IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0914

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALEXANDER SHANTEE THOMAS ROSS,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Evidence Was Sufficient to Convict Ross on Both Counts of Sexual Abuse.

Authorities

Neighbors v. Iowa Elec. Light & Power Co., 175 N.W.2d 97 (Iowa 1970)
State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)
State v. Cardona, No. 19-1047, 2020 WL 1888770 (Iowa Ct. App. April 15, 2020)
State v. Crone, 545 N.W.2d 267 (Iowa 1996)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Hildreth, 582 N.W.2d 167 (Iowa 1998)
State v. Hobbs, No. 12-0730, 2013 WL 988860 (Iowa Ct. App. March 13, 2013)
State v. Laffey, 600 N.W.2d 57 (Iowa 1999)
State v. Leckington, 713 N.W.2d 208 (Iowa 2006)
State v. Liggins, 557 N.W.2d 263 (Iowa 1996)
State v. Mayes, No. 19-0252, 2020 WL 2060306 (Iowa Ct. App. April 29, 2020)
State v. Paredes, 775 N.W.2d 554 (Iowa 2009)
State v. Patterson, No. 20-0073, 2021 WL 3074487 (Iowa Ct. App. July 21, 2021)
State v. Smith, 508 N.W.2d 101 (Iowa Ct. App. 1993)
State v. Thorndike, No. 13–1403, 2014 WL 3931873 (Iowa Ct. App. Aug. 13, 2014)
State v. Truesdell, 679 N.W.2d 611 (Iowa 2004)
State v. Williams, 695 N.W.2d 24 (Iowa 2005)

II. The District Court Did Not Rely on an Improper Factor When It Sentenced Ross.

Authorities

State v. Boldon, 954 N.W.2d 62 (Iowa 2021)
State v. Gonzalez, 582 N.W.2d 515 (Iowa 1998)
State v. Mateer, 383 N.W.2d 533 (Iowa 1986)
State v. Sinclair, 582 N.W.2d 762 (Iowa 1982)

Iowa Code § 232.55(2)(*a*)

III. The District Court Did Not Err When It Gave the Noncorroboration Instructions; But Even If It Did, Any Error Was Harmless.

Authorities

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Altmayer, No. 18-0314, 2019 WL 476488 (Iowa Ct. App. Feb. 6, 2019)
State v. Barnhart, No. 17-0496, 2018 WL 2230938 (Iowa Ct. App. May 16, 2018)
State v. Bennett, 503 N.W.2d 42 (Iowa Ct. App. 1993)
State v. Feddersen, 230 N.W.2d 510 (Iowa 1975)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)
State v. Knox, 536 N.W.2d 735 (Iowa 1995)
State v. Kraai, No. 19-1878, 2021 WL 1400366 (Iowa Ct. App. April 14, 2021)
State v. McCall, 754 N.W.2d 868 (Iowa Ct. App. 2008)
State v. Schuler, 774 N.W.2d 294 (Iowa 2009)
State v. Stallings, 541 N.W.2d 855 (Iowa 1995)
Iowa Code § 709.6

ROUTING STATEMENT

The State notes that the question whether giving a non-corroboration instruction violates Iowa Code section 709.6 has generated conflicting opinions in the Court of Appeals. *Cf. State v. Kraai*, No. 19-1878, 2021 WL 1400366, at *7 (Iowa Ct. App. April 14, 2021) (holding non-corroboration instruction violates section 709.6) (further review granted 06/30/21); *with State v. Barnhart*, No. 17-0496, 2018 WL 2230938, at *4 (Iowa Ct. App. May 16, 2018) (holding that a non-corroboration instruction does not violate section 709.6) (further review denied 07/23/18). The instructions given in *Kraai* and *Barnhardt* were materially identical. Another Court of Appeals decision, *State v. Altmayer*, No. 18-0314, 2019 WL 476488, at *5 (Iowa Ct. App. Feb. 6, 2019) (further review denied 07/25/19), left intact by *Kraai*, approved an instruction that is materially identical to the instructions given in this case.

