IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KARI SCHWARTZ, Defendant-Appellant.	SUPREME COURT 22-0390

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
HONORABLE JOHN BAUERCAMP, SENIOR JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 3rd 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 Kari Schwartz, 124 Hanna Blvd., Waterloo, IA, 50701.

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MJN/ls/03/23

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STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about February 6, 2023. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. The evidence that Schwartz employed "[a] pattern or practice or scheme of conduct to engage in" sexual conduct with A.S. was insufficient.

In this case, the evidence was insufficient to establish Schwartz engaged in a "pattern or practice or scheme of conduct" to engage in sexual conduct with A.S. The evidence of Schwartz's interactions with A.S. during the month of school shows that Schwartz's attention, conversations, and hugs were not part of a scheme to engage in sexual conduct with A.S. but were typical of her personality and her interactions with all students. When her interactions with A.S. are considered in context of how Schwartz interacted with other students, the

comments and the hugs are consistent with Schwartz both being a caring teacher and a young teacher who likely had trouble establishing prudent boundaries with her older students. It is a common issue that younger teachers, specifically teachers who have less than ten years' experience, often struggle with setting appropriate boundaries with older students who are essentially peers. (11/8/21 Trial Tr. Day 4 17:7 – 19:5).

Schwartz was known as the "cool teacher," the teacher who really cared about her students. (11/8/21 Trial Tr. Day 4 91:8 – 93:9; 104:5-12). She gave her students encouraging cards, told them she "loved" them and "was a hugger." (11/8/21 Trial Tr. Day 4 94:1 – 95:7, 98:11 – 99:2). She shared details of her personal life with her students. (11/4/21 Trial Tr. Day 2 113:7-10; 11/8/21 Trial Tr. Day 4 105:20 – 107:2). Schwartz had an "open-door" policy in her classroom and encouraged students to come in to the art room to work on projects at all hours of the day, including study halls, planning

periods, lunches, and before and after school. (11/8/21 Trial Tr. Day 4 91:8-93:9; 138:10 – 140:1; 141:11 – 142:11). Another student who was at the same art table with A.S. did not think the amount of time Schwartz spent at their table was excessive when compared to the time she spent with other students. (11/8/21 Trial Tr. Day 4 104:13 – 105:14; 107:3-17).

A review of the photo exhibits also demonstrates that that Schwartz was a touchy person and that, although the hugs might be full-body, they were not of a sexual nature. (State's Exs. 2, 3) (Conf. App. pp. 10-11). A.S. did not think the hugs were sexual at the time, and other students also did not interpret Schwartz's words or actions as sexual or romantic. (11/4/21 Trial Tr. Day 2 95:23 -97:2; 138:19 – 141:14; 11/8/21 Trial Tr. Day 4 98:18 – 99:2; 111:11-19).

As well, Schwartz's compliments to A.S., even when commenting about her hugs, were not of a sexual nature. Telling a high school student that she is beautiful and strong is

a far cry from the overtly sexual comments seen in Wickes, which involved commenting on the student's breasts, her "booty," and her "smoking hot legs." Wickes described his student as "smoking," "hot," a "pin up girl" with an "hour glass of curves" and explicitly telling her he wanted to be in a sexual/romantic relationship with her. State v. Wickes, 910 N.W.2d 554, 559-62 (Iowa 2018).

Even considering the evidence in the light most favorable to the State, as required, and assuming the incident in the stairwell occurred as recalled by A.S., the evidence is insufficient to show a "pattern or practice or scheme of conduct" to engage in sexual conduct with A.S. A.S.'s description of the stairwell incident does not demonstrate a culmination of a scheme to engage in sexual conduct, but an act of an entirely different nature and quality. What A.S. described in the stairwell was not a seduction, it was an assault and was completely out of character with the other complained of interactions which involved encouragement, compliments and

hugs. A.S.'s allegations included that she was physically restrained and groped under her pants while she sobbed. This is not behavior that would be primed by prior hugs and encouragement. Thus, assuming the stairwell incident occurred, it was an unplanned, opportunistic event and not the result of or part of a scheme on Schwartz's part.

