IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-1211

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN TRANE,
Defendant-Appellant.

ATTEMPTED APPEAL FROM THE IOWA DISTRICT COURT
FOR LEE (SOUTH) COUNTY
THE HONORABLE MARK KRUSE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The questions presented by the defendant are routine and largely unpreserved. He admits the evidentiary and recusal rulings were committed to the sound discretion of the district court. Appellant's Br. at 22–23. Such claims do not warrant retention.

However, the issue presented by the motion to dismiss contained in this brief is one of first impression. This Court previously ordered that, if the district court on remand found the defendant had not proven the victim made false allegations, the defendant's "convictions and sentence should be affirmed." *State v. Trane*, 934 N.W.2d 447, 466 (Iowa 2019). This Court's remand contemplated a termination of litigation after the district court ruled on the remand, yet the defendant has attempted to return to this Court again, filing a notice of appeal from an order that is not a "final judgment of sentence." Iowa Code § 814.6(1)(a). This Court has not weighed in on what method of appellate review a defendant must use to seek review of remand decision in which this Court ordered the convictions be "affirmed." The State urges no such review is appropriate. *See* Division I. The Court could retain this case to decide the question.

STATEMENT OF THE CASE

Nature of the Case

The defendant, Benjamin Trane, filed a notice of appeal following a remand hearing directed by this Court, to evaluate whether the victim made false allegations of sexual abuse. The remand hearing was held before the Lee (South) District Court, the Hon. Mark Kruse presiding. The district court weighed the credibility of witnesses and ruled that the defendant had not proven the victim made false allegations. Pursuant to the remand order, the district court affirmed the convictions.

Facts/Relevant Proceedings

The defendant operated a private boarding school, Midwest Academy, that catered to children whose parents believed they had "behavioral and disciplinary struggles." *State v. Trane*, 934 N.W.2d 447, 450 (Iowa 2019). The Academy operated outside of the licensing and regulatory scheme operated by the Iowa Board of Education. *Id.*

While at Midwest Academy, then-17-year-old K.S. was sexually abused by the defendant. *Id.* at 451 The defendant controlled nearly all aspects of K.S.'s life at Midwest Academy, including what privileges she had, whether she could call home, and whether she could go on outings. *Id.* at 450–51. K.S. disclosed to a staff member

that the defendant sexually abused her, eventually leading to an investigation by the Iowa Division of Criminal Investigation (DCI) and other law enforcement agencies. *See id.* at 451. K.S. also detailed the defendant engaging in a pattern or practice of grooming behavior surrounding the abuse, such as having K.S. disrobe and describe her body; having K.S. complete surveys about sexual topics, including masturbation; and taking K.S. shopping for lingerie at Victoria's Secret to celebrate K.S.'s seventeenth birthday. *Id.* at 452.

As part of the investigation, the DCI and other agencies executed a search warrant at Midwest Academy, leading to the interview of students and ultimately the closure of the facility. *Id.* The defendant was charged with multiple counts and ultimately convicted following trial by jury of assault with intent to commit sex abuse and sexual exploitation by means of pattern or practice by a counselor or therapist, both against K.S. *Id.* at 454–55. (The defendant was also convicted of child endangerment against one or more other victims, not at issue in this briefing. *Id.*)

On direct appeal, this Court rejected a variety of the defendant's claims and conditionally affirmed, remanding for a hearing "to determine whether, by a preponderance of the evidence, K.S. made

false allegations of sexual abuse against her adoptive or foster parents," the Wolaks. *See id.* at 466. Following a series of pandemic-related delays, that remand hearing was held on April 23, 2021.

K.S. testified in-person. She "clearly articulated that she was sexually abused and physically abused by [her uncle Michael] Wolak and in the Wolak home." Ruling, p. 10; App. 60. In response to a "tough" and "personal" cross examination, K.S. "respond[ed] to the questions with good command of the facts and provided details about events and her reasoning for certain actions going back in time." Ruling, p. 10*;* App. 60. She described the timeframe of the abuse, the circumstances of a physical injury that was used as a time marker, and "clear[ed] up" some confusion about whether she spoke to law enforcement in Iowa or Wisconsin. *See* Ruling, pp. 10–11; App. 60–61. K.S. described "an intertwining of physical and sexual abuse." Ruling, p. 11; App. 61.

