IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0813

TIMOTHY DUANE SMITH,
Applicant-Appellant,

vs.

STATE OF IOWA
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CASS COUNTY
THE HONORABLE GREG W. STEENSLAND, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Applicant Timothy Duane Smith ("Smith") appeals from the district court's denial of his application for post-conviction relief ("PCR"). On appeal, Smith asserts his trial counsel was ineffective for failing to request additional strikes after the district court denied his motion to remove certain prospective jurors for cause, for failing to object to alleged juror misconduct, and for failing to present evidence favorable to Smith at trial.

Course of Proceedings

The State accepts Smith's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

A jury found Smith guilty of two counts of sexual abuse in the second degree for repeatedly kissing, fondling, and orally and vaginally and/or anally raping his stepdaughter, H.R., when she was

between the ages of six and ten. FECR015634 08-09-2018 Order of Disposition, Ex. 7 (Trial Tr.) at 176:3–9; App. 591–94. At trial, H.R. testified specifically to three different assaults. For the first, Smith and H.R. were in Smith's bedroom, and he began to touch her. Ex. 7 (Trial Tr.) at 178:11–179:12. Smith touched his penis to H.R.'s chest, mouth, and vagina. Ex. 7 (Trial Tr.) at 179:13–180:6. Smith then put his penis into H.R.'s mouth, and her vagina or anus. Ex. 7 (Trial Tr.) at 180:7–181:10.[1] When he finished assaulting her, Smith ejaculated on H.R., and she had to leave and clean herself up. Ex. 7 (Trial Tr.) at 181:6–23. H.R. described this as "something sticky all over" her. *Id.*

For the second, H.R. said she remembered she ate too much candy, got sick, and went into the bathroom to throw up in the bathtub. Ex. 7 (Trial Tr.) at 181:24–182:20, 204:12–18. Smith was in the bathroom, sitting on the toilet, with his pants down. Ex. 7 (Trial Tr.) at 204:19–206:24. After H.R. was done being sick, Smith forced his penis into her mouth and ejaculated inside her mouth. Ex. 7 (Trial Tr.) at 182:10–183:14.

[1] An expert testified at trial that young children often have difficulty differentiating between their vagina and anus. Ex. 7 (Trial Tr.) at 239:10–17.

For the final assault, H.R. went into her parents' bedroom and found Smith lying under the blankets watching television. Ex. 7 (Trial Tr.) at 184:19–185:9. Smith turned the television channel "to Spongebob because that's what [H.R.] liked at the time." Ex. 7 (Trial Tr.) at 185:3–9. H.R. undressed, Smith then penetrated H.R.'s vagina or anus, and she felt "a sharp pain." Ex. 7 (Trial Tr.) at 185:3–186:7. At the end of the assault, Smith ejaculated on H.R.'s "stomach and chest area." Ex. 7 (Trial Tr.) at 186:14–25.

H.R. said she did not immediately disclose this abuse because she was afraid Smith would hurt her. Ex. 7 (Trial Tr.) at 183:15–184:3. A few years after her mother divorced Smith, H.R. told her mother about the abuse on Thanksgiving, but she did not provide details. Ex. 7 (Trial Tr.) at 190:13–191:16, 199:7–200:1, 220:3–16. Later, a teacher at school became concerned about H.R. and alerted the police. Ex. 7 (Trial Tr.) at 191:17–192:19.[2] H.R. then met with Detective Haley Bloom and disclosed Smith's abuse. Ex. 7 (Trial Tr.) at 192:17–194:7, 243:5–244:24.

[2] At trial, H.R. said the teacher became concerned when H.R. reacted strangely when the teacher was discussing family, but Detective Bloom testified the teacher overheard H.R. disclosing the abuse to friends. Ex. 7 (Trial Tr.) at 190:13–191:16, 242:3–14.

During the time Smith lived with H.R., he was frequently unemployed and often had primary care of H.R. and her brother, including bathing and dressing the children. Ex. 7 (Trial Tr.) at 216:20–21, 334:22–335:2, 336:1–14, 344:12–346:3. Smith admitted he had a long history of romantic relationships with single mothers who had young children. Ex. 7 (Trial Tr.) at 343:3–344:11. Smith also testified that after he and H.R.'s mother divorced, he still saw H.R. and her brother for weekend visitations. Ex. 7 (Trial Tr.) at 340:1–9, 346:4–10.

