NO. 21-1676

**IN THE SUPREME COURT FOR THE STATE OF IOWA**

STATE OF IOWA,
Appellee,

vs.

NELSON FLORES,
Appellant.

AN APPEAL FROM THE IOWA DISTRICT COURT
FOR CRAWFORD COUNTY

HONORABLE ZACHARY HINDMAN, JUDGE

# APPLICATION FOR FURTHER REVIEW

**NELSON FLORES**
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## QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in finding good cause existed for continuance, where the cause for delay was attributable to the State?
2. Did the Court of Appeals err in determining that the State's admission of the forensic interview was harmless error?
3. Did the Court of Appeals err when it affirmed the Districts Court's admittance of co-conspirator statements?

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## STATEMENT SUPPORTING FURTHER REVIEW

Further review is warranted in this case pursuant to Iowa R. App. P. 6.1103(b)(1), (2) and (4). First, the Court of Appeals' decision that good cause existed to violate Flores' statutory right to a speedy trial when the cause for delay was solely attributable to the State's lack of diligence is an important question of law that should be settled by the Supreme Court and is an issue of broad public importance that the Supreme Court should determine. Notably, the State failed to timely file a writ of Habeas Corpus ad prosequendum, and then argued that Flores' lack of presence at trial was the fault of the Federal Government.

Second, the Court of Appeals admission of the forensic interview as harmless error conflicts with *State of Iowa v. Jake Skahill,* No. 19-1067 (Iowa 2021), and the Supreme Court's decision in *State v. Austin*, 585 N.W.2d 241, 243-44 (Iowa 1998). The Court of Appeals found that the "overwhelming" evidence in this case constituted harmless error; however, W.R. was the only witness with firsthand knowledge of the offenses.

Lastly, Flores argues that the Court of Appeals' decision that the co-conspirator statements were admissible conflicts with *State v. Kidd*, 239 N.W.2d 860 (Iowa 1976).

## STATEMENT OF THE CASE

Nelson Flores was first charged in Crawford County case FECR067438 in a three count trial information alleging: Count I, sexual abuse in the second degree, in violation of Iowa Code §§709.1, 709.3(1)(b), 903B.1, Count II, lascivious acts with child, in violation of Iowa Code §§709.1, 709.8(1)(a), 709.8(2)(a), 903B.1, and Count III, assault with intent to commit sexual abuse, in violation of Iowa Code §§709.11, 903B.2. Trial Information, Appx. P. 4. The Trial Information was filed on July 14, 2016. Trial Information, Appx. P. 4. Mr. Flores waived his right to a speedy trial within 90 days pursuant to Iowa Rule of Criminal Procedure 2.33(2)(b), and the document indicated an interpreter was used. Written Arraignment and Plea of Not Guilty, FECR067438. Appx. P. 7. On August 1, 2017, Mr. Flores filed a waiver of his right to a speedy trial within one year pursuant to IA R. Cr. P. 2.33(2)(c); however, on this document there was no indication that a Spanish interpreter was utilized. Waiver of Right to Speedy Trial, FECR067438. Appx. P. 9. Trial was continued several times over the course of 2018 and 2019. It was eventually set for a bench trial on January 28, 2020, but that trial was continued on the State's motion and was reset to September 9, 2020. 1/15/2020 Motion for Continuance, 3/10/2020 Order

Setting Hearing. Appx. P. 11-12. On September 4, 2020, the State moved to continue the trial without objection due to Mr. Flores' need for an interpreter. 9/4/2020 Motion for Continuance, Appx. P. 14. On January 29, 2021 the State moved to reset the trial due to Mr. Flores having obtained new counsel. 1/29/2021 Motion to Re-Set Trial & Pre-Trial Conference, Appx. P. 15. On May 4, 2021, the District Court continued the trial to July 13, 2021 on Defense counsel's motion, presumably for the case to be tried at the same time as the companion case FECR069029. 5/4/21 Order Continuing Trial and Pretrial Conference, Appx. P. 16.

Mr. Flores was also charged in a ten count trial information in a separate case, Crawford County Case FECR069029: Counts I-III, sexual abuse in the third degree in violation of Iowa Code §§709.1, 709.4(1)(b)(3)(d), 903B.1, Count IV-V, extortion in violation of Iowa Code §§711.4(1)(a), 711.4(2), Count VI, conspiracy to commit a felony (suborn perjury), in violation of Iowa Code §§706.1, 720.3, Count VII, conspiracy to commit an aggravated misdemeanor (prevent apprehension or obstruct the prosecution of the defendant), in violation of Iowa Code §§706.1, 719.3, Count VIII, lascivious conduct with minor, in violation of Iowa Code §§709.14, 903B.2, Count IX, tampering with a witness or juror, in violation

of Iowa Code §720.4, and Count X, dissemination and exhibition of obscene materials to minor, in violation of Iowa Code §728.2. Trial Information, FECR069029, Appx. P. 40. The Trial Information in FECR069029 was filed on April 12, 2021. Mr. Flores submitted a written arraignment and plea of not guilty on May 6, 2021. Written Arraignment, FECR069029, Appx. P. 45. In this written arraignment, Mr. Flores demanded his right to a speedy trial pursuant to Iowa Rule of Criminal Procedure 2.33(2)(b). Written Arraignment, FECR069029 p. 3, Appx. P. 47. In an arraignment order, the District Court set the case for jury trial on July 13, 2021. Order of Arraignment, FECR069029, Appx. P. 48.

Several motions and orders related to a continuance of trial were filed in both cases. On July 2, 2021, the State filed a motion for good cause finding for continuance, alleging that because Mr. Flores was in the custody of Immigration and Customs Enforcement (hereinafter "ICE"), he could not be brought to trial on July 13, 2021. Motion for Good Cause Finding For Continuance, Appx. P. 50. On July 6, 2021, the State filed a petition for writ of habeas corpus ad prosequendum, requesting the District Court issue an order commanding ICE to release Mr. Flores to the custody of the Crawford County Sheriff. Petition for Writ of Habeas Corpus Ad Prosequendum,

Appx. P. 52. On July 7, 2021, Mr. Flores filed a resistance to the State's continuance. Resistance to State's Motion to Continue Trial, Appx. P. 54. The District Court set a hearing on the State's motion to continue trial for July 8, 2021.

