury's acquittal of the defendant regarding the lascivious acts charge, the jury obviously disbelieved S.V.'s testimony concerning the contact that she alleged. Since there was no testimony from S.V. concerning different times, places or circumstances regarding the alleged oral sex versus the hand touching, the jury likely disbelieved S.V.'s testimony concerning both the oral sex and the hand/finger touching. If the jury did believe S.V's testimony on the oral sex there would be no reason for the jury wanting clarification of the last sentence of Instruction No. 16 (APP ___). It defies all common sense and rationality that the jury would be seeking clarification from the court as to whether the defendant licking S.V.'s vagina in his bed at night is an act that is "sexual in nature."

What makes the most sense based on the sequence of events is that the jury was likely struggling with whether the statements made by the defendant to the police where he informed the deputies that, on one occasion, S.V. crawled into bed with him and took his hand and place it in her "crotch area", which he immediately removed, was or was not a sex act. Under Instruction no. 16, such an act meets the technical definition of a sex act as far as what is required for the contact between the various body parts. But the jury was likely struggling with whether such acts

were or were not "sexual in nature" which is why they sought clarification from the court on that issue.

This is further indicated from the jury's acquittal of Mr. Montgomery on the lascivious acts charge because that instruction required the state to prove the element that defendant committed the touching with the "specific intent to arouse or satisfy the sexual desires of himself or S.V." *See* Instruction No. 15 (App__). No such element was set forth in the sexual abuse instruction or the sex act instruction. *See* Instructions 14 (App__) and 16 (App__) respectively.

The statements made to the police by Mr. Montgomery does not indicate an intent to satisfy his sexual desire either because Mr. Montgomery informed the police he immediately removed his hand once the contact was realized. More evidence to support this is based on the jury's communication to the court that it had reached a decision on the lascivious acts charge, but it was deadlocked on the sexual abuse charge. *See* Trial tr. Day 3 pp. 115 line 15 – 116 line 13. Again, the jury was struggling with the concept of whether the placement of the defendant's hand by S.V. on her crotch was a sex act. Such contact is clearly innocent contact and was not what our legislature intended to qualify as sexual abuse. However, under the nebulous "sexual in nature" standard under our current caselaw and with

no clarification from the trial court, the defendant was convicted by the jury of sexual abuse based on this innocent conduct.

Since this court should interpret "sexual contact" or a "sex act" to require the act be committed with the motive or intent to sexually gratify the defendant or victim as argued above, then the necessary elements to prove lascivious acts with a child and second degree sexual abuse are indistinguishable, except for the age of the child which is not in dispute in this case. Thus, the defendant's acquittal on the lascivious acts charge makes his conviction of sexual abuse to be wholly inconsistent and requires this court to acquit Mr. Montgomery of second-degree sexual abuse. *See Halstead*, 791 N.W.2d at 816.

Even if the defendant's case is analyzed under the "sexual in nature" standard, there is still an inconsistency within the context of this case. Whether the act was committed for the purpose of arousing or satisfying the sexual desire of the defendant or S.V. and the purpose of the act are factors or circumstances relevant to whether the act was "sexual in nature." *See Pearson* at 455. Because the jury acquitted the defendant on the lascivious acts charge, which included those factors as an element of proof, such intent and purpose on the part of the defendant was not present. No other relevant factors were proven that would allow a finding that the act committed was "sexual in nature" and warrant a conviction of sexual abuse.

This makes the two findings of the jury inconsistent with one another and requires this court to reverse the defendant's conviction.

II.

The trial court erred when it refused to provide proper instructions to the jury in response to the jury's request.

