

IN THE IOWA SUPREME COURT

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SUPREME COURT NO. 20-0914

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STATE OF IOWA,

Plaintiff-Appellee,

vs.

ALEXANDER SHANTEE THOMAS ROSS,

Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR MADISON COUNTY  
THE HONORABLE MARTHA MERTZ, JUDGE

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**APPELLANT'S REPLY BRIEF  
AND  
REQUEST FOR ORAL ARGUMENT**

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## PROOF OF SERVICE

On September 17, 2021, I, the undersigned, did serve the within Appellant's Reply Brief and Request for Oral Argument on all other parties to this appeal by e-filing it through the EDMS system and mailing one (1) copy thereof to the Defendant:

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## CERTIFICATE OF FILING

I hereby certify that I did file the within Reply Brief and Request for Oral Argument with the Clerk of Supreme Court, Iowa Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319 by e-filing it through the EDMS system on September 17, 2021.

/s/ John C. Heinicke  
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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

### I. WHETHER THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND ROSS GUILTY OF TWO COUNTS OF SEXUAL ABUSE IN THE SECOND DEGREE?

#### Authorities

#### STATUTES AND RULES

Iowa R. App. P. 6.1101(2)(d), (f)  
(Iowa Code § 709.3(1)(b) (2018))

#### CASES

*State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984)  
*State v. Harrington*, 284 N.W.2d 244, 248 (Iowa 1979)  
*State v. Henderson*, 696 N.W.2d 5 (Iowa 2005)  
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*State v. Quinn*, 691 N.W.2d 403 (Iowa 2005)  
*State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980)  
*State v. Williams*, 695 N.W.2d 23 (Iowa 2005)  
*State v. Smith*, 508 N.W.2d 101 (Iowa App. 1993)

### II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING UPON IMPROPER FACTORS AT SENTENCING?

#### Authorities

#### STATUTES AND RULES

Iowa R. App. P. 4  
Iowa Code §§ 901.1 – 901.5

#### CASES

*State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002)  
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*State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015)  
*State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)

III. WHETHER THE TRIAL COURT ERRED IN GIVING  
INSTRUCTION NOS. 16 & 17, THE NONCORROBORATION  
INSTRUCTION?

Authorities

STATUTES AND RULES

Iowa R. App. P. 6.904(2)(c)

Iowa Code § 709.6

CASES

*State v. Altmayer*, 18-0314, 2019 WL 1400366 (Ia. App. Apr. 14, 2021)

*State v. Barnhardt*, 919 N.W.2d 637 (Iowa App. 2018)

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*State v. Harrington*, 284 N.W.2d 244, 250 (Iowa 1979)

*State v. Kraai*, 19-1878, 2021 WL 476488 (Ia. Ct. App. Feb. 6, 2019)

*State v. Shorter*, 945 N.W.2d 1 (Iowa 2020).

*State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987)

## STATEMENT OF THE CASE

**Nature of the Case:** This is an appeal from the judgment and conviction entered in the Iowa District Court for Madison County following jury trial in case number FECR109178. Alexander Shantee Thomas Ross was convicted of two Counts of Sexual Abuse in the Second Degree, alleging that Mr. Ross abused his girlfriend's two young daughters. Despite insufficient evidence that contradicted the statements made by the girls, reliance on improper factors at sentencing, and the district court giving improper jury instructions regarding non-corroboration, the district court sentenced Ross to serve two consecutive, twenty-five year terms, with 70% mandatory minimum served prior to release. For the reasons, the Appellant has filed this direct appeal and seeks the intervention of the Court of Appeals.

**Course of Proceedings:** Defendant-Appellant Alexander Shantee Thomas Ross, hereinafter referred to as Ross, Relies on the Course of Proceedings as previously filed in the Appellant's Proof Brief.

**Facts:** Ross relies on the Facts as previously filed in Appellant's Proof Brief. Additional facts will be cited as necessary in the Argument.

## ROUTING STATEMENT

Retention by the Iowa Supreme Court is appropriate because there are conflicting Court of Appeals opinions whether the submission of a non-corroboration instruction violates Iowa Code section 709.6. Clarification from the

Iowa Supreme Court could assist district court judges on whether to give a non-corroboration instruction moving forward. Iowa R. App. P. 6.1101(2)(d), (f).

## ARGUMENT

### I. THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND ROSS GUILTY OF TWO COUNTS OF SEXUAL ABUSE IN THE SECOND DEGREE.

**Standard of review:** On sufficiency of evidence claims, the standard of review is for correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). A jury's verdict is upheld if substantial evidence supports it. *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). "Substantial evidence does more than raise suspicion or speculation. We consider all record evidence not just the evidence supporting guilt when making sufficiency-of-the-evidence determinations. However, in making such determinations, we also view the 'evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.'" *State v. Williams*, 695 N.W.2d at 27 quoting *State v. Quinn*, 691 N.W.2d at 407. *See also State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005).

**Preservation of error:** Error was preserved with a timely made motion for judgment of acquittal. (Trial Tr. Day Five, pg. 28).



