ELECTRONICALLY FILED NOV 17, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JUSTICE MATHIS, Defendant-Appellant.	)))))))))	S.CT. NO. 20-0464

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 2, 2021

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CERTIFICATE OF SERVICE

On November 17, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Justice Mathis, 305 W Monroe, Mount Ayr, IA 50854.

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QUESTIONS PRESENTED FOR REVIEW

I. Was the complainants' testimony detailed and credible enough to support a finding of guilt?

II. Did the District Court err in denying Mathis' objection to a jury instruction that gave special attention and treatment to the testimony of the complainants?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant and pursuant to Iowa R. App. P. 6.1103 requests further review of the November 3, 2021, decision in State of Iowa v. Justice Mathis, Supreme Court No. 20-0464.

The Court of Appeals erred in affirming Mathis' convictions for Sexual Abuse in the Second Degree, class B felonies in violation of Iowa Code section 709.3(1)(b) (2013-2017).

This Court should grant further review to address the propriety of noncorroboration instructions focusing on the testimony of sexual assault complainants. Iowa R. App. P. 6.1103(b)(2), (3) (2021). The Iowa Court of Appeals recently changed its position on whether it is appropriate to give such instructions. State v. Kraai, No. 19-1878, 2021 WL 1400366, at *3-6 (Iowa Ct. App. Apr. 14, 2021). Other states are split on the issue. The Iowa Supreme Court has previously said judges should issue general instructions treating all witnesses

alike, which these instructions do not do. State v. Milliken, 204 N.W.2d 594, 596-97 (1973).

The Court of Appeals determined Mathis was not prejudiced by the instructional error. To the contrary, the instructional error in this case is compounded by the fact the complainants' testimony was not sufficient for conviction. The complainants' testimony lacked detail, was not corroborated, and was contradictory at times. Furthermore, Mathis was tried jointly with his grandfather, who was the first person the complainants accused of sexually abusing them. A prior sexual encounter with another person is relevant to a defense of false accusation. State v. Walker, 935 N.W.2d 874, 877 (Iowa 2019).

Jurors were given the false impression that *only* the complainants' testimony required no corroboration whereas corroboration is not required for *any* witness' testimony so long as that testimony is *believable.* The instruction allowed jurors to apply different standards to Mathis' testimony and

the testimony of the complainants.

Mathis's charges should be dismissed or, alternatively, he should receive a new trial with proper instructions.

WHEREFORE, Mathis respectfully requests this Court grant further review of the Court of Appeals' decision in his case.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Justice Mathis from his conviction, sentence, and judgment for three counts of Sexual Abuse in the Second Degree, class B felonies in violation of Iowa Code section 709.3(1)(b) (2013-2017), following a jury trial in Decatur County District Court.

Course of Proceedings and Facts: Mathis generally accepts the Court of Appeals recitation of the course of proceedings and facts. Additional and disputed facts will be addressed below as necessary.

ARGUMENT

I. The complainants' testimony was not detailed and credible enough to support a finding of guilt.

Preservation of Error: Error was preserved by the denial of Mathis' motions for judgment of acquittal. (Tr. Day 4 p. 52 L.7-55 L.10, p. 174 L.17-p. 175 L.9).

Scope of Review: The Court considers the evidence in the light most favorable to the State, and it considers all the evidence presented at trial, not just the evidence which supports the verdict. State v. Adney, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). The verdict must be supported by substantial evidence, "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." Id. The evidence presented must do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Merits: The State failed to establish beyond a reasonable doubt that Mathis committed the sex acts against the complainants. His convictions should be vacated.

As to Count I, the State was required to prove the following:

> 1. On or between October 1, 2015, and November 16, 2017, the Defendant performed a sex act upon B.T.
> 2. The Defendant performed the sex act while B.T. was under the age of 12.

(Inst. 19)(App. p. 39).