The persons identified as K.S.'s abusers, Michael and Kimberly Wolak, also testified. Both denied that the abuse occurred, described adopting K.S., and explained why they believed it was appropriate to send K.S. to Midwest Academy. *See* Ruling, pp. 2–5 & 10; App. 52–55 & 60. Michael Wolak, the direct perpetrator of the abuse, "did not at

times seem to be fully aware of the specifics of the allegations he was denying." Ruling, p. 9; App. 59. Kimberly Wolak testified that she could not come up with any reason why K.S. would make the allegations against her and her husband. Ruling, p. 9; App. 59. Kimberly also testified that she had no knowledge regarding what the defendant had been found guilty of in this prosecution. Ruling, p. 9; App. 59.

In comparing the testimony of K.S. and the Wolaks, the district court found that K.S. "showed a strong command of the factual circumstances surrounding the time period" of the abuse and was able to explain "her actions and her reasoning for her actions during the time frame in a believable fashion." Ruling, pp. 11–12; App. 61–62. The court found no evidence of any motive to fabricate and found that K.S. did not have any "'get even' mentality toward the Wolaks, or anyone else for that matter." Ruling, p. 12; App. 62. The court found K.S. showed "little hesitation in addressing questions of events that happened years ago," despite "having her statements and actions previously subjected to considerable scrutiny." Ruling, p. 12; App. 62.

The court credited the Wolaks' "favorable educational history and job history," but also found that Michael Wolak's testimony "lack[ed] detail in many instances." Ruling, p. 12; App. 62. The court found "notable" that Michael did not know "the type of allegations he was denying." Ruling, p. 12; App. 62. Ultimately, the court found that, in "the testimony of Mr. or Ms. Wolak[,] there was nothing specific that would undermine the testimony of K.S. or provide a basis to determine that K.S. made these allegations up, which is largely the premise." Ruling, p. 12; App. 62.

Based on this evidence, and for other reasons in its written ruling, the district court did "not find that, by a preponderance, K.S. made false allegations of sexual abuse against her adoptive parents or the foster parents." Ruling, p. 12; App. 62 (emphasis original). The district court thus "affirmed" the defendant's convictions. Ruling, p. 13; App. 63.

ARGUMENT

I. This attempted appeal should be dismissed. The defendant does not appeal a final judgment of sentence. He has not sought extraordinary review and such review is not warranted.

Preservation of Error/Standard of Review

These sections are not applicable to an appellate motion to dismiss.

Merits

This attempted appeal should be dismissed because the order at issue is not appealable as a matter of right and because the defendant has not sought any form of extraordinary review. As a result, this Court lacks jurisdiction.

This matter is before the Court following a remand from the direct appeal. This Court "conditionally remand[ed]" the case and provided two alternate outcomes to terminate the litigation, depending on the district court's findings:

> 1. "If false allegations were made, then Trane is entitled to a new trial"; or
>
> 2. "If Trane does not make this showing [that false allegations were made], then his convictions and sentence should be affirmed."

State v. Trane, 934 N.W.2d 447, 466 (Iowa 2019). The district court executed the remand, finding that "the defendant has not shown, by a

preponderance of the evidence, that K.S. made false allegations of sexual abuse[.]" Ruling, p. 13; App. 63 (emphasis original). The Court ordered that the convictions were "affirmed" and that the defendant "stands convicted," in compliance with the second alternative. Ruling pp. 12–13; App. 62–63.

The remand order affirming the convictions is not a "final judgment of sentence" as that term is used in the Code section regulating criminal appeals taken by a defendant. *See* Iowa Code § 814.6(1)(a). The defendant already took the direct appeal he was afforded following conviction, which resulted in the 2019 Supreme Court proceedings. This hearing on remand did not result in a new final judgment, but instead "affirmed" the convictions and sentences, pursuant to this Court's remand. *Trane*, 934 N.W.2d at 466. Neither the State nor the defendant may appeal a post-sentence ruling as a matter of right. *See State v. Anderson*, 246 N.W.2d 277, 279 (Iowa 1976) (only judgment appealable as a matter of right by defendant is sentencing order); *State v. Coughlin*, 200 N.W.2d 525, 526 (Iowa 1972) (no appeal for either party from motion-for-new-trial ruling that was not part of final judgment of sentence). The ruling at issue is not governed by section 814.6(1)(a) because it was not a final

judgment of sentence and, because the defendant has not sought or obtained any form of extraordinary review, this attempted appeal should be dismissed.

