\IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-0744

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD JAMES BRIMMER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE THOMAS A. BITTER, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Defendant Ronald James Brimmer ("Defendant") appeals his conviction following a jury trial in which he was found guilty of Sexual Abuse in the Second Degree, in violation of Iowa Code section 709.3(1)(c), a class B felony. On appeal, Defendant asserts the evidence was not sufficient to support his conviction, and he was denied his right to a public trial.

Course of Proceedings

The State accepts Defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3). The State notes the trial information was filed on September 20, 2019, not August 23, 2019, as Defendant states in his brief. 09-20-2019 Trial Inform.; App. 5–6. To the extent Defendant's course of proceedings delves into legal or factual disputes, the State does not agree with his characterizations.

Facts

Defendant and Agustin Bon-Orduno worked together at John Deere and were friendly outside of work. Trial Tr. Vol. III at 79:10–21. One night, they went to a McDonald's drive-through where 16-year-old J.H. worked. Trial Tr. Vol. II at 20:2–3, 21:1–11, Vol. III at 79:22–80:3. Bon-Orduno asked J.H. for her phone number. Trial Tr. Vol. II at 21:12–22. Initially, she declined, but after speaking with him a little more, she agreed. Trial Tr. Vol. II at 21:21–22:6. Bon-Orduno then added her as a friend on Snapchat. Trial Tr. Vol. II at 106:12–18.

On July 19, 2018, J.H. posted on Snapchat that she "was looking for alcohol to go drinking[.]" Trial Tr. Vol. II at 22:7–13. J.H. had never before consumed alcohol. Trial Tr. Vol. II at 34:4–17. Bon-Orduno responded "[t]hat he could help [her] out and give [her] some alcohol, and [they] could hang out together and drink." Trial Tr. Vol. II at 22:7–23. Defendant and Bon-Orduno drove to J.H.'s house and picked up J.H. and her younger sister, N.D. Trial Tr. Vol. II at 23:1–19, 57:21–58:10. N.D. was not interested in drinking, but she wanted to "come along [] just to make sure [J.H.] was okay." Trial Tri. Vol. II at 23:20–25, 57:7–20.

Defendant and Bon-Orduno made drinks for J.H. and N.D., and the four of them hung out in Bon-Orduno's bedroom. Trial Tr. Vol. II at 24:1–25:18, 58:11–23, 66:12–18. They listened to music and drank, except N.D. who only took a couple of sips and declined to drink more. Trial Tr. Vol. II at 25:19–26:13, 61:9–62:10, 65:22–66:5. At some point, Defendant texted J.H. on Snapchat and told her that Bon-Orduno liked her. Trial Tr. Vol. II at 51:17–25, 52:23–53:3, Ex. 42 (Defendant's Police Interview).

During the evening, the four left the house to get more alcohol from a local convenience store. Trial Tr. Vol. II at 64:2–23. They returned to Bon-Orduno's house and continued to drink and listen to music in his bedroom. Trial Tr. Vol. II at 64:22–65:14. Defendant and Bon-Orduno went to the kitchen to get J.H. another drink and were there for "three minutes, and then they put ice in a cup and poured her a drink." Trial Tr. Vol. II at 66:12–18.

Twenty minutes after Defendant and Bon-Orduno conferred in the kitchen and made J.H. a drink, J.H. left the bedroom to use the bathroom. Trial Tr. Vol. II at 26:14–20, 66:22–67:7. When J.H. left the bathroom, Bon-Orduno was waiting for her, "pushed [her] up against the wall and was holding [her] arms and [] trying to kiss

[her].” Trial Tr. Vol. II at 26:21–27:9. J.H. tried to move away from him, but he continued “to hold [her] there and [tried] to kiss [her] face.” Trial Tr. Vol. II at 27:10–25. J.H. told Bon-Orduno “no,” that she had a boyfriend, and “I can’t.” Trial Tr. Vol. II at 28:1–2.

Bon-Orduno ignored J.H.’s words and her continued resistance and pushed her into the bathroom. Trial Tr. Vol. II at 28:3–24. Bon-Orduno then pushed J.H. “over to where [she] was bending over and pulled [her] pants down.” Trial Tr. Vol. II at 28:25–29:12. Bon-Orduno proceeded to bend J.H. over the bathtub, then forcibly raped her both vaginally and anally. Trial Tr. Vol. II at 29:13–30:6. When he finished, J.H. “collapsed into the bathtub, so…half [her] body was over the wall of the bathtub, and then he left.” Trial Tr. Vol. II at 30:7–10. J.H. was “[e]xtremely confused of what just happened and terrified.” Trial Tr. Vol. II at 30:11–13.

While she was still lying over the bathtub, Defendant came into the bathroom. Trial Tr. Vol. II at 30:20–31:5. Defendant asked J.H. if he could touch her, and she said no. Ex. 40 (J.H. Police Interview).[1]

[1] At trial, J.H. could not remember what Defendant said. Trial Tr. Vol. II at 30:25–7, 49:15–23. During her police interview right after the assault, J.H. told police he asked to touch her, and she said no. Ex. 40 (J.H. Police Interview).

Defendant picked J.H. up, bent her over, and tried to insert his penis into her vagina, but he was unable to get an erection. Trial Tr. Vol. II at 31:8–16. Defendant asked J.H. to perform oral sex, and she did not respond. Trial Tr. Vol. II at 31:12–20. Defendant eventually became erect and forcibly raped J.H. both vaginally and anally. Trial Tr. Vol. II at 31:21–32:7. When he was finished, J.H. "fell back down, and he left." Trial Tr. Vol. II at 32:8–14.

While Defendant raped J.H., she heard Bon-Orduno speaking with her sister, N.D., about music to "distract" her. Trial Tr. Vol. II at 67:14–68:1, Ex. 40 (J.H. Police Interview). The music was loud, and N.D. did not hear anything else going on in the house. Trial Tr. Vol. II at 68:2–10. While J.H. was still lying in the bathroom, she heard Defendant and Bon-Orduno tell her sister to "check on [J.H.] because [she] was drunk and could have fallen off the toilet." Trial Tr. Vol. II at 32:15–21, 68:11–17.

N.D. went to the bathroom and found J.H. "hunched over the bathtub with her pants and her underwear at her ankles." Trial Tr. Vol. II at 68:18–25. J.H. was groggy, so N.D. helped her up. Trial Tr. Vol. II at 69:6–20. N.D. asked Bon-Orduno to drive them home. Trial Tr. Vol. II at 69:21–70:1. Bon-Orduno tried to delay her, but N.D.

insisted. Trial Tr. Vol. II at 69:21–70:22. Defendant and Bon-Orduno then drove J.H. and N.D. home. Trial Tr. Vol. II at 33:10–20, 71:1–72:5.