A. Standard of Review.

The supreme court reviews the trial court's refusal to give a requested instruction for correction of errors at law. *Lynch v. Saddler*, 656 N.W.2d 104, 107 (Iowa 2003). "As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

B. Preservation of Error

While the jury was deliberating, they sent a note to the court which stated, "We would like clarification of Instruction No. 16 in regards to the final sentence." *See* Jury Question No. 1 (App__). A record was made and the defendant, through his counsel, asked the court to provide clarification to the jury and specifically requested the court to instruct the jury that for the act to be sexual in nature it must have been committed for the purpose of satisfying the sexual desire of the defendant. *See* Trial tr. Day 3, pg. 113 line 1-22. The defendant also filed a timely

motion for new trial pursuant to Iowa R. Crim P. 2.24(2)(b)(5) and (7). *See* Motion for New Trial (App__). Error has been preserved.

C. Discussion

Although the defendant has argued for an acquittal by the court based on inconsistent verdicts set forth above, alternatively, if this court maintains the *Pearson* "sexual in nature" standard and its criteria, this court should order a new trial for the defendant based on the district court's refusal to instruct the jury on the *Pearson* criteria.

Rule 2.24(2)(b) provide grounds for granting a new trial after a verdict of guilty has been rendered. Subsection 5 of that part of the rule provides "When the court has misdirected the jury in a material matter of law, or has erred in the decision of any question of law during the course of the trial…." Subsection 7 of that part of the rule allows the granting of a new trial "When the court has refused properly to instruct the jury."

During jury deliberations, a question/communication was received by the court from the jury. The communique read as follows: "We would like clarification of Instruction No. 16 in regards to the final sentence." *See* Jury question 1 (App__). Instruction No. 16 defined a sex act for purposes of the sexual abuse in the second-degree charge. The final sentence read as follows, "you may

consider the type of contact and circumstances surrounding it in deciding whether the contact was sexual in nature." *See* Instruction No. 16 (App__).

The state did not believe any clarification should be made. The defendant, through his counsel, asked the court to provide clarification to the jury and specifically requested the court to instruct the jury that for the act to be sexual in nature it must have been committed for the purpose of satisfying the sexual desire of the defendant. *See* Trial tr. Day 3, pg. 113 line 1-22. The court entered an order which read as follows, "The court finds no clarification is necessary in regard to Instruction No. 16 and would direct the jury to review the instructions as a whole in reaching their verdict and follow the instructions previously given by the court." *See* Trial tr. Day 3, pg. 114 line 2-13.

Later the jury advised the court that it had reached a verdict on count II, lascivious acts with a child, but the jury was unable to reach a unanimous verdict on count I, sexual abuse in the second-degree. The court instructed the jury to continue deliberations. Trial tr. Day 3 pp. 115 line 15 – 116 line 13. Approximately 30 minutes later the jury returned its verdict. *Id*. at 117.

The trial court was obligated to provide additional instructions to the jury clarifying the last sentence of Instruction No. 16 as it related to "the type of contact and circumstances surrounding it in deciding whether the contact was sexual in

nature." In *State v. Martens*, 69 N.W.2d 482 (Iowa 1997), this court held as follows:

> According to the rule generally accepted, the court may, at the request of the jury, give further instructions, since the interest of justice requires that the jury have a full understanding of the case. It is usually said **to be the duty of the court to give additional instructions when requested** and a prejudicial refusal to do so has been held reversible error.

Martens at 485 (emphasis added) citing 89 C.J.S. *Trial* § 475, at 118-19 (1955); also citing *Stacks v. Rushing*, 518 S.W.2d 611, 614 (Tex.Civ.App.1974) (court's *failure to clarify issue when requested by the jury* was reversible error where failure to do so resulted in prejudice because of misinterpretation of issue by jury) (emphasis added). The court went on to explain:

> A number of courts have held that if the jury expresses confusion or lack of understanding of a significant element of applicable law, it is the court's duty to give an additional instruction. The refusal of a jury's request for an additional instruction in this situation may constitute reversible error.