After his sentencing, Smith filed a direct appeal, and his conviction was affirmed by the Iowa Court of Appeals. *See State v. Smith*, No. 18-1500, 2020 WL 1307693 (Iowa Ct. App. March 18, 2020). On June 8, 2020, Smith filed an application for PCR. Relevant to this appeal, Smith claimed his trial counsel was ineffective in three respects: 1) for failing to request additional peremptory strikes after the district court denied his motion to strike certain prospective jurors for cause; 2) for failing to object to alleged juror misconduct; and 3) for failing to present favorable evidence on Smith's behalf at trial. Facts relevant to these specific claims will be discussed more fully below.

ARGUMENT

I. Smith has failed to establish his trial counsel provided ineffective assistance.

Preservation of Error

Smith preserved error on his claims when he raised them in the district court, and the district court considered and ruled on them. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)) (holding error is preserved when "the court's ruling indicates that the court considered the issue and necessarily ruled on it….").

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006), *overruled on other grounds by Doss v. State*, 961 N.W.2d 701, 723 (Iowa 2021). "Postconviction relief proceedings are actions at law and are reviewed on error." *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element

is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (internal string citation omitted).

Merits

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Under the first prong, the applicant must show counsel's representation fell below an objective standard of reasonableness. *Id.* at 687–88. The reviewing court must be highly deferential to counsel's performance, avoid judging in hindsight, and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To prove the second prong, the applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981) (internal quotation marks and citation omitted). "When trial counsel makes a reasonable decision concerning strategy, we will not interfere simply because the chosen strategy does not achieve the desired result." *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984) (internal citations omitted).

Smith claims his trial counsel was ineffective in three different respects. The State will address each in turn.

A. Smith's trial counsel did not provide ineffective assistance by failing to request additional peremptory strikes.

1. Trial counsel did not breach a duty – he requested the prospective jurors by struck for cause, and the district court did not abuse its discretion when it denied his request.

First, Smith asserts his trial counsel was ineffective because after the district court declined to strike four jurors—Juror H., Juror Kn., Juror A., and Juror D.—for cause, his trial counsel did not request additional peremptory strikes. At the outset, the State notes that it struck Juror H. and Juror D. with two of its peremptory strikes, so whether the district court erred in failing to remove those

jurors for cause—and more to the point, whether trial counsel erred by failing to request replacement peremptory strikes for these jurors—is not relevant to Smith's claim because *State v. Jonas* only applies to situations where a defendant is forced to use a peremptory strike. 904 N.W.2d 566, 582–84 (Iowa 2017). Smith struck Juror Kn. and Juror A., so the State will limit its discussion to those two prospective jurors.

Juror Kn. stated she thought "it's important to get on that stand and defend yourself if you truly believe that you are innocent." Ex. 7 (Trial Tr.) at 146:1–147:19. Juror Kn. clarified that "[m]aybe what I would need to have is some sort of defense against whatever. I mean, whether it's not the defendant himself, there would need to be somebody that takes defense on whatever is proven or what you're trying to prove, otherwise I will be like you're guilty." Ex. 7 (Trial Tr.) at 147:22–148:17. After these statements, the district court addressed Juror Kn.:

> District Court: [] I do not expect everybody in this room to understand how a jury trial works. You guys have not gone to law school, from what I understand. So if the Court instructs you on how a jury trial must be conducted to include the fact – and I'll give a more detailed instruction later – that there is no obligation or responsibility for the

> defendant to testify or to put on any evidence. It is a hundred percent the State's burden. Every case. Not just today's case. Every state it's the State's burden to prove that the…defendant is innocent until proven guilty. Is that something that even being instructed by the Court on the law – to which I'm not holding you to know that beforehand but now that I'm telling you that is the law – can you listen to the evidence presented by the State and come to a decision following my instructions, even if that may be a situation where the defendant chooses not to testify? Can you do that?
>
> Juror Kn.: I can follow instructions.
>
> District Court: Okay. Do you think that you can be a fair or impartial juror or would that be stretching it for you in this situation?
>
> Juror Kn.: I can give it my best shot.
>
> District Court: Kind of like what the State was saying earlier, best shot is kind of maybe I'll try. I think I need something a little more firm. Can you be fair and impartial in this case?
>
> Juror Kn.: Yes.

