IN THE SUPREME COURT OF IOWA
Supreme Court No. 23–0413
Pottawattamie County No. FECR163543

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALLAN ROBERT SIEVERS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
THE HON. KATHLEEN KILNOSKI, JUDGE

AMENDED BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **Did the trial court err in overruling Sievers's objection and admitting testimony from the victim's friend about a statement in which the victim disclosed sexual abuse (after he had told a different friend, but years before he told his mother) as an initial disclosure of abuse under section 622.31B?**

II. **Did the trial court err in overruling Sievers's objection and admitting evidence of pornographic images from a hidden folder on Sievers's computer, which included a photo that showed a young boy's anus and testicles?**

III. **Did the trial court err in permitting the prosecution to present testimony from a witness wearing jail garb and non-visible shackles, who was friends with Sievers?**

IV. **Did the trial court err in permitting cross-examination after Sievers testified to his general denial, then said that he was willing to answer the State's questions?**

V. **The victim testified that Sievers touched his penis on multiple occasions. Did substantial evidence support these convictions for sexual abuse?**

ROUTING STATEMENT

Sievers requests retention. *See* Def's Br. at 8. The State agrees that it presents an issue of first impression, regarding the applicability of section 622.31B when there are multiple initial disclosures. As such, retention is appropriate. *See* Iowa R. App. P. 6.1011(2)(c).

Also, this case involves 5.404(b) evidence of motive to commit sexual abuse against a young boy. This implicates a specific segment of *State v. Putman* that was wrongly decided and should be overruled. *See State v. Putman*, 848 N.W.2d 1, 10 (Iowa 2014). Retention is also appropriate for that reason. *See* Iowa R. App. P. 6.1011(2)(f).

STATEMENT OF THE CASE

Nature of the Case

This is Allan Robert Sievers's direct appeal from his convictions on two counts of second-degree sexual abuse, both Class B felonies, in violation of Iowa Code section 709.3(1)(b) (2010). Sievers engaged in sex acts with E.O., while E.O. was between five and nine years old. A jury found Sievers guilty on both of those counts.[1] At sentencing, the court imposed 25-year sentences of incarceration with a 70% minimum before parole on each count, then set them to run concurrently.

[1] The jury could not reach a unanimous verdict on a charge of lascivious acts with a child. The court declared a mistrial on that count.

In this appeal, Sievers argues **(1)** the trial court abused its discretion in admitting evidence of E.O.'s initial disclosures under section 622.31B; **(2)** the district court erred in admitting evidence of photographs that Sievers kept on his computer for sexual gratification (including a photo of a young boy's anus and testicles) to establish his motive to commit a sex act with E.O., in the manner E.O described; **(3)** the trial court erred in overruling Sievers's request for the State's rebuttal witness to testify in civilian clothing (instead of prison garb); **(4)** the trial court erred in permitting the State to cross-examine him after he testified in his own defense, because his testimony on direct was limited to a flat denial in an answer to a single question about whether he did what E.O. had described; and **(5)** the evidence was insufficient to support his convictions for doing what E.O. testified that he did.

Statement of Facts

E.O. was born in 2004. His mother (Leslie) dated Sievers. E.O. and Leslie stayed with Sievers frequently, starting in 2010. During the summer of 2013, Leslie and E.O. moved in with Sievers. They moved out in December 2013. *See* D0280, Trial Tr. (12/13/22 – 12/19/22)[2] 304:9–307:9.

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[2] The State is reasonably sure that D0280 is the trial transcript.

E.O. testified, under oath, that Sievers sexually abused him. It would start with Sievers "[s]howing [him] naked photos of women, other stuff like that . . . [o]ff of his computer," to see what E.O. was "comfortable with." *See* D0280, at 332:21–334:9. Sievers told E.O. that he looked at those photos on his computer "all the time." *See* D0280, at 334:12–335:7. Subsequently, while E.O. was laying in bed and "trying to go to sleep," Sievers stroked E.O.'s penis. Sievers told E.O. "that he does it to himself all the time and that it was normal." *See* D0280, at 335:13–336:13; D0280, at 337:23–338:12 (demonstrating that Sievers used "his index finger and his thumb in an up-and-down motion"). E.O. knew he could remember two specific instances when that happened; he could remember both "falling asleep to it" and "waking up to it." *See* D0280, at 336:8–337:8. He also remembered instances when he was on Sievers's bed, while he was watching the Lord of the Rings movies. It was a trilogy; E.O. and Sievers watched them on consecutive nights. On the first night, Sievers stroked E.O.'s penis:

> I believe [Sievers] asked me to get undressed. I got into his bed. And while we were watching the movie, he grabbed my penis and started stroking it.
>
> [. . .]

> It was strange to me. Again, I was a child and had no idea what those feelings actually were. Some days it made me sick to my stomach; other days it didn't bother me at all.

See D0280, at 339:12–340:23. On the next night, E.O. fell asleep in Sievers's bed—but he woke up to "Sievers thrusting behind [him]," with his penis between E.O.'s naked buttocks. E.O. just laid there and tried to force himself to go back to sleep. *See* D0280, at 340:24–342:25. On the third night, Sievers stroked E.O.'s penis after the movie ended. *See* D0280, at 343:9–344:5.

Sievers had access to E.O. while Leslie was working overnight, as a nurse. *See, e.g.*, D0280, at 338:13–339:11; D0280, at 381:3–21; D0280, at 404:3–20. Sievers would only touch E.O. on nights when nobody else was in the house. *See* D0280, at 344:9–345:1. On one such occasion, Sievers told E.O. it was "naked man night," so they "watched movies completely naked." *See* D0280, at 345:2–347:6. Sievers would "grab his [own] penis and swing it in circles," as E.O. watched. *See id.*

E.O. did not want to talk about this. He had "tried for years to bury it in [his] own head" because he "didn't want to think about it" and "didn't want to feel the feelings that come with it." *See* D0280, at 348:3–13. He remembered what Sievers did to him and realized that

it was inappropriate when he "had sexual ed class in fifth grade." *See* D0280, at 348:14–16. E.O. made partial disclosures to two of his friends (C.M. and K.K.) in vague, non-specific terms. *See* D0280, at 363:12–23.

E.O. disclosed the abuse to Leslie when he was in ninth grade. E.O. had gotten in a fight and had been sent to the principal's office. The school called Leslie, and she came to the school to talk with E.O. E.O. "became very tearful," which led to this disclosure:

> I told him that if he needed help, if he was — that I was there to help him. And he looked at me and said the last time that I told — or that I tried to tell you I needed help, you never helped me. And I asked him what he meant . . .
>
> [. . .]
>
> He said when I told you I needed help you didn't help me. I said what do you mean. And he said do you remember when I used to tell you that [Sievers] was mean to me. And I said yes. And he said, mom, the motherfucker raped me.

See D0280, at 309:11–312:8; *accord* D0280, at 348:24–353:6 (E.O.'s account of the same disclosure).

Leslie reported this to the sheriff's office. E.O. participated in a forensic interview. A redacted version of that interview was admitted by agreement between the parties. *See* D0280, at 369:7–20; D0280, at 575:12–577:18; D0280, at 608:17–616:4; D0210, State's Ex. 56 at 12:22–24:58.

A sheriff's deputy contacted Sievers and interviewed him about E.O.'s allegations, at Sievers's home. *See* D0280, at 450:8–451:8. When he asked Sievers if he had touched E.O. inappropriately, Sievers said "no, I don't think so or maybe in the shower"—Sievers equivocated and offered explanations for why he may have touched or grabbed E.O. in innocuous ways. *See* D0280, at 458:10–459:4; D0205 & D0206, State's Exs. 11 & 13.

Deputies obtained a search warrant to look for the pornography that E.O. described on Sievers's electronic devices. At that time, Sievers was engaged to Jamie Doran. She was there when the search warrant was executed. She testified that Sievers told her something important:

> [T]he officer had [Sievers's] phone in his hand, the officer's hand, and [Sievers] requested to have the phone to check his time clock to get hours off of it for work. The officer then handed him back the phone and [Sievers] said at that point in time that he had deleted an encrypted file called Time Clock that had pictures on it that he didn't want other people to see.

D0280, at 537:8–538:4. When a deputy tried to search that phone, he "wasn't able to retrieve data from it." *See* D0280, at 518:19–519:10.