Once J.H. and N.D. arrived home, J.H. told her boyfriend what happened. Trial Tr. Vol. II at 33:21–23, 34:18–37:21. Although they were scared they would get in trouble for underage drinking, J.H. and N.D. called police to report the assault. Trial Tr. Vol. II at 38:5–23, 73:8–74:12, Ex. 2 (Call to Dispatch). Police transported J.H. to the hospital where a sexual assault evidence collection kit was performed. Ex. 92:20–96:9, 103:21–105:3, Ex. 3 (J.H. Medical Records); Conf. App. 6–20. Seminal fluid collected as part of the kit revealed two DNA profiles: Defendant's and Bon-Orduno's. Trial Tr. Vol. III at 13:1–8, 14:1–16:10, 17:10–17, Ex. 45 (DNA Report); Conf. App. 34.

After the assault but prior to the search warrant being served at Bon-Orduno's house, Defendant texted with Bon-Orduno's brother, Jessy—who was present at the house during the assaults but did not participate. Trial Tr. Vol. III at 37:11–40:19, 41:19–42:1. In what appears to be a joke, Jessy called Defendant "gay" for having sex with J.H. after Bon-Orduno and referred to "sloppy seconds." Trial Tr. Vol. III at 40:20–41:11, 88:7–12, Ex. 44 (iMessage Chat); Conf. App. 22.

Defendant responded with laughing emojis. Trial Tr. Vol. III at 41:12–14, Ex. 44 (iMessage Chat); Conf. App. 22. Jessy then texted, "I should have gangbanged the little sister," with "a sideways type of smiley face" emoji. Trial Tr. Vol. III at 41:15–18, Ex. 44 (iMessage Chat); Conf. App. 22. Defendant responded "hell yeah" with a "laughing hysterically" emoji. Trial Tr. Vol. III at 42:2–4, Ex. 44 (iMessage Chat); Conf. App. 22.

After Defendant and Jessy learned about the police investigation, they continued to text:

> Jessy: I think the girl told the truth that nothing happened.
>
> Defendant: Good but that's what I'm thinking cuz they would have done something by now.
>
> Jessy: Yea it's weird.
>
> Defendant: Yeah, that what I'm saying I'm hoping that nothing happens and we can just go back to how life was!
>
> Jessy: I hope so. Cuz detectives and cops are not stupid they should be smart enough to know the truth.
>
> Defendant: Yeah they probably caught her in some lie or something unless they are waiting till like Monday but like I said you would they wait that long you know.

***

Defendant: Yeah I'm hoping so like I said though we can even catch her in some many lies ourselves so just imagine how many they caught her in they're trained for that shit and like I said we should be fine because they have to do the rape test cuz they can't just arrest people for a female saying you raped them and shit they have to have the proof and the rape test will prove she wasn't raped.

Jessy: You should call bro and ask if you have charges.

Defendant: Hell I'm scared bro my baby moma called to see but they wouldn't tell her shit. They just lie anyways.

***

Jessy: They said they want to talk to you to get your story to match hers and be clear and off the hook.

Defendant: Yeah, fuck that though they can find me if they wanna talk cuz if I say shit that she didn't say then that's probably gonna stir it back up.

Jessy: Bro you gave up anyways.

Defendant: Yeah I'm scared fuck that.

***

Jessy: Right now it's my brother's word against hers.

Jessy: Two against one matching the truth should be good.

Jessy: Just tell the truth.

***

Jessy: LOL any news?

Defendant: No haven't heard anything.

Jessy: Good. You guys free men.

Trial Tr. Vol. III at 40:20–47:1, 54:23–55:9, Ex. 44 (iMessage Chat); Conf. App. 24–32.

Defendant gave a recorded interview to police. Ex. 42.[2] In it, Defendant admitted to hanging out with Bon-Orduno, J.H., and N.D. on July 19. *Id.* He initially claimed that his significant other dropped him off at Bon-Orduno's house, and J.H. and N.D. were already there. *Id.* Later in the interview, after the investigator told Defendant he planned to get the traffic cameras for the night in question, Defendant admitted that he went with Bon-Orduno to pick the girls up from their home and bring them to Bon-Orduno's. *Id.* Defendant said he exchanged messages with J.H. over Snapchat and told her that Bon-Orduno was interested in her. *Id.* Defendant claimed J.H. messaged

[2] The State had a difficult time viewing Exhibits 40 and 42, and on its review, there were no time stamps for more specific reference.

him and said she didn't want to do anything because she was in a relationship. *Id.* Defendant categorically denied any sexual contact with J.H. *Id.*

Defendant testified at trial and told an entirely different story. On July 19, Defendant said Bon-Orduno asked him if he wanted to come over to his house to hang out with J.H. and N.D. Trial Tr. Vol. III at 80:13–81:2. Defendant, Bon-Orduno, and J.H. drank at the house, but N.D. did not. Trial Tr. Vol. III at 81:4–82:13. Defendant said he added J.H. on Snapchat, then sent her a message and asked if she wanted to have a threesome with him and Bon-Orduno. Trial Tr. Vol. III at 82:2–83:6. Defendant claimed J.H. agreed to the threesome. Trial Tr. Vol. III at 83:7–24.

After the exchange of messages, Defendant said he saw Bon-Orduno and J.H. "kissing in the hallway before they went into the bathroom." Trial Tr. Vol. III at 84:4–11. While they were in the bathroom, Defendant "was either in the kitchen or in the room with Jessy." Trial Tr. Vol. III at 84:23–85:5. When Bon-Orduno exited the bathroom, Defendant went in. Trial Tr. Vol. III at 85:6–10. Defendant said he asked J.H. if he could touch her, and he claimed "[s]he shook her head yes." Trial Tr. Vol. III at 85:9–86:7. Defendant said he asked

J.H. to perform oral sex, and J.H. said no. Trial Tr. Vol. III at 86:5–16. Defendant said that J.H. then turned around and faced the bathtub, and he assumed that meant she was ready to have sex. Trial Tr. Vol. III at 86:17–87:7.

Defendant said he attempted to have sex with J.H., but he could not get an erection. Trial Tr. Vol. III at 86:23–87:7. During this time, Defendant stated J.H. "sat down on the end of the tub and started crying." Trial Tr. Vol. III at 87:8–15. Defendant claimed he then left the bathroom and told Bon-Orduno what happened. Trial Tr. Vol. III at 87:16–19. He agreed they told N.D. to check on J.H., then drove the girls home. Trial Tr. Vol. III at 87:20–88:4.

