IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. REUBEN SCHOOLEY, Defendant-Appellant.	EMMET COUNTY FECR012703 SUPREME COURT NO. 23-1117

APPEAL FROM THE IOWA DISTRICT COURT
FOR EMMET COUNTY
HONORABLE CHARLES BORTH, JUDGE

AMENDED BRIEF FOR APPELLANT

MARTHA J. LUCEY
State Appellate Defender

MELINDA J. NYE
Assistant Appellate Defender
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
6200 Park Avenue
Des Moines, Iowa 50321
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Statutes and Court Rules:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the evidence was insufficient to prove that Reuben Schooley used unreasonable force, torture or cruelty when he yanked his daughter's shirt, slapped her on the head and spanked her on June 12, 2022.

II. Whether the district court improperly considered the guardian ad litem's sentencing statement because it was not authorized and because it contained allegations of unproven conduct.

Routing Statement

This case should be retained by the Iowa Supreme Court because the case raises two substantial issues of first impression. Iowa R. App. P. 6.1101(2)(c). First, the case raises the issue of the sufficiency of the evidence of "unreasonable force, torture, or cruelty" to prove child endangerment when a father slapped his nearly 10-year-old daughter on the top of her head with an open hand and spanked her on the bottom with his hand and sent her outside on a summer day because she was "acting like an animal" for stealing her siblings' belongings. Further, the case raises the issue of the proper role of a guardian ad litem in sentencing. In this case, the guardian ad litem provided an unsolicited "report" advocating for a prison term for the defendant in lieu of the child providing her own victim impact statement, and the court relied on it when imposing sentence.

Nature of the Case

Following a jury trial in the Emmet County District Court, Reuben Schooley was convicted of child endangerment resulting in bodily injury, a class D felony in violation of Iowa Code section

726.6(1)(b) (2022). D0057, Judgment Order at 1 (7/14/23). The district court sentenced Schooley to a five-year indeterminate term of imprisonment and imposed a fine of $1025. D0057, Judgment Order at 1-2. Schooley appeals. D0060, Notice of Appeal (7/14/23). He asserts the evidence was insufficient to support his conviction and the district court improperly considered the sentencing statement of the guardian ad litem when sentencing him.

Statement of Facts

Reuben Schooley raised his daughter, A.S., since she was eighteen months old and her mother's parental rights were terminated. D0073, Trial Tr. Day 2 at 40:3-41:23 (5/10/23). In June 2022, Reuben and A.S., who was just shy of turning ten years old, lived in their home in Ringstead, Iowa, with his girlfriend, Tessica, and her three teenaged children. D0075, Trial Tr. Day 1 at 111:18-112:23 (5/9/23); D0073, Trial Tr. Day 2 at 15:14-16:9; 41:24-42:17 (5/10/23).

Reuben and Tessica had been struggling to effectively discipline A.S. for lying and stealing for roughly two years. Reuben had been

in couples counseling with Tessica, and A.S. had been in therapy as well. They were specifically seeing a behavior therapist who was actively counseling them to help reduce A.S.'s lying. D0073, Trial Tr. Day 2 at 20:1-10; 46:19-49:20. To achieve this goal, and given A.S.'s difficulty accepting responsibility for her actions, they had grounded her for "the better part" of two years. At times while she was grounded, she was not allowed to have anything in her room except her bed and dresser, and she had to eat her meals in her room rather than with the rest of the family. She was not deprived of food and was always encouraged to drink water. D0075, Trial Tr. Day 1 at 113:3-114:19; 120:4-11; D0073, Trial Tr. Day 2 at 31:13-19; 35:20-37:15; 59:15-62:3.