At the July 8, 2021 hearing, the State argued for the continuance of trial, and in addition to restating the reason that Mr. Flores was in ICE custody, also stated that the parties were in the midst of conducting depositions of potential trial witnesses. 7/8/21 PTC 5:3-25, 6:9-22. Mr. Flores' counsel asserted to the Court that he had diligently attempted to schedule the depositions for a period of three months. 7/8/21 PTC 7:14-22.

On July 9, 2021, the District Court issued a writ of habeas corpus for Mr. Flores with the wrong name, and corrected the writ in a nunc pro tunc order on the same date. 7/9/21 Writ, 7/9/21 Order Nunc Pro Tunc, Appx. P.59-61. On August 12, 2021 the District Court issued an order nunc pro tunc with corrections to the original writ. Nunc Pro Tunc Order on State's Petition for Writ of Habeas Corpus Ad Prosequendum, 8/12/2021 Corrected-Writ of Habeas Corpus, Appx. P. 63-66. Mr. Flores was transported on the same date from the Pottawattamie County Jail to the Crawford County Jail. 8/12/21 Return of Service, Appx. P. 68.

The admissibility of the Project Harmony Videos was heavily litigated throughout the case. At the final pretrial conference prior to the beginning of the jury trial, the State reiterated its intention to offer the videos. 8/12/21 PTC TR 14:19-22. Mr. Flores once again objected to their admissibility at the pretrial conference through a limine motion. 8/12/21 PTC TR 15:22. The State further argued that the testimony of Wendy Hernandez should be compelled by the Court, or if she is excluded or claims privilege, then she should be declared unavailable and her deposition should be entered into evidence. 8/12/21 PTC TR 37:16-25, 38:1-4. Mr. Flores filed a motion in limine requesting first that certain false ID cards be excluded from evidence due to their prejudicial effect outweighing their probative value. 8/12/21 PTC TR 59:4-6. He further requested that testimony regarding a rumor that he hired someone to kill another person be disallowed. 8/12/21 PTC TR 61:20-25, 62:1-13. Mr. Flores requested once again that the District Court not allow the State to play the Project Harmony videos. 8/12/21 PTC TR 64:5-9, 65:2-23.

The District Court overruled Mr. Flores' motion in limine in regards to the ID cards and contract killer rumor, but directed the State to present that evidence first outside the presence of the jury. 8/14/21 PTC Order, p.

18-19, Appx. P. 86-87. The District Court did sustain Mr. Flores' limine as to the Project Harmony videos, overruling the prior order that allowed the videos to be entered into evidence. 8/14/21 PTC Order p. 31, Appx. P. 99. The District Court found that the videos could potentially come in pursuant to Rule 5.801(d)(1)(B), but reserved such ruling until the evidence was presented at trial. 8/14/21 PTC Order p. 31, Appx. P. 99.

On the morning of trial, Mr. Flores' Trial Counsel brought the issue back up before the District Court, arguing that his impeachment with prior statements from one of the videos would not essentially open the door to the State being able to admit the videos. Trial Vol. 1 TR 8:5-25, 9:1-23. The District Court once again declined to rule on the issue until after Mr. Flores' cross examination of W.R. Trial Vol. 1 TR 14:1-6. The Court somewhat ruled on the issue the following day, but reserved final ruling until after Mr. Flores' cross examination of W.R. Trial Vol. 2 TR 9:23-25, 10:1-7. The District Court at that time did believe that admission of prior statements from one recorded interview would not open the door for the admission of other recorded interviews. Trial Vol. 2 TR 12:23-25, 13:1-2, 21:11-14.

Day one of the trial was jury selection. During trial, the District Court found that the 2016 Project Harmony interview was admissible under Rule

5.106, but not the 2020 Project Harmony interview. Trial Vol. 3 TR 123:11-25, 124:1-2, 126:1-2.

During the trial, the District Court ruled that evidence of the fake ID and the fight between Wendy Hernandez and Mr. Flores was inadmissible as not relevant and under Rule 5.403. Trial Vol. 3 TR 214:23-25, 215:1. The District Court further ruled that statements made by Wendy Hernandez were not admissible as co-conspirator statements admissible under Rule 5.801(d)(2)(e). Trial Vol. 3 TR 216:17-24. The State requested similar statements be admitted during a different witness Jennifer Bullock's testimony. Trial Vol. 4 3:4-16. After hearing the witness testify outside the presence of the jury, the District Court allowed these statements to be presented to the jury. Trial Vol. 4 16:5-13.

The State rested after Ms. Bullock's testimony. Trial Vol. 4 74:8. The Defense made a motion for judgment of acquittal as to all the counts in both cases. Trial Vol. 4 63-70. The Defense presented one witness, Dr. Ross Valone. Trial Vol. 4 74:14.

A verdict was returned in FECR067438 which found Mr. Flores guilty of all counts in the Trial Information. Criminal Verdict, FECR067438. Mr.

Flores was also found guilty in FECR069029 of Counts 1-3, 6-10, and not guilty on Counts 4-5. Criminal Verdict FECR069029.

Mr. Flores filed a Motion for New Trial wherein he alleged five different issues: 1) the District Court improperly admitted the Project Harmony video; 2) the District Court improperly admitted evidence regarding Mr. Flores' immigration status in the United States; 3) the District Court failed to rule on Mr. Flores' motion for mistrial following the elevator incident; 4) the District Court failed to rule on Mr. Flores' Motions for Judgment of Acquittal; and 5) the jury's verdict was contrary to the evidence. Motion for New Trial, Appx. P. 18.

The District Court denied Mr. Flores' post-trial motions for the reasons stated during the sentencing/motion hearing on October 29, 2021. 10/29/21 Order. The District Court upheld the charges in the felony case, but dismissed the charges in the simple misdemeanor case under Ia. R. Cr. P. 2.54. Sentencing TR 9:18-25, 10:1-13.

On October 29, 2021, The District Court sentenced Mr. Flores in FECR067438 to a twenty-five year indeterminate term of incarceration, after ordering the three counts to be ran concurrent. Order of Disposition, p. 2-4, Appx. P. 27-28. In FECR069029 the District Court ran all counts concurrent

for an indeterminate term of ten years. Order of Disposition, p. 2-4, Appx. P. 27-28. The District Court ordered that the sentences in FECR067438 and FECR069029 be ran consecutive for a total indeterminate term of 35 years. Mr. Flores timely filed a notice of appeal on November 2, 2021.

