IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0464

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTICE MATHIS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DECATUR COUNTY
THE HONORABLE DUSTRIA A. RELPH, JUDGE

APPELLEE'S BRIEF

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II. The district court did not err when it followed Iowa appellate decisions regarding non-corroboration instructions.

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

The defendant urges the Supreme Court to retain this case to decide two issues: (1) the constitutionality of amendments to section 814.7 and (2) the legality of a so-called non-corroboration jury instruction. Defendant's Proof Br. at 23. Neither claims warrants retention.

The question related to section 814.7 is presented in multiple cases already retained by the Supreme Court, some of which have been orally argued in the fall of 2020. *See, e.g.*, *State v. Boldon*, No. 19-1159; *State v. Treptow*, No. 19-1276; *State v. Tucker*, No. 19-2082. In any event, deciding the constitutionality of section 814.7 is unnecessary to resolution of this appeal, as the defendant did preserve error on the sufficiency question for which ineffective assistance is his fallback argument.

The question related to the non-corroboration instruction has been twice decided by the Court of Appeals and was presented in a third case set for oral argument in November of 2020. *See State v.*

Barnhardt, No. 17-0496, 2018 WL 2230938, at *4 (Iowa Ct. App. May 16, 2018); *State v. Altmayer*, No. 18-0314, 2019 WL 476488, at *5 (Iowa Ct. App. Feb. 6, 2019); *State v. Kraai*, No. 19-1878 (orally argued Nov. 19, 2020). So far, the Court of Appeals panels have unanimously affirmed the instruction and, as discussed in Division II below, the Court of Appeals decisions reflect the majority rule. Retention is thus unnecessary, unless the Court of Appeals divides on the issue at a later date.

STATEMENT OF THE CASE

Nature of the Case

The defendant, Justice Mathis, appeals his convictions for three counts of sexual abuse in the second degree, Class B felonies in violation of Iowa Code sections 709.3(1)(b). The defendant was convicted following trial by jury in the Decatur County District Court, the Hon. Dustria Relph presiding.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Defendant Justice Mathis (the subject of this appeal) was tried jointly with Defendant Mickie Atkins, his mother's husband, at the

request of both defendants to further their trial strategy. Trial tr. vol. I, p. 16, line 16 — p. 18, line 18.[1]

Facts

Defendant Mathis sexually abused his niece B.T. (a little girl, age eleven at trial) and his nephew L.S. (a little boy, age nine at trial). Trial tr. vol. III, p. 27, lines 6–9; p. 28, lines 2–5; p. 77, line 23 — p. 78, line 1. Mathis lived with Defendant Atkins and Atkins' wife (Mathis' mother) at residences where the abuse took place in Decatur County. *See* trial tr. vol. III, p. 29, line 12 — p. 30, line 4; p. 33, lines 2–16; p. 79, lines 4–8.

B.T. and L.S. went to the Atkins-Mathis residence three-to-five times a week while their mother worked at the Casey's in town. Trial tr. vol. III, p. 79, lines 17–25; p. 96, lines 8–15; p. 97, line 18 — p. 98, line 8. Sometimes the children stayed overnight. Trial tr. vol. III, p. 80, lines 6–18.

The children disclosed sexual abuse after their mother found L.S., age seven, engaged in unusual sexual behavior.

One day, the children's mother discovered L.S. positioned in the "sixty-nine" position with his five-year-old brother; they were naked

[1] The State refers to "volume" in its transcript citations, though the reporter instead labeled the consecutive volumes by "day."

with their penises near each other's' mouths. Trial tr. vol. III, p. 103, line 25 — p. 105, line 24; p. 105, line 25 — p. 106, line 4. L.S. said he learned what to do "from Grandpa"—Defendant Atkins. Trial tr. vol. III, p. 106, lines 3–24; p. 107, lines 9–18.

The children disclosed that Defendant Atkins had abused B.T. individually and persuaded or coerced the children to perform sex acts on one another while he watched.

Eventually, both L.S. and B.T. disclosed how Atkins persuaded or coerced them to perform sex acts on one another while Atkins watched. Trial tr. vol. III, p. 43, line 14 — p. 44, line 13; p. 84, line 21 — p. 86, line 4; p. 106, lines 3–24; p. 107, line 9 — p. 109, line 9.

B.T. further disclosed that Defendant Atkins had vaginally raped her multiple times in multiple locations. She specifically described how Atkins put his "dick" on or inside her "pussy." Trial tr. vol. III, p. 40, lines 4–15; p. 41, lines 4–7. She also described how Atkins touched her vagina with his hands. Trial tr. vol. III, p. 41, lines 8–22. While he abused B.T., Defendant Atkins would say, "F me baby; and all nasty stuff." Trial tr. vol. III, p. 47, lines 18–22.

The children also disclosed that Defendant Mathis abused them separately.

Later, both children also disclosed that Defendant Mathis had abused them.

Defendant Mathis started abusing B.T. by, in her words, having "sex" with her by "putting his parts in my parts." Trial tr. vol. III, p. 45, lines 23–25; p. 46, lines 4–6. When asked to explain further, B.T. said that Mathis put his "penis" into her "vagina." Trial tr. vol. III, p. 46, lines 10–15.

Defendant Mathis abused L.S. by luring L.S. to his bedroom and then anally raping him. *See* trial tr. vol. III, p. 86, line 16 — p. 87, line 13. When asked to explain what Mathis did to him, L.S. said that Mathis "told [him] to take [his] clothes off" and then Mathis "stuck his private up … my butt." Trial tr. vol. III, p. 87, lines 14–25. When asked to clarify his use of the word "private," L.S. said that Mathis put his "penis" inside of L.S.'s "butt." Trial tr. vol. III, p. 88, lines 1–5. L.S. did not know how many times Mathis raped him, but it was more than once, on different days. Trial tr. vol. III, p. 88, lines 4–23.

L.S. did not tell anyone about the abuse because Mathis "said he'd punch [L.S.]" if he told anyone. Trial tr. vol. III, p. 89, lines 2–17.

ARGUMENT[2]

I. *State v. Smith* perpetuates rape myths and should be formally disavowed. Even if Smith remains the law, the evidence here was sufficient.

Preservation of Error

The State does not contest that a motion for judgment of acquittal was made below on substantially the same basis now advanced on appeal. As a result, this Court need not address any argument related to the effectiveness of counsel.

Standard of Review

When evaluating a sufficiency challenge, evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn to uphold the verdict. *State v. Leckington*, 713 N.W.2d 208, 212–13 (Iowa 2006). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

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[2] The undersigned acknowledges he is the author of two law review articles that relate to issues presented in this brief. *See* Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions,* 53 Tulsa L. Rev. 1 (2017); Tyler J. Buller, State v. Smith *Perpetuates Rape Myths and Should be Formally Disavowed*, 102 Iowa L. Rev. Online 185 (2017). Some content in this brief was adapted from those articles.