Martens at 485 citing 75 Am.Jur.2d *Trial* § 1109, at 632-33 (1991); and citing *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 761 P.2d 1022, 1025 (1988) (court erred in not giving answer to jury's question where question demonstrated confusion on the jury's behalf); also citing *People v. Brouder*,168 Ill.App.3d 938, 119 Ill.Dec. 632, 638, 523 N.E.2d 100, 106 (1988) (trial court

committed reversible error when it refused defense counsel's tendered instruction where jury requested instruction, demonstrating confusion as to a question of law).

In *Martens*, the defendant was convicted of sexual abuse in the third-degree. During deliberations, the jury sent a note to the court asking whether pubic hair was a part of the genitalia. The court's response, agreed to by both sides, was that the jury was required to deliberate without further elaboration provided by the court. *Martens* at 484. On appeal, the defendant claimed his trial counsel was ineffective for failing to request additional instructions from the court informing the jury that pubic hair was not part of the genitalia. *Id*. After considering various medical definitions of the word "genitalia" the court held pubic hair is part of the genitalia, thus, no prejudice resulted to the defendant because had the jury considered pubic hair to be part of the genitalia in its deliberations, they would have been correct and the defendant's request for additional instruction to the jury would have been an incorrect statement of the law. *Id*. at 485-86.

In the case at bar the court was obligated to inform the jury that they were to consider the circumstances set forth in *Pearson* in their deliberations in response to a direct request from the jury seeking clarification regarding the last sentence of Instruction No. 16 which instructed the jury they may consider the type of contact and surrounding circumstances in deciding whether the contact was sexual in

nature. The description of the circumstances outlined in *Pearson* are general enough to be applied in all cases and would not have been a specific comment on the evidence by the court.

When applying the *Pearson* factors listed by the supreme court, those factors weigh in favor of an acquittal for the defendant and shows that he was prejudiced by the court's failure to provide the jury with their requested clarification. In particular, the factors of, "whether the contact was made to arouse or satisfy the sexual desires of the defendant or victim," and the "purposefulness of the contact," *Pearson* at 455, weigh against a finding of guilt. This is because the jury acquitted the defendant on the lascivious acts charge which required those very factors to be proven. Defendant, through his counsel, specifically mentioned those factors to the court when stating the defendant's position that he believed that the court should have provided additional clarification to the jury as to the circumstances that affect whether an act is sexual in nature. *See* Trial tr. Day 3, pg. 113.

Since the jury returned a general verdict we don't know with one hundred percent certainty which theory they used to return their guilty verdict on the sexual abuse charge. However, even if the court would find sufficient evidence exists for a finding of guilt on one or the other of the theories presented, i.e., oral sex or hand

touching, that should not prevent the court from ordering a new trial in this case.

In *Martens* the court addressed such a situation and held as follows:

> The State argues that regardless of the merits of this issue there was sufficient evidence to convict defendant of committing a sex act by defendant's illegal contact with other parts of H.A.'s body, specifically her anus. The State cites *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), in support of this argument. *Griffin*, however, involved a question of insufficiency of the evidence, whereas the question in the case at bar pertains to legal errors and constitutional protections.
>
> We have said that "[w]ith a general verdict of guilty, we have no way of determining which theory the jury accepted." *State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996). For this reason, we reversed and remanded the case for a new trial in *Hogrefe*. Thus, the validity of a verdict based on facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing legal error. *See Erickson v. Wright Welding Supply, Inc.*, 485 N.W.2d 82, 86 (Iowa 1992) (holding that defendant in civil case was entitled to a new trial when trial court erred in submitting one of several theories of recovery and jury returned only general verdict); *Gordon v. Noel*, 356 N.W.2d 559, 564-65 (Iowa 1984) (same). In this case, even though the jury may have reached their determination of guilt on the theory that defendant touched H.A.'s anus, the basis for its decision is impossible to ascertain because of the general verdict.

See Martens at 485. Thus, regardless of which theory the jury accepted in the case at bar to find guilt on the sexual abuse charge, the defendant is entitled to a new trial because the court did not provide the jury with the factors it was to consider in

deciding whether the acts were sexual in nature as requested by the jury during its deliberations.