Because the State will not have the opportunity to sur-reply to any subsequent filing by the defendant, the State acknowledges the district court expressed some confusion over its role in determining appealability, setting an appeal bond, and issuing mittimus. *See* Ruling, pp. 13–14; App. 63–64. The State urged that mittimus should issue immediately if the convictions were affirmed. *See* State's Brief on Remand, pp. 14–15. The district court noted that "[t]he wording of the Supreme Court opinion and Procedendo give support to the State's position" but speculated that this Court may have intended further appeals. *See* PCR Ruling, p. 14; App. 64. The district court noted that "any appeal can be denied" by this Court, which seems to correctly recognize that this Court—not the district court—is the ultimate arbiter of appellate jurisdiction. PCR Ruling, p. 14; App. 64; *see State v. Tucker*, 959 N.W.2d 140, 149 (Iowa 2021) ("Our appellate jurisdiction must be exercised according to law. It is our duty to reject an appeal not authorized by statute." (internal citations and quotation marks omitted)).

Had this Court intended to authorize an appeal from the remand or retain jurisdiction, it knows how to say so. *See State v. Johnson*, 272 N.W.2d 480, 485 (Iowa 1978) ("Defendant's right to appeal from the trial court's in camera determination is preserved."); *State v. Hall*, 235 N.W.2d 702, 731 (Iowa 1975) ("defendant's right to appeal from the trial court's in camera determination is preserved"). The existence of this language in *Johnson* and *Hall* confirms that, absent such a preservation, there is no appeal as a matter of right. This Court's remand in *Trane* did not expressly or impliedly preserve a right to appeal from the remand ruling, nor did the Court retain jurisdiction. *Trane*, 934 N.W.2d at 466. The defendant did not petition for rehearing to modify the remand and secure the inclusion of such language. The remand directive from *Trane* is law of the case, it contemplated a termination of litigation if the district court affirmed the convictions, and no appeal is authorized here. *See id.*

To the extent the Court considers any belated attempt by the defendant to invoke appellate jurisdiction by means of a writ or other extraordinary means, the Court should reject the claim. This case ultimately concerns a question of credibility: the witnesses at the remand hearing gave conflicting testimony and the district court

entered a lengthy ruling making credibility findings to resolve the conflict. *See* Ruling; App. 51–64. As the Eighth Circuit has said, and this Court has cited with approval, "The district court's findings regarding a witness' credibility are virtually unreviewable on appeal." *United States v. Kime*, 99 F.3d 870, 885 (8th Cir. 1996); *see State v. Hickman*, 576 N.W.2d 364, 367 (Iowa 1998) (citing the former with approval). And to the extent the defendant may petition for certiorari, the writ cannot be used to decide questions that were not preserved below. *See Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482, 490 (Iowa 2003); Division IV (all claims of evidentiary error in the proceedings were unpreserved). This Court's limited judicial resources are not appropriately devoted to hearing unpreserved claims or second-guessing the credibility of witnesses on a cold record, and thus extraordinary review is not appropriate.

There is no appeal as a matter of right in this case pursuant to section 814.6(1)(a) because the defendant does not appeal a final judgment of sentence. The defendant has not sought, and should not receive, review by means of this Court's extraordinary jurisdiction. As a result, this attempted appeal should be dismissed.

II. The district court's ruling on the credibility of witnesses is essentially unreviewable. To the extent review is proper, the district court's ruling was supported by substantial evidence.

Preservation of Error

The State does not contest error preservation on the sufficiency of the evidence to support the district court's ruling on remand.

Standard of Review

The crux of the defendant's claim is about which witness(es) the district court should have found credible. "The district court's findings regarding a witness' credibility are virtually unreviewable on appeal." *United States v. Kime*, 99 F.3d 870, 885 (8th Cir. 1996); *see State v. Hickman*, 576 N.W.2d 364, 367 (Iowa 1998) (citing the former with approval).

To the extent the defendant also challenges the sufficiency of the evidence overall, review is for correction of errors at law. The evidence must be viewed in the light most favorable to the State and all reasonable inferences must be drawn to uphold the verdict or ruling. *State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006). A fact-finder is "free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269

(Iowa 1996). A bench verdict supported by substantial evidence is "binding" on this Court. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993).