Ex. 7 (Trial Tr.) at 148:22–150:9.

Juror A. was a retired prison guard who stated during voir dire, "if I put myself in [Smith's] position, I would want to defend myself." Ex. 7 (Trial Tr.) at 79:14–17, 150:17–23. She expressed that "when I talked to other inmates, they always wished they had gotten up and

testified." Ex. 7 (Trial Tr.) at 150:17–151:5. But when asked whether she would "be able to follow the instruction of the Court regarding what the law is about, what the State's obligation and burden is in this case, and that the defendant sitting here has, indeed, said he's not guilty," Juror A. agreed she "would follow the directions." Ex. 7 (Trial Tr.) at 151:6–152:3.

Here, the district court did not abuse its discretion when it denied trial counsel's motion to strike Juror Kn. and Juror A. for cause, so Smith's trial counsel did not breach a duty by failing to request additional peremptory strikes. The district court has wide discretion in ruling on challenges for cause under time constraints and with a firsthand view of the panelist's demeanor. *Jonas*, 904 N.W.2d at 574 (noting importance of deferring to reasonable exercises of discretion on review because "district court judges are required to make rulings on juror disqualification on the spot and in real time."); *State v. Tillman*, 514 N.W.2d 105, 107 (Iowa 1994) (internal citations omitted) ("In ruling on a challenge for cause, the district court is vested with broad discretion."). Iowa courts are not alone in taking this approach:

> Reviewing courts are properly resistant to second-guessing the trial judge's estimation

> of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. In contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service.

Skilling v. United States, 561 U.S. 358, 386–87 (2010) (internal citation omitted).

Both Juror Kn. and Juror A. expressed an opinion that they would need to hear from a defendant to render judgment against him. But when told the law was different than their opinion and does not require a defendant to testify, both jurors stated they could follow the law and the district court's instructions. While it is understandable that Smith's trial counsel used peremptory strikes to remove these potential jurors, we should not conflate a defendant's desire to remove a juror with a district court's requirement to do so. And here, trial counsel "did [his] best to have the potential [] juror[s] stricken for cause[.]" *Powell v. State*, No. 18-0542, 2019 WL 2524264, at *7 (Iowa Ct. App. June 19, 2019). Thus, he breached no duty to Smith.

In other, similar cases, this Court has declined to find a district court abused its discretion. In *State v. Lindemann*, a prospective juror found it significant that the defendant had been arrested and charged with a crime because it meant that "[o]bviously, the police officers felt he was guilty[.]" No. 19-1632, 2021 WL 210986, at *6 (Iowa Ct. App. Jan 21, 2021). When asked whether he "could make a decision about [the defendant's] guilt based solely on what you hear in court?" the prospective juror responded, "Possibly." *Id.* Later, the prospective juror said he didn't "know if [he] could give an honest decision." *Id.* at *7. The defendant moved to strike for cause, but the district court denied it because the prospective juror stated he "can follow instructions." *Id.* The court of appeals affirmed the district court's decision because the potential juror never "expressed actual, unequivocal bias[.]" *Id.* at *8. The same is true here. Both Juror Kn. and Juror A. stated they could follow the instructions and never expressed any actual, unequivocal bias. As such, the district court did not abuse its discretion by denying Smith's challenge for cause of these jurors, and his trial counsel was under no obligation to request additional peremptory strikes.

2. *Smith has failed to establish any prejudice from his trial counsel's failure to request additional peremptory strikes.*

Smith has also failed to establish any prejudice from his trial counsel's failure to request additional peremptory strikes. First, as stated above, the district court did not abuse its discretion when it denied Smith's challenges for cause, so any request for extra peremptory strikes would have been fruitless.

Second, to be entitled to presumed prejudice on direct appeal, *Jonas* requires a defendant to not only request additional peremptory strikes, but to specifically identify which prospective juror he or she would remove with additional strikes. 904 N.W.2d at 583 (stating a defendant is entitled to presumed prejudice "[w]hen a defendant identifies a particular juror for an additional peremptory challenge and the district court denies the additional peremptory challenge[.]"). At the PCR trial, Smith failed to illicit testimony from his trial counsel that he wished to strike any particular juror who ended up serving on the jury. On this subject, trial counsel was asked:

> PCR Counsel: Let me ask it this way. This is going to be a very unfair question, but help me if you can. At the time, did you think that you needed additional strikes in order to get a fair and impartial jury for Mr. Smith?

