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, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

SHERYL SOICH
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
sherri.soich@ag.iowa.gov

THOMAS KUNSTLE
Sioux County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

AMENDED FINAL

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ROUTING STATEMENT

The defendant asks for Iowa Supreme Court retention, urging the court to reconsider its holding in *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994). He does not point to any expressions of legislative or judicial disagreement with the court's prior interpretation that would merit reconsideration, however. Because the underlying issues in the case involve the application of existing legal principles and settled law, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case.

A Sioux County jury convicted Michael Montgomery of one count of second-degree sexual abuse, in violation of Iowa Code sections 709.1 and 709.3(1)(b) (2015). Verdict Forms; Conf. App. 45. The jury acquitted the defendant of one count of lascivious acts with a child, in violation of Iowa Code sections 709.8(1)(a), 709.8(1)(b), and 709.8(2)(a) (2015). Verdict Forms; Conf. App. 45. The charges stemmed from allegations that Montgomery repeatedly molested his young granddaughter.

Course of Proceedings.

The State agrees with the defendant's rendition of the case's procedural history. *See* Iowa R. App. P. 6.903(3).

Facts.

When she was in third or fourth grade, S.V. would occasionally spend the night with her maternal grandparents, Brenda and Michael Montgomery, in Hospers, Iowa. Tr. Day 1, p. 150, lines 4-18. She would sometimes get into bed with them to watch movies. Tr. Day 1, p. 151, lines 9-13. At some point, Montgomery began to touch his granddaughter inappropriately, kissing her back and trying to put his finger into her mouth. Tr. Day 1, p. 150, line 19 – p. 51, line 3. He also took off her clothes and underwear, and he touched and licked her vagina. Tr. Day 1, p. 151, line 2 – p. 152, line 23. S.V. could feel her grandfather's finger and the wetness of his tongue. Tr. Day 1, p. 152, line 15 – p. 153, line 12. Montgomery would also make S.V. kiss him on the mouth, and he would sometimes make her touch his bare penis, which she described as "textured" and "[m]uscly." Tr. Day 1, p. 154, line 3 – p. 155, line 7. Although "the penis situation didn't happen that often… the kissing and licking of the back and the other stuff happened often." Tr. Day 1, p. 155, lines 8-13.

Touching her vagina was included in "the other stuff." Tr. Day 1, p. 155, lines 8-18. Montgomery told his granddaughter not to tell anyone what he was doing to her. Tr. Day 1, p. 157, lines 11-17. S.V. followed her grandfather's orders initially, but eventually told her friend Addison, her mother's boyfriend's son L.V., a school guidance counselor, and finally her mother. Tr. Day 1, p. 159, lines 6-13; p. 162, line 24 – p. 163, line 2.

S.V.'s mother, Rebecca Warnke, recalled that S.V. tearfully told her "Mommy, Papa touched me," around the conclusion of her third-grade year. Tr. Day 1, p. 205, line 13 – p. 206, line 17. She told her daughter "it would be okay and she needs to be completely honest about what was going on because if she didn't she could get into trouble or he could get in trouble." Tr. Day 1, p. 206, line 5 – p. 207, line 9. S.V. maintained that Montgomery had touched her. Tr. Day 1, p. 207, lines 10-12. Rebecca then confronted her father, who became angry and defensive and walked away. Tr. Day 1, p. 207, line 13 – p. 208, line 13. Although she took her daughter to a counselor in May of 2016, Rebecca did not initially report the abuse to authorities because she was concerned that her ex-husband would obtain custody of her children and because Montgomery had been diagnosed with stage 4

cancer. Tr. Day 1, p. 209, line 18 – p. 211, line 23. S.V. went to counseling for a few months and then "refused to talk" until two years later, when Rebecca heard from the school guidance counselor that S.V. had disclosed the abuse to her and the allegations came to light. Tr. Day 1, p. 211, line 15 – p. 212, line 6.

Teresa Den Hartog, a former close friend of Montgomery's, testified at trial. She learned that he had been accused of sexually abusing S.V. and confronted him about it. Tr. Day 2, p. 3, line 9 – p. 7, line 13. Montgomery told Teresa that "he didn't do anything that [S.V.] didn't initiate first. Then he paused and went into saying... Why would he do anything with [S.V.] when he has [his wife] Brenda. And when he paused, it was a long enough pause that I was convinced that he did have sexual relations with [S.V.]." Tr. Day 2, p. 7, line 24 – p. 8, line 5.

The State also called S.V.'s friend, Addison P., and S.V.'s mother's boyfriend's son, L.V., both of whom testified that S.V. told them a few years earlier that her grandfather was touching her inappropriately. Tr. Day 2, p. 16, line 16 – p. 20, line 7 (S.V. tells Addison that her grandfather touches her "between her legs"); p. 25, line 19 – p. 31, line 7 (S.V. tells L.V. that Montgomery "licked and

touched" her "private area"). Both told her to report the sexual abuse to an adult. Tr. Day 2, p. 18, line 24 – p. 19, line 25; p. 30, lines 19-23.

Sioux County Deputy Tony Reitsma also testified, describing his interview with Montgomery. Tr. Day 2, p. 38, line 8 – p. 42, line 15. The defendant told officers that S.V. had twice pulled his hand to her groin while they were in bed to "explore herself" with his hand. Tr. Day 2, p. 38, line 21 – p. 40, line 22; *see also* State's Ex. 5 (DVD) at 33:00. When asked if his granddaughter was wearing clothes, he gave the non-responsive answer, "I was." Tr. Day 2, p. 39, lines 9-17. When pressed, Montgomery repeatedly said he could not recall whether S.V. was naked or clothed. Tr. Day 2, p. 39, line 24 – p. 40, line 10. He told the officers he "put an end to it and wouldn't allow it," thereafter banishing her from the bedroom. Tr. Day 2, p. 40, lines 11-22. He did not report the incident to S.V.'s mother, Rebecca Warnke. Tr. Day 2, p. 40, lines 11-22. The recorded interview was played for the jury. R. Day 2, p. 43, line 14 – p. 45, line 25.

Forensic interviewer Victoria Ricke also testified, explaining various dynamics at play in child sexual abuse cases, such as grooming, delayed disclosure, and compartmentalization. Tr. Day 2, p. 119, line 7 – p. 128, line 15. She was unaware of any research on

the subject of a sexually abused child transferring his or her memories from one perpetrator to another. Tr. Day 2, p. 127, lines 1-22.

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Montgomery did not testify at trial. He did, however, call several witnesses – including his wife Brenda and his other daughter Crystal – to testify that they had never witnessed him acting inappropriately or sexually abusing a child. Tr. Day 3, p. 28, line 23 – p. 29, line 2; p. 53, lines 3-7; p. 57, lines 3-12; p. 63, lines 1-10; p. 65, line 23 – p. 66, line 9. He also called psychologist Rosanna Jones-Thurman, who opined that it was possible a child could confuse pornography with reality and could initiate inappropriate sexual contact with an adult. Tr. Day 2, p. 85, line 4 – p. 89, line 25.

As noted, the jury convicted the defendant of second-degree sexual abuse, but acquitted him of lascivious acts with a child. Additional facts will be discussed as relevant to the arguments below.

ARGUMENT

I. The jury did not render inconsistent verdicts when it convicted the defendant of second-degree sexual abuse and acquitted him of lascivious acts with a child because multiple acts were alleged; further, the "sexual in nature" requirement of *State v. Pearson*, 514 N.W.2d 452 (Iowa 1994) should remain the law.

Scope of Review.

An inconsistent verdict challenge has constitutional implications and is therefore subject to *de novo* review. *See State v. Halstead*, 791 N.W.2d 805, 807 (Iowa 2010).

Preservation of Error.

The defendant preserved error on his inconsistent verdicts claim by unsuccessfully filing a motion for new trial and a motion in arrest of judgment. Motion for New Trial and in Arrest of Judgment; Ruling; Conf. App. 46-65, 73-78. He has not preserved error, however, on his claim that *State v. Pearson* should be overruled. Because Montgomery did not present this claim to the trial court, it is not preserved for this court's review. *See* Hearing on Post-Trial Motions Tr. p. 2, line 24 – p. 11, line 25 (counsel relies on *State v. Pearson* in making a jury instruction complaint, but does not suggest that it should be overruled); *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("Nothing is more basic in the law of appeal and error

than the axiom that a party cannot sing a song to us that was not first sung in the trial court."); *State v. Maghee*, 573 N.W.2d 1,8 (Iowa 1997) (the court notes that an objection must be "sufficiently specific to alert the district court to the basis" of the objection and observes that a party is bound by the objection made and may not "amplify or change the objection on appeal"); *but see State v. Williams*, 895 N.W.2d 856, 872, fn. 2 (Iowa 2017) (stating "it would make little sense to require a party to argue existing law should be overturned before a court without the authority to do so"). The State addresses the *Pearson* argument in the event the court finds the claim to be properly before it.

