IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DEREK MICHAEL WHITE, Defendant-Appellant.	S.CT. NO. 22-0522

APPEAL FROM THE IOWA DISTRICT COURT
FOR OSCEOLA COUNTY
HONORABLE SHAYNE L. MAYER, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 14th day of March, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Derek White, #6346954, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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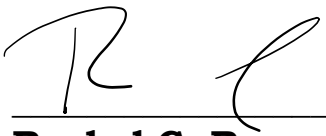

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). White's minor sons, who were not victims of the charged crimes, were allowed to testify by closed-circuit television under Iowa Code section 915.38(1)(a). Their testimony violated article I, section 10 of the Iowa Constitution. "Under the [Iowa] Constitution, he has the right to see the witnesses against him, face to face." State v. Reidel, 26 Iowa 430, 437 (1869); accord State v. Collins, 32 Iowa 36, 40 (1871).

This Court held a prior version of the statute, Iowa Code section 910.14, did not violate the Sixth Amendment. State v. Rupe, 534 N.W.2d 442 (Iowa 1995). And this Court has applied the test from Maryland v. Craig, 497 U.S. 836 (1990), to two-way video testimony under the Sixth Amendment. State v. Rogerson, 855 N.W.2d 495 (Iowa 2014).

There is some debate, however, as to the stability of Craig in the wake of Crawford v. Washington, 541 U.S. 36 (2004). See, e.g., People v. Jemison, 952 N.W.2d 394, 396 (Mich. 2020) ("Crawford did not specifically overrule Craig, but it took out its legs."); United States v. Cox, 871 F.3d 479, 492-95 (6th Cir. 2017) (Sutton, J., concurring) ("[T]he two opinions would give Janus a run for his money.").

Because Sixth Amendment jurisprudence is unstable and this Court has not previously considered whether Section 915.38(1)(a) violates the Iowa Constitution, White respectfully asks the Court to retain this case.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Derek White following guilty verdicts on charges of neglect or abuse of a dependent child and two counts of child endangerment in Osceola County District Court. On appeal, White challenges the testimony by closed-circuit television of two nonvictim child witnesses, the denial of a proposed jury

instruction, the failure to provide further instruction in response to a jury question, the sufficiency of the evidence, and his reasonable ability to pay nearly $11,000 in category B restitution.

Course of Proceedings: On October 26, 2020, the State charged White and codefendant Donna Reisdorfer with neglect or abuse of a dependent child, a class C felony in violation of Iowa Code sections 726.3 and 703.1 (2020), three counts of child endangerment causing injury, class D felonies in violation of Iowa Code sections 726.6(1), 726.6(6), and 703.1 (2020),[1] one count of child endangerment, an aggravated misdemeanor in violation of Iowa Code sections 726.6(1), 726.6(7), and 703.1 (2020), and one count of administering a harmful substance, a class D felony in violation of Iowa Code sections 708.5 and 703.1 (2020). (Information) (App. pp. 6-8).

[1] The State charged White under the 2020 Iowa Code; subsequent amendments to section 726.6 resulted in renumbering of the applicable code sections that do not apply to this case. (Trial III 29:10-32:9)

White entered a not guilty plea. (Written Arraignment) (App. pp. 9-10).

The State moved to amend the trial information to one count of neglect or abuse of a dependent child, a class C felony, and two counts of child endangerment causing bodily injury, class D felonies, on December 15, 2021. (Motion to Amend; Amended Information) (App. pp. 11-15). The court granted the motion. (Protective Order Ruling p. 1) (App. p. 23).

On January 14, 2022, the State moved for a protective order to allow White's two minor children, M.W. and J.W., to testify as witnesses to the abuse of the alleged victim, D.C., via closed-circuit television. (Protective Order Motion) (App. pp. 16-19). The defense resisted. (Protective Order Resistance) (App. pp. 20-22). The court held a hearing on January 24, 2022. (Hearing 1:1-25). The district court granted the State's motion for a protective order on January 26, 2022. (Protective Order Ruling) (App. pp. 23-30).

The State again moved to amend the trial information to charge White solely rather than jointly with Reisdorfer on January 26, 2022. (Motion to Amend; Amended Information) (App. pp. 31-35). The court granted the motion. (Order to Amend) (App. pp. 36-37).

Prior to trial, the defense filed a proposed jury instruction, stating, "The mere fact that a person suffered an injury does not mean a party committed a crime." (Supplemental Proposed JI) (App. pp. 40-41). After hearing the parties' arguments, the district court denied the request to submit the instruction. (Trial II 22:3-23:24).

Trial commenced on February 1, 2022. (Trial I 1:1-25). During deliberations on February 3, the jury submitted a question: "Does the act in count 3 element 3 have to be the defendant doing the act or could him not bringing the child in be counted as cruelty?" (Jury Question) (App. p. 55). The defense requested the court clarify that the offense required a volitional act, while the State asked that the jury be instructed

to reread the instructions. (Trial III 87:3-92:10). The court directed the jurors to reread the instruction. (Trial III 87:3-92:10) (Jury Question) (App. p. 55). The jury found White guilty of all three charges. (Verdict Order) (App. p. 56-58).

On March 21, 2022, the district court sentenced White to 15 years in prison with the class D felonies concurrent with one another but consecutive to the class C felony. (Judgment) (App. pp. 72-93). The court suspended the applicable fines and surcharges but found that White had the reasonable ability to pay nearly $11,000 in court-appointed attorney fees and court costs, despite his incarceration and outstanding child-support obligations. (Sentencing 20:9-24:23) (Judgment p. 11) (App. p. 82). Defense counsel filed a timely notice of appeal on March 22, 2022. (Notice) (App. p. 101).

Facts: Derek White and Donna Reisdorfer lived together with Reisdorfer's teenage son, E., her two-year-old son D.C., and White's sons, M.W. and J. W. (Trial II 33:21-34:1; 34:11-35:3; 36:8-37:1; 47:7-17). The Department of Human Services

(DHS) was already involved with the family. (Trial II 35:4-6; 132:10-13).

On May 5, 2020, Family, Safety, Risk and Permanency (FSRP) worker Linda Diekevers made an unannounced visit to the home around 10:00 a.m. (Trial II 26:17-27:18; 28:18-29:24). White advised that the kids had woken early and were taking naps. (Trial II 28:18-29:24). Diekevers returned at 12:40 p.m. and White let her in. (Trial II 29:25-30:25; 35:7-24). She observed bruises of different colors—yellow, gray, and red—all over D.C.'s face, including into his hairline and ear. (Trial II 29:25-31:22) (Exh. 17) (Conf. App. p. 18). There were "three different types of injury" on his ears. (Trial II 31:23-32:16). She testified she hadn't seen injuries this bad before despite being a social worker since 2004. (Trial II 31:23-32:16). Reisdorfer told her that D.C. woke up like that. (Trial II 32:17-21; 36:1-7). Diekevers notified her supervisor, the abuse hotline, and DHS. (Trial II 32:22-33:5).

DHS worker Adrian Warnke and Deputy Tyler Bos arrived at the home to follow up. (Trial II 70:8-25; 71:7-25; 131:10-25). Reisdorfer was hesitant, but White let them in. (Trial II 72:1-14). D.C. was upstairs napping; originally Reisdorfer and White wouldn't let Warnke see him but then agreed. (Trial II 133:13-134:20). There were multiple bruises across D.C.'s face, some of which had a linear appearance, like a belt mark; the bruising even went into his ear. (Trial II 72:21-75:8; 134:24-136:15; 140:8-142:5) (Exh. 15-19) (Conf. App. pp. 16-20).

Warnke and Bos believed that D.C. needed to go to the hospital. (Trial II 75:10-76:15; 136:16-137:8). They escorted Residorfer and D.C. there. (Trial II 75:10-76:15).

Family Nurse Practitioner Nicholas Vust treated D.C. in the emergency room at around 5:45 p.m. on May 5, 2020. (Trial II 40:20-41:8; 45:24-47:17). D.C. had developmental delays, which can be a symptom of child abuse. (Trial II 44:17-45:23; 47:18-48:10). D.C. didn't talk, walked on his tiptoes,

and did not like to be touched. (Trial II 47:18-48:10). Vust documented multiple bruises that even went into the ear canal, opining that they were at different stages of healing due to their color. (Trial II 48:11-49:21; 51:12-54:21) (Exh. 8-9, 11-12, 14-16) (Conf. App. pp. 9-10, 12-13, 15-17). The bruising was widespread across D.C.'s face, almost from one ear to the other. (Trial II 49:2-10). Vust was concerned that the linear marks across the face could have been caused by a belt. (Trial II 68:1-9; 69:16-23).

