IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 22-0199

STATE OF IOWA,
Plaintiff-Appellee

vs.

ABEL GOMEZ MEDINA
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE SCOTT BEATTIE AND HEATHER LAUBER

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellant's Final Brief with the Electronic Document Management System with the Appellate Court on the 4th day of August 2023.

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I hereby certify that on the 4th day of August 2023, I did serve the Defendant-Appellant's Final Brief on Appellant, listed below, by mailing one copy thereof to the following Defendant-Appellant:

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ROUTING STATEMENT

This appeal should be transferred to the Iowa Court of Appeals because it is a case presenting the application of existing legal principles in accordance with Iowa R. App. P. 6.1101(3)(a).

CASE STATEMENT

Abel Gomez Medina appeals from his convictions for:

> Count I: Sexual Abuse in the 2nd Degree, in violation of Iowa Code § 709.3(1)(b), a Class B Felony,
>
> Count II: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony,
>
> Count III: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony,
>
> Count IV: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony,
>
> Count V: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, and
>
> Count VI: Indecent Contact with a Child in violation of Iowa Code § 709.12, an Aggravated Misdemeanor.

The court sentenced Mr. Gomez to a term of twenty-five years on Count I with a minimum sentence of 70% years pursuant to Iowa Code § 902.12. (App. 27). The court sentenced Mr. Gomez to ten years each on Counts II through V, all to be run consecutively with count I and to each other. (App. 27). The court also sentenced Mr. Gomez to two years on Count VI, to be served consecutively for a total sentence of 67 years. (App. 27). The court also sentenced Mr. Gomez to lifetime parole. (App.27).

FACTUAL BACKGROUND

Abel Gomez Medina lived with his wife, Tiffany Gomez, and her four children, K.D., A.S, L.G., and R.M. in Des Moines, IA. (Trial Tr. Vol. 2 136: 5-137:16). The family lived in a small home with a basement and main level, with one bedroom on the main level and one and a half bedrooms downstairs in the basement. (Trial Tr. Vol. 2 139:5-17). K.D. and A.S, the two girls, slept in bunk beds in the bedroom on the main floor. (Trial Tr. Vol. 2 140:3-7). L.G. and R.M., the two younger boys, slept in the basement bedroom. (Trial Tr. Vol. 2 142:6-18). Through the door, Mr. Gomez and Tiffany Gomez slept in another bedroom in the basement. (Trial Tr. Vol. 2 143:1-5). Mr. Gomez's father, Efrain, also lived with the family for several years. (Trial Tr. Vol. 2 165:22-166:11). When Efrain lived there, he would sleep in a bed in the front room. (Trial Tr. Vol. 2 193:1-4).

Tiffany worked at Potbelly from six in the morning until two in the afternoon. (Trial Tr. Vol. 2 145:2-4). Tiffany would pick up the children from school. (Trial Tr. Vol. 2 145:23-146: 5). Mr. Gomez would drop the children off at school, then work at Culver's at around eight or nine in the morning, and after he finished his work at Culver's, would go to a second job at Firestone until ten at night. (Trial Tr. Vol. 2 148:3-24). The various schools

that the children attended started class between 7:45 AM and 8:30 AM. (Trial Tr. Vol. 4 79:10-16).

On April 1, 2019, Abel Gomez Medina took away the phone of his fifteen-year-old stepdaughter, K.D., for inappropriate sexting with a boy. (Trial Tr. Vol. 3 118:15-21; 128:10-14). Later that day, after she completed band, she told her counselor that Mr. Gomez had abused her. (Trial Tr. Vol. 3 118:22-25; 121:18-24).