Merits.

Michael Montgomery first complains that the jury rendered inconsistent verdicts in his case when it convicted him of second-degree sexual abuse and acquitted him of lascivious acts with a child. He also urges the court to overrule *State v. Pearson*, 514 N.W.2d 432 (1994) and hold that a sexual abuse conviction requires proof of

sexual motive or intent.[1] Neither claim entitles the defendant to relief.

A. *State v. Pearson* and the "sexual in nature" requirement.

Iowa Code section 709.1 provides that any sex act performed with a child constitutes sexual abuse. Iowa Code § 709.1(3). A person performing a sex act with a child under the age of twelve commits second-degree sexual abuse. Iowa Code § 709.3(2). A "sex act" is defined, among other ways, as "any *sexual* contact between two or more persons by … [c]ontact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person [or] [c]ontact 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 licensed professional]." Iowa Code § 702.17 (emphasis added).

In *State v. Pearson*, the Iowa Supreme Court held that a "sex act" did not require skin-to-skin contact between the requisite body parts. *State v. Pearson*, 514 N.W.2d 452, 456 (Iowa 1994). In *Pearson*, the defendant moved his clothed penis against a young boy's

[1] For ease of explanation and context, the State addresses the two claims in reverse order in the body of its brief.

clothed buttocks. *Pearson*, 514 N.W.2d at 454. The *Pearson* court concluded that the presence of intervening fabric would not automatically foreclose a sexual abuse conviction:

> Whether intervening material prevents contact must be determined on a case-by-case basis, considering the nature and amount of the intervening material. If the intervening material would, from an objective viewpoint, prevent a perception by the participants that the body parts (or substitutes) have touched, contact has not occurred. Thus, prohibited contact occurs when (1) the specified body parts or substitutes touch and (2) any intervening material would not prevent the participants, viewed objectively, from perceiving that they have touched.

Id. at 454.

The *Pearson* court went on to disabuse the defendant of the notion that an adult innocently bouncing a child on his lap would be guilty of sexual abuse under the court's interpretation of the statute, noting "[n]ot all contact is a 'sex act.'" *Id.* at 455. The court fashioned a non-exhaustive list of factors in determining whether contact is "sexual in nature":

> 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.

Id. at 455.

The court decided *State v. Monk* on the same day as *Pearson*, remanding that case for retrial. *State v. Monk*, 514 N.W.2d 448, 452 (Iowa 1994). In *Monk*, the contact at issue was the insertion of the end of a broomstick handle into the victim's anus during "horseplay" among young, mentally challenged men who were friends. *Monk*, *id.* The jury was not instructed that the contact had to be sexual in nature, as required by Iowa Code section 702.17. *Id.* at 450-51. Because Monk's defense was precisely that and the jury was improperly instructed, Monk's conviction was reversed. *Id.* The court reaffirmed, however, that sexual motivation or gratification is not an element of sexual abuse. *Id.* at 451-52.

In dissent, Justice Carter urged in *Pearson* that "sexual gratification" should be an element of sexual contact, which would allow a defendant to argue he lacked such an intent. *Pearson*, *id.* at

457 (Carter, J., dissenting in part). Also in dissent, Justice Snell argued the "focus should be on the meaning of 'contact' as used in the statute," and that "the statutory description of the four types of contact that constitute a 'sex act' displays the intimate personal nature of the offense." *Id.* at 458 (Snell, J., dissenting). Justice Snell predicted that "juries will be rudderless vessels navigating an unchartered course without compass or lighthouse," and the "[l]aw will oscillate from jury to jury on waves of emotion." *Id.* at 460. In *Monk*, Justices Carter and Snell again dissented, with Justice Snell contending the holdings of *Pearson* and *Monk* "go well beyond any recognizable legislative intent to protect victims against sex abuse." *Id.* at 452 (Carter and Snell, Js., dissenting).

B. *Pearson*'s continued viability.

As the Iowa Supreme Court observed in *State v. Anderson*, "Ours [is] not to reason why, ours [is] but to read, and apply." *State v. Anderson*, 801 N.W.2d 1, 2 (Iowa 2011) (*quoting Holland v. State,* 253 Iowa 1006, 115 N.W.2d 161, 164 (1962)). Long-standing principles of statutory construction dictate that if the statutory language is clear and unambiguous, the court will not impose its "own ideas of what is best…" *Id.* at 6-7.

Here, there is no reason to interpret Iowa Code section 702.17 any differently than the court did in 1994. The *Pearson* court correctly read the plain language of the definitional section – a "sex act" means "sexual contact…" – to mean that the contact must be "sexual in nature." *See Pearson*, *id.* The *Pearson* court rightly declined to graft a sexual intent element onto a statute that does not contain one. The legislature clearly knew how to require a sexual intent element in drafting a statute, as it has done in the context of lascivious acts with a child and indecent conduct with a child. *See* Iowa Code §§ 709.8(1), 709.12(1) (prohibiting various acts if done "for the purpose of arousing or satisfying the sexual desires of either of them"); *see also State v. Capper*, 5369 N.W.2d 361, 367 (Iowa 1995), *overruled on other grounds by State v. Hawk*, 616 N.W.2d 527, 530 (Iowa 2000) (holding neither lascivious acts with a child nor indecent contact with the child are lesser included offenses of second-degree sexual abuse involving a child because they require proof the defendant acted with specific intent to arouse or satisfy sexual desires).

The legislature's choice to omit a sexual intent element was reasonable. As is often said, sexual abuse is a crime of power rather

than sex. *See, e.g.*, Myths and Facts about Sexual Violence: Georgetown Law, https://www.law.georgetown.edu/your-life-career/health-fitness/sexual-assault-relationship-violence-services/myths-and-facts-about-sexual-violence/; Dorothy Hicks, Sexual Battery: Management of the Rape Victim, https://www.glowm.com/resources/glowm/cd/pages/v6/v6c096.html. The facts of *State v. Davis*, 584 N.W.2d 913 (Iowa Ct. App. 1998) demonstrate this concept and provide a real-world example of the *Pearson* court's wisdom in interpreting the sexual abuse provisions exactly as written. After Davis came home to his live-in girlfriend and asked her to have sex, the two started to argue. *Davis*, 584 N.W.2d at 915. Davis became enraged and began to suffocate and restrain his girlfriend. *Id.* He pulled off her clothes, threatened to kill her, and thrust his fist into her vagina – causing several lacerations – before placing her head underwater in a bathtub and trying to stab her. *Id.* He was convicted of first-degree kidnapping and second-degree sexual abuse. *Id.*

On appeal, Davis cited *Pearson* and argued that his behavior was assaultive rather than sexual in nature. *Id.* The court rightly rejected this claim:

> The vagina is a specified body part. The question is whether Davis' contact with Smith's vagina was sexual in nature.
>
> It would be a perverse construction of the supreme court's holding in *Pearson* to find the act was not sexual in nature. While there is no direct evidence Davis was satisfying his sexual desires by thrusting his fist into Smith's vagina, the context and the surrounding circumstances of the case make clear the act was sexual in nature.
>
> Davis and Smith were lovers. Less than an hour before the incident Davis asked Smith to have sex. She refused. The refusal prompted Davis' violent behavior. Davis had no legitimate excuse for this act. This is not a case where a parent touches a child while bathing them or changing their diaper. Davis purposely penetrated Smith's vagina with his fist after she had denied him sex. The fact he intentionally secluded Smith [from a roommate] while performing this brutal act indicates his consciousness of the sexual nature of the act. The district court's denial of Smith's judgment of acquittal for sexual abuse is affirmed.

Davis, *id.* at 917-18.

Under Montgomery's proposed interpretation, the fact that Davis was motivated by anger rather than sexual arousal would absolve him of liability for a sex crime. The *Pearson* court rightly interpreted "sexual contact" to be "sexual in nature" while at the same time declining to specifically require sexual intent or sexual motivation on the defendant's part. The facts of *Davis* illustrate that

an act can be sexual in nature without the defendant possessing the intent for sexual gratification.