Merits

The defendant first challenges whether the district court's ruling is supported by "substantial evidence." Appellant's Br. at 23. To the extent this is not an outright challenge to credibility, which is beyond the province of appellate courts to decide, the defendant's claim appears to be synonymous with analyzing whether the evidence was sufficient to support the ruling, as discussed in the preceding standard-of-review section. Under this standard of review or anything like it, the defendant's complaints are meritless.

The district court, like any other fact-finder, was free to credit some witnesses and discredit others. *Liggins*, 557 N.W.2d at 269. The court's ruling reflects that the court found K.S.'s testimony compelling and the Wolaks' less persuasive. *See* Ruling, pp. 8–12; App. 58–62. While the defendant may personally believe the Wolaks were more believable than K.S., he identifies no error beyond mere disagreement with the court's finding to the contrary. *See* Appellant's Proof Br. at 25–40. All of the defendant's claims are arguments that

he could and did make to the fact-finder below; that the court rejected the defendant's arguments and evidence in favor of the State's is no basis for relief.

The first particularized complaint is a general assertion that the defendant believes the court should have believed the Wolaks' denials instead of K.S.'s testimony. Appellant's Proof Br. at 27–30. The defendant does not actually identify any legal error throughout these pages of his briefing. *Id.* The closest he comes is a complaint about factors that arguably weighed somewhat in favor of the Wolaks' credibility, but even the defendant admits the court gave weight to these factors—the defendant just wishes it had been more weight. Appellant's Proof Br. at 29. At one point, the defendant seems to suggest the district court should have believed Michael Wolak's testimony because the State elected to not cross-examine him. Appellant's Proof Br. at 29. But this proves nothing. Experienced trial attorneys can reasonably decide when cross-examination is unnecessary, as evidenced by the district court's findings that Michael Wolak's direct testimony lacked detail and was generally unpersuasive. Ruling, p. 12; App. 62.

Next, the defendant complains that the district court should not have believed K.S. Appellant's Proof Br. at 30–34. These complaints, again, are the kind of factual questions entrusted to fact-finders (whether judge or jury) in courtrooms across this state every day. The core thrust of the defendant's complaint is that he finds K.S.'s assertion that she was sexually abused multiple times, by multiple offenders, "bizarre" and allegedly "press[ing] the boundaries of probability." Appellant's Proof Br. at 31. The legal basis for this argument is *State v. Smith*, 508 N.W.2d 101, 104–05 (Iowa Ct. App. 1993), a 2–1 decision of the Court of Appeals that is an aberration and relic of a time less-enlightened about the dynamics of sexual abuse. Appellant's Proof Br. at 31.

In short, *Smith* is wrongly decided, its holding parades rape myths as legal analysis, and its continued citation by defense attorneys evidences why it needs to be formally overruled. *See State v. Atkins*, No. 20-0488, 2021 WL 3895198, at *3 n.4 (Iowa Ct. App. Sept. 1, 2021) (acknowledging criticism of *Smith*, declining to extend its reasoning to the case at issue, opting not to reach the question of "*Smith*'s continued vitality"); *State v. Cardona*, No. 19-1047, 2020 WL 1888770, at *2 n.1 (Iowa Ct. App. April 15, 2020) (same,

"leav[ing] for another day the question of *Smith*'s continued salience"). Though much could be said about *Smith*'s deficiencies, the core errors are "that *Smith* denigrated the testimony of sexual abuse victims, including by ignoring the phenomenon of victim grooming, requiring unrealistic descriptions of sex acts from child victims, and crediting an absence of enduring genital injury as more probative than a victim's testimony." *Cardona*, 2020 WL 1888770, at *2 n.1 (paraphrasing the State's argument). These errors have no place in published appellate opinion.

In any event, however, *Smith* affords the defendant no relief here. No Iowa appellate court has subsequently cited *Smith* as a basis to grant relief in a sexual abuse prosecution, and this case should not be the first. The district court's ruling includes a detailed rationale for finding K.S. credible and, though he may disagree with the court's conclusion, the defendant cannot identify any legal error therein. Looking beyond the facts, *Smith* is also inapplicable here because it was a case in which the State bore the burden of proof, not the defendant; here the defendant was required to prove the falsity of the statements by a preponderance of the evidence, unlike *Smith* where the State had to rely on the statements to prove guilt beyond a

reasonable doubt. *Smith*, to the extent it correctly states any law, provides the defendant no help.