While a conflict between unpublished Court of Appeals opinions—a decision on publication is pending in *Kraai*—is not a ground for retention under rule 6.1101, clarification from this Court could assist district court judges who must determine whether to give such instructions going forward. *See* Iowa R. App. 6.1101(2)(d), (f).

That said, retention in this case is unnecessary for two reasons. First, this case involves the *Altmayer* instruction rather than the *Barnhardt* instruction. Second, this Court has already granted further review in *Kraai*. *See State v. Kraai*, Sup. Ct. No. 19-1878, Order 06/30/21. Because this case involves the *Altmayer* instruction that was not involved in *Kraai*, transfer of this case to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal from a guilty verdict following a jury trial on charges of sexual abuse in the second degree. Alexander Shantee Thomas Ross argues that the evidence was insufficient, that the district court erred when it instructed the jury that the law does not require corroboration of the victims' testimony, and that the district court abused its discretion in sentencing.

Course of Proceedings

The State accepts the course of proceedings as set forth in Ross's brief as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

At the time of trial in March of 2020, L.C. was ten years old and her sister, K.C., was nine. Prior to April of 2019, L.C. and K.C. lived with their mother and Ross in Patterson, Iowa. Trial Tr. Vol. IV P.24 L.16 – P.25 L.23. L.C. and K.C.'s mother worked nights as a nurse, leaving the girls in Ross's care. Trial Tr. Vol. IV P.28 Ls.2-14. L.C. testified that Ross began to sexually abuse her when she was in the first or second grade. Trial Tr. Vol. IV P.31 L.15 – P.32 L.8. Ross put his penis in L.C.'s vagina and in her "bottom" more than ten times. Trial Tr. Vol. IV P.32 Ls.12-18, Trial Tr. Vol. IV P.33 L.11 – P.34 L.7, P.35 Ls.3-7. Ross also tried "shoving" his penis into L.C.'s mouth, but she "would try to spit it out." Trial Tr. Vol. IV P.37 L.23 – P.38 L.3. She said that it "hurted a lot" when Ross raped her, and that he would either cover her mouth and nose with his hand or slap her face when she screamed or cried out. Trial Tr. Vol. IV P.33 L.25 – P.34 L.9, P.35 Ls.3-9. When Ross was finished, "white stuff" came out of his penis which he would clean up with a "dirty rag." L.C. would start crying, and Ross would lock her in her room. Trial Tr. Vol. IV P.35 Ls.10-23.

K.C. also testified that Ross touched her private parts with his penis more than ten times. Trial Tr. Vol. IV P.71 L.10 – P.77 L.11. She

said that she tried to yell for help, but Ross covered her mouth with his hand. Trial Tr. Vol. IV P.77 L.14 – P.78 L.1. After sexually abusing K.C., Ross would reward her with sweets and toys. Trial Tr. Vol. IV P.81 Ls.2-8.

ARGUMENT

I. The Evidence Was Sufficient to Convict Ross on Both Counts of Sexual Abuse.

Preservation of Error

Ross's motion for judgment of acquittal was insufficient to preserve the arguments he now raises on appeal. In his motion, Ross argued that the State failed to prove that any sexual abuse occurred between January 1, 2019, and April 11, 2019, as charged in the trial information. Trial Tr. Vol. V P.28 Ls.4-11. He also argued that the State failed to prove that the sexual abuse took place in Madison County. Trial Tr. Vol. V P.28 Ls.11-14. Finally, he included a vague and conclusory statement that "the evidence is not sufficient to prove that a sex act occurred." Trial Tr. Vol. V P.28 Ls.15-16. He did not cite *State v. Smith*, he did not mention any alleged "conflicting testimony" or "unwillingness on each girl's part to answer," nor did he mention alleged "coaching" by L.C. and K.C.'s grandmother. Appellant's Br. P.17-19.

Error is not preserved on a sufficiency of the evidence claim where counsel fails to make a motion for judgment of acquittal specifying the elements of the charge being challenged. *See State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011) ("The motion for directed verdict of acquittal ... lacked any specific grounds, and thus, the error was not preserved."); *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) ("The record reveals Crone's attorney did not mention the 'threat' or 'anything of value' elements of the extortion charge in his motion. Accordingly, Crone's motion for judgment of acquittal did not preserve the specific arguments he is now making for the first time on appeal."). Because Ross did not mention any of the specific grounds he now raises on appeal, his motion for judgment of acquittal was insufficient to preserve error on these issues. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) (noting defendant "failed to specifically raise the sufficiency of the evidence claim now raised on appeal").