K.D. testified that when she was eleven years old and in fifth grade that Abel would touch her on her breasts and her vagina. (Trial Tr. Vol. 3 129:2-14). She testified that there was an instance Mr. Gomez put his penis into her vagina. (Trial Tr. Vol. 3 131:6-25). K.D. testified that Mr. Gomez would touch her, have her touch him, or insert his penis into her five times a week by 2019. (Trial Tr. Vol. 3 129:18-24). She testified that he would put his penis in her mouth and lick her vagina. (Trial Tr. Vol. 3 136:1-9). She testified that he put his penis into her anus. (Trial Tr. Vol. 3 138:13-19). She testified that it would usually happen before Mr. Gomez took her and the other children to school. (Trial Tr. Vol. 3 146:9-14). Mr. Gomez would still be in the home in the morning after her K.D.'s mother, Tiffany Gomez, left for work. He would assault her in the same room with her sister Angela. (Trial Tr. Vol. 3 147:9-

15). She testified that the abuse mostly did not happen when she was away from the home. (Trial Tr. Vol. 3 162:21-23).

L.G. testified at the trial that he never saw his father rape his sister and that he never saw anything appropriate at the house. (Trial Tr. Vol. 3 37: 1-10; 29:16-18). In a CPC video interview, he said that he saw K.D. and his father having "sex" or "inappropriate things." (Trial Tr. Vol. 3 49:10-22).

Tiffany never saw Mr. Gomez acting inappropriately with K.D. and she was fairly aware of where everyone in the house was at all times due to creaking floorboards. (Trial Tr. Vol. 2 197:11-198:21). Efrain, Mr. Gomez's father, also testified that he never saw anything inappropriate between K.D. and Mr. Gomez, and never found anything suspicious about how they interacted. (Trial Tr. Vol. 4 101:21-102:20). Efrain never saw Mr. Gomez have sex with K.D., but if he dd, he would have called the police. (Trial Tr. Vol. 4 103:9-17). Tiffany's father, Terrance Dean, lived close by and would stop over unannounced. (Trial Tr. Vol. 4 111:21-112:9). Dean never saw anything unusual about how K.D. and Abel interacted and never saw them alone together in the house. (Trial Tr. Vol. 4 112:19-113:25). A.S., K.D.'s younger sister and roommate, testified that she never saw K.D. and Mr. Gomez alone or doing inappropriate things. (Trial Tr. Vol. 4 129:11-25).

Tiffany's sister and aunt to K.D., Crystal, also never saw anything unusual about how K.D. and Mr. Gomez interacted. (Trial Tr. Vol. 4 142:17-143:5).

COURSE OF PROCEEDINGS

Before trial, the State motioned for closed-circuit testimony for K.D., citing Iowa Code § 915.38 and arguing that the court should protect K.D. as a minor protect a minor, from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate. (App. 5). Mr. Gomez resisted the motion, arguing that there was no indication that K.D. would be unable to communicate and that it would infringe on Mr. Gomez's 6th Amendment right of confrontation. (App. 8). At hearing, the GAL testified that being in the presence would affect her ability to truthfully testify at trial. (Tr. Closed-Circuit Hearing 15:21-25). K.D.'s reports to her counselor did not indicate that she could not be truthful when testifying in front of Mr. Gomez. (Tr. Closed-Circuit Hearing 15:21-25). The defense additionally argued that K.D. was able to push back concerning the allegations, maintain academic attendance and grades, and verbalize her concerns and her thoughts. (Tr. Closed-Circuit Hearing 45:5-25). The court granted the motion for K.D. to testify via closed-circuit equipment over Mr. Gomez's objection, noting that the court considered the arguments of the parties. (App. 13).

During trial, K.D. went from being 17 years old on her first day of testimony, to turning 18 on her second day of testimony and becoming the age of majority. (Trial Tr. Vol. 4 5:22-25). Mr. Gomez renewed his objections to the continued use of closed-circuit testimony and particularly argued that it should no longer apply due to K.D.'s majority. (Trial Tr. Vol. 4 6:19-7:4). The court overruled the objection, revising its ruling to find that under 915.28(1)(c) that K.D. could continue to testify using closed-circuit testimony due to her mental illness, and that it would make it difficult for her to communicate and testify in the same room as the defendant because of the stress it would cause due to her PTSD, depression, and anxiety. (Trial Tr. Vol. 4 10:21-13:13).

