IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1551

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICK BOOKER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MONICA L. ZRINYI WITTIG, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The defendant requests Iowa Supreme Court retention. Defendant's Brief p. 12. According to Booker, the issue of whether an alleged pretextual reason for striking a juror qualifies as a race-neutral reason is a substantial issue of first impression. Because this court's three-part *Batson* analysis is well-established and the court already evaluates race-neutral reasons to determine whether they are pretextual, however, this case should be routed to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case.

A Dubuque County jury convicted Patrick Booker, Jr., of one count of third-degree sexual abuse, enhanced, in violation of Iowa Code sections 709.14(1)(a), 902.14(1)(b), and 901A.2 (2019). The defendant was acquitted of one count of first-degree kidnapping, in violation of Iowa Code section 710.2 (2019). The charges stemmed from allegations that Booker raped a woman acquaintance after a "tattoo party" in her home.

Course of Proceedings.

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

Facts.

Thirty-one-year-old C.H. lived in Dubuque, Iowa and earned a living babysitting. Vol. II Tr. p. 124, lines 8-16. She knew the defendant, Patrick Booker, by his nickname, "P", but she had not seen him in six or seven years. Vol. II Tr. p. 125, line 18 – p. 126, line 15. They reconnected on Facebook, and C.H. invited Booker and his friend Andy "Roo" Cheeks to come to her home for the weekend for a "tattoo party." Vol. II Tr. p. 126, line 18 – p. 127, line 17. C.H. expected to share in the profits from customers getting tattoos and piercings at her apartment that weekend. Vol. II Tr. p. 127, lines 5-23. On Friday afternoon, April 14, 2018, Booker, Andy Cheeks, and Booker's older brother Larry Earley arrived in town and stayed at C.H.'s apartment. Vol. II Tr. p. 129, line 9 – p. 129, line 4.

On Saturday, April 15, visitors were coming in and out of the apartment getting tattoos. Vol. II Tr. p. 130, lines 1-6. After receiving a tattoo around midnight, C.H. went to her bedroom. Vol. II Tr. p. 130, lines 17-25. Days before the tattoo party, C.H., the defendant, and Andy Cheeks had agreed to "do sex stuff together." Vol. II Tr. p. 130, lines 19-25. However, C.H. had no plans to engage in a sex act with Booker's brother Larry Earley, who walked into her bedroom

that night and was "being vocal." Vol. II Tr. p. 130, line 17 – p. 131, line 1. Booker disrobed, sat on the bed holding his phone, and instructed C.H. to have sex with Larry Earley, whom she did not know. Vol. II Tr. p. 127, line 24 – p. 129, line 8; p. 136, lines 1-24. She said she felt uncomfortable with this change in plans, and she left the room. Vol. II Tr. p. 136, line 1 – p. 137, line 11.

Booker angrily followed C.H. into the kitchen, where he slammed her head against the wall at least once. Vol. II Tr. p. 130, line 17 – p. 131, line 12; p. 139, lines 4-8. She cut her lip and injured her head. Vol. II. Tr. p. 147, lines 3-23. C.H. testified that Booker threatened her and forced her to stay in the kitchen in front of an open window for several hours.[1] Vol. II Tr. p. 130, line 17 – p. 131, line 12. After he released her, C.H. walked into her bedroom and lay on the bed on her abdomen. Vol. II Tr. p. 131, lines 6-12.

Booker entered the bedroom, tore off C.H.'s clothes, and penetrated her anally and vaginally with his penis. Vol. II Tr. p. 131, line 15-19. She was crying as he raped her and she told him to stop. Vol. II Tr. p. 131, lines 16-19. Andy Cheeks and Larry Earley walked

[1] As indicated, the jury acquitted Booker of first-degree kidnapping. The State briefly notes the testimony for context.

into the bedroom and tried to intervene, but Booker told the men to "mind their own business." Vol. II Tr. p. 131, lines 16-25. The sexual assault lasted ten or fifteen minutes. Vol. II Tr. p. 132, lines 1-3.

Afterward, Booker said that he was not feeling well and asked for medicine; C.H. gave him melatonin and he fell asleep. Vol. II Tr. p. 132, lines 6-10. On Sunday morning while Booker slept, C.H. went downstairs and told her neighbor April Saunders that she had been raped. Vol. II Tr. p. 133, lines 2-7. Booker, Andy Cheeks, and Larry Earley left on Sunday. Vol. II Tr. p. 133, lines 10-13.

C.H. was afraid and did not contact the police right away; when she asked her landlord to change the locks a few days later, she explained what had happened and he encouraged her to contact the police. Vol. II Tr. p. 134, lines 10-20. After speaking to an officer, C.H. underwent a sexual assault examination on Wednesday, April 18, 2018. Vol. II Tr. p. 101, line 2 – p. 121, line 5. DNA consistent with Booker's genetic profile was detected on C.H.'s vaginal sample. Vol. III Tr. p. 32, line 1 – p. 37, line 17. Although the profile was only partial, it was an "extremely rare DNA profile" and would occur in unrelated individuals 1 in 2.3 quintillion times, many instances

greater than the earth's population. Vol. III Tr. p. 36, line 13 – p. 37, line 17.

The State introduced photographs of C.H.'s torn shirt, her reddened and swollen lip and a red substance appearing to be blood on her kitchen wall at trial. *See* Vol. II Tr. p. 141, line 18 – p. 142, line 8; p. 148, line 22 – p. 150, line 7; Vol. III Tr. p. 10, line 9 – p. 12, line 11; *see also* State's Exhs. 4-11.