Providing the jury with all or at least some of the type of circumstances outlined in *Pearson* would have been a correct statement of the law, it clearly had application to the case, and those *Pearson* factors were not stated anywhere in other instructions to the jury. Therefore, the additional instruction should have been given to the jury. *See Kellogg* at 516. This court should reverse the district court's order denying the defendant's motion for new trial and remand this case for a new trial.

III.

The defendant was denied his constitutional right to present a defense to the crimes charged when the trial court refused to allow the defendant to offer evidence of the sexual acts committed by L.V. upon S.V. as an exception to Iowa's "rape shield law."

A. Standard of Review

When reviewing a trial court's rulings on admissibility of evidence, the supreme court uses an abuse-of-discretion standard. *State v. Alvey*, 458 N.W.2d 850, 852 (Iowa 1990). However, review of constitutional questions is de novo. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

B. Preservation of Error

Iowa R. Ev. 5.412 prohibits use of evidence of a victim's other sexual behavior. However, Rule 5.412(b)(1) does provide for some exceptions in a criminal case. Iowa R. Ev. 5.412(c)(1) sets forth the procedure to determine the admissibility of such evidence that requires the defendant to file a motion and offer

of proof describes the evidence and states the purpose for which the evidence is being offered. The defendant in this case filed a timely pretrial motion to admit evidence (App__) and offer of proof (App__).

Throughout the trial the defendant also presented offers of proof outside the presence of the jury at various times and renewed his motion to admit after each offer of proof. *See* trial tr. Day 1, pp. 194 – 200; trial tr. Day 2, pp. 106 – 110; trial tr. Day 3, pp. 2 – 4. The defendant also filed a motion for new trial pursuant to Iowa R. Cr. P. 2.24(2)(b)(9) arguing that the trial court's refusal to admit such evidence denied him his constitutional right to present a defense on his own behalf. *See* Motion for New Trial (App__). Error has been preserved.

C. Discussion

L.V. is the step-brother of S.V. About 5 years prior to the trial S.V. and her mother moved in with L.V's father at their farm. *See* testimony of L.V., trial tr. Day 2, pp. 26 line 10 – 27 line 13. At the time of his trial testimony L.V. was 16. *See* trial tr. Day 2, pg. 26 line 1-4.

S.V. testified that sexual abuse from L.V. committed upon her began when she was age 9. Trial tr. Day 1, pg. 195 line 10 – 17. S.V. reported to the CAC forensic interviewer that the abuse from L.V. continued until 4-5 days before her interview with the CAC interviewer. *See* offer of proof, pg. 1 (App__). *See also*

Summary of CAC forensic interview, pg. 28 of minutes of testimony (App__). S.V. was rather equivocal on the age when the alleged abuse began with the defendant first stating it was age 10, then stating ages 8, 7 and 9 years of age. *See* offer of proof, pg. 1 citing dep. tr. pp. 18 line 9 - 19 line 5 (App__). S.V. confirmed this at trial. Trial tr. Day 1, pg. 162 line 20 -23. Thus, the abuse committed by L.V. and the alleged abuse committed by the defendant occurred during the same time frame.

S.V. also reported to the CAC forensic interviewer that she felt bad that she was going to tell on her brother. *See* Offer of proof, pg. 2 (App__) citing Summary of CAC forensic interview, pg. 28 of minutes of testimony (App__). S.V. also claimed to the CAC interviewer that when the defendant began the abuse she told L.V. about it and S.V. "thinks that is why [L.V.] started doing it to her." *See* Offer of proof, pg. 2 (App__) citing Summary of CAC forensic interview, pg. 27 of minutes of testimony (App__). All of this was confirmed by S.V. at the trial. Trial tr. Day 1, pp. 195 – 196. S.V. also testified that she reported to the CAC worker that the acts committed by L.V. were the same type and kind that were committed upon her by her grandpa, the defendant. Trial tr. Day 1, pg. 195 line 18-22.