In Flores appeal, he argued six points: 1) The District Court erred when it found good cause for the State's motion to continue trial beyond the speedy trial deadline; 2) The District Court erred when it allowed the admission of the 2016 Project Harmony forensic interview under Iowa Rule of Evidence 5.106; 3) The District Court erred when it allowed the admission of the same alleged co-conspirator statements it had previously ruled inadmissible; 4) There was insufficient evidence to find Mr. Flores guilty when the State's entire case was based upon the credibility of one witness; 5) The District Court erred when it overruled Mr. Flores' motion for a new trial because the jury's verdict was contrary to the evidence presented; and 6) Mr. Flores' Trial Counsel was ineffective when he failed to object to witness vouching by the State's expert forensic interviewer. The Iowa Court of Appeals issued a decision on May 10, 2023, affirming the jury's verdict on all issues presented. Flores timely filed this application with the requisite fee within the statutory period prescribed by Iowa R. App. P. 6.1103.

## STATEMENT OF THE FACTS

Jury trial in all cases commenced on August 17, 2021. Jury selection took up the entirety of the first day.

The State first called Amy Cirian as a witness. Trial Vol. 2 TR 61:22-24. She is the forensic interview program manager at Project Harmony in Omaha, NE, which is a child advocacy center. Trial Vol. 2 TR 63:12-13, 19-21. She testified that three different interviewers, April Anderson, Jessica Martinez, and Janessa Michaelis, met with W.R. at various times. Trial Vol. 2 TR 73:11-14. The first interview took place June 22, 2016, the second on October 8, 2019, and the third on January 11, 2020. Trial Vol. 2 TR 75:8-11. She believed after reviewing the videos that the interviewers followed proper procedure, did not make any mistakes, and that she did not have any concerns about them. Trial Vol. 2 TR 76:19-25, 77:1-4. The State further asked Ms. Cirian if there were red flags she looked for to identify coaching by an adult. Trial Vol. 2 TR 95:22-25, 96:1-9. She said that if there are concerns and red flags for coaching, then there is a procedure to address it. Trial Vol. 2 TR 96:10-20. She then stated that none of the procedures to address red flags were instituted during W.R.'s interview. Trial Vol. 2 TR 96:21-23. The State reaffirmed the testimony with Ms.

Cirian during her redirect examination, with her stating there were no red flags during W.R.'s interviews. Trial Vol. 2 TR 120:6-20.

Crawford County Sheriff's Deputy Michael Bremser testified next on behalf of the State. Trial Vol. 2 TR 122:18. He testified that he responded to a call on June 3, 2016 in regards to Nelson Flores. Trial Vol. 2 TR 123:18-23. He spoke with W.R. at a clinic, who he determined to be a potential victim of sexual abuse. Trial Vol. 2 TR 124:1-4, 125:9-10. He arranged for W.R. to go to Project Harmony. Trial Vol. 2 TR 128:7-11. Deputy Bremser later learned that W.R. did not go to Project Harmony, but instead went to St. Anthony's. Trial Vol. 2 TR 129:11-17. Deputy Bremser later arrested Mr. Flores at his residence in Deloit, and described his demeanor at the time of the arrest as emotional, crying, and visibly upset. Trial Vol. 2 TR 132:6-17. He testified that a no contact order was put into place on June 24, 2016 between Mr. Flores and W.R. Trial Vol. 2 TR 134:6-13.

The State also called Crawford County Sheriff's Deputy Roger Rasmussen. Trial Vol. 2 TR 154:1. Deputy Rasmussen testified that he assisted with Mr. Flores' arrest. Trial Vol. 2 TR 155:9-12. Deputy Rasmussen interviewed W.R. regarding potential no contact order violations.

Trial Vol. 2 TR 156:20-25. Deputy Rasmussen witnessed a fake ID and fake social security card with the picture of Wendy Hernandez, who is W.R.'s mother. Trial Vol. 2 TR 165:12-25.

W.R. testified at trial for the State. Trial Vol. 2 TR 178:9. She testified that her birthday is July 29, 2005. Trial Vol. 2 TR 179:24-25. She lives with Jennifer Bullock, but used to live with her grandma, and before that lived with her mother, Wendy Hernandez. Trial Vol. 2 TR 180:16-18, 181:2-4, 182:2-12. She testified that she was at court "[b]ecause Nelson raped me." Trial Vol. 2 TR 185:17-20. She testified that it happened "[v]arious times." Trial Vol. 2 TR 187:23-25. W.R. testified that she was between nine and fifteen years old when it happened. Trial Vol. 2 TR 188:1-4. She stated that it happened in her mom's bedroom, where she, Nelson, her mother, and her little brother slept. Trial Vol. 2 TR 189:9-17. When it happened, her mother was not home, just Nelson and her little brother. Trial Vol. 2 TR 190:1-6. She testified that Nelson would touch her body on her private areas, including her vagina, and chest. Trial Vol. 2 TR 190:24-25, 191:1-5. She further testified that Nelson penetrated her vagina with his penis. Trial Vol. 2 TR 192:13-21. She would scream while he did this to her. Trial Vol. 2 TR 193:22-24.

W.R. testified that she told her mother and grandmother about the assaults. Trial Vol. 2 TR 202:12-21. She also told a nurse at a Denison hospital about what happened. Trial Vol. 2 TR 205:18-25, 206:1-10. The nurse called the police. Trial Vol. 2 TR 206:11-15. W.R. went to Project Harmony and told a lady at Project Harmony essentially the same story to which she testified. Trial Vol. 2 TR 210:7-10.

W.R. testified that she went with her mom to purchase a fake ID when W.R. was fifteen years old. Trial Vol. 2 TR 238:3-9. She stated that her mom needed to get papers to be able to work. Trial Vol. 2 TR 238:17-20.

W.R. stated that she went back to Project Harmony a second time, and "took it all back." Trial Vol. 2 TR 242:1-3. W.R. also testified regarding a fight that took place between Nelson and Wendy Hernandez, W.R.'s mother. Trial Vol. 3 TR 10:12-23. The fight was regarding Wendy having a boyfriend and Nelson finding out. Trial Vol. 3 TR 13:19-25. W.R. also testified that Nelson had a girlfriend. Trial Vol. 3 TR 13:24-25, 14:1. She stated that after she took back the allegations against Mr. Flores, that he would continue to sexually abuse her. Trial Vol. 3 TR 16:6-19. W.R. testified that after the last time she was sexually abused she went to live with her great aunt. Trial Vol. 3 TR 47:9-12.