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Booker did not testify in his own defense. He called Andy Cheeks to testify that he did not see Booker having sex with C.H. Vol. III p. 95, line 8- p. 96, line 9. Cheeks added that he intended to have sex with C.H. but could not become aroused. Vol. III Tr. p. 95, lines 18-23. Cheeks admitted that he had been friends with the defendant for many years and they traveled together, participating in tattoo parties. Vol. III Tr. p. 99, line 1 – p. 100, line 8.

The defendant's brother Larry Earley also testified for the defense, testifying that it was he who had sex with C.H. that night. Vol. IV Tr. p. 34, line 21 – p. 35, line 9. He claimed that he had been invited to engage in a "threesome [or] foursome" with C.H. but that only he and Andy Cheeks participated, and his brother the defendant

"chose not to partake." Vol. IV Tr. p. 34, lines 12-24. On cross-examination, the prosecution played a recorded jail call between Booker and Earley in which they discuss Earley's deposition and upcoming trial testimony and Booker instructs him to answer only the questions posed, be mindful of which lawyer is examining him, and not give the prosecutor any information: "Fuck that N----. Don't give that N---- shit. Fuck that N---." Vol. IV Tr. p. 50, line 1 – p. 61, line 25; Court's Exh. 1.

Booker also called C.H.'s neighbor April Saunders and his niece Ashanti Eason to testify that C.H. has a reputation for being dishonest. Vol. III Tr. p. 119, lines 9-22; p. 126, lines 8-21. In turn, the State called Ashanti Eason's twin sister Ashante to testify that her sister is "not very truthful 90 percent of the time" and that, to her knowledge, C.H. is truthful. Vol. IV Tr. p. 66, lines 10-22. C.H.'s sister Kayla Leib also testified, nothing that while C.H. had been convicted of theft, she was an honest person. Vol. IV Tr. p. 68, line 1 – p. 70, line 24.

As noted, the jury acquitted Booker of first-degree kidnapping but convicted him of third-degree sexual abuse. Additional facts will be discussed as relevant to the arguments below.

ARGUMENT

I. The State presented substantial evidence establishing that the defendant committed third-degree sexual abuse and that he had committed prior sex offenses in Illinois, subjecting his sentence to enhancement. The trial court also correctly determined that the weight of the evidence did not preponderate heavily against the verdict.

Standard of Review.

Sufficiency of the evidence claims are reviewed for the correction of errors at law. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010); *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

Weight of the evidence claims are reviewed for an abuse of discretion. "Nevertheless, we caution trial courts to exercise this discretion carefully and sparingly when deciding motions for new trial based on the ground that the verdict of conviction is contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). This remedy has been described as "extraordinary." *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006).

Preservation of Error.

The defendant preserved error on his sexual abuse sufficiency claim by moving for a judgment of acquittal at trial. *See* Vol. III Tr. p. 59, lines 15 – p. 65, line 17; Vol. IV Tr. p. 88, lines 1-22. He preserved error on his weight of the evidence claim in a motion for a new trial.

See Oct. 29, 2020 Motion for New Trial; Nov. 19, 2020 Order; App. 24-28, 29-32.

Merits.

A. Sufficiency of the evidence.

Patrick Booker, Jr., first alleges that the evidence presented at trial was insufficient. This court should find, to the contrary, that the State presented substantial evidence establishing his guilt.

When reviewing a challenge to the sufficiency of the evidence, this court views the evidence in the light most favorable to the State. *State v. Edouard*, 854 N.W.2d 421, 437 (Iowa 2014). The court does not resolve conflicts in the evidence, assess the credibility of the witnesses, or weigh evidence. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). The court makes any legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *State v. Hall*, 371 N.W.2d 187, 188 (Iowa Ct. App. 1985); *State v. Wheeler*, 403 N.W.2d 58, 60 (Iowa Ct. App. 1987). The test for whether the evidence is sufficient to withstand appellate scrutiny involves an inquiry as to whether the evidence is "substantial." *State v. Musser*, 721 N.W.2d 758, 760 (Iowa 2006).

The findings of the factfinder are to be broadly and liberally construed, rather than narrowly, and in cases of ambiguity, they will be construed to uphold the verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa Ct. App. 1985). Evidence meets the threshold criteria of substantiality if it could convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. *State v. Williams,* 695 N.W.2d 23, 27 (Iowa 2005). Substantial evidence to support the conviction may exist even if substantial evidence to the contrary also exists. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." *State v. Sanford,* 814 N.W.2d 611, 615 (Iowa 2012) (quoting *Nitcher*, 720 N.W.2d at 556).

In this case, the State was required to prove that Booker and the victim, C.H., engaged in a sex act and that the sex act was by force or against C.H.'s will. *See* Iowa Code § 709.14(1); *see also* Jury Instruction No. 15; App. 9. A sex act is defined, among other ways, as "sexual contact" between the genitals of one person and the genitals or anus of another person, or by penetration of a person's penis into

another person's vagina or anus. Iowa Code § 702.17; *see also* Jury Instruction No. 18; App. 10.

"Against the will" is synonymous with "without the victim's consent," and "consent remains the lynchpin" in sex abuse cases. *State v. Meyers*, 799 N.W.2d 132, 142 (Iowa 2011). While Iowa's 1851 Code required the sex act to be committed "by force and against [the victim's] will," "our legislature changed the conjunctive 'and' to 'or' in 1921." *Meyers*, 799 N.W.2d at 142 (citing 1921 Iowa Acts ch. 192 § 1). The current statute, in contrast to the former, criminalizes either: "[W]e note section 709.4(1) does not require evidence of both force and the lack of consent, but one or the other." *Id.* "The overall purpose of Iowa's sexual abuse statute is to protect the freedom of choice to engage in sex acts." *Id.* at 143.