Although Montgomery characterizes *Pearson* as "unsound, confusing, and unworkable" (Defendant's Brief, p. 25), history has not borne that out. Since 1994, the court has consistently reaffirmed the definition of a sex act and the factors to consider that were adopted in *Pearson*. *See, e.g., State v. Thede*, 2016 WL 5930417, *4 (Iowa Ct. App. Oct. 12, 2016) (applying *Pearson* factors to evaluate grandfather's conduct of making his teenaged granddaughter shave the hair around his penis, anus, and scrotum with an electric razor while he said "Oh, honey, right there"); *State v. Howard*, 825 N.W.2d 32, 44-45 (Iowa 2012) (citing *Pearson* in analyzing the evidence of sexual abuse and determining whether admission of the defendant's erroneously admitted confession was harmless); *State v. Dothseth*, 2009 WL 607617, *1 (Iowa Ct. App. Mar. 11, 2009) (using *Pearson* analysis to reject minister's claim of "religious practices" as a justification to touch a thirteen-year-old girl's vagina).

General principles of *stare decisis* also support *Pearson's* continued viability. *See generally Youngblut v. Youngblut*, No. 18-1416, 945 N.W.2d 25, 43-44 (Iowa June 12, 2020) (McDonald, J.

dissenting) (explaining the doctrine of *stare decisis* and noting that for nonconstitutional precedent to be overruled, it must reach a critical mass of wrongness – a high standard that includes whether it has "proved unworkable in practice, does violence to legal doctrine, or has been so undermined by subsequent factual and legal developments that continued adherence to the precedent is no longer tenable"). None of these concerns is present here.

Montgomery does not cite to any decision over the last twenty-six years in which the court has voiced the same concerns articulated by the dissenting justices in *Pearson* and *Monk*. Thus, as the *Pearson* majority predicted in 1994, "common sense and reasonableness" have prevented "an arbitrary perversion of the sexual abuse laws." *Pearson,* 514 N.W.2d at 456. A mother may still bathe her son and a department store Santa Claus may still bounce a toddler on his lap without fear of prosecution.

Nor does Montgomery point to any action taken by the legislature to show its disagreement with the court's past interpretation of Iowa Code section 702.17. *See Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 600 (Iowa 2011) ("The legislature is presumed to know the state of the law"); *Drahaus v. State*, 584

N.W.2d 270, 276 (Iowa 1998) (the legislature's failure to amend a statute in response to the court's interpretation reflects acquiescence in that interpretation). To the contrary, since *Pearson* the legislature has increased penalties for sex offenders, not reduced them. *See, e.g.,* Iowa Code chs.692A, 903B; Iowa Code §§ 902.12(3), 902.14. *Pearson* should not be overruled.

C. Vagueness.

The defendant also briefly suggests that the sexual abuse statute as construed in *Pearson* is void for vagueness. Defendant's Brief, pp. 30-31. Montgomery did not make a vagueness complaint below, so error on this claim is not preserved. *See Allen v. Iowa Dist. Ct. for Polk Cty.*, 582 N.W.2d 506, 510, fn.1 (Iowa 1998) ("Allen also raises a constitutional vagueness challenge... That issue was not raised to the district court... Because error was not preserved on this issue, we do not address it."); *Maghee*, 573 N.W.2d at 13 (noting a vagueness challenge was raised on appeal but was "not preserved in the district court for our review").

Even if error had been preserved, Montgomery would not be entitled to relief. A party claiming a statute is void for vagueness "bears a heavy burden to show the statute clearly, palpably, and

without a doubt, infringes on the constitution." *State v. White*, 545 N.W.2d 552, 557 (Iowa 1996). A vague law is one that does not specify the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited," and does not provide an adequate standard to discourage arbitrary and discriminatory enforcement. *State v. Watkins*, 659 N.W.2d 526, 534 (Iowa Ct. App. 2003). "A statutory term provides fair warning if the meaning of the word 'is to be 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. Hunter*, 550 N.W.2d 460, 465 (Iowa 1996), *overruled on other grounds by State v. Robinson*, 618 N.W.2d 306, 311-12 (Iowa 2000). "The statute must also provide an adequate standard for those who administer the law." *Watkins*, 659 N.W.2d at 535. If a statute is not vague as applied to the defendant, he generally does not have standing to make a facial challenge. *State v. Newton*, 929 N.W.2d 250, 255 (Iowa 2019).

Whether an act is sexual in nature is a fact-dependent inquiry that ordinary people can understand and apply to govern their own conduct. *See Pearson*, *id.* at 456. The *Pearson* court appropriately

recognized that the definition of "sexual contact" had to be somewhat flexible given the circumstances that could arise where there is hand-to-genital contact between a child and an adult. *Pearson*, *id*. As the court recognized, a common-sense, reasonable interpretation of that phrase provides a standard for distinguishing between a caretaker and a pedophile. *See Pearson*, *id*. As applied to Montgomery's case, fair warning is provided under the *Pearson* interpretation that his conduct of hand-to-genital contact and mouth-to-genital contact with his granddaughter was criminal. Montgomery's contention to the contrary – if considered – should be rejected.

D. Other jurisdictions.

The cases Montgomery cites from other jurisdictions are distinguishable. In *Flink v. State*, 683 P.2d 725 (Alaska Ct. App. 1984), the court read into its sexual abuse of a minor statute an element of intent to arouse or gratify sexual desires. *Flink*, 683 P.2d at 729-33. While the Alaska statute contained the phrase "sexual contact," as the Iowa statute does, it *defined* "sexual contact" as "the intentional touching, directly or through clothing, by the defendant of the victim's genitals, anus, or female breast." *Flink*, 683 P.2d at 742, n.3. Thus, the *Flink* court was faced with different statutory language

but the same problem as the *Pearson* and *Monk* courts – distinguishing between sexual abuse and innocent contact with private parts seemingly falling within the language of the statute. The court in *Flink* resolved the quandary by requiring a sexual intent that was not specifically included in the statutory language. *See Flink*, 683 P.2d at 732 (noting "…[W] are left in substantial doubt as to the legislature's intentions regarding the culpable mental states for these crimes;" the court applies the rule of lenity to construe ambiguous language against the State). The Iowa Supreme Court chose to interpret "sexual contact" – which was *not* specifically defined, as it was in Alaska – by mandating a "sexual in nature" requirement. *Pearson*, *id.* Both approaches ensure that innocent contact between requisite body parts is not punished, but the Iowa Supreme Court's approach remains true to the plain language of its statute and avoids adding an element that the legislature did not include.

State v. Tobin, 602 A.2d 528 (R.I. 1992), is also distinguishable. There, the defendant challenged a definition of "sexual contact" that was defined 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 a sexual arousal, gratification, or assault." *Tobin*, 602 A.2d at 534. In the words of the court, Tobin argued that the statute "predicate[d] a finding of unlawful sexual contact not on what defendant actually intended but on what some other person, either the complainant or the jury, could reasonably believe that he intended. We agree." *Id.* The *Tobin* court found that a 'literal reading of this statute, without more, allows criminal liability without proof of *mens rea*," and concluded that the jurors should have been instructed that they were required to find the defendant's purpose was sexual arousal, gratification, or assault. *Id.* at 535. The "can be reasonably construed" language – defining the crime only from the perspective of others – is not contained in the Iowa statute and provides little guidance for this court.

Iowa's sexual abuse statute is a general intent crime, as the court has long held. *State v. Kelso-Christy*, 911 N.W.2d 663, 666 (Iowa 2018) (citing *State v. Riles-El*, 453 N.W.2d 538, 539 (Iowa Ct. App. 1990)) ("The Iowa Supreme Court has clearly held on several occasions that sexual abuse is a general intent crime."); *State v. McNitt*, 451 N.W.2d 824, 825 (Iowa 1990) (observing that third-degree sexual abuse requires only general intent); *State v. Donelson*,

302 N.W.2d 125, 136 (Iowa 1981) ("Sexual abuse itself does not require specific intent."); *see also State v. Mummau*, No. 12-1082, 2013 WL 2145994, at *3 (Iowa Ct. App. Mar. 23, 1994) (rejecting the defendant's argument that the sexual abuse statute was unconstitutional because it does not contain a *mens rea* provision; "… [I]n our reading of *Monk* and its sister case [] *Pearson*… we find no requirement for sexual intent in the mind of the defendant. To the contrary, 'sexual motivation is not required in order to establish an offense of sexual abuse'"); *State v. Tague*, 310 N.W.2d 209, 211-12 (Iowa 1981) (in rejecting the defendant's mistake of age defense in a child sexual abuse case, the court notes, "Neither case law nor the [sexual abuse] statute supports the defendant's view that intent is an element of the crime… Statutes regarding sex offenses are common examples of employment of strict liability intended to protect the public welfare."); *State v. Sullivan*, 298 N.W.2d 267, 272-73 (Iowa 1980) ("The fact an erroneous judgment by an offender may still subject him or her to criminal sanction if the partner does not possess the requisite mental capacity [to consent to a sex act] does not make the statute unconstitutional. This crime does not require knowledge or intent.").