The State filed a motion in limine, seeking to exclude evidence of 911 calls made by Tiffany, arguing that they were not relevant. (App. 16). Mr. Gomez resisted, arguing that it was relevant to K.D.'s motive, intent, and plan under Iowa Rule of Evidence 5.404(b) and that the danger of unfair prejudice did not substantially outweigh the risk of unfair prejudice under Iowa Rule of Evidence 5.403. (App. 20). Mr. Gomez also argued that it was relevant in showing the family dynamics on the case, whether K.D. felt supported or not, K.D.'s actions in the home, whether K.D. discussed the allegations with

Tiffany, whether K.D. was acting out, and K.D.'s motive for making the allegations. (Trial Tr. Vol. 2 9:3-24).

Mr. Gomez made an offer of proof of the two 911 calls that showed Tiffany asking police for assistance for herself and K.D. in the months after K.D. reported the abused to authorities. (Trial Tr. Vol. 3 5:12-23; Exhibit D, Exhibit E). One 911 call was because K.D. was hitting Tiffany in front of the other children and another call K.D. was hitting her head against the wall and making a hole in the wall. (Trial Tr. Vol. 3 6:10-19). When K.D. was hitting others, she was upset that Tiffany wanted the house to get cleaned up. (Trial Tr. Vol. 3 7:10-20). When K.D. was hitting her head, K.D. was upset that Tiffany asked her to clean up her messy room. (Trial Tr. Vol. 2 7:10-20). The court ruled that the evidence was not admissible under Iowa Rule of Evidence 5.403 as not relevant and being substantially outweighed by the danger of confusion of the issues. (Trial Tr. Vol. 2 17:3-25).

During closing argument, the State sought to explain why L.G. was denying any abuse at trial, arguing "Remember he specifically said, 'Mom said Kaylee lied.' He had been told in those months over and over 'don't believe your sister.' Maybe not in those words, but our common sense and experience tells us that." (Trial Tr. Vol. 5 28:18-22). Mr. Gomez objected to improper argument ad personal belief and moved to strike. (Trial Tr. Vol. 5

28:23-24). The court overruled Mr. Gomez's objection. (Trial Tr. Vol. 5 28:25). The State doubled down after the objection was overruled and kept repeating that his mother was telling him lies. (Trial Tr. Vol. 5 29:2-11).

The jury found that Mr. Gomez guilty of Count I: Sexual Abuse in the 2nd Degree, in violation of Iowa Code § 709.3(1)(b), a Class B Felony, Count II: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, Count III: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, Count IV: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, Count V: Sexual Abuse in the 3rd Degree, in violation of Iowa Code §§ 709.4(1)(a), 709.4(b)(2), and 709.4(1)(b)(3), a Class C Felony, and Count VI: Indecent Contact with a Child in violation of Iowa Code § 709.12, an Aggravated Misdemeanor. The court sentenced Mr. Gomez to a total of sixty-seven years with Count I to be served at 70% of the term before Mr. Gomez was eligible for parole. (App. 27). Mr. Gomez timely filed a notice of appeal. (App. 33).

ARGUMENT

I. THE COURT ALLOWING CLOSED CIRCUIT TESTIMONY FOR AN ADULT THAT IS ABLE TO COMMUNICATE REQUIRES REVERSAL UNDER THE CONFRONTATION CLAUSE AND IOWA CODE § 915.38(1)

A. Error Preservation

Error was preserved when the court granted the State's motion for closed-circuit testimony for K.D., over Mr. Gomez's objection that there was no indication that K.D. would be unable to communicate and that it would infringe on Mr. Gomez's 6th Amendment right of confrontation and Mr. Gomez renewed his objections to the continued use of closed-circuit testimony and particularly argued that it should no longer apply due to K.D.'s majority. (App. 8 ; Trial Tr. Vol. 4 6:19-7:4; App. 13; Trial Tr. Vol. 4 10:21-13:13).

