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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

APPLICANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 30, 2023

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CERTIFICATE OF SERVICE

On the 18th day of September, 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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QUESTIONS PRESENTED FOR REVIEW

I. Does Article I, section 10 of the Iowa Constitution require the defendant to confront accusers face to face?

II. Did the district court err by denying White's proposed jury instruction that correctly stated the law?

III. Did the district court abuse its discretion by failing to clarify the instructions in response to a jury question?

IV. Was there sufficient evidence that White had custody of D.C.?

V. Does White have the reasonable ability to pay nearly $11,000 in category B restitution?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant and pursuant to Iowa Rule of Appellate Procedure 6.1103 requests further review of the August 30, 2023, decision.

1. The Court of Appeals properly found that error was preserved and that it could decide the Confrontation Clause issue under article I, section 10 because this Court has not previously decided this issue. However, in its analysis of the confrontation issue, the Court of Appeals fell back into the "reliable evidence" analysis utilized in Roberts and Craig but overruled by Crawford v. Washington, 541 U.S. 36, 38, 60-63 (2004). Opinion at 12 (citing State v. Rupe, 534 N.W.2d 442, 444 (Iowa 1995)). "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).

2. The Court of Appeals also relied on State v. Strable, 313 N.W.2d 497, 500 (Iowa 1981), to reject the argument that the Iowa Constitution requires face-to-face confrontation. Opinion at 12-13. Strable relied on Wigmore on Evidence, to conclude that face-to-face confrontation was "dispensable." Id. at 501. The Court of Appeals failed to consider that authorities Wigmore cited for this proposition directly contradicted his point. 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, 523-25 (2010) (citing 5 John H. Wigmore, Wigmore on Evidence § 1395 (3d ed. 1940) and cases therein). The authorities cited by Wigmore actually support cross-examination in the defendant's presence. Id.

3. This Court has stated that we look to the text of the constitution "as illuminated by the lamp of precedent, history, custom, and practice." State v. Wright, 961 N.W.2d 396, 402 (Iowa 2021). The Court of Appeals neglected to consider the

history—dating back to Roman times—of requiring confrontation face to face with the accused.

4. The Court of Appeals erred in finding sufficient evidence that White had custody of D.C. Opinion at 13-14. The dates when Reisdorfer took her older son to North Dakota are unclear, and there was no testimony about who cared for the child in Reisdorfer's absence. The only testimony about who cared for D.C. was the DHS worker's statement that the older son watched the younger children. (Trial II 152:11-18). Therefore, there was insufficient evidence of custody.

5. By finding the district court did not abuse its discretion when it failed to supplement the instruction in response to the jury's question, White was unable to defend against an alternative means of committing the offense that was not charged. Opinion at 18-20. The Court of Appeals cited to State v. Arends, No. 03-0420 2004 WL 1159739, at *3 (Iowa Ct. App. May 26, 2004), for the proposition that failing to obtain medical care for the child could qualify as an

intentional act. Opinion at 19. Arends involved a violation of child endangerment without serious injury, which comprises different elements than child endangerment causing bodily that the jury questioned the court about in count III. Arends, 2004 WL 1159739, at *3. Furthermore, a different panel of the Court of Appeals has rejected the idea that substantial evidence can support a finding of guilt for failing to obtain medical treatment when the jury wasn't instructed on it. State v. Dean, No. 21-1338, 2023 WL 1810033, at *4 n.2 (Iowa Ct. App. Feb. 8, 2023). Thus, the jury considered a crime for which White was not charged because the district court failed to supplement the instruction.

6. White did meet his burden under section 910.2A(2)(a), contrary to the Court of Appeals decision regarding his reasonable ability to pay nearly $11,000 in category B restitution. Opinion at 20-22. When asked about his employment prospects after being sentenced to 15 years in prison, White said he would "attempt to go back to work." But

he also told the judge, “I mean, I don’t know what’s going to happen years down the road.” (Sentencing Tr. 22:4-12). He also reminded the court of his child support obligation, which was $3,000 behind. (Sentencing Tr. 22:23-23:12). The combination of a 15-year prison sentence, uncertainty about future employment, and his overdue child support obligations met the statute’s preponderance of the evidence burden.

WHEREFORE, Derek White respectfully requests this Court grant further review of the Court of Appeals decision in 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.

ARGUMENT

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

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).

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 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.

Justice O'Connor's concurrence in Coy 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.

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.

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: the unavailability of the witness, a testimonial statement, and 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. 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).

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."). 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).

This Court found the predecessor to section 915.38(1)(a) 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).[1] The district court ruled that three adult victims and three lab analysts could testify remotely in a serious 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

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

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.

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). 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 required the testimony be given "face to face with the accused." Id. at 40-41.

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). 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). 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). Child abuse prosecutions during this period were rare, however. Id. at 806, n.67.

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. 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.

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.

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

Merits: 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." (App. 41).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 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 v. Marriott Int'l, Inc., 880 N.W.2d 699, 708, n.3 (Iowa 2016). 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. 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. 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 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. 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.

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

Merits: During deliberations, the jury submitted a question regarding the third element of count III, child endangerment, asking "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?" (App. 55).

The defense argued that the court should supplement the instruction, explaining to the jury that a volitional act was required. The State resisted, arguing, the jury should be advised to reread the instructions. 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) (App. 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). 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. State v. McCall, 754 N.W.2d at 868, 872 (Iowa Ct. App. 2008). 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. 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. (App. 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. 50-51). See State v. Arends, No. 03-0420, 2004 WL 1159730, at *3 (Iowa Ct. App. May 26, 2004).

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

Merits: 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.

(App. 49) (emphasis added).

Regarding the first element, the evidence supports that White is not the parent or guardian of D.C. The dispute is whether he had custody of D.C. Instruction 23 defined custody. (App. 52).

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); accord State v. Johnson, 528 N.W.2d 638, 640-41 (Iowa 1995).

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 in early May. (App. 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. (App. 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. 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.

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

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. Defense counsel estimated his fees would be $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. The State took no position. (Sentencing 19:15-24:23).

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). 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. State v. Hawk, 952 N.W.2d 314, 321 (Iowa 2020). 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).

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 incarceration. The sentencing court abused its discretion by failing to consider all the required factors. See Albright, 925 N.W.2d at 162. 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 review the decision of the Court of Appeals and find that White is entitled to a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $5.08, 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 FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,341 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

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