Merits

The sole argument in the defendant's appellate brief regarding sufficiency is an attempt to revive the Court of Appeals' archaic decision in *State v. Smith*, 508 N.W.2d 101, 105 (Iowa App. 1993). Defendant's Proof Br. at 38–39. In 1993, a Court of Appeals panel spit 2–1 and, through application of rape myths and a misunderstanding of child-sex-abuse dynamics, usurped the roles of the jury and district court to decide questions of credibility. *Smith*, 508 N.W.2d and 105. This Court should formally overrule *Smith* and begin to undo the damage it has wrought with unfounded attacks on sexually abused children.

As detailed below, every Iowa appellate case to cite *Smith* has turned away from it and *Smith* majority's opinion rests on a rotten foundation. But even if this Court chooses to leave *Smith* on the books, this defendant is not entitled to any relief, and his convictions should be affirmed.

A. *State v. Smith* perpetuates rape myths and should be formally disavowed.

The majority opinion in *Smith* has been implicitly rejected in decades of Iowa appellate decisions. In some ways, Iowa appellate decisions have recognized from the outset that *Smith* is intolerable

and cannot be permitted to propagate in the jurisprudence. As of this brief, *Smith* has been substantively cited 68 times by Iowa appellate courts and never followed to grant a defendant relief through a sufficiency challenge.[3] More than 70% of the above-cited cases

[3] *State v. Spates*, No. 19-0749, 2020 WL 6156739 (Iowa Ct. App. Oct. 21, 2020); *State v. Mayes*, No. 19-0252, 2020 WL 2060306 (Iowa Ct. App. April 29, 2020); *State v. Cardona*, No. 19-1047, 2020 WL 1888770 (Iowa Ct. App. April 15, 2020); *State v. Sallis*, No. 17-1842, 2019 WL 325019 (Iowa Ct. App. Jan. 23, 2019); *State v. Hilliard*, No. 17-1336, 2018 WL 4923000 (Iowa Ct. App. Oct. 10, 2018); *State v. Garduno-Rodriquez*, No. 17-1165, 2018 WL 3057543 (Iowa Ct. App. June 20, 2018); *State v. Jackson*, No. 17-0470, 2018 WL 1629902 (Iowa Ct. App. Apr. 4, 2018); *State v. Kissel*, No. 16-0887, 2017 WL 6032585 (Iowa Ct. App. Nov. 22, 2017); *State v. Fister*, No. 15- 1542, 2016 WL 6636688 (Iowa Ct. App. Nov. 9, 2016); *State v. Lusk*, No. 15-1294, 2016 WL 4384672 (Iowa Ct. App. Aug. 17, 2016); *State v. Schneider*, No. 14-1113, 2015 WL 2394127 (Iowa Ct. App. May 20, 2015); *State v. Schondelmeyer*, No. 14–0621, 2015 WL 1817030 (Iowa Ct. App. April 22, 2015); *State v. Duncan*, No. 14-0073, 2015 WL 1546433 (Iowa Ct. App. April 8, 2015); *State v. Thorndike*, No. 13-1403, 2014 WL 3931873 (Iowa Ct. App. Aug. 13, 2014); *State v. Jaquez*, No. 12-2264, 2014 WL 667634 (Iowa Ct. App. Feb. 19, 2014); *State v. Havugimana*, No. 12-1906, 2013 WL 6118658 (Iowa Ct. App. Nov. 20, 2013); *State v. Stechcon*, No. 13-0049, 2013 WL 5951359 (Iowa Ct. App. Nov. 6, 2013); *State v. Elliott*, No. 12-1086, 2013 WL 4504926 (Iowa Ct. App. Aug. 21, 2013); *State v. Hameed*, No. 12- 1630, 2013 WL 3458095 (Iowa Ct. App. July 10, 2013); *State v. Fulton*, No. 12-0363, 2013 WL 1749916 (Iowa Ct. App. April 24, 2013); *State v. Zieman*, No. 12-0575, 2013 WL 988857 (Iowa Ct. App. March 13, 2013); *State v. Douglas*, No. 12-0665, 2013 WL 541641 (Iowa Ct. App. Feb. 13, 2013); *State v. Umana*, No. 11-0667, 2012 WL 4513859 (Iowa Ct. App. Oct. 3, 2012); *State v. Powers*, No. 11-0624, 2012 WL 4513843 (Iowa Ct. App. Oct. 3, 2012); *State v. Medrano*, No. 10-2090, 2011 WL 5390427 (Iowa Ct. App. Nov. 9, 2011); *State v. Paulsen*, No. 10-1287, 2011 WL 3925699 (Iowa

Ct. App. Sept. 8, 2011); *State v. Bohnenkamp*, No. 09-1041, 2010 WL 3155224 (Iowa Ct. App. Aug. 11, 2010); *State v. Alexander*, No. 07-2048, 2008 WL 5412283 (Iowa Ct. App. Dec. 31, 2008); *State v. Moeller*, No. 07- 1053, 2008 WL 2520765 (Iowa Ct. App. June 25, 2008); *State v. Cashatt*, No. 06-2026, 2008 WL 508464 (Iowa Ct. App. Feb. 27, 2008); *State v. Davis*, No. 05-1339, 2007 WL 1827489 (Iowa Ct. App. June 27, 2007); *State v. Desimone*, No. 05-1740, 2007 WL 750649 (Iowa Ct. App. March 14, 2007); *State v. DeMichelis*, No. 05-0962, 2006 WL 2267831 (Iowa Ct. App. Aug. 9, 2006); *State v. McAlister*, No. 05-0204, 2006 WL 1896216 (Iowa Ct. App. July 12, 2006); *State v. Wilder*, No. 03-1664, 2006 WL 1896247 (Iowa Ct. App. July 12, 2006); *State v. Boehm*, No. 05-0590, 2006 WL 1628100 (Iowa Ct. App. June 14, 2006); *State v. Bowen*, No. 05-0878, 2006 WL 929324 (Iowa Ct. App. April 12, 2006); *State v. Becerra*, No. 04-0567, 2005 WL 3115330 (Iowa Ct. App. Nov. 23, 2005); *State v. Bernhart*, No. 04-1035, 2005 WL 2367841 (Iowa Ct. App. Sept. 28, 2005); *State v. Vanderleest*, No. 03-1732, 2005 WL 1397167 (Iowa Ct. App. June 15, 2005); *State v. Morris*, No. 04-0201, 2005 WL 839469 (Iowa Ct. App. April 13, 2005); *State v. Johnston*, No. 03-1955, 2004 WL 2387083 (Iowa Ct. App. Oct. 27, 2004); *State v. Green*, No. 03-0032, 2004 WL 893909 (Iowa Ct. App. April 28, 2004); *State v. Erazo*, No. 02-1749, 2004 WL 573661 (Iowa Ct. App. March 24, 2004); *State v. Davis*, No. 02-0355, 2003 WL 21544491 (Iowa Ct. App. July 10, 2003); *State v. Shepard*, No. 02-1271, 2003 WL 21230379 (Iowa Ct. App. May 29, 2003); *State v. Paulson*, No. 01-0379, 2003 WL 118209 (Iowa Ct. App. Jan. 15, 2003); *State v. Doornink*, No. 01-1572, 2002 WL 31757269 (Iowa Ct. App. Dec. 11, 2002); *State v. Wagner*, No. 01–1232, 2002 WL 1758180 (Iowa Ct. App. July 31, 2002); *State v. McCully*, No. 01-0256, 2002 WL 987834 (Iowa Ct. App. May 15, 2002); *State v. Mankin*, No, 00-2029, 2002 WL 663632 (Iowa Ct. App. April 24, 2002); *State v. McAlister*, No. 00-0997, 2001 WL 427592 (Iowa Ct. App. April 27, 2001); *State v. Lage*, No. 01-0496, 2002 WL 597419 (Iowa Ct. App. March 13, 2002); *State v. Humphrey*, No. 00-0270, 2001 WL 194646 (Iowa Ct. App. Feb. 28, 2001); *State v. Coffer*, Nos. 00-0586 & 99-1218, 2001 WL 98686 (Iowa Ct. App. Feb. 7, 2001); *State v. Lopez*, 633 N.W.2d 774 (Iowa Ct. App. 2001); *State v. Ford*, No. 00-0585, 2000 WL 1834065 (Iowa Ct. App. Dec. 13, 2000); *State v. Bennett*, Nos. 00-0459 & 99-0726, 2000 WL 1675593 (Iowa Ct. App. Nov. 8, 2000); *State v.*