B. Standard of Review

The court reviews Confrontation Clause claims de novo. State v. Bentley, 739 N.W.2d 296, 297 (Iowa 2007). The erroneous admission of evidence in violation of the Confrontation Clause mandates reversal unless the State establishes that the error was harmless beyond a reasonable doubt. State v. Brown, 656 N.W.2d 355, 361 (Iowa 2003). To determine harmlessness, the ask does not ask whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered. State v. Newell, 710

N.W.2d 6, 25 (Iowa 2006). Rather, the court asks whether the guilty verdict actually rendered in this trial was surely unattributable to the error. Id. In assessing whether error was harmless, the court reviews the importance of the witness' testimony, 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 permitted, and the overall strength of the prosecution's case. State v. Brown, 656 N.W.2d 355, 361-62 (Iowa 2003). "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." Coy v. Iowa, 487 U.S. 1012, 1022-23 (1988).

The court reviews decisions granting closed-circuit testimony protection under Iowa Code § 915.38(1) for errors at law. State v. Rupe, 534 N.W.2d 442, 444 (Iowa 1995).

C. Face to Face Confrontation Cannot be Dispensed of for Adults

The Confrontation Clause of the United States Constitution guarantees to Mr. Gomez the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36 (2004), the U.S. Supreme Court held that the Framers intended the Confrontation Clause to preclude admission of "testimonial" statements made by unavailable witnesses who have not been subjected to cross-examination was based, in part, on the Confrontation Clause's express reference to "witnesses against the accused" — that is, to those who "bear testimony" against the accused, whether in court or out of court.

The Confrontation Clause expresses a strong preference for face-to-face confrontation, but that requirement must occasionally give way to considerations of public policy and the necessities of the case. State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014).

In Maryland v. Craig, 497 U.S. 836, 849-50 (1990), the U.S. Supreme Court set forth a two-prong test to determine when face-to-face confrontation with a child victim of alleged sexual abuse may be excused and closed-circuit television testimony used in its place. Id. In such cases, the State must prove: (1) that the denial of face-to-face confrontation is necessary to further an important public policy, and (2) that the reliability of the testimony is

otherwise assured. Id.

The U.S. Supreme Court determined that protecting child witnesses from the psychological harm of testifying, when they could not communicate, was a sufficiently important public policy concern to justify denying face-to-face confrontation. Maryland v. Craig, 497 U.S. 836, 840-42 (1990).

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 855. The critical inquiry is whether the use of the procedure is necessary to further the important state interest of protecting the child witness. Id. at 852.

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857 (emphasis added). Craig sets forth a three-part test for determining necessity. First, the trial court must hear evidence and determine whether use of the closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. Id. at 855. Second, the trial

court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Id. at 856. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. Id.

> [T]he Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom in the presence of the defendant would result in the child suffering serious emotional distress such that the child could not reasonably communicate.
>
> Id. at 858 (emphases added).

Since deciding Craig, the U.S. Supreme Court has not returned to the issue of the constitutionality of remote video testimony and has not expanded its jurisprudence to adults. See State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014). Some courts have found that closed-circuit testimony is sufficiently "necessary" for public policy reasons if the witness has a serious medical condition that left them unable to travel or if the witness is in a foreign jurisdiction beyond the subpoena power of the courts. Id. at 506. Convenience, efficiency, and cost-saving are not sufficient public policy reasons for dispensing with face-to-face confrontation. Id. at 5007.

Iowa Code § 915.38(1) is the statute allowing for close-circuit testimony in Iowa. While the first provisions only apply to minors, Iowa Code

§ 915.38(1)(c) provides "upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this subsection, regardless of the age of the victim or witness." A child is defined as a "person under the age of fourteen years." Iowa Code § 702.5.