The majority of B.T.'s testimony at trial dealt with multiple instances of alleged sexual abuse by her step-grandfather, Mickie Atkins. (Tr. Day 3 p. 38 L.8-p. 45 L.15, p. 47 L.15-p. 49 L.10, p. 54 L.9-p. 68 L.6, p. 70 L.17-p. 73 L.12). Her testimony regarding her alleged sexual interaction with Mathis – in full – was as follows:

> Q. Did anything that you didn't want to happen with anybody else happen in this house?
> A. Yes.
> Q. Okay. And can you tell me what happened with somebody else?
> A. Me and Justice were upstairs laying in his bed and then it started happening.
> Q. Okay. And when you say "it started happening", can you tell me what you mean by that?
> A. I mean sex.
> Q. And so, if you can, tell the jury who -- so you said "sex". Who was having sex?
> A. Justice.
> Q. And when you say the word "sex", what do you mean?
> A. I mean he was putting his parts in my parts.
> Q. Okay. And when you say your "parts", which part of your body are you talking about?
> A. My lower parts.
> Q. Okay. And are -- so I need you to be just a

little bit more specific. Which parts on your lower parts was he putting his parts in?

A. My vagina.

Q. And what part was he putting in your vagina?

A. His penis.

Q. And did you want that to happen?

A. No.

Q. And I think you said earlier that you are 11 now?

A. Yes.

Q. And so did this happen before you turned 11?

A. Yes.

Q. Did -- At this house did Justice ever put his parts anywhere else in your body?

A. No.

Q. Okay. Did what you just described to the jury happen more than one time?

A. No.

Q. Just one time?

A. Yes.

Q. Did Justice ever make you put any of his parts in your body?

A. No.

Q. Did he ever make you use your mouth at any time?

A. No.

Q. Did he ever put his mouth anywhere on you?

A. No.

Q. When these things were happened -- happening, did Justice ever tell you -- or say anything to you?

A. No.

(Tr. Day 3 p. 45 L.16-p. 47 L.14).

As to Count II, the State was required to prove:

> 1. On or between October 1, 2015, and November 16, 2017, the Defendant performed a sex act upon L.S.
> 2. The Defendant performed the sex act while L.S. was under the age of 12.

(Inst. 20)(App. p. 40). Count III required the same proof as Count II, with the exception that the sex act occurred on a different date than the sex act in Count II. (Inst. 21)(App. p. 41).

L.S. testified that Atkins would make him and his sister B.T. take off their clothes and have sex while he watched. (Tr. Day 4 p. 84 L.1-p. 85 L.23). As to Mathis, L.S. testified:

> Q. Okay. So can you tell me, did anything that you didn't want to have happen happen at this house?
> A. Yes.
> Q. Okay. Can you tell me a little bit what happened?
> A. Justice made me come upstairs a lot.
> Q. Okay. And when you say "come upstairs", where did he make you come upstairs to?
> A. To his room.
> Q. Is that where he slept?
> A. Yes.

Q. Was that his bedroom?
A. Yes.
Q. Okay. And when Justice would make you come upstairs, what would happen?
A. He did the same thing that Grandpa made me do to Baileigh.
Q. Okay. And you said he would make you do the same thing that Grandpa made you do; is that correct?
A. Yes.
Q. Did he do those things to you or did you do them to him?
A. He did those things to me.
Q. And so when you say that he made you do the same things that Grandpa made you do, can you tell me what that is?
A. He made me and him have sex.
Q. Okay. And, if you can, how did that happen?
A. He took his clothes off.
Q. Okay. And what happened next?
A. He told me to take my clothes off.
Q. And did you do that?
A. Yes.
Q. And then what happened after that?
A. He stuck his private up me; my butt.
Q. And when you say "his private", what part of his body are you talking about?
A. His -- His penis.
Q. And you said that he would put that in your butt?
A. Yes.
Q. Did that happen on more than one day?
A. Yes.
Q. Do you know how many times that happened?

A. No.

(Tr. Day 3 p. 86 L.16-p. 88 L.9).

Normally, the testimony of a complainant – if believed – would be sufficient to support a conviction. As a general rule, the credibility of witness testimony is left to the jury. State v. Mitchell, 568 N.W.2d 493, 503 (Iowa 1997). The Iowa Supreme Court has recognized an exception to the rule:

> "The rule that it is for the jury to reconcile the conflicting testimony of a witness does not apply where the only evidence in support of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. We may concede that, ordinarily, contradictory statements of a witness do not make an issue of fact; and that such situation may deprive the testimony of all probative force."

Id. (quoting State ex rel. Mochnick v. Andrioli, 216 Iowa 451, 453, 249 N.W. 379, 380 (1933). This was the exception applied in State v. Smith, where the Iowa Court of Appeals reversed Smith's sexual abuse convictions because "the only evidence against appellant is the statements and testimony of the three girls [and because

when] read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and, at times, border on the absurd." State v. Smith, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993).