Vust also observed bruises on D.C.'s back, shoulders, thigh, and ankles. (Trial II 49:22-54:21) (Exh. 6-7, 10, 13) (Conf. App. pp. 7-8, 11, 14). There was no sign of a brain bleed or fracture in a CT scan. (Trial II 54:22-55:4).

Reisdorfer gave different versions of what happened that didn't match the injuries Vust saw. (Trial II 55:7-59:9). First, she said D.C. rolled out of bed, though his bed was a mattress on the floor. (Trial II 55:7-59:9; 137:14-139:10) (Exh. 3-5) (App. pp. 42-44). Next, she said that D.C. fell on a toy when he

rolled out of bed. (Trial II 55:7-59:9). Finally, Reisdorfer said that D.C. rolled between the bed and wall. (Trial II 55:7-59:9). She also said that D.C. was a clumsy kid. (Trial II 55:7-59:9). The injuries were not consistent with a fall to the floor or on an object. (Trial II 55:7-59:9). Even falling off a dresser would not produce the injury to D.C.'s ear. (Trial II 55:7-59:9).

Vust's diagnosis was alleged child abuse. (Trial II 60:17-61:1). While Vust couldn't say who inflicted the injuries, he said it could not be a child due to the strength needed to cause the ear injury. (Trial II 66:24-67:15).

Warnke testified it was a founded physical abuse report with regard to White. (Trial II 153:19-154:15). However, she was impeached with her deposition testimony, in which she testified that she couldn't determine who abused D.C.—White, Reisdorfer, or someone else. (Trial II 153:19-154:15).

Bos confirmed that Residorfer's older son, E., had left the home on April 29 to live with his grandmother in North Dakota. (Trial II 77:8-24). Bos also applied for a search

warrant to locate any belts in the home and the toy that Reisdorfer claimed D.C. fell on. (Trial 78:22-83:15). He located four belts in the home, one of which resembled the marks on D.C.'s face, and also seized the toy. (Trial 78:22-83:15) (Exh. 5) (App. p. 44).

Patrick Conry is D.C.'s biological father. (Trial II 92:20-93:17). D.C. was living in a foster home at the time of trial and doing well. (Trial II 61:2-62:11; 94:25-95:19) (Exh. 21-22) (Conf. App. pp. 21-22). Conry visited D.C. before D.C. went to the hospital, which he believed was April 30, though he was uncertain of the exact date. (Trial II 93:18-94:21; 95:20-24; 96:2-24; 97:13-18). There were no marks on D.C.'s face on that visit. (Trial II 93:18-94:21) (Exh. 1) (Conf. App. p. 5).

J.W. is age 8 and M.W. is age 11. (Trial II 110:19-111:11; 123:9-19). White is their father. (Trial II 111:19-21; 124:11-13). They lived with White and Reisdorfer, as well as D.C. and E. (Trial II 113:5-113:22; 124:20-125:20; 128:23-129:12). J.W. and M.W. shared a room with D.C. (Trial II 115:13-116:14;

125:21-126:18). They had beds, but D.C. slept on a mattress on the floor. (Trial II 115:13-116:14; 125:21-126:18).

One morning, J.W. woke up and D.C. had lots of bruises. (Trial II 116:21-117:13). M.W. told J.W. that D.C. had fallen out of bed. (Trial II 116:21-117:13; 127:22-128:19). M.W. heard the big thud when D.C. fell but J.W. did not because he was asleep. (Trial II 115:8-12; 116:21-117:13).

Both boys testified that White spanked D.C., but Residorfer did not spank. (Trial II 117:14-119:22; 126:19-127:21). J.W. said White spanked D.C. on the bottom and used a belt to spank. (Trial II 117:14-119:22; 120:2-20). M.W. said that White sometimes spanked D.C. but only with a hand on D.C.'s butt. (Trial II 129:13-22; 130:2-11). They never saw D.C. injured after the spankings. (Trial II 120:12-14; 129:18-20). While they didn't always see the spankings because they sometimes took place upstairs, they could hear White was mad and D.C. was crying or screaming. (Trial II 117:14-119:22; 126:19-127:19).

Dr. Suzanne Haney is a child abuse pediatrician at Children's Hospital and Medical Center in Omaha. (Trial III 5:3-20). She reviewed the photos and records in this case and examined D.C. on May 29, 2020. (Trial III 8:10-9:2). The bruises had resolved, and the foster mom had seen improvements in D.C.'s developmental delays. (Trial III 9:3-10:6). Bruises in a child that age would usually go away in a few days to a week or so. (Trial III 19:16-20:10).

Haney explained that you cannot date bruising to determine if injuries occurred at different times. (Trial III 11:16-12:7). "There's some real good data that we can't tell how old a bruise is just based on color." (Trial III 11:16-12:7). However, "ear bruises are very specific for abuse" because it's difficult to injure the ear, even in a fall. (Trial III 12:1-13:9). Bruising patterns are also more common with abuse, like the linear pattern of bruising on D.C.'s face. (Trial III 13:21-14:21) (Exh. 8) (Conf. App. p. 9). Whatever left the linear marks on D.C.'s face was flexible, like a belt. (Trial III 18:12-18). She was

also concerned by a linear mark on D.C.'s arm that suggested an object was used. (Trial III 16:5-12) (Exh. 13) (Conf. App. p. 14).

She testified that you might get a single bruise from rolling off a bed onto a toy or falling from a dresser, but not this pattern of bruising. (Trial III 17:7-18:11). Haney diagnosed physical abuse. (Trial III 18:22-19:6). Whether it was a hand or belt that left the marks, it was child abuse. (Trial III 20:11-20; 24:15-20; 25:12-20).

ARGUMENT

I. Article I, section 10 of the Iowa Constitution requires the defendant to confront accusers face to face.

Preservation of Error: The State requested a protective order to allow White's minor sons, J.W. and M.W., to testify by closed-circuit television. (Motion for Protective Order) (App. pp. 16-19). The defense resisted, arguing that the court should follow a stricter approach under article I, section 10 of the Iowa Constitution by requiring face-to-face encounters.[2]

[2] Undersigned counsel does not renew on appeal the

(Resistance to Protective Order p. 3) (App. p. 22). In the alternative, the defense argued that, at the very least, face-to-face testimony should be required for nonvictim witnesses. (Resistance to Protective Order p. 3) (App. p. 22). The parties argued the matter at a hearing, after which the district court granted the request for a protective order. (Hearing 19:14-22:10) (Ruling on Protective Order) (App. pp. 23-30). Error was preserved by the pleadings, arguments, and ruling thereon. See State v. Rupe, 534 N.W.2d 442, 443-44 (Iowa 1995) (ruling on defendant's challenge to protective order following hearing below).

Standard of Review: Constitutional claims are reviewed de novo. State v. Rogerson, 855 N.W.2d 495, 498 (Iowa 2014).

Merits: White's right to confrontation was denied by the district court's allowance of testimony by nonvictim child witnesses via closed-circuit television under Iowa Code section 915.38(1)(a).

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arguments made below regarding the Sixth Amendment.

The Hearing. The State sought a protective order to allow White's sons, J.W. and M.W., to testify to the abuse of D.C. via closed-circuit TV. (Protective Order Motion) (App. pp. 16-19). J.W. was age 8 and M.W. was age 10 (11 at the time of trial). (Trial II 110:19-111:19-21; 123:9-19) (Protective Order Motion) (App. pp. 16-19). The boys' therapist, Jennifer Haidar, testified at the protective order hearing that they would be traumatized by testifying in the same room as their father. (Hearing 5:8-21; 6:10-25; 7:1-4; 9:19-10:5; 12:1-9; 13:21-14:11).

Haidar said it could retraumatize M.W. to testify to the abuse of another child by White in White's presence, which would prevent him from being able to communicate, possibly to the point that he couldn't be truthful or accurate. (Hearing 8:19-10:23). Emotional distress might result from testifying in front of White, not just from appearing in the courtroom. (Hearing 10:24-11:25).

Regarding J.W., she said testifying in front of White would cause emotional distress and an inability to communicate. (Hearing 12:1-15:7). She thought it would be difficult for J.W. to tell anything against his father because he had confused thoughts about White. (Hearing 12:1-15:7). Emotional distress might result from testifying in front of White, not just from appearing in the courtroom. (Hearing 12:1-15:7).