Defendant testified that he and Bon-Orduno had gone out drinking together "numerous times." Trial Tr. Vol. III at 97:7–24. During one of these occasions, Bon-Orduno told Defendant he hadn't had sex since he moved to the United States, and Defendant told him he "wanted to help him get laid[.]" Trial Tr. Vol. III at 97:7–21.

ARGUMENT

I. The Evidence Was Sufficient to Show that Defendant Was Aided and Abetted By Another Person When He Sexually Assaulted J.H.

Preservation of Error

Defendant preserved this claim for appeal by moving for a judgment of acquittal on the specific grounds he now raises and receiving a ruling on the motion. Trial Tr. Vol. III at 102:16–106:5.

Standard of Review

Claims of legal sufficiency are reviewed for "correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

A challenge to the sufficiency of the evidence does not allow a reviewing court to weigh evidence or determine that the jury weighed the evidence incorrectly. "'Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence.'" *Sanford*, 814 N.W.2d at 615 (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)). Instead, "review on questions of sufficiency of the evidence is to determine if there is substantial evidence to support the verdict of the jury." *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997) (internal string cite omitted). This occurs when "a rational trier of fact" viewing the evidence in the light most favorable to the State

"could have found that the elements of the crime were established beyond a reasonable doubt." *State v. Keopasaeuth*, 645 N.W.2d 637, 640 (Iowa 2002) (citing *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)). The fact-finder decides which evidence to accept or reject. *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005). Evidence is not insubstantial merely because the evidence could support contrary inferences or because the verdict rests on weighing the credibility of conflicting witness testimony. *Id.* "Direct and circumstantial evidence are equally probative." Iowa R. App. P. 6.904(3)(p); *see also State v. Thomas*, 847 N.W.2d 438, 447 (Iowa 2014).

"In considering a sufficiency-of-the-evidence challenge, '[i]t is not the province of the court…to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury.'" *State v. Sousley*, No. 19-1103, 2020 WL 5650756, *7 (Iowa Ct. App. Sept. 23, 2020) (quoting *State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006)).

Merits

Defendant was charged with sexual abuse in the second degree under the theory that he was aided or abetted by another person

while he performed a sex act that was forcible or against the will of J.H. Iowa Code § 709.3(1)(c). The jury was marshalled to find whether Defendant "was aided or abetted by one or more person" during his commission of the sex act against J.H. Jury Instr. No. 13; App. 18. Defendant claims the evidence is insufficient to prove he was aided or abetted by another person when he assaulted J.H. He does not challenge any of the other elements.

Aid or abet was defined for the jury.

> …"[A]id and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aid and abets the commission of a crime must be determined only on the facts which show the part he has in it and does not depend upon the degree of another person's guilt.

Jury Instr. No. 15; App. 19; *see also State v. Tyler*, 873 N.W.2d 741, 750 (Iowa 2016) (internal citation omitted) ("To sustain a conviction

on the theory of aiding and abetting, the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act either by active participation or by some manner encouraging it prior to or at the time of its commission.").

Defendant claims there is no evidence of a prior agreement between himself and Bon-Orduno to commit a sexual assault against J.H. App. Br. at 41. To believe this argument you would have to believe that after Defendant and Bon-Orduno *together* picked up J.H. and N.D. and *together* supplied J.H. with alcohol until she was intoxicated, they both *independently* decided to successively rape J.H. in the exact same bathroom in the exact same manner. You would also have to believe that after Bon-Orduno finished assaulting J.H. in the bathroom, he did not inform Defendant that J.H. was in a vulnerable position in the bathroom, and that Defendant just happened to stumble upon her half-naked and slumped over a bathtub and spontaneously decided to rape her. This is not only preposterous; it's soundly belied by the record.

"'[E]vidence of a defendant's presence, companionship, and conduct before and after the offense is committed may be enough from which to infer a defendant's participation in the crime.'" *State v.*

Neiderbach, 837 N.W.2d 180, 211 (Iowa 2013) (quoting *State v. Hearn*, 797 N.W.2d 577, 581 (Iowa 2011)). Here, Defendant was not merely present at Bon-Orduno's house. He joined Bon-Orduno to pick up two underage girls and transport them to Bon-Orduno's house. Trial Tr. Vol. II at 23:1–19, 57:21–58:10. He joined Bon-Orduno in making alcoholic drinks for these underaged girls. Trial Tr. Vol. II at 24:1–25:18, 58:11–23, 66:12–18. N.D. also saw Defendant and Bon-Orduno privately converse in the kitchen for a few minutes before making J.H. another drink. Trial Tr. Vol. II at 66:12–18. Not long after, J.H. left to use the bathroom, and Bon-Orduno followed to begin the first assault. Trial Tr. Vol. II at 26:14–20, 66:22–67:7.

After Defendant and Bon-Orduno raped J.H., they told N.D. a story about how J.H might have fallen off the toilet and had N.D. check on her. Trial Tr. Vol. II at 32:15–21, 68:11–17. Then both Defendant and Bon-Orduno drove her and N.D. home. Trial Tr. Vol. II at 33:10–20, 71:1–72:5. The day after the assaults, Defendant exchanged messages with Bon-Orduno's brother, Jessy, where Jessy referred to Defendant as "gay" for assaulting J.H. after Bon-Orduno and called J.H. "sloppy seconds." Trial Tr. Vol. III at 40:20–41:11, 88:7–12, Ex. 44 (iMessage Chat); Conf. App. 22. In the days after they

became aware that J.H. had reported the assault to police, Defendant and Jessy exchanged several messages where they worried about charges being brought and discuss telling the same story to police so it's "two against one matching the truth[.]" Trial Tr. Vol. III at 40:20–47:1, 54:23–55:9, Ex. 44 (iMessage Chat); Conf. App. 24–33; *see also State v. Christensen*, No. 09-0961, 2010 WL 4792120, at *2–6 (Iowa Ct. App. Nov. 24, 2010) (rejecting sufficiency challenge attacking victim's credibility and observing that Christensen's argument "completely ignores both his own statements to the DCI consistent with L.S.'s description of the assault and the confirming statements of Sickels . . . both Christensen and Sickels lied to the DCI and then change their stories after they talked privately in the DCI parking lot."); *State v. Sickels*, No. 09-0897, 2010 WL 4792316, at *3–*5 (Iowa Ct. App. Nov. 24, 2010) (same).

And "'[c]ircumstances matter.'" *Sousley*, 2020 WL 5650756 at *8 (quoting *Tyler*, 873 N.W.2d at 751). Bon-Orduno's "initial sex act with" J.H. "'could be regarded as encouragement for what subsequently happened—i.e.' further sex acts performed on" J.H. by Defendant. *Id.* (quoting *Tyler*, 873 N.W.2d at 750–51); *see also State v. Ledezma*, 549 N.W.2d 307, 312 (Iowa 1996) (weighing "the fact the

three men all took turns assaulting [the victim] as support for the finding of aiding and abetting."); *State v. Finnigan*, 478 N.W.2d 630, 632 (Iowa 1991) (referring to Iowa Code § 709.3(1)(c) as "the 'gang rape' statute[.]").