As deputies seized a particular computer, Sievers told them that it "was used only for work and did not have internet access." *See* D0280, at 518:11–18. A deputy found pornography on that computer,

hidden in a directory for device drivers, in a series of folders with decoy names. *See* D0280, at 501:16–506:22. The hidden folder had "249 still photos and 16 videos," in two subfolders. *See* D0280, at 506:23–508:1. All of that content was pornographic. One photo stood out to the deputy:

> Within the XXXTrent & Others folder there was a digital photograph, a JPEG file, that showed a — a — a male child with light colored hair and he is outside in daylight on a wooden deck or patio. He's bent over and bracing himself on a few steps on this — on this deck. He is not wearing a shirt. He is wearing blue-and-white plaid cargo pants. And also red, white and blue striped underwear. Both of which are pulled down revealing his buttocks and testicles.

D0280, at 507:5–508:1. A sheet of the images in those files was admitted into evidence, over Sievers's "objections of 403 and 401." *See* D0280, at 508:14–509:19; D0215, State's Ex. 57. The parties stipulated that the boy in that photo was not E.O. *See* D0280, at 302:6–303:15.

There were also "shellbags" that indicated that there were once other files and folders that Sievers had deleted from that hidden folder when it was in a different location in the directory. At one point, that hidden folder had contained "a subfolder under that called Leslie and a subfolder under Leslie that was called [E]." *See* D0280, at 510:14–516:2.

There were over 25,000 non-explicit images (like "family photos and vacation photos") stored elsewhere on that computer. But none of the images in Sievers's hidden folder were non-explicit or non-sexual. *See* D0280, at 516:17–517:23. A number of the explicit photos showed Sievers himself, often with others. Another man (Trent Suhr) was in explicit photos taken inside Sievers's house. *See* D0280, at 525:14–526:2.

Sievers testified in his own defense. He had moved to limit the State's cross-examination. *See* D0280, at 672:3–677:6. The trial court had preliminarily ruled that "once [Sievers] takes the stand his credibility is at issue," and he could be cross-examined accordingly. *See* D0280, at 675:2–20. Here is the entirety of the direct examination of Sievers:

> **DEFENSE**: Could you please state your name for the record.
>
> **SIEVERS**: My name is Allan Robert Sievers.
>
> **DEFENSE**: How do you feel about testifying today?
>
> **SIEVERS**: Pretty nervous.
>
> **DEFENSE**: Were you in court over the past couple of days and did you hear all the allegations against you by [EO]?
>
> **SIEVERS**: Yes, I did.
>
> **DEFENSE**: Are any of the allegations that you sexually abused [EO] true?
>
> **SIEVERS**: No, they are not.

> **DEFENSE**: Are you ready and willing to answer any questions the state might have concerning your testimony today?
>
> **SIEVERS**: Yes, I am.
>
> **DEFENSE**: No further questions.

D0280, at 679:3–680:5. The State asked to approach. Outside the presence of the jury, the State explained that the last question had opened the door to wide-ranging cross-examination. Sievers argued that cross-examination should be limited to questions about whether E.O.'s allegations were true, which he said was "a very wide berth." *See* D0280, at 680:7–682:5. The trial court ruled:

> I think the door is very wide open. I think the questions need to be consistent with my pretrial rulings in limine . . . . But, yes, I think otherwise the state is at liberty to question Mr. Sievers about allegations that he sexually abused [E.O.] as it sees fit.

D0280, at 683:6–13. The State cross-examined Sievers about whether he agreed with the timeline as established by Leslie and E.O. (he did). *See* D0280, at 684:3–685:3. It asked whether he did "naked man night" with E.O., as EO described in his testimony. Sievers denied it. Then:

> **STATE**: But you partake in a naked man night here and there, don't you?
>
> **SIEVERS**: No. Well, with who? What do you mean naked man night?
>
> **STATE**: Well, do you hang out naked with other men?

SIEVERS: No, no.

DEFENSE: Objection, outside the scope, relevance.

THE COURT: Overruled.

STATE: No, you don't?

SIEVERS: No.

STATE: Okay.

SIEVERS: Me and other men don't hang out naked, no.

D0280, at 685:4–22. So the State cross-examined Sievers about the contents of his pornography folder, including pictures of nude men in Sievers's home (which, by Sievers's count, included 54 photos of Suhr). *See* D0280, at 685:23–691:9. Sievers interrupted the prosecutor to try to explain the photo of the young boy showing his anus and testicles:

STATE: Well —

SIEVERS: And the picture of the boy is just a little kid mooning me one time.

STATE: With his testicles visible?

SIEVERS: I can't help it. He has large testicles. I'm sorry that they hung down below his butt.

STATE: But it's your — it's your testimony that you put that photo in this collection of explicit pictures; correct?

SIEVERS: It fell where it fell.

[. . .]

STATE: I'm asking if you placed the photo of the naked child in this folder.

SIEVERS: Yes, I did. . . . [J]ust inadvertently just swiped it over and put it in with the other nude photos. Never thinking that, you know — didn't think any further than that.

D0280, at 691:2–696:19. Sievers also said that he did not remember having or deleting a subfolder labeled with E.O.'s name, but then he gave a detailed explanation for when/why he deleted that subfolder. *See* D0280, at 696:20–697:6.

On rebuttal, the State presented testimony from Suhr, to rebut Sievers's testimony that the explicit pictures were someone else's idea, or that someone else took them and sent them to him, or that Seivers had some other "sexually neutral reason" for taking/keeping them. *See* D0280, at 711:20–713:3; D0280, at 716:13–25. Suhr identified himself in many of the explicit photos from Sievers's hidden folder. He said that Sievers took all those pictures, and loved doing it. *See* D0280, at 719:4–720:23. The trial court said it would reserve ruling on any relevance objections to particular questions. No such objection was made.

The jury found Sievers guilty on both counts of sexual abuse.[3] At sentencing, the district court rejected Sievers's challenge that the verdict was against the weight of the evidence—and it said this:

> . . . I decide whether or not the credible evidence supports one side more than it does the other. . . . I think I have to

[3] Jurors could not reach a unanimous verdict on a third charge of lascivious acts with a child. The trial court declared a mistrial on that particular count. *See* D0280, at 785:11–793:3.

> start with [E.O.]'s testimony and, yes, he did testify at one point at trial that he had a bad memory. But I think overall he demonstrated that he had a very good memory about what had happened to him. . . . [E.O.] was I thought remarkably calm and lacked — it's clear he does not like Mr. Sievers but I don't believe he really wanted to be here and he — he lacked motivation to want to have to testify in front of adults and people who did not know him about what had happened to him when he was a child. . . . There was a lot of corroborating evidence in support of [E.O.]'s trial testimony. And I think the differences in his previous statements are differences that do not cast doubt on his credibility or cast doubt on my conviction that this happened.
>
> [. . .]
>
> I did not find Mr. Sievers' trial testimony to be credible. I found it to be self-serving, not surprisingly. I did find [E.O.]'s testimony to be reliable, to be corroborated by plenty of other evidence in the case and I do find that the weight of the credible evidence supports the verdict of guilty on Count I and Count II.

See D0282, Sent. Tr. 33:8–37:20.

Additional facts will be discussed when relevant.

ARGUMENT

I. The trial court did not err in admitting K.K.'s testimony about one of E.O.'s initial disclosures.

Preservation of Error

Sievers made this objection before trial and during trial. The trial court overruled it. *See* D0103, Order (12/12/22), at 2; D0280, at 426:8–436:25. That preserved error for the same challenge on appeal. *See, e.g.*, *State v. Dessinger*, 958 N.W.2d 590, 598 (Iowa 2021).

Rulings that admit evidence may be affirmed on any basis for admissibility that is established by the record, even if it was neither the basis for the ruling nor argued as a basis for admission below. *See id.* at 599 (citing *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002)).

Standard of Review

Rulings that admit evidence "under a hearsay exception" are reviewed "for correction of errors at law." *See id.* at 597 (citing *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2004)).

Merits

The trial court admitted K.K.'s testimony that E.O. told her that he had been sexually abused. It did not err in doing so. Her testimony was admissible under section 622.31B.

A. Section 622.31B was applicable because it governs admissibility of evidence at trial. It is procedural. It took effect before trial, so it applied at trial.

Sievers argues that section 622.31B should not apply because it was enacted in 2022 (months before trial) and it did not exist when the State filed these charges in 2020. *See* Def's Br. at 30–36. The trial court correctly rejected that argument. *See* D0103 at 2.