Haider testified that, in her professional opinion, it was necessary for both boys to testify by closed-circuit television. (Hearing 15:8-13). She thought the boys might go silent or not feel comfortable telling the truth if they testified in front of White, though it could also happen with closed-circuit television testimony. (Hearing 16:8-17:6). She thought they might also be traumatized knowing White was watching their testimony. (Hearing 16:8-17:6). Haider concluded, "My hope would be that they didn't have to testify against their father in any capacity. I wouldn't wish that upon [M.W.] or [J.W.]. But

since it sounds like there's not another option, the closed circuit is the best option we have." (Hearing 18:1-5).

The Parties' Arguments. The State argued that the requirements of the Iowa Code had been met, and that they were trying to minimize the trauma to M.W. and J.W. by having them testify via closed-circuit television. (Hearing 19:14-22:10) (Protective Order Motion) (App. pp. 16-19). The State further argued that the statute applies to all minors, regardless of whether they are victims or witnesses, and there was no violation of confrontation rights based on previous caselaw. (Hearing 19:14-22:10) (Protective Order Motion) (App. pp. 16-19).

The defense resisted, arguing that the court should apply a stricter approach under article I, section 10 of the Iowa Constitution by following the dissenters in Maryland v. Craig, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting), requiring face-to-face testimony. (Hearing 19:14-22:10) (Resistance to Protective Order pp. 2-3) (App. pp. 21-22). The defense also

argued, “At the very least, Article I Section 10 requires in person, face-to-face testimony of nonvictim witnesses.” (Resistance to Protective Order p. 3) (App. p. 22). Furthermore, the defense noted that it was the State who was subjecting M.W. and J.W. to trauma by calling them as witnesses. (Hearing 19:14-22:10).

The Ruling. The district court declined to adopt a stricter approach than required by the Iowa Code, finding that Iowa Code section 915.38 applies to minors, not just victims. (Ruling on Protective Order p. 5) (App. p. 27). Further, it found the Iowa Supreme Court has upheld the constitutionality of section 915.38. (Ruling on Protective Order p. 6) (App. p. 28). The district court ruled that the State had met the requirements of section 915.38 and granted the protective order. (Ruling on Protective Order pp. 6-7) (App. pp. 28-29).

The Trial. Both boys testified at trial. (Trial II 107:911; 121:18-20). The judge, witnesses, prosecution, and defense counsel met in chambers while White and the jury remained

in the courtroom. (Trial II 105:21-106:7). The district court confirmed that defense counsel was satisfied that he could communicate with his client during their testimony, if needed. (Trial II 104:16-105:5). As requested by the defense, the court instructed the jury they could not draw any conclusions from J.W. and M.W. testifying via closed-circuit television. (Trial II 105:21-106:7) (Proposed Cautionary JI) (App. p. 39). There were some audio difficulties during J.W.'s testimony where the jury could not hear and repetition was necessary. (Trial II 114:1-16; 119:7-15).

Iowa Code section 915.38(1)(a). This section was enacted in 1999 as part of the Victim Rights Act. 1998 Iowa Acts ch. 1090, § 31 (1999). The previous version required the defendant to be in an adjacent room or behind a screen or mirror. Iowa Code § 910A.14 (1985), invalidated by Coy v. Iowa, 487 U.S. 1012 (1988).

The Iowa Code provides:

> Upon its own motion or upon motion of any party, a court may protect a minor, as defined in section

> 599.1, from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom. However, such an order shall be entered only upon a specific finding by the court that such measures are necessary to protect the minor from trauma. Only the judge, prosecuting attorney, defendant's attorney, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the minor may be present in the room with the minor during the minor's testimony. The judge shall inform the minor that the defendant will not be present in the room in which the minor will be testifying but that the defendant will be viewing the minor's testimony through closed-circuit television.

Iowa Code § 915.38(1)(a) (2021).

A. Sixth Amendment Jurisprudence is unstable.

A review of the most recent Sixth Amendment caselaw shows unresolved conflicts in the high court's approach to confrontation rights. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The federal confrontation right is obligatory in state prosecutions. U.S. Const. amend.

XIV; Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1067 (1965).

The United States Supreme Court found the use of a screen between the defendant and his 13-year-old accusers, pursuant to Iowa Code section 910A.14, violated the Sixth Amendment. Coy v. Iowa, 487 U.S. 1012 (1988). Writing for the majority, Justice Scalia stated, "It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." Id. at 1020. Turning to Roman law, Latin, and even Shakespeare, the Court indicated there was no doubt that the Confrontation Clause guaranteed "a face-to-face meeting with witnesses appearing before the trier of fact." Id. at 1016.

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or

> reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Id. at 1020.

The Court acknowledged that the Confrontation Clause may give way to other important interests, leaving for another day any exceptions. Id. at 1020-21. Since there was no individualized finding that the children in Coy needed protection, there was no exception. Id. at 1021. The case was remanded to the Iowa Supreme Court to determine if the error was harmless, id., which determined it could not find the error was harmless beyond a reasonable doubt. State v. Coy, 433 N.W.2d 714 (Iowa 1988).

Justice O'Connor wrote a concurrence in Coy, to note that while the use of the screen violated the Confrontation Clause, other procedures may be constitutional if "necessary to further an important public policy." Id. at 1022-24 (O'Connor, J., concurring). O'Connor observed that the Confrontation Clause reflected a preference for face-to-face, but it was not an absolute requirement. Id. at 1024.

Justice O'Connor's view became the majority in Maryland v. Craig, 497 U.S. 836 (1990). The Court examined a statute providing for a "child victim" in "a case of abuse of a child" to testify via one-way television in a room separate from the defendant, judge, and jury. Id. at 840, n.1. The State utilized this procedure for the six-year-old victim and child witnesses, who had also allegedly been sexually abused by the defendant. Id. at 840-41.

The Craig majority acknowledged Coy, but also stated that the Confrontation Clause does not guarantee the absolute right to a face-to-face confrontation with witnesses. Id. at 844. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 845. In the Craig majority's view, the Confrontation Clause guaranteed the following rights: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." Id. at 846.

The combined effect of these elements ensured "that evidence admitted against an accused is reliable and subject to rigorous adversarial testing." Id. at 846. It found that these elements were preserved by the Maryland statute, which adequately ensured the reliability of the testimony. Id. at 851.

The Court further found that the procedure employed must be necessary to further an important state interest—in this case, "protecting children who are allegedly victims of child abuse from the trauma of testifying against the perpetrator." Id. at 852. This interest outweighed the defendant's right to confront his accusers face to face in court. Id. at 853. The Court also required that the child cannot be traumatized merely by the courtroom but specifically by the presence of the defendant. Id. at 855-56.

Justice Scalia vigorously dissented in Craig, referring to the majority decision as a "subordination of explicit constitutional text to currently favored public policy." Id. at 861 (Scalia, J., dissenting). In Scalia's view, face-to-face

confrontation is not a "preference" that is "reflected" in the Confrontation Clause but "a constitutional right unqualifiedly guaranteed." Id. at 863. Furthermore, the Confrontation Clause "does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." Id. at 862 (emphasis in original). Justice Scalia rejected the idea that a child's unwillingness to testify in front of the defendant is the same as the unavailability required by the Confrontation Clause. Id. at 865-66.

> To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

Id. at 867.

Moreover, the dissent opined that the protection of the child's interest was well within the State's control, questioning why a prosecutor would want to call a witness who could not

reasonably communicate. Id. at 867. Justice Scalia baldly stated:

> The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

Id. In conclusion, he wrote, "The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation guarantees (everything, that is, except confrontation)." Id. at 870.

Justice Scalia, joined by Justice Thomas, later dissented from the denial of certiorari in two related cases. In 1998, the Court denied certiorari in a case where a 15-year-old "vaguely protested that she could not be near [the defendant]" in a rape and sodomy case. Danner v. Kentucky, 119 S. Ct. 529 (1998) (Scalia, J., dissenting from denial of certiorari). "It is a dangerous business to water down the confrontation right so dramatically merely because society finds the charged crime

particularly reprehensible. Indeed, the more reprehensible the charge, the more the defendant is in need of all constitutionally guaranteed protection for his defense." Id. at 530.