Importantly, Defendant admitted that he saw Bon-Orduno kiss J.H. outside the bathroom before going inside with her. Trial Tr. Vol. III at 84:4–11. He even claimed that he exchanged Snapchat messages with J.H. in which he solicited a threesome with J.H. and Bon-Orduno. Trial Tr. Vol. III at 82:2–83:24. Clearly, the jury rejected Defendant's claim that these sexual acts were consensual, and he does not challenge the sufficiency of that determination. Thus, Defendant cannot claim ignorance of what Bon-Orduno did to J.H. in the bathroom; acts which directly preceded his own assault on J.H.

There was also evidence that Bon-Orduno lent aid to Defendant while Defendant was raping J.H. in the bathroom. Bon-Orduno played loud music and "distracted" N.D. by going to the bedroom and talking to her about music and singing. Trial Tr. Vol. II at 67:14–68:10, Ex. 40 (J.H. Police Interview). These acts demonstrated Bon-Orduno's knowledge that Defendant was assaulting J.H. in the bathroom—and tried to provide him cover. Finally, Defendant lied to

police during the investigation and changed his story almost entirely at trial. *See State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982) (observing that a defendant's telling of false stories to explain or deny material facts against them "is by itself an indication of guilt"). Defendant's claim that the evidence was not sufficient to prove he was aided and abetted by another person while he committed a sex act on J.H. is without merit and should be rejected.

II. The District Court Did Not Err When It Closed the Trial to the Public Due to the COVID-19 Pandemic.

Preservation of Error

Whether error is preserved in this case is debatable. The day before trial, the parties met to discuss motions in limine and jury selection. The district court said that "because of Covid and social distancing" it would call prospective jurors in two groups for voir dire—a morning group and an afternoon group. 04-05-21 Motion Tr. at 10:4–19. It then discussed "whether or not this trial's going to be open to the public." 04-05-21 Motion Tr. at 11:24–25. The district court explained:

> The only setup that we have that can accommodate a jury trial in our county is to spread the jurors out evenly in the back of the courtroom behind the bar. Therefore, if we had any people from the public for either side, for

> the Defendant or for the victim, those people would have to sit very close to – either right next to or right behind the jurors. The couple of jury trials that we've done up to this point, we've simply closed the trial to the public, and I know that is not ideal, but most important to me is that we get a fair trial in this case, fair for everybody involved, both sides, and we want the jurors to feel, number one, that they don't have people sitting too close to them during this time of Covid, and number two, that we don't have people sitting close enough to the jurors that the jurors either hear something they shouldn't hear or that the jurors feel in some way intimidated by either side. So in all likelihood, probably will not be able to allow anybody from the public into the trial.

04-05-21 Motion Tr. at 12:1–21.

After the district court's statement, the State did "not have any record" to make on the issue. 04-05-21 Motion Tr. at 12:22–23. Defendant suggested they "flip-flop" the courtroom and allow spectators to sit in front of the bar inside the jury box. 04-05-21 Motion Tr. at 13:1–8. The district court responded:

> Technically, and from a spacing standpoint, I think it would [work]. I think we can fit some people up in the jury box. They'd be seated in front of the bar. They would be directly behind one of the counsel tables because we've turned the counsel tables a little bit inward to face each other. They'd also be seated up front pretty close to the witness stand. I'll think about that, but I'm not sure that that would be something that I would be

> comfortable doing, but let me walk around the courtroom this afternoon and think about that a little bit.

04-05-21 Motion Tr. at 13:9–19. Trial counsel stated "Okay. And in the meantime, I'll discuss with [Defendant], you know, whether he's really wanting to enforce his right to a public trial or what we can work out." 04-05-21 Motion Tr. at 13:20–23.

On the first day of trial, prior to jury selection, Defendant raised the issue again and stated his objection "if the public is disallowed." Trial Tr. Vol. I at 3:20–4:11. The district court said:

> [L]ogistics in the courtroom make it really, really difficult to have anybody from the public in because the jurors will be evenly spaced out in the back of the courtroom, and anybody from the public is going to be seated very close to the jurors, and I've said all along that everything is not functioning perfectly ideal during Covid. One of my goals is to make this trial open to the public, but my very first goal is to make sure we have a fair trial for the State, for the Defendant and that it's fair in every way to all witnesses as well, including any witness who may testify as a victim. I don't want people from the public seated really close to the witness stand up in front where the jury box is. I don't want people from the public on either side sitting right next to or right behind the jurors because I want the jurors to feel like it's safe and that I don't want them to overhear anything. I don't want them to feel intimated in any way.

> So logistically it's not going to work to have people in from the public. We have closed a few trials here previously to the public. If there was a way I could stream this, for example, to another courtroom or publicly somehow, I would do that. I don't have that capability, and again, I've said if the State wants to provide somebody to do that, I'm happy to accommodate that, but I can't run that myself. So for me to protect the fairness of this trial comes before family members having the ability to come in and sit and watch, and that's unfortunate, but that's just the way it's going to go during Covid. My suspicion is sometime within the next six weeks or so, give or take, our social distancing is going to be relaxed because everybody will have had access to the vaccination and I think we'll be back to normal. Until then in that short period of time, I understand that his family may not be entirely happy that they don't get to sit and watch, but unless we stream this to another location, they're not going to be able to sit in the courtroom and watch, and that's just the way it's going to have to be.[3]

Trial Tr. Vol. I at 6:5–25. Defendant asked the district court to clarify whether trial would be closed during voir dire only or would be closed entirely. Trial Tr. Vol. I at 7:3–6. The district court responded:

> Right. Yes, because both times the jurors are going to sit spaced out in the back of the

[3] Although the district court suggested it may be possible for the State to stream the trial to a different room, Defendant never requested that this option be implemented, and its feasibility was never discussed on the record. Defendant does not raise this issue in his brief.

> courtroom, and with a criminal jury, we're going to have 14 jurors so they're going to fill up that back of the courtroom. I walked around there yesterday. The only place we could possibility fit public would be those benches against the back windows and even there, they're going to be seated about six feet behind the second row of jurors, and I'm not – I'm just not comfortable with that. I don't want—even if somebody says something unintentionally by reaction without any intention to cause any influence, I don't want the jurors seated that close to the public where they can overhear something that they shouldn't hear. So, yes.