Rueben also utilized spanking as discipline for A.S. He spanked her on her bottom with an open hand, and estimated that he probably spanked her every other day. D0075, Trial Tr. Day 1 at 120:2-3; 125:6-8; D0073, Trial Tr. Day 2 at 62:4-8. State's Ex. 5 (Body Camera 2) at 0:55-1:00; (Body Camera 4) at 1:55-2:40. However, because Reuben was in college, Tessica handled most of

the discipline in the house. She created a wooden paddle to spank A.S. because she didn't think using her hand was effective or got A.S.'s attention. She didn't think Reuben could have ever spanked A.S. hard enough to leave bruising. D0073, Trial Tr. Day 2 at 27:2-28:15; 30:14-31:12; 37:21-38:15; 47:21-48:15; 53:24-55:11; 56:15-23. Another punishment Tessica implemented, in an attempt to avoid physical punishment, was requiring A.S. to wear a shirt over her other clothes that said "Don't trust me" on the back. D0073, Trial Tr. Day 2 at 5:2-9; 34:16-35:19; 55:16-56:7.

Earlier that year, Reuben had been diagnosed with autism. One of the techniques he used to keep himself from becoming overstimulated was to seclude himself for limited periods of time to reduce his exposure to the noise and bustle of the family activities. D0073, Trial Tr. Day 2 at 53:24-54:18. On June 12, 2022, while he was studying in his room, he heard Tessica yelling at A.S. It upset him, so he came of out of his room, took A.S. to her room and spanked her with an open hand on her bottom. She was wearing the "don't trust me" shirt, so he pulled it off of her and told her to get

out of the house because she was acting like an animal. D0073, Trial Tr. Day 2 at 42:18-43:15; 58:5-59:14. Reuben had no recollection of hitting A.S. in the head, although he acknowledged that both Tessica and A.S. claimed he did. D0073, Trial Tr. Day 2 at 63:1-4. A.S. went outside, and when Reuben couldn't see her, he went out to see where she was. He found her talking to her stepsister, who was supposed to be mowing. He told A.S. to "get out of there." A.S. cried and yelled at him and "starting marching down the street." Reuben watched her until she got to the end of the street and turned a corner. At that point, he decided to go get her. D0073, Trial Tr. Day 2 at 43:16-44:12.

Tessica remembered that Reuben had been in his room, when she was in the kitchen with A.S. and got upset with A.S. about something and yelled at her. Reuben came out of his room, "getting loud with her and then grabbed her, kind of put his arm around her head – not – you know, and slapped her on the top of the head." She did not see Reuben spank A.S. that day. She was surprised at his reaction because he is usually the calmest one in the family. D0073,

Trial Tr. Day 2 at 17:9-19:25; 31:24-32:20; 33:7-13. He told A.S. to go outside, something that had been recommended in therapy, as a way to separate and let everyone's emotions settle. After she went outside, they realized that she was disrupting her stepsister's mowing. He told her to leave her sister alone, and A.S. walked away. D0073, Trial Tr. Day 2 at 22:1-23:3; 32:21-33:6; 34:2-15.

A.S. generally remembers events the same way, with a few differences. She does not remember being in trouble with Tessica, but instead thinks she was sitting in her room, when Reuben came in and spanked her. He yanked on her shirt, spanked her on the bottom, and hit her on her head with an open hand. She testified that it did not hurt when he yanked on her shirt, but that her head and bottom hurt for "a couple minutes." She said he didn't tell her why he was spanking her, but she knew she had been bad by taking her sibling's things. She thinks he might have scratched her when he pulled her shirt off. He told her she was stupid and an animal and told her to go outside because she shouldn't be in his house.

She did, walking away down the street barefoot. D0075, Trial Tr. Day 1 at 115:2-118:24; 122:23-124:12.

Olivia Hammond was outside in her yard with her son and husband when A.S. approached them. A.S. began crying, so Olivia sat down on the porch with her. She saw A.S. had a red mark on her neck. She testified that A.S. told her that her dad had grabbed her by the collar, slammed her head into the wall, called her a dirty animal and kicked her out of the house. A.S. explained she had been punished for taking something from one of her siblings. Reuben arrived within a few minutes in the car, and A.S. told Olivia she didn't want to go, but she eventually got into the car with Reuben. Olivia called 911 as soon as they drove away. D0075, Trial Tr. Day 1 at 118:25-119:14; 120:12-121:6; 127:13-130:14; 131:18-133:8; 135:5-136:11. D0049 State's Ex. 1 (5/12/23); D0050 State's Ex. 2 (5/12/23).