The following year, Justice Scalia, again joined by Justice Thomas, dissented from the denial of a petition for certiorari, objecting to the expansion of Craig to include "a child witness whose abuse is neither the subject of the prosecution nor will be the subject of her testimony." Marx v. State, 120 S. Ct. 574, 575 (1999) (Scalia, J., dissenting from denial of certiorari).

The Confrontation Clause was once more on the docket when Justice Scalia wrote for the majority in Crawford v. Washington, 541 U.S. 36 (2004), which did not overrule Craig, but "took out its legs." People v. Jemison, 952 N.W.2d 394, 396 (Mich. 2020). The Craig majority had relied heavily on Ohio v. Roberts, 448 U.S. 56 (1980), overruled by Crawford, 541 U.S. at 60-63, to reach its decision. Craig, 497 U.S. at 846-49. Roberts required necessity and an "indicia of

reliability" to admit the prior testimony of an unavailable witness under the Confrontation Clause. Roberts, 448 U.S. at 65-67. In Crawford, where a non-testifying wife's recorded statement to police was played at her husband's trial to undercut his claim of self-defense, the Roberts "amorphous" and "subjective" reliability standard was overruled. Crawford, 541 U.S. at 38, 60-63. Examining Roman law, common-law traditions, and early decisions of the Colonies and states, the majority adopted a different test for admission: (1) the unavailability of the witness; (2) a testimonial statement; and (3) the opportunity for cross-examination. Id. at 68.

Of course, Crawford addressed hearsay and its interplay with the Confrontation Clause. But given Craig's heavy reliance on Roberts and Roberts' subsequent demise in Crawford, some courts have been in a quandary when ruling on cases under the Confrontation Clause. The Sixth Circuit concluded that the Craig test was satisfied when seven children testified via closed-circuit television in a sexual

exploitation trial. United States v. Cox, 871 F.3d 479, 483-85 (6th Cir. 2017). But in a concurrence, one federal judge observed that the opinions in Craig and Crawford "would give Janus a run for his money." United States v. Cox, 871 F.3d 479, 492 (6th Cir. 2017) (Sutton, J., concurring). At length, the concurrence considered the stark differences between the two opinions. For instance, "Craig said that the 'face-to-face confrontation requirement is not absolute.' Crawford said that a face-to-face meeting between an accuser and the accused was an essential part of the confrontation right." Id. at 493 (internal citations omitted). In addition:

> Or consider the methodology of each opinion. Craig looked to the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court" to identify new exceptions to the right to face-to-face confrontation. But Crawford looked to the original publicly understood meaning of confrontation to determine when the exception-free words of the guarantee ("[i]n all criminal prosecutions") should have exceptions.

Id. at 493 (internal citations omitted).

The concurring judge in Cox seemed to be left with more questions than answers. Such as, "The right to confront a witness usually is the chief protection against a false accusation. How can we guarantee the full effect of that protection when two lines of cases, both purportedly good law, dispute the nature and reach of the Clause that guarantees it?" Id. at 494. And, "How can Craig survive in the absence of the Roberts balancing test?" Id. As well as, "Even on Craig's own terms (in truth, Roberts' terms), did the Court correctly frame the balancing of interests? Craig permitted Maryland to balance the right of the child witness to avoid trauma against the right of the defendant to confront the witness. Is that the correct question?" Id. The judge concluded, "American judges and lawyers and citizens often take great pride in talking about the constitutional protections we accord individuals suspected of the most offensive crimes. I sometimes wonder if we mean it." Id. at 495.

The Second Circuit put together its own test. United States v. Gigante, 166 F.3d 75 (2d Cir. 1999). The court upheld the decision to allow a witness in the Federal Witness Protection Program who was in the final stages of cancer to testify via two-way video from a remote location. Id. at 79. The Second Circuit found that an important public policy wasn't required because a two-way system was employed, unlike the one-way system in Craig. Id. at 81. It adopted the exceptional circumstances test utilized under Federal Rule of Criminal Procedure 15 to allow witnesses to testify via two-way closed-circuit television. Id.

The majority of the Eleventh Circuit applied the Craig test when it found that the defendant's confrontation rights were violated because two witnesses testified from Australia via two-way video conference. United States v. Yates, 438 F.3d 1307, 1316-17 (11th Cir. 2006) (en banc). One dissenting opinion would have applied the Crawford analysis because the witnesses were unavailable and their testimony was hearsay.

Id. at 1325-26 (Tjoflat, J., dissenting). Another dissenter stated, "Crawford reinforced the longstanding principle that the Confrontation Clause in effect imposes two parallel sets of ground rules, one governing testimony by witnesses who are available to appear in court and one governing testimony by witnesses who are unavailable." Id. at 1329. (Marcus, J., dissenting).

The Missouri Supreme Court has also attempted to reconcile Craig and Crawford. In a juvenile adjudication, the juvenile officer presented testimony of the alleged victim, mother, and babysitter via two-way video. C.A.R.A. v. Jackson Cnty. Juv. Office, 637 S.W.3d 50, 52 (Mo. 2022). After reviewing Coy, Craig, and Crawford, the court concluded it would "apply Craig to the facts it decided: a child victim may testify against the accused by means of video (or similar Craig process) when the circuit court determines, consistent with statutory authorization and through case-specific showing of necessity, that a child victim needs special protection." Id. at

63; see also People v. Jemison, 952 N.W.2d 394, 396, 400 (Mich. 2020) ("To reconcile Craig and Crawford, we read Craig's holding according to its narrow facts.").

The Missouri Supreme Court found the victim's testimony might qualify under Craig but lacked witness-specific findings. Id. at 65. However, the court found that Crawford applies to the testimony of the mother and babysitter, requiring a determination the witness was unavailable and the defendant had a prior opportunity to cross-examine. Id. In a companion case, the court concluded that a DNA analyst's testimony by two-way video violated confrontation because there was no finding the witness was unavailable. State v. Smith, 636 S.W.3d 576, 587 (Mo. 2022).

To add to the questions about Craig's stability, Justice Sotomayor indicated that Craig may not apply outside that context. In the denial of a petition for certiorari where a witness was allowed to testify via two-way video, the justice wrote, "Because the use of video testimony in this case arose

in a strikingly different context than in Craig, it is not clear that the latter is controlling." Wrotten v. New York, 560 U.S. 959 (2010) (Sotomayor, J., denying certiorari).

This Court, too, has entered the fray of Confrontation Clause jurisprudence under the Sixth Amendment. First, it found the predecessor to section 915.38(1)(a) (formerly 910A.14) complied with Craig. State v. Rupe, 534 N.W.2d 442 (Iowa 1995). It upheld the district court's ruling that a child witness, who was not the victim of the charged sexual abuse offense, could testify outside of Rupe's presence because the State met the requisite showing of necessity while preserving Rupe's confrontation rights under Craig. Id. at 444.

Next, this Court held that the Craig test applied under the Sixth Amendment when deciding if a witness can testify via live, two-way video. State v. Rogerson, 855 N.W.2d 495 (Iowa 2014).[3] The district court ruled that three adult victims and three lab analysts could testify remotely in a serious

[3] The Court did not reach Rogerson's claim under article I, section 10 of the Iowa Constitution. Id. at 498, n.3.

injury by OWI case. Id. at 496. Rogerson objected this procedure violated his confrontation rights, and this Court granted an application for interlocutory appeal. Id. The Rogerson Court acknowledged that the U.S. Supreme Court hadn't considered new technology since Craig, as well as its rejection of a proposed Federal Rule of Criminal Procedure that would have allowed unavailable witnesses to testify via two-way video. Id. at 499-500. Rogerson argued for the adoption of the Craig test for both one-way and two-way video, and the Court agreed. Id. at 500, 504. But it warned, "[D]espite its preferability over one-way transmission, we do not believe two-way videoconferencing is constitutionally equivalent to the face-to-face confrontation envisioned by the Sixth Amendment." Id. at 504. A defendant's Sixth Amendment rights are fully protected only by the combination of "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact" and "face-to-face

testimony." Id. (citing Maryland v. Craig, 497 U.S. 836, 846 (1990)).

This Court further cautioned:

> Technology has changed since the late eighteenth century, but human nature has not. This social pressure to tell the truth can be diminished when the witness is far away rather than physically present with the defendant in the courtroom. The Supreme Court has expressed a strong preference for in-person encounters between witnesses and defendants that no form of virtual testimony can fully satisfy. Two-way video technology may permit the witness and defendant to see one another, but the screen and the physical distance between the two tend to reduce the truth-inducing effect of the confrontation. The Supreme Court has recognized "that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." Remote testimony of any kind should not be lightly substituted in its place.

