IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0199
Polk County. No. FECR327355

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ABEL GOMEZ MEDINA,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT BEATTIE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case does not meet any of the criteria for Iowa Supreme Court retention under Iowa Rule of Appellate Procedure 6.1101(2)(a)-(f). As the defendant suggests, transfer to the Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case.

A Polk County jury convicted Abel Gomez Medina of one count of second-degree sexual abuse, four counts of third-degree sexual abuse, and one count of indecent contact with a child, in violation of Iowa Code sections 701.3(1)(b), 704.4(1)(a), 709.4(b)(1), 709.4(1)(b)(3), and 709.12, respectively. Verdict Forms; App. 22–25. The charges stemmed from allegations that Gomez sexually abused his young stepdaughter for years, subjecting her to repeated acts of oral sex, anal sex, and intercourse. Minutes of Testimony; Conf. App. 4–91.

Course of Proceedings.

The State agrees with Gomez's rendition of the case's procedural history. *See* Iowa R. App. P. 6.903(3).

Facts.

When K.D. was in fifth grade, she lived in a small house in Des Moines with her mother Tiffany, her three siblings, and her stepfather, the defendant Abel Gomez Medina. Trial Tr. Vol. II p. 136, line 1 – p. 139, line 17. K.D. considered the defendant to be her father. Trial Tr. Vol. III p. 19, lines 19-21. Four years later, when K.D. was in ninth grade, she would tell her school counselor and other authorities that her stepfather had been sexually abusing her regularly since she was in fifth grade. Trial Tr. Vol. II p. 193, lines 7-18. Tiffany Gomez remained in her marriage to the defendant, and she testified at trial that she never observed any sexual impropriety between her husband and her daughter, had no concerns that Gomez was sexually abusing K.D., and would have left her husband had any sexual abuse occurred. Trial Tr. Vol. III p. 18, lines 16-25.

By the time of trial, K.D. was seventeen years old and a high school senior. Trial Tr. Vol. III p. 97, line 25 – p. 98, line 24. She recalled that when she was fifteen in 2019, her stepfather would react with jealously if she had any contact with boys, telling her that "they just wanted to use [her]." Trial Tr. Vol. III p. 116, line 1 – p. 118, line 14. On April 1, 2019, K.D. had her phone taken away because she was

"sexting" a boy. Trial Tr. Vol. III p. 118, lines 15-18. She was upset and tired of "being controlled," and spoke to her counselor Mr. Carter that day. Trial Tr. Vol. III p. 118, line 22 – p. 122, line 22. K.D. told Mr. Carter something she had only told her friend Keylan, whom she had sworn to secrecy: that her "stepdad [had been] having sex with [her]" for four years. Trial Tr. Vol. III p. 118, line 22 – p. 122, line 25. She explained that she had kept the sexual abuse a secret because she was worried "everything would change in the household" and her mother Tiffany would not believe her. Trial Tr. Vol. III p. 119, line 20 – p. 120, line 13. That fear turned out to be well-founded; when Tiffany picked up K.D. that day, she would not look at her daughter or speak to her. Trial Tr. Vol. III p. 123, lines 6-25. She later described her mother as being angry at her, but not at Gomez. Trial Tr. Vol. III p. 130, lines 15-19.

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K.D.'s stepfather began sexually abusing her by touching her breasts and vagina when she was in fifth grade or perhaps earlier. Trial Tr. Vol. III p. 126, line 8 – p. 127, line 17. She remembered that timeline because she recalled talking to her elementary school counselor on the subject of boundaries and wanted to tell her Gomez

was touching her sexually then, but she did not. Trial Tr. Vol. III p. 126, line 11 – p. 128, line 4. Over time, Gomez increased the frequency and ratcheted up the type of sexual abuse he committed on his young stepdaughter. Trial Tr. Vol. III p. 129, lines 9-20. Four years later, he was subjecting K.D. to various sex acts about five times a week, ranging from fellatio and cunnilingus to vaginal intercourse and anal sex. Trial Tr. Vol. III p. 129, line 18 – p. 148, line 11. Gomez would usually ejaculate on K.D.'s abdomen or back rather than inside of her vagina. Trial Tr. Vol. III p. 133, line 1 – p. 136, line 16. When making her perform oral sex on one occasion, he ejaculated in her mouth and ordered her to swallow his semen. Trial Tr. Vol. 136, lines 5-23.