Deputy Thomas Schultes responded to the call. He first spoke with Olivia, then went to the Schooley house. Reuben answered the door. Reuben acknowledged that he had spanked A.S. and that she

left the house. He willingly allowed A.S. to speak with Deputy Schultes privately. Deputy Schultes noticed fresh red marks on A.S.'s neck and collarbone, and when Schultes asked him, Reuben did not know how he could have left the marks, although he remembered later that he had taken the shirt off of her. Deputy Schultes arrested Reuben, and then asked Tessica to help him look at her bottom for marks. They found fading bruises. D0075, Trial Tr. Day 1 at 138:15-151:1; D0073, Trial Tr. Day 2 at 65:9-16. D0049-D0052, State Exs. 1-4; State's Ex. 5.[1] Because the bruises were fading, and because Reuben used an open hand over her clothing without a lot of force, no one thought the spanking Reuben administered on June 12 could have caused the bruising observed. D0073, Trial Tr. Day 2 at 65:6-8; 122:9-22.

DHS provided services to the family after Reuben was charged with child endangerment. The family was receptive, successfully

[1] State's Exhibit 5 consists of four segments of Officer Schultes body camera footage. The State only played portions of each segment, identified in the trial transcript: Segment 1 (1:08–5:14); Segment 2 (2:46-3:40 and 6:45-7:41); Segment 3 (0:00-1:56); and Segment 5 (1:40-3:16). D0075, Trial Tr. Day 1 at 140:4-150:9.

completing two rounds of family preservation services. Reuben and Tessica altered their parenting and disciplinary styles, moving A.S. belongings back to her room. They found that her behavior improved. D0075, Trial Tr. Day 1 at 162:3-25; D0073, Trial Tr. Day 2 at 3:20-9:25; 20:14-21:20; 25:4-27:1; 31:20-23; 49:21-51:10; 56:8-14.

Argument

I. The evidence was insufficient to prove that Reuben Schooley used unreasonable force, torture or cruelty when he yanked his daughter's shirt, slapped her on the head and spanked her on June 12, 2022.

A. Error Preservation. Because Reuben Schooley proceeded to trial and has been convicted, he may challenge the sufficiency of the evidence supporting his conviction on direct appeal whether or not he made a sufficient motion for directed verdict. State v. Crawford, 972 N.W.2d 189, 198 (Iowa 2022). However, he did move for a directed verdict, the State resisted, and the district court denied the motion. D0073, Trial Tr. Day 2 at 10:23-11:22 (5/10/23).

B. Standard of Review. Challenges to the sufficiency of the evidence are reviewed for the correction of errors at law. State v.

Jones, 967 N.W.2d 336, 339 (Iowa 2021). The appellate court grants deference to the jury's verdict and will uphold the verdict if it is supported by substantial evidence. Id.

Evidence is substantial if it could "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." Jones, 967 N.W.2d at 339. In assessing the sufficiency of the evidence, the court considers all of the evidence, not just the evidence supporting guilt. State v. West Vangen, 975 N.W.2d 344, 348 (Iowa 2022). However, the court views the evidence in the light most favorable to the verdict. Id. at 348-49. Evidence that merely raises suspicion, speculation, or conjecture is insufficient. Id. at 349 (quoting State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992) (en banc)).

C. Discussion. To prove Reuben guilty of child endangerment resulting in bodily injury, the State had to prove:

> 1. On or about the 12th day of June, 2022, the defendant was the parent of A.S.
>
> 2. A.S. was under the age of fourteen years.
>
> 3. The defendant intentionally committed an act or series of acts which used unreasonable force, torture, or cruelty that resulted in bodily injury to A.S.