Unless otherwise specified by the legislature, "a statutory rule of evidence applies to a proceeding tried subsequent to its effective date, even though the provision was nonexistent at the time the proceeding was commenced." *See State ex rel. Leas in re O'Neal*, 303 N.W.2d 414, 419 (Iowa 1981). This applies in Iowa courts, and elsewhere:

> Rules of evidence are at all times subject to modification by the legislature, and a statute relating to such rules constitutes an exception to the general rule against retroactive construction. . . .
>
> Statutes changing the rules of evidence are applicable from their passage not only to causes of action arising thereafter but also to actions accrued or pending at the time.

82 C.J.S. Statutes § 573, at n.7–n.12. This is not "retroactivity" at all—rules of evidence regulate the *trial*, so this is prospective application to a trial that began after the statute's enactment. *See Hrbek v. State*, 958 N.W.2d 779, 783 (Iowa 2021) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 263 (2012)).

Sievers argues that "[his] rights are substantively affected by retroactive applicability because it permitted the State to introduce otherwise inadmissible hearsay." *See* Def's Br. at 34. But *all* changes to the rules of evidence will affect the admissibility of evidence. That proposed exception would defeat the general rule in every case where it could possibly apply. The Iowa Supreme Court specifically warned against Sievers's proposal for how to apply the rules of evidence:

> No serious person could contend the procedures governing each and every case become fixed at the time the petition is filed in the case. Must the district court know the procedures in place on the date every case is filed and continue to apply old, superseded procedures? The rules of evidence from 1987 govern trial one week, but the rules of evidence from 1997 govern trial the next week, and the rules of evidence from 2007 govern trial the following week, and so on. Our cases have repeatedly rejected this trapped-in-amber approach.

Hrbek, 958 N.W.2d at 783; *accord State ex rel. Leas in re O'Neal*, 303 N.W.2d at 419–20. This specifically applies to rules about hearsay. *See Moffitt Bldg. Mat'l Co. v. U.S. Lumber and Supply Co.*, 124 N.W.2d 134, 136 (Iowa 1963); *Bingham v. Blunk*, 116 N.W.2d 447, 449 (Iowa 1962). Thus, the trial court did not err in ruling that section 622.31B applied.

B. Section 622.31B applies to "an initial disclosure of the offense." That means there can be more than one initial disclosure for any given offense.

The relevant portions of section 622.31B state:

> 2. In a prosecution for physical abuse or a sexual offense . . . upon or against a child, . . . the following evidence shall be admitted as an exception to the hearsay rule if all of the requirements in subsection 3 apply:
>
> a. Testimony by the victim concerning an out-of-court statement, whether consistent or inconsistent, made by the victim to another person that is *an* initial disclosure of *the* offense.
>
> b. Testimony by another concerning an out-of-court statement, whether consistent or inconsistent, made by the victim that is *an* initial disclosure of an offense charged for physical abuse or a sexual offense against the victim.

Iowa Code § 622.31B(2) (emphasis added). A victim's statements that make "an initial disclosure of the offense" are admissible to prove the truth of any matters asserted in those statements, through testimony from any witness with personal knowledge of those statements (even the victim who made them).[4] That applies to E.O.'s statement to K.K.

K.K. testified that, sometime in 2018 or 2019, E.O. told her that he had been sexually abused. In her offer of proof, K.K. testified:

> He told me that when he was younger — around like seven — that his mom's — I want to say he was her boyfriend at the time, could have been the ex — was doing things to him that were not appropriate. . . . [T]here was touching on both sides according to him. He didn't go into much detail and I didn't make him . . . because it looked like it was very upsetting for him to talk about. . . .

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[4] If the witness is someone other than the victim, then they can also testify about statements that are an initial disclosure of *a different* sexual offense against the victim. *See* Iowa Code § 622.31B(2)(b).

> [. . .]
>
> He told me that he hadn't told his mom yet. That he hadn't really told anybody yet. And that he was considering telling his mom.
>
> [. . .]
>
> . . . [H]e told me that he didn't want anyone to know. And that he trusted me with the information.

D0280, at 431:17–433:12. She gave similar testimony after the court ruled that her testimony was admissible. *See* D0280, at 441:20–444:1.

Sievers argues that section 622.31B does not apply because K.K. was actually the *third* person whom E.O. told. *See* Def's Br. at 36–39. That is inaccurate. On cross-examination, E.O. clarified: he told C.M., then K.K., *then* his mother. *See* D0280, at 398:19–398:23; *accord* D0280, at 362:4–10. So the minor premise of Sievers's argument is correct in that K.K. apparently was not the very first person whom E.O. told.

Still, the major premise of Sievers's argument is incorrect—the statute does not apply to only the *first* initial disclosure, per offense. If it did, it would be limited to "*the* initial disclosure of the offense," not "*an* initial disclosure of the offense." The legislature uses the word "an" as a non-restrictive, indefinite article, as any English speaker would:

> Simply put, it is the difference between 'bring me a book' and 'bring me the book.' In the first instance, any book will do; in the second instance, a particular book is expected.

BP America Prod'n Co. v. Madsen, 53 P.3d 1088, 1091 (Wyo. 2002).

The general assembly could have limited the applicability of section 622.31B by stating that it applied to *the* initial disclosure. But it did not. Instead, it broadened the statute's applicability by using an indefinite article that creates space for *more than one* initial disclosure, even in cases involving only *the* one offense. Courts know to treat those drafting choices as intentional and meaningful, and to give them effect. *E.g.*, *United States v. Adair*, 38 F.4th 341, 351 (3d Cir. 2022) (holding that use of indefinite article in sentencing guidelines that apply to "an organizer or leader" meant that the guideline "allows the possibility that multiple persons engaged in the same criminal activity could qualify as organizers or leaders," then giving effect to that deliberate choice); *see also Salazar v. AT&T Mobility LLC*, 64 F.4th 1311, 1315 (Fed. Cir. 2023) (explaining that indefinite article "a" means "one or more");[5] *accord Cramer v. Transitional Health Servs. of Wayne*, No. 163559, 2023 WL 4845610, at *13 (Mich. July 28, 2013) (quoting a prior case

[5] Cases interpreting the indefinite article "a" are equally applicable because "an" is a "euphonic mutation" that has the same meaning. *See State v. Kidd*, 562 N.W.2d 764, 765 (Iowa 1997).

that used dictionary definitions to contrast meanings of "a" and "the"); *Yellowbird v. N.D. Dep't of Transp.*, 833 N.W.2d 536, 539 (N.D. 2013) (quoting *Black's Law Dictionary* 1477 (6th ed. 1990)).

It is true that "an" sometimes implies that it is describing one *and only one* of something. *E.g.*, *Veatch v. Bartels Lutheran Home*, 804 N.W.2d 530, 536 (Iowa 2011) (holding that indefinite article in statute on failed actions that describes the effect of filing "a new one" only "refers to a single refiling; and the statute, therefore, saves only one additional action"); *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 861 n.12 (Iowa 2009) (noting that statute that authorizes an order to pay for "an examination" is limited by that term, and so it "does not authorize" an order "to pay for a second examination"); *cf. Kidd*, 562 N.W.2d at 765. But the use of a singular indefinite article in this statute does not imply any such limitation. This provision permits admission of "[t]estimony . . . concerning an out-of-court statement . . . that is an initial disclosure of the offense." *See* Iowa Code § 622.31B(2)(a). Here, "that is an initial disclosure" describes the already-singular subject of the sentence—there is no quantity-limiting function because the clause is already about "*an* out-of-court statement" that is at issue. So, taken together, this means that the admissibility of each statement offered is

analyzed separately—and that multiple statements may each qualify as "an initial disclosure" because none need to be "*the* initial disclosure." There is no other way to give effect to that deliberate drafting choice.

Sievers argues that the meaning of the word "initial" overrides the indefinite article and limits the applicability of section 622.31B to the very first disclosure of the offense. *See* Def's Br. at 37–39. But it does not. It certainly limits the applicability of this hearsay exception to statements that are *early* disclosures (and its applicability is further limited by the circumstances-indicating-reliability requirement). *See* Iowa Code § 622.31B(3)(b). But there can be many initial disclosures if each of them discloses new or different information or if each of them comes at an early stage in the process of disclosure. *See, e.g.*, *State v. Barnes*, No. 48993-7-II, 2018 WL 3854916, at *3 (Wash. Ct. App. Aug. 14, 2018) ("Even though TV made some inconsistent statements, there was some degree of consistency between the two initial disclosures."); *State v. Tjernagel*, No. 15–1519, 2017 WL 108291, at *5 (Iowa Ct. App. Jan. 11, 2017) (noting expert testimony that "the literature talks about children disclosing in . . . bits and pieces" and that "[s]ometimes they'll disclose a little bit and then later on they maybe disclose more"). It is intuitive that E.O.'s statement to Leslie is an "initial disclosure" because

it was an early disclosure and because it *initiated* the investigation that led to this prosecution. And his statements to C.M. and K.K. were also initial disclosures—they were earlier, incomplete, proto-disclosures.