Here, substantial evidence was presented at trial establishing that Booker sexually abused C.H. The victim's testimony alone is sufficient on this point. Eyewitness testimony to a sex crime is not required. Although sexual abuse prosecutions used to require independent evidence corroborating the victim's account, the law changed in 1976. "This requirement for corroboration evidence 'plays on long-held myths that rape victims – and women more generally –

cannot be trusted.'" *State v. Barnhardt*, No. 17-0496, 2018 WL 2230938, *4 (Iowa Ct. App. May 16, 2018) (quoting Tyler J. Buller, *State v. Smith Perpetuates Rape Myths and Should Be Formally Disavowed*, 102 Iowa L. Rev. Online 185, 195 (2017)); *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("Even if the only evidence of a sex act is the alleged victim's testimony, it is sufficient to sustain a finding of guilt.").

Here, as recounted above, C.H. testified unequivocally that Patrick Booker vaginally and anally raped her in her bedroom. She described the circumstances leading up to the sexual assault and testified to where, when, and how it occurred. Vol. II Tr. p. 130, line 17 – p. 131, line 25; p. 135, line 16 – p. 150, line 16.

Further, although corroboration is not required, evidence corroborating the victim's account was presented. A photograph of C.H.'s ripped shirt was admitted at trial, as were photographs of her blood on the wall and her injured lip. Vol. II Tr. p. 131, lines 16-25; p. 141, line 18 – p. 142, line 8; p. 148, line 22 – p. 150, line 7; Vol. III Tr. p. 10, line 9 – p. 12, line 11; *see also* State's Exhs. 4-11; Exh. App. 3-6. DNA consistent with Booker's "extremely rare profile" was detected

on the vaginal swab taken from C.H. Vol. III Tr. p. 34, line 20 – p. 37, line 6.

On appeal, Booker criticizes the victim's testimony, pointing out various minor inconsistencies or uncertainties. For instance, Booker finds fault with C.H.'s hesitancy at trial regarding whether she actually injured her lip. Defendant's Brief pp. 31-32. However, Officer Nicole Salazar testified to C.H.'s statements at the time and photographed the swollen, red, and slightly cut lip three days later. Vol. III Tr. p. 10, line 9 – p. 12, line 11.

Booker also expresses skepticism that C.H.'s shirt would rip in a straight line – rather than a jagged one – as he would expect. Defendant's Brief p. 33; *see also* State's Exh. 4 (photograph of C.H.'s shirt); Exh. App. 3. The jurors would be well within their purview, however, to conclude that a shirt could tear in a linear or a jagged manner depending on the fabric, the location of the tear vis-à-vis the seams of the shirt, and the positions of the person tearing the fabric and the person wearing the shirt. The type of tear in C.H.'s shirt does not negate the strength of the evidence here.

Booker also points out that Andy Cheeks and Larry Earley both denied witnessing Booker rape C.H. Defendant's Brief p. 33. It is not

surprising that Larry Earley would testify in support of Booker, who is his brother. Similarly, Andy Cheeks is Booker's longtime friend and former co-defendant in a sexual abuse case in Illinois – not a disinterested witness. Moreover, the jury heard a recorded conversation between Booker and Larry Earley in which Booker instructs his brother, in crude and explicit terms, to not cooperate with the prosecutor. *See* Vol. IV Tr. p. 50, line 17 – p. 61, line 25; Court's Exh. 1 (audio recording). The fact that neither man testified against Booker is of little import.

Finally, Booker suggests that the evidence is insufficient by noting that C.H. was planning to participate in a *ménage à trois* with Andy Cheeks and him that weekend. Defendant's Brief p. 34. That fact alone, of course, does not establish consent, especially given that C.H. explained the sudden change in circumstances to the jury. Although Booker rightly acknowledges that a person can withdraw consent at any time, he maintains that the credibility of the victim is important in determining whether consent was truly given or withdrawn. While this may be true, the jurors heard all of Booker's attacks on the victim's credibility and were obviously unpersuaded by them. This is precisely their function. The jury may choose to believe

"all, some, or none" of a witness' testimony. *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992).

Booker also makes a brief reference to the sufficiency of the evidence establishing his identity as it pertained to his criminal history for enhancement purposes.[2] In addition to State's Exhibit 35, which detailed the criminal record of "Patrick Booker" in Cook County, Illinois, the State presented the testimony of Booker's friend Andy Cheeks. Cheeks testified that he and Booker were co-defendants charged with two counts of aggravated criminal sexual abuse in Chicago based on an incident that occurred on Nov. 28, 2011. Vol. V Tr. p. 12, line 14 – p. 13, line 11. Andy Cheeks and the defendant pleaded guilty simultaneously in May 2013 and were both sentenced to ten-year terms of incarceration. Vol. V Tr. p. 14, line 7 – p. 15, line 8. Cheeks identified Patrick Booker in the courtroom as the

[2] The State challenges error preservation with regard to the sufficiency of the evidence of Booker's identity for enhancement purposes. Booker did not move for a judgment of acquittal before this issue was submitted to the jury. *See* Vol. V Tr. p. 18, lines 13-21. Error is not preserved. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (requiring a defendant to specify in his motion for a judgment of acquittal which element he contends has not been established in order to preserve error on that claim).

same Patrick Booker who was his co-defendant a decade earlier in Chicago. Vol. V Tr. p. 14, lines 21-24.