Merits: “709.3 Sexual abuse in the second degree. 1. A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances: [ . . . ] b. The other person is under the age of twelve.” (Iowa Code § 709.3(1)(b) (2018)). “Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt.” *State v. Legear*, 346 N.W.2d 21, 23 (Iowa 1984). “The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record.” *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). “We consider all evidence at trial, not just the evidence that supports guilt.” *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). “This court has gone its full length to protect the right of jury trial against encroachment by the courts under any guise, and one of the rights of jury trial is the right to have the credibility of the witness determined by the jury.” *State v. Smith*, 508 N.W.2d 101, 103. “The sufficiency of corroboration testimony is normally a question of fact for the jury.” *State v. Harrington*, 284 N.W.2d 244, 248 (Iowa 1979).

“When read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and attimes, border on the absurd.” *State v. Smith*, 508 N.W.2d at 103. It is clear that both girls in the

case at hand lived in a home where they could easily observe sexual activity between their parents:

Q: Okay. Have you ever seen your mom or Alex naked?

A [K.C.]: Sometimes when I would wake up in the morning and ask to watch TV.

Q: Would you go in their bedroom?

A: No. I could just see them through the crack.

Q: The crack of what?

A: Of the kitchen.

Q: Okay. So there's a crack in the kitchen that you can see into their bedroom?

A: Yes.

Q: And you saw your mom and Alex in there naked?

A: Yes.

*Id.* at 92. If K.C. was able to observe the adult couple engaged in consensual sexual acts in the privacy of their bedroom, it is clear that, while living in the same home, L.C. would have observed the same sexual interactions. When taken in conjunction with the conflicting testimony and unwillingness on each girl's part to answer, it is clear that the evidence was not substantial enough to withstand a verdict of guilty.

L.C. explains that she also reported the alleged abuse to her grandmother in Colorado, who told her that she herself had been a victim of sexual abuse as a child. *Id.* at 37. During "special talks" L.C. had with her grandmother, L.C. was influenced and instructed by her grandmother to make the allegations that underlie the charges in the instant case. *See Id.* at 50. During one of these special talks, L.C. stated, "Well, when me and her were talking, she had something like that happen to her, too. And she know what it felt like and so she—she just wanted me to know to stay strong

and tell the people that are going to help you so that they can out him in jail.” *Id.* It is clear that the girls were coached by their grandmother and that the grandmother had a clear interest in keeping the girls with her in Colorado.

In conclusion, it is clear that there was insufficient evidence presented by the State to meet their burden of proof. No evidence was presented to suggest that either girl had been subjected to sexual abuse of the type and frequency of that described in the alleged victims’ testimony. The girls themselves contradicted each other with their descriptions of these occurrences of alleged abuse. Further, it appears that both were coached by their grandmother, who, by revealing her own childhood abuse and her wish for her grandchildren to stay in Colorado, and who was clearly biased in her desired outcome. The State did not meet their burden of proof, and as such, these convictions cannot stand.

## **II. THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING UPON IMPROPER FACTORS AT SENTENCING.**

**Standard of review:** Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 4; *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). “We apply an abuse of discretion standard when the sentence challenged was within the statutory limits.” *State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015). “We will find an abuse of discretion when ‘the district court exercises its discretion on grounds or for reasons that were clearly untenable or

unreasonable.” *State v. Headley*, 926 N.W.2d 545, 549 (Iowa 2019) (citing *State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)).

**Preservation of error:** The State and Ross agree that error has been preserved.

**Merits:** It is improper under the sentencing guidelines in Iowa Code §§ 901.1 – 901.5, and a violation of Ross’ procedural and substantive due process rights, as well as his confrontation rights, as those rights are protected by the Iowa and United States Constitutions, for the trial court to have considered. The sentencing court is to consider pertinent information, which is the purpose of the presentence investigation, and such categories of information are listed in Iowa Code § 901.3. Iowa Code section 901.2(1) authorizes the district court to receive “any information which may be offered which is relevant to the question of sentencing.” Iowa Code section 901.5 authorized the court to “receive and examin[e] all pertinent information, including the presentence investigation report.” Iowa Code section 901.3(1)(a) authorizes a presentence investigator to inquire into the “defendant’s characteristics, family and financial circumstances, needs and potentialities.”

While it is true that the rules purport to allow the court to “consider information from other sources,” that statement is limited in its application. *See, e.g., State v. Formaro*, 638 N.W.2d 720 (Iowa 2002) (“It is a well-established

rule that a sentencing court may not rely upon additional, unproven, and unprosecuted charges unless . . .”). It is improper for the Court to say it would not consider juvenile matters but then also say it considered the statement of counsel which included the juvenile matters. This serves as one example of a type of information that may not properly be considered. Accordingly, Mr. Ross prays this Court to vacate his sentence and remand the matter for resentencing.

### **III. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NOS. 16 & 17, THE NONCORROBORATION INSTRUCTION.**

**Standard of Review:** The State and Ross agree that jury instructions are reviewed for correction of errors at law. *State v. Benson*, 919 N.W.2d 237, 241-2 (Iowa 2018).