Note that victims may not know *which* of multiple disclosures was the first to occur. It is fortuitous that E.O. knew that he told C.M. before K.K.—but if he had not, Sievers's reading of the statute would render testimony about *either* disclosure inadmissible, if nobody could establish which disclosure came first. That would be common in cases involving sexual abuse of children. A child who previously confided in two friends (or more) about any aspect of the abuse would need to give a precise timeline of those disclosures—which children can rarely do. And even when a child can do that, any proto-disclosure will foreclose the use of this hearsay exception to admit evidence of their disclosures that actually initiated an investigation—even if subsequent disclosures were more complete or more detailed; even if they are offered through an adult witness with more complete recall; even if they are otherwise reliable and probative. That cannot be correct. The whole point of this new enactment was to allow in *more* evidence of reliable statements that disclose abuse. A reading that gives effect to the deliberate choice to admit each statement that is "an initial disclosure of the offense" is

the construction that "best achieves the statute's purpose, and avoids absurd results" that would render it inoperable. *See Chavez v. MS Tech. LLC*, 972 N.W.2d 662, 667 (Iowa 2022) (quotation omitted).

Sievers argues that the rule of lenity should tip the scales towards his preferred reading of section 622.31B. *See* Def's Br. at 37. But the rule of lenity applies only to statutes which "define a crime, [or] ordain its punishment." Scalia & Garner, *Reading Law*, at 296 (quoting *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)); *State v. Hearn*, 797 N.W.2d 577, 585–87 (Iowa 2011) (explaining that rule of lenity applies to statutes "imposing criminal liability" to ensure that criminal liability "cannot be expanded beyond express legislative terms by construction or implication"). It is inapplicable to procedural rules, including rules of evidence. Otherwise, trial courts would need to apply three versions of each rule of evidence: one version for when a defendant urges it to *admit* evidence; a second version for when a defendant asks it to read the same rule to *exclude* similar evidence; and a third, neutral version for civil trials. Fortunately, that is not how rules of evidence work. *See, e.g.*, *State v. Countryman*, 573 N.W.2d 265, 266 (Iowa 1998) (quoting *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984)) (affirming ruling that excluded polygraph results offered by criminal defendant, and stating

that defendant's right to due process "does not prevent the court from following evidentiary rules that are designed to assure both fairness and reliability in the ascertainment of guilt and innocence").

Other states have "outcry statutes" with *explicit* requirements that mirror the requirement that Sievers wants this Court to read into section 622.31B. Most notably, a Texas rule requires courts to admit statements "made to the first person, 18 years of age or older, other than the defendant, to whom the child . . . made a statement about the offense." *See* Tex. Code Crim. P. art. 38.072, § 2(a)(3). If Iowa's general assembly wanted this statute to do what Sievers describes, it could have used similar language. It chose not to. That is meaningful. *See State v. Wilson*, 941 N.W.2d 579, 587–88 (Iowa 2020) (holding stand-your-ground laws did not require pretrial immunity hearing, in part because "Iowa did not opt for the [other states'] language that has generally been interpreted as affording a right to a pretrial hearing"). The choice not to include such a requirement is especially meaningful in light of the difficulty of applying that requirement in Texas—a whole morass of caselaw sets out an inexact test for determining when a child's remarks are detailed enough to be "a statement about the offense" that precludes admission of subsequent statements. *See, e.g.*, *Bradshaw v.*

State, 675 S.W.3d 78, 80 (Tex. Ct. App. 2023) (citing Texas cases that require assessment of whether statement is only "the general allusion" of sexual abuse or whether it describes the "how, when, and where"). Sievers's reading of section 622.31B would require a similar analysis to determine what qualifies as enough of a "disclosure" to preclude all other statements about the same abuse. But the Iowa legislature chose *not* to use the same language as statutes containing that requirement. Instead, it deliberately acknowledged that a particular statement may be "*an* initial disclosure of the offense"—there may be more than one.

The trial court was correct. Section 622.31B applied at this trial, and K.K.'s testimony that described an initial disclosure of sexual abuse was admissible (even if E.O. had previously disclosed abuse to C.M.).

C. Even if the court misinterpreted section 622.31B, Sievers was not prejudiced.

Improper admission of hearsay is harmless if it is cumulative with other evidence that was properly admitted (or not objected to). This often applies to statements disclosing abuse. *See State v. Howland*, No. 22–0519, 2023 WL 3613259, at *6 (Iowa Ct. App. May 24, 2023) (collecting cases where "no prejudice was found due to the cumulative nature of the hearsay evidence"). Here, K.K. testified that E.O. told her that his mother's then-boyfriend had touched him—but he did not go

into much detail. *See* D0280, at 441:20–444:1. Leslie's testimony about E.O.'s disclosure to her, which identified Sievers *by name*, also came in, under a different hearsay exception (which Sievers does not challenge). *See* D0280, at 309:11–312:8. Later, E.O.'s account of that disclosure also came in, without objection. *See* D0280, at 348:24–353:6. And the parties stipulated to admission of large portions of the video of E.O.'s forensic interview. *See* D0280, at 608:17–616:4. Finally, E.O. testified about the sexual abuse, with as much granular detail as he could. *See* D0280, at 332:21–344:5. The few bits of K.K.'s testimony that described the substance of E.O.'s statements were cumulative with his testimony about the abuse, and the rest of it was cumulative with testimony about E.O.'s initial disclosure to Leslie. Thus, any error would be harmless.

Sievers cross-references a prior argument about how he was prejudiced by admission of K.K.'s testimony. Here is that argument:

> [K.K.'s testimony] shielded E.O. from any argument that he had made false allegations. . . . Through the use of hearsay statements purported to have been made prior to the Leslie being called to E.O.'s principal's office, defense counsel was prevented from arguing that E.O. may have made false allegations to deflect from being in trouble at school. K.K.'s testimony proactively rendered any such argument as meritless when it would have otherwise been a reasonable consideration for the finder of fact in assessing E.O.'s credibility.

Def's Br. at 35. This is an argument that Sievers was prejudiced because admitting this evidence unfairly prevented him from making *factually false arguments* about E.O.'s disclosures. Nobody is entitled to exclude evidence to maintain a false version of the facts. Of course, Sievers never implied that E.O.'s disclosure to Leslie was fabricated "to deflect from being in trouble"—not even while cross-examining E.O. or Leslie, *before* the final ruling that admitted K.K.'s testimony. That is likely because doing so would *guarantee* that her testimony would be admitted as a prior consistent statement, from before E.O. had the alleged motive to fabricate. *See State v. Fontenot*, 958 N.W.2d 549, 555–61 (Iowa 2021). So Sievers's argument cannot establish even hypothetical prejudice—any jury who heard his hypothetical argument that E.O. fabricated these allegations in the principal's office to avoid getting in trouble would hear this testimony from K.K., in response.

Sievers also argues that he was prejudiced because this evidence was admitted to bolster E.O.'s credibility, which he argues is improper under *State v. Elliott*, 806 N.W.2d 660, 670 (Iowa 2011). *See* Def's Br. at 35–36. The problem in *Elliott* was that the evidence was ostensibly admitted for a non-hearsay purpose, but was really admitted and used for the truth of the matter asserted in that out-of-court statement. *See*

Elliott, 806 N.W.2d at 670. There was no subterfuge here, so that issue is not present. More importantly, *Elliott* only found prejudice because the erroneously admitted evidence was *not* really cumulative, in the sense that it was the only source of disinterested testimony on what happened from someone without "similar motives to point the finger at [the defendant]." *See id.* at 669–72. Here, K.K.'s testimony only described E.O.'s statements and demeanor. That was cumulative with other testimony that described E.O.'s statements and demeanor, the video of his forensic interview, and E.O.'s testimony at trial.