involve sexual-abuse prosecutions, the majority of which involve testimony from child victims like those discounted in *Smith*. Many of these subsequent decisions—implicitly or explicitly—recognize that a distrust of victims colored the *Smith* majority opinion and supplied a springboard for dozens of defendants to unfairly malign the children they molested and raped. It is time to exorcise *Smith* from the law.

As a doctrinal matter, *Smith* cannot be reconciled with holdings of the Supreme Court that correctly recognize it is the role of the jury—not an appellate court reading a cold record—to decide questions of credibility. *See, e.g.*, *State v. Paredes*, 775 N.W.2d 554, 567 (Iowa 2009) ("[A] court must be careful not to usurp the role of a jury by making credibility determinations that are outside the proper scope of the judicial role."); *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999) ("[I]t is for the jury to judge the credibility of the witnesses and weigh the evidence."); *Neighbors v. Iowa Elec. Light & Power Co.*,

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Williams, Nos. 00-225 & 99-0551, 2000 WL 1157832 (Iowa Ct. App. Aug. 16, 2000); *State v. Weaver*, No. 98-1214, 1999 WL 823562 (Iowa Ct. App. Oct. 15, 1999); *State v. Kostman*, 585 N.W.2d 209 (Iowa Ct. App. 1998); *State v. Speaks*, 576 N.W.2d 629 (Iowa Ct. App. 1998); *State v. Mitchell*, 568 N.W.2d 493 (Iowa 1997); *State v. Veal*, 564 N.W.2d 797 (Iowa 1997); *State v. Fletcher*, 554 N.W.2d 568 (Iowa Ct. App. 1996); *State v. Walker*, 538 N.W.2d 316 (Iowa Ct. App. 1995); *State v. Capper*, 539 N.W.2d 361 (Iowa 1995); *State v. Hawkins*, 519 N.W.2d 103 (Iowa Ct. App. 1994).

175 N.W.2d 97, 101 (Iowa 1970) ("Defendant's argument is persuasive, but we may not substitute our view of the evidence for that of the jury."). It would be illogical or sexist to find that appellate courts must respect jurors' credibility determinations in all cases except sex crimes—where, not coincidentally, the majority of testifying victims are female. The credibility findings of the jury in a sexual abuse case are owed the same deference as the jury's findings in a robbery case.

In addition to the doctrinal problem, *Smith* also perpetuates five specific rape myths, all of which harm victims and are grounded in misguided views of the facts or the law:

1. Smith *suggests corroboration of victim testimony is needed, which has not been the law in Iowa since the 1970s.*

Until the mid-20th century, most states had laws on the books that imposed greater requirements on the testimony of rape victims than victims of any other crime, essentially requiring that the rape victim's testimony be corroborated while holding the robbery victim's did not. *See, e.g.*, Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1017–40, 1055–56 (1991); A. Thomas Morris,

Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 Duke L.J. 154, 154–57, 167–68. Iowa abolished the sexist corroboration requirement in the 1970s, long before *Smith* was decided. Iowa Code § 782.4 (1950) (repealed 1974); *see* Iowa Code § 709.6 (2020).

It is beyond question that corroboration of victim testimony is no longer required. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("We find that the alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt."); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The law has abandoned any notion that a rape victim's accusation must be corroborated."); Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of victims shall not be required.").

Despite the Legislature abrogating the corroboration requirement, it lingered in *Smith*. *See* 508 N.W.2d at 103 (noting "the only evidence against appellant is the statements and testimony of the three girls"); *id.* at 104 (discussing lack of "physical evidence of abuse found in a careful medical examination" and how "no one who was in the room at the time saw or heard anything"); *id.* at 105 ("No one, other than the girls themselves, ever saw or heard appellant do

or say anything that would raise any suspicion he was abusing them…."). Perpetuating the myth that corroboration is required harms adult and child sex-abuse victims, because "[c]orroborative evidence of sexual assault—such as torn clothes or injuries—is not only uncommon, it is downright rare." Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 New Crim. L. Rev. 644, 652 (2010). *Smith*'s implicit rejection of the law on corroboration perpetuates the mistaken belief that corroboration is required, allowing that rape myth to linger on. Such a plain error should be banished from reported decisions by formally overruling *Smith*.

2. Smith *found the victims' testimony unreliable due to the lack of physical injuries, yet the overwhelming majority of adult- and child-sex-abuse victims do not have physical injuries.*

The *Smith* majority "expected" to find medical evidence of "stretching, scarring, or loss of elasticity" despite the little-girl victims' delayed disclosure and descriptions of primarily touching rather than penetration. *See Smith*, 508 N.W.2d at 104. The belief that there will be physical evidence of sexual abuse—even when children are anally or vaginally penetrated—is a rape myth. *See* Lee Madigan & Nancy C. Gamble, *The Second Rape: Society's Continued*

Betrayal of the Victim 95 (1991) (describing the rape "myth that a real victim should be found lying crumpled on the ground in a pool of blood").

The research establishes that 90% of children examined for genital injuries at a Child Protection Center do not have any. *See* Wendy A. Walsh et al., *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56 Crime & Delinquency 436, 443 (2010). And physical evidence of any kind is found in less than 15% of cases. *Id.* This is in part because the odds of finding medical evidence decreases dramatically outside the first 24 hours following sexual abuse. *See* Linda E. Ledray, Sexual Assault Res. Serv., Sexual Assault Nurse Examiner (SANE) Development & Operation Guide 69–71 (1999), https://www.ncjrs.gov/ovc_archives/reports/saneguide.pdf [Hereinafter, "Ledray, SANE Guide."]