D0046, Jury Instr. No. 14 (5/10/23). See also Iowa Code § 726.6(1)(b) (2022). In this case, Reuben stipulated that he was A.S's parent and that A.S. was under the age of fourteen. D0043, Stipulation (5/10/23).

The jury was also instructed that

> A parent of a child under the age of 14 may use reasonable and timely physical punishment to discipline the child.
>
> In determining the reasonableness of the force used, you may consider the age, physical condition, and other characteristics of the child; the gravity of the misconduct; the amount and means of the force used; and whether the punishment was corrective rather than to satisfy the anger of the person inflicting it.

D0046, Jury Instr. No. 15 (5/10/23). See also State v. Arnold, 543 N.W.2d 600, 603 (Iowa 1996).

Reuben's actions on June 12, 2022, were within his parental rights to discipline his daughter and did not exceed those bounds and rise to the level of "unreasonable force, torture or cruelty" as required to support his conviction. Iowa Code § 726.6(1)(b). See also Hildreth v. Iowa Dept. Human Svcs., 550 N.W.2d 157, 160 (Iowa 1996).

A.S. testified that on June 12, 2022, she told the Deputy Schultes that Reuben had "spanked me on the butt and hit me on the head" with an open hand. She agreed that he had also "yanked on her shirt." D0075, Trial Tr. Day 1 at 115:2-13; 116:23-117:1; 122:23-123:3. She explained that when her dad hit her on the head "I mean, it hurt like a couple minutes." As well, the spanking "only hurt for a few minutes." D0075, Trial Tr. Day 1 at 115:16 – 116:4; 116:17-23. It didn't hurt when he yanked on her shirt, but it left red marks on her neck and clavicle area, presumably from an inadvertent fingernail scratch. D0075, Trial Tr. Day 1 at 115:18-19; 123:12-124:2. D0049-D0050, State's Exs. 1 & 2 (5/12/23). She said he didn't tell her why he was hitting her but she knew it was because she had taken things that belonged to her siblings. D0075, Trial Tr. Day 1 at 117:2-7. He called her stupid and told her she didn't belong in the house because she was acting like an animal, so she left the house and walked down the street barefoot. D0075, Trial Tr. Day 1 at 117:8-11; 118:8 - 119:14. She testified that Reuben had spanked her before but mostly it was Tessica who

spanked her. She estimated she was spanked every other day. She thought that "maybe once" Reuben had spanked her with a paddle, but "it was still mostly Tessica" who used the paddle. She also testified that Tessica had spanked her with the paddle just a few days before, which left the bruising that was found on her bottom. D0075, Trial Tr. Day 1 at 119:15-120:3; 122:9-22; 125:6-8. D0051-D0052, State's Ex. 3 & 4 (5/12/23).

Reuben's testimony largely tracked with A.S.'s recollection, although he explained that A.S. had been downstairs when she got in trouble with Tessica. He was in his room studying and heard Tessica yelling. He took A.S. to her room and spanked her with an open hand on her bottom. He took off the "don't trust me shirt" she was wearing and told her to get out of the house because she was acting like an animal. D0073, Trial Tr. Day 2 at 42:18-43:15; 58:5-59:14. Reuben did not recall hitting A.S. in the head that day. D0073, Trial Tr. Day 2 at 63:1-4. She went outside, and when he saw she was disrupting her stepsister from mowing, Reuben yelled at her to "get out of there." A.S. left yard, and Reuben went to get

her once he saw she turned a corner and was out of sight. D0073, Trial Tr. Day 2 at 43:16-44:12.

He was confident he could not have caused the bruises found on A.S.'s bottom that day, or on any other day, because he only spanked her with his hand and because he didn't ever spank her hard enough to make an impact on her. D0073, Trial Tr. Day 2 at 55:1-11; 64:25-65:8. He knew Tessica had a paddle, but he hadn't ever seen Tessica use it. D0073, Trial Tr. Day 2 at 56:15-23; 62:9-16. He agreed that he told the officer that he yanked the shirt off of A.S. He did not intentionally scratch A.S. when he took off the shirt, but agreed it was possible he scratched her with his fingernail. He agreed that hitting A.S. on the head was not an appropriate disciplinary action, and that he felt guilty when he spanked A.S. He explained that he doesn't spank A.S. "out of a place of anger. It's because I'm angry at the things she's doing." D0073, Trial Tr. Day 2 at 63:5-64:6; 65:9-16.