Throughout the discussion of K.S.'s testimony, the defendant's brief views the evidence in the light most favorable to the Wolaks' innocence, rather than—as the standard of review requires—the light most favorable to the State. For example:

- The defendant urges that K.S.'s repeat victimization renders her testimony suspect, while the State's position is that many pedophilic offenders select their victims based on whether the victims will be believed by authorities when they disclose the abuse. Appellant's Proof Br. at 30–31. As a result, this defendant and other abusers likely perceived K.S. as an ideal target for their sexual abuse, given her history and the likelihood uneducated persons would consider her "damaged goods" or otherwise unbelievable.

- The defendant also faults K.S.—who was a preteen or teen when abused—for her inability to provide recordings or video evidence of the abuse. Appellant's Proof Br. at 31–32. K.S. had no duty to secure evidence supporting her report of abuse. And perhaps more importantly, K.S. had little to no agency while living with the Wolaks or detained at Midwest Academy under the control of her abuser, and it is thus unsurprising that any corroborative evidence K.S. may have been once able to supply is no longer available.

- Finally, the defendant posits that K.S. should not be believed because it is not credible that child protective services in multiple states "fail[ed] to detect this abuse." Appellant's Proof Br. at 32. Regrettably, any experienced practitioner in this area of the law knows that DHS and its analogues in other states routinely fail to detect abuse,

> whether due to staffing shortages, poor training, bad screening criteria, etc. This argument does not support the defendant's prayer for relief.

In short, these attempts to undermine K.S.'s testimony may have been proper to present in argument to the district court while weighing the evidence, but it does not make out a prima facie claim for reversal on appeal.

Third, the defendant claims that the district court's "interpretation of the evidence … was biased in K.S.'s favor." Appellant's Proof Br. at 34. This claim is not actually grounded in the law and should be disregarded entirety. A jury is not "biased" because they accept the testimony of a rape victim over the accused, nor was the district court "biased" in this case for believing K.S. rather than the Wolaks. The defendant again cites *Smith*, a pernicious divided decision that denigrates rape victims in a way that would be preposterous in the context of any other criminal offense. Appellant's Proof Br. at 35. He also draws on *Graham*, the case the bare majority in *Smith* relied on. Appellant's Proof Br. at 35. But that case is dissimilar to this one.

In *Graham*—the matter's second trip to the Iowa Supreme Court—a witness gave a version of events at a second trial that was

"self-contradictory" and "so manifestly insincere and absurd that no person could candidly believe it." *Graham v. Chicago & N.W. Ry. Co.*, 119 N.W. 708, 710–11 (Iowa 1909). Unlike the *Graham* court looking at a general verdict from a jury, we know here that K.S.'s testimony was *not* insincere: the district court explained its rationale for believing her, which is important context in reviewing this cold record. *See* Ruling, pp. 11–12; App. 61–62. The defendant cannot credibly assert that no person could candidly believe K.S.'s testimony. The district court's ruling thoroughly evaluated the evidence presented and concluded the defendant did not meet his burden. *See* Ruling; App. 51–64.

The defendant also urges in this portion of his briefing that the district court "ignored evidence." Appellant's Br. at 36. But the ruling belies this statement. The district court expressly acknowledged the arguments made by the defendant, giving them some weight—but apparently not as much weight as the defendant wishes. *See* Ruling, p. 11; App. 61. The defendant cites no authority suggesting that he can obtain reversal merely because he (or this Court) might have weighed the credibility of witnesses somewhat differently. He is not entitled to relief.

Finally, setting aside the particulars of the complaints advanced by the defendant, he fails to confront in his briefing a crucial impediment to obtaining relief: that he bore the burden of proof at the remand hearing. Even if one were inclined to believe many of the defendant's arguments *and* many of the State's arguments—to essentially find it equally likely that K.S. or the Wolaks were truthful—the defendant still would not be entitled to a new trial. *See Swift, Inc. v. Sheffey*, 2010 WL 4792321, at *3 (Iowa Ct. App. 2010) ("Where evidence is in equipoise, the party who bears the burden of proof cannot prevail."); *Greenberg v. Alter Co.*, 124 N.W.2d 438, 442 (Iowa 1963) (when "the best that can be said is the evidence is in equipoise," the "plaintiff has not carried the burden of proof by a preponderance of the evidence"); *see also State v. West,* 24 P.3d 648, 656 (Hawaii 2001) ("[W]here the trial court is unable to determine by a preponderance of the evidence that the statement is false, the defendant has failed to meet his or her burden, and the evidence may be properly excluded."). The defendant is not owed a new trial.