> Trial Counsel: Would I have accepted them if they existed? Absolutely.
>
> PCR Counsel: Were any of the jurors that actually ended up on the jury ones that you would have liked to have struck?
>
> Trial Counsel: If I remember correctly – and it's been going on four years now – I don't believe any of those four made it on to the final jury pool, but I believe that strikes had to be utilized in order to get rid of those that would have otherwise been used for other jurors.
>
> PCR Counsel: Your recollection is correct. The point was made that four jurors that you specifically took up with Judge Christensen ends up that you struck two and the State struck two. And hence my question, could you have used additional strikes?
>
> Trial Counsel: To replace the two that I would have used if those jurors would have been struck by the judge?
>
> PCR Counsel: Right.
>
> Trial Counsel: Absolutely.

PCR Trial Tr. at 11:18–12:17.

This testimony is not sufficient to meet the *Jonas* requirement of specifically naming the juror to be struck with an additional peremptory challenge. Any lawyer offered additional peremptory strikes would gladly take them. But that does not mean they are entitled to them. And here, Smith's trial counsel did not testify that he

had any concerns about the fairness or impartiality of any member of the jury that served.

To sidestep this failure of proof, for the first time in his appellate brief, Smith picks three jurors who "could have" been struck with additional peremptory strikes. While Juror Ko. did pick a five out of 10 when asked whether he agreed with the concept of innocent until proven guilty, it seems evident from the record that he did not fully understand the question posed to him. When asked to elaborate, he said, "Either you're innocent or you're guilty…So that's why I said five," and said that, "until you hear all the evidence, it's the way it is." Ex. 7 (Trial Tr.) at 133:18–134:16. As for Juror P., his duties as a 911 operator involved taking "secondary 911 calls" for the Iowa Department of Public Safety that are "usually traffic complaints." Ex. 7 (Trial Tr.) at 99:15–100:5. Juror P. had also previously been convicted of a crime, but said, "it was my mistake, not anybody else's, so I was treated like I should have been treated." Ex. 7 (Trial Tr.) at 99:1–14, Ex. 12B (Juror Questionnaires) at 16; Conf. App. 22.

And Smith's claim that Juror C. agreed with the statement "criminals have too many rights," cherry-picks his words and leaves out his full statements in the record. After Juror C. agreed with this

statement, he clarified, "you said 'criminals,' which in my mind I take that to be they've already been convicted…if they've been convicted, I think there are times when they do sometimes continue to have rights where maybe the victim gets forgotten about." Ex. 7 (Trial Tr.) at 125:21–126:8. As for unconvicted defendants, Juror C. disagreed that they have too many rights. Ex. 7 (Trial Tr.) at 126:9–127:7.

Nothing about the statements from these three jurors makes it clear a defense lawyer would use a peremptory strike on them. But more importantly, nothing in the record establishes that Smith's trial counsel wanted to strike them. Smith's argument is pure speculation and cannot support his prejudice claim. *See State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993) ("In the absence of some factual showing that this circumstance resulted in a juror being seated who was not impartial, the existence of prejudice is entirely speculative."); *see also State v. Ritchison*, 223 N.W.2d 207, 212–13 (Iowa 1974) (stating that "a reviewing court cannot predicate error upon speculation as to answers which would have been given had objections thereto not been sustained."). And because the jurors were removed, Smith "received a fair trial." *Powell*, 2019 WL 2524264, at *8; *see also Dixon v. State*, No. 16-2195, 2018 WL 3471833, at *7

(Iowa Ct. App. July 18, 2018) (finding *Strickland* prejudice established when "an actually biased juror served on the jury.").

Smith has no constitutional right to a certain amount of peremptory strikes—or any peremptory strikes at all—and he does not claim that any biased juror sat on his juror. *See U.S. v. Martinez-Salazar*, 528 U.S. 304, 313 (2000) (internal citation and quotation marks omitted) (rejecting "the position that, without more, the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. So long as the jury that sits is impartial[,] the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."). As such, Smith has failed to establish any prejudice.