The Iowa Supreme Court has recognized an exception to the general error-preservation rule when "the record indicates the grounds for a motion were obvious and understood by the trial court and counsel." *State v. Williams*, 695 N.W.2d 24, 27 (Iowa 2005). This

exception does not apply. The record shows that the State's response and the district court's ruling on the motion focused on Ross's claims that the State failed to prove the sexual abuse occurred between January and April of 2019, and that it occurred in Madison County. Neither the State nor the district court would have had any way of knowing that Ross intended to argue *Smith* credibility or coaching by the grandmother. Error is not preserved.

Standard of Review

When evaluating a sufficiency challenge, evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn to uphold the verdict. *State v. Leckington*, 713 N.W.2d 208, 212–13 (Iowa 2006). "A jury 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).

Merits

Ross's claim relies heavily on the court of appeals decision in *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993). In *Smith*, the court of appeals found a lack of substantial evidence supporting the defendant's convictions of multiple sexual abuse charges where

testimony of the three alleged victims was, in the majority's view, "inconsistent, self-contradictory, lacking in experiential detail, and, at times, border[ing] on the absurd." 508 N.W.2d at 103. But *Smith* is essentially a dead letter. As of this brief, *Smith* has been cited many times by Iowa appellate courts but has not produced a single victory for a defendant on a sufficiency challenge.[1] Most of those cases involved the sexual abuse of children and challenges to the testimony of those victims. This refusal to apply the deeply flawed decision in *Smith* reflects the fundamental doctrine that it is the role of the jury—not an appellate court reading a cold record—to decide questions of credibility. *See, e.g.*, *State v. Paredes*, 775 N.W.2d 554, 567 (Iowa 2009) ("[A] court must be careful not to usurp the role of a jury by making credibility determinations that are outside the proper scope of the judicial role."); *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999) ("[I]t is for the jury to judge the credibility of the witnesses and weigh

[1] For recent examples, *see State v. Patterson*, No. 20-0073, 2021 WL 3074487, at *2 (Iowa Ct. App. July 21, 2021); *State v. Mayes*, No. 19-0252, 2020 WL 2060306 (Iowa Ct. App. April 29, 2020); *State v. Cardona*, No. 19-1047, 2020 WL 1888770 (Iowa Ct. App. April 15, 2020); *see also State v. Hobbs*, No. 12-0730, 2013 WL 988860, at *3 (Iowa Ct. App. March 13, 2013) (describing the exception to the jury credibility determination rule that underlies the *Smith* decision as "exceedingly rare.").

the evidence."). This fundamental doctrine applies even in close cases. *See, e.g., Neighbors v. Iowa Elec. Light & Power Co.*, 175 N.W.2d 97, 101 (Iowa 1970) ("Defendant's argument is persuasive, but we may not substitute our view of the evidence for that of the jury."). But this is not a close case.

Ross's argument for discarding the jury's verdict is based on (1) K.C.'s testimony that she observed her mother and Ross naked in their bedroom, (2) an allegation of "conflicting testimony" that lacks any specific examples of conflict, (3) a nine-year-old girl's unwillingness to say the words "penis" and "vagina" in open court, and (4) testimony that the victims' grandmother supported them following their disclosure of Ross's sexual abuse and encouraged them to report it. Appellant's Br. P.17-19.