Although much of the sexual abuse "blurr[ed] together," K.D. described several incidents in detail at trial, recalling locations, time frames, or types of sex acts. Trial Tr. Vol. III p. 129, line 18 – p. 148, line 11. She recalled that her stepfather would spit and put his saliva on his penis before inserting it into her vagina or anus, although she did not understand why at the time. Trial Tr. Vol. III p. 131, line 6 – p. 139, line 3. When Gomez penetrated her anus, K.D. told him it was painful but he said, "It's going to be fine." Trial Tr. Vol. III p. 138, line

13 – p. 139, line 7. When he tired of her squirming, he instructed K.D. to "get on [her] back, where he then pushed his penis into [her] vagina." Trial Tr. Vol. III p. 139, lines 8-13.

K.D. also testified that Gomez told her he did not want her to get pregnant and would frequently make her take a "morning after" pill, which caused her to develop a rash whenever she took it. Trial Tr. Vol. III p. 149, line 12 – p. 158, line 22. Her mother wrongly believed the rash was caused by deodorant. Trial Tr. Vol. III p. 156, line 1 – p. 158, line 22.

K.D.'s younger brother L.G. – eleven years old at the time of trial – also briefly testified. When asked whether he recalled ever talking about "seeing anything inappropriate" at his house, he said he could not remember and/or denied the conversation. Trial Tr. Vol. III p. 29, line 1 – p. 30, line 11; p. 32, line 25 – p. 37, line 9. The trial court ultimately deemed L.G. unavailable and permitted the State to offer his forensic interview under the residual exception to the rule against hearsay, as well as ruling that the door would then be open for Gomez to present L.G.'s deposition testimony, which he did. Trial Tr. Vol. III p. 31, line 14 – p. 32, line 15; p. 38, line 7 – p. 77, line 6.

The jury watched a recording of the forensic interview at trial. During the interview, L.G. expressed anger and sadness that his father no longer lived with them. *See* Court's Exh. 2 at 14:02:12. L.G. reluctantly told the interviewer that he witnessed Gomez and K.D. "doing inappropriate stuff" when he was hiding under his father's bed. *See* Court's Exh. 2 at 14:08:20; Trial Tr. Vol. III p. 91, line 4 – p. 93, line 10. L.G. explained that his father and sister were having "sex," they were both naked, and K.D. was on top of Gomez while their bodies were "together." *See* Court's Exh. 2 at 14:10:57-14:11:15; 14:24:35. He told the forensic interviewer he saw this behavior more than once and that he told his mother and she was upset with K.D. *See* Court's Exh. 2 at 14:15:23-14:15:35. In his deposition testimony – presented to the jury at trial during the defense's case – L.G. was less forthcoming. He sometimes stated he did not remember what he saw in the bedroom and other times outright denied it, but he insisted several times that he "did not want to talk about it." *See* Depo. of L.G. p. 9, line 10 – p. 34, line 24; *see also* Trial Tr. Vol. IV p. 88, line 22 – p. 94, line 7 (parties discuss L.G.'s deposition testimony, which is read into the record).

For his defense, Gomez called several witnesses to testify about his work schedule and to state that they had never seen him engage in inappropriate contact with his stepdaughter. Trial Tr. Vol. IV p. 55, line 18 – p. 68, line 15 (defendant's employer testifies about his schedule); p. 69, line 18 – p. 73, line 21 (another of defendant's employers testifies about his schedule); p. 112, line 10 – p. 113, line 25 (defendant's father, who lived with the family, testifies he saw no sexual impropriety in the defendant's house); p. 118, line 12 – p. 137, line 20 (victim's sister testifies she never saw suspicious behavior between her father and K.D. and notes K.D. is "mean" to her); p. 106, line 4 – p. 113, line 25; p. 139, line 12 – p. 143, line 16 (Tiffany Gomez's father and sister testify they never saw any suspicious behavior on Gomez's part).

As noted, the jury convicted Gomez of second-degree sexual abuse, third-degree sexual abuse, and indecent contact with a child.

ARGUMENT

I. The trial court properly permitted the victim to testify through closed-circuit television under Iowa Code section 915.38.

Standard and Scope of Review.

This court's review of a decision involving Iowa Code section 915.38 is for the correction of errors at law. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995). Gomez's constitutional claim under the confrontation clause is reviewed *de novo*. *State v. Schaer*, 757 N.W.2d 630, 633 (Iowa 2008).

Preservation of Error.

The defendant preserved error by unsuccessfully objecting to the State's motion to present the testimony of the victim by closed-circuit testimony. *See* June 1, 2020 Resistance to Motion for Closed-Circuit Testimony, Time Limits on Testimony & Use of Facility Dog; Aug. 20, 2021 Order; App. 8–12, 13–15.

Merits.

Abel Gomez Medina first complains that the trial court erred in permitting the victim to testify at trial by one-way closed-circuit television. Because the court correctly determined that protective measures were warranted under Iowa Code section 915.38 and *Maryland v. Craig*, Gomez's claim should be rejected.