And if it was not cumulative—if it provided some key ingredient that was not provided by any other evidence—then it would have been admissible under the residual exception (through similar showings of reliability and notice given). *Compare* Iowa Code § 622.31B(3), *with* Iowa R. Evid. 5.807. So even then, any error would be harmless, and Sievers would not be entitled to relief. *See* Iowa R. Evid. 5.103(a).

II. The trial court did not err in admitting the explicit photo of the young boy from Sievers's hidden folder, or in admitting the other explicit images from that folder.

Preservation of Error

The parties argued the admissibility of this evidence at a hearing on motions in limine. *See* Hearing Tr. (12/12/22), 54:6–72:12. When

the explicit photos were offered into evidence at trial, Sievers raised "objections of 403 and 401." *See* D0280, at 508:14–509:19. The court overruled that objection. *See id*. That ruling preserved error to renew the same challenge on appeal. *See Dessinger*, 958 N.W.2d at 598.

Standard of Review

Review of an evidentiary ruling that balances probative value against potential for unfair prejudice is for abuse of discretion. This is "not an exact science" and appellate courts "give a great deal of leeway to the trial judge who must make this judgment call." *State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006).

Merits

Exhibit 57 is the "contact sheet" containing the explicit images that were found in the hidden folder on Sievers's computer, shrunk to show all of them at once (and redacted). *See* D0215. The photo of the young boy is eleven down, fourth from the left. He is bent over, showing his anus and testicles. The court initially ruled that the explicit photo (and any testimony about it) would be inadmissible. *See* D0103 at 2. But then it reconsidered, and it ruled that "[t]he State may offer evidence regarding the photographs of a nude child found

on [Sievers's] computer." *See* D0164, Add'l Order (12/13/22), at 1; *see also* D0280, at 19:25–22:14. That was not error.

A. If Sievers possessed this photo of a young boy to use it for his own sexual gratification and arousal, that is relevant evidence of his motive and intent.

Sievers argues that this photo is irrelevant because it could not corroborate E.O.'s testimony that Sievers had photos of naked women. *See* Def's Br. at 42. But that was not why the State offered this photo. Rather, it was because it helped show Sievers's interest in "achieving gratification through children"—specifically, young boys. *See* D0280, at 19:25–20:21. The State needed to prove that touching occurred, and that it was "sexual in nature." *See* D0224, Jury Instr. 23. Additionally, on the charge of lascivious acts with a child, the State needed to prove that Sievers touched his genitals to E.O.'s body "with the specific intent to arouse or satisfy the sexual desires of [himself] or E.O." *See* D0224, Jury Instr. 22. So Sievers's intent was a legitimate non-character issue, and the fact that he kept this particular explicit photo was relevant. *See State v. Elston*, 735 N.W.2d 196, 200 (Iowa 2007) ("We conclude the pornographic images of young girls had great probative value on the question of whether Elston touched A.E.

'for the purpose of arousing or satisfying the sexual desires of either [himself or A.E.].'").

It was also relevant proof of motive, despite what *Putman* says. In *Putman*, the State alleged that Putman raped a toddler. It offered evidence that investigators found pornography about raping toddlers on Putman's computer. It was admitted. On appeal, *Putman* agreed that Rule 5.404(b) permits evidence of motive. But then, in a single paragraph, *Putman* rejected that as a legitimate theory of relevance:

> The perpetrator's motive for sexually abusing L.R. was not a legitimate or disputed issue in this case. The State was not required to prove Putman's state of mind as an element of the crime, and Putman's state of mind at the time of the crime was not put in issue. *See Newell*, 710 N.W.2d at 21 (discussing elements of first-degree murder and the need for evidence on the defendant's state of mind at the time of the crime in making a relevancy determination). The evidence of child pornography therefore could not be admitted for the purpose of proving Putman's motive.

Putman, 848 N.W.2d at 10. That paragraph is clearly wrong, and this Court should repudiate it before it does any more damage. *See, e.g.*, *State v. Wilde*, 987 N.W.2d 486, 497 (Iowa Ct. App. 2022) (stating it was bound by *Putman*'s holding that "child pornography cannot be admitted to prove the alleged perpetrator's motive" to abuse a child).

Professor Doré identified the problems with *Putman*'s analysis:

> . . . As the court itself points out, motive merely provides an explanation for why a defendant may have committed the offense. If the defendant says he did not do the act, his motive for doing so helps to establish that he, as opposed to someone else, did. That is, motive would seem to be "in issue" in any case in which a person claims that he or she did not commit the alleged offense. . . . Although possession of pornography in general might not provide a specific enough motive to engage in child sexual abuse, the testimony admitted in *Putman* was narrower than general character evidence. That Putman was sexually aroused by pornography depicting adult men sexually molesting two- and three-year-old girls arguably gave him an unusual motive—a taste for or compulsion regarding this particular type of sexual abuse.
>
> [. . .]
>
> . . . Although a generalized motive of sexual gratification may not be specific enough to provide a non-propensity reason to engage in the charged offense, some sex offenses might reflect a sufficiently unusual drive (i.e., reason) to engage in the particular type of sexual misconduct that cannot be satisfied by other means. Such a particularized motive might furnish a non-propensity purpose for this type of evidence.

Laurie Kratky Doré, *Iowa Practice Series: Evidence* § 5.404:6, at n.49–n.50 & n.55 (updated Oct. 2023). There are two parts to this critique. First, Doré is correct that motive is always "at issue" when the State must prove that a defendant committed a charged offense. *See, e.g.*, *United States v. Roux*, 715 F.3d 1019, 1024 (7th Cir. 2013) (quoting *United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012)) (noting "the defendant's motive—an explanation of *why* the defendant would engage in the charged conduct—becomes highly relevant when

the defendant argues that he did not commit the crime"). A defendant's *lack* of motive is generally probative evidence that supports a defense that they did not commit the crime. Evidence of motive replaces that defense-friendly gap with logical explanations for particular decisions to commit the crime. It is relevant to help prove *what* truly happened by establishing *why* it would have happened. Even when a crime has no specific-intent element, motive (or lack thereof) is always at issue and may generally be proven as part of the State's case-in-chief.

Of course, the probative value of certain motive evidence may be so marginal that it becomes inadmissible, or it may be drowned out by unfair propensity inferences. *State v. Thoren* rejected a claim that motive was a legitimate non-character theory of relevance on charges that Thoren sexually abused some massage clients (all adult women). *See State v. Thoren*, 970 N.W.2d 611, 628 (Iowa 2022). Again, Doré is correct when she notes that *Thoren* "painted with too broad a brush in dismissing motive as a legitimate disputed issue in sex abuse cases." *See* Doré, *Evidence* § 5.404:6, at n.54. The bigger problem in *Thoren* was that the State was offering evidence of a very similar act of abuse to prove "a generalized motive" of sexual attraction to adult women. That motive evidence was not very probative—many men are attracted

to adult women (to the point where jurors likely assume such a motive may be in play, by default). And that probative value was drowned out by obvious propensity inferences that jurors would draw from evidence that Thoren had sexually assaulted other women during massages. So it is best to read *Thoren* as rejecting "pretextual" attempts to use motive to smuggle in propensity evidence. *See id.* at 628 (quoting *Jackson v. Commonwealth*, No. 2019-SC-0597-MR, 2021 WL 2618168, at *7 (Ky. June 17, 2021) (Minton, C.J., concurring in result only)).

While *Thoren* involved a motive that is so common among men that proving it would have minimal probative value, *Putman* involved an uncommon motive that most people do not share or readily impute: sexual attraction to young children. Hence, Doré's second critique of *Putman*: that it failed to recognize that "a narrow and unique motive to engage in the particular sexual misconduct at issue" can "furnish a non-propensity purpose for this type of evidence." *See* Doré, *Evidence* § 5.404:6, at n.54–n.55. Evidence of that unique motive is probative in prosecutions for sex crimes against children because "[m]ost people do not have a taste for sexually molesting children." *See United States v. Cunningham*, 103 F.3d 553, 556 (7th Cir. 1996); *cf. State v. Munz*, 355 N.W.2d 576, 581–83 (Iowa 1984) (discussing Wigmore and noting

that "special kinds of inferences are probative on issues such as motive . . . toward certain sexual conduct"). In a case like *Thoren*, jurors are well-served by relying on default assumptions about who is typically attracted to whom, and the probative value of motive evidence is low. But in a case like *Putman* (or this one), evidence of motive is relevant to help prove what the defendant did, by proving that he would have a relatively unique and particularized reason to do it—and it is a piece of the puzzle that jurors may need, in order to put the picture together.