III. The district court did not abuse its discretion when it declined to recuse itself from the remand hearing. The defendant has not articulated any basis for recusal.

Preservation of Error

The State does not contest error preservation on the second motion to recuse, to the extent it is based on any acts of the judge taken *after* the direct appeal. However, to the extent the defendant attempts to re-litigate acts of the judge from *before* the direct appeal, including any prior motion to recuse, such a claim exceeded the remand, is not properly preserved, and cannot be revived on appeal now. *See Kuhlmann v. Persinger*, 154 N.W.2d 860, 864 (Iowa 1967) ("[W]hen the Supreme Court remands for a special purpose, the district court, upon the remand, is limited to do the special thing authorized by this court in its opinion, and nothing else.").

Standard of Review

The defendant bears the burden to prove recusal was appropriate. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). The decision of whether to recuse is committed to the sound discretion of the district court. *Id.* "[A]ctual prejudice must be shown before a recusal is necessary." *State v. Sinclair,* 582 N.W.2d 762, 766 (Iowa 1998).

Merits

The defendant next complains that the district court did not recuse itself from the Rule 5.412 hearing on remand. Appellant's Proof Br. at 40–44.

Much of the defendant's complaints here seem misplaced, as the majority of what he complains about is the district court's conduct at sentencing—prior to the direct appeal being taken. *See* Appellant's Proof Br. at 40–44. Those complaints are so frivolous that the defendant did not even brief the issue of recusal when he directly appealed his conviction, as heard in this Court's 2019 decision. *See State v. Trane*, 934 N.W.2d 447 (Iowa 2019). The complaints are just as frivolous now and this Court should not allow the defendant to breathe new life into his old complaints under the guise of an attempted appeal from a remand hearing.

Nonetheless, even if one assumes good faith in the defendant's denigration of the district court, the specifics of his complaints do not hold up. For example:

- The defendant asserts that the court called his attorney's advocacy "ridiculous." Appellant's Br. at 42. Yet buried in a footnote of the defendant's brief is the actual quote from the court, in which the court referred to any further *delay of sentencing* as "ridiculous." Appellant's Proof Br. at 42 (citing sent. hrg. tr. p. 9, lines 13–21). This was a

fair statement given that sentencing had already been delayed six months, to May 2018 despite verdicts in December 2017. *Trane*, 934 N.W.2d at 464. The reasonableness of the district court's observation about delays is also borne out by specific language in this Court's opinion from the direct appeal, where this Court unanimously opined that conducting the type of post-trial hearing the defendant sought "would likely delay judgment and sentencing in many cases." *Trane*, 934 N.W.2d at 464.

- The defendant complains about the conduct of the sentencing hearing (despite not making that complaint on direct appeal), yet cites no legal authority supporting reversal on that basis. Appellant's Br. at 42–44. In the State's review of the transcript portions cited by the defendant, the district court's comments are all reasonable following a jury verdict. The court is free to reject a slanted description of evidence by counsel. And the court is free to consider the defendant's lack of remorse and attack on the victims as a form of re-victimization that warrants disapprobation. Were there any viable issue here, it would have been raised on direct appeal, not used to buttress a complaint following a remand hearing that did not go as the defendant might have wished.

- The defendant also complains about an increase in bond amounts, arguing the increase was *sua sponte*. Appellant's Proof Br. at 44. As a threshold matter, a district court is authorized to set bond without notice, and often must do so. *See generally* Ch. 811. But also, the claim that the increase was *sua sponte* ignores the larger context of the proceedings and the State's requests. The State's position below—which is still the State's position on appeal—is that the remand order is not appealable and the defendant is not eligible for appeal bond at all. *See* State's Brief on Remand, pp. 14–15. The State sought immediate mittimus, which the State maintains was required under the circumstances. As a result, what the

> defendant asserts was court action biased against him (bond) was actually a gift to which the State believes the defendant was not entitled. Moreover, when the defendant complained to the court about his difficulties in posting the additional bond, the district court promptly exonerated the bond and allowed the defendant to post $50,000 cash or surety—the exact bond previously imposed. *See* 5/11/2018 Judgment; 8/19/2021 Order. Once again, the defendant got what he wanted, over the State's objection. This is not evidence of bias.