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him." U.S. Const. amend. VI. While face-to-face confrontation is preferred, it is not always constitutionally mandated. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). A defendant's right to confrontation is not violated when a minor testifies by closed-circuit television under certain circumstances. *Id.* The United States Supreme Court recognized in *Maryland v. Craig* that "the State's 'interest in the protection of minor victims of sex crimes from further trauma and embarrassment is a compelling one,' [and] the Confrontation Clause is not violated where the State's interest in the physical and psychological well-being of child abuse victims outweighs the defendant's right to face his accuser in court." *Id.*; *State v. McDonnell*, No. 08-0798, 2009 WL 1492839, at *4 (Iowa Ct. App. May 29, 2009) (quoting *Craig*, 497 U.S. at 852).

Iowa Code section 915.38(1) mirrors the requirements for compliance with the Confrontation Clause established in *Craig*. Section 915.38(1) provides that "a court may 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, 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." The trial court can enter an order only "upon a specific finding by the court that such measures are necessary to protect the minor from trauma." Iowa Code § 915.38(1).

The *Craig* court established a three-part test to determine when alternate procedures are necessary to protect a child witness from trauma, which Iowa courts have regularly applied:

> (1) 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," (2) the trial court must find that "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," and (3) "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than "mere nervousness or excitement or some reluctance to testify."

State v. Cuevas, No. 08-1344, 2009 WL 3337606, at *9 n.3 (Iowa Ct. App. Oct. 7, 2009) (quoting *Craig*, 497 U.S. at 856). While the *Craig* court did not specifically state the constitutional minimum level of "trauma" that must be established, the court determined that the

Confrontation Clause is not violated where "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" is established. *Id.* at 857. "If this trauma [from testifying in a defendant's physical presence] impedes or handicaps a child's ability to communicate, protective measures must be adopted." *Rupe*, 534 N.W.2d at 444.

A. Use of the one-way closed-circuit television procedure on the first day of testimony.

In this case, the trial court correctly determined that the evidence pertaining to K.D's condition met the requirements of the three-part test of *Maryland v. Craig* and Iowa Code section 915.38. The closed-circuit procedure was necessary to protect K.D.'s welfare and allow her to truthfully communicate. According to her therapist and her guardian ad litem, the physical presence of her stepfather would have traumatized K.D., and the emotional distress she would have experienced would have been more than *de minimus*.

On appeal, Gomez challenges the finding that K.D. would be unable to testify truthfully in his presence, noting that this opinion originated from the guardian ad litem, Erin Romar, and not an expert witness. Defendant's Brief p. 22. Erin Romar testified that she had

frequent contact with the victim – so frequent that she could not estimate the number of contacts. Aug. 12, 2021 Hearing Tr. p. 12, line 20 – p. 14, line 9. Ms. Romar indicated that K.D. "struggles significantly with emotional regulation and self-harm behavior that were severe," "continues to struggle with concentration, sleep, hygiene, [and] ongoing nightmares," and has expressed "extreme concern and fear and anxiety" about what may occur at trial. Aug. 12, 2021 Hearing Tr. p. 15, lines 1-12. She testified that "[w]ithout a question" Gomez's presence would traumatize K.D. and deemed testifying in his presence the "most detrimental thing we could put her through…" Aug. 12, 2021 Hearing Tr. p. 15, lines 5-12. When specifically asked if Gomez's presence would affect K.D.'s ability to testify truthfully about the facts of the case, Ms. Romar answered, "Yes – And I also believe it would make it difficult for her to be able to sit down and testify…" Aug. 12, 2021 Hearing Tr. p. 15, lines 21-25.

K.D.'s therapist, Dr. Petrina Leitz, also testified at the hearing. In terms of testifying truthfully in front of Gomez, Dr. Leitz discussed the "flight or freeze" response to trauma, noting that a person's brain may stop and render them unable to verbalize at all; she indicated that she had concerns K.D., who suffered from post-traumatic stress

disorder as well as depression and anxiety, could respond that way. Aug. 12, 2021 Hearing Tr. p. 35, line 15 – p. 36, line 16.

Despite Gomez's suggestion, the fact that K.D could maintain good grades or otherwise function may show that she could compartmentalize her trauma when not faced with it, but it does not establish she was not currently traumatized. Both her therapist and her guardian ad litem believed K.D. continued to wrestle with serious trauma issues that would be exacerbated by testifying in front of Gomez. Aug. 12, 2021 Hearing Tr. p. 14, line 18 – p. 16, line 13; p. 33, line 11 – p. 37, line 24. In light of the testimony of Ms. Romar and Dr. Leitz, this record amply supports the trial court's conclusion that K.D. met the three requirements for protection through closed-circuit television, including the requirement that her ability to communicate would be impeded. *See Rupe*, 534 N.W.2d at 444 (noting that when expert testimony revealed that the victim would likely be unable to communicate "at all," the trial court's focus on whether the victim could give truthful testimony was proper). The trial court's ruling here was similarly supported by the record.