**Preservation of Error:** The State and Ross agree that error was preserved.

**Merits:** Iowa Code section 709.6 specifically provides that “[n]o instruction shall be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim’s testimony than that of any other witness to that offense or any other offense.” The use of Instruction Nos. 16 & 17 resulted in prejudicial error to Ross and requires reversal of his convictions and a remand for a new trial.

First, the non-corroboration instruction is not a uniform instruction and has not been approved by the Iowa State Bar Association’s Uniform Jury Instruction committee. Although trial courts are not bound by the uniform instructions, *State v.*

*Harrington*, 284 N.W.2d 244, 250 (Iowa 1979), there is a distinct preference in giving uniform instructions to be followed by the trial courts. *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). The trial court in the case at bar did not use a uniform instruction. Second, the effect of Instruction Nos. 16 & 17 is to highlight the testimony of the child victims and emphasize that testimony does not have to be corroborated.

The use of Instruction Nos. 16 & 17 does create a different standard for the child victims by telling the jury that their testimony need not be corroborated. This is in direct contravention to Iowa Code section 709.6. Third, the reliance on *State v. Barnhardt*, 919 N.W.2d 637, 2018 WL 2230938 (Table 2018) as authority for the use of the non-corroboration instruction is misplaced. The *Barnhardt* opinion is not a reported opinion. “Unpublished opinions or decisions shall not constitute controlling legal authority.” Iowa Rule of Appellate Procedure 6.904(2)(c). Moreover, the premise upon which *Barnhardt* was based is not applicable in the case at bar. The *Barnhardt* opinion cites to two law review articles written by an Iowa Assistant Attorney General which refer to “. . . implicit effects of institutionalized sexism and anti-victim bias [that] persists in the hearts and minds of jurors.” *State v. Barnhardt*, 919 N.W.2d 637, 2018 WL 2230936 (Table 2018).

It is true, as the State mentions in its Brief at 20, that the instruction given in Ross’ case was more like the instruction given in *State v. Altmayer*, No. 18-0314,

2019 WL 476488 at \*5 (Iowa Ct. App. Feb. 6, 2019) which explicitly informed the jurors that they are to evaluate the testimony of the victim the same way they would evaluate the testimony from any other witness, as section 709.6 requires. Ross submits that the second sentence of Instruction No. 16 and 17 implicitly violated the prohibition against the use of noncorroboration instruction found in State v. Kraai, No. 19-1878, 2021 WL 1400366 (Iowa Ct. App. Apr. 14, 2021. (Jury Instruction No. 16 and 17; App. Vol. II, p. 45, 46). While telling the jury that the testimony of the victim may be evaluated the same way as any other witness in the first sentence, the same instructions then tell the jury that the testimony of the victim need not be corroborated in the second sentence. As Kraai points out “[t]he challenged instruction informed the jurors that the complainant’s testimony did not require corroboration. But it did not tell them what to do with that legal principle.” State v. Kraai, No. 19-1878, 2021 WL 1400366 at \* 8 (Iowa Ct. App. Apr. 14, 2021. Essentially the second sentence of Instruction No. 16 and 17 negates any mitigating effect the first sentence had. Ross submits that the instructions given in his case did not tell the jury to apply the same standard to all testimony by virtue of the second sentence to those very instructions. As the Kraai court held, “[c]ontrary to the State’s argument, the instruction here did not tell the jury to apply the same standard to all testimony. The court did not convey that equivalency to Kraai’s jury. Thus, we hold giving the noncorroboration instructions was error.” Id at 15.

The giving of Instruction No. 16 and 17 was not harmless error and the two guilty verdicts rendered were attributable to the faulty instructions. State v. Shorter, 945 N.W.2d 1, 9 (Iowa 2020).

Prospective jurors in the case at bar were specifically told by the prosecutor about the lack of corroborating evidence, the lack of DNA evidence, lack of other witnesses during voir dire and the prospective jurors understood that corroborating evidence was not required. There was thus no need for an additional instruction that only served to highlight the testimony of the child victims and instruct the jurors that that testimony need not have corroborating evidence to the exclusion of the other evidence.

### **CONCLUSION**

For all of the reasons stated above, Defendant-Appellant Alexander Shantee Thomas Ross respectfully requests that this Court reverse the judgment and sentence of the district court and remand this case for a new trial for the two counts of sexual abuse in the second degree.

### **NOTICE OF ORAL ARGUMENT**

Notice is hereby given that upon submission of this cause, counsel for appellant hereby desires to be heard in oral argument.



ATTORNEY COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Reply Brief and Request for Oral Argument was the sum of \$1.80.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS.**

1. This Reply Brief and Request for Oral Argument complies with the type-volume limitation of Ia. R. App. P. 6.903(1)(g)(1) because the Reply Brief and Request for Oral Argument contains 3357 words.
2. This Reply Brief and Request for Oral Argument complies with the typeface requirements of Ia. R. App. P. 6.903(1)(e) and the type-style requirements of Ia. R. App. P. 6.903(1)(f) because this Reply Brief and Request for Oral Argument has been prepared in a proportionally spaced typeface using Time New Roman in 14-point font.

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