Expanding Craig to adults, and therefore anyone with a mental illness, cannot be sufficient public policy to overcome the preference for face-to-face confrontation.

> [Flace-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.

Coy v. Iowa, 487 U.S. 1012, 1023 (1988). More than 50% of Americans will be diagnosed with a mental illness at some point in their lifetime. Kessler RC, , et al., Lifetime prevalence and age-of-onset distributions of mental disorders in the World Health Organization's World Mental Health Survey Initiative. World Psychiatry 6(3):168-176 (2007). There is a strong preference for face-to-face confrontation. State v. Rogerson, 855 N.W.2d 495, 499 (Iowa 2014). Accusers will be more reluctant to make false accusations when they were in the personal presence of the accused. Id. at 504. The 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. Id. Face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. Id.

Expanding the use of closed-circuit testimony for all adults does more than make the right to confrontation occasionally give way to considerations of public policy and the necessities of the case, it opens the floodgates so that any crime with a victim no longer needs to have face-to-face confrontation, and apposition never authorized by the U.S. Supreme Court. K.D. was an adult when she testified. While allowing her to testify via videoconferencing surely was efficient and helpful to the State, it was not such an important public policy to prevent adult witnesses from testifying about painful experiences that it should have violated the preference for face-to-face confrontation. In addition, the court had already granted videoconferencing under Iowa Code § 915.38(1) even though K.D. was an adult under Iowa Code § 702.5. Expanding this practice to adults, based solely on mental illness, makes it so that video conferencing is available even in unconstitutional situations, such as mere nervousness or excitement or some reluctance to testify. See Maryland v. Craig, 497 U.S. 836, 856 (1990).

This was not harmless error. The court cannot be sure that the guilty verdict actually rendered in this trial was unattributable to the error. See State

v. Newell, 710 N.W.2d 6, 25 (Iowa 2006). K.D. was the star witness of the prosecution's case, her testimony was not cumulative, the only corroborating evidence of her claims were the out-of-court statements made by L.G. that he saw "sex", every other witness around the family testified that they had never seen any inappropriate behavior between Mr. Gomez and K.D., and the prosecution's case relied on one eyewitness with no physical evidence. The court must reverse because error cannot surely be said to be harmless without the face-to-face testimony of K.D..

D. There Was Insufficient Evidence to Show that K.D. Could Not Give Truthful Testimony in the Presence of Mr. Gomez

As stated above, part of the Craig test is that the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than mere nervousness or excitement or some reluctance to testify. Maryland v. Craig, 497 U.S. 836, 856 (1990).

> [T]he Confrontation Clause requires the trial court to make a *specific finding* that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child *could not reasonably communicate.*

Id. at 858 (emphasis added).

Iowa Code section 915.38(1) "preserves the defendant's basic right to confrontation while protecting minor victims from the trauma which often results from testifying in a defendant's physical presence. *If this trauma*

impairs or handicaps a child's ability to communicate, protective measures must be adopted." State v. Rupe, 534 N.W.2d 442, 444 (Iowa 1995) (emphasis added).

While the court made findings regarding this issue, those findings were not based on sufficient evidence that K.D. was unable to truthfully testify in the presence of Mr. Gomez. At hearing, the GAL testified that being in the presence would affect her ability to truthfully testify at trial. (Tr. Closed-Circuit Hearing 15:21-25). However, this was the opinion of a lay witness without any support from K.D.. K.D.'s reports to her counselor did not indicate that she could not be truthful when testifying in front of Mr. Gomez. (Tr. Closed-Circuit Hearing 15:21-25). Additionally, K.D. was able to push back concerning the allegations, maintain academic attendance and grades, and verbalize her concerns and her thoughts. (Tr. Closed-Circuit Hearing 45:5-25). At no point in time during the court's questioning did K.D. ever say that she could not give truthful testimony in the presence of Mr. Gomez.