As the Court of Appeals has recognized, the Iowa appellate courts have consistently upheld trial courts' decisions to grant the

protections of section 915.38(1) when the minor victim's ability to communicate would suffer because of the presence of the defendant. *See State v. Hicks*, No. 13-1912, 2015 WL 1046130, at *5 (Iowa Ct. App. March 11, 2015) ("Our court has repeatedly rejected the same or similar challenge Hicks makes in this case.") (citing *Rupe*, *id.*; *Cuevas*, 2009 WL 3337606, at *9-10; *State v. Paulson*, No. 06-0141, 2007 WL 461323, at *5-6 (Iowa Ct. App. Feb. 14, 2007); *State v. Bailey*, No. 01-0955, 2002 WL 31308238, at *1-3 (Iowa Ct. App. Oct. 16, 2002); *State v. Mosley*, No. 00-0094, 2001 WL 293221, at *2-4 (Iowa Ct. App. March 28, 2001)); *see also State v. Nuno*, No. 17-1963, 2019 WL 1486399, at *3 (Iowa Ct. App. Apr. 3, 2019) ("We defer to the district court. The witness' ability to communicate would be impaired and the accommodation [under Iowa Code section 915.38] was necessary to protect the witnesses from trauma – as testified by the children's therapists. The district court did not err…."). The court should come to the same conclusion here.

B. Use of the one-way closed-circuit television procedure on the second day of testimony.

Gomez also specifically challenges the trial court's decision to allow K.D. to testify via closed-circuit television on her 18th birthday, October 28, which was the second and final day of her testimony at

trial. Because the trial court had independent grounds to invoke Iowa Code section 938.15, the court should reject this claim.

K.D. began testifying at trial on the day before her 18th birthday, and she concluded her testimony on her birthday, when she reached the age of majority. Trial Tr. Vol. IV p. 5, lines 22-25. Gomez argued that the protections of Iowa Code section 915.38 should have ceased to apply on the second day of testimony because K.D. was no longer a minor. Trial Tr. Vol. IV p. 6, line 19 – p. 13, line 13.

After hearing the arguments of the parties, the trial court ruled:

> The Court believes -- Let me back up and state there are a couple of things I think come in play that I need to make sure are clear for the record.
>
> First and foremost, the determination and the request to appear via closed-circuit were made well in advance of [K.D.]'s 18th birthday. Unfortunately, this case was -- has strung on considerably due to the pandemic.
>
> Also, I would note that [K.D.] was ready to testify beginning at 1:00 yesterday and with some delays due to the need to review some of the video with the defendant. The Court believes that we most likely could have gotten done with her testimony yesterday before she turned 18, but we had those delays.
>
> That being said, I think those are really issues that are not of any import in the Court's decision. The Court clearly believes that it would have and probably should have made a

> determination under 915.38 paragraph (1)(c) that as well as her minority age giving a justification for the closed-circuit testimony, that [K.D.]... should be allowed to be give her testimony via closed-circuit under provision (c) because of her mental illness. Specifically, the Court believes that she does have a documented mental illness of PTSD as well as depression, that it is necessary for her, for her mental health and well-being, to be able to present the testimony via closed-circuit.
>
> And as a result, under the provision of 915 -- Iowa Code section 915.38(1)(c), the Court can grant that and does hereby grant that. Regardless of her age, she can provide her testimony via closed-circuit because of that mental illness.
>
> As such, we're going to continue in the format that we have previously started, the closed-circuit format.

Trial Tr. Vol. IV p. 10, line 8 – p. 11, line 16.

At the prosecutor's request, the court elaborated on its ruling to specifically address the *Maryland v. Craig* three-part test:

> Thank you for mentioning that. Let me clarify that so that it is very clear for the appellate record.
>
> First and foremost, the Court does believe, due to her mental illness, that it is necessary. Specifically, the nature of the mental illness which she suffers, both PTSD and depression as well as anxiety, she stated. These would, obviously, make it difficult for her to testify, given the fact that she would have

> to be present with the defendant in the same room providing testimony.
>
> Secondly, the Court does believe that it would cause additional trauma. I believe this was sustained -- or would be supported by, rather, the testimony of her therapist at the time of the original hearing as well.
>
> Just the nature of that trauma is the same regardless of her age or because of the mental illness. So I think that her presence in the same room as the defendant would create trauma and would exacerbate, obviously, her mental health condition.
>
> And, again, as the Court previously held with her minor age, this is more than just discomfort that would come about because of her presence with the defendant. She, because of her previously diagnosed condition, would suffer, obviously, significant stress, and it would make it difficult for her to communicate and testify in this case.