"Under Iowa law, identity of names – standing alone – is insufficient to establish identity of person." *State v. Sanborn*, 564 N.W.2d 813, 815 (Iowa 1997). Additional evidence is required to prove identity. *Sanborn,* 564 N.W.2d at 816. The State in this case presented additional evidence; it used both a certified criminal history document and an eyewitness co-defendant to establish Booker's identity. His insufficiency claim should be rejected.

B. Weight of the evidence.

Booker also challenges the weight of the evidence. Because the credible evidence did not preponderate heavily against the guilty verdict, Booker cannot prevail.

In *State v. Ellis*, the Iowa Supreme Court distinguished between the standard to be applied in evaluating motions for a judgment of acquittal during trial – evidence sufficient that a rational jury could convict the defendant beyond a reasonable doubt – and the standard to be applied in evaluating motions for a new trial – evidence that a greater amount of credible evidence supports one side of an issue. *Ellis*, 578 N.W.2d at 658. The *Ellis* standard requires the trial

court to examine issues of credibility in assessing whether a new trial is appropriate on the ground that the verdict was contrary to the weight of the evidence. *Id.* "Except in the extraordinary case where the evidence in this case preponderates heavily against the verdict, trial courts should not lessen the jury's role as the primary trier of facts and invoke their power to grant a new trial. A trial court should not disturb the jury's findings where the evidence they considered is nearly balanced or is such that different minds could fairly arrive at different conclusions." *Shanahan*, 712 N.W.2d at 135.

Booker cannot sustain his heavy burden of proof here. While the defense did present witnesses who briefly attacked C.H.'s credibility, the greater weight of credible evidence supported the guilty verdict. The impact of the defense witnesses who simply opined C.H. had a reputation for dishonesty could not outweigh C.H.'s credible, detailed, consistent, and corroborated testimony. No witness from the defense was able to contradict or cast doubt on the basic allegation of the rape, with the possible exception of fellow sex offender Andy Cheeks and the defendant's brother Larry Earley, who claimed they did not witness Booker sexually abusing C.H.

The trial court specifically found Larry Earley's testimony to be incredible. Nov. 19, 2020 Ruling p. 4; App. 32. The court also noted that the victim's version of events during the investigation and at trial was consistent and credible. Nov. 19, 2020 Ruling pp. 3-4; App. 31-32.

This is not a case where the verdict should be disturbed. The trial court properly declined to invoke this extraordinary remedy, and Booker is not entitled to relief on appeal.

II. The trial court properly overruled the defendant's *Batson* challenge to Juror No. 38 and rightly granted the State's motion to strike Juror No. 24 for cause.

Standard of Review.

Appellate courts review *Batson* challenges *de novo* but give "great deference" to the trial court's stated conclusions about the credibility of a striking party's race-neutral explanations. *See State v. Veal,* 930 N.W.2d 319, 327 (Iowa 2019) (quoting *State v. Mootz*, 808 N.W.2d 207, 214 (Iowa 2012)); *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997) (quoting *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990)). Rulings on strikes for cause are reviewed for an abuse of the

trial court's "broad" discretion. *State v. Tilman*, 574 N.W.2d 105, 107 (Iowa 1994).

Preservation of Error.

Booker preserved error on his *Batson* challenge and his complaint regarding the removal of a juror for cause. *See* Vol. I Tr. p. 50, line 24 – p. 58, line 23; Vol. II Tr. p. 62, line 20 – p. 74, line 19.

Merits.

Booker next makes two complaints involving the selection of the jury. Neither claim entitles him to relief.

A. The *Batson* challenge.

Batson v. Kentucky prohibits the use of peremptory strikes during jury selection to engage in racial discrimination. *Mootz*, 808 N.W.2d at 214-15 (citing *Batson v. Kentucky*, 476 U.S. 79, 100 (1986)). Iowa courts apply the *Batson* three-step analysis for assessing claims that a peremptory strike has been exercised on the basis of race:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether

> the opponent of the strike has proved purposeful racial discrimination.

Mootz, 808 N.W.2d at 215 (citing *Batson, id.*). Even striking the sole potential juror who is African-American does not automatically establish a prima facie case of discrimination. *See Knox*, 464 N.W.2d at 448; *accord State v. Smith*, No. 16-1881, 2017 WL 4315058, at *2 (Iowa Ct. App. Sept. 27, 2017).

"[O]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *See Mootz*, 808 N.W.2d at 218 (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)). Then, "[b]ecause race-neutral reasons were provided, the district court was required to accept them and proceed to step three, to determine whether the reasons were merely a pretext for discrimination." *See id.* at 219. The burden to persuade the court that race motivated the strike remains with the strike opponent. *Id.* at 214-15, 219 (citation omitted).

In this case, the prosecutor used a peremptory strike to remove Juror No. 38, who was African-American. During voir dire, Juror No. 38 was asked to respond to a hypothetical question involving a

scantily clad person walking through a neighborhood with "a lot of bars, a lot of drunk people, people looking to… hook up with someone else. Does that person potentially get what they deserve what they get?" Vol. II Tr. p. 23, line 17 – 25 line 3. After another juror answered in the negative, Juror No. 38 responded, "I would say pretty much the same," but added, "There's always two sides to a story." Vol. II Tr. p. 25, lines 4-5. When pressed, the potential juror maintained that the woman had a right to say "no" but spoke of "booty calls," the emboldening effects of alcohol, and other factors such as the time of night involved. Vol. II Tr. p. 25, line 6 – p. 26, line. The potential juror twice more added, "There's always two sides to a story" before recounting the experience of his cousin, who was incarcerated on a 50-year sentence after "four or five guys had sex with a girl" at a house party. Vol. II Tr. p. 26, line 21 – p. 29, line 16. Juror No. 38 blamed the sexual abuse victim for his cousin's conviction:

> MR. KIRKENDALL [the prosecutor]: ….[W]ho do you….blame more in that situation? Do you think…the woman was kind of at fault, for being put in that situation? Do you think your cousin was more at fault for being one of the guys who partook?
>
> JUROR NO. 38: I'd say both parties, really.