O'Brien County deputy Steven Vander Veen conducted an investigation of the allegations that S.V. made concerning sexual abuse committed upon her by L.V. During deputy Vander Veen's interview with L.V. he admitted to committing

the sexual acts with S.V. *See* trial tr. Day 3, pp. 2-4. *See also* exhibit 109 (App__) and 110 (App__).

Dr. Rosanna Jones – Thurman also testified at trial. Dr. Thurman is a clinical psychologist who practices in Omaha and Council Bluffs. About half of her practice is devoted to treating and evaluating children. Over the course of her career she has interviewed thousands of children who have made allegations of sexual abuse. Trial tr. Day 2, pp. 77-80.

Dr. Thurman testified during the offer of proof that based on her review of the materials and statements that S.V. made concerning the conduct with L.V. that she believed L.V. engaged in grooming behavior with S.V. Dr. Thurman also testified that she believed that S.V.'s memory was contaminated with what was going on with L.V. with what she could have conceived happening with the defendant. Dr. Thurman also testified that she has seen in her practice children accuse someone else of abuse so that they won't get the real perpetrator in trouble. Dr. Thurman's review of S.V.'s statements showed that S.V. stated that she didn't want to get L.V. in trouble and also that she, herself, didn't want to get in trouble. Trial tr. Day 2, pp. 107-109. Prior to the trial, defendant supplemented its offer of proof with an email from Dr. Thurman setting forth her opinions. *See* Supplement to Offer of Proof (App__).

S.V. had a physical examination with Karin Ward, RN at Mercy Child Advocacy Center. S.V. described to the nurse that L.V. and the defendant used their finger to insert between the folds of skin in S.V.'s vagina. *See* Offer of Proof, pg. 2 (App__) citing Summary of CAC forensic interview, pg. 29 of minutes of testimony (App__). Nurse Ward stated that penetration and trauma may occur in the genital area without leaving definite physical signs. *Id*.

The trial court denied the defendant's motion to admit evidence of the abuse committed by L.V. *See* Ruling on State's First Motion in Limine and Defendant's Motion to Admit Evidence Pursuant to Rule 5.412 (App__). After each offer of proof made at trial, the defendant renewed his motion to admit such evidence and each time the court denied such motion. *See* trial tr. Day 1, pp. 194 – 200; trial tr. Day 2, pp. 106 – 110; trial tr. Day 3, pp. 2 – 4.

Iowa R. Ev. 5.412 prohibits use of evidence of a victim's other sexual behavior. However, Rule 5.412(b)(1) does provide for some exceptions in a criminal case. The exceptions relevant to the case at bar are the following:

> (A) Evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.
>
> …
>
> (C) Evidence whose exclusion would violate the defendant's constitutional rights.

Exception (A) applies in this case. Even though no physical signs of the sexual contact and penetration that was alleged by S.V. remained on her body that

were observable at the time of her medical examination, Nurse Ward reported that trauma and penetration can occur without leaving physical signs. Thus, the defendant should have been allowed to offer evidence that someone other than he was the source of the penetration and trauma reported to Nurse Ward by S.V. even though no physical signs existed. Particularly when the report shows that S.V. reported that another person, L.V., in addition to the defendant, committed the same acts against her. Exception (A) uses the term "injury", but it does not define injury to require physical signs observable on the body at the time of an examination. Nurse ward reported that trauma can still occur without physical signs. This would still qualify as an injury for purposes of exception (A).

The court of appeals has recently supported this argument in the case of *State v. Walker*, No. 18-0457 (March 20, 2019). In that case, the victim was not found to have sustained any physical injuries, but the defendant sought to introduce evidence that another individual committed sexual abuse on the victim. The court of appeals acknowledged that the defendant may have been able to admit such evidence under exception (A) of Rule 5.412(b)(1), however, the defendant failed to comply with the motion to admit and notice and hearing requirements set forth in the rule and the court held that the district court was correct to exclude such evidence. *Walker* at **9-10.