Id. at 504-05 (internal citation omitted).

B. Iowa Code section 915.38(1)(a) violates article I, section 10 of the Iowa Constitution.

One might say that Sixth Amendment jurisprudence is a mess. See State v. Wright, 961 N.W.2d 396, 410 (Iowa 2021) (observing, "Current Fourth Amendment jurisprudence is a

mess," and deciding the case under article I, section 8). Thus, White urges this Court to diverge from the U.S. Supreme Court's analysis in Craig to find that Iowa Code section 915.38(1)(a) denied him the right to confrontation under the Iowa Constitution.

"In determining the minimum degree of protection the constitution afforded when adopted, we generally look to the text of the constitution as illuminated by the lamp of precedent, history, custom, and practice." Wright, 961 N.W.2d at 402. Moreover, the question is not whether the article I, section 10 of the Iowa Constitution should be interpreted more or less stringently than the Sixth Amendment, but what it "means and how it applies to the case at hand." Wright, 961 N.W.2d at 403-04 (quoting Hans A. Linde, E. Pluribus—Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 179 (1984)).

The Iowa Constitution requires that defendants meet accusers face to face. "In all criminal prosecutions, . . . the

accused shall have a right . . . to be confronted with the witnesses against him." Iowa Const. art I, § 10. In a case of cheating by false pretenses, this Court rejected the State's attempt to present evidence against the defendant through certificates of protest by notaries public. State v. Reidel, 26 Iowa 430, 435 (1869). "Under the [Iowa] Constitution, he has the right to see the witnesses against him, *face to face*." Id. (emphasis added). Although the notary public's written protest would be admissible in a civil case, "the deposition of the notary could not be used against the defendant in a criminal prosecution; the Constitution forbids it." Id. at 437.

At a trial for assault with intent to commit murder, the State read into evidence the testimony of a witness taken by a justice of the peace, over the defendant's objection. State v. Collins, 32 Iowa 36, 39 (1871). Citing to article I, section 10, the Court stated:

> Here is a clear and express declaration of the *right* of the defendant "in a criminal prosecution" "to be confronted with the witnesses against him." This right to have them brought into

> court, where he can see them, while they give evidence against him, is secured by this constitutional provision. Their testimony can be given only upon the trial of the cause, and face to face with the accused; and any act of the legislature purporting to authorize depositions of witnesses, taken out of court, to be used against a party on trial in a criminal case, would be in conflict with this section of the constitution, and, therefore, void. The minutes of evidence admitted in this case do not rise even to the dignity of a deposition; but, if they did, it would have been error to admit them as original evidence, because incompetent in view of the above clause of the constitution.

Id. at 40-41 (emphasis in original).

Historically speaking, the practice of confronting one's accusers face to face dates back to Roman times. Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988); Crawford, 541 U.S. at 43; Frank R. Herrmann & Brownlow M. Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481, 483 (1994) [hereinafter Herrmann]. This practice mostly came to a halt with the rise of inquisitional procedures in the thirteenth century. Herrmann at 483-84. The practice made a resurgence, however, as English law

developed a right of confrontation. Crawford, 541 U.S. at 44-45.

Another example is an incident from 1789, in which a man was accused of inciting local indigenous tribe members to murder. Marc C. McAllister, The Disguised Witness and Crawford's Uneasy Tension with Craig: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence, 58 Drake L. Rev. 481, 526 (2010) (citing 5 John H. Wigmore, Wigmore on Evidence § 1395 (3d ed. 1940) (quoting George Rogers Clark, Memoir on the Conquest of the Illinois 42 (1920)) [hereinafter McAllister]. The accused adamantly denied the claim. McAllister at 526. When Colonel Clark demanded that the accusers be brought to make the claim before the man's face, they were confused and dispersed without giving testimony. McAllister at 527.

The history of testimony by child witnesses isn't as clear. Children did testify in seventeenth- and eighteenth-century England, though their ages weren't often mentioned, or their

parents testified on their behalf. Johnathan Clow, Note, Throwing A Toy Wrench In the "Greatest Legal Engine:" Child Witnesses and the Confrontation Clause, 92 Wash. U. L. Rev. 793, 805-6 (2015) [hereinafter Clow]. Child abuse prosecutions during this period were rare, however. Id. at 806, n.67.

In the 1980s in the U.S., protective statutes were enacted in response to daycare sexual abuse scandals, allowing children to testify outside the presence of the accused. Id. at 807. Iowa was among the states to enact legislation in 1985, allowing children to testify while the defendant was in an adjacent room or behind a screen or mirror. Coy, 487 U.S. at 1014, n.1. As previously discussed, this practice was found in violation of the defendant's confrontation rights. Id. at 1019. Additionally, the investigation and trial practices in the 1980s traumatized children, Clow at 807, n.75, and resulted in some convictions being overturned. Frontline, Outcomes of High Profile Day Care Sexual Abuse Cases of the 1980s,

https://www.pbs.org/wgbh/pages/frontline/shows/fuster/lessons/outcomes.html (last visited Oct. 20, 2022).

One of the problems with the Craig test is not only that its underpinnings were overruled by Crawford, but it relies on the concept of reliability, which misses the point. As one scholar stated,

> Trials should not be based on winnowing evidence to that which is reliable before presentation to the fact-finder. Rather, trials are attempts to determine the truth from an aggregation of evidence, some of which may be very unreliable. Live testimony under oath and subject to cross-examination—the paragon of acceptable evidence—is not necessarily reliable; that is why we have conflicting testimony at trial.

Richard D. Friedman, The Conundrum of Children, Confrontation, and Hearsay, 65 Law and Contemp. Probs. 243, 245-46 (2002). The Crawford Court agreed by overruling the reliability test adopted in Roberts. Crawford, 541 U.S. at 38, 60-63.

Additionally, the Craig test relies on erroneous principles established and often quoted from Wigmore on Evidence,

which claimed that at common law, cross-examination was *required*, but the accused testifying in the defendant's presence was only *desirable*. Craig, 497 U.S. at 847; Coy v. Iowa, 487 U.S. 1012, 1029 (1988) (Blackmun, J., dissenting); State v. Brown, 132 N.W.2d 862, 864 (Iowa 1911).

Indeed, in State v. Strable, this Court concluded that it was harmless error to place a blackboard between the defendant and his 15-year-old accuser because the essential purpose of confrontation under the Sixth Amendment was to secure the right of cross-examination. State v. Strable, 313 N.W.2d 497, 500-01 (Iowa 1981) (citing 5 J. Wigmore, Evidence, § 1395, p. 123 (3rd ed. 1940)). Relying on Wigmore, the Court concluded that the secondary purpose was for the witnesses to be brought before the tribunal, *not* the accused, and that this secondary purpose was "dispens[a]ble." Id. at 501.

However, the cases cited by Wigmore in support of this claim directly contradict his proposition by lauding both cross-

examination *and* presence. McAllister at 523-25 (citing 5 John H. Wigmore, Wigmore on Evidence § 1395 (3d ed. 1940) and cases therein). For example,

> How contrary this is to a fundamental rule in our law, that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence; and that is due to every man injustice.

McAllister at 524 (quoting Fenwick's Trial, (1696) 13 How. St. Tr. 591, 638, 712 (H.C.)).

Thus, the reasoning of the Craig Court should be rejected by this Court in analyzing White's confrontation rights under the Iowa Constitution. Not only has Crawford "taken out its legs" by rejecting and overruling the reliability test from Roberts, historical records reveal that confrontation has meant face to face since Roman times, at common law, during the founding era, and in this Court's early interpretations of the Iowa Constitution.

After considering precedent, history, custom, and practice, White urges this Court to find that article I, section

10 of the Iowa Constitution requires in-person, face-to-face testimony. (Resistance to Protective Order p. 3) (App. p. 22). The district court refused to apply a stricter approach under the Iowa Constitution. (Ruling on Protective Order pp. 5-6) (App. pp. 27-28). It should be overruled because allowing the witnesses to testify against White violated article I, section 10 of the Iowa Constitution.