Trial Tr. Vol. IV p. 12, line 14 – p. 13, line 13. The court subsequently reiterated that it believed it could have made the mental illness determination "way back when it made the original determination… based upon minority… under Iowa Code section 915.38." Trial Tr. Vol. IV p. 17, lines 1-18.

The trial court was right. K.D. experienced documented and serious mental illness, including diagnoses of post-traumatic stress disorder, generalized anxiety, and persistent depressive disorder,

necessitating two in-patient hospitalizations. *See* Aug. 12, 2021 Hearing State's Exh. 2 (letter from Dr. Petrina Jones Leitz); Aug. 12, 2021 Hearing Tr. p. 32, line 10 – p. 38, line 5; *see also* Trial Tr. Vol. IV p. 7, line 12 – p. 10, line 1 (K.D. testifies in chambers that she receives therapy weekly and has twice been hospitalized). Gomez argues on appeal that mental health issues are ubiquitous and the mental health prong of the statute therefore opens the floodgates to videoconference testimony. Defendant's Brief pp. 19-21. That fear will not be realized, however. Iowa Code section 915.38(1)(c) still requires a finding of necessity, much like the protection based on the witness' age in section 915.38(1)(a). *See* Iowa Code § 915.38(1)(c) ("In addition, 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."). The statute does not expand the protections to all adults, as Gomez argues, or to any adult with a hint of a relatively minor mental illness – it applies only to those for whom the protections of closed-circuit testimony are necessary, as determined by the trial court. In any event, as discussed, the victim in this case has been hospitalized twice

because of mental illness and continues to suffer from post-traumatic stress disorder, generalized anxiety disorder, and persistent depressive disorder. K.D.'s diagnoses fit any definition of mental illness, and the necessity requirement was already properly established under the age provision of section 915.38(1)(a). The trial court correctly applied the mental illness provision to protect K.D. on her eighteenth birthday.

II. The prosecutor did not commit error in closing argument by pointing out that the victim's younger brother had been told by their mother that his sister was lying, which explained his reluctance to testify at trial.

Standard and Scope of Review.

Prosecutorial error and misconduct rulings are reviewed for an abuse of the trial court's discretion, but constitutional claims are reviewed *de novo*. *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018).

Preservation of Error.

The defendant objected to the comment he now challenges during the prosecutor's closing argument. Trial Tr. Vol. V p. 28, lines 23-25. Error is preserved.

Merits.

Gomez next contends that the prosecutor committed error[1] during closing arguments by characterizing the statements of K.D.'s younger brother, L.G. The court should reject his claim.

The prosecutor bears a dual role in representing the State during a criminal prosecution: to prosecute with vigor while ensuring the defendant receives a fair trial. *State v. Morris*, 207 N.W.2d 150, 153 (Iowa 1974); *State v. Knox*, 532 N.W.2d 149, 153 (Iowa Ct. App. 1995). It is the prosecutor's duty to refrain from improper methods calculated to obtain a conviction. *Berges v. United States*, 295 U.S.

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[1] The Iowa Supreme Court has distinguished between different types of errors committed by prosecutors, cataloging various claims and observing, "While some of the conduct in these cases may have been intentional, other conduct can be the result of mistake or error during the heat of trial." *State v. Schlitter*, 881 N.W.2d 380, 393 (Iowa 2016). In *Schlitter*, the court noted that use of the term "prosecutorial misconduct" tends to conflate the concept with professional misconduct; although similar, "professional misconduct generally applies to intentional behaviors on the part of the attorney, while prosecutorial misconduct is not always intentional." *Id.* at 393. The *Schlitter* court drew an even finer distinction, concluding that it would now distinguish between prosecutorial error – "where the attorney has made a mistake" and prosecutorial misconduct – where a prosecutor intentionally violates a clear standard or recklessly disregards a duty to comply. *Id.* at 394. "A prosecutor who has committed error should not be described as committing misconduct." *Id.* Gomez acknowledges the distinction here and refers to the prosecutor's conduct as error.

78, 88 (1935). A prosecutor's misconduct will not warrant a new trial unless the conduct was so prejudicial as to deprive the defendant of a fair trial. *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003). The party claiming prejudice bears the burden of establishing it. *State v. Bishop*, 382 N.W.2d 554, 561 (Iowa 1986).

Lawyers are granted certain latitude during closing arguments. *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006); *State v. Thornton*, 498 N.W.2d 670, 677 (Iowa 1993). Some oratory freedom must be allowed:

> Within reasonable limits, the language of counsel in the argument is privileged, and he is permitted to express his own ideas in his own way, so long as they may fairly be considered relevant to the case which has been made... [H]e is not required to [forgo] all the embellishments of oratory, or to leave uncultivated the fertile field of fancy.