Even among adult rape victims that presented to an emergency department for treatment, a study found that 68% had no injuries whatsoever, 26% had minor injuries that did not require medical treatment, around 5% had moderate injuries, and only 0.2% of victims had severe physical injuries. *See* Ledray, SANE Guide, at 69–70.

The *Smith* majority opinion did not and does not reflect an accurate understanding of the human body. It should be overruled.

3. Contrary to the Smith *majority's apparent belief, children can be molested with non-offending individuals in the same house or even the same room.*

The *Smith* majority found it "incredible" and thought it "border[ed] on the surreal" that a child could be abused subtly under a blanket while other people were nearby. *See* 508 N.W.2d at 103–05. One of the top researchers in the field of child-sex-abuse dynamics has interviewed child molesters who openly describe abusing children with non-offending adults nearby. *See* Anna C. Salter, Predators: Pedophiles Rapists, and Other Sex Offenders: Who They Are, How They Operate, and How We Can Protect Ourselves and Our Children, at 28 [Hereinafter, "Salter, Predators".]. One interviewed child molester described raping a child in a car, feet away from the child's parents:

> There were times that I raped in a car with the parents in the front seat, me in the backseat with the children. The child would feel such a bond of trust that the child would decide okay, I'd like to go to sleep, and I'd manipulate the child and lay him across the seat and molest the child with my hand on his penis. By forcing my hands on his penis while the parents were in the front seat.

Id. at 28. Another told the interviewer that the abuse took place while the child's mother was "sleeping in the same bed." *Id.*

Among the 68 appellate cases rejecting *Smith*, a panel of the Court of Appeals has expressly rejected the *Smith* majority's erroneous belief that children cannot be molested when adults are nearby in the home:

> The testimony of [the victims] was not inconsistent, self-contradictory, lacking in experiential detail, or bordering on the absurd. [The victims] each consistently testified where the incidents occurred and gave detailed testimony about the sexual abuse. While [one victim] 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 [the defendant] briefly touched [the victim's "peeper" over his clothes and at other times under [the victim's] clothes.

State v. Lusk, No. 15-1294, 2016 WL 4384672, at *2 (Iowa Ct. App. Aug. 17, 2016).

The outdated thinking in *Smith* on this point also creates a paradox where children are expected to supply corroborating evidence of sexual abuse (see Division I.A.1 above), yet victims are

also faulted if the abuse happens subtly when others are nearby. Taken together, the mistaken beliefs that abuse must be corroborated and that it cannot happen in front of witnesses would render it impossible to prosecute virtually any child sexual abuse. The unsupported view that children cannot be abused while non-offending adults are nearby should be excised from Iowa law by disavowing *Smith*.

4. Smith *does not acknowledge grooming and fails to understand how child-sex-abuse victims may have mixed feelings toward offenders.*

The *Smith* majority thought it was significant and exculpatory that the little-girl victims sometimes "enjoyed being with" the offender and would "sit on his lap" or "kiss him goodbye" in view of others. *Smith*, 508 N.W.2d at 105. That a victim shows affection for an offender who groomed her, or that a victim has mixed or complicated feelings toward an offender, does not undermine the victim's credibility and does not make it less likely that the victim was abused.

There is widespread consensus among researchers that pedophiles tend to "groom" their victims. *See, e.g.,* Kenneth Lanning, *The Evolution of Grooming: Concept and Term*, 33 J. of

Interpersonal Violence, 5–16 (2018); Georgia M. Winters & Elizabeth L. Jeglic, *Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters*, 38 Deviant Behavior, vol. 6, 724–733 (2017); Daniel Pollack & Andrea MacIver, *Understanding Sexual Grooming in Child Abuse Cases*, 34 Child. L. Prac. 161 (2015). The Iowa Supreme Court has found that grooming is so critical to understanding child sexual abuse that an expert may opine on and explain the concept at trial. *State v. Leedom*, 938 N.W.2d 177, 193 (Iowa 2020). Yet "grooming"—both the word and the concept—is entirely absent from *Smith*. Without addressing this important topic, the *Smith* majority played on rape myths and inadvertently enabled pedophiles who groom victims, weaponizing common behaviors in an attempt to gaslight and discredit victimized children.

Moreover, in cases with and without grooming, it is unsurprising that victimized children have complex and sometimes contradictory feelings toward their abusers:

> The clinical literature discloses that in intrafamilial abuse cases, many abused children are ambivalent about the abuser, feeling warmth and anger at the same time. It is not uncommon for abused children to want to live with and demonstrate affection toward the abusive parent.

John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 88 (1989). It is also common for intrafamilial offenders to lavish gifts, praise, and love on the victims as part of the grooming process. *See* Benoit Leclerc et al., *Examining the Modus Operandi of Sexual Offenders Against Children and Its Practical Implications*, 14 Aggression & Violent Behav. 5, 9 (2009). In one case study, more than half of minor victims interviewed said they "loved …, liked …, need or depended on" their sexual abuser. Lucy Berliner & Jon R. Conte, *The Process of Victimization: The Victims' Perspective*, 14 Child Abuse & Neglect 29, 32 (1990).

In short, the research proves that the *Smith* majority relied on common behaviors exhibited by sexually abused children to undermine their credibility and set a convicted child molester free. This Court should disavow *Smith* to ensure that does not happen again.

5. Smith *criticized the little-girl victims for not offering sufficient details about their molestation. Child rapists cannot be allowed to escape punishment because they molest children with a limited vocabulary.*

The *Smith* majority admitted that one of the victims "could say definitely … that [the defendant] used his finger [to abuse her] and

that it hurt." 508 N.W.2d at 104. But this apparently was not enough, as the Court nonetheless described that testimony as "lacking in experiential detail." *Id.* at 103. As a pure matter of legal doctrine, controlling precedent should have foreclosed this contention when *Smith* was decided. The Iowa Supreme held 50 years ago that "[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 and details of such shocking activity." *State v. Rankin*, 181 N.W.2d 169, 172 (Iowa 1970). This principle obviates the *Smith* majority's apparent desire for the little-girl victims to have described the sex acts in more detail.

The precise nature of the *Smith* majority's complaint has always been a little unclear, given that the little girls in that case described how the defendant "touched" and "licked" their privates; said that the defendant took his penis out of his "panties" and "put it right up to [the victim]'s private"; said that the defendant's penis was "hard"; and said that he performed oral sex by getting "on his knees [with] his head bent down]"while the victim was on her back. *See* Appendix in *State v. Smith*, No. 92-13453, at 83–86, 107–109, 111 (on file with State Law Library). It seems the criticism in part was that the

children could not recall with specificity the date or location of individual instances of abuse, given that the abuse happened with frequency. *Smith*, 508 N.W.2d at 103–105. This criticism is contrary to all available research regarding children, memory, and the dynamics of sexual abuse.