Contrary to the findings of the Court of Appeals, the testimony of the complainants is not sufficiently detailed to be considered credible or substantial enough to support the convictions.

First and foremost, the complainants' testimony is not corroborated. Both children had physical exams completed by a sexual assault nurse examiner and no physical evidence of a sexual assault was found. (Tr. Day 4 p. 14 L.3-15, p. 16 L.22-p. 17 L.7). While Mathis does not dispute that the lack of physical injury is not necessarily inconsistent with prior sexual abuse, the lack of physical injury is wholly consistent with the absence of sexual abuse.

Second, the testimony of the children did not corroborate each other with respect to Mathis. B.T. testified to one instance of alleged sexual abuse with Mathis in his bedroom. (Tr. Day 3 p. 45 L.16-p. 47 L.14). L.S. would have been in the house as well and never observed any sexual interaction between Mathis and B.T. (Tr. Day 3 p. 83 L.7-11, p. 88 L.12-17). L.S., meanwhile, testified to more than one incident of alleged sexual abuse by Mathis in Mathis' bedroom. (Tr. Day 3 p. 86 L.16-p. 88 L.9). Again, B.T. would have been in the house at the time and did not testify to any observations of inappropriate contact between Mathis and B.T. (Tr. p. 83 L.7-11).

Third, in instances involving Atkins, B.T. and L.S. sometimes contradicted each other. L.S. claimed Atkins made him place his penis inside of B.T.'s vagina. (Tr. Day 3 p. 84 L.21-p. 85 L.23). B.T. testified Atkins made L.S. rub against her, but that he did not penetrate her. (Tr. Day 3 p. 43 L.21-p. 44 L.10). B.T.'s testimony also contradicted itself

at times. At trial, she claimed Atkins called her into the living room where he assaulted her the first time, whereas at deposition she testified he did not call her into the living room, but that she walked into the room and saw him naked and that he did not see her. (Tr. Day 3 p. 39 L.4-11, p. 54 L.22-p. 59 L.22). She also testified at trial that the first incident with Atkins happened at the trailer, whereas in her deposition she testified it happened at the new house. (Tr. Day 3 p. 38 L.8-19, p. 64 L.10-p. 65 L.2). B.T. also acknowledged that her deposition testimony was that Atkins wanted to have sex with her in the bedroom, whereas her trial testimony was that they had sex in the laundry room. (Tr. Day 3 p. 44 L.17-25, p. 65 L.3-p. 66 L.7).

Fourth, to the extent jurors might not expect children of B.T.'s and L.S.'s ages to have knowledge of certain sex acts, this is an unhelpful factor in assessing the credibility of the complaints against Mathis. Both complainants testified they were abused by Atkins. (Tr. Day 3 p. 38 L.2-p. 45 L.13, p. 54

L.22-p. 66 L.7, p. 83 L.23-p. 85 L.23). They would have knowledge of sex acts based upon that prior abuse. See State v. Walker, 935 N.W.2d 874, 877 (Iowa 2019)(recognizing prior sexual encounter with another person may be relevant to defense of mistaken identity or false accusation).

Notably, when the complainants initially disclosed to their mother, both named Atkins – not Mathis – as the perpetrator. (Tr. Day 3 p. 106 L.14-p. 109 L.9). On November 16, 2017, Stephanie S. found her younger son with his mouth close to L.S.'s penis as they were laying in bed. (Tr. Day 3 p. 103 L.15-p. 105 L.24). When she asked what they were doing, L.S. said he learned it from Atkins and that Atkins made him and B.T. do things. (Tr. Day 3 p. 106 L.3-p. 108 L.1). When Stephanie confronted B.T. and told her she would not get in trouble, B.T. confirmed L.S.'s statement. (Tr. Day 3 p. 108 L.2-14, p. 116 L.8-19). Neither complainant mentioned Mathis during this conversation.

Mathis, meanwhile, flatly denied committing the acts alleged. (Tr. Day 4 p. 160 L.17-p. 164 L.8). He testified he preferred not to have the kids in his room as it was cluttered with various things including glass bottles and fantasy blades that could have injured them. (Tr. Day 4 p. 160 L.1-16). The only times the complainants were in or near his room is when his grandmother Brenda had the kids wake him up or on one occasion when they played a video game with Mathis and his friend. (Tr. Day 4 p. 151 L.14-22, 158 L.16-p. 160 L.4).