State v. Blanks, 479 N.W.2d 601, 604 (Iowa Ct. App. 1991) (citing *State v. Burns*, 119 Iowa 663, 671, 94 N.W. 238 (Iowa 1903)).

While counsel may not express personal opinions as to guilt, innocence, or credibility, he or she is permitted to point out weaknesses in the defendant's testimony. *State v. Roghair*, 353 N.W.2d 433, 435 (Iowa Ct. App. 1984). Further, counsel has the right to argue all inferences and conclusions that reasonably flow from the

evidence. *Thornton*, *id.* at 677. Counsel is always free to attack the credibility of the witnesses during closing argument. *State v. Martens*, 521 N.W.2d 768, 772 (Iowa Ct. App. 1994). The line between permissible and impermissible argument is fine. *Roghair*, *id.* at 435; *State v. Escobedo,* 573 N.W.2d 271, 277 (Iowa Ct. App. 1997).

In making the prejudice determination for a prosecutorial error or misconduct claim, the court examines: 1) the severity and pervasiveness of the misconduct; 2) the significance of the misconduct to the central issues in the case; 3) the strength of the State's evidence; 4) the use of cautionary instructions or other curative measures; and 5) the extent to which the misconduct was invited by the defense. *Graves*, 668 N.W.2d at 869.

During her closing argument, the prosecutor in this case discussed the fact that K.D.'s allegations were corroborated by statements from her younger brother, L.G. Trial Tr. Vol. V p. 27, lines 6-23. She discussed his forensic interview, which the jury viewed at trial:

> And you heard in that interview that [L.G.] was hiding under the bed, observed something, in his own words, inappropriate, and when [the interviewer] asked, "What do

> you mean?" He said, "sex." He said he saw [K.D.] without her clothes on and Dad without his clothes on, [K.D.] on top of Dad, their bodies were together doing sex.
>
> No, as a nine-year-old he did not say "I observed his penis inserted into the vagina of [K.D.]." Your common sense and experience tells you that's not how a nine-year-old is going to describe it. The fact that he knew the word "sex" in and of itself I'm surprised by, frankly, but he described then -- when she asked "What do you mean by sex?" "Inappropriate." He physically – or excuse me -- he described what he saw with his own eyes, [the victim] with her clothes off, Dad with his clothes off. Their bodies together having sex.
>
> Now later on, when -- nine months later, about, when that deposition was done, after he's been living in the same house as Tiffany Gomez Medina, he's a little bit more loose on what he remembers. *Remember he specifically said "Mom said [K.D.] 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. V p. 27, line 24 – p. 28, line 22 (emphasis added).

At that point, defense counsel objected to the prosecutor's statement as "improper argument" and "personal belief" and moved to strike the comment. Trial Tr. Vol. V p. 28, lines 23-25. The court overruled the objection. Trial Tr. Vol. V p. 28, lines 23-25. The prosecutor finished her point before concluding:

> Your common sense and your experience. We heard about suggestibility from [forensic interviewer] Mary Collins. We heard the difference but even still -- even though he'd been told by his mom that [K.D.] was lying, ladies and gentlemen, he kept saying "I think the lies are true" or something. However you remember that exact wording, rely on your own memory, but he said "I think the lies are true." What his mom was trying to tell him was a lie. He was seemingly at war with himself because he knows what his own eyes saw, and we heard he wants to be with his dad.

Trial Tr. Vol. V p. 29, lines 2-11.

On appeal, Gomez suggests that the prosecutor improperly called L.G. – whom he characterizes as an exculpatory witness – a liar. Defendant's Brief p. 25. Assuming use of the word "liar" is problematic for all witnesses and not just defendants, it is not what the prosecutor said here. *See generally Graves*, 668 N.W.2d at 876 ("We conclude… that Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments.") It is not improper to suggest that a witness' version of events is not credible based on the evidence. *See Carey*, 709 N.W.2d at 556 ("…"[M]isconduct does not reside in the fact that the prosecution attempts to tarnish defendant's credibility or boost that of the State's witnesses; such tactics are not

only proper, but part of the prosecutor's duty."). The prosecutor is free to argue, based on reasonable inferences drawn from the evidence, that certain testimony is unbelievable. *Id.* (citing *Graves*, 668 N.W.2d at 876). The prosecutor may not convey a personal opinion or create evidence, but he or she may craft an argument based on the evidence. *See State v. Leedom*, 938 N.W.2d 177, 194 (Iowa 2020) (sanctioning the prosecutor's "drawing on reasonable inferences" to surmise why the relationship between two people in the case had deteriorated); *Ngyuen v. State*, 707 N.W.2d 317, 326 (Iowa 2005) (distinguishing *Graves* and noting the prosecutor here did not engage in name-calling); *Graves*, 668 N.W.2d at 874-75.