Conclusion. For the reasons argued above and in her opening brief, the evidence was insufficient to establish that Schwartz engaged in a scheme to engage in sexual contact with A.S. Her conviction should be vacated and her case remanded for judgment entry on the lesser included offense of sexual exploitation by a school employee.

II. The district court erred by instructing the jury that "hugging" constituted "sexual conduct."

Instruction 16 misstated the law by improperly instructing the jury that "hugging" was per se "sexual conduct." (Jury Instruction No. 16) (App. p. 14). Iowa Code § 709.15 identifies various types of conduct that are per se sexual conduct, but does not include "hugging." Iowa Code § 709.15(3)(a)(2).

Rather hugs *may* constitute sexual conduct. State v. Wickes, 910 N.W.2d 554, 567 (Iowa 2018).

The misstatement in Instruction 16 is not remedied by a consideration of Instruction 14 which requires the jury to find both that Schwartz engaged in "sexual conduct" with A.S. and that she did so with the specific intent to arouse or satisfy the sexual desires of herself or A.S. (Jury Instr. No. 14, elements 1 & 3) (App. p. 13). The opposite is more likely—the misstatement in Instruction 16 defining "sexual conduct" would improperly influence the jury's consideration of the sexual gratification element and influence the jury to conclude that Schwartz's actions were done for sexual gratification. Once the jury learns that "hugging" is per se sexual conduct, on par with other obviously sexually motivated touching (such as kissing, fondling of the genitals, breasts and pubes, and vaginal or anal penetration), the jury is likely to improperly conclude that because Schwartz hugged A.S., she did so for sexual gratification. (Jury Instr. Nos. 16, 17) (App. p. 14).

The record does not rebut the presumption of prejudice that applies when the jury has been erroneously instructed. See State v. Murray, 796 N.W.2d 907, 908 (Iowa 2011). The jury could have believed every word Schwartz testified to and still have convicted her. The jury could have believed the hugs between Schwartz and A.S. were "for reassurance, comfort or in congratulation," and that the incident in the stairwell occurred as described by Schwartz, yet still felt compelled to convict her under the erroneous instructions. See Wickes, 910 N.W.2d at 566.

The request for documents submitted by the jury during deliberations highlights the fact that the evidence was not overwhelming and that the jury struggled to decide who to believe—A.S. or Schwartz. (Court's Ex. 2) (Conf. App. 26). The specific documents requested by the jury would help evaluate the credibility of each woman: they wanted a school calendar for 2009; examples of the artwork on which A.S. alleged Schwartz had written and erased inappropriate

messages; copies of the depositions of both women; and more information about the school's investigation and circumstances of Schwartz's departure from the school. (Court's Ex. 2) (Conf. App. p. 26).

Conclusion. Because the district court erroneously instructed the jury that hugging was per se sexual conduct, and the record does not affirmatively establish a lack of prejudice, Schwartz's conviction should be vacated and her case remanded for a new trial.

III. The district court erred by refusing to allow Schwartz to introduce evidence that the school's investigation in Schwartz's misconduct resulted in an "unfounded" finding.

Error has been preserved. At trial, it was the State that first characterized the results of the investigations as "unfounded." In its motion in limine, the State requested the court "prohibit evidence that a past investigation by the Independence High School and the Iowa Board of Education determined that the conduct was 'unfounded'." (State's Motion in Limine, ¶ 7) (App. p. 12). The parties agreed that the Board of Education's conclusion was "unfounded" and that the

school's investigation was also "unfounded," although the principal disagreed with that finding. (11/4/21 Trial Tr. Day 2 7:22 – 9:12). That is all Schwartz has argued on appeal should have been admitted—exactly what the State itself wanted excluded. Accordingly, error has been preserved. Lee v. State, Polk Cnty. Clerk of Ct., 815 N.W.2d 731, 739 (Iowa 2012) ("In particular, " 'the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.' ").

The admission of the results of the investigation would have permitted the jury to hear the complete story of the investigation from 2009 and would have alleviated the inherent prejudice that arises from learning that an investigation occurred and that Schwartz left her employment at the school. The jury heard in great detail about what Principal Sorenson found concerning about Schwartz's interactions with A.S.