Like Iowa, two of North Carolina's sexual abuse statutes do not require that the defendant have a sexual intent or sexual purpose. In rejecting the argument that the crimes should be read to require a sex act "for the purpose of arousing or gratifying sexual desire," the court examined the plain language of the statutes:

> Neither the first-degree sexual offense statute nor the crime against nature statute contains a sexual purpose requirement. *See* N.C. Gen.Stat. §§ 14–27.4(a)(1), 14–177. Because the General Assembly included this requirement in the indecent liberties statute, but omitted it from these other sex offense statutes, we must conclude that the omission was intentional. (omitting authorities). Simply put, this Court must give effect to each of the statutes as written; we do not have the power to add a sexual purpose element to an unambiguous criminal statute that does not contain one.

In re J.F., 237 N.C. App. 218, 224-25, 766 S.E.2d 346 (2014). Like the North Carolina court, the Iowa Supreme Court refrained from adding a sexual purpose element to an unambiguous criminal statute that did not contain one in *Pearson*, and should decline Montgomery's offer to add it now. *See Pearson*, *id.*; *see also State v. Alvarado*, 875 N.W.2d 713, 720 (Iowa 2016) (refusing to construe lascivious acts with a child statute to require skin-to-skin contact because it would "in effect, add words to the statute, contrary to our rules of statutory construction").

The Supreme Court of Arizona reached a similar conclusion in interpreting a statutory affirmative defense to child molestation and child sexual abuse. In *State v. Holle*, 379 P.3d 179, 240 Ariz. 300 (2016), the court analyzed a provision that provided, "It is a defense… that the defendant was not motivated by a sexual interest." *Holle*, 379 P.3d at 200. In rejecting the defendant's complaint that his due process rights were violated by shifting the burden of proof to him, the court noted, "The statutes defining the crimes do not mention, imply, or require sexual motivation." *Id.* The statute prohibited knowing or intentional "sexual contact" with children, and the Arizona Supreme Court refused to add an element that was not there, finding the statutory scheme provided for an affirmative defense but "clearly and unambiguously" did not include sexual motivation as an element the State must prove. *Id.* at 201. The *Pearson* court's "sexual in nature" requirement accomplishes the same result as the Arizona affirmative defense, permitting the defendant to argue the contact was non-sexual and therefore innocent. Nothing more is required, and *Pearson* should remain the law.

E. Inconsistent verdicts.

Montgomery also claims that the sexual abuse conviction and lascivious acts acquittal in his case demonstrate inconsistent verdicts. Defendant's Brief, pp. 36-40. While it is true that the crime of lascivious acts with a child requires a sexual purpose and second-degree sexual abuse does not, there is no tension between the two verdicts in this case. The State alleged numerous acts of molestation over a period of some eighteen months, including contact between the defendant's fingers and S.V.'s vagina, contact between S.V.'s hand and the defendant's penis, and contact between the defendant's tongue and S.V.'s vagina. *See* Trial Info.; Tr. Day 1, p. 150, line 16 – p. 157, line 10; Conf. App. 7-8. This is not a case of a compound felony and an underlying predicate offense, the guilt of which is a necessary building block of the compound crime. *See Halstead*, 791 N.W.2d at 806-08, 815-16 (acknowledging the term "inconsistent verdicts" is often used imprecisely to cover a variety of circumstances before narrowing the discussion to "true inconsistency' or "repugnancy": "…[W]e find that the jury verdicts in this case are truly inconsistent. A jury simply could not convict Halstead of the compound crime of assault while participating in a felony without finding him guilty of

the predicate felony offense of theft in the first degree. There is simply no exit from this air-tight conundrum.").

Here, in contrast, there is no air-tight conundrum. The defendant was charged with one count of a crime alleging hand-to-genital contact with a sexual purpose and an age requirement for both the defendant and the victim, and one count of a crime alleging mouth-to-genital sexual contact or hand-to-genital sexual contact with a child. The two crimes have distinct elements and do not share a greater-lesser relationship, as noted. *See Capper*, *id.* S.V. described various and repeated acts of sexual impropriety committed by her grandfather over a period of time spanning more than a year, including at least three different types of bodily contact. *See* Trial Info.; Tr. Day 1, p. 150, line 16 – p. 168, line 25; Conf. App. 7-8. The jury is always free to believe "all, some, or none" of a witness's testimony. *See State v. Phanhsouvanh*, 494 N.W.2d 219, 232 (Iowa 1992). As the prosecutor argued:

> It is legally possible for Defendant to have committed a sex act, i.e. sexual contact between the Defendant's mouth and S.V.'s genitals, while still not engaging in lascivious acts, i.e. touching S.V.'s genitals or having S.V. touch the Defendant's penis. The jury could have believed part of S.V.'s testimony, that where S.V. described the Defendant licking her

> vagina, and disbelieved, or not been convinced by the State, by S.V.'s statements that the Defendant touched her vagina or that she touched the Defendant's penis. Alternatively, the jury could have found sufficient evidence to demonstrate only one sexual incident occurred, one time, as opposed to more than one time.

State's Resistance to Motion for New Trial, pp. 4-5; *see also* Ruling on Motion for New Trial, p. 5; Conf. App. 69-70, 77.

There are any number of conclusions that the jurors could have drawn. The jury may have even believed the defendant's claim to officers that his third-grade granddaughter wanted to "explore herself" with his hand and placed it between her legs before he retrieved it in horror. *See* State's Ex. 5 (DVD) at 33:00. That would explain the acquittal on the lascivious acts charge. However, the jurors may have also believed that Montgomery later licked S.V.'s vagina, especially in light of the testimony of the defendant's former close friend Teresa Den Hartog, who testified that Montgomery told her "he didn't do anything [his granddaughter] didn't initiate first." Tr. Day 2, p. 3, line 11 – p. 8, line 24. Attempting to analyze deliberations of a jury is a fool's errand and is unnecessary here in any event. *See State v. Doorenbos*, No. 19-1257, 2020 EL 3264408, *4 (Iowa Ct. App. June 17, 2020) ("While it may be surprising for

jurors to credit only part of a witness's testimony, that is their function;" the court rejects an inconsistent verdicts claim where the verdicts "addressed three separate offenses alleged to have occurred on three different days" that did not involve overlapping elements, predicate crimes, or special interrogatories). An acquittal and a conviction on two legally distinct charges pertaining to different acts at different times does not create an inconsistent verdicts problem, as the trial court properly concluded. Montgomery is unentitled to relief.

II. The trial court properly declined to submit an additional jury instruction on the subject of the *Pearson* "sexual in nature" requirement after the jury requested clarification.

Standard of Review.

Jury instructions must correctly state the law and should be supported by substantial evidence. *State v. McCall*, 754 N.W.2d 868, 871 (Iowa 2008). The decision to give a supplemental instruction or to refrain from giving one is within the sound discretion of the trial court. *McCall*, *id.* (quoting *State v. Watkins*, 463 N.W.2d 15, 18 (Iowa 1990)).

Preservation of Error.

The State disputes error preservation. While the defendant asked the court to supplement the jury instructions by adding a sexual purpose element, (Tr. Day 3, p. 112, line 3 – p. 114, line 15), he did not make the request he presents on appeal until his motion for new trial, as discussed more fully below. Error is therefore not preserved. *See State v. Foley*, No. 17-0043, 2017 WL 4317328, *2 (Iowa Ct. App. Sept. 27, 2017) ("Foley's objection to the supplemental jury instruction was inadequate to alert the district court to the argument he now raises on appeal…"). It is true that Iowa Rule of Civil Procedure 1.924 applies to criminal cases provides and provides that an objection to a supplemental jury instruction may be made in a motion for new trial. *Foley*, *id.* That rule, however, should not be construed to excuse the failure to voice a particular objection when specifically discussing the supplemental instruction with the trial court before the court submits it. To hold otherwise would be completely at odds with the purposes of error preservation. *See Foley*, *id.* at *2 (noting an objection must be specific so that the trial court may correct an instruction before giving it to the jury; Foley

neither voiced his appellate objection at trial or in a motion for new trial).

