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IN THE SUPREME COURT OF IOWA
Supreme Court No. 23–1928
Lee County (South) No. PCLA006528

BENJAMIN TRANE.
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LEE COUNTY (SOUTH)
THE HONORABLE MICHAEL J. SCHILLING, JUDGE

APPELLEE & CROSS-APPELLANT'S AMENDED BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Trane demanded a speedy trial, against the advice of his trial counsel. Did the PCR court err in finding that Trane's counsel was not ineffective for declining to delay trial by moving to sever the charges?

II. Count III charged Trane with child endangerment as to two potential victims: "B.V. and/or A.H." The evidence showed that Trane endangered both children through the same acts: he used his authority to direct others to carry out disciplinary policies that he designed, which required that those two children be underfed and held in near isolation. Both children deteriorated, mentally and physically. Trane saw it happen. Did the PCR court err in finding that Trane's trial counsel was ineffective for failing to challenge that marshalling instruction?

ROUTING STATEMENT

Trane requests retention. *See* App's Br. at 5. The State agrees retention is appropriate, because of the jury-instruction issue raised in its cross-appeal. *See* Iowa R. App. P. 6.1101(2)(b)–(d) & (f).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal and cross-appeal from an order that granted partial relief in a first PCR action. Benjamin Trane was convicted of assault with intent to commit sex abuse, an aggravated misdemeanor, in violation of Iowa Code section 709.11(3); sexual exploitation by a school counselor through a pattern, practice, or scheme of conduct, a Class D felony, in violation of Iowa Code section 709.15(2)(a)(1); and child endangerment, an aggravated misdemeanor, in violation of Iowa Code section 726.6(1)(a). Trane owned and ran a private school for troubled youth. Trane's sexual relationship with a female student, K.S., gave rise to Counts I and II. Trane's actions that inflicted "OSS" isolation on two male students, B.V. and A.H., gave rise to Count III. A jury found him guilty (but rejected a greater charge of sexual abuse). This Court affirmed on direct appeal. *See State v. Trane I*, 934 N.W.2d 447 (Iowa 2019); *State v. Trane II*, 984 N.W.2d 429 (Iowa 2023).

Trane filed this PCR action. He alleged that his trial counsel (Lisa Schafer) was ineffective. The matter went to trial on the merits. The PCR court rejected all but one of Trane's claims. It concluded that trial counsel was ineffective for failing to challenge the jury instruction that defined the elements of the child endangerment charge, because each element could be proven as to "B.V. and/or A.H." *See* D0133, PCR Ruling (10/24/23). So it ordered retrial on that count alone.

Trane appeals. He argues that the PCR court erred in rejecting his claim that his trial counsel was ineffective for not moving to sever Counts I and II from Count III. But he cannot establish error in the PCR court's finding that "trial counsel's sworn statements explaining that she discussed filing a Motion for Severance … with Trane are more credible than Trane's … statements to the contrary." *Id.* at 8. And even if he could, he still could not establish *Strickland* prejudice.

The State cross-appeals. Trial counsel was not ineffective at all, because this marshalling instruction was not objectionable. The State may charge alternative acts within the same course of conduct, and a jury only needs to reach a unanimous verdict on the ultimate issue of whether *at least* one alternative for each element was proven beyond a reasonable doubt. Jurors need not agree on which alternative it was.

Moreover, even if failing to object was a breach of duty, there was no *Strickland* prejudice. Trane conceded most of the charged elements as to both children. For this breach to matter, Trane would need to establish a reasonable probability that jurors would not have reached a unanimous verdict that he created a substantial risk to B.V. or A.H. (or both). On this record, that is not possible—each of those children was underfed in OSS for weeks and months at a time, and each child lost about 25% of his respective body weight.

Statement of Facts

The Iowa Supreme Court summarized some of the relevant facts in its first ruling that affirmed Trane's convictions on direct appeal:

> In the fall of 2002, Benjamin Trane and his wife moved from Utah to Iowa with hopes of establishing a private, therapeutic boarding school for troubled teens. . . . Eventually, Trane became the sole owner of the school. Midwest Academy offered programming unique from that of other private, military, or residential schools, rendering it appealing to parents of teens with a variety of behavioral and disciplinary struggles. Midwest Academy purported to offer a combination of character-building, therapeutic, and educational programming, although it operated outside the purview of the Iowa Board of Education and its licensing requirements.
>
> Midwest Academy functioned under a rules-and-consequences-based levels system. . . .
>
> Relevant to the child endangerment charge was the use of Out-of-School Suspension (OSS) rooms. OSS rooms were designed for a single student to occupy for up to twenty-four hours at a time, with constant supervision. The

OSS rooms were employed as a “last ditch effort” to curb undesirable behaviors. … While in OSS, the student was expected to sit in structure except for bedtime, meaning he or she could choose from one of three positions in which to sit without moving. [Footnote omitted.] The lights in the OSS room were always on. Should the student break structure without permission or otherwise act out, the twenty-four-hour clock would reset.