This Court is left to guess what possible relevance Ross's first argument has to his sufficiency challenge. With respect to the second, Ross makes the bare assertion that "[t]he girls themselves contradicted each other with their descriptions of these occurrences of alleged abuse." Appellant's Br. P.19. But Ross does not cite even one example of such a contradiction. His allegation is particularly puzzling because L.C. and K.C. were not witnesses to one another's

molestation by Ross and did not describe his abuse of the other. Ross's argument that K.C.'s unwillingness to say the words "penis" and "vagina" in open court somehow reflects on her credibility should be rejected out of hand. This is not a case where K.C. was confused about which of her body parts Ross touched, as Ross concedes. *See* Appellant's Br. P.11. K.C. was nervous and embarrassed to use the proper term in a courtroom, which is understandable for a nine-year-old girl.[2] Ross's characterization of the grandmother's support and encouragement as "coaching" is inappropriate in the context of a sufficiency challenge, where the appellate courts "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

Ross writes in his brief, "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." Appellant's Br. P.19. "Even if that were so, the jury, in its role as fact-finder, may predicate its verdict on victim testimony alone."

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[2] One reason K.C. gave for her refusal to say "penis" in the courtroom was "[b]ecause it's not for a little kid to say." Trial Tr. Vol. IV P.75 L.17.

Patterson, 2021 WL 3074487, at *2 (citing *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998)). L.C. and K.C. testified in detail about being molested and raped by Ross, including that it was painful and that he prevented them from crying out for help with a hand on their mouths. Their testimony alone provides substantial evidence to affirm the jury's verdict. *See, e.g.*, *State v. Thorndike*, No. 13–1403, 2014 WL 3931873, at *1 (Iowa Ct. App. Aug. 13, 2014) (rejecting *Smith* challenge because "[t]he victims' respective testimony regarding the same operative facts is substantial evidence sufficient to support the jury's verdict"), *aff'd*, 860 N.W.2d 316 (Iowa 2015).

II. The District Court Did Not Rely on an Improper Factor When It Sentenced Ross.

Preservation of Error

The State does not contest error preservation.

Standard of Review

Generally, review of a district court's sentencing decision is for abuse of discretion or for a defect in sentencing procedure. *See State v. Gonzalez,* 582 N.W.2d 515, 516 (Iowa 1998). A claim that a court considered an improper factor implicates a defect in sentencing procedure rather than a court's exercise of discretion. *State v. Mateer,* 383 N.W.2d 533, 537 (Iowa 1986). If the district court

does consider an improper factor, the sentence must be vacated and the case remanded for resentencing. *See State v. Sinclair,* 582 N.W.2d 762, 765 (Iowa 1982).

Merits

Ross argues that the district court improperly considered a sex offense he committed while he was a juvenile. Appellant's Br. P.20-21. It did not. In response to some confusion about the accuracy of the information in the presentence investigation report, the State made the following record at sentencing:

> MR. SCHULTZ: In light of what Mr. Ross stated as to his juvenile, the State would ask that the Court not even consider that. I think – I think that at this point the evidence in this case alone substantiates a consecutive sentence. I don't think we need to look at his – his juvenile record. Whether it was or was not, I don't think it matters.
>
> ...
>
> So I would ask the Court, again, to run these consecutive, and not even consider Mr. Ross's potential juvenile record.

Sent. Tr. P.16 Ls.13-20, P.17 Ls.5-7. In response to the State's request, the district court agreed that it would not consider any juvenile offense. Sent. Tr. P.19 L.23 – P.20 L.1.

But even if the district court had considered Ross's juvenile sex offenses, he would not be entitled to resentencing. The Iowa Code provides that courts may consider juvenile adjudications and dispositions in sentencing for felonies and aggravated misdemeanors. *See* Iowa Code § 232.55(2)(*a*). The Code does not provide any limitation on the consideration of juvenile adjudications and dispositions for the purposes of sentencing. *See State v. Boldon*, 954 N.W.2d 62, 73 (Iowa 2021). Ross argues that the district court may not consider "unproven" or "unprosecuted" offenses. Appellant's Br. P.21. True enough, unless (1) the facts before the court demonstrate the defendant committed the offense or (2) the defendant admits committing the offense. *See Gonzalez,* 582 N.W.2d at 516. In this case, Ross admitted to one of the two juvenile sex offenses listed in the presentence investigation, Sent. Tr. P.6 L.22 – P.7 L.18, and while he denied having committed the other one, the presentence investigator noted that he "rechecked this charge through ICIS and the name, DOB, and Social Security number match the defendant." PSI P.3; Conf. App. 18. Neither offense was "unproven" or "unprosecuted."