C. A new trial is required.

Error was not harmless. The admission of evidence in violation of the confrontation clause does not mandate reversal if the State can establish the error was harmless beyond a reasonable doubt. State v. Brown, 656 N.W.2d 355, 361 (Iowa 2003). In assessing whether error was harmless, a reviewing court considers, "[T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of

course, the overall strength of the prosecution's case." Id. at 361–62 (citation omitted).

J.W. and M.W. were the only trial witnesses who lived in the home. They described White as the one who used a belt to spank D.C., specifically saying that Reisdorfer didn't spank. The child abuse expert, investigating officer, DHS worker, and treating physician all described the marks on D.C.'s face as looking like they came from a belt. Further, J.W. and M.W. described hearing D.C. cry or scream upstairs when White disciplined him. Without their testimony, the State only had White and Reisdorfer acting reluctant to let the DHS worker and officer in the door, the child's injuries, and Reisdorfer's varying explanations for how D.C. got hurt. The evidence against White was not strong without this testimony and implicated Reisdorfer instead. Thus, error was not harmless. The district court ruling must be reversed and a new trial granted.

II. The district court erred by denying White's proposed jury instruction that correctly stated the law.

Preservation of Error: Prior to trial, the defense filed a proposed jury instruction. (Supplemental Proposed JI) (App. pp. 40-41). After hearing the parties' arguments, the district court denied the request to submit the instruction. (Trial II 22:3-23:24). Error was accordingly preserved. See State v. Plain, 898 N.W.2d 801, 816 (Iowa 2017) (reviewing district court's denial of requested jury instruction).

Standard of Review: The refusal to give a jury instruction is generally reviewed for errors at law unless the instruction is discretionary, in which case it is reviewed for abuse of discretion. Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699, 707-08 (Iowa 2016); accord Plain, 898 N.W.2d at 816 ("We generally review refusals to give jury instructions for errors at law; however, if the requested jury instruction is not required or prohibited by law, we review for abuse of discretion."). In this case, the standard of review should be for errors at law because the instruction is a correct statement of the law and isn't embodied in other instructions. Alcala, 880

N.W.2d at 707 (citing Sonnek v. Warren, 522 N.W.2d 45, 47 (Iowa 1994)).

Merits: The parties disputed whether a crime had occurred and who committed it. (Trial I 148:12-153:18; Trial III 54:24-55:14; Trial III 69:5-71:21; Trial III 80:20-81:9). White submitted a proposed jury instruction based on a civil instruction that stated, "The mere fact that a person suffered an injury does not mean a party committed a crime." (Supplemental Proposed JI) (App. p. 41).

The parties made the following arguments:

> [DEFENSE COUNSEL]: I would request that that be submitted, Your Honor, because I think that's an accurate statement of the law, more so with crimes than it is with torts. The fact that just an injury occurred does not mean that a crime occurred. And I think that should be instructed to the jury.
>
> …
>
> [COUNSEL FOR THE STATE]: Right. First of all, it's just his defense. He's got all of the jury instructions that talk about the fact that no crime occurs until we do -- we meet all of the elements. His own opening talked about the fact that we have to prove a crime occurred, not just injuries. So I would note that the case that he cited has been overruled but when -- when reading it, it specifically goes to a tort.

> I don't think that it's appropriate to basically get another version of what his defense is in the jury instructions. And so it's not appropriate.

(Trial II 22:13-23:6).

The district court ruled:

> THE COURT: Thank you. I've taken an opportunity to read the Smith v. Koslow case. I would note that it has been overruled on a different matter. It was overruled on an error of the court by submitting a negligent training theory to the jury. But I would note that specifically head note 3 of that Smith v. Koslow case talks about the fact the plaintiff has suffered an injury does not mean that the defendant was negligent. And so it's not exactly the language that the defendant in this case is requesting. I would agree with the State that this is specifically referencing a tort. And even with that, I'm not certain that Smith v. Koslow – the language in Smith v. Koslow would match with the instructions. So the Court will decline the defense's request to give this particular instruction.

(Trial II 23:7-21). The district court erred in denying the requested instruction.

Civil law principles apply to criminal cases. For instance, the "principles of causation normally associated with civil tort litigation have a proper application in criminal cases." State v. Murray, 512 N.W.2d 547, 550 (Iowa 1994); accord State v.

Marti, 290 N.W.2d 570, 584-85 (Iowa 1980). Thus, it was not unusual for the defense to propose a modified civil instruction in this case. The model instruction states, "The mere fact an accident occurred or a party was injured does not mean a party was [negligent] [at fault]." Iowa Civil Jury Instr. 700.8 (2019).

Civil instruction 700.8 arose from the principle that "no inference of negligence arises from the mere fact that a collision occurred." Armbruster v. Gray, 282 N.W. 342, 344 (Iowa 1938). Even though this is a "fundamental tenet of tort law," the Iowa Supreme Court first addressed whether it was appropriate to submit it as a jury instruction in Smith v. Koslow, 757 N.W.2d 677, 680 (Iowa 2008), overruled on other grounds by Alcala, 880 N.W.2d at 708, n.3. Smith objected to a supplemental instruction that read, "The mere fact that a party was injured does not mean that a party was negligent." Id. at 679. At issue was whether a surgeon was negligent in a procedure he performed wherein the patient died. Id. at 678-

79. The Supreme Court canvassed other jurisdictions, finding that one court indicated the instruction "is best reserved for those medical malpractice cases in which the jury might improperly use a bad medical result to find negligence." Id. at 681 (citing Jones v. Porretta, 405 N.W.2d 863, 870 (Mich. 1987)). Yet, another court found the instruction is "particularly appropriate where the jury has heard evidence or argument from which it might reach an improper conclusion that doctors guarantee good results or can be found negligent merely because of a bad result." Id. (quoting Watson v. Hockett, 727 P.2d 699, 673 (Wash. 1986)). The Court concluded that there was no error in submitting the instruction because of Smith's closing arguments. Id. at 681-82. An instruction "that properly assists the jury in the correct application of the law to the facts is not error." Id. at 682.

The Smith Court cautioned that the instruction could result in reversible error if it unduly emphasized a particular theory. Id. at 681. Instructions "that set apart, highlight, or

accentuate the testimony of a particular witness or a particular piece of evidence are improper." State v. Kraii, 969 N.W.2d 487, 492 (Iowa 2022). For instance, an instruction in a sexual abuse case that said the victim's testimony need not be corroborated unduly emphasized the victim's testimony. Id. at 491-93. Instructions that may be repetitious but clarify a legal concept, however, are not erroneous. Burkhalter v. Burkhalter, 841 N.W.2d 93, 107 (Iowa 2013). "While the instructions overlap to some degree, that is often the case in jury instructions that build upon concepts of law." Id. at 107.

The district court erred in denying the requested instruction. An instruction must be given when it correctly states the law and is not embodied in other instructions. Smith, 757 N.W.2d at 683; accord Alcala, 880 N.W.2d at 707. The proposed instruction correctly stated the law. As with the tort principle that you cannot infer negligence from an injury, the jury here could not infer guilt from an injury. This

principle was not embodied in any other instructions, contrary to the State's argument below.

White was prejudiced by the court's refusal to give the proposed instruction. The test of prejudice for refusing to give a proposed instruction is "whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice." Plain, 898 N.W.2d at 817 (quoting State v. Marin, 788 N.W.2d 833, 836 (Iowa 2010)). As in the cases cited in Smith, this is the type of case in which a jury would be tempted to infer guilt because a young child was injured and only White was on trial to be held accountable for those injuries. See Smith, 757 N.W.2d at 681. Reisdorfer or another could have injured D.C. Accordingly, White should be granted a new trial.

III. The district court abused its discretion by failing to clarify the instructions in response to a jury question.

Preservation of Error: During deliberations, the jury submitted a question about count III. (Jury Question) (App. p. 55). The defense requested the court clarify the instruction,

while the State asked that the jury be instructed to reread the instructions. (Trial III 87:3-92:10). The court directed the jurors to reread the instruction. (Trial III 87:3-92:10) (Jury Question) (App. p. 54). Defense counsel renewed the objection after trial, arguing the court refused to properly instruct the jury, which the State resisted; the district court denied the motion for new trial. (Motion for New Trial, pp. 3-5; Resistance to New Trial, pp. 4-5; Ruling on New Trial p. 5) (App. pp. 61-63, 69-70, 98). Error was accordingly preserved. State v. McCall, 754 N.W.2d 868, 871 (Iowa Ct. App. 2008)

Standard of Review: Review of a court's decision to respond to a jury question is for abuse of discretion. Id.