Trial Tr. Vol. I at 7:7–20. The district court then offered Defendant the option to

> reset trial at a time when social distancing is not an issue and the public could be in. He certainly doesn't have to do that, but that would be one other option as opposed to having trial today without any members of the public or any members of his family being present.
>
> So, again, when we finish making our short record, [Trial Counsel], I'll let you talk to your client about that issue. If he would prefer to continue trial and do it in a couple of months when his family can be present, you let me know that and we'll talk about that before we continue on with the trial.

Trial Tr. Vol. I at 8:13–9:7. The parties then proceeded to voir dire.

At the end of the day, trial counsel "renew[ed] my request then that my client's mother would be able to be in the courtroom, just one

person, during trial." Trial Tr. Vol. I 174:24–175:1. Without addressing that request, the district court asked whether Defendant and trial counsel discussed a continuance. Trial Tr. Vol. I at 175:2–6. Although it was still within the speedy trial deadline, Defendant did not want to continue trial because he'd been incarcerated since his arrest. Trial Tr. Vol. I at 175:7–176:1. The district court then asked, "[a]nything else from the defense?" Trial Tr. Vol. I at 176:1. Trial counsel said no. Trial Tr. Vol. I at 176:2. This issue was not raised or addressed again until post-trial motions. Thus, it appears the district court never actually ruled on Defendant's request to have his mother present during trial.

Arguably, when Defendant pivoted from his request that the public be allowed into the trial and asked only for his mother to attend, he abandoned his original objection to the trial being closed to the general public. And the district court never ruled on Defendant's request to allow his mother to attend. Preservation of error requires an issue to be both raised and decided by the district court, and here, while there was much discussion, there was never a final ruling. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (internal citations omitted); *see also Taft v. Iowa Dist. Court ex rel Linn Cty.*,

828 N.W.2d 309, 322 (Iowa 2013) (citing *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) ("Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal.")). This is because "it is not a sensible exercise of appellate review to analyze facts of an issue 'without the benefit of a full record or lower court determination[].'" *Meier*, 641 N.W.2d at 537 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992)).

Similar cases suggest Defendant's arguments here were not sufficient to preserve error. In *People v. Poe,* the California Court of Appeals reiterated the principle that "the right to [a] public trial may be forfeited by failing to object." A160102, 2021 WL 5578080, at *2 (Cal. Ct. App. Nov. 30, 2021). Amid the COVID-19 pandemic, a California district court held a sentencing hearing for a defendant that excluded the public. *Id.* at *2. Trial counsel told the court the defendant's wife and family were in the hallway and asked the court to allow them to enter. *Id.* at*1– 2. "The court denied the request, and stated that it would not 'allow anyone in.'" *Id.* at*1–2. Trial counsel said, "'Even the spouse, your Honor?' The court said, 'No.'" *Id.* at *1.

Counsel responded, "'Okay,' and did not object at the time or later in the proceedings." *Id.* at*1–2.

The California appellate court relied on *Waller v. Georgia*, 467 U.S. 39 (1984), and found the defendant's request to have his family present and the district court's refusal to let anyone in insufficient to preserve the issue because his failure to object "forfeited 'his right [to have his family present at sentencing]…preclude[ing] any subsequent challenge by him of an order excluding the public.'" *Id.* (quoting *People v. Virgil*, 253 P.3d 553, 578 (Cal. 2011)). The court also found that had the defendant "asserted the right, it would have been incumbent on him to demonstrate how the presence of family members 'bore a reasonably substantial relation to his opportunity to defend himself.'" *Id.* at *3 (quoting *Virgil*, 253 P.3d at 576). The court stated that the defendant failed to specify who, other than his wife, was in the hallway nor did he assert "how their absence deprived him of the opportunity to mitigate his sentence." *Id.*

And in *State v. Richardson*, the Ohio Court of Appeals found that the defendant failed to preserve error when the district court "did not make an affirmative declaration that appellant's family members were necessarily barred from the proceedings." No. 2020-T-0037,

2021 WL 4477645, at *6 (Ohio Ct. App. Sept. 30, 2021). The court found that trial counsel was "obviously aware" of the administrative orders that placed "certain restrictions and limitations relating to courtroom attendance[,]" but failed to assert that the defendant's family members "could have fallen under the rubric of those having business with the court[,]" and thus, been admitted to the hearing. *Id.* The court also found that trial counsel failed to "state the family was available to appear, only that they 'planned to appear' and 'would like to have spoken.'" *Id.*

The court held that not only were these arguments a failure to "formally object[,]" they "acquiesced to sentencing in the absence of appellant's family. Appellant's counsel only asked the court to 'consider' permitting family members to speak in mitigation; counsel, however, did not revisit the issue or object to the court proceeding to sentencing." *Id.*

These cases suggest that merely asking the district court to permit the public or family members to attend the trial is not sufficient to raise the issue in the district court or preserve it for appeal; the defendant must make a specific objection to the trial proceeding without the attendance of the public or family. *See Poe*,

2021 WL 5578080 at*2 (quoting *Waller*, 467 U.S. at 47) (finding "the prerequisite to initiate that inquiry is "the objection[] of the accused.'"); *see also Richardson*, 2021 WL 4477645, at *6 (finding that after the defendant asked the district court to "consider" permitting his family members to attend, "counsel [] did not revisit the issue or object to the court proceeding to sentencing."). And the defendant must obtain a ruling for the issue to be preserved. *See Richardson*, 2021 WL 4477645, at *6 ("The trial court, however, did not make an affirmative declaration that appellant's family members were necessarily barred from the proceedings.").

With these principles in mind, the State would assert Defendant failed to preserve error on this issue. First, while Defendant originally objected "if the public was disallowed[,]" after voir dire, when Defendant raised this issue again, he abandoned this objection and merely "requested" Defendant's mother be permitted in the courtroom. Trial Tr. Vol. I at 174:24–175:1. Defendant raised no objection to proceeding without her present. Second, Defendant failed to obtain a ruling on this request. After Defendant made it, the district court asked about the possibility of continuing the trial—an issue that was left open prior to voir dire and needed to be resolved.

Trial Tr. Vol. I at 8:13–9:11, 175:2–176:2. Third, while trial counsel requested Defendant's mother be allowed in the courtroom, no record was made as to whether she was available to attend, whether she desired to do so, and if she was available and desired to attend, whether her presence "'bore a reasonably substantial relation to [Defendant's] opportunity to defend himself.'" *Poe*, 2021 WL 5578080, at *3. Fourth, Defendant never again raised the issue of his mother's attendance. As such, Defendant acquiesced in his non-public trial and forfeited his right appeal the issue.

Standard of Review

Review of this issue is de novo. *State v. Schultzen*, 522 N.W.2d 833, 835–36 (Iowa 1994).