Brenda testified she was not aware of B.T. or L.S. spending any time in Mathis' bedroom, but was aware that he would get angry if they came to his room. (Tr. Day 4 p. 117 L.2-p. 118 L.11). She testified that, with the exception of times when she was hospitalized, she was almost always at her residence when the children would visit because she was unable to travel on her own. (Tr. Day 4 p. 102 L.1-p. 103 L.3, p. 121 L.23-p. 122 L.11).

The uncorroborated and conflicting testimony of the complainants in this case was not credible enough to provide sufficient evidence for conviction. Mathis' convictions for Sexual Abuse in the Second Degree should be vacated and his case remanded for dismissal.

II. THE DISTRICT COURT ERRED IN DENYING MATHIS' OBJECTION TO A JURY INSTRUCTION THAT GAVE SPECIAL ATTENTION AND TREATMENT TO THE TESTIMONY OF THE COMPLAINANTS.

Preservation of Error: Error was preserved by the District Court's denial of Mathis' objection to the challenged instruction. (Tr. Day 5 p. 6 L.18-p. 15 L.11).

Scope of Review: Challenges to jury instructions are reviewed for correction of errors at law. State v. Hanes, 790 N.W.2d 545, 549 (Iowa 2010). "Our review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence." Id. Error in an instruction does not require reversal unless it was prejudicial to the complaining party. Id. Preserved errors in jury instructions are presumed prejudicial unless the record

affirmatively establishes a lack of prejudice. State v. Lorenzo Baltazar, 935 N.W.2d 862, 871 (Iowa 2019); State v. Kuhse, 937 N.W.2d 622, 629 (Iowa 2020).

Merits: After the close of evidence, the District Court made a record on the instructions to be given to the jury. Mathis objected to Instruction 24, which "indicates that there is no requirement that the testimony of an alleged victim of sexual offenses be corroborated. And it goes on to say the alleged victim's testimony alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." (Tr. Day 5 p. 6 L.18 – p. 7 L.1).

While Mathis acknowledged that the lack of any requirement to corroborate the testimony of an alleged sexual abuse victim was a correct statement of the law, he pointed out that the Iowa Code also prohibited instructing jurors to use a different standard for evaluating victim testimony. (Tr. Day 5 p. 7 L.2-16, p. 9 L.12-20). Jurors were already going to be given a standard instruction on how to evaluate the

credibility of witnesses, whereas the proposed instruction was not standard. (Tr. Day 5 p. 7 L.17-p. 8 L.4, p. 9 L.4-7, 21-25).

Mathis concluded:

> By specifically highlighting the testimony of the children, the court is treating their testimony with greater deference than that of the testimony of any other witness, Your Honor. Including my client, Justice Mathis, who, according to the evidence presented, is a special -- basically a special needs individual. He has -- He took special education. We're not asking for a -- for his testimony to be treated any differently than anyone else's, Your Honor, and we believe that by including that particular sentence that the instruction implies, doesn't state but it implies that a lesser standard should apply to the children's testimony. Which is, in fact, strictly contrary to Iowa Code 709.6.

(Tr. Day 5 p. 10 L.1-13).

The State responded that similar instructions had been upheld in two unpublished Court of Appeals cases. (Tr. Day 5 p. 11 L.14-p. 12 L.12). The State noted the instruction was a correct statement of the law, and argued that "if the jury were to find that their testimony was credible beyond a

reasonable doubt that that alone is sufficient to sustain a guilty verdict in this matter." (Tr. Day 5 p. 12 L.7-19).

Mathis responded that the rulings in the unpublished decisions cited by the State had yet to be adopted by the Iowa Supreme Court. (Tr. Day 5 p. 12 L.20-p. 13 L.2). Mathis also argued that such a substantive change in the jury instructions should come from Iowa's Jury Instructions Committee. (Tr. Day 5 p. 13 L.3-21).

The District Court determined the instruction accurately stated the applicable law and was appropriate because defense counsel mentioned in opening statements that there would be no evidence corroborating the complainant's testimony. (Tr. Day 5 p. 14 L.3-17). The court agreed, however, to shorten the instruction to simply state the law and not to "give any undue prominence to any -- any particular testimony." (Tr. Day 5 p. 14 L.18-p. 15 L.11).