B. Smith has failed to establish any jury misconduct took place or any resulting prejudice.

Next, Smith argues his trial counsel was ineffective for "failing to object to juror misconduct prior to the close of evidence." App. Br. at 33. At the PCR trial, Smith's ex-wife, June Weinbrandt, testified she was present for the final day of trial. PCR Tr. at 32:21–33:12. Weinbrandt claimed that during a break, she went outside to smoke and saw some jurors, who were also smoking. PCR Tr. at 35:3–17. Weinbrandt said she overheard a juror say, "Oh, he's guilty. No

matter what he's guilty," and the other jurors nodded in agreement. PCR Tr. at 35:3–37:1, 43:22–44:14.

Weinbrandt also claimed that Smith's second wife—H.R.'s mother—was standing near the jurors when this was said, although Weinbrandt was not sure whether she was listening to the jurors or whether she was on her cellphone. PCR Tr. at 38:16–40:2, 44:15–45:3. Weinbrandt stated when she returned to the courtroom, she told trial counsel about what she overheard, but he "just blew [her] off." PCR Tr. 40:18–41:22.

Smith's mother also testified at the PCR trial and stated she was outside with Weinbrandt, but she did not overhear anything the jurors may have said. PCR Tr. 49:9–50:7. She also could not remember if Smith's second wife was outside at the time. PCR Tr. 50:8–12. Smith's mother did remember Weinbrandt speaking to trial counsel after they returned to the courtroom, but she did not hear what was said. PCR Tr. 50:13–24.

When asked whether there was any jury misconduct at trial, trial counsel testified that he did not "have any specific recollection of [him] seeing anything or any specific recollection of somebody bringing it up to [him]." PCR Tr. 17:5–17. Trial counsel said that if

someone had told him about possible jury misconduct, "[t]he first thing I would have done is speak to whoever is providing me that information or if it is my own, my observation, take whatever information came from that, and I would take it to the judge with the prosecutor." PCR Tr. 27:6–15. Trial counsel said if Weinbrandt's accusation had been raised to him, he would have made a record of it with the court. PCR Tr. 27:16–21.

The district court found that Smith had failed "to establish that any juror misconduct occurred…There was only one witness, June Weinbrandt, who claims to have seen the alleged misconduct. She claims to have heard the jurors talking on a break and one of them declaring Smith's guilt. Her testimony is not credible or compelling." 04-28-2022 Order Denying PCR at 5; App. 33. The State agrees.

The State also agrees that trial counsel credibly testified that, had he been informed of the alleged misconduct, he would have made a record of it and taken appropriate action. PCR Tr. 27:16–21. It is borderline implausible that had this situation occurred as described by Weinbrandt, that trial counsel would have simply "blown it off."

And even if such a situation did occur—which is a big "if"—Smith has failed to demonstrate any prejudice from it. "A new trial

need not result from misconduct unless there is a reasonably probability that the misconduct did in fact influence the jury in its deliberations." *State v. Anderson*, 448 N.W.2d 32, 34 (Iowa 1989) (internal citation). Smith presented no evidence that these statements impacted the jury's deliberations or its verdict.

In *State v. Christensen*, the Iowa Supreme Court found no reasonable probability the verdict was affected when a jury was informed of outside threats of violence against the jury and discussed these threats during deliberations. 929 N.W.2d 646, 680 (Iowa 2019). And in *State v. Harrington*, the Supreme Court found there was no reasonable probability a jury verdict was affected even though the jurors discussed information that was not introduced at trial, specifically that the defendant had previously shot his brother, but there were only bare assertions that the shooting was mentioned during deliberations and there was no hint of the extent of the discussion. 349 N.W.2d 758, 762–63 (Iowa 1984) *abrogated on other grounds by Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988). The factual scenarios in *Christensen* and *Harrington* are far more extreme than the situation alleged here. Smith's allegations are too thin to prove jury misconduct took place, and there is no indication

that this alleged misconducted affected the jury verdict. Smith's claim fails.