Tessica testified she was in the kitchen that afternoon, when she got upset with A.S. and yelled at her. She couldn't remember

exactly why, but thought it was related to the continuous problems they'd been having with A.S. lying and stealing. Reuben came out of his room, "getting loud with her and then grabbed her, kind of put his arm around her head – not – you know, and slapped her on the top of the head." She did not see Reuben spank A.S. that day. D0073, Trial Tr. Day 2 at 17:9-19:25; 31:24-32:20; 33:7-13. He told A.S. to go outside, and she did, but soon after they realized she was disrupting her stepsister. He told her to leave her sister alone, and A.S. walked away. D0073, Trial Tr. Day 2 at 22:1-23:3; 32:21-33:6; 34:2-15. After A.S. left and they couldn't see her from the house, Reuben went to get her. D0073, Trial Tr. Day 2 at 22:1-23:3; 32:21-33:6; 34:2-15.

Tessica acknowledged that she had used a wooden paddle to spank A.S. on the bottom prior to June 12. She denied that she could have caused the bruises found on A.S. but also didn't have any other explanation for how they could have gotten there. She testified that although Reuben had spanked A.S., he always did it with his hand and not hard enough to make A.S. cry. She was sure he

couldn't have bruised her. She estimated that she had used the paddle on A.S. within a week of June 12. D0073, Trial Tr. Day 2 at 27:2-28:15; 37:21-38:15.

Reuben's actions on June 12, 2022—spanking A.S. on her bottom with an open hand over her clothing, smacking her on the top of her head with an open palm, and forcibly removing her extra shirt and sending her outside do not rise to the level of unreasonable force, torture or cruelty as required for a conviction pursuant to Iowa Code § 726.6(1)(b) (2022). Under Iowa law, "a parent has a right to 'chastise his child,'" and it is only when "'when such chastisement amounts to cruelty or inhumanity,'" the conduct becomes criminal. State v. Rollins, No. 12-0548, 2013 WL988853 at *6 (Iowa Ct. App., March 13, 2013) (quoting In re W.G., 349 N.W.2d 487, 488 (Iowa 1984)). Parents have "a right to inflict corporal punishment on their child, but that right is restricted by moderation and reasonableness." Arnold, 543 N.W.2d at 603, citing State v. Bell, 223 N.W.2d 181, 184 (Iowa 1974). "The proper test is whether, under the particular circumstances, the amount of force used or the means employed by

the parent rendered such punishment abusive rather than corrective in character." Arnold, 543 N.W.2d at 603, citing State v. Fischer, 245 Iowa 170, 177, 60 N.W.2d 105, 109 (1953). The determination of whether the conduct exceeded permissible discipline must be determined on a case by case basis because "the amount of force which would be reasonable or excessive necessarily varies with the age, physical condition, and other characteristics of a child as well as with the gravity of the child's misconduct." Arnold, 543 N.W.2d at 603.

In this case, to discipline his nearly 10-year-old daughter for stealing, Reuben spanked her on her bottom with an open hand over her clothing. She testified it only hurt for a couple minutes. He slapped her on the top of her head with an open hand, also causing pain for a few minutes. He told her she was acting like an animal and sent her outside on a summer evening, yanking off her extra shirt and accidentally scratching her, although A.S. felt no pain. Because he didn't intend for her to leave the yard, he went to pick her up when she got out of sight.