As a result, the jury was instructed "There is no requirement that the testimony of an alleged victim of sexual offenses be corroborated." (Inst. 24)(App. p. 44).

Instruction 24 – while generally a correct statement of law – nonetheless implied a different standard for the complainants' testimony as compared to other witnesses, including Mathis himself. By telling the jury that the complainants' testimony, specifically, did not require corroboration, the implication was that the testimony of other witnesses somehow did. Particularly where no other evidence corroborated either the complainants' allegations against Mathis or his denials, the instruction was prejudicial.

A trial court has a duty to instruct the jury on the applicable law. State v. Stallings, 541 N.W.2d 855, 857 (Iowa 1995). In addition:

> [An instruction] is not intended to marshal the evidence or give undue prominence to certain evidence involved in the case. State v. Milliken, 204 N.W.2d 594, 596 (Iowa 1973). Trial court ordinarily should not draw attention to specific evidence when instructing the jury. "A trial court must walk a

> middle course and avoid arguing the case for either side in the instructions." State v. Fagan, 190 N.W.2d 800, 802 (Iowa 1971).

State v. Marsh, 392 N.W.2d 132, 133 (Iowa 1986). Instructions should not "lead a jury to dissociate the evidence thus emphasized from all other evidence they are duty bound to consider. The proper practice is to give a general instruction, … applicable to all witnesses alike." State v. Milliken, 204 N.W.2d 594 (Iowa 1973).

"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." State v. Stallings, 541 N.W.2d 855, 857 (Iowa 1995).

Mathis begins by recognizing that the Iowa Rules of Criminal Procedure state that no corroboration is required to support the testimony of a victim. See Iowa R. Crim. P. 2.21(3) (2020). See also 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.").

In fact, the law has long held that no corroboration of *any* witness' testimony is required *so long as the jury could reasonably deem the testimony to be credible*. See, e.g., Graham v. Chicago and N.W. Ry. Co., 143 Iowa 604, ___, 119 N.W. 708, 711 (1909)(applying rule in personal injury case); Artz v. Chicago, R.I. & P.R, 34 Iowa 153, 159-60, 1872 WL 200 (1871) (same). In determining the credibility of witness testimony, jurors in this case were instructed to consider whether the testimony was consistent with other evidence they believed. (Inst. 13)(App. p. 33). In this case, the complainants' testimony was not credible, but jurors were explicitly told no corroboration was required for their testimony. (Inst. 24)(App. p. 44).

An instruction telling jurors no corroboration is required for the testimony of the complainants – without a similar advisory as to the testimony of all other witnesses – singles out the complainants' testimony for special consideration. If the court instructs the jury that corroboration is specifically not

required for the complainants, the jury could reasonably infer that it is required for all other witnesses. The concept that "the express mention of one thing implies the exclusion of other things not specifically mentioned" is nothing new – it is regularly used in statutory interpretation. See, e.g., State v. Beach, 630 N.W.2d 598, 600 (Iowa 2001).

The Iowa Code recognizes that instructions should not treat victims differently than other witnesses:

> No instruction shall be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or any other offense.

Iowa Code § 709.6 (2019). While this statute is consistent with a change in prior law that required corroboration of complainant's testimony in cases of sexual abuse, see Iowa Code § 782.4 (1973), it goes beyond that revision. It does not simply state that no corroboration of a sexual assault complainant's victim is necessary; it flatly prohibits a district court from instructing jurors that there are different standards

for witnesses' testimony. Instruction 24 violates this directive.

The Court of Appeals agreed it was improper for the District Court to have given the instruction, based on its recent unpublished opinions. Opinion pp. 6-7 (citing State v. Kraai, No. 19-1878, 2021 WL 1400366, at *6 (Iowa Ct. App. Apr. 14, 2021); State v. Atkins, No. 20-0488, 2021 WL 3895198, at *4 (Iowa Ct. App. Sept. 1, 2021)). In Kraai, the Court of Appeals disavowed its own unpublished cases approving the instruction and acknowledged the noncorroboration instruction in Krai's case:

> singled out the testimony of the "complainant" as not requiring corroboration. Because it mentioned only the complaining witness, the jurors could have believed that the testimony of other witnesses, particularly the accused, did require corroborating evidence to be believed. Because of that asymmetry, we agree with Kraai that the challenged instruction defied section 709.6.