During cross-examination, Mr. Flores' Trial Counsel asked W.R. if she did not state during her 2016 Project Harmony interview that Nelson rubbed his body against hers. Trial Vol. 3 TR 68:18-25, 69:1-12. She testified that she meant that but reworded that statement. Trial Vol. 3 TR 69:13-17.

Dr. Suzanne Haney, a child abuse pediatrician at Children's Hospital and Medical Center in Omaha, and a subcontractor for Project Harmony, testified next for the State. Trial Vol. 3 TR 146:5-21. She reviewed a medical exam that was performed on W.R. at Project Harmony. Trial Vol. 3 TR 155:6-9. She testified that a nurse practitioner at Project Harmony, Jessica Tippery, performed the exam. Trial Vol. 3 TR 156:11-16. Dr. Haney testified that W.R.'s medical exam showed a normal genitourinary examination with no indication of prior trauma, and such a finding is not uncommon in girls and women that have had sexual intercourse. Trial Vol. 3 TR 160:4-25, 161:1-19. Dr. Haney testified; however, that there are injuries that could occur due to sexual abuse, such as bruising, petechiae, abrasions, lacerations and a complete hymenal cleft. Trial Vol. 3 TR 170:12-25, 171:1-8. There are also possible signs of long-term damage that can be seen during a medical examination. Trial Vol. 3 TR 172:6-21.

Further, the observations made by Ms. Tippery of W.R. were consistent with someone who never had intercourse. Trial Vol. 3 TR 175:11-17.

Exhibit 201, the video of the 2016 Project Harmony interview, was played for the jury, except for timestamp from 11:05 to 11:09:02. Trial Vol. 3 TR 185:13-25.

Gabriela Bermudez, W.R.'s aunt, also testified for the State. Trial Vol. 3 TR 186:20-25, 189:2-5. She calls W.R. by the name of "Judy." Trial Vol. 3 TR 189:6-12. She testified that she saw W.R. and Mr. Flores together in a car with W.R.'s mother and little brother during a time when there was a restraining order in place. Trial Vol. 3 TR 192:10-25, 193:1-11. She also saw W.R. and Mr. Flores together at a birthday party. Trial Vol. 3 TR 196:1-23.

Jennifer Bullock was the next witness that testified for the State. Trial Vol. 4 20:15-17. She is employed with the Center Against Abuse and Sexual Assault, CAASA. Trial Vol. 4 21:5-7. She is also W.R.'s great-aunt. Trial Vol. 4 23:10-13. DHS placed W.R. to live with Ms. Bullock on September 24, 2020. Trial Vol. 4 27:10-17. Ms. Bullock testified that she had a conversation with Wendy Hernandez whereby Wendy had made arrangements to leave the State with Mr. Flores and live in Tennessee under

a different name with W.R. so Mr. Flores would not get in trouble. Trial Vol. 4 37:12-22. She further stated that an attorney named Martha told Wendy Hernandez that the only way to be together with Nelson was to get married or leave the State. Trial Vol. 4 38:8-14. When asked by the State if there was a conflict between Ms. Bullock and her husband because of her taking in W.R., she replied there was no conflict because her husband "believes Judy with all his heart." Trial Vol. 4 40:23-25.

Dr. Ross Valone, an obstetrician and gynecologist, testified on behalf of the Defense. Trial Vol. 4 74:12-4, 75:1. He testified that he has cared for children who suffered trauma to their genitalia. Trial Vol. 4 78:10-12. He has also conducted forensic examinations for alleged sexual abuse. Trial Vol. 4 78:21-23. He testified that the examination of W.R. was a delayed exam. Trial Vol. 4 80:22-25. His opinion was that there were no physical indicators or conditions that would indicate W.R. was sexually abused. Trial Vol. 4 83:8-14.

## ARGUMENT

### A. The Court of Appeals erred when it found that Flores' statutory right to a speedy was not violated, and that good cause existed for continuance.

*a. Standard of Review.*

A district court's application of the procedural rules governing speedy trial is reviewed for correction of errors at law. *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001). Statutes which implement the right to a speedy trial should receive a liberal construction for the purpose of protecting citizens' liberty. *State v. Taylor*, 881 N.W.2d 72, 76 (Iowa 2016). A district court's determination of whether the State showed good cause for the delay is reviewed for abuse of discretion. *State v. McNeal*, 897 N.W.2d 697 (Iowa 2017). The discretion; however, is narrow when considering good cause for delay of the trial. *State v. Campbell*, 714 N.W.2d 622, 627 (Iowa 2006).

*b. Preservation of Error*

Flores objected to the continuance of trial beyond the one year speedy trial deadline.

*c. Statutory Right to Speedy Trial*

It should first be noted that Mr. Flores only made a direct demand for speedy trial in the FECR069029 case, and in case FECR067438 had filed a waiver of the one-year demand for speedy trial. However, Mr. Flores asserts

that his speedy trial arguments should apply to both cases, given all the circumstances. These include that the cases were consolidated for trial, that the waiver was filed four years prior to the demand in FECR069029, and that the original waiver contained no evidence that the document was explained to Mr. Flores in his native language. It is clear under all the circumstances that Mr. Flores' intention was to have trial on both cases within 90 days of the filing of the Trial Information in FECR069029.

The Court of Appeals relied on *State v. Campbell*, 714 N.W.2d 622, 628 (Iowa 2006), and *State v. Winters*, 696 N.W.2d 903, 909 (Iowa 2006); however, the cause for delay in the instant case is notably different than those relied upon. The Court of Appeals correctly recited that "[t]he decisive inquiry in these matters" is "whether events that impeded the progress of the case and were attributable to the defendant or to some other good cause for delay served as a matter of practical necessity to move the trial date beyond the initial ninety-day period required by the rule." *State v. Campbell*, 714 N.W.2d 622, 628 (Iowa 2006).

The causes for delay in this case were not attributable to Flores, nor his attorney, rather the deadline was blown from a lack of due diligence by the State. The State failed to file a Motion for Writ of Habeas Corpus ad

Prosequendum, despite having more than two months' notice that Flores' presence would be an issue at trial. Furthermore, the State was unprepared for depositions; and although the District Court had not yet ruled on several pretrial motions, the Court was prepared to rule. The Court of Appeals found that "whether and when Flores would be released was entirely up to the federal government." This is simply untrue and sets a dangerous precedent. Common sense commands that the federal government would not randomly release Flores to the State of Iowa unless and until the State requested them to. The cause for the delay is not attributable to the Federal Government having custody of Flores; rather, the State not filing a necessary writ to produce his body. After the State filed the writ, Flores was delivered within one day.