Exception (C) also applies in this case. Disallowing the defendant to offer evidence of another person committing sexual acts against her during the same time frame that she alleged the defendant committed acts coupled with expert testimony from Dr. Thurman that S.V. contaminated her memories with acts committed by L.V. with what she could have conceived happening with the defendant was a denial of the defendant's fundamental right to present a defense to the crimes charged.

In *State v. Russell*, 897 N.W.2d 717, 731 (Iowa 2017) the court held as follows:

> Compulsory Process. The United States Constitution recognizes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. Likewise, the Iowa Constitution recognizes the right "to have compulsory process for his witnesses." Iowa Const. art. I, § 10.
>
> The right to compulsory process includes the right to compel a witness's presence in the courtroom and the right to offer testimony of witnesses. *State v. Weaver*, 608 N.W.2d 797, 802 (Iowa 2000). The Supreme Court has described the right to compulsory process as follows:
>
> > The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of

> challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.
>
> *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988)(quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967)).

Russell at 731. The right to present a defense is a fundamental right that is essential to a fair trial. *State v. Clark*, 814 N.W.2d 551, 561 (Iowa 2012). What more basic defense does a defendant have than to offer evidence that he is not the true perpetrator of the alleged crime and that it is another person who is the actual perpetrator. The refusal on the part of the trial court to allow the defendant to present the evidence of L.V.'s sexual acts upon S.V. denied the defendant a fair trial and the court should order a new trial and allow such evidence to be presented.

IV.
The prosecuting attorney engaged in prejudicial misconduct during closing arguments.

A. Standard of Review.

Claims of prosecutorial misconduct are generally reviewed for an abuse of discretion. *State v. Plain*, 898 N.W.2d 801, 811 (Iowa 2017). However, a claim of prosecutorial misconduct implicates a defendant's due process right to a fair trial. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). Constitutional claims are

reviewed de novo. *Halstead*, 791 N.W.2d at 807. Evidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith. *See State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) citing *State v. Leuty*, 247 Iowa 251, 258, 73 N.W.2d 64, 69 (1955).

B. Preservation of Error

The misconduct claimed in this case was impermissible vouching for the credibility of the alleged victim, S.V., by the prosecuting attorney. The defendant filed a motion in limine requesting no argument be presented vouching for the credibility of S.V. arguing that she is telling the truth. *See* Defendant's First Motion in Limine, para. 2 (App__). The trial court granted the defendant's motion. *See* Ruling on Defendant's First Motion in Limine. Defendant also filed a motion for new trial pursuant Iowa R. Crim. P. 2.24(2)(b)(5) which specifically authorizes the court to grant a new trial "…when the prosecuting attorney has been guilty of prejudicial misconduct during the trial thereof before the jury." Thus, error has been preserved.

No objection was made by defense counsel at the time the vouching was made by the prosecutor during closing arguments. To the extent such an objection is required in order to preserve error, trial counsel was ineffective.

C. Discussion

During closing arguments, the prosecuting attorney, Mr. Kunstle, was discussing the defendant's statements to the police during his interview and made the following comments to the jury:

> And then Michael Montgomery goes on in his police interview and he explains why would [S.V] – when questioned by the police, "Why would [S.V.] use her hand and put it in between her legs on her crotch?"
>
> He explains, "Kids are kids. They explore themselves. I was a kid; you were a kid. You know, we go through periods where we explore ourselves. She was exploring herself, and she thought she could explore herself with me, with my hand."
>
> **Why would he say that? He would say that if what [S.V.] is saying is true, that he sexually abused her.**

See Trial tr. Day 3, pg. 88 line 8-20. The above highlighted portion of Mr. Kunstle's argument shows that his comments were an impermissible vouching of the credibility of [S.V] and the guilt of the defendant.