State v. Kraai, No. 19-1878, 2021 WL 1400366, at *3 (Iowa Ct. App. Apr. 14, 2021).

The Kraai Court acknowledged at least eight other jurisdictions had disapproved of giving noncorroboration instructions. Id. at *5 (citing (citing Burke v. State, 624 P.2d 1240, 1257 (Alaska 1980); Gutierrez v. State, 177 So. 3d 226, 229-30 (Fla. 2015); Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003); State v. Williams, 363 N.W.2d 911, 914 (Minn. Ct. App. 1985); State v. Schmidt, 757 N.W.2d 291, 297 (Neb. 2008); State v. Stukes, 787 S.E.2d 480, 483 (S.C. 2016); Veteto v. State, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000), abrogated on other grounds by State v Cook, 248 S.W.3d 172 (Tex. Crim. App. 2013); Garza v. State, 231 P.3d 884, 891 (Wyo. 2010)).

The Kraai Court also recognized at least eight other jurisdictions had approved noncorroboration instructions. Id. at *5 (citing People v. Gammage, 828 P.2d 682, 687 (Cal. 1992); Mency v. State, 492 S.E.2d 692, 699–700 (Ga. Ct. App. 1997); People v. Welch, Crim. No. 90-00008A, 1990 WL 320365, at *1 (D. Guam App. Div. Oct. 30, 1990); People v. Smith, 385 N.W.2d 654, 657 (Mich. Ct. App. 1986); Pitts v.

State, 291 So. 3d 751, 757–59 (Miss. 2020); Gaxiola v. State, 119 P.3d 1225, 1231–32 (Nev. 2005); State v. Marti, 732 A.2d 414, 420–21 (N.H. 1999); State v. Zimmerman, 121 P.3d 1216, 1223 (Wash. Ct. App. 2005)).

Notably, several of the cases that have upheld noncorroboration instructions included clarifying language that does not appear in the instruction given in Mathis' case. See, e.g., Pitts v. State, 291 So.3d 751, 757 (Miss. 2020)("the uncorroborated testimony of a sex-crime victim is sufficient to support a conviction if accepted as true by the finder of fact"); Mency v. State, 492 S.E.2d 692, 699-700 (Ga. Ct. App. 1997)(jury instructed "the uncorroborated testimony of the victim is sufficient to sustain a conviction of the charges of child molestation and aggravated child molestation as contained within this bill of indictment if that testimony is sufficient to convince you of the defendant's guilt beyond a reasonable doubt"); Gaxiola v. State, 119 P.3d 1225, 1231-32 (Nev. 2005)(jury instructed "There is no requirement that the

testimony of a victim of sexual offenses be corroborated, and his testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty."); State v. Clayton, 202 P.2d 922, 923 (Wash. 1949)("You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.")).

While the Court of Appeals agreed it was error for the District Court to give the noncorroboration instruction, it determined the error was not prejudicial. Mathis respectfully disagrees.

The instruction presented in Mathis' case created a different standard for the complainants' testimony as compared to the testimony of the defense witnesses. While trying to address one ill – the idea that testimony by sexual assault complainants must *always* be corroborated – it created another – that it *never* requires corroboration, even if not credible. This instruction did not adequately state the applicable law and would have confused the jury into giving greater deference to the complainants, to the prejudice of Mathis. (Tr. Day 5 p. 10 L.1-13).

Because the resolution of this case rested primarily on the testimony of the complainants as compared to the testimony of the defendant -- along with the weight to be given to each -- "[i]t was therefore of prime importance to defendant that the case not be weakened by special judicial comment" on the weight to be given the complainants' testimony as distinguished from the testimony of other witnesses. State v. Bester, 167 N.W.2d 705, 710 (Iowa 1969).

When a court gives an improper instruction, this Court will review the error according to whether or not it is of a constitutional magnitude. State v. Hanes, 790 N.W.2d 545, 550 (Iowa 2010). "When an error is of a constitutional dimension, the State must show beyond a reasonable doubt the error did not result in prejudice." Id. If the error is not of a constitutional magnitude, "we presume prejudice and reverse unless the record affirmatively establishes there was no prejudice." Id. at 551.

Mathis contends Instruction 24 violated his due process right to a fair trial. When faced with a due process challenge to criminal jury instructions, the Iowa Supreme Court first considers "subjective, open-ended considerations, such as fair play and fundamental concepts of justice, … [and then] takes into account more objective factors, such as historical practice and contemporary consensus." State v. Becker, 818 N.W.2d 135, 153 (Iowa 2012), overruled on other grounds by Alcala v.