Open-handed spanking on the bottom is the quintessential allowable mild physical punishment contemplated by Iowa law acknowledging parents' right to discipline their children. The open-handed slap on the top of the head is similar. A.S. testified each punishment only hurt for a minute, and neither caused any other injury. Iowa cases finding parental discipline amounted to abuse or unreasonable force, torture, or cruelty have all involved much more egregious physical punishment than an open-handed spanking. See e.g, State v. Benson, 919 N.W.2d 237, 242-43 (Iowa 2018) (affirming convictions for assault and child endangerment when father hit child on the legs with a broomstick causing bruising visible after three days); State v. Hickman, 576 N.W.2d 364, 367-68 (Iowa 1998) (upholding conviction for child endangerment of woman who "whupped" child repeatedly and hard with a belt, her hand, a shoe and a spoon); Arnold, 543 N.W.2d at 603 (upholding child endangerment conviction for father who struck child with a leather belt leaving significant bruising still visible after three days). In the child welfare context, the Iowa Supreme Court concluded that a

father who spanked an eight-year-old three times on her bottom with a wooden spoon over her jeans was not guilty of child abuse even though the spanking left red marks on her buttocks visible the next day. See Hildreth, 550 N.W.2d at 159-60. See also In re Laequise P., 119 A.D.3d 801, 802, 989 N.Y.S.2d 292, 293 (2014) (concluding father's "open-handed spanking" of an eight-year-old child "as a form of discipline after he heard the child curse at an adult was a reasonable use of force and, under the circumstances presented here, did not constitute excessive corporal punishment."); In re F.W., 634 N.E.2d 1123, 1129 (Ill. App. 1994) ("parents should understand a swat on a child's buttocks with an open hand and the 'paddling' of a child with belts, boards, cords, or ropes are intrinsically distinct exercises of corporal punishment.").

"Whatever changes may have occurred in social views on corporal punishment, Iowa law has remained consistent. The government can intrude only so far into family judgments on such matters." Arnold, 543 N.W.2d at 602. Because Reuben's actions of spanking his daughter on the bottom, slapping her on her head, and

sending her outside as punishment for stealing do not constitute unreasonable force, torture or cruelty, the district court erred in denying Reuben's motion for directed verdict.

D. Conclusion. Because the evidence was insufficient to support Reuben's conviction for child endangerment, conviction should be vacated and his case remanded for dismissal.

II. The district court improperly considered the guardian ad litem's sentencing statement because it was not authorized and because it contained allegations of unproven conduct.

A. Error Preservation. The appellate court will review a defendant's claim of abuse of discretion during sentencing on direct appeal with or without an objection in the trial court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994).

B. Standard of Review. Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907; State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of

impermissible factors." State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998); State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998).

C. Discussion. A sentencing court abuses its discretion if it considers an impermissible factor in sentencing a defendant. State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998); State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998). "A court may not consider an unproven or unprosecuted offense when sentencing a defendant" unless the State proves or the defendant admits that offense. State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998). Where "the sentencing court[]… ma[kes] specific reference to" the impermissible factor, an "affirmative showing" is made that the court considered that factor. State v. Jose, 636 N.W.2d 38, 43 (Iowa 2001); State v. Lovell, 857 N.W.2d 241, 242-43 (Iowa 2014).

If the court relies on an improper factor, the defendant is entitled to a new sentencing hearing, even if the impermissible factor was "merely a secondary consideration." State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014) (quoting State v. Grandberry, 619 N.W.2d 399, 401 (Iowa 2000)). If the court has relied on an improper factor, the

appellate court "cannot speculate about the weight a sentencing court assigned to [the] improper consideration and the defendant's sentence[] must be vacated and the case remanded for resentencing." State v. Gonzalez, 582 N.W.2d 515, 517 (Iowa 1998). To "protect the integrity of our judicial system from the appearance of impropriety," resentencing must be before a different judge. Lovell, 857 N.W.2d at 243.

In this case, a guardian ad litem (GAL) was appointed pursuant to Iowa Code section 915.37 to represent A.S.'s interests. Iowa Code § 915.37 (2023). The court appointed the same attorney who had been appointed as GAL in a concurrent chapter 232 proceeding. D0025, Motion for GAL (4/12/23); D0026, Response to Motion (4/12/23); D0027, Order Appt'g GAL (4/12/23).