Merits.

The defendant next argues that the trial court erred in not further instructing the jury after a request for clarification. This court should find that the trial court was correct in concluding no further instruction was necessary.

Jury Instruction No. 16 defined "sex act" for the jury for purposes of the second-degree sexual abuse charge:

> Concerning Element Number 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.*

Jury Inst. No. 16; Conf. App. 17 (emphasis added).

A few hours into deliberations, the jury sent a note stating, "We would like clarification of Instruction No. 16 in regards to the final sentence." *See* Jury Question No. 1; Conf. App. 38-39. The lawyers and the trial judge discussed the note, and Montgomery asked the

court to further instruct the jury that the act needed to be committed for the purpose of satisfying the defendant's sexual desire. Tr. Day 3, p. 112, line 3 – p. 114, line 15. The prosecutor argued that the instruction was the uniform instruction on the definition of a sex act and noted that it included the concept that the contact must be sexual in nature, rather than benign. Tr. Day 3, p. 113, lines 15-20. The court ultimately responded, "The court finds that no further clarification is necessary in regard to Instruction Number 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." Order; Tr. Day 3, p. 114, lines 2-15; App. --.

On appeal, the defendant's argument has evolved. While at trial he specifically requested that the court instruct the jury the act must be "for the purpose of satisfying the sexual desire of the defendant" (Tr. Day 3, p. 113, line 6 – p. 114, line 1), he argues on appeal that the court should have given the jury the various non-exhaustive *Pearson* factors as clarification. Defendant's Brief, pp. 41-42. At the motion for new trial stage, Montgomery expanded his argument to include the *Pearson* criteria, contending for the first time that the trial court

should have provided the jury with the various factors in its response. Hearing on Post-Trial Motions Tr. p. 4, line 14 – p. 6, line 19.

Because the trial court was never asked to include the *Pearson* factors in a supplemental instruction, however, the court cannot be faulted for that failure. As discussed above, a motion for new trial complaint should not preserve a claim that was not made at the time the trial court could have actually honored the request, if so inclined. To the extent that Montgomery's claim is that the court should have given the supplemental answer he requested at the time, the court should reject that claim on the merits. As discussed extensively above, sexual intent or sexual motivation is not an element of second-degree sexual abuse. On this issue, the trial court observed:

> In this case, for the court to provide the requested instruction by the defendant – "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" – would be an incorrect statement of the law (defendant arguing the dissent in *Pearson*).

Ruling on Motion for New Trial, p. 2; Conf. App. 74.

The trial court was right. Montgomery's jury received an instruction that correctly conveyed the law, mirrored the language of the statute, and was the uniform instruction. *See* Uniform Jury Instr.

No. 900.8. The appellate court disapproves of uniform instructions reluctantly. *State v. Doss*, 353, N.W.2d 874, 881 (Iowa 1984). The uniform instruction defining a sex act was proper under *State v. Pearson* and *State v. Monk* because it twice conveyed the concept that the contact involved must be sexual in nature, and it instructed the jury to consider the surrounding circumstances in making that determination. To the extent this court considers this claim on appeal, it should reject it.

Finally, even if Montgomery had asked the trial court to specifically list the *Pearson* factors and it had refused, the court would have been on solid ground. In *State v. Davis*, the court found that counsel was not ineffective in failing to request the *Pearson* list of factors in addition to the uniform instruction. *Davis*, 584 N.W.2d at 919. The *Davis* court concluded that the uniform instruction "correctly conveyed to the jury that the act must be sexual in nature" and it was not error for counsel to request the uniform instruction without additional details. *Id.*

While Montgomery argues on appeal that the *Pearson* factors were particularly important because the jury requested clarification, that request does not establish that an additional instruction would

have had any effect. The jurors may have simply noticed that Instruction Number 15, the lascivious acts marshalling instruction, required them to find that the defendant acted with "the specific intent to arouse or satisfy the sexual desires of himself or S.V." Jury Inst. No. 15; Conf. App. 16. One or more of the jurors may have been curious whether "sexual in nature" was different than acting with specific sexual intent. And even if the court had given a full *Pearson* explanation, it may have inured to the State's benefit rather than the defendant's because it would still not have required a sexual purpose. *Pearson*, *id.* at 455 (noting that while a sexual purpose may be relevant, "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").

In sum, the trial court properly submitted the uniform instruction and refused to supplement it with an incorrect statement of the law by adding an element of sexual intent or purpose. Any argument regarding the *Pearson* list of factors is not preserved and would not entitle Montgomery to relief even if preserved. Montgomery cannot prevail.

In addition, Montgomery suggests that there is a general verdicts problem in this case. Defendant's Brief, pp. 44-47. However, both of the theories presented to the jury were legally correct and factually supported; therefore, no general verdicts issue arises. *See generally State v. Schlitter*, 881 N.W.2d 380, 289-91 (Iowa 2016) (finding counsel ineffective for failing to move for a judgment of acquittal on various alternative counts of child endangerment when one alternative was not supported by sufficient evidence and the jury returned a general verdict).

Further, general verdicts are no longer prohibited. Iowa Code section 814.28, which became effective on July 1, 2019, provides:

> When the prosecution relies on multiple or alternative theories to prove the commission of a public offense, a jury may return a general verdict. If the jury returns a general verdict, an appellate court shall not set aside or reverse such a verdict on the basis of a defective or insufficient theory if one or more of the theories presented and described in the complaint, information, indictment, or jury instruction is sufficient to sustain the verdict on at least one count.

Iowa Code § 814.28.

This statute effectively overrules the Iowa Supreme Court's common-law rule that otherwise valid criminal convictions should be

reversed because not all theories of guilt discussed in the instructions were supported by proof beyond a reasonable doubt. Under section 814.28, substantial evidence for each alternative of a general verdict is no longer required. Here, each theory of guilt was factually supported, but Montgomery could not prevail on his general verdicts complaint in any case given the new legislation. His complaint should be rejected.

III. The trial court properly exercised its discretion under Iowa Rule of Evidence 5.412 in refusing to allow the defendant to present evidence that another person sexually abused the victim.

Standard of Review.

Rulings pursuant to Iowa Rule of Evidence 5.412 are reviewed for an abuse of the trial court's discretion. *State v. Walker*, 935 N.W.2d 874, 879 (Iowa 2019).

Preservation of Error.

The State agrees that error was preserved through pre-trial motions, offers of proof, and renewed requests at trial. *See* June 20, 2019 Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412; Conf. App. 10-11; Tr. Day 1, p. 194, line 8 – p. 203, line 3 (S.V.); Tr. Day 2, p. 106, line 18 – p. 112, line 5 (Dr. Rosanna

Thurman-Jones); Tr. Day 3, p. 2, line 4 – p. 4, line 3 (police reports regarding L.V.).

Merits.

Montgomery's third complaint concerns proffered evidence that L.V., the teenaged son of S.V.'s mother's boyfriend, sexually abused S.V. The defendant sought to present evidence that L.V. abused S.V. during the same period that she reported the sexual abuse by her grandfather. The trial court properly exercised its discretion in excluding this evidence under Iowa Rule of Evidence 5.412, the rape shield law.

Iowa's rape shield law was "enacted to (1) protect the privacy of victims, (2) encourage reporting, and (3) prevent time-consuming and distracting inquiry into collateral matters." *State v. Mitchell*, 568 N.W.2d 493, 497 (Iowa 1997). From a historical perspective, rape shield laws "evolved from society's recognition that a rape victim's prior sexual history is irrelevant to issues of consent or the victim's propensity for truthfulness." *State v. Awbery*, 367 P.3d 346, 349 (Mont. 2016). Rape shield laws, in practical terms, "reflect[] a compelling state interest in keeping a rape trial from becoming a trial of the victim." *See id.*

Iowa Rule of Evidence 5.412 prohibits the introduction of reputation or opinion evidence of the victim's "other sexual behavior" in a sexual abuse prosecution. Iowa R. Evid. 5.412(a)(1). There are three narrow exceptions under the rule. First, evidence of specific instances of a victim's sexual behavior may be admitted to prove that another person was the source of semen, injury, or other physical evidence. Iowa R. Evid. 5.412(a)(1)(A). Second, evidence of specific instances of sexual behavior between the victim and the defendant may also be admitted on the issue of consent. Iowa R. Evid. 5.412(a)(1)(B). Third, evidence may be "constitutionally required" to be admitted. Iowa R. Evid. 5.412(a)(1)(C). "The scope of [the constitutionality required] exception remains unclear." Laurie Kratky Doré, 7 *Iowa Practice: Evidence* § 5.412:1, at 398 (2018-19 ed.). "The Iowa courts have repeatedly indicated that an accused does not have a constitutional right to admit evidence of a victim's sexual behavior that is irrelevant or whose probative value is outweighed by unfair prejudice." Doré, *id.*; *see also Walker*, 935 N.W.2d at 877-78 (in one of the Iowa Supreme Court's most recent decisions applying Rule 5.412, the court finds evidence suggesting that the four-year-old

victim's eight-year-old brother may have been the victim of sexual abuse was not relevant or admissible).