Marriott Int'l Inc., 880 N.W.2d 699, 708-09 (Iowa 2016) (standard of review).

"An allegedly erroneous ruling […] must go to the heart of the case in order to be considered of such magnitude as to implicate the due process clause." State v. Traywick, 468 N.W.2d 452, 455 (Iowa 1991). "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." In re Winship, 397 U.S. 358, 361 (1970). "Evidentiary charges in jury instructions that relieve the government of its burden of proving each element of the offense beyond a reasonable doubt violate the Due Process Clause of the Fourteenth Amendment." Moore v. Ponte, 186 F.3d 26, 33 (1st Cir. 1999).

This Court also recognizes that instructions, rules, and statutes violate due process when they "violate fundamental concepts of justice which define the community's sense of fair play and decency." See State v. Becker, 818 N.W.2d at 151 (citing State v. Cox, 781 N.W.2d 757, 764 (Iowa 2010) and

State v. Reyes, 744 N.W.2d 95, 101 (Iowa 2008)). In State v. Milliken, the Iowa Supreme Court recounted the history of its warning to trial courts to avoid emphasizing certain evidence or facts in instructions so that they do not "lead a jury to dissociate the evidence thus emphasized from all other evidence they are duty bound to consider." State v. Milliken, 204 N.W.2d 594, 596-97 (1973)(citing cases dating as far back as 1908).

Instruction 24 places particular emphasis on the lack of need for corroboration of the complainants' testimony, while potentially misleading jurors to believe corroboration is necessary for other witnesses. This relieves part of the burden on the State, as it allows jurors to view the complainants' testimony in a more favorable manner than other witnesses' testimony.

This is particularly problematic given that Mathis testified in his own defense. Mathis testified to a general denial – he did not commit the acts alleged. (Tr. Day 4 p. 160

L.17-p. 164 L.8). Because he was asserting a general denial, there was nothing substantive to corroborate. Logically, he would not be able to prove an act never happened. Proving Non-Existence, available at https://www.logicallyfallacious.com/logicalfallacies/Proving-Non-Existence (last visited August 3, 2020). Legally, he was not required to do so. State v. Allen, 293 N.W.2d 16, 20 (Iowa 1980)(state has burden to prove all elements of an offense beyond a reasonable doubt).

As described in more detail in Issue I above and incorporated here by reference, the complainants' testimony was not only not corroborated but also contradictory at times. Both complainants testified they were abused by Atkins. (Tr. Day 3 p. 38 L.2-p. 45 L.13, p. 54 L.22-p. 66 L.7, p. 83 L.23-p. 85 L.23). They would have knowledge of sex acts based upon that prior abuse. Notably, when the complainants initially disclosed to their mother, both named Atkins – not Mathis – as the perpetrator. (Tr. Day 3 p. 106 L.14-p. 109 L.9).

The Court of Appeals incorrectly determined there was no prejudice based on Mathis' opportunity to commit the crime, the adequacy of the complainant's testimony, and the arguments of counsel including the failure to call attention to the noncorroboration instructions. Opinion pp. 7-8. Opportunity is not the same as guilt, the complainants' testimony was not credible, and the court – not counsel – instructs the jury on the law. State v. Mayes, 286 N.W.2d 387, 392 (Iowa 1979). This Court should not assume jurors ignored the instruction that permitted them to treat the complainants' testimony differently than the remaining evidence. See State v. Hanes, 790 N.W.2d 545, 552 (Iowa 2010)(jurors are presumed to follow instructions).

Regardless of whether the State has the burden to show the lack of prejudice beyond a reasonable doubt or whether this Court presumes prejudice unless the record affirmatively establishes otherwise, the record in this case establishes the requisite harm requiring a new trial.

CONCLUSION

For all of the reasons discussed in Issue I above, Defendant-Appellant Justice Mathis respectfully requests this Court vacate the decision of the Court of Appeals, vacate his convictions, sentence, and judgment for three counts of Sexual Abuse in the Second Degree and remand his case to the District Court for dismissal. Alternatively, for the reasons discussed in Issue II above, he respectfully requests a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $4.93, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

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

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,576 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Theresa R. Wilson Dated: 11/17/21

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