It should not take scientific research to recognize that children often lack the vocabulary, if not the substantive comprehension, to fully describe sex acts performed on them. *See* Ellen R. DeVoe & Kathleen Coulborn Faller, *The Characteristics of Disclosure Among Children Who May Have Been Sexually Abused*, 4 Child Maltreatment, 217, 225–26 (1999).

To the extent a dive into the research is necessary, experts agree that while children can remember the core elements of an event with adult-like accuracy, children tend to provide fewer details when asked to spontaneously recall the event. Myers et al., 68 Neb. L. Rev. at 95–97. The research also shows that children's occasional inconsistency in the chronological sequence of events is not related to the accuracy with which they recall core events. *Id*. at 97–100.

It is particularly difficult for children who have been repeatedly abused to isolate specific instances: "when a child is repeatedly

abused for months or years, individual molestations blur together. If the child is asked to describe particular episodes, the child may become confused, and such confusion may lead to inconsistent versions of events." *Id.* at 88. Put differently, "It is very difficult, if not impossible, for young children to specify the date and time of a past event, especially when the memory is embedded in a series of similar ongoing acts." *Id.* at 104. The Court of Appeals has recognized a similar principle in cases that post-date *Smith*, reflecting that, "given the amount and duration of abuse, it is hardly surprising that the girls' testimony would contain some minor inconsistencies." *See State v. Davis*, No. 02-0355, 2003 WL 21544491, at *2 (Iowa Ct. App. July 10, 2003).

Smith's criticism of the victims for not giving more details regarding the abuse, such as dates or locations, is contrary to the credible scientific research and has no place in a published appellate opinion.

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As recently as April of 2020, the Court of Appeals has faced calls to overturn *Smith*, and chose to "leave for another day the question of *Smith*'s continued salience." *State v. Cardona*, No. 19-
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1047, 2020 WL 1888770, at *2 n.1 (Iowa Ct. App. April 25, 2020). *Smith* should be overruled now, so that it no longer adds credence to rape myths, like those advanced by this defendant. Iowans deserve better than rape myths masquerading as legal analysis.

B. Whether *Smith* remains the law or not, the defendant's complaints about the sufficiency of the evidence are without merit.

Regardless of whether this Court formally disavows *Smith* today, the facts in this record do not warrant granting the defendant relief. There was ample support in the record for three counts of sexual abuse in the second degree:

- B.T. testified that Defendant Mathis had "sex" with her by "putting his parts in my parts." Trial tr. vol. III, p. 45, lines 23–25; p. 46, lines 4–6. When asked to explain further, B.T. said that Mathis put his "penis" into her "vagina." Trial tr. vol. III, p. 46, lines 10–15.

- L.S. said that Mathis anally raped him. *See* trial tr. vol. III, p. 86, line 16 — p. 87, line 13. When asked to explain, L.S. said that Mathis "told [him] to take [his] clothes off" and then Mathis "stuck his private up … my butt." Trial tr. vol. III, p. 87, lines 14–25. L.S. further clarified that Mathis put his "penis" inside of L.S.'s "butt." Trial tr. vol. III, p. 88, lines 1–5. L.S. did not know how many times Mathis raped him, but it was more than once, on different days. Trial tr. vol. III, p. 88, lines 4–23.

Viewing this evidence in the light most favorable to the State, as this Court must, there was sufficient evidence for multiple counts of sexual abuse.

In his brief, the defendant draws on the rape myths perpetuated by *Smith* to attack the credibility of the victims. Defendant's Proof Br. at 39–43. This necessarily admits defeat in a sufficiency challenge: the defendant does not argue that the record lacks testimony establishing the elements of the offense, for he cannot—he instead argues this Court should not believe the victims' testimony based on rape myths. This Court's role is not to decide credibility questions; that was for the Decatur County jury that saw these witnesses' testimony in-person. This Court cannot give the defendant what he wants, which is a credibility finding based on reading a cold appellate record.

If this Court disagrees, and accepts the defendant's invitation to usurp the role of the jury to decide credibility, the Court should not disturb the verdict. The State sequentially addresses the rape myths put forward by the defendant below. In addition to the research discussed in Division I.A, the myths relied on in *Smith* and recited by

the defendant were debunked by the testimony of expert witnesses at trial:

The defendant protests that "the complainants' testimony is not corroborated." Defendant's Proof Br. at 39. Iowa law has not required corroboration of victim testimony for nearly 50 years. *See, e.g.*,. *Hildreth*, 582 N.W.2d at 170 (Iowa 1998);. *Knox*, 536 N.W.2d at 742; Iowa Code § 782.4 (1950) (repealed 1974); Iowa R. Crim. P. 2.21(3). This complaint is legally irrelevant to a sufficiency challenge.

The defendant further attempts to play on the rape myth that a real victim would have injuries. Specifically, the defendant complains that the lack of injury is "wholly consistent with the absence of sexual abuse," despite making the grudging concession that "the lack of physical injury is not necessarily inconsistent with prior sexual abuse." Defendant's Proof Br. at 39. This highlights the necessity of dispelling the rape myth—the defendant seeks relief based on the absence of physical injury, even when he knows better and acknowledges no physical injuries could be expected.

As discussed in Division I.A., the overwhelming majority of child and adult sexual abuse victims do not have injuries or present

with physical evidence. *See* Walsh et al., 56 Crime & Delinquency at 443; Ledray, SANE Guide, at 69–71.

Nurse Jennifer Sleiter also dispelled this myth with her expert testimony at trial:

> **Q.** Ma'am, when you did the genital exam I think you stated that everything was normal; is that correct?
>
> **A.** Yes.
>
> **Q.** Were you surprised by that based upon the information that you were given about what the allegations were?
>
> **A.** No.
>
> **Q.** And why were you not surprised by that?
>
> **A.** In my practice over the last 15 years, as well as the research, it's been well-documented that most child sexual exams are normal and have normal exams. There is a lot of reasons for that. For young children, a lot of times they don't disclose right away; so there may be a significant amount of time between the actual incident and the time of the exam.
>
> If there is a small injury, that injury can heal completely and there may not be any signs of injuries or scars at that time.
>
> There can also be different types of touching that don't necessarily leave a injury at the time of the incident.
>
> And just the way that the child's body is, the physiology of the child's body, we can explain

> why there -- a lot of times there are no injuries.
>
> **Q.** Ma'am, I think you stated that you've performed over 2,000 exams; is that correct?
>
> **A.** Yes.
>
> **Q.** Is it fairly normal within your experience -- your professional experience and the research that injuries are not common in these types of cases?
>
> **A.** Yes. Both in my clinical experience and in the research it's documented that approximately 95 percent of the exams are normal with no physical findings.

Trial tr. vol. IV, p. 15, line 14 — p. 16, line 21.

The defendant's reliance on the pernicious myth that a real victim would have injuries should not be a part of this Court's case law generally and does not warrant relief in this case specifically.