III. The District Court Did Not Err When It Gave the Noncorroboration Instructions; But Even If It Did, Any Error Was Harmless.

Preservation of Error

Ross objected to the noncorroboration instructions and received an adverse ruling. Error is preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Challenges to jury instructions are reviewed for errors at law. *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010).

Merits

Instructions 16 and 17 provide, with respect to each victim:

> You should evaluate the testimony of [the victim] the same way you evaluate the testimony of any other witness. The law does not require that the testimony of [the victim] be corroborated in order to prove that she was sexually abused. You may find the Defendant guilty of Sexual Abuse if [the victim]'s testimony convinces you of guilt beyond a reasonable doubt.

Instruction Nos. 16 & 17; App. 45-46. Ross argues that these instructions run afoul of Iowa Code section 709.6, which prohibits any instruction in a trial on a charge of sexual abuse "cautioning the jury to use a different standard relating to a victim's testimony than

that of any other witness to that offense or any other offense." Iowa Code § 709.6.

The challenged instructions are identical to an instruction approved by the court of appeals in *State v. Altmayer*, No. 18-0314, 2019 WL 476488, at *5 (Iowa Ct. App. Feb. 6, 2019). In that case, the court of appeals explained its decision as follows:

> Instruction number twenty-five accurately reflects Iowa Code section 709.6, which prohibits instructing "the jury to use a different standard relating to a [sexual abuse] victim's testimony than that of any other witness to the offense or any other offense." Furthermore, the instruction does not unduly emphasize [the victim]'s testimony because it explicitly applies the same standard to [the victim] as all other witnesses and it reminds jurors they must find Altmayer guilty beyond a reasonable doubt to convict him of sexual abuse. Therefore, the district court did not err in submitting instruction number twenty-five.

Id. In another similar case, *State v. Barnhardt*, the court of appeals approved an instruction stating only that "[t]he law does not require that the testimony of the alleged victim be corroborated." No. 17-0496, 2018 WL 2230938, at *4 (Iowa Ct. App. May 16, 2018).

In *State v. Kraai*, the court of appeals revisited the noncorroboration instruction issue and concluded that the *Barnhardt* instruction did violate section 709.6. No. 19-1878, 2021 WL 1400366,

at *3.[3] Specifically, the court focused on concerns that the *Barnhardt* instruction "singled out the testimony of the 'complainant' as not requiring corroboration." *Id.* "Because it mentioned only the complaining witness, the jurors could have believed that the testimony of other witnesses, particularly the accused, did require corroborating evidence to be believed." *Id.* The court distinguished the *Barnhardt* instruction from the *Altmayer* instruction, which tells the jury to "evaluate the testimony of [the complaining witness] the same way you evaluate the testimony of any other witness." *Id.* at 7 n.10. The *Kraai* decision said nothing about disavowing the *Altmayer* instruction, which was given in this case.

In *Kraai*, as in *Altmayer* and *Barnhardt*, the court of appeals agreed that a noncorroboration instruction is "an accurate statement of law." *See id.* at *7–8; *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) (citing *State v. Feddersen*, 230 N.W.2d 510, 514–15 (Iowa 1975)) ("The law has abandoned any notion that a rape victim's accusation must be corroborated."). Refusing to instruct the jury on this relevant point of law would be an abdication of the trial court's

[3] As explained in the State's routing statement, this Court has since granted further review in *Kraai*. *See State v. Kraai*, Sup. Ct. No. 19-1878, Order 06/30/21.

"duty to instruct fully and fairly" on "all issues raised by the evidence." *See State v. Schuler*, 774 N.W.2d 294, 297 (Iowa 2009) (quoting *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995)); *State v. McCall*, 754 N.W.2d 868, 872 (Iowa Ct. App. 2008) (quoting *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa Ct. App. 1993)) (explaining that trial court has "the duty to ensure the jury understands . . . the law it must apply"). That is especially the case with the *Altmayer* instruction, which explicitly informs the jurors that they are to evaluate the testimony of the victim the same way they would evaluate testimony from any other witness, as section 709.6 requires.