Merits: During deliberations, the jury submitted a question regarding the third element of count III, child endangerment. (Jury Question) (App. p. 55). The instruction stated,

> The Trial Information charges the defendant, Derek Michael White, with Child Endangerment. The State must prove all of the following elements:

1. On or about May 2, 2020, to May 5, 2020, the defendant was the parent, guardian, or person having custody or control of D.C. or a member of the household in which D.C. resided.

2. D.C. was under the age of 14 years.

3. The defendant intentionally committed an act or series of acts which used unreasonable force, torture, or cruelty that resulted in physical injury to D.C.

4. The defendant's act resulted in bodily injury to D.C.

If the State has proved all of the elements, the defendant is guilty of Child Endangerment. If the State has failed to prove any one of the elements, the defendant is not guilty of Child Endangerment.

(Instr. 22) (App. p. 51) (emphasis added).

The jury asked, "Does the act in count 3 element 3 have to be the defendant doing the act or could him not bringing the child in be counted as cruelty?" (Jury Question) (App. p. 55).

The defense argued that the court should supplement the instruction, explaining to the jury that a volitional act was required. (Trial III 87:3-92:10). The State resisted, arguing, the jury should be advised to reread the instructions. (Trial III

87:3-92:10). While the district court agreed a volitional act was required, it answered the jury with, "The jurors are directed to re-read the instruction." (Trial III 87:3-92:10) (Jury Question) (App. p. 55).

The court may supplement instructions to the jury. The civil rules of procedure regarding jury instructions apply in criminal cases. Iowa R. Crim. P. 2.18(5)(f). "While the jury is deliberating, the court may in its discretion further instruct the jury, in the presence of or after notice to counsel." Iowa R. Civ. P. 1.925. "[T]he court, may, at the request of the jury, give further instructions, since the interest of justice requires that the jury have a full understanding of the case." State v. Martens, 569 N.W.2d 482, 485 (Iowa 1997). In the instant case, the defense correctly noted that the court had the authority to clarify the instruction in response to the jury's question. (Trial III 89:4-11). Thus, the district court had the authority to respond with a supplemental instruction and not just direct the jury to reread the instruction.

A supplemental instruction would have answered the jury's question without prejudicing either party. Additional instructions must be fair to both parties and cannot prejudice the defendant. McCall, 754 N.W.2d at 872. The court may not, however, change the instructions by adding an alternative means of committing the offense. State v. Watkins, 463 N.W.2d 15, 1718 (Iowa 1990); see also McCall, 754 N.W.2d at 873 (finding alternative means of committing the offense did not occur when the court revised the burglary instructions to add "entering" language). In Watkins, the State approached the court while the jury was deliberating, and asked to modify the instructions to add the assault alternative to the robbery instructions, which the court did. Id. at 17. The Supreme Court found that Watkins was prejudiced because an alternative means of committing the offense was injected into the case that he could not challenge. Id. at 18.

In the instant case, the opposite occurred. By failing to clarify the instructions for the jury, the defense was unable to

confront an alternative means of the offense that was not charged or tried. The jury's question indicated it believed that White not "bringing the child in" could constitute an act of cruelty. (Jury Question) (App. p. 55). While that may have satisfied count II, which charged White with acting "with knowledge that he was creating a substantial risk to D.C.'s physical health or safety," it did not satisfy the element of count III requiring him to have "intentionally committed an act or series of acts which used unreasonable force, torture, or cruelty that resulted in physical injury to D.C." Compare (Instr. 21) with (Instr. 22) (App. pp. 50-51). See State v. Arends, No. 03-0420, 2004 WL 1159730, at *3 (Iowa Ct. App. May 26, 2004) (finding failure to seek medical treatment would qualify under the child endangerment element of knowingly acting in a manner that creates a substantial risk to physical health).

Count III required the State to prove a volitional act by White that resulted in physical injury to D.C. (Instr. 22) (App.

p. 51). Failing to seek medical treatment does not satisfy that element; even if it is an act, physical injury did not result from it. D.C. was bruised but did not have a brain breed or fracture.

Furthermore, the State did not argue, nor did White defend against, a claim that White failed to seek medical care for Reisdorfer's son. By failing to clarify the instruction for the jury, White was denied the opportunity to defend himself against a charge that was not brought against him.

The district court abused its discretion by failing to further instruct the jury. Reversible error may occur when a court refuses a jury's request for an additional instruction when the jury is confused about an element of the law. Martens, 569 N.W.2d at 485. White had not defended himself against a charge that he failed to act, and the State had not made that claim against him. Despite agreeing that the element required a volitional act, the district court failed to clarify the instruction for the jury. (Trial III 87:3-92:10). Additionally, even if the general and specific intent

instructions would have clarified the jury's understanding, as the State argued below, the district court only instructed them to "re-read the instruction," not the instructions as a whole. (Instr. 16; Instr. 25; Jury Question; Resistance to New Trial p. 5) (App. pp. 48, 53, 55, 70). Thus, the jury was left without any real guidance from the district court despite its confusion. White is entitled to a new trial. See Watkins, 463 N.W.2d at 18.

IV. There was insufficient evidence that White had custody of D.C. and that he was the one who injured the child.

Preservation of Error: On appeal, White challenges the evidence as insufficient as to custody and identity. A motion for judgment of acquittal at trial was not required because "a defendant whose conviction is not supported by sufficient evidence is entitled to relief when he raises the challenge on direct appeal without regard to whether the defendant filed a motion for judgment of acquittal." State v. Crawford, 972 N.W.2d 189, 202 (Iowa 2022).

Standard of Review: Claims of insufficient evidence to support a conviction are reviewed for correction of errors at law. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

Merits: "In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider all of the record evidence viewed 'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.'" State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012) (quoting State v. Keopasaeuth, 645 N.W.2d 637, 639-40 (Iowa 2002)). The Court should uphold the verdict only if it is supported by substantial evidence in the record as a whole. Id. "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." State v. Kemp, 688 N.W.2d 785, 789 (Iowa 2004) (citing State v. Webb, 648 N.W.2d 72, 76 (Iowa 2002)). However, consideration must be given to all of the evidence, not just the evidence supporting the verdict. State v. Petithory, 702 N.W.2d 854, 856-57 (Iowa 2005) (citation omitted). "The

evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." Webb, 648 N.W.2d at 76 (citing State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)).

The State has the burden of proving "every fact necessary to constitute the crime with which the defendant is charged." Webb, 648 N.W.2d at 76 (citing State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976)); see also State v. Limbrecht, 600 N.W.2d 316, 317 (Iowa 1999) (citing State v. Harrison, 325 N.W.770, 772-73 (Iowa Ct. App. 1982)) ("That record must show that the State produced substantial evidence on each of the essential elements of the crime.").

A. White did not have custody of D.C.

In the instant case, the State was required to prove the following elements of neglect or abuse of a dependent child in count I:

1. On or between May 2, 2020, to May 5, 2020, the defendant was the parent or *person having custody of a child, D.C., a child.*

2. D.C. was a person under the age of 14 years.

3. The defendant knowingly or recklessly exposed D.C. to a hazard or danger against which D.C. could not reasonably be expected to protect himself.

(Instr. 20) (App. p. 49) (emphasis added).

Regarding the first element, the evidence supports that White is not the parent or guardian of D.C. (Trial II 145:1-10). The dispute is whether he had custody of D.C. The district court gave the following instruction:

> Concerning element number 1 of Instruction(s) No. 20, 21 & 22, having custody is not limited to legal custody. It means to be in charge of an individual and to hold the responsibility to care for that individual. Custody not only means a power of oversight but also a responsibility for the care of an individual.

(Instr. 23) (App. p. 52). This instruction was agreed upon by the parties, based on language from caselaw. (Trial II 16:18-17:20).

White did not have custody of D.C. Taking responsibility for a person, particularly if they are in a helpless condition, is sufficient to find custody. State v. Leckington, 713 N.W.2d

208, 216 (Iowa 2006) (finding the defendant had custody of a highly-intoxicated teenager when she moved him to her home); accord State v. Johnson, 528 N.W.2d 638, 640-41 (Iowa 1995) (holding legal custody was not required to find wife had custody of her ill husband).