In *Putman*, it was clear that the toddler had been raped—the issue was identity. So proof of Putman's motive to rape that toddler should have been relevant to help identify him as the actual culprit (and, indeed, *Putman* affirmed the ruling that admitted the evidence on essentially that basis, without calling it evidence of "motive"). *See Putman*, 848 N.W.2d at 10–13. Sievers argued that someone else may have abused E.O., and this could just be a case of mistaken identity. *See* D0280, at 596:9–597:4; (defense expert testimony on "conflation"); D0280, at 750:16–751:6 (referring back to that testimony and arguing "it is possible for a child to conflate the behavior of one adult with the behavior of another adult"). So evidence of motive was probative to identify Sievers as a person with

the motive to commit the abuse that E.O. described. *Accord State v. Frederiksen*, No. 15–0844, 2016 WL 4051655, at *11–12 (Iowa Ct. App. July 27, 2016) (noting similarity in age between victim and children depicted in the pornographic images was probative and holding that "Frederiksen's possession of the images makes it more probable he was the person who abused E.M."). Here, unlike in *Putman*, there was also a question of whether any touching had occurred *at all*. So motive evidence was also highly probative to help show why it *would* have occurred. *See Roux*, 715 F.3d at 1024.

This is not a propensity inference because it does not posit that the defendant acted "in conformity with his prior actions." *See State v. Redmond*, 803 N.W.2d 112, 117 (Iowa 2011). Note that the act of possessing the explicit photo does not necessarily establish propensity for *acts* of sexual abuse—it just expands the range of potential objects of Sievers's sexual desires to include boys in E.O.'s age group. *See, e.g.*, *United States v. Bartunek*, 969 F.3d 860, 863 (8th Cir. 2020) ("That Bartunek derived gratification from the replicas of young children gave him a motive to possess and distribute child pornography."). Nor could this even qualify as character evidence given that pedophilic attraction, like suicidal ideation, almost always "stems from mental health issues

rather than from a character trait." *See State v. Buelow*, 951 N.W.2d 879, 888 (Iowa 2020). It is *motive* to commit these specific offenses—and without motive, none of this makes sense. Without this evidence, jurors might wonder *why* a man would touch E.O.'s penis (especially if other evidence shows that the man dated a series of adult women); without an answer, that could germinate into reasonable doubt. Even if jurors found that E.O. *believed his own testimony*, they could conclude that he must be mistaken—because a grown man with a female fiancée presumably has no reason to touch a young boy. This evidence showed that Sievers *did* have a reason to touch a boy's penis—because Sievers (unlike most adult men) could derive sexual arousal and gratification from a young boy's genitals. *See United States v. Brand* 467 F.3d 179, 201 (2d Cir. 2006) (noting "child pornography shares a strong nexus with pedophilia" and quoting Congressional findings to that effect)[6]; *United States v. Bentley*, 475 F.Supp.2d 852, 858 (N.D. Iowa 2007) (noting prior-bad-act evidence had probative value despite differences between offense and prior bad acts because "[t]he child pornographer, like the child rapist, displays a sexual interest in children"). This is a

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6 *Brand* was abrogated on unrelated grounds by *United States v. Cabrera*, 13 F.4th 140, 147 (2d Cir. 2021).

particularized motive that helped establish that Sievers had a reason to do what E.O. described, and it supported an inference that he acted with the intent to derive sexual arousal or gratification while doing so.

The part of *Putman* that rejects motive as a theory of relevance is clearly wrong and should be disavowed. Alternatively, this Court could treat this as relevant evidence of intent or identity (though it is only probative on identity *because* it establishes particularized motive) and affirm on that basis instead. *See, e.g.*, *Elston*, 735 N.W.2d at 200. Either way, the trial court was correct that this photo was relevant.

B. The full contents of the hidden folder were relevant to prove the sexual nature of Sievers's interest in the explicit photo of the young boy.

It was apparent that Sievers would argue that this photo was "taken sort of in good fun or goofing around." *See* D0280, at 24:2–20; *accord* D0280, at 691:2–696:19; D0280, at 761:1–9. That is why it was important to admit that photo alongside the *other* explicit photos in the same folder. They are *all* explicit, and most are obviously sexual. *See* D0280, at 516:17–517:23. Many of them depict close-ups of genitals or sex acts. *See* D0215. If the jury had not been allowed to see those other photos, it could have believed Sievers's explanation that he had saved that photo of the young boy "[t]o play

back to the kid some day . . . when he was older and say, hey look at you, goofy kid." *See* D0280, at 692:18–22. The other photos helped disprove that—they were clearly kept and used for sexual arousal and/or gratification, and they helped show that Sievers kept the explicit photo of the young boy to arouse/satisfy a similar sexual interest. *See, e.g.*, *Turenne v. State*, 297 A.3d 340, 355 (Md. Ct. App. 2023) ("A reasonable juror could also infer that Turenne took these photos for sexual gratification, based on . . . the photos' location among other pornographic images"). So they were relevant to show the sexual nature of his interest in this photo.

C. The potential for unfair prejudice was minimal, and it did not outweigh the high probative value of this evidence.

Sievers argues that this evidence was unfairly prejudicial, to an extent that substantially outweighed its probative value. *See* Def's Br. at 39–45. Of course, Sievers does not reckon with its true relevance as proof of motive and intent. In *Memro*, the California Supreme Court rejected a similar relevancy/balancing challenge:

> The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with Carter. . . . [W]e cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent [as required for that specific charge] was substantial.

People v. Memro, 905 P.2d 1305, 1348 (Cal. 1995). Here, too, there was a need for evidence that established Sievers's motive and intent. E.O.'s story was likely *false* unless Sievers had "a narrow and unique motive to engage in the particular sexual misconduct at issue." *See* Doré, *Evidence* § 5.404:6, at n.54–n.55. So there was a strong need for this kind of evidence to establish that uncommon motive/intent. And Sievers's claim that this could be a case of mistaken identity also heightened the need for this kind of evidence. *See Putman*, 848 N.W.2d at 14 ("The State's need to respond to Putman's assertion that it was Lawrence and not him who was the perpetrator of this sexual assault . . . substantially increased the probative value of the evidence of the two videos found in his possession."); *accord* D0280, at 750:16–751:6.

On the other side of the scale, the potential for unfair prejudice was low. The parties stipulated that the boy in the picture was not E.O. *See* D0280, at 302:6–303:15. The State emphasized that Sievers was not on trial for possessing the explicit photos. *See* D0280, at 744:11–745:10; D0280, at 769:5–16. Sievers complains that the trial court did not give a limiting instruction on the use of this evidence. *See* Def's Br. at 44. But Sievers did not request one; he cannot allege error in

failing to give a jury instruction that he never requested. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988). In any event, the act of keeping those pictures was "not likely to arouse the jury's sense of horror" in the context of a trial that focused on more troubling evidence—namely, E.O.'s account of enduring *acts* of sexual abuse. *See State v. White*, 668 N.W.2d 850, 855 (Iowa 2003) (finding potential for unfair prejudice did not substantially outweigh probative value because "the prior acts were not the focus of the trial" and they were "substantially less brutal" than charged acts, so "the prior acts evidence would not rouse the jury to "'overmastering hostility'" (quoting *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001))).

Sievers was not entitled to a sanitized presentation of evidence that would be more amenable to his attempt to characterize the photo as non-sexual—as "good fun or goofing around." *See* D0280, at 24:2–20; D0280, at 691:2–696:19; D0280, at 761:1–9. Simply "eliciting testimony from Deputy Kava" that described those photographs would not cut it. *See* Def's Br. at 44–45. Jurors needed to *see* the explicit photos to truly understand why they were strong proof of Sievers's motive and intent, and why Sievers's attempt at an innocuous explanation was hogwash. *See generally State v. Goodson*, 958

N.W.2d 791, 801–02 (Iowa 2021) (rejecting arguments that unfair prejudice of prior-bad-acts evidence substantially outweighed its probative value because "[i]n cases with conflicting direct testimony, it is crucial to have triangulating evidence to resolve the issue"). Jurors also needed to see the explicit photos to understand the probative value of the evidence about a *deleted* folder in the same hidden directory, labeled with E.O.'s first name. *See* D0280, at 510:14–516:2. The strength of the inference that Sievers harbored a sexual interest in E.O. was dependent on the obvious sexual nature of the remaining contents of that hidden folder—so the State needed to *show* the pictures, to convey the actual strength of that inference. *See Memro*, 905 P.2d at 1348; D0280, at 745:2–10.