Vol. II Tr. p. 29, line 18 – p. 30, line 3.

Juror No. 38 subsequently said he would "try to go on facts," but again peppered a response with references to victim-blaming: "I'm not trying to defend anybody, but I'm saying, hypothetically, let's say this person called this girl over to the house for a late night booty call… and who knows, that maybe they had contact more than once, and this particular time, she probably turned him in." Vol. II Tr. p. 46, line 19 – p. 47, line 14. He also talked about working the night shift and being sleep-deprived. Vol. II Tr. p. 55, line 18 – p. 56, line 3.

The prosecutor exercised a peremptory strike to remove Juror No. 38, and Booker made a *Batson* challenge, arguing that the potential juror was African-American and should not have been struck by the prosecutor. Vol II. Tr. p. 66, line 2 – p. 69, line 25. Although the trial court initially appeared to side with the defendant, after reviewing *Batson* the court reconsidered:

> THE COURT: … I have looked at the Supreme Court's positioning with regard to the Batson challenge, and the one case I'm referring to in particular that spells out the requirements for the Court to render a decision on such a challenge is State versus Mootz, . . . When I am to render a decision, of course, this is a little bit different in the facts, because the Court raised the Batson challenge itself under this decision,

> I have to look at a showing that there is a prima facie case of racial discrimination.
>
> I've looked at the notes that I keep during the voir dire process, which show me that there are a variety of different things that came up with the individuals that the State struck. The only thing that I found that I couldn't use to support any position one way or the other, because there were a couple of people that the State struck who were really not addressed during voir dire, so I don't know that they can give me any support one way or the other, but I cannot say that there is a pattern of racial discrimination in the use of the peremptory strikes. There seem to be individuals that do have problems in their past with regard to opinions concerning knowing someone who has been involved with those questions, particularly based on the sex and the assault cases posed by the Court, and there were also individuals that were really vocal with regard to how upsetting it was to them that some people had suffered through either being falsely accused or who have had family members who were victims.
>
> So I will take back my previous decision and indicate that the State has established the necessary shifting of burden concerning the reasons for its use of peremptory strike, and so the panel is as it is...

Vol. II Tr. p. 72, line 16 – p. 73, line 25.

The trial court properly rejected the defendant's *Batson* challenge. First, Booker did not make the required prima facie showing of racial discrimination, as the court found. In determining

whether a defendant has established the requisite showing of purposeful discrimination on the basis of race, the court should consider all relevant circumstances, including a pattern of strikes against jurors of a particular race, as well as the prosecutor's questions and statements during jury selection. *Griffin*, 564 N.W.2d at 375 (*citing Knox*, 464 N.W.2d at 448). There is nothing in this record suggesting a pattern of discriminatory strikes or that the prosecutor questioned or treated Juror No. 38 differently than any other potential juror.

Second, even assuming Booker could have made a prima facie showing of discrimination – thereby shifting the burden to the State – the prosecutor articulated clear, race-neutral reasons for striking Jury No. 38. A court's analysis of the explanation offered is "extremely deferential." *Mootz*, 808 N.W.2d at 218. "At this step of the inquiry, the issue is the facial validity of the [lawyer's] explanation. Unless discriminatory intent is inherent in the …explanation, the reason offered will be deemed race-neutral." *Mootz, id.* (*citing Hernandez*, 500 U.S. at 360. "[A] *Batson* challenge should not prevail merely because the judge does not find the reason given to be persuasive.

Rather, the reason must, in and of itself, violate equal protection." *Veal*, 930 N.W.2d at 334 (internal quotation marks omitted).

The prosecutor in this case had more than one race-neutral reason for exercising a peremptory strike to remove Juror No. 38, but his primary reason was the potential juror's tendency to victim-blame and his perception of his incarcerated family member's sexual abuse experience:

> MR. KIRKENDALL: Your Honor, Juror Number 38 during the defense questioning was obviously uncomfortable with sitting through the length of the trial. He was talking about work he would miss, and miss going forward. Even when talked to by Your Honor, he was likely to go to work, and I believe he will continue to go to his third-shift job, and we had concerns about his ability to pay attention. More concerning than that was his answer concerning his cousin's apparent sex abuse conviction. The lesson he drew from his cousin has a 50-year prison sentence was that there were two sides to every story, and that the victim and his cousin were probably equally to blame. That this is a sexual assault case, the State felt it was going to be a difficult opinion to overcome, considering how these cases are likely determined by the jury.

Vol. II Tr. p. 66, line 16 – p. 67, line 7.

This explanation was completely unrelated to Juror No. 38's race and therefore survives any facial scrutiny. " Because race-neutral

reasons were provided, the district court was required to accept them and proceed to step three to determine whether the reasons were merely a pretext for discrimination." *See Mootz*, 808 N.W.2d at 219.

And step three does not yield a favorable result for Booker. There is no indication that the prosecutor's stated reasons were "so silly or superstitious" that they must have been a mere pretext for purposeful discrimination. *Mootz, id.* at 220 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). The prosecutor's concerns about Juror No. 38 here were valid rather than pretextual, especially given his repeated insistence that "there are two sides to every story" in sexual assault cases and his charitable perspective on his convicted sex offender cousin's accountability.