The other factors for continuance were again attributable to the State. The record shows that Flores made extensive efforts to schedule depositions, but the State could not or chose not to schedule them until the last minute. Counsel made requests for depositions on March 29, April 7, April 12, April 14, May 10, May 18, and June 11 – yet the State did not schedule depositions until days before the trial was set to begin. Then, they were unable to produce their witnesses for depositions. The final factor that the

State relied upon was that there were several motions that had not been ruled upon; however, most of the Motions were made by the State, again, at the eleventh hour. And, although the State argued that the pending motions were a cause for delay, the Judge stated "I've reviewed every one of these motions, I've read every pertinent case that's been cited. I'm more than happy to handle those motion hearings because I do think I understand the issues generally." MTC Hearing at 14.

**B. The Court of Appeals err determination that the State's admission of the forensic interview was harmless error is contrary to Iowa Supreme Court precedent.**

*a. Standard of Review*

The appellate courts review evidentiary decisions regarding admission of hearsay for correction of errors at law. *State v. Veverka,* 938 N.W.2d 197, 202 (Iowa 2020).

*b. Preservation of Error*

Mr. Flores objected to the admission of the Project Harmony videos by way of a motion in limine and objections at trial. Trial Vol. 2 121:2. c.

*c. Argument*

The Court of Appeals erred in determining that the District Court's admission of the 2016 Project Harmony Video was harmless error because it

contradicts Iowa Supreme Court precedent. The Court of Appeals did not consider whether the introduction of the 2016 Project Harmony was inadmissible prejudicial hearsay, because the Court found that that there was overwhelming evidence of the defendant's guilt, citing *State v. Montgomery*, 966 N.W.2d 641, 661 (Iowa 2021). Considering the evidence in this case; however, the Court of Appeals decision is in conflict with *State v. Skahill*, 966 N.W.2d 1 (Iowa 2021).

Like in *Skahill*, this case was W.R.'s word against Flores'. However, in *Skahill*, a medical examination also revealed some damage to that victim's genitalia. In this case, the State's witness, Dr. Haney, stated that W.G.'s vaginal exam was normal, and that were no transections, lacerations, or contusions. Trial Vo. 3 at 160-161. Nor were there any additional witnesses with firsthand knowledge of the alleged incidents. Although the Iowa Supreme Court has held that the victim's testimony alone can sustain a conviction, *State v. Donahue*, 957 N.W.2d 1, 11(Iowa 2021), W.R.'s testimony alone does not meet the high standard of "overwhelming" evidence.

Therefore, this Court should further review whether the Forensic Interview is admissible under Iowa R. Evid. 5.106. This issue is a case of

first impression that should be decided by the Iowa Supreme Court, because the State, rather than the Defense, relied on *State v. Austin*, 585 N.W.2d 241, 243–44 (Iowa 1998) to admit evidence that is otherwise inadmissible. ("The State presented the evidence first and the defense cross-examined without using or seeking the admission of the recordings. Because the State rather than the defense opened the door, we question its reliance on *Austin* for admission of the recordings. We elect to bypass that issue and proceed to a harmless-error analysis. (See *Parker*,747 N.W.2d at 209" )

**C. The Appellate Court erred when it allowed the admission of the same alleged co-conspirator statements it had previously ruled inadmissible..**

*a. Standard of Review*

The standard of review with respect to the admission of hearsay evidence is for correction of errors at law. *Huser* at 495. The district court's preliminary findings are reviewed for substantial evidence. *Huser* at 504. When hearsay is improperly admitted, the error is presumed to be prejudicial unless the State shows the contrary. *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011).

*b. Preservation of Error*

Mr. Flores preserved error by objecting to the admission of the co-conspirator statements. Trial Vol. 4 12:21-22.

*c. Admission of Co-conspirator statements*

Iowa Rule of Evidence 5.801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. "Proof of a conspiracy must include evidence independent of the co-conspirator's statement." *State v. Dullard*, 668 N.W.2d 585 (Iowa 2003). To be in furtherance of the conspiracy a statement "in some measure or to some extent, it must aid or assist toward the consummation of the object of the conspiracy." *State v. Gilmore*, 132 N.W. 53, 55 (Iowa 1911). A statement cannot be considered to be in furtherance of a conspiracy after the last objectives of the conspiracy have been achieved. *State v. Puffinbarger*, 540 N.W.2d 452 (Iowa App. 1995).

During Gabriela Bermudez's testimony, the State attempted to elicit testimony regarding statements from Wendy Hernandez and her plans to leave the state with Mr. Flores and W.R. The District Court ruled these statements as inadmissible because the State did not meet its burden to show the statements were made in furtherance of a conspiracy, reasoning that "the

statement can't just be by a conspirator about the conspiracy, it has to be in furtherance of the conspiracy." Trial Vol. 3 216:21-23. During Jennifer Bullock's testimony, the State elicited similar statements regarding Wendy Hernandez and her plans to leave the state with Mr. Flores and W.R. Trial Vol. 4 7:16-23. During this testimony; however, the District Court found that the State had met its burden to show the statements were made in furtherance of the conspiracy. The District Court stated:

> "[W]e've got circumstances where this is after this witness, Jennifer Bullock, has become involved with this family, and so essentially any move by Wendy Hernandez and by the defendant involving [W.R.] is going to have to involve Jennifer Bullock in some way because essentially they're going to have to get the kid away from her or take her with – either without this witness's knowledge or with this witness's knowledge, so with that it seems to me like why would Wendy be telling this witness that other than essentially to butter her up and get – get her to a point where this conspiracy can happen."

Trial Vol. 4 15:16-25, 16:1-4.

The District Court relied on the Iowa Supreme Court case of *State v. Kidd* to support its reasoning. 239 N.W.2d 860 (Iowa 1976). In *Kidd*, the

Iowa Supreme Court held that statements made an hour after a robbery that were essentially a report of the robbery to a co-conspirator were held to be in furtherance of the conspiracy. *Kidd* at 865. The *Kidd* case; however, is distinguishable from Mr. Flores's case.