This serves as an independent reason for reversal outside of just expanding closed-circuit testimony to adults, and the court should apply the same harmless error analysis as in that subsection of the brief.

II. THE COURT ALLOWING THE STATE TO CALL AN EXCULPATORY WITNESS A LIAR REQUIRES REVERSAL

A. Error Preservation

Error was preserved when during closing argument, the State argued "Remember he specifically said, 'Mom said Kaylee lied.' He had been told in those months over and over 'don't believe your sister.' Maybe not in those words, but our common sense and experience tells us that." (Trial Tr. Vol. 5 28:18-22). Mr. Gomez objected to improper argument and personal belief and moved to strike. (Trial Tr. Vol. 5 28:23-24). The court overruled Mr. Gomez's objection. (Trial Tr. Vol. 5 28:25).

B. Standard of Review

Trial courts generally have broad discretion in ruling on claims of prosecutorial error and the court reviews those rulings for an abuse of discretion. State v. Jacobs, 607 N.W.2d 679, 689 (Iowa 2000). However, to the extent a claim of prosecutorial misconduct raises an issue of due process, review is de novo. State v. Boggs, 741 N.W.2d 492, 508 (Iowa 2007).

C. Argument

Both prosecutorial error and prosecutorial misconduct use the same analysis and factors in deciding the issue. State v. Schlitter, 881 N.W.2d 380, 394 (Iowa 2016). The only distinction is that it would be unfair to say that a prosecutor had committed misconduct when the prosecutor made a human

error. Id. Therefore, the Appellant will proceed in calling the State's argument and offer as evidence as "error" and use the same analysis on error as he would on misconduct. "Evidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith." State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003).

There are two elements to prosecutorial error. Graves, 668 N.W.2d at 869. First, the Defendant must show that there was error. Id. Second, the Defendant must show that the error prejudiced the Defendant and denied him a fair trial. Id.

As to the first element, it is not necessary to show that the prosecutor had bad faith. Id. A trial can be unfair to the Defendant even when the prosecutor acts in good faith. Id. The prosecutor's conduct is not less erroneous or less prejudicial simply because of his good faith. State v. Leuty, 73 N.W.2d 64, 69 (Iowa 1955). The question is rather whether the Defendant has had the fair, impersonal, trial the law attempts to guarantee. Id.

A prosecutor is entitled to some latitude during closing argument in analyzing the evidence admitted in the trial. State v. Graves, 668 N.W.2d 860, 874 (Iowa 2003). Further, a prosecutor may argue the reasonable inferences and conclusions to be drawn from the evidence. Id. A prosecutor may not express her personal beliefs. Id. This personal vouching occurs when the

personal belief is purportedly based on knowledge of facts not possessed by the jury or any ground other than the weight of the evidence in the trial. Id. This vouching may occur because it causes the jury to trust the judgment of the prosecutor rather than their view of the evidence. Id. In Iowa, it is improper for a prosecutor to call the defendant a liar but may make an argument that certain testimony is not believable. Id.

It should be considered prosecutorial error to call any exculpatory witness a liar, but even if the court believes that principle only applies to the defendant, the prosecutor was making claims not based in any way on the evidence. There was nothing suggesting that L.G. had "had been told in those months over and over 'don't believe your sister.'" or that this had affected his testimony. No witness had testified to this. This was not a fair inference, even if it was the personal belief of the prosecutor. L.G. could have genuinely not remembered or the presence of in-court testimony and oath could have made him change is testimony to say that there was no inappropriate situations that he had seen.

In considering the second element of prejudice, the court looks at several factors, in the context of the entire trial. State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003). The court considers:

1) The severity and pervasiveness of the error

2) The significance of the error to the central issues in the case

3) The strength of the State's evidence

4) The use of cautionary instructions or curative measures

5) The extent to which the Defense invited the error.

Id.