Merits

A. Legal framework for the right to a public trial.

Both the State and Federal Constitutions provide the accused a right "to a speedy and public trial." U.S. Const. amend. VI; Iowa Const. art. I, § 10; *Schultzen,* 522 N.W.2d at 835–36; *Des Moines Register & Tribune Co. v. Iowa Dist. Ct. for Story County,* 426 N.W.2d 142, 144 (Iowa 1988); *Iowa Freedom of Information Council v. Wifvat,* 328 N.W.2d 920, 924 (Iowa 1983); *State v. Hightower,* 376 N.W.2d 648, 649 (Iowa Ct. App. 1985). The right to a public trial

is applicable against the states under the Fourteenth Amendment. *Presley v. Georgia*, 558 U.S. 209, 212 (2010).

The public-trial requirement benefits the accused in multiple ways: (1) the public presence allows for the public to see that a person is not unjustly condemned; (2) the public may keep a jury aware of the responsibility and importance of their function; (3) a public trial encourages witnesses to come forward; and (4) the public's presence discourages perjury. *See Waller*, 467 U.S. at 46.

Yet, the public-trial right "is subject to exceptions." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017). "The right to a public trial has never existed as a rigid, inflexible straight jacket upon the courts." *State v. Lawrence*, 167 N.W.2d 912, 914 (Iowa 1969); *State v. Rees,* No.14-1124, 2015 WL 3876740, at *3 (Iowa Ct. App. June 24, 2015). Trial courts have the discretion to limit attendance as the circumstances warrant, protect witnesses, or to grant or refuse individual voir dire. *Wifvat*, 328 N.W.2d at 924; *State v. Webb,* 309 N.W.2d 404, 414 (Iowa 1981); *State v. Dicks,* 473 N.W.2d 210, 213 (Iowa Ct. App. 1991). The Supreme Court "has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the

government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45. The right is also subject to forfeiture and waiver. *State v. Pinno*, 850 N.W.2d 207, 212–13, 223–226 (Wis. 2014).

In *Waller*, the United States Supreme Court laid out four criteria for excluding the public:

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

467 U.S. at 48. These criteria are only invoked when the accused, or the public, objects to exclusion of the public. *See id.* at 47.

B. The COVID-19 global pandemic.

In late 2019, a novel coronavirus began to circulate throughout the globe, infecting millions and killing thousands, and creating a global pandemic the likes of which had not been seen for a century. *See* Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337, 2020 WL 1272563 (March 13, 2020). On March 13, 2020, as this deadly virus began to spread quickly

through American communities, President Trump declared a national state of emergency. *See id.* On February 24, 2021, President Biden extended this declaration. *See* Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 86 Fed. Reg. 11599, 2021 WL 754367 (Feb. 24, 2021).

On March 17, 2020, Governor Reynolds declared a state of public health disaster emergency in Iowa. Gov. Reynolds Issues a State of Public Health Disaster Emergency, March 17, 2020.[4] Because the virus—COVID-19—spreads quickly from person to person, all areas of public life came to a shocking and abrupt halt. *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 10 (Iowa 2020) (Appel, J., specially concurring) (noting the "serious health concerns arising from the COVID-19 pandemic."); *see also Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 828 (Mass. 2021) ("COVID-19 can cause severe illness in infected persons and may lead to death. Person-to-person contact is the primary method by which the virus spreads, and an asymptomatic person may spread the virus. There currently is no cure."). Political leaders and ordinary civilians alike

[4] https://governor.iowa.gov/press-release/gov-reynolds-issues-a-state-of-public-health-disaster-emergency

scrambled to adjust their daily public lives to stem the spread and save millions of lives.

These changes extended to the judicial system, and on March 14, 2020, all trials were suspended by order of the Iowa Supreme Court. In the Matter of Ongoing Preparation For Coronavirus/COVID-19 Impact on Court Services, March 14, 2020 Order;[5] *see also State v. Emanuel*, No. 20-0737, 2021 WL 1906366, at *1 (Iowa Ct. App. May 12, 2021) ("Following the commencement of the COVID-19 pandemic's wreak of havoc around the globe, our supreme court entered a number of supervisory orders concerning the pandemic's impact on court services."). On March 17, 2020, the Iowa Supreme Court issued an additional supervisory order in light of "[t]he Governor's order [which] includes a prohibition on gatherings in excess of 10 persons." In the Matter of Ongoing Preparation For Coronavirus/COVID-19 Impact on Court Services, March 17, 2020 Order;[6] *see also Vazquez Diaz*, 167 N.E.3d at 828 ("Because the

[5]https://www.iowacourts.gov/collections/470/files/1049/embedDocument/

[6]https://www.iowacourts.gov/collections/476/files/1055/embedDocument/

situation is fluid, the courts have periodically changed [supervisory] orders in response to public health data.").

On July 9, 2020, the Iowa Supreme Court issued a supervisory order on resuming in-person court services and how to do so safely. In the preamble, the Iowa Supreme Court said that "[t]he Iowa Judicial Branch is balancing the need to take measures to reduce the spread of COVID-19 with its commitment to conduct the important work of the courts." In the Matter of Resuming In Person Court Services During COVID-19, July 9, 2020 Order at 1.[7] In this order, the Iowa Supreme Court stated:

> Courtrooms: Courts shall mark courtrooms to ensure physical distancing, including markings showing where participants should sit or stand to ensure six feet of distance from others. Courts shall also ensure, to the greatest extent possible, that individuals enter and exit courtrooms in patterns that maintain physical distancing.
>
> i. Courtrooms shall be reconfigured as necessary to accommodate physical distancing, including as appropriate placing participants in the gallery or relocating the witness stand (table, box, or seat).
>
> ii. Attorneys shall not approach witnesses, court reporters, or judges during

[7]https://www.iowacourts.gov/collections/526/files/1144/embedDocument/

> evidentiary hearings and trials absent specific permission from the judge.
>
> iii. Courts shall adjust or move courtroom microphones to permit adequate sound amplification.

Id. at 3.

The Supreme Court also said:

> Courtroom admittance: Courts shall institute courtroom admittance policies to limit the number or people permitted in the courtroom. Courts shall ensure sufficient space for people whose presence is essential to the evidentiary hearing or trial—parties, attorneys, witnesses, and court staff—with six feet of physical distancing. *Family members, the public, and others whose presence is not essential to the evidentiary hearing or trial may be permitted into the courtroom as physically-distanced space permits.*

Id. at 4 (emphasis added). Criminal trials resumed in September 2020, but on November 10, 2020, after a surge of infections, the Iowa Supreme Court again postponed all jury trials until February 1, 2021. In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services, November 10, 2020 Order at 1.[8]

[8]https://www.iowacourts.gov/collections/583/files/1243/embedDocument/

Defendant's trial began on April 6, 2021, just two months after trials resumed and while the Iowa Supreme Court's supervisory orders were in place. In the order contemplating the resumption of in-court services, the Iowa Supreme Court required district courts to enforce social-distancing protocols to keep essential courtroom participants safe. *See* In the Matter of Resuming In Person Court Services During COVID-19, July 9, 2020 Order ("Courts *shall* institute courtroom admittance policies to limit the number or people permitted in the courtroom." (emphasis added)). The Iowa Supreme Court stated that family members, the public, and other nonessential personnel should only be admitted "if physically-distanced space permits." *Id.* at 4.