The District Court erred when it determined that the co-conspirator statements were made in furtherance of the conspiracy. At first, the District Court held that statements regarding Wendy Hernandez's future plans were inadmissible because they were not in furtherance of the conspiracy. The District Court reversed its reasoning without any different testimony other than the witness who was testifying. The District Court then made the leap in logic to the inference that Wendy was trying to "butter up" the witness, without any facts or evidence to support the conclusion. The District Court believed the timing of the statement was insignificant. However, the timing was highly significant, as under the District Court's reasoning W.R. would have had to been in Jennifer Bullock's custody for the "butter up" statements to make sense. The District Court committed legal error by admitting the statements.

## CONCLUSION

For the reasons stated above, we request this Court grant the application for further review.

NELSON FLORES,
Appellant.

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NO. 21-1676

IN THE SUPREME COURT FOR THE STATE OF IOWA

STATE OF IOWA,
Appellee,

vs.

NELSON FLORES,
Appellant.

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**CERTIFICATE OF SERVICE**

CHRISTOPHER J. ROTH, after being duly sworn states:

1. He is the attorney for Appellant herein.

2. On the 25th Day of May 2023, he filed a copy of the Application for Further Review with Attached Court of Appeals Decision with the Appellate EDMS system, which served an electronic copy on all parties of record.

NELSON FLORES,
Appellant.

By: /s/Christopher J. Roth
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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) or (2) because:
    a. This brief contains 5,535 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:
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/s/*Christopher J. Roth* 05/25/2023

**IN THE COURT OF APPEALS OF IOWA**

No. 21-1676
Filed May 10, 2023

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**NELSON CARLOS FLORES,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Crawford County, Zachary Hindman, Judge.

Nelson Flores appeals his convictions for crimes relating to sexual abuse of a child. **AFFIRMED.**

Tyler D. McIntosh and Christopher J. Roth of Roth Weinstein, LLC, Omaha, Nebraska, for appellant.

Brenna Bird, Attorney General, and Benjamin Parrott, Assistant Attorney General, for appellee.

Heard by Vaitheswaran, P.J., Badding, J., and Doyle, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2023).

**VAITHESWARAN, Presiding Judge.**

A jury found Nelson Flores guilty of several crimes relating to sexual abuse of a child. On appeal, Flores challenges (I) a claimed violation of his speedy trial right; (II) the sufficiency of the evidence supporting the jury's findings of guilt; (III) the admission of a recorded interview of the child; (IV) the admission of co-conspirator statements concerning a plan to leave the state; (V) the denial of his motion for new trial; and (VI) his attorney's performance.

***I. Speedy Trial***

Iowa Rule of Civil Procedure 2.33(2)(b) states: "If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown."

The State charged Flores with crimes in two separate cases. The trial information in the first case was filed on July 14, 2016. Two-and-a-half weeks later, Flores waived his ninety-day speedy trial right. The trial information in the second case was filed on April 12, 2021. Flores demanded his right to a speedy trial in the second case. Both cases were consolidated for trial. The State moved to postpone the trial date beyond the speedy trial deadline, citing the need to obtain Flores' release from federal custody. The district court granted the motion. Trial was held after the deadline.

Flores acknowledges he waived his speedy-trial right in the first case but argues his demand in the second case and the consolidation of both cases militate in favor of finding a violation. He also asserts the waiver in the first case was invalid because there was no evidence that it "was explained to [him] in his native

language." Finally, Flores contends the State could have sought his release from federal custody at an earlier date, undermining its claim of good cause for the violation.

Our review of a claimed denial of a speedy trial right is for corrections of errors of law. *See State v. Abrahamson*, 746 N.W.2d 270, 273 (Iowa 2008) *(*citing *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001)). We review a good cause determination for an abuse of discretion. *State v. Watson*, 970 N.W.2d 302, 307 (Iowa 2022).

There was no speedy trial violation in the first case. First, Flores waived his right. Second, the document containing his waiver stated Flores could "read and understand the English language with the help of an interpreter," leading to an inference that he had an interpreter. Third, Flores' attorney could have waived the right for him. *See State v. LeFlore*, 308 N.W.2d 39, 41 (Iowa 1981) (stating "the statutory right to a speedy trial under [the former version of rule 2.33(2)(b)] is not a personal right that can be waived only by the defendant" and "[d]efense counsel acting within the scope of his or her authority may waive this right on the defendant's behalf without the defendant's express consent"). Fourth, Flores essentially reaffirmed his waiver by seeking sixteen postponements of trial in the first case. Finally, the first case was not consolidated with the second case until after Flores demanded speedy trial in the second.

We turn to whether the State established good cause for seeking a delay of the consolidated trial. In granting the State's motion, the district court cited Flores' potential unavailability, twelve pending motions in the case, and the court's need to preside over another jury trial with a speedy trial deadline. On appeal, the State

points to Flores' own request to postpone trial due his attorney's planned vacation. The State also notes that its request for a seven-day postponement was based in part on "the relatively rare occurrence" of having to file a petition for writ of habeas corpus to obtain Flores' release from federal custody.

"The decisive inquiry in these matters" is "whether events that impeded the progress of the case and were attributable to the defendant or to some other good cause for delay served as a matter of practical necessity to move the trial date beyond the initial ninety-day period required by the rule." *State v. Campbell*, 714 N.W.2d 622, 628 (Iowa 2006). Although the State acknowledges it "could have perhaps requested custody [of Flores] earlier," whether and when Flores would be released was entirely up to the federal government. As the prosecutor stated at a hearing on the State's motion, "unless and until . . . the feds release [Flores] to [the State] . . . we can't get him here." The prosecutor also pointed to "a number of unplanned roadblocks" associated with witness depositions. Again, those depositions could have been taken earlier, but logistical issues resulted in delays. Flores' attorney conceded as much, stating "[t]he State has—has set forth I guess accurately as far as the problems that we're running into." Finally, both sides filed numerous pretrial motions in the weeks before and after the good cause motion was filed. It is true "the mere existence of the motions or the request for discovery" may not excuse a failure to comply with the speedy-trial rule. *See State v. Winters*, 696 N.W.2d 903, 909 (Iowa 2006). At the same time, "the time required for the court to rule on motions filed by a defendant can amount to delay attributable to the defendant and constitute good cause for the failure to comply with the speedy trial deadline." *Id.* at 908. In the same vein, "good cause for pretrial delay under

the speedy-trial rule can result from the need to complete pretrial discovery." *Id.* at 909.