The Iowa Supreme Court has adopted a broad definition of other "sexual behavior":

> We hold that "past sexual behavior" means a volitional or non-volitional physical act that the victim has performed for the purpose of the sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person.

State v. Baker, 679 N.W.2d 7, 10 (Iowa 2004) (quoting *State v. Wright*, 776 P.2d 1294, 1297–98 (Or. 1989). "Under rule 5.412, a victim's 'other sexual behavior' includes any sex act, regardless of the act's consensual or nonconsensual nature." *Walker*, 935 N.W.2d at 878.

In this case, Montgomery sought to admit evidence that S.V. was sexually abused by L.V. around at the same time as she alleged Montgomery abused her. *See* Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412; Conf. App. 10-11. The defendant contended that the proffered evidence was admissible under the rape shield law to show an alternate source of injury under subsection A and was "constitutionally required" under subsection C,

because the evidence was relevant to show that S.V. may have " contaminated " or conflated her memories of abuse with L.V. into allegations against her grandfather. The State argued that neither theory justified admission under rule 5.412. State's Response to Defendant's Offer of Proof, pp. 1-2; Conf. App. 18-19.

The trial court found that evidence involving sexual abuse of S.V. by L.V. should be excluded. *See* Ruling on State's First Motion in Limine and Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412, p. 6; Conf. App. 30. The court properly exercised its discretion in excluding this potential evidence. With regard to the "source of semen or injury" exception, the court correctly found: "There does not exist and is not anticipated that there will be an offer of semen, evidence of injury, or other physical evidence. Accordingly, the court finds that... Iowa Rule of Evidence 5.412(A) does not apply." *See* Ruling on State's First Motion in Limine and Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412, p. 2; Conf. App. 26.

Indeed, at trial, no evidence of semen or injury was presented. Tr. Day 2, p. 137, line 15 - p. 143, line 17. Montgomery argues that although Nurse Karin Ward examined S.V. and found no visible signs

of injuries, she stated that "penetration and trauma may occur in the genital area without leaving definite physical signs" and therefore the injury exception should still apply. To present evidence of an alternate source of possible, undetected injury when no party is contending there was any injury is contrary to the plain language of that provision. The phrase "source of semen, evidence of injury, or *other* physical evidence" presupposes the existence of physical evidence. The court rightly found subsection A to be inapplicable.

Montgomery cites the Court of Appeals decision in *State v. Walker*, 935 N.W.2d 874 (Iowa 2019) as support for his argument. Defendant's Brief, p. 52. While it is true the court seemed to suggest that evidence that the victim's brother may have sexually abused her "may have been admissible to show a different perpetrator committed the act" under the source of semen or injury exception rather than the "constitutionally required "exception, that statement, made in passing, was dicta because the court went on to find that the defendant had not complied with the notice requirements of rule 5.412 in any event. *See Walker*, *id.*; *State v. Beck*, No. 13-0347, 2014 WL 667598, *8 (Iowa Ct. App. Aug. 12, 2014) (noting that dictum is a passing expression of the court unnecessary to the decision and

therefore not binding precedent); *see also Shelby Cty. Cookers, L.L.C. v. Utility Consultants International, Inc.*, 857 N.W.2d 186, 191 (Iowa 2015) ("That language is clearly dicta, however, and does not control our decision in this case."). Moreover, the Iowa Supreme Court took further review of the *Walker* decision and considered and decided the rape shield issue itself. *See Walker*, *id.* at 877-878. The Supreme Court opinion does not specifically discuss the applicability of either exception because it found the defendant's claims to be pure speculation. *Id.*

The trial court also found that the evidence did not fall into the "constitutionally required" category. *See* Ruling on State's First Motion in Limine and Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412, p. 5; Conf. App. 29. The court relied on *State v. Jones*, 490 N.W.2d 787, 790 (Iowa 1992), *overruled on other grounds by State v. Plain*, 898 N.W.2d 801, 826 (Iowa 2017), and *State v. Elliott*, No. 18-0526, 2019 WL 1300333, *3-4 (Iowa Ct. App. March 20, 2019). In *Jones*, the defendant contended that his constitutional right to present a defense was violated by the court's refusal to admit evidence of the child victim's prior sexual abuse by another person; he argued that the evidence was relevant to

show “an alternate source of the child's ability to describe the sex act perpetrated on her” and – as Montgomery does here – to demonstrate the victim may have been confusing his alleged abuse with the previous abuse. *Jones*, 490 N.W.2d at 791. The court found both theories at best marginally relevant and more prejudicial than probative, affirming the trial court’s use of rule 5.412 to exclude the evidence. *Jones, id.*

In *Elliott*, the court came to a similar conclusion, relying on *Jones* to find that the evidence of the victim's prior abuse was not constitutionally required. *Jones*, *id.* at *5; *see also State v. Clarke*, 343 N.W.2d 158, 161-63 (Iowa 1984) (holding that evidence that the “relatively young female” victim had oral sex in the past year was not admissible under the rape shield law to demonstrate that she may have fantasized the act and/or that she would be more likely to plausibly describe the mechanics of an act she had experienced in the past). The court reiterated that evidence that is irrelevant is not constitutionally required to be admitted, and even relevant evidence may be excluded under this exception if the prejudicial effect outweighs its probative value. *Clarke*, *id.* at 161.

The trial court in this case was unconvinced that evidence of other abuse experienced by S.V. was integral to Montgomery's defense. Although the defendant presented the statement of an expert who opined that memory does not improve over time but rather becomes more blurred and possibly contaminated with other events in a person's history, there is nothing to suggest that S.V. would actually confuse molestation by her sexagenarian grandfather and her teenage pseudo-stepbrother. She indicated that L.V. kissed her and licked her vagina once after she told him what Montgomery had done to her. Tr. Day 1, p. 194, line 24 – p. 196, line 15 ("[L.V.] would kiss me a lot. He licked my vagina one time. That's pretty much it."). As the trial court properly concluded, the proposed evidence did "not outweigh the substantial danger of unfair prejudice, confusion of issues, misleading of the jury, and invasion of the complainant's privacy, which rule 5.412... is designed to prevent." Ruling on State's First Motion in Limine and Defendant's Motion to Admit Evidence Pursuant to Iowa Rule of Evidence 5.412, p. 5; Conf. App. 29. This ruling was a proper exercise of the court's discretion and should be affirmed.

IV. The defendant's prosecutorial misconduct claim was not preserved at trial, and he is precluded from raising an ineffective assistance of counsel claim on direct appeal.

Scope of Review.

Ineffective assistance of counsel claims are reviewed *de novo*. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

Preservation of Error/Merits.

Error is not preserved. No objection was lodged during closing arguments when the prosecutor made the statement Montgomery challenges as improper vouching on appeal. *See* Tr. Day 3, p. 38, lines 3-20 (The prosecutor asks, "Why would [the defendant] say [that "kids are kids" and that his granddaughter was explor[ing] herself with his hand]"? He would say that if what [S.V.] is saying is true, that he sexually abused her."). Although the defendant did allege prosecutorial misconduct in a motion for a new trial, that objection came too late. *See State v. Bucklin*, 304 N.W.2d 452, 454 (Iowa 1981) (an evidentiary objection "was not raised until the motion for new trial was made. In order to preserve error, objections must be timely and be raised at the earliest time the error becomes apparent… Defendant did not preserve error on this issue."); *State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980) (noting that a motion for new trial

is ordinarily not sufficient to preserve error when the proper objection was not first made at trial).