Next, the defendant complains that the children's testimony "did not corroborate each other," apparently because B.T. would have been in the house while L.S. was abused and vice versa, and the defendant thinks they should have witnessed something. Defendant's Proof Br. at 40. As the defendant admits, some or all of the abuse took place in a bedroom, sequestered from the rest of the house. Defendant's Proof Br. at 40. Logic alone defeats the defendant's complaint about witnesses. But to

the extent further argument is necessary, the scholarly research discussed in Division I.A indicates abuse can happen with others around—even in the same bed or the same car as non-offending adults. *See* Salter, Predators, at 28. Also, Nikki Romer's expert testimony at trial dispelled the myth that children cannot be abused with non-offending individuals in the same residence:

> **Q.** Ma'am, another topic I would like to talk about is that is it your experience that people that are not associated with your field of work believe that abuse could only happen if other individuals weren't around?
>
> **A.** Yes; that's something I hear quite often.
>
> **Q.** And if you could, explain based on the research and your personal professional experience what you mean by that?
>
> **A.** So a -- a lot of times there's the myth out there that abuse can't happen in the same house if other people are around or even in the same room if other people are around; and that's just not the case.
>
> I think one thing that most people probably have experienced in your life is if you've ever been an adult in the same room as a couple kids and all of a sudden one kid starts screaming and crying; and you look up. What happened? You know, and, well, Charlie took my cookie or he pushed me or something; right? So that kind of gives you an idea that things can happen. You can be in the same room as those two children and something

could have happened and you didn't realize what happened and you had to ask.

And the same is true for sexual abuse. Sexual abuse can occur in the same house. It can occur in the same room. The severity and type of abuse varies. It can be something that happens in one second; if somebody is walking by and it's a touch of an inappropriate body part as the child walks by. It can be a touch under the table.

There's also other things, distractions, or, you know, we constantly have phones or TVs, tablets, things that kind of occupy our time that we're not completely paying attention to. There's -- It could just be things that are in the way that block our eyesight. We have furniture sometimes or blankets and abuse can occur behind that; their vision is blocked.

Sometimes I've -- in my experience, I meet a lot of kids, when it happens at nighttime and there is other people in the room that are sleeping. You know, if you're sleeping you – it's hard to have that … eyes-on supervision and things can happen.

And then I think it is important to realize and to take in account that the majority of sexual abuse actually occurs between someone that's known to the child and to the family. And if you know the person involved, you trust that person; and when you trust someone, you're not as vigilant and you don't pay as close of attention. So that's another reason why abuse can happen under the same roof or in the same room.

Trial tr. vol. IV, p. 27, line 15 — p. 29, line 12. The regurgitation of a rape myth—that children can't be sexually abused with other people around—has no place in this Court's case law and warrants no relief for this defendant.

Next, the defendant complains that B.T. said that Defendant Atkins made L.S. put his penis on her vagina, while L.S. said he put his penis in her vagina. Defendant's Proof Br. at 40. The defendant also complains about alleged inconsistencies in B.T.'s testimony about locations where Atkins abused her. Defendant's Proof Br. at 41. As a threshold matter, this testimony regarding Co-Defendant Atkins is collateral to the evidence supporting Defendant Mathis' convictions. But even if it were not collateral, this testimony was not truly inconsistent. It is hardly surprising that two elementary-school-aged children cannot provide anatomically precise descriptions of how their grandfather forced them to perform sex acts on one another. Whether Atkins coerced L.S. put his penis "on" or "inside" B.T.'s vagina does not change the nature of the underlying sex act. *See* Iowa Code § 702.17.

Moreover, as discussed in Division I.A, the limited ability of the children to describe sex acts is consistent with research that shows

that children often "lack … understanding about what happened," "may not have an adequate vocabulary for communicating about sexual activity," or are (understandably) too embarrassed to share extensive intimate details to a room full of strangers. *See* DeVoe & Faller, 4 Child Maltreatment at 225–26. Of particular interest, the research recognizes that most young girls use the word "inside" to refer to areas inside the vagina and surrounding external structures, inside the labia. *See* Lisa J. Milam & William R. Nugent, *Children's Knowledge of Genital Anatomy and Its Relationship With Children's Use of the Word "Inside" During Questioning About Possible Sexual Abuse*, 26 J. Child. Sex. Abuse 23, 32–35 (2017); H.R. Gallion et al, *Genital Findings in Cases of Child Sexual Abuse: Genital vs Vaginal Penetration*, 29 J. Ped. & Adolesc. Gynecology 604, 605–10 (2016). The research thus demonstrates the wrongheadedness of intuition underlying arguments made by both the *Smith* majority and the defendant's brief; criticizing children's vocabularies is not a proper basis on which to discredit victim testimony.

At trial, expert witness Nikki Romer testified at length about the different pressures that may cause children to delay disclosure or only partially disclose the abuse. *See* trial tr. vol. IV, p. 33, line 4 — p. 39,

line 19. Romer's testimony tracked the research, explaining that sometimes children "don't have the words to be able to describe" the abuse, sometimes they "fear if they're going to believed; if they're going to be supported," and sometimes they "might not comprehend" the nature or character of the abuse perpetrated against them. *See id.*

The defendant's related complaint, that B.T. arguably did not consistently describe locations where she was abused, is meritless for similar reasons. As discussed in Division I.A, the available social-science research and Iowa case law that post-dates *Smith* both recognize that victims of repeat abuse have difficulty describing specific incidents in isolation. *See, e.g.*, Myers et al., 68 Neb. L. Rev. at 88, 104; *Davis*, 2003 WL 21544491, at *2. Nikki Romer also addressed this point in her expert testimony at trial:

> **Q.** Ma'am, in addition to what you were just talking about, based on your experience and the research, if the abuse happened frequently or more than on one occasion, does that affect the ability of the child to remember?
>
> **A.** Sure. I mean, and that's – that's true of adults too. If there is a -- something that happens frequently to you as a typical part your life, trying to recall specific episodes is going to be more difficult than talking kind of in general terms about what had happened.

Q. And if you could, give the jury an example of what you mean by that?

A. So just like getting ready in the morning for work. You know, usually you have a routine that you do.

So if someone were to ask you, Tell me everything you did last Tuesday to get ready for work.

A typical answer might be, well, usually, I, you know, get up in the morning and I start the coffee. Take a shower. I get dressed. Sometimes in the bedroom. Sometimes in the bathroom. Kind of depends on if my spouse is awake, because I don't want to wake them up. You know, I brush my teeth, get my clothes on, and go to work.

If someone were to ask specifically, Okay, so -- but last Tuesday we're talking about, did you get ready in the bedroom or in the bathroom? Could you answer that?

Maybe? Maybe not; right? If it is common and stuff like that, it might not -- might not stand out.

But let's say last Tuesday was your dream job interview. You've been waiting for this opportunity your whole life. Tuesday is that day. And I ask you, Tell me everything you did last Tuesday to get ready for this job interview.