We conclude a confluence of circumstances, some outside the State's control, caused the delay in bringing Flores to trial within the ninety-day speedy trial deadline. We discern no abuse of discretion in the district court's decision to grant a short continuance to facilitate resolution of pretrial matters and Flores' presence at trial.

### *II. Sufficiency of the Evidence*

The jury found Flores guilty of one count of second-degree sexual abuse, one count of lascivious acts with a child, one count of assault with intent to commit sexual abuse, three counts of third-degree sexual abuse, one count of conspiracy to commit a felony (suborning perjury), one count of conspiracy to commit an aggravated misdemeanor (obstruction of prosecution), one count of lascivious conduct with a minor, one count of tampering with a witness (threatening the child believing the child "had been or may be summoned as a witness in a judicial proceeding"), and one count of dissemination and exhibition of obscene materials to a minor.[1] Flores asserts "there was insufficient evidence to convict [him] of any of the charges." In his view, "the State's entire case was based upon the credibility of one witness."

That witness, a child who was sixteen years old at the time of trial, testified that Flores sexually abused her from the ages of nine to fifteen. She provided a detailed, anatomically-specific description of multiple sex acts. She said that

[1] The jury also found Flores guilty of three counts of violating a no-contact order. The jury found Flores not guilty of two counts of extortion.

Flores also touched her inappropriately "[w]henever [her] mom would turn around or leave to use the rest room." And he showed her pornography on his phone.

The child recounted Flores' efforts to have her remain silent about the abuse. While he was sexually assaulting her, he told her, "Don't tell your mom," and "you're going to get in trouble if you tell somebody that I did this to you." When he learned she intended to report details to authorities, he said, "Don't tell them what I did." Notwithstanding Flores' orders, the child disclosed the abuse to health professionals and law enforcement authorities. She was later interviewed by child protective personnel.

Flores pressured her to take back her statements. He threatened her with having "to go to foster care," where people would hurt her and she would never "see the family again." He told her he knew a cop, a disclosure that made her feel "[a]nxious" because she thought she "might get in trouble."

The child's mother was present when Flores made some of these comments. She and the child's grandmother supported Flores. According to the child, the mother's response was, "this all depends on you. Whatever you say could affect us majorly." They would "[o]ften" tell her "that it's all made up, everything that you're saying is just a dream." Their comments made her feel "[n]ervous, scared" and "regretful." She "feared that something would happen to [her] mom or [her] grandma" and "something bad was going to happen if [she] didn't say what they wanted [her] to say."

The child recanted statements she made during an initial interview with a child abuse professional. She testified to doing so "because [she] was being

pressured." Flores continued to sexually abuse her following her disclosures and following entry of a no-contact order.

Flores and the child's mother crafted a plan to abscond with the child. When the child was fifteen, Flores told her he would take her "[s]omewhere far away." They would say, "Let's just go somewhere where we could be a family again, where we wouldn't have court."

The child's testimony, together with other evidence, amounted to substantial evidence in support of the findings of guilt. *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (citation omitted). The assessment of her credibility was within the jury's purview. *See State v. Mathis*, 971 N.W.2d 514, 519 (Iowa 2022) (stating in considering a challenge to the sufficiency of the evidence supporting a jury verdict, "it is not the province of the court . . . to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." (quoting *State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006))).

***III. Forensic Interview***

The State filed a motion to admit recorded forensic interviews of the child under the residual exception to the hearsay rule. *See* Iowa R. Evid. 5.807. The district court initially granted the motion, reasoning that "the issue of credibility [was] so inherently questioned by the witness's change in testimony" that the recording was "necessary" within the meaning of that exception. The court also found the interview was "essentially . . . a prior consistent statement necessary to rebut any claim of newly fabricated evidence."

Notwithstanding the ruling, Flores filed a motion in limine to exclude the recordings. The trial judge concluded the earlier ruling was "not necessarily final." The court stated (1) the recorded interviews, "if offered for the truth of the statements made during those interviews, plainly constitute[d] hearsay"; (2) the State failed to proffer "any reason why the alleged victim [was] unable to testify"; and, indeed, expressed an intent "to present" her testimony at trial; (3) the "in-person testimony would be more probative on any relevant issue than would be the recorded interviews, and (4) the availability of such testimony mean[t] that the admission of the recorded interviews [was] not necessary." The court further concluded that the child's "prior recantation and un-recantation did not change the necessity analysis. The court reasoned that the recordings would simply "bolster the credibility of the alleged victim's testimony on these matters, which is not an exception to the hearsay rule." Although finding the recordings inadmissible "under the residual hearsay exception," the court deferred ruling on whether the recordings would be admissible to rebut a recent fabrication under Iowa Rule of Evidence 5.801(d)(1)(B).

The defense raised the issue again at the beginning of trial. The court again deferred ruling on the issue. Later, the court informed the parties that the court would focus on whether the recordings were admissible under the rule of completeness set forth in rule 5.106, if the defense used portions of the child's recorded statements to impeach Flores. The court stated he would "have to wait to see what the cross-examination show[ed]" before ruling on the issues.

The State called the child to the stand. The State raised the child's initial recorded interview on direct examination. The prosecutor asked her about the

nature of the conversations, whether Flores tried to influence her statement, and whether she was truthful with the interviewer. On cross-examination, Flores' attorney pointed out inconsistencies between her prior statements and her trial testimony. At the conclusion of her testimony, the district court ruled the recordings would not be admissible "as substantive evidence" under rule 5.801(d)(1)(B). The court further ruled the 2016 recordings would be admissible under rule 5.106 "only for purposes of assessing the witness's credibility" and the jury would be so instructed.

Flores takes issue with the court's ruling. He notes that he did not delve into minutiae contained in the prior recordings and "the State essentially goaded the [d]efense into cross-examining [the child] regarding the tape."

Iowa Rule of Evidence 5.106 states:

> (a) If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.
>
> (b) Upon an adverse party's request, the court may require the offering party to introduce at the same time with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 5.106(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

"Fundamentally, rule 5.106's purpose is to prevent a party—particularly the party that presents evidence first—from misleading juries with partial or incomplete evidence." *State v. Tucker*, 982 N.W.2d 645, 658 (Iowa 2022). "Our prior cases recognize an 'opening the door' principle of evidence." *State v. Parker*, 747 N.W.2d 196, 206 (Iowa 2008). "This rule . . . provides that 'one who induces a trial

court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of the opening.'" *Id.* (internal quotations and citation omitted).