Anticipating a possible error preservation problem, Montgomery alternatively alleges that counsel was ineffective if error was not preserved. Defendant's Brief, p. 55. There are two additional hurdles for Montgomery to clear, however. First, his ineffective assistance argument is insufficient, consisting only of the acknowledgment that counsel did not object at the time the statement was made and the sentence, "To the extent such an objection is required in order to preserve error, trial counsel was ineffective." Defendant's Brief, p. 55. This argument is undeveloped and should be deemed waived. *See State v. Inman*, No. 17-1975, 2019 WL 156585, *3 (Iowa Ct. App. Jan. 9, 2019) (finding the defendant's "blanket statement that if we find her claims were not preserved, we should consider them under the ineffective-assistance framework" to be insufficient to merit consideration on direct appeal).

Second, and more clearly fatal to the defendant's claim, the appellate courts are now precluded from deciding ineffective assistance complaints on direct appeal. In *State v. Damme*, No. 19-1139, 944 N.W.2d 98, 108-109 (Iowa May 29, 2020), the Iowa

Supreme Court considered 2019 legislative changes to Iowa Code section 814.7. *Damme*, *id.* at *9. The amendment provides:

> An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for post-conviction relief pursuing to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for post-conviction relief purposes, and *the claim shall not be decided on direct appeal from the criminal proceedings.*

Iowa Code § 814.7 (2019) (emphasis added).

As the court recently recognized in *Damme*, that legislation became effective on July 1, 2019. The amendment therefore applies to cases in which judgment and sentence were entered on or after that date. *Damme, id.* (concluding the court lacked jurisdiction to decide the defendant's ineffective assistance claims on direct appeal under the amended statute because judgment was entered on July 1). Montgomery's judgment and sentence were entered on September 20th, 2019. Judgment and Sentence; Conf. App. 80-91. The statute applies to him. The court thus lacks jurisdiction to entertain a claim of ineffective assistance of counsel on direct appeal in this case.

V. The evidence presented at trial was substantial and preponderated in favor of the guilty verdict.

Standard of Review.

This court reviews sufficiency of the evidence claims for the correction of errors at law. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010).

"Trial courts have wide discretion in deciding motions for new trial.... Nevertheless, we caution trial courts to exercise this discretion carefully and sparingly when deciding motions for new trial based on the ground that the verdict of conviction is contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The remedy has been described as "extraordinary." *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006).

Preservation of Error.

Error is preserved as to both claims. Montgomery unsuccessfully moved for a judgment of acquittal at trial, and he alleged that the verdict was contrary to the weight of the evidence in his motion for a new trial; that claim was also rejected. *See* Tr. Day 2, p. 150, line 1 – p. 151, line 19; Tr. p. Day 3, p. 70, line 15 – p. 71, line 12; Defendant's Motion for New Trial, pp. 16-20; Conf. App. 61-65.

Merits.

Montgomery's final two claims concern the sufficiency and the weight of the evidence against him. He contends that the State presented insufficient evidence establishing that he committed second-degree sexual abuse and contends the weight of credible evidence was contrary to the guilty verdict. This court should conclude that the evidence against the defendant was substantial and that it preponderated in favor of the verdict. Montgomery's conviction for second-degree sexual abuse should not be disturbed.

A. Sufficiency of the Evidence.

In evaluating a sufficiency of the evidence claim, the appellate court reviews the record in a light most favorable to the State. *Shanahan*, 712 N.W.2d at 134. The court makes any legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *State v. Wheeler*, 403 N.W.2d 58 (Iowa Ct. App. 1987); *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). The test for whether the evidence is sufficient to withstand appellate scrutiny involves an inquiry as to whether the evidence is "substantial." *State v. Musser*, 721 N.W.2d 758, 760 (Iowa 2006).

The findings of the factfinder are to be broadly and liberally construed, rather than narrowly, and in cases of ambiguity, they will be construed to uphold, rather than defeat, the verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa Ct. App. 1985). Evidence meets the threshold criteria of substantiality if it could convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. *State v. Williams,* 695 N.W.2d 23, 27 (Iowa 2005). Substantial evidence to support the conviction may exist even if substantial evidence to the contrary also exists. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990). A challenge to the sufficiency of the evidence does not allow the reviewing court to "resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence." *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006) (citing *Williams*, 695 N.W.2d at 28). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." *State v. Sanford,* 814 N.W.2d 611 (Iowa 2012) (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)).

Here, Montgomery contends that the evidence against him was insufficient, pointing out that the State did not present any physical

evidence or eyewitnesses to the crime. Defendant's Brief, p. 61. He also criticizes the victim's testimony as unbelievable and outlandish. Defendant's Brief, pp. 61-62. Physical evidence and eyewitness testimony to a sex crime are not required, however. Although sexual abuse prosecutions used to require independent evidence corroborating the victim's account, that has not been the law since 1976. "This requirement for corroboration evidence 'plays on long-held myths that rape victims – and women more generally – cannot be trusted.'" *State v. Barnhardt*, 2018 WL 2230938, *4 (Iowa Ct. App. May 16, 2018), *quoting* Tyler J. Buller, *State v. Smith Perpetuates Rape Myths and Should Be Formally Disavowed*, 102 Iowa L. Rev. Online 185, 195 (2017); *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("Even if the only evidence of a sex act is the alleged victim's testimony, it is sufficient to sustain a finding of guilt.").

The fact that S.V. was uncertain as to the dates and times is not surprising given her young age. As forensic interviewer Victoria Ricke testified, children do not always display perfect recall, especially of multiple events occurring years earlier. Tr. Day 2, p. 125, line 8 – p. 127, line 10. Some uncertainty from a child witness is to be

expected. *See Walker*, *id.* at 881 (quoting *State v. Rankin*, 181 N.W.2d 169, 172 (Iowa 1970) (acknowledging that minor inconsistencies in a young sex abuse victim's testimony were immaterial in light of her age; "[A] person should not be able to escape punishment for such a disgusting crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time in details of such shocking activity."). S.V. consistently maintained the substance of the primary allegations against her grandfather and describe the acts with specificity. Tr. Day 1, p. 152, line 13 – p. 155, line 18 (S.V. recalls the wetness of Montgomery's tongue on her vagina and describes his penis as "muscly" and "textured"); Tr. Day 1, p. 185, lines 5-15 (she describes Montgomery as moving his two fingers in a manner similar to the pulling of a trigger of a gun when touching her vagina). Minor inconsistencies at trial do not negate the fact that S.V. never recanted her allegations or wavered in her insistence that her grandfather touched her sexually while she was in his bed.

S.V. also told several others about the abuse after it happened, including her friend Addison, her mother's boyfriend's son L.V., her school guidance counselor, and her mother. Tr Day 1, p. 159, lines 6-

13l p. 162, line 24 – p. 162, line 2. Moreover, the jury heard testimony from Montgomery's former friend Teresa Den Hartog, who recounted that the defendant told her he "didn't do anything to [his granddaughter] that she didn't initiate first. Tr. Day 2, p. 7, lines 1 – p. 8, line 5. The evidence against Montgomery was substantial.

Montgomery likens his case to *State v. Smith*, 508 N.W.2d 101 (Iowa Ct. App. 1993). Defendant's Brief, pp. 62-63. *State v. Smith* is the seminal case for evaluating whether the testimony of a witness is so self-contradictory, absurd, or impossible to believe that it should be deemed a nullity. *See Smith, id.*; *State v. Lopez,* 633 N.W.2d 774, 785 (Iowa 2001) (recognizing that *Smith* created the exception to the general rule that juries reconcile conflicting testimony); *Mitchell*, 568 N.W.2d at 503-04 (finding the general rule applied when the witnesses' testimony was not as impossible as the testimony in *Smith*).