In short, these and the other complaints by the defendant are—at most—evidence of a case in which a defendant is unhappy he was charged and convicted of a crime that he claims he did not commit. The jury found otherwise and the district court acted reasonably as a consequence.

To the extent any further analysis is warranted, the district court entered a multi-page ruling in response to the motion to recuse, which reflects an appropriate exercise of discretion. *See* 2/12/2021 Order; App. 51–64. For example, the court noted that the defendant took a number of the court's statements out of context. 2/12/2021 Order, p. 4; App. 41. The court also noted that the defendant complained that the court stopped spectators from "clapping" during sentencing and "request[ed] that the Defendant address the Court and not the public during allocution," which "are expected actions of any judge." 2/12/2021 Order, p. 4; App. 41. Finally, the court noted

it had "examine[d] its own conscience with regard to the issue presented" and concluded there was nothing about the case or the defendant that would render the court impartial. 2/12/2021 Order, p. 5; App. 42. This ruling reflects an appropriate exercise of discretion.

The defendant also complains, apparently in the context of alleging "bias," that the district court "den[ied] his motion for video testimony." Appellant's Proof Br. at 44. Again, this was a reasonable ruling. The remand hearing was ultimately about credibility and the court was correct to note "the importance of in-person testimony" in resolving the questions presented. 2/12/2021 Order, p. 6; App. 43. This is no basis for relief.

Finally, beyond the merits of the defendant's arguments about recusal, his claim fails for the additional reason that he cannot prove actual prejudice. The majority of the defendant's complaints about the judge's conduct relate to proceedings that took place at sentencing—before the direct appeal in which the defendant declined to raise the recusal issue. *See* Appellant's Br. at 42–43. All of the proceedings, including sentencing, were unanimously affirmed by this Court on direct appeal, with the exception of a narrow remand on the limited issue of the 5.412 hearing. *See Trane*, 934 N.W.2d at 466.

The defendant cannot prove prejudice and he was not entitled to judge-shop on remand.

IV. The defendant did not preserve any evidentiary errors. Even if he had, there was no abuse of discretion.

Preservation of Error

The defendant complains in the final division of his brief about the admission and consideration of three types of evidence: evidence of physical abuse, evidence of Kimberly Wolak's bias against K.S. and/or toward the defendant, and evidence that K.S.'s testimony had remained consistent and stood up to rigorous questioning. *See* Appellant's Proof Br. at 45–54. None of these claims were preserved.

The defendant's complaint about the consideration of physical abuse, *see* Appellant's Br. at 45–49, is both unpreserved and invited. The first witness called at the hearing was Michael Wolak. The defendant's attorney conducted direct examination and asked the following questions:

> **Q.** [By Mr. Parrish] Well, let me ask you this. Were the allegations made at the time they interviewed you, were they true or false, that you had abused her sexually or **physically**?
>
> **A.** False.

Remand tr. p. 16, lines 14–18 (emphasis added).

> **Q.** (By Mr. Parrish) The question I have for you is: did you **physically** abuse [K.S.]? Yes or no?
>
> **A.** No.

Remand tr. p. 22, lines 18–22 (emphasis added). The second witness was Kimberly Wolak, again directed by the defendant's attorney, and she was asked these questions:

> **Q**. And at that point in time when they were investigated, the statements made by Kathryn that you may have sexually abused her or **physically** abused her, would those statements have been true or false?
>
> **A.** Those statements are false.

Remand tr. p. 31, lines 14–19 (emphasis added).

> **Q.** After that investigation, which you indicated any statements that she may have made would have been false, about sexual or **physical** abuse were false, did you eventually send her to the Midwest Academy?
>
> **A.** Yes, we did.

Remand tr. p. 32, lines 9–15 (emphasis added).

> **Q.** So you're denying any sexual abuse allegations, any **physical** abuse allegations; is that correct?
>
> **A.** Yes.

Remand tr. p. 35, lines 20–23 (emphasis added). The record affirmatively demonstrates that it was the defendant who injected the

topic of physical abuse into the hearing. He only complains now that the disposition of the case was adverse to him. This bars relief. "Under the Doctrine of Invited Error, it is elementary a litigant cannot complain of error which he has invited." *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989) (party cannot complain about evidence the party itself elicited).