C. The district court followed the Iowa Supreme Court's supervisory orders and appropriately applied the *Waller* criteria to close Defendant's trial.

Here, the district court followed the Iowa Supreme Court's requirements and guidelines, and it made specific findings that the courtroom was unable to accommodate any non-essential public spectators. The district court noted that the only way to safely accommodate a jury trial in the courtroom was to move the jury from the jury box and spread them "out evenly in the back of the

courtroom behind the bar." 04-05-21 Motion Tr. at 11:24–12:3. The district court stated that the only way to have people from the public—either supporters of Defendant or supporters of the victim—would be to have them "sit very close to – either right next to or right behind the jurors." 04-05-21 Motion Tr. at 12:4–19. The district court expressed concern with placing members of the public so close to the jury because it did not want jurors to have members of the public sit so close to them—both because the district court was concerned about the spread of COVID-19 and because the district court did not want the jurors to "feel in some way intimidated by either side." 04-05-21 Motion Tr. at 12:4–19.

As to Defendant's request that they "flip-flop" the courtroom and allow members of the public to sit in the jury box, the district court noted that it might "technically" work from a social-distancing standpoint, but it expressed concern with members of the public sitting so close to a testifying witness and to counsel tables. 04-05-21 Motion Tr. at 13:9–19. Knowing these concerns and Defendant's suggestions prior to trial, the district court stated it would "walk around the courtroom this afternoon and think about that a little bit." 04-05-21 Motion Tr. at 13:16–19. Ultimately, the district court stated

that logistically, it was too difficult to have members of the public in the courtroom because of their nearness to the jury if they sat in the gallery or to the testifying witness if they sat in the jury box. Trial Tr. Vol. I at 5:11–9:7.

The record clearly shows the district court was concerned about the well-being of the people essential for trial, thoughtfully attempted to find a solution to Defendant's request to have the public present, and wanted to do what was necessary to ensure a fair and safe trial. Defendant makes little of the district court's concern with having members of the public sit in the gallery alongside the jury, which could subject them to intimidation or to overhearing comments from the spectators. App. Br. at 53. He claims this "risk is present in every jury trial." *Id.* But this ignores the fact that in a typical trial, a jury is not only seated in front of the bar—they are seated in a jury box which is wholly separate and removed from all other people in the courtroom. This separation denotes their unique and important function.[9]

[9] Typically, jurors never mingle with the public or the parties during a trial and even enter and exit the courtroom through their own door. By placing the jurors in the gallery, the district court preserved this separation.

The district court expressed a legitimate concern with having members of the public sit directly behind the jury. 04-05-21 Motion Tr. at 12:1–21. First, the jury may have been concerned about a person sitting too close, thus putting their health at risk and making it difficult for them to concentrate on the evidence. Trial Tr. Vol. I at 6:5–25, 7:7–20; *see also* Kimberly K. Henrickson, COVID-19 & the Courts: The Pandemic's Impact on the Practice of Litigation and Considerations for Future Remote Proceedings, 40 Rev. Litig. 305, 329 (Spring 2021) ("Many Americans may be wary of attending jury selection from a public health standpoint even after the pandemic officially ends[.]").

Second, it's easy to see why a juror could feel intimidated if a member of either the victim's or Defendant's family sat directly behind or next to them during trial. This is simply not the same as these family members sitting in the gallery during a typical trial while the jury sits removed and protected in their box. Even if a family member made no overt threats or statements during the trial, sitting *right behind* a juror could have undue influence on that juror, and that influence could cut in favor of the State or Defendant. Considering it is not uncommon for jurors to face more overt

pressure, the district court's concern about subtle or unintended pressure was warranted. *See State v. Levy,* No. 18-0511, 2020 WL 567696, at *3 (Iowa Ct. App. Feb. 5, 2020) (discussing a district court's closure of a courtroom to the public after someone yelled "find [unintelligible] innocent" at a juror while she returned to the courthouse after lunch.); *see also* Tara J. Mondelli, *Deck v. Missouri*: Assessing the Shackling of Defendants During the Penalty Phase of Trials, 15 WIDLJ 785, 810 (2006) ("People should not feel they are forced to risk their lives to perform their civic duties in courtrooms.").

Finally, the district court did not want public spectators to sit in the jury box where they would sit close to testifying witnesses and counsel. Trial Tr. Vol. I at 6:5–25, 7:7–20. Sitting in front of the bar is reserved for the essential parties to a trial. As the district court noted, it is not appropriate to seat members of the public in the jury box so close to a testifying witness. This is especially so here considering the two most important witnesses were young girls testifying about a brutal and traumatic assault. The district court was not required to abandon all courtroom safety protocols and traditional decorum simply because the room may have been able to "technically" accommodate one or two extra people in front of the bar while

maintaining social distancing.[10] *See Lawrence*, 167 N.W.2d at 914 (stating that the right to a public trial "has generally been viewed as a right subject to the inherent power of the court to limit attendance as the conditions and circumstances reasonably require, for the preservation of order and decorum in the courtroom, and to reasonably protect the rights of parties and witnesses.").

Defendant also points to a perceived disparity between the number of jurors sitting the gallery during voir dire and the number of jurors seated for trial. App. Br. at 43–45. But on a cold record, other than their general location, Defendant has no idea how the potential jurors were placed around the courtroom to accommodate social-distancing requirements. The district court specifically stated "the *only* setup that we have that can accommodate a jury trial in our county is to spread the jurors out evenly in the back of the courtroom behind the bar" and "we're going to have 14 jurors so they're going *to fill up that back of the courtroom*." 04-05-2021 Motion Tr. at 11:24–12:3, Trial Tr. Vol. I at 7:7–11 (emphasis added). Considering the district court had the benefit of making these observations in real

[10] The State reiterates that Defendant did not preserve his argument that only his mother be allowed to attend trial.

time and while personally present in the courtroom, we should defer to its analysis.