The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). Evidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith. *See State*

v. Graves, 668 N.W.2d 860, 869 (Iowa 2003) citing *State v. Leuty*, 247 Iowa 251, 258, 73 N.W.2d 64, 69 (1955).

The second required element is proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial. "Thus, it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." In determining prejudice the court looks at several factors "within the context of the entire trial." The court must consider (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct. *Graves* at 869. Subsequent cases have identified the strength of the State's case against the defendant as the most important factor. *See, e.g., State v. Boggs*, 741 N.W.2d 492, 509 (Iowa 2007); *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006).

A prosecutor "is precluded from using argument to vouch personally as to a defendant's guilt or a witness's credibility." *Graves* at 874. "An argument amounts to impermissible vouching if the jury could reasonably believe the prosecutor was expressing a personal belief in the credibility of a witness, either through explicit personal assurances or implicit indications that information not presented to the

jury supports the witness." *State v. Martens,* 521 N.W.2d 768, 772 (Iowa Ct. App. 1994).

In *Reed v. State*, No. 18-0561 (Iowa Ct. App., July 3, 2019) the court of appeals recently ordered a new trial for a defendant based on prosecutorial misconduct where the prosecutor had made comments to the jury during closing arguments regarding the testimony of one of the police officers and stated to the jury that "He's telling you the truth" and "He's being honest." *Reed* at *6-7. In *Reed*, the defendant sought post-conviction relief for his conviction of eluding. The court of appeals found that the credibility of the testimony of the police officer in that case was essential to proving that Reed exceeded the speed limit by at least 25 miles per hour, which is an element of eluding and was, thus, prejudicial. *Reed* at *7. This reasoning by the court of appeals is consistent with the supreme court's directive that the most important factor to consider among those factors set forth in *Graves* is the strength of the state's case against the defendant. *See Boggs* at 509.

Likewise, in the case at bar, the state's case against Mr. Montgomery was not strong. This is demonstrated by the fact that the jury acquitted him on the charge of lascivious acts. It is also demonstrated by the fact that the jury at one point was deadlocked and could not reach a unanimous decision on the sexual abuse charge.

The state's entire case rested on the credibility of S.V.'s statements. Her testimony was essential to the elements that were required to be proven by the state. The words used by Mr. Kunstle "what [S.V.] is saying is true" is indistinguishable from the prosecutor's words in *Reed*, "He's telling you the truth." Mr. Kunstle's reference to "what" S.V. was saying was not some extraneous information, rather, the "what" Mr. Kunstle was referencing was clear and went to the very heart of the criminal charge when Mr. Kunstle stated, "that he sexually abused her." This was an impermissible vouching for the credibility of S.V. and the guilt of Mr. Montgomery. Given the weakness of the state's case, Mr. Kunstle's comments were prejudicial to Mr. Montgomery and the court should order a new trial on this basis as well.

V.

The evidence was insufficient to support the jury's verdict or the verdict was otherwise contrary to the weight of the evidence.

A. Standard of Review

Review of claims of insufficient evidence to support a conviction is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). Substantial evidence exists to support a verdict when the record reveals evidence that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* In making this determination, "[w]e view the evidence in the light most

favorable to the verdict," including all reasonable inferences that may be deduced from the record. *State v. Gay,* 526 N.W.2d 294, 295 (Iowa 1995).

Review of the trial court's denial of a motion for new trial is for an abuse of discretion. *State v. Nitchter*, 720 N.W.2d 547, 559 (2006). Under rule 2.24(2)(*b*)(6), when deciding such a motion, the district court is entitled to weigh the evidence and consider the credibility of the witnesses. *Id*. If the court determines the verdict is contrary to the weight of the evidence and a miscarriage of justice may have occurred, it is within the court's discretion to grant a new trial. *Id.* The weight-of-the-evidence analysis is much broader than a sufficiency-of-the-evidence analysis in that "it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other." *Nitcher*, 720 N.W.2d at 559. Only in the extraordinary case, where the evidence preponderates heavily against the verdict, should a district court lessen the jury's role as the primary trier of fact and invoke its power to grant a new trial. *State v. Shanahan,* 712 N.W.2d 121, 135 (Iowa 2006).