The defendant's complaint about whether Kimberly Wolak knew the nature of the jury verdict or the defendant's crimes was not preserved. This testimony was elicited without objection. *See* remand tr. p. 47, line 8 — p. 48, line 6. The defendant cannot complain now, having sat mute below. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Finally, the defendant's complaint about the district court considering whether K.S.'s testimony at the remand hearing was "consistent with her prior testimony" was also invited error. Appellant's Proof Br. at 50. The defendant moved admission of K.S.'s deposition at the start of the remand hearing, and his attorney relied on that prior sworn testimony to aggressively cross-examine K.S. and

then attack her testimony at length in his written pleadings (including his appellate brief). *See* remand tr. p. 5, line 10 — p. 7, line 7 (court admitting Exhibit AA at the defendant's request); *see generally* Appellant's Br. The defendant cannot admit evidence, use the evidence for his own purposes, and then complain when the court considers it. *E.g.*, *McCracken*, 445 N.W.2d at 378.

Standard of Review

Had any of these errors been preserved, the State does not dispute that review would be for an abuse of discretion. *See* Appellant's Br. at 22.

Merits

The defendant's final complaints are about the conduct of the remand hearing. These errors would not warrant relief, even if they had been preserved. The district court did not abuse its discretion.

The defendant's first complaint is that the district court heard and considered evidence of physical abuse, in addition to sexual abuse. Appellant's Br. at 45–49, 51–54. (The defendant devotes two subheadings to the physical-abuse evidence, but they concern the same issue, so the State addresses both jointly.) As discussed above, this error was invited by the defendant, as he is the one who elicited

the evidence of physical abuse at the hearing, and he cannot now complain about how the district court used that evidence in its analysis. On the merits, the district court correctly found that the testimony of the defendant's own witnesses intertwined the physical and sexual abuse. *See* Ruling, p. 9; App. 59 ("Ms. Wolak was stronger [than her husband] in her denials of any type of abuse, sexual or physical or some intertwining of them."). As did K.S. *See* Ruling, p. 11; App. 61 ("[K.S.] described an intertwining of physical and sexual abuse."). Because the physical abuse was perpetrated in the home by the same man who was sexually abusing K.S., it would have been difficult if not impossible for K.S. or the Wolaks to discuss one and not the other. Rule 5.412 is not so rigid that a hearing on whether a rape victim in a violent relationship cannot describe the context of the crime, particularly when the violence helps explain a delayed disclosure. The defendant has not identified any error in considering the evidence and he is not entitled to relief.

Next, the defendant complains about the consideration of factors that weighed for or against the credibility of witnesses at the hearing. Appellant's Proof Br. at 50–54. The first specific item he complains about is that Kimberly Wolak did not know the nature of

the allegations against the defendant. Appellant's Proof Br. at 50. This was relevant bias evidence—the witness was testifying on behalf of the defendant, after a jury found the defendant guilty of sexually exploiting her niece, and she claimed to believe K.S.'s report of sexual abuse against the defendant was false, despite not knowing the nature of the report. *See* remand tr. p. 47, line 8 — p. 48, line 6. Either Kimberly was lying or her willful ignorance of the jury's verdict, as well as the sexual abuse inflicted on her niece by the defendant, was pertinent to understanding her bias and evaluating her credibility.

The defendant next complains that the district court found K.S.'s testimony was consistent with her prior sworn testimony. Appellant's Proof Br. at 50–51. As discussed above, this is evidence the defendant himself admitted at the hearing as Exhibit AA. The defendant's complaint is also at odds with his repeated attacks on K.S. for being allegedly "inconsistent" or "contradictory" (as he repeats numerous times in the briefing). *See generally* Appellant's Br. If the defendant is permitted to allege that K.S. was inconsistent, surely the court may also consider that her statements were in fact consistent. There is no error here.

Last, even if the district court should have excluded some of this evidence (despite the fact that the defendant elicited it), any error is harmless. At core, this was a hearing about credibility—whether K.S. or the Wolaks were telling the truth—and the arguments made by the defendant do little more than nibble around the edges of the ultimate issue. Even if this evidence tilted the scales such that, instead of finding a failure of proof, the district court found the evidence in equipoise, the defendant still would not be owed a new trial.

CONCLUSION

This attempted appeal should be dismissed. If this Court reaches the merits, the district court should be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case can be decided on the briefs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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