As in *Mootz*, the potential juror's "life-experiences and prejudices" made him an undesirable juror for one of the parties. The prosecutor was simply exercising the right to strike a juror predisposed to be unfavorable to him, which is the purpose of peremptory strikes. *See id.* at 220 (in a reverse-*Batson* context, the court sanctions the defendant's reservation about a bartender who "knew" intoxication and had been "deservedly" arrested before, finding these concerns were legitimate and not pretextual); *see also*

State v. Draper, No. 07-0113, 2007 WL 4322565, *2 (Iowa Ct. App. Dec. 12, 2007) (finding no purposeful discrimination for the State's exercise of a strike against an African-American juror who, rather than drawing the expected conclusions from circumstantial evidence in a hypothetic scenario, presented reasons to find the hypothetical defendant not guilty). Booker's *Batson* challenge was properly rejected by the trial court and does not entitle him to relief.

B. The strike for cause.

Booker also contends that the trial court abused its discretion in striking Juror No. 24 for cause. A potential juror should be dismissed for cause if she or he has "formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial." Iowa R. Crim. P. 2.18(5)(k). As noted, the trial court enjoys "broad" discretion in ruling on challenges for cause. *Tilman*, 574 N.W.2d at 107. As the United States Supreme Court has noted:

> Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartially for that judge is appraised and is mainly influenced by a host of factors impossible to capture fully in the record – among them, the prospective juror's candor, body language, and appreciation of duty.

State v. Jonas, 904 N.W.2d 566, 585-86 (Iowa 2017) (Waterman, Jr. concurring specially) (quoting *Skilling v. United States*, 561 U.S. 358, 386 (2010)).

Here, the State asked that Juror No. 24 be removed for cause and the court granted the request. Juror No. 24 said during jury selection that she knew several people who had been falsely accused of a crime. Vol. I Tr. p. 52, line 13 – p. 53, line 17. Although she agreed that she would not apply a higher standard of proof in evaluating a case, she quickly demonstrated that that was not exactly true:

> MR. KIRKENDALL: Is there any sort of extra layer that you're going to add on there saying not only does the State have to prove that case, but I really have to believe this victim, or I have to believe everything she says, or I can't have any sort of sense that there might be some unreasonable thing about her that's going to cause me to question whether or not what she's reporting is true?
>
> JUROR NUMBER 24: I would agree with that last statement, yes.
>
> MR. KIRKENDALL: So you are not --
>
> JUROR NUMBER 24: I mean, that's 100 percent true. I agree.
>
> MR. KIRKENDALL: Okay. Even though sort

> of the rule is explicitly not 100 percent, it's not beyond all doubt, it's just beyond a reasonable doubt, right?
>
> JUROR NUMBER 24: Yes. That's what it says.
>
> MR. KIRKENDALL: And to some extent it is, and you're right, and it's hard to define what that is, but what I'm hearing you say is you don't want to have a doubt?
>
> JUROR NUMBER 24: I -- I don't want to have any doubt. I've seen too many false accusations.
>
> MR. KIRKENDALL: And is that a firmly held opinion?
>
> JUROR NUMBER 24: Um, as of this moment, yes.

Vol. I Tr. p. 53, line 18 – p. 54, line 21.

When subsequently questioned by defense counsel, the potential juror said she would follow the instructions of the court. Vol. I Tr. p. 56, line 13 – p. 57 line 7. She added, however, that she had "high standards" based on her experiences, and explained that her family was destroyed by wrongful accusations involving minor family members. Vol. I Tr. p. 57, lines 11-25.

The trial court granted the State's request to strike Juror No. 24 for cause. Vol. I Tr. p. 58, lines 1-6. In dismissing her, the court observed that it could "see… all over [her] face and [her] body

posture" that the case was "extremely bothersome" to her. Vol. I Tr. p. 58, lines 1-19.

The trial court did not abuse its broad discretion in removing Juror No. 24 for cause. Although Booker faults the court for not explicitly stating its rationale on the record, the court's reasoning can be gleaned from the juror's answers immediately preceding the dismissal. While she did express some difficulty in hearing and noted she had a vacation approaching, the court was obviously concerned that Juror No. 24 held a fixed opinion that the prosecution should have to prove a case beyond all doubt. The fact that she then told the defense lawyer she could follow the court's instructions was cold comfort given her continued insistence on "high standards" and her demeanor, as noted by the trial court. As the Iowa Supreme Court has observed, "On the issue of disqualification of a jury for cause, there is authority for the proposition that when a potential juror at the onset of voir dire expresses bias or prejudice unequivocally, the potential jury should be disqualified for cause notwithstanding later, generalized statements the potential jury could be fair." *Jonas*, 904 N.W.2d at 571. This is exactly what occurred here – despite her

eventual unconvincing capitulation, Juror No. 24 was rightly held to her initial, strongly held opinion.