In this case, L.G. clearly recounted in his forensic interview that he saw his father and his sister having sex while he was hiding under the bed. *See* Court's Exh. 2 (forensic interview). During the deposition taken about eight months after the forensic interview, L.G. struggled through questions about whether he ever saw anything inappropriate happen between his father and K.D. The nine-year-old denied telling Mary Collins during the forensic interview that he saw his sister and the defendant having sex while he hid under the bed. Depo. of L.G. p. 34, line 2 – p. 35, line 24. When asked, however, if

he had ever seen his father with K.D. in his bedroom, he said "Yes" before he said he "forgot" what happened in the bedroom. Depo. of L.G. p. 16, lines 14-25. He conceded that he told his mother he had seen inappropriate things in their bedroom, and he said at various points that only his father was doing inappropriate things and that only K.D. was doing inappropriate things, but not the two of them together. Depo. of L.G. p. 23, line 23 – p. 24, line 23; Trial Tr. Vol. III p. 25, line 14 – p. 26, line 23. Clearly conflicted, L.G. testified he did not want to talk about the subject and admitted his mother told him "there were no bad things going on." Depo. of L.G. p. 24, line 18 – p. 25, line 13. Tiffany Gomez also "sometimes" told him he was wrong when he said he saw inappropriate things. Depo. of L.G. p. 28, lines 1-14. L.G.'s mother explicitly told him K.D. was lying. Depo. of L.G. p. 27, line 25 – p. 28, line 7.

When asked at the deposition why his father no longer lived with the rest of the family. L.G. replied, "Because… my sister [K.D.] told some lies about it and – and that's why my dad went away." Depo. of L.G. p. 9, lines 1-9. When pressed about who characterized K.D.'s statements as lies, he said, "My mom told me that she was lying. And I kind of think that, about that. And I think it was true."

Depo. of L.G. p. 9, lines 10-15. L.G. was questioned further on that ambiguous, child-like answer:

Q. What do you think is true?

A. Like, the lies that she told at the hospital.

Q. What were they?

A. My mom never told me.

Q. So what do you think is true?

A. The lies -- the lies.

Depo. of L.G. p. 10, line 1 – p. 11, line 7. By the time of trial, as indicated, L.G. testified that he did not remember what happened in the bedroom. Trial Tr. Vol. III p. 29, line 1 – p. 37, line 9.

Given that Tiffany Gomez was still in a relationship with her husband at the time of trial and L.G. specifically testified that his mother told him his sister was lying, it was fair commentary for the prosecutor to argue that, based on the evidence, the child had been influenced by his mother. He testified to that very fact at his deposition, admitting that she "sometimes" told him he was wrong about seeing inappropriate things, and he expressed uncertainty as to whether K.D.'s "lies" were actually true despite what his mother told him. Depo. of L.G. p. 9, line 1 – p. 11, line 7; p. 27, line 25 – p. 28, line 16. Thus, the prosecutor's comment was not based on personal belief.

It was based directly on L.G.'s statements and was not improper, as the trial court correctly found.

Alternatively, even assuming this court finds the comment was improper, Gomez is nonetheless unable to establish prejudice, as he must. The comment was neither severe nor pervasive. It was a brief and isolated reference during closing argument. Although the prosecutor finished her train of thought after the objection was overruled by discussing the subject for a few more sentences, she did not belabor the point. She did not revisit the topic on rebuttal. Trial Tr. Vol. V p. 54, line 22 – p. 73, line 17. There were no "persistent efforts" to inject improper commentary into the trial. *See Graves*, 668 N.W.2d at 879. While important to the case in terms of corroboration, L.G. was not nearly as important as the victim, K.D., and her testimony was strong and credible. There was no request for a cautionary instruction because the objection was overruled, and finally, the comment was pertinent but not invited by the defense. The prosecutor's brief comment during closing argument did not render the defendant's trial unfair. Gomez's contention to the contrary should be rejected, and his convictions should be affirmed.

III. The trial court properly exercised its discretion in excluding evidence of two 911 calls involving the victim and her mother, which were unrelated to the offenses and occurred months after she disclosed the abuse.

Standard of Review.

This court reviews evidentiary rulings for an abuse of the trial court's discretion. *State v. Niederbach*, 837 N.W.2d 180, 190 (Iowa 2013); *State v. Richards*, 809 N.W.2d 80, 89 (Iowa 2012). An abuse of discretion occurs when the trial court bases its decision "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. August*, 589 N.W.2d 740, 744-45 (Iowa 1999).

Preservation of Error.