(11/4/21 Trial Tr. Day 2 183:6 – 188:25). Her direct testimony culminated with a question about Schwartz leaving the school:

> Q: At some point in time did – as you – at the beginning of what you would describe as an investigation, did Ms. Schwartz leave the school?"
> A: So –
> Q: I just want a yes or no answer.
> A: Yes.

(11/4/21 Trial Tr. Day 2 188:20-25). This brief questioning does not make clear the relationship between the investigation and Schwartz's departure. It does not clarify that Schwartz's leaving was not due to a finding of misconduct. Even if it implies that her leaving was not directly caused by a finding of misconduct because it happened at the "beginning" of the investigation, it does not clarify that there wasn't a later finding of misconduct at the conclusion of the investigation. This misconception and probable inference would not have been clarified even if Schwartz had objected to the question or had elicited clarifying testimony that her departure was not a direct result of a finding of the investigation. The fact of the investigation and the details of the investigation implied a

finding of misconduct, which was prejudicial to Schwartz. See State v. Thoren, 970 N.W.2d 611, 623-24 (Iowa 2022) (describing high risk of unfair prejudice to defendant when jury learns of an administrative investigation).

As well, learning that Schwartz was later employed in an educational setting does not cure any misunderstanding about whether she was subject to some of discipline ten years earlier. A lay jury cannot be expected to understand the variety of sanctions available when a teacher has committed misconduct and whether some punishments might be temporary. See Thoren, 970 N.W.2d at 621 (describing testimony from Iowa Board of Massage Therapy administrator explaining investigative process and different resolutions to an investigation).

And finally, the jury's request for documents highlights the relevance of the additional details about the results of the investigation. The jury requested to see "results of the internal school investigation" and the "public document to the school

board showing the conclusion of Kari's employment." (Court's Ex. 2) (Conf. App. p. 26).

Thoren does not hold that a prior administrative finding is irrelevant in all circumstances. Thoren, 970 N.W.2d at 622 ("That Thoren was investigated by the Board using different standards does not in itself make evidence from the investigation irrelevant to the criminal charges."). The court considered the State's theories of relevance and either rejected them or found them of minimal value. Some purposes proposed by the State were improper—for example the State argued the evidence was relevant because the administrative investigation and conclusions made it more likely that Thoren also committed sexual abuse in the current case. However, propensity evidence is not permitted: "Evidence about the Board's investigation cannot be used when its sole relevance is to enhance the credibility of the victim." Thoren, 970 N.W.2d at 622. However, that is not the purpose the evidence in this case—in this case, the evidence is being offered by the

defendant and it is not offered to bolster the credibility of the victim. Instead it is exculpatory evidence being offered by a defendant to alleviate the improper prejudice inherent in the evidence about the investigation.

Conclusion. The district court abused its discretion in excluding the evidence of the results of the school's investigation. Because the record does not affirmatively establish a lack of prejudice, Schwartz's conviction should be vacated and her case remanded for a new trial.

IV. The application of Iowa Code section 907.3's exclusion of deferred or suspended sentencing options without a jury finding that Schwartz was a mandatory reporter and A.S. was under eighteen years of age violates Schwartz's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

This is not a jury instruction error that can be blamed on Schwartz. Rather this is a sentencing issue: whether the court can impose a mandatory prison term without the required findings by the jury. Any failure to request the proper jury instructions lies with the State, not Schwartz. Cf., State v. Love, 858 N.W.2d 721, 727 (Iowa 2015) (Mansfield, J.

concurring specially) ("If the State wishes to avoid this outcome [that assault sentences merge even though there was ample evidence of multiple assaultive acts], it must ensure the defendant is charged and the jury is instructed in a way that requires a finding of separate conduct for each conviction."). Accordingly, State v. Heard, 934 N.W.2d 433 (Iowa 2019), is entirely inapplicable.