Moreover, the juror's belief that the prosecution must establish the defendant's guilt beyond all doubt is sufficient to constitute a fixed opinion justifying a strike for cause, even if it is not an actual fixed opinion "on the defendant's guilt or innocence" in the language of the rule. In finding that a potential juror's strongly negative views of the prosecutor's office stemming from his own legal troubles was sufficient to warrant a strike for cause, the Court of Appeals observed that the test is "whether the juror holds such a fixed opinion on the merits of the case *that he or she cannot judge impartially the guilt or innocence of the defendant*." *State v. Duhrkopf*, No. 19-2038, 2020 WL 6484043, *4 (Iowa Ct. App. No. 4, 2020) (emphasis added). The *Duhrkopf* court concluded that in applying that standard, the trial court acted within its considerable discretion in striking the potential juror who bore a grudge against the county attorney. *Id.* at *4-5; *see also State v. Morrow,* No. 14-2126, 2016 WL 3003355, at *2 (Iowa Ct. App. May 25, 2016) (finding a potential juror was properly struck for cause when an officer slated to testify was "involved in a drug raid of her house within the past year and she would not believe his

testimony."); *State v. Farnsworth*, No. 13-0401, 2014 WL 2884732, at *4 (Iowa Ct. App. June 25, 2014) (holding that a potential juror was properly struck for cause when he "clearly indicated his bias toward the defense").

Likewise, Juror No. 24 could not be fair to both sides because she held a fixed opinion about holding the prosecution to an elevated burden of proof. She thus could not judge the defendant's guilt or innocence impartially. The court properly exercised its discretion in allowing the strike for cause.

As a final matter, Booker cannot establish prejudice, as he must. A defendant "ha[s] no right to a trial before any particular juror or jury. All [the defense] could insist upon was a competent and impartial jury." *Summy v. City of Des Moines*, 708 N.W.2d 333, 339-40 (Iowa 2006), *overruled on other grounds of Alcala v. Marriot Intern., Inc.,* 880 N.W.2d 669 (Iowa 2016). Even if the court abused its discretion in striking Juror No. 24, prejudice in this context must be demonstrated rather than presumed. *Duhrkopf*, *id.*; *Summy*, *id.*; *Morrow*, *id.* at *3 ("Our court has not presumed prejudice from erroneous exclusion" of a juror). The defendant has not shown or attempted to show that the court's removal of Juror No. 24 resulted

in the seating of a biased juror. His claim fails on prejudice grounds as a result. Booker is unentitled to relief.

III. The trial court did not have jurisdiction to entertain the State's *nunc pro tunc* motion once a notice of appeal was filed.

Standard of Review.

This court reviews jurisdictional issues for the correction of errors at law. *Schaefer v. Putnam,* 841 N.W.2d 68, 74 (Iowa 2013).

Preservation of Error.

A claim challenging jurisdiction may generally be raised at any time and the court has inherent power to determine whether it has jurisdiction. *See Lloyd v. State*, 251 N.W.2d 551, 556-57 (Iowa 1977). In any event, Booker raised the jurisdictional issue below. *See* Jan. 20, 2021 Resentencing Tr. p. 4, line 12 – p. 5, line 14; Jan. 19, 2021 Resistance to Motion *Nunc Pro Tunc*; App. 42-43.

Merits.

Booker next asserts that the trial court was without jurisdiction to issue a *nunc pro tunc* order correcting his sentence after a notice of appeal had been filed. The State agrees.

"Generally, an appeal divests the district court of jurisdiction." *State v. Mallett*, 677 N.W.2d 775, 776 (Iowa 2004). The trial court's

jurisdiction may be restored only through a limited remand from the appellate court or by a stipulation from the litigants for an order of dismissal. *Id.* The trial court does, however, maintain jurisdiction over disputes between the parties that are "merely collateral to the issues on appeal." *Id.*; *see also State v. Jose*, 636 N.W.2d 38, 46 (Iowa 2001) (noting "the district court retains jurisdiction to hear 'issues collateral to and not affecting the subject matter of the appeal'" and citing restitution modifications under Iowa Code section 910.7 as an example of an issue collateral to the appeal); *State v. Lessner*, 626 N.W.2d 869, 871 (Iowa Ct. App. 2001) (collecting cases involving issues deemed to be collateral, including contempt proceedings, sanctions, and award of attorney fees).

In this case, the trial court corrected an oversight from the original sentencing proceeding in which it had neglected to impose the mandatory special sentence of lifetime supervision under Iowa Code section 903.B. *See* Jan. 8, 2021 *Motion Nunc Pro Tunc*; Nov. 23, 2020 Judgment and Sentence; Jan. 22, 2021 Amended Judgment and Sentence; App. 41, 34-37, 44. Booker's notice of appeal was perfected several months earlier, on November 24, 2020. *See* Nov.

24, 2020 Notice of Appeal; Jan. 20, 2021 Amended Sentencing Tr. 4, lines 20-23; App. 39-40.

At the second sentencing proceeding, the trial court expressed uncertainty as to whether the sentencing issue was collateral to the appeal, noting: "I don't know that I can analyze it as collateral or not collateral because the whole entire matter right now, from the court's perspective of reviewing the Notice of Appeal… pertains to the trial itself and then the ultimate sentencing…" Jan. 20, 2021 Amended Sent. Tr. p. 6, lines 19-24. The court went on to "correct the sentence, and this will then be forwarded on when the appeal is certified and complete after all briefing." Jan. 20, 2021 Amended Sent. Tr. p. 7, lines 5-7.

As Booker notes, he appealed from all adverse rulings and orders, and the amended sentencing order directly affects his punishment. Defendant's Brief p. 57. Booker challenges the sufficiency of the evidence supporting his sexual abuse conviction as well as his sentencing enhancement on appeal, and success on his appellate claim would obviously impact the sentence imposed. His sentence is not unrelated to or divorced from the subject matter of the appeal and is therefore not collateral to the appeal. The State agrees

that the trial court had been divested of jurisdiction after Booker filed a notice of appeal and was thus without the ability to entertain the *nunc pro tunc* request while the appeal was pending.[3] If the defendant is unsuccessful on appeal – once jurisdiction is restored to the trial court – the State will likely correct the omission by moving to correct an illegal sentence and asking the trial court to impose the special sentence of lifetime supervision under Iowa Code section 903.B.