Gomez preserved error. He resisted the State's motion in limine regarding the 911 calls orally and in writing, and he made an offer of proof at trial. *See* Sept. 27, 2021 Resistance to State's Motion in Limine; Trial Tr. Vol. II p. 5, line 11 – p. 18, line 15; Vol. III p. 4, line 16 – p. 11, line 23.

Merits.

Gomez's third and final complaint involves the trial court's exclusion of two 911 calls placed months after K.D. reported Gomez

had sexually abused her. Because Gomez cannot establish that the court abused its discretion, he cannot prevail.

Before trial, the State filed a motion in limine seeking to exclude evidence of two 911 calls Tiffany Gomez made involving her daughter that were unrelated to the allegations of sexual abuse. Sept. 23, 2021 State's Motion in Limine; App. 16–19. The May 20, 2019 dispatch notes provided:

> Meet with Tiffany. Problem half is [K.D.], daughter, 15 YO WF wearing blk shirt and multicolor pants… No weapons. [K.D.] hit the caller a couple of times… Refused rescue.

Oct. 28, 2021 Defense Exh. D; App. 35.

The June 2, 2019 dispatch notes stated that the caller's 15-year-old daughter

> has been banging head on the wall and actually knocked a hole in the wall for the last couple of hours, won't say a word until Mom called us. She did yell at her mom when mom called 911.

Oct. 28, 2021 Defense Exh. E; App. 36.

Gomez argued that the 911 calls – made two months after K.D. disclosed the abuse on April 1, 2019 – were relevant to show the "family dynamics" between the victim and her mother. Trial Tr. Vol. II p. 8, line 25 – p. 15, line 19. The prosecutor argued that, in addition

to being hearsay, the evidence was irrelevant and improper character evidence. Trial Tr. Vol. II p. 7, line 10 – p. 8, line 21; p. 15, line 21 – p. 17, line 2. The trial court ultimately excluded the evidence:

> THE COURT: I think after discussing this and kind of listening to the arguments on it, I think it's not relevant under 403. Specifically, I don't see the probative value, first and foremost, and to the extent that it does have any probative value, it's very minor probative value, which would be substantially outweighed by the danger of confusion of the issues that would result.

Trial Tr. Vol. II p. 17, lines 3-9.

The court allowed Gomez to make an offer of proof the next day before revisiting the issue. Tiffany Gomez testified in the offer of proof that the police came to their home on both occasions when she called 911. Trial Tr. Vol. III p. 6, line 3 – p. 7, line 6. K.D. was removed from the home and committed on May 20 and had a conversation with police after the June 2 call. Trial Tr. Vol. III p. 7, lines 1-6. The incidents "had nothing to do with this case at all," according to Tiffany Gomez; both stemmed from Tiffany asking K.D. to clean the house. Trial Tr. Vol. III p. 7, lines 7-20.

The court reaffirmed its earlier ruling, noting that the 911 calls bore no relationship to the allegations in the case and postdated

them. In addition to being irrelevant, the court found the proffered evidence to be improper character evidence. Trial Tr. Vol. III p. 10, line 15 – p. 11, line 2.

The court properly exercised its discretion in excluding this evidence as irrelevant. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence… more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Even relevant evidence is not automatically admissible, however. Although relevant, evidence may be excluded it its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. Unfairly prejudicial evidence is evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case." *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988).

Here, as the trial court found, the proffered evidence was irrelevant and unfairly prejudicial. The 911 calls involved escalating arguments between the victim and her mother and did not pertain to the defendant. They were unrelated to the allegations in the case and

occurred at least seven weeks afterward. Evidence that the victim and her mother argued, even violently, over cleaning the house added nothing of relevance to the jury's task of determining whether Gomez sexually abused his stepdaughter.

Moreover, evidence of the "family dynamics" at play in the Gomez household were presented at trial though other testimony. It was unequivocally established that Tiffany Gomez did not believe or support her daughter after the allegations came to light and that K.D. was upset that her phone was taken away by Gomez. Trial Tr. Vol. III p. 116, line 1 – p. 124, line 18. L.G.'s deposition testimony also established that Tiffany Gomez had branded her daughter a liar. Depo. of L.G. p. 9, line 1 – p. 28, line 7. The 911 call evidence would have added little or no pertinent information and would have reflected negatively on the victim's character. The trial court rightly excluded the evidence. This court should reject Gomez's contention to the contrary and affirm his convictions.

CONCLUSION

For the reasons discussed above, the State respectfully requests that the court affirm Abel Gomez Medina's convictions for one count of second-degree sexual abuse, four counts of third-degree sexual abuse, and one count of indecent contact with a child.

REQUEST FOR NONORAL SUBMISSION

Gomez has requested oral argument. The State believes the issues raised do not require further elaboration. If the defendant is granted oral argument, however, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

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