Heard involved a claim by a 26-year-old that he could not be sentenced to a mandatory sentence of life without parole for first degree murder without a jury finding that he was an adult at the time crime. Heard, 934 N.W.2d at 445. However, life without parole is the statutorily prescribed sentence for first degree murder, and Heard argued he was entitled to leniency available to juveniles because the State had not proven he was not a juvenile and his sentence violated Alleyne v. United States, 570 U.S. 99, 104 (2013). Heard's argument, and the court's rejection of it, is entirely inapplicable to Schwartz's case. In this case, the normally applicable sentencing statute allows the

judge to consider a lesser-restrictive option of a suspended sentence and probation *unless* certain aggravating facts exist—that Schwartz was a mandatory reporter and the victim was a minor.[1] Schwartz's situation, then, requires additional factual findings that remove the normal sentencing options available and require the imposition of a harsher sentence of imprisonment and thus falls squarely within the prohibitions of Alleyne.

Although constitutional errors are subject to a harmless error analysis, the scope of this analysis in the context of an Apprendi or Alleyne error has not been explicitly addressed by the United States Supreme Court. The approach used in United States v. Pena, 58 F.4th 613, 622 (2nd Cir. 2023), and United States v. Carr, 761 F.3d 1068, 1082 (9th Cir. 2014), is not universally accepted. The Third Circuit has rejected this approach and instead concluded that the proper treatment of

[1] This situation is unlike the application of prison term for the commission of a forcible felony. Whether a crime is statutorily designated as a forcible felony is a legal question, not a factual question that the jury could find.

an alleged Alleyne error is to look to see if the error contributed to the *sentence* imposed. United States v. Lewis, 802 F.3d 449, 456 (3d Cir. 2015) (quoting Sochor v. Florida, 504 U.S. 527, 539, (1992)). "In other words, harmless-error review for a sentencing error requires a determination of whether the error 'would have made no difference to the sentence.' " Lewis, 802 F.3d at 456 (quoting Parker v. Duggar, 498 U.S. 308, 319 (1991)). This analysis is distinct from the analysis used for trial errors which examines whether it is " 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Lewis, 802 F.3d at 456 (quoting Neder v. United States, 527 U.S. 1, 18 (1999)).

The Third Circuit explained its reasoning:

> Looking back to the trial record would run directly contrary to the essence of Apprendi and Alleyne. The motivating principle is that judges must not decide facts that change the mandatory maximum or minimum; juries must do so. If we affirm because the evidence is overwhelming, then we are performing the very task that Apprendi and Alleyne instruct judges not to perform.

Lewis, 802 F.3d at 456.

The Iowa Supreme Court's analysis and reasoning in State v. Davison demonstrate an affinity for the Third Circuit approach. In Davison, the court held that the imposition of Iowa Code § 910.3B's $150,000 restitution against a defendant without a jury finding that he caused the death of another was a Sixth Amendment violation. State v. Davison, 973 N.W.2d 276, 288 (Iowa 2022). In that case, the Iowa Supreme Court did not scrutinize the evidence to see whether there was overwhelming evidence to support the judge's finding that Davison did cause the death of another. Davison, 973 N.W.2d at 287-88. Instead, the court considered only whether there actually was a jury finding that Davison caused the death of another. Davison, 973 N.W.2d at 287-88. "Apprendi ensures 'that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.'" Davison, 973 N.W.2d at 291 (McDonald, J., concurring). "[H]ere the district court imposed a financial penalty on Davison for a homicide

offense even though the jury found him guilty only of an assault. This is precisely the kind of jury circumvention Apprendi was intended to avoid." Davison, 973 N.W.2d at 292 (McDonald, J., concurring). This reasoning applies with equal force in Schwartz's case.

Conclusion. Because the district court cannot be prohibited from considering suspended and deferred sentencing options without jury findings that Schwartz was a mandatory reporter and A.S. was under age eighteen, as required by the Sixth and Fourteenth Amendments, Schwartz's sentence should be vacated and her case remanded for a new sentencing hearing in which all the options under section 907.3 are considered.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $1.63, and that amount has been paid in full by the Office of the Appellate Defender.

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

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:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,041 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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