IV. The trial court properly exercised its discretion in admitting State's Exhibit 35, a certified criminal record, over the defendant's relevance and authentication objections.

Standard of Review.

This court reviews evidentiary rulings for an abuse of the trial court's discretion. *State v. Neiderbach*, 837 N.W.2d 180, 190 (Iowa 2013).

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[3] Booker separately appealed the post-judgment amended sentencing order, as he was required to do to challenge the ruling. *See State v. Formaro*, 638 N.W.2d 720, 727 (Iowa 2002); Jan. 29, 2021 Notice of Appeal; App. 46. The two appeals were later consolidated. Mar. 5, 2021 Iowa Supreme Court Order; App. 48-49.

Preservation of Error.

The defendant preserved error by objecting to State's Exhibit 35 on relevance and authentication grounds at trial. Vol. V Tr. p. 17, line 25 – p. 18, line 14.

Merits.

Booker's final claim concerns State's Exhibit 35, a certified statement of conviction/disposition from Cook County, Illinois. The trial court properly admitted the document.

After the jury convicted Booker of third-degree sexual abuse, he declined to stipulate to his prior Illinois criminal history for sentencing enhancement purposes under Iowa Code sections 901A.2 and 902.14 (2017). A second trial was held, and the court admitted State's Exhibit 35, a certified copy of a conviction and disposition document from Cook County, Illinois. According to the certified record, "Patrick Booker" pleaded guilty on May 8, 2013 to two counts of aggravated criminal sexual abuse and was convicted on May 14, 2013, resulting in a ten-year sentence of incarceration. State's Exh. 35 pp. 1, 4-5; Exh. App. 8, 12-13.

Booker objected to the admission of State's Exhibit 35 as hearsay and on relevance/authentication grounds. Vol. V Tr. p. 17,

line 11 – p. 18, line 15. On appeal, Booker reasserts the relevance/authentication argument, contending that the document was only nominally probative and highly prejudicial. Defendant's Brief p. 61.

Relevant evidence has "any tendency to make the existence of any fact that is of consequence… more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…"). Rule 5.403 does not render all prejudicial evidence inadmissible. *State v. Howell*, 557 N.W.2d 908, 912 (Iowa Ct. App. 1996). Instead, it only prohibits unfairly prejudicial evidence. *Id*. Unfairly prejudicial evidence is evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988).

"To satisfy the requirement of authentication or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Iowa R. Evid. 5.901(a). "Authentication or identification represents one component in the relevance determination with regard to certain types of evidence, such as the contents of a document," and it "establishes a connection between the exhibit and the subject matter of the litigation." Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.901:0 (2018). Authentication arises as "a condition precedent to admissibility and is thus governed by Rule 5.104(b)," which requires the proponent of the evidence to "present direct or circumstantial proof sufficient to support a finding of the conditional fact by a reasonable juror." *See id.*

This is a low bar: "The court is authorized to exclude or strike the evidence only if the showing of relevance is so weak that the jury could not reasonably find that the preliminary condition was fulfilled." *See* Doré, *Iowa Practice Series: Evidence* § 5.104(3). "Only a *prima facie* showing of identity and connection to the crime is required. Clear, certain, and positive proof is generally not required." *State v. Collier*, 372 N.W.2d 303, 308 (Iowa Ct. App. 1985). "Once

the trial court determines this foundational requirement has been met, any speculation to the contrary affects the weight of the evidence rather than its admissibility." *State v. Akok*, No. 17-0655, 2018 WL 4362065, *1 (Iowa Ct. App. Sept. 12, 2018) (citing *State v. Biddle*, 652 N.W.2d 191, 196-97 (Iowa 2002)).

As for criminal history records specifically, certified court records are admissible as self-authenticating public records. Iowa R. Evid. 5.902(4). Such public records "require no extrinsic evidence of authenticity" when "the copy is certified as correct by… the custodian or another person authorized to make the certification…" Iowa R. Evid. 5.902(4); *see also* Iowa R. Evid. 5.902(1) (self-authentication of domestic public documents that are sealed and signed).

The trial court properly exercised its discretion in admitting State's Exhibit 35. Booker's certified court records from Cook County met the foundation for self-authenticating public records. The certificate was in the name of Dorothy Brown, Clerk of the Circuit Court for Cook County, Illinois, bore her signature, and provided that she was the keeper of the records. *See* State's Exh. 35; Exh. App. 8-13. Although State's Exhibit 35 referred to "Patrick Booker" rather than "Patrick H. Booker, Jr.," the omission of the middle initial and

"Jr." are not fatal to its admissibility. As noted, relevance as it relates to authentication is a low bar, and once cleared, any claimed deficiencies go the weight rather than the admissibility of the evidence. *Biddle, id.*

In sum, the certified Illinois document listing the defendant's first and last name was self-authenticated. It was also highly probative on the issue of Booker's criminal history and was not unfairly prejudicial. It was therefore admissible. The trial court properly overruled Booker's objections, and his conviction for third–degree sexual abuse should be affirmed.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this court affirm Patrick Booker, Jr.'s conviction for third-degree sexual abuse.

REQUEST FOR NONORAL SUBMISSION

The defense has requested non-oral submission. The State agrees that the issues presented are fully addressed in the briefs and

do not require further elaboration. If the defendant is granted oral argument, however, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: October 4, 2021

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