B. Preservation of Error

At the close of the state's evidence the defendant made a motion for a directed verdict. *See* trial tr. Day 2, pg. 150. At the close of all of the evidence the defendant made a motion for judgment of acquittal. *See* trial tr. Day 3, pg. 70.

Following the jury's verdict, the defendant filed a timely motion for new trial or judgment of acquittal arguing the evidence was insufficient to sustain the conviction or the verdict was otherwise contrary to the weight of the evidence. *See* (App__). Error has been preserved.

C. Discussion

In this case the state did not show any physical evidence to corroborate the testimony of S.V. The state also did not produce any witnesses to the alleged events described by S.V. The state called Teresa Den Hartog in an attempt to show that Mr. Montgomery made some type of incriminating statements to her. However, Ms. Den Hartog's testimony is not believable because she lied under oath both to the jury and in her deposition that she wrote her testimony on a form which she gave to the police. In fact, S.V.'s mother wrote the statement for Ms. Den Hartog. S.V.'s mother, Rebecca Waranke, is the person who informed Teresa Den Hartog of the allegations that S.V. had made. *See* Trial tr., Day 2, pp. 9 -13.

S.V.'s testimony was not believable. S.V. gave many different ages as to when she claimed the abuse started. She testified in her deposition to four different ages: 7, 8, 9, and 10. *See* Trial tr., Day 1, pg. 161. S.V. told her friend, A.P., that it began when she was ages 3-5. *See* Trial tr., Day 2, pg. 22.

S.V.'s claims were also outlandish. She claimed that the defendant committed these acts, which included licking her vagina while her grand mother was also in the bed. Trial tr., Day 1, pp. 164-65. S.V. testified that sometimes she would try to get away and her grandpa would pull her back, but when asked how he would do that she said he pushed her off the bed really hard. This testimony is illogical and makes no sense. Trial tr., Day 1, pg. 165. S.V. testified that when the defendant was licking her vagina he would take her hand make her put his hand on his private part. Trial tr., Day 1, pg. 166. This description by S.V. is physically impossible. At trial S.V. suddenly claimed that the defendant had taken a shower with her after she had met with the county attorney and he brought the subject up to her. Trial tr., Day 1, pp. 177-78. S.V. also claimed on re-cross-examination that the defendant threatened to hurt her if she told anyone, but denied any such threat in her deposition testimony. Trial tr., Day 1, pp. 188-89.

The statements made by S.V. are like those considered by the court of appeals in *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993) which held that the testimony of the three girls who accused the defendant of sexual abuse:

> When read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and, at times, border on the absurd.

Id. The court of appeals acknowledged that ordinarily it is for the jury to determine the credibility of witnesses, however, the court also recognized the long-standing principle in Iowa that such a rule does have a limitation where the court quoted the following:

> This court has gone its full length to protect the right of jury trial against encroachment by the courts under any guise, and one of the rights of jury trial is the right to have the credibility of the witness determined by the jury. Generally speaking there are no limitations upon this rule, but there are limitations upon the application of it. The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.

Smith at 103 quoting *Graham v. Chicago & Northwestern Ry. Co.*, 143 Iowa 604, 119 N.W. 708 (1909).

CONCLUSION

For all the foregoing reasons stated in this brief, defendant/appellant, Michael Montgomery prays that this honorable court reverse the judgment and sentence entered herein and direct a judgment of acquittal based on inconsistent verdicts.

Alternatively, the defendant requests the court order a new trial with proper instructions to the jury and allow the defendant to offer the material evidence requested.

ORAL ARGUMENT REQUESTED

The defendant/appellant requests oral argument on all issues raised in this brief.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 12,377 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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2-20-20
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