White lived in the home with Reisdorfer and her children, but there is no evidence that he was responsible for D.C.'s care. The State argued that DHS worker Warnke and Deputy Bos testified that White was taking care of D.C. while Reisdorfer took her older son, E., to North Dakota on or about May 3 to 5, 2020. (Resistance to New Trial p. 2) (App. p. 67). In fact, Bos testified that Reisdorfer took E. to North Dakota on April 29. (Trial II 77:8-24). Bos did not testify to who cared for D.C. in Reisdorfer's absence. Warnke testified that Reisdorfer and White told her that Reisdorfer took E. to North Dakota while White "remained in the home"; she did not indicate who took care of D.C. in Reisdorfer's absence. (Trial II 152:19-153:5).

Additionally, the district court ruled that DHS worker Warnke testified that White took care of D.C. at various times. (Ruling on New Trial p. 3) (App. p. 96). There was no such testimony. The only evidence in the record regarding who cared for D.C. was Warnke's testimony that 16-year-old E. watched the younger children. (Trial II 152:11-18).

Thus, there is insufficient evidence in the record that White was responsible for the care of D.C.—even in Reisdorfer's absence when she took E. to North Dakota—because no one testified to who cared for the child in her absence. Reisdorfer was the child's parent, who was responsible for his care, and thus he was in her custody, not White's.

Furthermore, Patrick Conry, D.C.'s biological father, testified he had visited with D.C. on or about April 30, and saw no bruises or marks on the child. (Trial II 93:1-94:15). If Reisdorfer took her older son to North Dakota on April 29, as Bos testified—and D.C. was allegedly in White's custody

during that time—then D.C. was not injured while in White's custody. Therefore, the State has failed to prove the first element count I.

B. White did not injure D.C.

The State was required to prove the following elements of child endangerment in count II:

1. On or about May 2, 2020, to May 5, 2020, the defendant was the parent, guardian, or person having custody or control of D.C. or a member of the household in which D.C. resided.

2. D.C. was under the age of 14 years.

3. *The defendant acted with knowledge that he was creating a substantial risk to D.C. physical health or safety.*

4. *The defendant's act resulted in bodily injury to D.C.*

(Instr. 21) (App. p. 50) (emphasis added).

The State was required to prove the following elements of child endangerment in count III:

1. On or about May 2, 2020, to May 5, 2020, the defendant was the parent, guardian, or person having custody or control of D.C. or a member of the household in which D.C. resided.

2. D.C. was under the age of 14 years.

3. *The defendant intentionally committed an act or series of acts which used unreasonable force, torture, or cruelty that resulted in physical injury to D.C.*

4. *The defendant's act resulted in bodily injury to D.C.*

(Instr. 22) (App. p. 51) (emphasis added).

There is insufficient evidence that White harmed D.C. The third and fourth elements of counts II and III require the State to prove that White exposed D.C. to harm or acted in a manner that resulted in harm to D.C. (Instr. 21, 22) (App. pp. 50-51). There was no eyewitness to D.C.'s injuries. D.C. himself did not testify. And M.W. and J.W. testified that there was a loud thud when D.C. had fallen out of bed, consistent with one of the explanations Reisdorfer gave for the child's injuries. Indeed, it was Reisdorfer who gave varying accounts for how D.C. got hurt, not White. While M.W. and J.W. testified that White spanked as discipline, and sometimes used a belt, they did not observe injuries as a result of this

discipline. Thus, there is insufficient evidence that White was the cause of D.C.'s injuries or that he exposed D.C. to harm, as required by the instructions.

C. The remedy is dismissal of the charges.

The charges against White must be dismissed due to insufficient evidence. "[W]hen the defendant's conviction is reversed on grounds that the evidence was insufficient to sustain the conviction . . . double jeopardy principles require that the case be dismissed." State v. Chapman, 944 N.W.2d 864, 875 (Iowa 2020). Because the State failed to prove that White had custody or control or that he exposed D.C. to harm or caused his injuries, the charges must be dismissed.

V. White doesn't have the reasonable ability to pay nearly $11,000 in category B restitution.

Preservation of Error: At defense request, the district court assessed White's reasonable ability to pay category B restitution at sentencing. (Sentencing 20:9-24:23). The district court questioned White under oath, then concluded that he must pay up to $10,000 of court-appointed attorney fees as

part of category B restitution, as well as court costs, and included it in the sentencing order. (Sentencing 24:9-20) (Judgment pp. 10-11) (App. pp. 81-82). Because the district court entered a final restitution order at sentencing, White did not need to object to preserve error. State v. Hawk, 952 N.W.2d 314, 318, 320 (Iowa 2020).

Standard of Review: A reasonable ability to pay determination is reviewed for an abuse of discretion. Iowa Code § 910.2A(5) (2021); Hawk, 952 N.W.2d at 320.

Merits: After sentencing White to 15 years incarceration and suspending the fines and surcharges, the district court questioned the defense about White's reasonable ability to pay category B restitution. (Sentencing 19:15-24:23). Defense counsel estimated his fees would be about $15,000 or more and asked that the court find White didn't have the reasonable ability to pay or limit it to a smaller amount. (Sentencing 21:10-23:19). The State took no position. (Sentencing 23:20-22).

White advised the court that he was currently employed, though he was uncertain about his ability to secure employment after prison. (Sentencing 21:10-24:8). According to the PSI, he earned $16,000 in the last year. (PSI, p. 5) (Conf. App. p. 28). He was behind in his child-support obligations in the amount of $3,100 and owed $269 per month. (PSI, pp. 4-5) (Conf. App. pp. 27-28). Additionally, he owed $1,750 to Verizon Wireless, though he forgot to mention that at sentencing. (Sentencing 21:10-24:8) (PSI, p. 4) (Conf. App. p. 27). White has his GED and is not disabled. (Sentencing 21:10-24:8) (PSI p. 4) (Conf. App. p. 27).

The district court stated:

> Mr. White, based on your representations and based on what I've seen in the PSI, you have been able to maintain and obtain full-time employment. Like I said, I don't have a crystal ball and neither do you. But I would assume that upon your release from prison, you will be able to seek full-time employment. And I would encourage you to do so. It will probably be a term of your release of some sort pending something that we can't predict. You do have a high school education. . . .

> So while it does concern me that you're behind in your child support, I'm going to make the finding that you do have the reasonable ability to pay a cap of $10,000 of category B restitution in this amount. And so I will order that you be required to pay up to $10,000 of category B restitution. So I think that the rule requires that I specify, so I'm going to say not more than $10,000 of court appointed attorney fees. And you'll be ordered to pay the rest of the category B restitution that would be the court reporter fees and the court costs. It will end up being over 10,000, but I'm going to cap the attorney fees at $10,000.

(Sentencing 23:23-24:19). The court costs and fees totaled $880.75. (Docket Report p. 23) (Conf. App. p. 49).

The district court abused its discretion by finding White had the reasonable ability to pay nearly $11,000 in category B restitution. "[A] court should not order payment of restitution unless the convicted person 'is or will be able to pay it without undue hardship to himself or dependents, considering the financial resources of the defendant and the nature of the burden payment will impose.'" State v. Albright, 925 N.W.2d 144, 161 (Iowa 2019) (quoting State v. Rogers, 251 N.W.2d 239, 245 (Iowa 1977) (enbanc)), overruled on other grounds by

State v. Crawford, 972 N.W.2d 189 (Iowa 2022). The sentencing court must consider the defendant's financial resources and obligations, "including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependents," as well as future earning potential. Hawk, 952 N.W.2d at 321 (citing Albright, 925 N.W.2d at 161-62). While the district court considered White's earning potential, income, and his child-support obligation, it failed to consider his basic human needs in its analysis. (Sentencing 23:23-24:19).

In Hawk, the Court found the district court did not abuse its discretion by ordering less than $600 in category B restitution. Hawk, 952 N.W.2d at 321. In contrast, White earned $16,000 in the past year, owed $4,850 in debt, and was sentenced to a 15-year term of incarceration. Being saddled with an additional debt of nearly $11,000 in category B restitution will significantly impact his ability to meet his basic human needs after his incarceration. The sentencing

court therefore abused its discretion by failing to consider all of the required factors. See Albright, 925 N.W.2d at 162 ("We find the sentencing court should consider all these factors when awarding the final amount of restitution based on the offender's reasonable ability to pay."). The restitution order should be vacated and the case remanded. Id.

CONCLUSION

For all of the reasons discussed above, Defendant-Appellant Derek White respectfully requests this Court reverse and remand the case to the Osceola County District Court for a new trial, or in the alternative, dismissal of the charges.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $10.55, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

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