In *State v. Smith*, the defendant was charged with sexually abusing his stepdaughters. *Smith*, *id.* at 103. One witness's testimony was self-contradictory because she changed her testimony repeatedly on the subject of how many times she was abused and the locations of the abuse. *Id.* at 103. The witness initially said the

defendant touched her while sharing a twin bed during an ice storm. *Id.* She later stated the defendant touched her several times in the bedroom and once on his lap. *Id.* She then remembered only one abuse incident, later in the same testimony said it was two incidents of abuse, and testified she told a DHS interviewer she was abused five times. *Id.* at 103-04. The witness subsequently said the defendant never touched her while she was on his lap. *Id.* Another witness testified to seeing the defendant touch her sister in the living room, but ultimately said the touching only occurred in the bedroom. *Id.* This witness later said, "I think I guessed when I told her" about the touching. *Id.*

Each witness in S*mith* also testified to an incident that the court deemed to be incredible. One witness stated she was sharing a twin bed with the defendant while the defendant's wife and two stepdaughters were also in the room when the defendant touched her, yet no one saw or heard anything. *Id.* at 103. The other witness stated she was attending a family birthday party with fifteen to eighteen people in the room, and at the time when everyone was in the room opening presents, the defendant touched her vagina with his finger, but no one else in the room was aware of the abuse. *Id.*

In *Smit*h, the court summarized the testimony of one of the victims "as a whole self-contradictory, lack[ing] experiential detail, and describ[ing] scenes . . . that border on the surreal." *Smith*, *id.* at 104. The court also noted that the combined testimony of the victims, three young sisters, was "inconsistent and . . . at times, border[ed] on the absurd." *Smith*, *id.* at 103. As noted, the girls described incidents of abuse that they said occurred while the defendant's wife lay sleeping one foot away and during a crowded birthday party. *Smith*, *id.* at 104. The court noted that the girls responded "I don't know" to almost *all* questions about the basic details of the crime. *Id.* Moreover, no physical evidence of abuse was discovered despite "a careful medical examination" and a claim of injury. *Id.*

State v. Smith is a unique case, and although many defendants have compared their own cases to *Smith* in the twenty-seven years since it was decided, their claims have been consistently rejected. *See*, *e.g.*, *State v. Hilliard*, 2018 WL 4923000, *3 (Iowa Ct. App. Oct. 10, 2018) (rejecting the defendant's *Smith* comparison by noting "Hilliard points to the lack of physical evidence or other eyewitness accounts of sexual abuse. He also notes S.C. testified he laughed immediately before the touching and then repeatedly told Hilliard to

stop while [two relatives] slept through the commotion a few feet away. These arguments go toward witness credibility, and Hilliard made these arguments at trial. The jury accepted S.C.'s testimony about the touching as credible, as they are entitled to do."); *State v. Kissel*, 2017 WL 6032585, * 2 (Iowa Ct. App. Nov. 22, 2017) ("In this case, the minor inconsistencies Kissel points out between the child's deposition testimony and her trial testimony pale in comparison to her consistent testimony regarding the fundamental facts of the abuse she endured [including the location, the description of the defendant, and the nature of the acts committed.] We thus leave the credibility determination to the jury, where it belongs."); *State v. Fister*, 2016 WL 6636688, *3-5 (Iowa Ct. App. Nov. 9, 2016) ("This is not one of the rare cases in which the victim's testimony was so impossible and absurd and self-contradictory that it should be deemed a nullity by the court. It was for the jury to sort out the credibility issues…"); *State v. Schneider*, 2015 WL 2394127, *3 (Iowa Ct. App. May 20, 2015) ("We have great faith in the competency of juries; the instances in which a court should consider testimony a nullity due to credibility determinations are 'limited.'"); *State v. Alexander*, 2008 WL 5412283 (Iowa Ct. App. Dec. 31, 2008) ("There are inconsistencies in the

testimony of both people involved in the incident. We do not, however, find the complaining witness's testimony as to the events so wholly and completely unbelievable so as not to be credible evidence to support the conviction."); *State v. Moeller,* 2008 WL 2520765 (Iowa Ct. App. June 25, 2008) ("Furthermore, although there were some inconsistencies between [the victim] Anna's testimony and that of other witnesses, we do not find that such inconsistencies were 'so impossible and absurd and self-contradictory' that we should deem Anna's or any other witnesses' testimony a nullity."); *State v. Davis*, 2007 WL 1827489 (Iowa Ct. App. June 27, 2007) ("While the inconsistencies in Jaquita's testimony do raise an issue concerning her credibility, we conclude this was not a case like *Smith* where the testimony was so inconsistent, self-contradictory, and impossible that the court should have deemed it a nullity and excluded it."); *State v. Shepard*, 2003 WL 21230379 (Iowa Ct. App. May 29, 2003) ("After our review of B.P.'s testimony, we are not convinced that her testimony rises to the level of absurdity or lacks experiential detail, as did in *Smith*."); *State v. Humphrey*, 2001 WL 194646 (Iowa Ct. App. 2001) ("Lastly, Humphrey overstates the significance of B.G.'s inconsistent statement. A statement of reservation or uncertainty is a

far cry from the factual inconsistencies and incredible claims made by the complaining witnesses in *Smith*."); *State v. Mitchell*, *id.* ("R.C.S. was somewhat inconsistent with her story about how she was abused by Mitchell, but she never changed the operative fact that she and Mitchell had sexual intercourse. R.C.S.'s testimony about Mitchell, at least, was never absurd or surreal."). Like these cases, variances in the testimony here do not approach the level of *Smith*.

Moreover, the testimony of S.V. did not paint a surreal or absurd picture. A momentary act of sexual abuse by a motivated offender could be accomplished without attracting the attention of others. *Smith* does not stand for the proposition that sexual abuse cannot occur surreptitiously in the presence of others. *In State v. Lusk*, the court observed:

> While C.L. testified the incident occurred while other people were present in the room, his mother testified there was a confused atmosphere during the relevant time period because several people and two dogs were coming in and out of the room and several conversations were taking place at the same time. It is not implausible Lusk briefly touched C.L.'s "peeper" over his clothes and at other times under C.L's clothes. We determine the evidence in this case does not come within the exception found in *Smith*....

State v. Lusk, 2016 WL 4384672, * 2-3 (Iowa Ct. App. Aug. 17, 2016). Montgomery's *Smith* claim should be rejected.

B. Weight of the Evidence.

A claim that the evidence is "contrary to law or evidence" is a weight of the evidence challenge, drawing the court into questions of witness credibility. *Ellis*, 578 N.W.2d at 659. In *State v. Ellis*, the Iowa Supreme Court distinguished between the standard to be applied in evaluating motions for a judgment of acquittal during trial – evidence sufficient that a rational jury could convict the defendant beyond a reasonable doubt – and the standard to be applied in evaluating motions for a new trial – evidence that a greater amount of credible evidence supports one side of an issue. *Ellis*, 578 N.W.2d at 658. The *Ellis* standard requires the trial court to examine issues of credibility in assessing whether a new trial is appropriate on the ground that the verdict was contrary to the weight of the evidence. *Id.* "Except in the extraordinary case where the evidence in this case preponderates heavily against the verdict, trial courts should not lessen the jury's role as the primary trier of facts and invoke their power to grant a new trial. A trial court should not disturb the jury's findings where the evidence they considered is nearly balanced or is

such that a different minds could fairly arrive at different conclusions." *Shanahan*, 712 N.W.2d at 135.

The trial court properly declined to invoke this extraordinary remedy here. The evidence did not preponderate heavily in favor of an acquittal. As noted, Montgomery called several witnesses who testified they had never seen him act inappropriately around children. The defendant's wife Brenda also testified, noting that she had not witnessed Montgomery sexually abuse S.V. in their bed. Tr. Day 3, p.28, line 23 – p. 29, line 2. The jury could have reasonably determined that the defendant furtively touched S.V. while his wife was asleep or briefly out of bed. The jury could have also concluded that Brenda was lying to protect her husband of 36 years. *See* Tr. Day 1, p. 164, line 20 – p. 165, line 5 (S.V. recalls telling the forensic interviewer that her grandmother "would feel things, like the bed moving a lot, but she never said anything about it, but I bet she felt it."). There is nothing so incredible in the testimony of the State's witnesses nor so credible in the testimony of the defendant's witnesses that the trial court would be compelled to act as the thirteenth juror and disturb the verdict. Finally, the fact that the jury acquitted Montgomery of one of the two counts against him further

strengthens the conclusion that the jurors carefully weighed all of the evidence and engaged in credibility determinations, just as they should have. Montgomery is not entitled to a new trial. His conviction for second-degree sexual abuse should be affirmed.

CONCLUSION

For the reasons discussed above, the State respectfully requests that the court affirm the defendant's conviction for second-degree sexual abuse. Further, the court should decline to overrule *State v. Pearson*.

REQUEST FOR NONORAL SUBMISSION

The defendant has requested oral argument. The State believes the issues are fully addressed and the case can be decided by reference to the briefs without further elaboration. In the event the defendant is granted oral argument, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

SHERYL SOICH
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sherri.soich@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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Dated: September 23, 2020

SHERYL SOICH
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sherri.soich@ag.iowa.gov