Sievers notes that *Putman* commended the district court for admitting only the *titles* of specific pornographic video files, and not the actual videos themselves. *See* Def's Br. at 43–44 (citing *Putman*, 848 N.W.2d at 15–16). But Sievers did not name these image files. He also vociferously objected to the idea that any witness would describe that the picture showed the young boy's anus and testicles, in lieu of admitting the actual picture. *See* D0280, at 20:21–26:15. In any event, this is different from *Putman* in three respects. First, the image

files in this case have much less potential for unfair prejudice than the videos in *Putman*, which showed injurious vaginal intercourse with toddlers. Second, the actual contents of the files in Sievers's hidden folder were needed to enable inferences about the likely contents of the files that pertained specifically to E.O., which Sievers had already deleted. *See* D0280, at 510:14–516:2; D0280, at 770:17–17–21 ("He deleted a folder called [E] in his porn collection."). And third, these files did not have descriptive names—much less names that were descriptive enough to fully communicate the prurient or pornographic nature of the images, which is notoriously difficult to put into words. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting inability to define "hard-core pornography" further than "I know it when I see it").

Weighing probative value against potential for unfair prejudice is "not an exact science," so appellate courts "give a great deal of leeway to the trial judge who must make this judgment call." *See Newell*, 710 N.W.2d at 20–21. Sievers cannot establish that the trial court abused that broad discretion in finding that the potential for unfair prejudice did not substantially outweigh the probative value of this evidence. *See State v. Richards*, 879 N.W.2d 140, 145 n.1 (Iowa 2016). The photos

had clear probative value, and minimal potential for unfair prejudice in comparison to E.O.'s graphic testimony. *See, e.g.*, *State v. Parker*, No. 10–1511, 2011 WL 5387212, at *4–5 (Iowa Ct. App. Nov. 9, 2011) (citing *State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993)) ("[T]hough this evidence could tend to raise the passion of the jury, the specific prior bad acts were not more prejudicial than the evidence concerning the actual crime charged."). Thus, Sievers's challenge fails.

III. The trial court did not err in permitting the State to present testimony from Suhr under these conditions, because the jury could not see his shackles.

Preservation of Error

Error was not preserved for a challenge about the fact that Suhr testified while wearing jail garb. Just before Suhr's testimony, Sievers requested that he "appear in civilian clothing as well as unshackled in the presence of the jury"—and he offered to "go to Wal-Mart and get some clothing for [Suhr] to wear . . . if there's nothing else available." *See* D0280, at 707:13–708.3. The trial court ruled, just before lunch:

> If there are clothes that can be obtained between now and 1 o'clock, that's fine. But I'm not going to hold up any of the proceedings so that he can wear something else if that doesn't happen before one o'clock.

D0280, at 708:23–709:11. There was no further record, objection, or ruling on that issue before Suhr testified. *Accord* D0282 at 25:16–24

(trial court observing that "[t]here was no motion to continue to get [Suhr] different clothing"). Error is not preserved for any claim that the trial court erred by declining to grant an additional remedy that Sievers never requested.

Nor was error preserved for a shackling-related challenge. The court initially granted the motion for Suhr to testify without shackles. *See* D0280, at 708:23–710:8. Later, after a recess, the court explained:

> The plan is that . . . he'll be brought in before we have the jury in because — because of the protocols for the court security folks. He does need to be shackled but the jury will not see him walking in or out of the courtroom in shackles so he'll be sitting at the witness box when the jury is brought in.

D0280, at 716:1–12. There was no further record, objection, or ruling. Sievers never challenged that solution as inadequate or inappropriate, nor did he request any other remedy. So error is not preserved. *See State v. Krogmann*, 804 N.W.2d 518, 524–25 (Iowa 2011) (citing *Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000)).

Standard of Review

Review of this kind of ruling is for abuse of discretion. *See, e.g.*, *State v. Shipley*, 429 N.W.2d 567, 569 (Iowa Ct. App. 1988) (quoting *State v. Ellis*, 350 N.W.2d 178, 183 (Iowa 1984)).

Merits

Sievers argues that he was prejudiced because the State elicited testimony from Suhr that he was Sievers's best friend, while Suhr was wearing prison garb. *See* Def's Br. at 45–50. Note that he cannot allege any prejudice from shackling, because jurors never saw Suhr's shackles. *See* D0282 at 25:16–24 (trial court noting "we took steps to make sure [jurors] did not see [Suhr] walk in or out of the courtroom"); *Houk v. State*, No. 15–1976, 2017 WL 514402, at *1 (Iowa Ct. App. Feb. 8, 2017) (ordering defendant to wear a stun belt had no effect on the trial when "[t]here was no indication that any member of the jury saw the belt").

Suhr was a witness for the State. The out-of-state authority in Sievers's brief is mostly about *defense* witnesses. *See Hightower v. State*, 154 P.3d 639, 641 (Nev. 2007); *State v. Artwell*, 832 A.2d 295, 301 (N.J. 2003). Here, "[i]f there was any prejudice, it was against the [S]tate, since [Suhr's] inmate status would affect the credibility of [his] testimony against the defendant." *See Tompkins v. State*, 386 So.2d 597, 599 (Fla. Dist. Ct. App. 1980). And Sievers is wrong to state that *Carney v. State* "held the defendant had been prejudiced." In reality, it held that Carney was *not* prejudiced by "counsel's failure to object to

Carney's mother appearing in shackles and jail garb"—far worse than what occurred in this case. *See Carney v. State*, 158 So.3d 706, 709 (Fla. Dist. Ct. App. 2015). No Iowa case has ever found prejudice from an imperceptibly-shackled State's witness testifying in prison garb. *But see State v. Wilson*, 406 N.W.2d 442, 449 (Iowa 1987) (commending the district court for similar choreography with a shackled defendant).

Suhr's testimony was brief, and limited to showing that Sievers was lying when he tried to distance himself from those explicit photos and "naked man nights" generally. *Compare* D0280, at 685:8–688:18, *with* D0280, at 719:4–720:23 (Suhr testifying that *all* the pictures of him showing his naked genitals were taken by Sievers, in Sievers's home). Even if error had been preserved—even if the trial court had rejected some request for a continuance to obtain clothes or another remedy—Sievers would be unable to show an abuse of discretion or prejudice.

IV. The trial court did not err in permitting the State to cross-examine Sievers after he testified on direct.

Preservation of Error

Sievers moved to limit cross-examination, before he testified. The trial court made a preliminary ruling, but indicated it was "not going to rule in advance" on particular lines of questioning. *See*

D0280, at 673:16–676:20. After direct examination, the State made a record on the permissible scope of cross-examination. Sievers and the court agreed that the State could ask "any question related to" whether he sexually abused E.O. *See* D0280, at 680:7–682:5; D0280, at 683:6–13. Sievers made two scope/relevance objections during cross-examination that were overruled. *See* D0280, at 685:8–20; D0280, at 704:11–705:21. Error is preserved for challenges to those two rulings. But error is not preserved for challenges to any other questions, because the trial court never ruled (and was never asked to rule) on whether other questions were irrelevant or outside the proper scope of cross-examination. *See State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003) (error preservation generally requires "that a specific objection to the admission of evidence be made known, and the trial court be given an opportunity to pass upon the objection and correct any error").

Standard of Review

Rulings on relevance objections and on the proper scope of cross-examination are reviewed for abuse of discretion. *See State v. Holmes*, 325 N.W.2d 114, 117 (Iowa 1982) (citing *State v. Gibb*, 303 N.W.2d 673, 680 (Iowa 1981)).

Merits

When a defendant chooses to testify, "the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well." *See Portuondo v. Agard*, 529 U.S. 61, 69 (2000) (quoting *Perry v. Leeke*, 488 U.S. 272, 282 (1989)). It is true that Rule 2.20(1) states that cross-examination of a defendant in a criminal case "shall be strictly confined therein to the matters testified to" on direct examination. *See* Iowa R. Crim. P. 2.20(1). But that does not mean that prosecutors "can only parrot the questions propounded on direct"—they can still ask *new* questions, as long as they bear upon those same matters. *See Holmes*, 325 N.W.2d at 117 (quoting *State v. Jackson*, 259 N.W.2d 796, 800–01 (Iowa 1977)).