As applied, "rule 5.106 allows a second litigant to introduce alongside supposedly partial or incomplete evidence some additional evidence "that in fairness ought to be considered at the same time." *Tucker*, 982 N.W.2d at 659 (internal quotations and citations omitted). For example, in *State v. Austin*, 585 N.W.2d 241, 243–44 (Iowa 1998), "[t]he criminal defendant—the first litigant—had used a summary of [a recorded child] interview . . . to cross-examine and impeach the victim" and "the state—the second litigant—successfully invoked rule 5.106 to demand the entire interview recording be admitted into evidence for the sake of fairness." *Id.* (summarizing *Austin*).

The posture was reversed here. The State presented the evidence first and the defense cross-examined without using or seeking the admission of the recordings. Because the State rather than the defense opened the door, we question its reliance on *Austin* for admission of the recordings. We elect to bypass that issue and proceed to a harmless-error analysis. *See Parker*, 747 N.W.2d at 209 ([E]rror in an evidentiary ruling that is harmless may not be a basis for relief on appeal.").

"The State overcomes the presumption of prejudice if it can establish that there was overwhelming evidence of the defendant's guilt." *State v. Montgomery*, 966 N.W.2d 641, 661 (Iowa 2021) (internal quotations and citation omitted). As noted, the child provided detailed trial testimony. Her testimony together with other

record evidence was overwhelming. Accordingly, any error in admitting the recordings was harmless.

### *IV. Co-Conspirator Statements*

Iowa Rule of Evidence 5.801(d)(2)(E) states statements made by a party's coconspirator "during and in furtherance of [a] conspiracy" and offered against the opposing party are not hearsay. The State expressed an intent to offer a witness who would testify that the child's mother conspired with Flores to leave the state with him and with her children. Flores objected. The district court ruled the testimony admissible.

The witness testified she had a conversation with the child's mother about taking the child away. The mother told the witness the only way she, Flores, and the children could be together so that Flores "wouldn't get in trouble was to leave the state and that they were planning on going to Tennessee with his family." The witness had four to five conversations with the mother on the topic.

Flores contends the mother's statements as recounted by the witness did not satisfy rule 5.801(d)(2)(E) because they were not "in furtherance of" the conspiracy. On this element, the Iowa Supreme Court has stated:

> It is not the purpose of the rule to exclude statements relating to the conspiracy uttered during the active [life] of the conspiracy under circumstances indicating reliability. The furtherance requirement is construed broadly with this in mind. A narrative declaration is in furtherance of the conspiracy if it has some connection with what is being done in promotion of the common design.

*State v. Kidd*, 239 N.W.2d 860, 864 (Iowa 1976) (citations omitted). "The principal question in the in furtherance issue is whether the statement promoted, or was intended to promote, the goals of the conspiracy." *State v. Dayton*, No. 10-1161,

2011 WL 4578505, at *5 (Iowa Ct. App. Oct. 11, 2011) (internal quotations and citation omitted). "When a declarant seeks to induce the listener to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objective, the declaration may be admissible." *Id.* "Statements concerning activities of the conspiracy, including future plans, also may become admissible when made with such intent." *Id.*

The district court concluded the requirement was satisfied. The court provided the following reasoning:

> The statement itself and other evidence as well indicate that both [Flores] and [the mother] were members of this conspiracy and obviously the statements were made during the course of the conspiracy . . . [and] by a preponderance of the evidence that what we've got here, we've got circumstances where . . . any move by [the mother] and by [Flores] involving [the child] is going to have to involve [the testifying witness] in some way because essentially they're going to have to get the kid away from her or take her with—either without this witness's knowledge or with this witness's knowledge, so with that it seems to me like why would [the mother] be telling this witness that other than essentially to butter her up and get—get her to a point where this conspiracy can happen. So under the liberal in furtherance standard I think that has been satisfied.

The court reasonably concluded the statements were a last-ditch effort by the mother to have the child returned to her custody and to obstruct the prosecution of Flores. We discern no error in the court's ruling. *See State v. Tangie*, 616 N.W.2d 564, 568 (Iowa 2000) (setting forth standard of review).

### *V. Motion for New Trial*

Flores filed a motion for new trial, arguing in part, that the jury's findings of guilt were contrary to the evidence. The district court denied the motion, reasoning as follows:

> The application of the legal standard that applies to these types of motions differs a little bit from the legal standard which applies to a motion for judgment of acquittal in that the Court, faced with a motion like this one, is drawn into the question of credibility. The weight of the evidence, as raised in a motion like this, refers to the trier of fact here, the jury's determination, that a greater amount of credible evidence support one side of an issue or cause over the other side.
>
> And so a Court may grant the new trial where a verdict is contrary to the weight of the evidence. And, again, it's a much broader inquiry than what the Court conducts in relation to a motion for judgment of acquittal.
>
> But that said, the standard is not necessarily an easy one, as is reflected in the case quoted by the State. And so again, this is a closer call in the Court's mind than the judgment of acquittal. As [defense counsel] has already pointed out today, as he pointed out many times at trial, there were some inconsistencies in the State's evidence which the defendant pointed out. Those inconsistencies obviously undermine the credibility of some of the State's evidence. But at the same time, the Court cannot say based on the evidence before it that what the jury did, the manner in which the jury elected to resolve those inconsistencies, is clearly against the weight of the credible evidence.

Flores again argues "the State's entire case rested upon the credibility of [the child]" and "[t]here was no corroborating evidence to support [the child's] story." "On a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *State v. Linderman*, 958 N.W.2d 211, 218 (Iowa Ct. App. 2021) (quoting *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003)). Suffice it to say we discern no abuse of discretion in the court's ruling.

### *VI. Ineffective Assistance of Counsel*

Flores contends his trial attorney "was ineffective when he failed to object to witness vouching by the State's forensic interviewer." The court cannot address

his ineffective-assistance-of-counsel claim on appeal. *See Tucker*, 982 N.W.2d at 652 (citing Iowa Code § 814.7 (2022)).

We affirm the jury's findings of guilt and the judgment and sentence.

**AFFIRMED.**


IOWA APPELLATE COURTS

State of Iowa Courts

| **Case Number** | **Case Title** |
| --- | --- |
| 21-1676 | State v. Flores |

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