In this case, prior to sentencing, the GAL provided written statement, labelled as a "report to the court" which was initially filed as an addendum to the PSI. D0056, PSI Addendum (7/13/23). The PSI authors characterized the report as a Victim Impact Statement. D0056, PSI Addendum at p. 1. When making its

sentencing recommendation, the State noted that the GAL "wrote a report to speak for A.S." D0067, Sent. Tr. 6:16-18 (7/14/23). Later, the State again represented that the GAL's statement was a victim impact statement: "The guardian ad litem did do a victim impact statement for A.S., and so she has requested that we read her statement in open court this morning." D0067, at 12:10-14. The State clarified that the victim impact statement read at sentencing was the same as the GAL's report that was addended to the PSI. D0067, at 12:10-13:9.

1. Because the GAL's statement was not authorized, the district court should not have considered it when imposing sentence. When the court-imposed sentence, it explicitly relied on the GAL's sentencing recommendation: "The Court finds, as suggested by the guardian ad litem, that probation would not be an adequate deterrent to this defendant." D0067, at 14:2-8. Because the statement provided by the GAL was not authorized by the pertinent statutes, the court's consideration of the statement and its contents was an impermissible sentencing consideration. Accordingly, Schooley's

sentence should be vacated and his case remanded for resentencing. See Gonzalez, 582 N.W.2d at 517.

The GAL was appointed to represent A.S.'s interests during the trial pursuant to Iowa Code section 915.37.

> The guardian ad litem shall receive notice of and may attend all depositions, hearings, and trial proceedings to support the child and advocate for the protection of the child but shall not be allowed to separately introduce evidence or to directly examine or cross-examine witnesses. However, the guardian ad litem shall file reports to the court as required by the court.

Iowa Code § 915.37(1)(a) (2023).

Although the GAL may provide reports "as required by the court," there is no indication in the record that the court requested this report from the GAL. See Iowa Code § 915.37(1)(a) ("However, the guardian ad litem shall file reports to the court as required by the court."). In fact, at the beginning of the sentencing hearing, the court seemed unaware that the document had been prepared and certainly gave no indication that it was expecting a report from the GAL. "I see there was addendum filed yesterday which I haven't looked at but I will look at quickly." D0067, Sent. Tr. 2:14-17

(7/14/23). Thus, while it was titled as a "report to the court," the sentencing recommendation was not requested by the court from the GAL pursuant to section 915.37(1)(a).

While the GAL is authorized to "advocate for the protection of the child" at the trial proceedings, section 915.37 does not expressly authorize the GAL to provide a sentencing recommendation or a victim impact statement on behalf of the child. See Iowa Code § 915.37(1)(a). The limitations placed on a GAL by section 915.37 demonstrate that a GAL is not a second prosecutor. Advocating for the protection of the child is not the same as advocating for the conviction of the defendant. State v. Skahill, 966 N.W.2d 1, 18 (Iowa 2021). "It is not the GAL's role to attempt to bring about a *result* in the criminal case just because the GAL believes the result will benefit the child." Skahill, 966 N.W.2d at 18-19 (emphasis in original). Although section 915.37 does not expressly prohibit the GAL from making a sentencing recommendation, because advocating for a particular sentence is equivalent to the other prosecutorial duties such as introducing evidence and examining witnesses, which are

prohibited, this court should conclude a sentencing recommendation is also prohibited because it exceeds the GAL's proper role.

As well, the GAL's report was not a proper victim impact statement. When a "victim is unable to make an oral or written statement because of the victim's age, or mental, emotional, or physical incapacity, the victim's attorney or a designated representative shall have the opportunity to make a statement on behalf of the victim." Iowa Code § 915.21(1)(e) (2023). The record in this case does not establish that A.S. was unable to make her own victim impact statement or that the GAL was A.S.'s "designated beneficiary." See State v. Lopez, 872 N.W.2d 159, 176-77 (Iowa 2015).