You might say, just like before, I got up. You know, I put the coffee on. I took a shower. I got dressed in the bathroom. I know I did though because I got up so early because I was nervous and anxious and I got up earlier than

> I ever have before and I know my spouse was sleeping.
>
> So you're able to answer a little bit more information than you could because it's not typical anymore. It's not something that -- that's happened over and over. There's something different about that day.
>
> So the same is true for us as for children. When something occurs and it's common, you can usually tell generally what happens. But unless something completely stands out different that day, it's hard to distinguish between those different times.

Trial tr. vol. IV, p. 41, line 3 — p. 42, line 23. That child-victim B.T. in this case could not offer specifics about which abuse happened in a specific location tells us nothing about whether she should be believed. B.T. was consistent that the abuse happened and that it happened more than once.

Fourth, the defendant complains that "jurors might not expect children of [the victims'] ages to have knowledge of certain acts," but they did here because Atkins abused them. Defendant's Proof Br. at 41. The defendant cites no legal authority suggesting this is a basis for reversing a verdict and there is none. This argument is meritless.

Fifth, the defendant complains that he said he didn't rape the children at trial and his mother testified on his

behalf. Defendant's Proof Br. at 42–43. The jurors were correctly instructed they should consider witnesses' "motive, candor, bias and prejudice" when decided "what testimony to believe." Jury Instr. No. 13: Credibility; App. 33. It is no surprise that the jury decided to reject the self-serving testimony of the defendant and his mother. This, like the defendant's other claims, is a meritless attempt to re-litigate credibility on appeal.

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Applying the rape myths in *Smith* to the facts and expert testimony in this case make clear that *Smith*'s foundation is rotten and cannot be tolerated. While *Smith* remains part of the law, defendants—like this one—will point to the Court of Appeals' condemnation of child-sex-abuse victims and ask for relief. *Smith* should be overruled. And this defendant is not entitled to relief, on any permutation of his sufficiency claim.

II. The district court did not err when it followed Iowa appellate decisions regarding non-corroboration instructions.

Preservation of Error

The State does not contest that the defendant objected to the non-corroboration instruction below on largely the same basis he
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argues on appeal. The State does not agree a "due process" objection was made below and to the extent a "due process" argument confers any special advantage to a defendant beyond the objection made below, that objection was not preserved and cannot be heard now. *See generally* trial tr. vol. V, p. 6, line 18 — p. 15, line 11 (argument and ruling); *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (on error preservation). The defendant advances no argument that counsel was ineffective related to the instruction. *See generally* Defendant's Proof Br. at 87–101.

The State also takes issue with one portion of the argument advanced by the defendant, given that he did not request any specific language be added to the instruction below. This is addressed in context, in the merits section that follows.

Standard of Review

Review is for correction of errors at law. *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 570 (Iowa 2017). "Instructional error does not merit reversal unless it results in prejudice." *Id.* (internal citation and quotation marks omitted). "Prejudicial error results when instructions materially misstate the law or have misled the jury." *Id.* (internal citation omitted).

Merits

The jury was instructed, "There is no requirement that the testimony of an alleged victim of sexual offenses be corroborated." Jury Instr. No. 24: Non-Corroboration Instruction; App. 44. This instruction was proper and the defendant is not entitled to reversal.

There is no question that instruction 24 is a correct statement of the law. *See, e.g.*, *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("We find that the alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt."); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The only direct evidence is the complainant's testimony. But under today's law that is sufficient to convict. The law has abandoned any notion that a rape victim's accusation must be corroborated."). The proposition is so uncontroversial it is included in the rules of criminal procedure: "Corroboration of the testimony of victims shall not be required." Iowa R. Crim. P. 2.21(3). Even trial counsel for the co-defendant grudgingly admitted this below. *See* trial tr. vol. V, p. 7, lines 2–6 ("First of all, with respect to the first sentence in regard to whether or not the corroboration is required, technically that is an accurate statement of the law…."). The defendant also admits on appeal the

instruction is a "correct statement of the law." Defendant's Proof Br. at 91, 93.

Non-corroboration instructions have twice been approved by the Iowa Court of Appeals. In *Barnhardt,* the Court of Appeals approved of instructing the jury that "[t]he law does not require that the testimony of the alleged victim be corroborated." *State v. Barnhardt*, No. 17-0496, 2018 WL 2230938, at *4 (Iowa Ct. App. May 16, 2018). In *Altmayer*, the Court of Appeals approved of a slightly longer instruction:

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

State v. Altmayer, No. 18-0314, 2019 WL 476488, at *5 (Iowa Ct. App. Feb. 6, 2019).

Barnhardt and *Altmayer* reflect the majority position. Nine different states, not counting Iowa, have approved of non-corroboration instructions. *See People v. Gammage*, 828 P.2d 682, 687 (Cal. 1992); *Mency v. State*, 492 S.E.2d 692, 699 (Ga. Ct. App.

1997); *People v. Welch*, No. 90-00008A, 1990 WL 320365, at *1 (D. Guam Oct. 30, 1990); *People v. Smith*, 385 N.W.2d 654, 657 (Mich. Ct. App. 1986); *Pitts v. State*, 291 So. 3d 751, 757 (Miss. 2020); *State v. Marti*, 732 A.2d 414, 420 (N.H. 1999); *Gaxiola v. State*, 119 P.3d 1225, 1231–32 (Nev. 2005); *Comm. v. Barney*, No. 1460 MDA 2014, 2015 WL 7433518, at *3 (Pa. Super. Ct. Mar. 27, 2015); *State v. Clayton*, 202 P.2d 922, 923 (Wash. 1949). Although there are slight variations in the wording, all these approved instructions communicate the same core concept that instruction 24 did here—the law does not require a victim's testimony be corroborated.

The defendant believes *Barnhardt* was wrongly decided. Defendant's Proof Br. at 95. He does not address the out-of-state cases discussed above. *See generally* Defendant's Proof Br. The gist of the defendant's complaint is that he believes, despite no instruction saying this, that the jury may have believed it was required to find corroboration of the defendant's witnesses but not the victim's testimony. Defendant's Proof Br. at 93–94.

This is a problem of the defendant's own making. He never asked the district court to add language specifying that his witnesses' testimony did not need to be corroborated. *See generally* trial tr. vol.

V, p. 6, line 18 — p. 15, line 11 (argument and ruling). He cannot complain now that the district court did not add language that he never requested. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (on error preservation); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989) ("Under the Doctrine of Invited Error, it is elementary a litigant cannot complain of error which he has invited[.]"). Further, the defendant cites no case holding that he is similarly entitled to a non-corroboration instruction, and the only case the State is aware of addressing the issue expressly holds the defendant is not so entitled. *Callahan v. State*, 568 S.E.2d 780, 785 (Ga. Ct. App. 2002).