This would be a harder case if not for the last question on direct, which opened the door to a wide-ranging inquiry. *See* D0280, at 679:3–683:13. But even without that, and even if Sievers had preserved error, his challenges would still fail. On direct examination, Sievers gave a general denial. *See* D0280, at 679:3–680:5. So the "matter testified to" was the ultimate question of guilt, itself. Any evidence that tended to show that Sievers *did* sexually abuse E.O. (or that he was not credible when he denied doing so) directly pertained

to the subject matter of his general denial on direct examination. *See State v. Yerhart*, No. 13–1949, 2014 WL 5478149, at *3–4 (Iowa Ct. App. Oct. 29, 2014) (citing Rule 2.20(1) but holding that the prosecutor could still cross-examine Yerhart about evidence that seemed inconsistent with his denials, and then proceed to ask about "the logical conclusion . . . that it was either a terrible coincidence or Yerhart was not telling the truth").

The only part of Sievers's challenge for which error is preserved is his mention of the cross-examination questions that asked whether he did "naked man nights" as E.O. described. *See* Def's Br. at 53; D0280, at 685:4–22. That resembles the challenge that was raised in *Goff*, which applied the same rule (before it was re-numbered). *Goff* held that cross-examination as to whether Goff had ever possessed a knife during his incarceration would have been proper; it would be relevant to "contradict his unequivocal testimony that he had no knife." Even though *other* instances where he may have possessed a knife were not discussed on direct examination, the State was still "entitled to" ask about related facts that were relevant to disprove that denial. *Goff* did ultimately hold "the cross-examination here lacked relevance and was consequently improper," because it did not actually bear on whether

Goff possessed a knife. But if it *had* been relevant to contradict Goff's knife-related denials, that would have been proper cross-examination. *State v. Goff*, 315 N.W.2d 768, 769–70 (Iowa 1982).

Goff is important because most of Sievers's argument is really a relevancy challenge to the State's cross-examination, in toto. *See* Def's Br. at 53–54. Sievers identifies a raft of allegedly irrelevant testimony in one sentence, without argument as to *why* each bit was irrelevant. Those relevancy challenges are neither preserved nor briefed, and this Court may deem them waived. *See* Iowa R. App. P. 6.903(2)(g)(3). In any event, the State could ask Sievers whether other relevant facts in E.O.'s testimony were true—including testimony that they spent a lot of time together, and that Sievers would take E.O. out to job sites. *See* D0280, at 338:5–19; 702:25–704:10. Sievers denied doing that and said that he "would never take a kid to a job site" because "[t]hat would just be a liability." *See* D0280, at 704:6–10. The State could then show that was false by asking about one specific incident on a job site where he recruited a child and sent him into an attic and through "a pretty tight crawl space"—which happened to be how he met Suhr. *See* D0280, at 704:11–705:25. The initial question was relevant because if Sievers and E.O. spent a lot of time together, that

would give Sievers opportunities to abuse (or groom) E.O., and it would also help negate any defense of mistaken identity. *See* D0280, at 338:5–19. Once Sievers gave a denial, the State could show that the explanation for his denial was inconsistent with other known facts. The falsity of his testimony, in itself, becomes relevant evidence on the matter explored on direct: the ultimate question of guilt. *See State v. Ernst*, 954 N.W.2d 50, 56 (Iowa 2021) (quoting *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993)).

The cross-examination on the explicit pictures was relevant to establish that Sievers intentionally saved that picture of a young boy's anus and testicles *in the same hidden folder* as photos that (one could infer) he saved to use for his own sexual arousal/gratification—which was proof of motive and intent. It also corroborated E.O.'s testimony that Sievers showed him pornography from a folder on his computer. D0280, at 332:21–335:7. Like the "terrible coincidence" in *Yerhart*, the State could invite Sievers to try out an innocuous explanation for the fact that a photo of a boy's genitals was in his hidden porn folder, which also used to contain a subfolder labeled with E.O.'s first name—because those facts tended to undercut Sievers's general denial, and unconvincing explanations would undercut it even more. *See Yerhart*,

2014 WL 5478149, at *3–4. And that is just what happened: Sievers's answers were not credible, which tended to disprove the general denial that he offered on direct. *See* D0280, at 691:22–697:6.

This is all academic—not just because error was not preserved, but also because Sievers ended his direct with a promise to "answer any questions the State might have." *See* D0280, at 680:1–4. The State and the court were right: it would be unfair if Sievers could say that, then turn around and prohibit the State from asking questions about things that were otherwise relevant. As the State observed, any limit on the scope of cross-examination after that would be misleading:

> [N]ow . . . the jury is misled because they think my hands are not tied . . . . They're going to wonder why isn't she asking about that child in the photo; why isn't she asking about the house that he purchased; why isn't she asking about that evidence he deleted. So the door was blown open.

D0280, at 680:23–681:6. Sievers essentially issued a challenge, and the State was entitled to answer that challenge by cross-examining him on any relevant matters, to the extent allowed by other rules of evidence. *See generally State v. Parker*, 747 N.W.2d 196, 206–07 (Iowa 2008).

Finally, note that almost everything that the State asked about was already in the record, which means that error in overruling any particular objection would likely be harmless. *See State v. Fevold*, No. 02–0339, 2003 WL 554751, at *4–5 (Iowa Ct. App. Feb. 28, 2003) (finding harmless error on a similar challenge because "the record elsewhere contains substantially the same evidence as contained in Fevold's cross-examination"). Jurors may have drawn inferences from Sievers's unconvincing explanations, but they could just as easily have drawn the same inferences from the *absence* of any explanation. And even without *any* cross-examination, there would still have been "a lot of corroborating evidence" in support of E.O.'s convincing testimony. *See* D0282 at 33:8–37:20. Thus, any error would be harmless.

V. The convictions are supported by sufficient evidence.

Preservation of Error

There is no longer an error-preservation requirement for challenges to sufficiency of the evidence on direct appeal. *See State v. Crawford*, 972 N.W.2d 189, 194–202 (Iowa 2022).

Standard of Review

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. That means evidence which, if believed, would

be enough to "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). A reviewing court will "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). That generally means accepting and crediting any testimony that aligns with the verdict—including victim testimony.

Merits

The gist of Sievers's sufficiency challenge is about the timeline. E.O. said that he thought Leslie was working as a travel nurse, when he was alone with Sievers overnight. *See* Def's Br. at 55–58. But E.O. was not sure whether she was travelling or just working night shifts. *See* D0280, at 393:8–11; 401:2–7. Sievers is correct that Leslie did not actually begin working as a travel nurse until 2014. But Leslie *was* working overnight nursing shifts throughout 2013, while she and E.O. lived with Sievers. *See* D0280, at 315:11–316:9; D0280, at 329:18–24. That matched E.O.'s statement that Leslie used to work "12-hour shifts" during that time. *See* D0280, at 381:3–21. So E.O. would still have spent nights alone with Sievers during that period. Indeed, E.O.

remembered seeing Leslie leave for work, then being abused by Sievers while Leslie was gone. *See* D0280, at 404:3–20. This is consistent with the timeline. *Cf.* D0280, at 733:6–19 (addressing this in State's closing argument).

Sievers also argues that E.O. is clearly wrong when he testified that he and Leslie lived with Sievers for a period of years, since they only lived together at Sievers's home for about six months. *See* Def's Br. at 55–58. But E.O. was including the prior period, during which he and Leslie would frequently stay over with Sievers. In any event, Sievers testified that E.O. was *right* about the general timeline. *See* D0280, at 684:3–22. So this does not undermine E.O.'s testimony.

Sievers's challenge cannot overcome the standard of review. Jurors could believe that E.O. was telling the truth when he described Sievers touching him. "A sexual abuse victim's testimony alone may be sufficient evidence for conviction." *State v. Donahue*, 957 N.W.2d 1, 10–11 (Iowa 2021). No corroboration is needed. *See State v. Mathis*, 971 N.W.2d 514, 518 (Iowa 2022); *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). The jury believed E.O. So did the trial court. *See* D0282 at 33:8–37:20. His testimony was direct evidence that Sievers sexually abused him.

That substantial evidence supports both convictions, so this challenge fails.

CONCLUSION

The State respectfully requests that this Court reject each of Sievers's challenges and affirm his convictions.

REQUEST FOR ORAL ARGUMENT

This case should be set for oral argument.

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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