The GAL stated that it would be "detrimental" and "traumatic" to A.S. to be present at the sentencing hearing, but the record does not establish that A.S. was "unable" to make her own victim impact statement. A.S. was ten at the time of trial and eleven at the time of sentencing. She had testified at trial and by all accounts was smart and certainly capable of expressing herself. D0075, Trial Tr. Day 1

at 108:20-21 (State's opening argument); 110:5-7 (court's questioning of A.S.); D0073, Trial Tr. Day 2 at 26:19-20 (testimony from Tessica). Although the GAL may not have thought it was in A.S.'s best interests to appear at sentencing, that concern does not authorize the GAL to provide a statement on behalf of A.S. A.S. could have provided her own victim impact statement in writing, or by video or audio recording without appearing at sentencing. Iowa Code § 915.21(1)(a-d). The GAL did not indicate whether she had even spoken with A.S. about providing a victim impact statement. Instead her statement focuses on the concerns of "many child victims." D0056, PSI Addendum at ¶ 13-14 (7/13/23). In fact, the GAL explicitly states that her sentencing recommendation is her own and that she seeks a prison term "in the best interest of the child." D0056, PSI Addendum at ¶ 17. She is not expressing A.S.'s concerns, as would properly be done if she were presenting a victim impact statement for A.S., but rather she is making her own independent sentencing recommendation.

Because the GAL's statement was not authorized by either section 915.37 or 915.21, it was improper for the court to rely on the statement when imposing Reuben's sentence. His sentence should be vacated and his case remanded for a new sentencing hearing.

D. <u>Even if the GAL's statement is permissible, it alleged unproven and unadmitted conduct that the court improperly relied on when sentencing Reuben</u>. The GAL's recommended a term of imprisonment for Reuben, citing incidents occurring after trial. The GAL relied on these allegations to conclude that Reuben had not taken responsibility for his actions and would not be deterred unless he was sent to prison.

> The concern the undersigned has for the child victim in this matter is that it does not appear that the Defendant has taken responsibility for the harm he caused his child, or perhaps worse, that he simply does not care. The pattern of abuse continued up again after the verdict and the undersigned feels that unless the Defendant faces serious punishment for the abuse he caused his child and the abuse he allowed his girlfriend to cause, he will simply do it over and over again and get better at hiding it.
>
> Sentencing the Defendant to probation would not deter future violence, it perhaps would encourage it. The family has shown through the course of trial an subsequent that they will retaliate against A.S.

D0056, at ¶ 15-16. See also D0056, PSI Addendum at ¶ 10-12 (describing events occurring after trial).

The district court relied explicitly on the GAL's reasoning when imposing sentence: "The Court finds, as suggested by the guardian ad litem, that probation would not be an adequate deterrent to this defendant." D0067, Sent. Tr. at 14:2-8. The GAL's "deterrence" justification for a prison term was based squarely on her allegations of unproven misdeeds committed after trial, conduct for which Reuben had not been convicted and which he strongly contested. D0056, at ¶ 15-16. D0067, Sent. Tr. at 8:12-9:17; 10:19-11:24. So when the court found, "as suggested by the guardian ad litem" that probation would not deter Reuben, the court was relying on the unproven and unadmitted conduct alleged in the GAL's statement.

E. Conclusion. Because the district court improperly relied on the unauthorized statement from the guardian ad litem, or in the alternative, on the unproven allegations contained in the statement, Reuben's sentence should be vacated and his case remanded for a

new sentencing hearing before a different judge. Lovell, 857 N.W.2d at 243.

Request for Oral Submission

Counsel requests to be heard in oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(i)(1) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,624 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

Melinda J. Nye
Assistant Appellate Defender
Appellate Defender Office
6200 Park Avenue
Des Moines, IA 50321
(515) 281-8841
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

Dated: *3/22/24*

MJN/lr/03/24

Filed: *3/22/24*