The reason for addressing the testimony of an alleged victim specifically, rather than all witnesses generally, is borne from the sexist history of instructions on this topic. For centuries, the law has "reflected age-old prejudices and unfair, pervasive doubts about the credibility of any woman who claimed to have been raped." Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 Akron L. Rev. 981, 1051–52 (2008). As a result, American courts historically embraced the opposite of the non-corroboration instruction given here. For

example, the Model Penal Code, drawing on seventeenth-century writings, recommended admonishing jurors that rape was a charge "easily made" and "difficult to defend against" and charged juries that "the law requires that you examine the testimony of the female person named in the information with caution." Model Penal Code § 213.6(5) (Am. Law Inst. 1962). Other instructions, here and abroad, told jurors that an "unchaste woman is more likely than others to consent to sexual advances," that "women who say no do not always mean no," and that reluctant consent renders penetration lawful. *See* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis. L. Rev. 1013, 1046 (1991).

By the early 1960s, more than 30 states (including Iowa) required a rape victim's testimony be corroborated in order to return a criminal conviction. *See* Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 Ohio St. J. Crim. L. 207, 214, n.57 (2003); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, 1371–72 (1972). Since then, nearly every state has rejected the corroboration requirement. *See* Michelle J. Anderson, *Diminishing*

the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims, 13 New Crim. L. Rev. 644, 652 (2010); Klein, 41 Akron L. Rev. at 987–87. Iowa modernized its law in 1974, when the General Assembly repealed a statutory provision that specified a defendant charged with rape "cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense." *See* Iowa Code § 782.4 (1950); 1974 Iowa Acts, ch. 1271, § 2 (repealing § 782.4). Despite this modernization of the law, rape myths linger on. *See* Division I.A (discussing how *State v. Smith* perpetuates rape myths). As the Nevada Supreme Court succinctly explained, the corroboration myth in particular endures, because "[j]urors mistakenly assume that they cannot base their decision on one witness's testimony even if the testimony establishes every material element of the crime." *Gaxiola*, 119 P.3d at 1233.

As the California courts have put it, "trials of sex crimes, which often are a credibility contest between the accused and the accuser, have 'special features which make such an instruction on lack of corroboration most proper.'" *Gammage*, 828 P.2d at 688 (citing and quoting *People v. McIntyre*, 115 Cal. App. 3d 899, 907, 176 Cal. Rptr.

3, 7 (Cal. Ct. App. 3d 1981)). In his brief, the defendant does not centrally contest this point, but does complain more generally that he believes the non-corroboration instruction unfairly emphasized the testimony of the victims and was contrary to section 709.6. Defendant's Proof Br. at 93–100.

The *Barnhardt* Court correctly characterized and rejected the defendant's argument about the statute: "By using section 709.6 to argue against the court's noncorroboration instruction, [the defendant] turns the statute on its head. And his concerns about the instruction lessening the State's burden in obtaining a conviction for sexual assault ring false." *Barnhardt*, 2018 WL 2230938, at *4. The *Altmayer* Court expressly rejected the argument as well. *See* 2019 WL 476488, at *5. The same result is warranted here. The instruction does not ask the jury to privilege the victim's testimony above other witnesses, but instead counteracts common biases and misperceptions that may lead jurors to believe the law requires corroboration when it actually does not. Also, the district court made an express finding that the instruction at issue did not unduly emphasize the victim's testimony when ruling on the motion for new

trial. *See* post-trial-motions hrg. tr. p. 47, lines 1–10. The defendant's complaints to the contrary do not establish error.

Out-of-state cases support the *Barnhardt* and *Altmayer* Court's conclusions. The California Supreme Court considered this exact question in *Gammage*, rejecting that defendant's contention that "the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference." *Gammage*, 828 P.2d at 687. The Nevada Supreme Court agreed, adopting the California court's reasoning and finding the totality of the instructions—including the non-corroboration instruction—"strike a balance that protects the rights of both the defendant and the complaining witness." *Gaxiola*, 119 P.3d at 1233 (citing and quoting *Gammage*, 828 P.2d at 687).

Similarly, in Mississippi, the state supreme court found that the instruction at issue "did not instruct the jury how to weigh [the victim]'s testimony," but instead "properly allowed the jury to determine what weight and credibility to give [the victim]'s testimony. *Pitts*, 291 So. 3d at 758. Cast slightly differently by the New Hampshire Supreme Court, the non-corroboration instruction "did not mean that the jury *should* convict if they believed [the

victim's] testimony, but that they *could* convict on the basis of [the victim's] uncorroborated testimony and all the other evidence in the case"—which is "merely a correct statement of the law." *Marti*, 617, 732 A.2d at 421 (emphasis original). Or, as the Nevada Supreme Court put it, "A 'no corroboration' instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law." *Gaxiola*, 119 P.3d at 1232. In short, an instruction telling jurors that corroboration is not required does not privilege or unfairly advantage the victim's testimony in a sex-crime prosecution.

Other out-of-state courts draw on a principle familiar to Iowa law, recognizing that instructions must be read in context rather than isolation, and hold that the totality of instructions guard against any danger that the defendant's testimony was disadvantaged by a non-corroboration instruction. *See, e.g., Mency*, 648, 492 S.E.2d at 699; *Welch*, 1990 WL 320365, at *2; *Pitts*, 291 So. 3d at 758–59. The jurors here were correctly instructed that they "must consider all of the instructions together" and that "[n]o one instruction includes all of the applicable law." Jury Instr. No. 6: Instructions; App. 26. Among the instructions, jurors were correctly told that the burden

remained on the State to prove its evidence on all elements beyond a reasonable doubt, that the defendant was presumed innocent, and that it was their role to decide who to believe and ultimately "find the truth and do justice." *See* Jury Instr. No. 2: Plea; App. 22; Jury Instr. No. 4: Presumption of Innocence; App. 24; Jury Instr. No. 13: Credibility; App. 33; Jury Instr. No. 29: Deliberation; App. 49. Reasonable doubt was also correctly defined. Jury Instr. No. 10: Reasonable Doubt; App. 30. Considering the jury instructions in total, as this Court must, there is no error, the law was correctly stated, and the defendant is not entitled to relief. *See State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995) ("When a single jury instruction is challenged, it will not be judged in isolation but rather in context with other instructions relating to the criminal charge.").

Finally, the closing argument given by the co-defendant's attorney highlights why this instruction was needed, given his complaints about a lack of corroboration:

> The key is can you **corroborate**? Is there anything to help you make -- what – what's more believable?

Trial tr. vol. V, p. 56, lines 1–3 (emphasis added).

> … Focus on the important things. The age of the kids. What grade they were in. Those

> things. That's what you focus on and make sense that these stories don't make sense. So if you **corroborate** it, it -- it doesn't add up.

Trial tr. vol. V, p. 62, lines 17–22 (emphasis added). One additional reason why the non-corroboration instruction is necessary is to guard against suggestions that, without corroboration, the jury cannot convict. The instruction was properly given under the circumstances presented below.

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The non-corroboration instruction correctly stated the law; was proper under *Barnhart*, *Altmayer*, and persuasive out-of-state cases; and was appropriate given the issues litigated and arguments made in this trial. The defendant is not entitled to relief.

CONCLUSION

This Court should affirm the defendant's convictions and sentence.
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REQUEST FOR NONORAL SUBMISSION

This case should be submitted on the briefs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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