C. Trial counsel made a reasonable strategic choice not to call certain witnesses at trial.

Finally, Smith finds fault with his trial counsel's decision not to call Weinbrandt, Smith's mother, and Smith's daughter as trial witnesses. App. Br. at 38–40. First, Smith makes no prejudice argument in this section of his brief and fails to assert that the result of trial would have been different if these witnesses had testified. In fact, the word "prejudice" appears nowhere in section III of his brief. App. Br. at 37–40. Insofar as he has failed to carry his burden to show any resulting prejudice from trial counsel's actions, Smith's ineffective assistance of counsel claim is facially deficient and should be denied. *See State v. Myers*, 653 N.W.2d 574, 578–79 (Iowa 2002) ("We conclude Myers failed to prove, or even assert, that there was a reasonable probability that, 'but for counsel's error[], [s]he would not have pleaded guilty and would have insisted on going to trial.' Her right to compulsory process cannot be claimed in a vacuum.").

Second, at the PCR trial, trial counsel said he spoke with Smith about offering the testimony of these three witnesses, but he was concerned because some of their testimony was likely not admissible,

and the testimony that was admissible could backfire because their testimony would put Smith and H.R. frequently alone. PCR Tr. 19:7–20:11. Trial counsel was right to be concerned with this possible scenario. In their depositions, Smith's mother and his daughter spoke about how often he was alone with H.R. and her brother. Ex. B (Sabartinelli Deposition) at 23:20–25:2, Ex. D (Dilthey Deposition) at 15:10–16:20. This would have further bolstered H.R.'s testimony that she and her brother were home alone with Smith during the assaults. Ex. 7 (Trial Tr.) at 187:13–189:17, 201:21–25. And having these witnesses testify about Smith's character would have opened the door to the prosecution to do the same. *See* Iowa R. Evid. 5.404(a)(2); Ex. B (Sabartinelli Deposition) at 22:14–23:19, 25:8–11, Ex. C (Weinbrandt Deposition) at 26:2–27:1, Ex. D (Dilthey Deposition) at 26:16–23, 32:2–10. Not calling these witnesses was a reasonable strategic decision on the part of trial counsel, and there was no possibility of a different result at trial. While Smith tries to undervalue the State's evidence, H.R.'s testimony was compelling, detailed, and consistent, and portions of it were corroborated by other witnesses including her mother, Detective Bloom, and Deputy David Beane.

And Smith tries to find fault with trial counsel's decision not to elicit testimony from Deputy Cory Larsen that after the initial investigation, there was not sufficient evidence to charge Smith. App. Br. at 40. But such testimony is inadmissible. Police officers do not make charging decisions; prosecutors do. *See State v. Iowa Dist. Court for Johnson Cty.*, 568 N.W.2d 505, 508 (Iowa 1997) (internal citations omitted) ("In our criminal justice system, the decision whether to prosecute, and if so on what charges, is a matter ordinarily within the discretion of the duly elected prosecutor. The decision whether to bring charges is at the heart of the prosecutorial function."). And no witness is permitted to testify regarding the credibility of the evidence. *See State v. Leedom*, 938 N.W.2d 177, 192 (Iowa 2020) (reiterating Iowa courts' commitment to the principle that an expert witness cannot testify regarding the credibility of a victim). That purely the jury's function. *See State v. Morgan*, 877 N.W.2d 133, 138–39 (Iowa Ct. App. 2016) (internal citations and quotation marks omitted) ("The very function of the jury is to sort out the evidence presented and place credibility where it belongs."). Smith has failed to establish his trial counsel breached a duty and

does not even attempt to argue that the result of trial would have been different had this testimony been pursued. His claim fails.

CONCLUSION

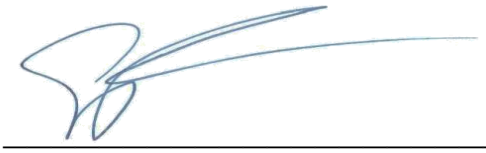
The State respectfully requests that this Court affirm the district court's ruling denying the PCR application in this case.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa



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CERTIFICATE OF COMPLIANCE

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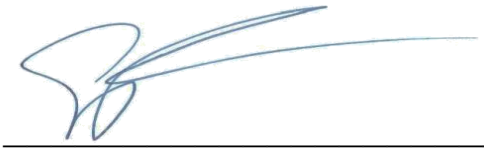

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