And Defendant complains that the district court permitted the "victim's advocate to be present" during J.H.'s testimony. App. Br. at 45. The district court likened a victim advocate to an interpreter and found the victim advocate was not "somebody from the public. They actually have a purpose with this trial." Trial Tr. Vol. I at 173:4–21. The district court also noted the advocate would not be present throughout the entire trial but would only be there during the victim's testimony then "the advocate will leave and the witness will leave as well." Trial Tr. Vol. I at 173:4–8. The district court was correct that the advocate is not the same as a member of the public; instead, they were essential trial personnel who played a limited but important role in the trial itself.

Defendant also seems to make little of the unprecedented global pandemic that required jury trials to shut down entirely for nearly a year. While trials resumed in September 2020, the Iowa Supreme Court suspended them again in November, and they did not resume again until February 2021—just two months before Defendant's trial. At the time, vaccinations were just becoming available to the public in

Iowa and community spread of the virus was still high. Press Release, Iowa Department of Public Health, Iowans with Underlying Conditions Eligible for COVID-19 Vaccine Beginning March 8 (March 5, 2021).[11] Our district courts were given a monumental task—hold jury trials while preventing the spread of a highly contagious and deadly virus. Considering the difficulty and uniqueness of that task, it's hard to find fault with the district court's thoughtful approach and decision in this case, especially since this approach was based on and required by the Iowa Supreme Court's supervisory orders. *See* Sent. Tr. at 9:16–22 ("We kept the jurors in the back of the courtroom where the public usually sits, and we kept their chairs six feet apart, and we made all of those accommodations because the Supreme Court felt by that point in time, it was safe enough to again start having jury trials with certain protections[.]").

And on the first day of trial, the district court even gave Defendant the option to continue the trial to a date when more of the population would be vaccinated and social-distancing requirements

[11] https://idph.iowa.gov/News/ArtMID/646/ArticleID/158405/Iowans-with-Underlying-Conditions-Eligible-for-COVID-19-Vaccine-Beginning-March-8; *see also* https://www.kwwl.com/coronavirus/april-3-cases-in-iowa-continue-to-rise-despite-the-vaccination-process/article_b3ade3e1-c676-5547-9bbd-407ce44745f3.html

eased. Trial Tr. Vol. I at 6:5–25. True, Defendant was not required to accept that option, especially given his long incarceration, but it's yet another example of the district court's sensitivity to the competing issues and consideration of possible alternatives.

Iowa courts were not the only ones to face these issues during the ongoing pandemic. Courts across the country dealt with closing courtrooms to public spectators so they could proceed with the business of the court while preventing the spread of COVID-19. The State was able to find six appellate court decisions from six different states that contemplated an issue similar to the one presented here. In each, the courts decided that the COVID-19 pandemic was a sufficient reason for a district court to either fully or partially close a courtroom to the public. *See State v. Bell*, A20-1638, 2021 WL 6110117 (Minn. Ct. App. Dec. 27, 2021) (affirming district court's determination that "it could not safely accommodate any spectators—not even one—within the courtroom while maintaining the protections in place to protect all participants from the COVID-19 pandemic."); *Henson v. Commonwealth*, 2020-SC-0343-MR, 2021 WL 5984690 (Ky. Dec. 16, 2021) (affirming district court decision to close courtroom to all public spectators, especially because the

closure "was not a matter of the trial court's judicial discretion but instead a matter of the trial court's adherence to this Court's emergency administrative orders."); *Poe*, 2021 WL 5578080 (finding that "protecting the parties, court personnel and the public from COVID-19 to be a 'higher value' which could justify limiting the public's access to a court proceeding."); *Lappin v. State*, 171 N.E.3d 702 (Ind. Ct. App. 2021) (holding "trial court implemented reasonable accommodations to deal with a nearly unprecedented global pandemic during the voir dire selection of Lappin's trial."); *Vazquez Diaz*, 167 N.E.3d at 822 (finding a virtual hearing, even if it was considered a partial closure, "would be appropriate considering the substantial need to protect public health during the COVID-19 pandemic."); *Strommen v. Larson*, OP 20-0327, 2020 WL 3791665 (Mont. 2020) (finding district court did not err in prohibiting public attendance and setting up a live stream because "our judicial system is operating under unprecedented circumstances due to the COVID-19 pandemic.").

In *Bell*, the Minnesota Court of Appeals applied *Waller*'s four criteria and found the district court did not err when it did not allow even one public spectator into the defendant's trial. 2021 WL 6110117,

at *4. The court of appeals found that "the overriding interest put forth by the district court was to safeguard both the trial participants and the public from COVID-19[,]" and the full closure "was narrowly tailored to the situation" because "there was no way to safely accommodate members of the public or [the defendant's] family inside the courtroom." *Id.* (internal quotation marks omitted); *see also Henson*, 2021 WL 5984690 at *3 (finding the governor's declaration that Kentucky was "under a state of emergency in response to the threat of COVID-19" to be an "overriding interest" especially because of "the immense loss of life in Kentucky as a result of COVID-19[.] [I]t is clear the precautions taken were a proportionate response to the threat posed by COVID-19.").

The court also found that "the district court considered reasonable alternatives such as letting in one or two spectators, and the district court made adequate findings supporting these conclusions." *Bell*, 2021 WL 6110117 at *5; *see also Henson*, 2021 WL 5984690 at *3 (finding closure narrowly tailored because the order "sought to limit the dangers posed by COVID-19 while allowing criminal trials to proceed as each trial court saw fit.").

Here, applying the *Waller* criteria, the result is the same. The district court made adequate findings on the record that the health and safety of essential people in the courtroom was an overriding interest, that the courtroom used for the trial was unable to safely accommodate any members of the public without jeopardizing the health of those in the courtroom and the fairness of the trial, and the district court considered reasonable alternatives, such as allowing only a small number of spectators in or continuing the trial to a later date. 04-05-21 Motion Tr. at 13:9–19, Trial Tr. Vol. I at 6:5–25, 7:7–20, 8:13–9:7.

"[O]ur judicial system is operating under unprecedented circumstances due to the COVID-19 pandemic.…Such are the rare circumstances, envisioned by *Weaver*, that may allow a judge to deprive a defendant of the right to an open courtroom." *Strommen*, 2020 WL 3791665, at *3. The district court satisfied the *Waller* criteria and made an adequate record of its decision. Defendant's claim should be rejected.

CONCLUSION

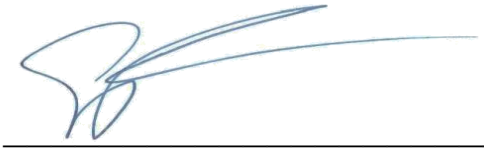
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



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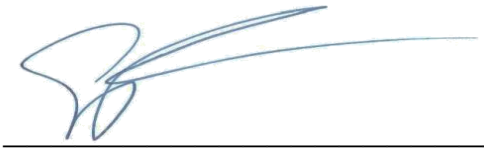

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