Reviewing the first factor, the court should be able to see that the severity and pervasiveness of the error was frequent. "Whether the incident was isolated or one of many is also relevant; prejudice results more readily from persistent efforts to place prejudicial evidence before the jury." State v. Greene, 592 N.W.2d 24, 32 (Iowa 1999). The prosecutor doubled down on the remarks as soon as the court gave her permission to do so and kept repeating that his mother was telling him lies. (Trial Tr. Vol. 5 29:2-11).

Reviewing the second factor the court can see that it was significant to the central issues in the case. The central issue in the case was whether the abuse occurred. The statement had to do with whether there was an additional eyewitness to the abuse.

On the third factor, the strength of the State's case was not so overwhelming that it would erase all prejudicial effects of the evidence. The State had only one eyewitness to the abuse with no corroborating evidence, so this witness was their best chance at corroboration.

On the fourth factor, the Defendant clearly is in the right. The court overruled the objection, so of course did not give a curative instruction.

On the fifth factor, Mr. Gomez is also clearly in the right. Mr. Gomez did not invite the error and immediately objected and made no remarks on whether State witnesses were lying.

III. THE COURT ERRED IN REFUSING TO ALLOW EVIDENCE OF THE FAMLY DYNAMIC THAT BROUGHT THE EYEWITNESS'S CREDIBILITY INTO QUESTION

A. Error Preservation

Error was preserved when the court granted the State's motion in limine, seeking to exclude evidence of 911 calls made by Tiffany, over Mr. Gomez's objection that was relevant to K.D.'s motive, intent, and plan under Iowa Rule of Evidence 5.404(b) and that the danger of unfair prejudice did not substantially outweigh the risk of unfair prejudice under Iowa Rule of Evidence 5.403, that the evidence was relevant in showing the family dynamics on the case, whether K.D. felt supported or not, K.D.'s actions in the home, whether K.D. discussed the allegations with Tiffany, whether K.D. was acting out, and K.D.'s motive for making the allegations. (App. 20; Trial Tr. Vol. 2 9:3-24).

Mr. Gomez made an offer of proof of the two 911 calls that showed Tiffany asking police for assistance for herself and K.D. in the months after

K.D. reported the abused to authorities. (Trial Tr. Vol. 3 5:12-23; Exhibit D, Exhibit E). One 911 call was because K.D. was hitting Tiffany in front of the other children and another call K.D. was hitting her head against the wall and making a hole in the wall. (Trial Tr. Vol. 3 6:10-19). When K.D. was hitting others, she was upset that Tiffany wanted the hue to get cleaned up. (Trial Tr. Vol. 3 7:10-20). When K.D. was hitting her head, K.D. was upset that Tiffany asked her to clean up her messy room. (Trial Tr. Vol. 2 7:10-20). The court ruled that the evidence was not admissible under Iowa Rule of Evidence 5.403 as not relevant and being substantially outweighed by the danger of confusion of the issues. (Trial Tr. Vol. 2 17:3-25).

B. Standard of Review

The court reviews decisions regarding relevant evidence for abuse of discretion. State v. Sullivan, 679 N.W.2d 19, 29 (Iowa 2004).

C. Argument

Critical to the State's case was the credibility of K.D., which the defense started poking holes in due to evidence that K.D. had other motives for testifying other than that it was the truth. For instance, on April 1, 2019, Abel Gomez Medina took away the phone of K.D. for inappropriate sexting with a boy, and later that day, after she completed band, she told her counselor

that Mr. Gomez had abused her. (Trial Tr. Vol. 3 118:22-25; 121:18-24; (Trial Tr. Vol. 3 118:15-21; 128:10-14)

The evidence was relevant in showing the family dynamics on the case, whether K.D. felt supported or not, K.D.'s actions in the home, whether K.D. discussed the allegations with Tiffany, whether K.D. was acting out, and K.D.'s motive for making the allegations. (Trial Tr. Vol. 2 9:3-24).

CONCLUSION

The court should reverse and remand for new trial

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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/S/ Alexander Smith
Dated: August 4, 2023
Alexander Smith