The record from voir dire showed that misconceptions about the need for corroboration of testimony regarding sexual abuse were present among the potential jurors. For example:

> SCHULTZ: … Do you believe that someone can be found guilty solely through witness testimony and no physical evidence?
>
> PROSPECTIVE JUROR 1: It would be hard for me to find someone guilty based on testimony alone.
>
> …
>
> SCHULTZ : … why do you think it would be difficult?
>
> PROSPECTIVE JUROR 1: I would feel that if I were going solely off the testimony of one or

> more people without physical evidence, that it is possible that there could be a bias towards somebody that those witnesses were – demonstrated. I think it should take more than that, than the word. I don't care if you bring in one hundred people up here to say the same thing. It should take more than that.

Trial Tr. Vol. II P.79 Ls.2-6, Ls.13-23. And another exchange with a different potential juror:

> SCHULTZ: … Can somebody be convicted of a sexual crime by just having the alleged victim testify? Is that good enough?
>
> …
>
> PROSPECTIVE JUROR 2: Just one. Just taking word against word. By not knowing either of them, I don't know if I could just trust one person by looking at them and saying they're correct, unless I had more evidence.

Trial Tr. Vol. II P.93 Ls.21-23, P.94 Ls.5-9. And another exchange with a different potential juror:

> SCHULTZ: … If a person testifies that – and accuses somebody of sexually assaulting them. Okay? And they testify to that. Without physical evidence or physical corroboration, you could not convict the person they accused. How many of you would raise your hand?
>
> …
>
> PROSPECTIVE JUROR 3: Because I want to make darn sure … I want to make sure the guy is guilty or whatever. It's going to take a lot to convince me one way or the other.

> SCHULTZ: So how would you define reasonable doubt, then?
>
> PROSPECTIVE JUROR 3: Well, if you had the evidence, that would be – define it that way.
>
> SCHULTZ: So testimony is not enough?
>
> PROSPECTIVE JUROR 3: I don't think so.

Trial Tr. Vol. II P.95 L.9 – P.96 L.1. To be fair, other panelists said they understood that they could rely on testimony as proof that abuse occurred. But the presence of the misconception that corroboration of a sex abuse victim's testimony is required among this panel was clear—*all* the jurors stood to benefit from an instruction that accurately describes the law. Because the district court gave the *Altmayer* instruction rather than the *Barnhardt* instruction, there was no error even if *Kraai* remains good law.

In any case, even if it was error to give the *Altmayer* instruction, such error was harmless. The testimony of the victims in this case was detailed, consistent, and as in *Kraai*, "outside the ken" of someone the girls' age. Ten-year-old L.C. testified that when Ross raped her, he would say "inappropriate things" like "Get it, yeah, Baby, oh yeah." Trial Tr. Vol. IV P.34 L.10 – P.35 L.2. She also testified that "white stuff" came out of his penis that was "gooey" and "disgusting." Trial Tr. Vol. IV P.35 Ls.10-19. When the State asked

nine-year-old K.C. whether Ross's penis was soft when he touched her, she answered that it was not. Trial Tr. Vol. IV P.79 Ls.4-11. As in *Kraai*, "the jury was not left to decipher the noncorroboration instruction in a vacuum." *Kraai*, 2021 WL 1400366, at *8. The instructions as a whole fairly guided the jury's decision making and explained the State's burden of proof. "On this record, the guilty verdict was 'surely unattributable'" to the noncorroboration instructions. *Id.*

CONCLUSION

For the foregoing reasons, Ross's convictions and sentence should be affirmed.

REQUEST FOR NONORAL SUBMISSION

Nonoral submission is appropriate for this case.

Respectfully submitted,

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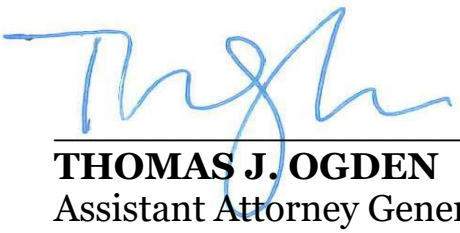

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CERTIFICATE OF COMPLIANCE

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:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,863** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 18, 2021

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