A.H. and B.V. were each confined in an OSS room for significant periods of time. A.H. arrived at Midwest Academy in May 2014 when he was twelve years old. A.H. had been diagnosed with anxiety, depression, and oppositional defiant disorder, … At Midwest Academy, A.H. continued his pattern of defiance, and as a result, he spent approximately half of his time in OSS. While in OSS, A.H. engaged in behavior such as urinating on the walls, punching his own nose to make it bleed, and throwing his chewed-up food at the surveillance camera. When A.H.’s parents removed him from Midwest Academy after approximately a year, A.H.’s weight had declined from 120 to 90 pounds.

B.V. was admitted to Midwest Academy a few months after A.H., when he too was twelve years old. B.V. came to the school with a diagnosis of attention deficit hyperactivity disorder and bipolar disorder, as well as a past history of assaultive behavior. While at Midwest Academy, B.V. spent at least 133 of his 210 days in OSS—sixty-three percent of his time at Midwest Academy. While in OSS, B.V. defecated and urinated in the room and often refused to eat. By the time B.V. left Midwest Academy in March 2015, his weight had gone down from 115 pounds to 89 pounds.

[…]

At Midwest Academy, each student was assigned a “family representative.” Trane, the owner, was also the family representative for four students, including K.S. As K.S.’s family representative, Trane controlled what level K.S. was on, whether K.S. could call home, and whether K.S. could go on outings.

> [. . .]
>
> In late 2015, K.S. disclosed to a night-time staff member named Cheyenne Jerred that Trane had been sexually abusing her, . . .

Trane, 934 N.W.2d at 450–52.

Trane demanded a speedy trial. But this was a complex case and "the discovery materials were voluminous." *See id.* at 452. And so "the trial transcript indicates that Trane's counsel tried to persuade him to waive speedy trial." But "Trane refused" to waive speedy trial. *See id.* at 459; PretrialTr. (11/27/17) at 2:18–25, filed as D0139, PCR Ex. N.

Trane raised ineffective-assistance claims in his direct appeal. The Iowa Supreme Court preserved all of them for PCR. But it opined on some of them in dicta. On a claim that trial counsel was ineffective for not filing a motion to sever the charges, *Trane I* remarked:

> Ordinarily one might have expected a motion for severance in a case like this. The sexual abuse and sexual exploitation charges involved a different kind of misconduct, carried out in a different way, against a different victim than the child endangerment charge. But. . . [i]t is possible that, as with the decision to insist on a speedy trial, this was a client call.

See Trane, 934 N.W.2d at 465.

On PCR, trial counsel (Lisa Schafer) testified that she *did* discuss the issue of severance with Trane, early in the course of her representation. Trane was adamant that he wanted the entire matter

concluded before Christmas, and he specifically ordered Schafer not to move for severance of charges (which, if granted, would have delayed trial on those severed charges). *See* D0162 at 29:12–32:13; *id.* at 88:3–89:8. That aligns with Schafer's affidavit:

> I believe it was early in the case when I remember explaining to [Trane] that [severance] would result in two trials, one likely after the other and that it would be at least a month after the first trial that the second one would be held, so there would be a different jury pool. He [waved] me off and made it clear that he wanted the matter done as quickly as possible and that he would be home by Christmas.

D0161, PCR Ex. A, at ¶3. And it aligned with what *Trane I* noted: she asked Trane to waive speedy trial because having extra time to prepare would ultimately improve their chances at trial—but Trane refused. *See* D0139 at 2:18–25; *Trane*, 934 N.W.2d at 45. E-mails between Schafer and Trane showed the same thing:

> I told you in our meeting on November 21 that I needed much more time given all the information that would need to be reviewed, let alone to do further investigation. I specifically recommended that you consider waiving speedy trial to give me that additional time. You did not want to do that and we proceeded to trial pursuant to your speedy trial demand.

See D0152, PCR Ex. 6 (e-mail dated January 4, 2018).

Trane's testimony was directly at odds with Schafer's testimony and the facts in the underlying record. Trane said that Schafer never

said they could move to sever these charges. *See* D0159 at 19:7–23 & 45:7–48:18. Trane asserted that he would have told Schafer to move for severance of those charges—even if that meant a delay of "several months" in concluding the proceedings. *See* D0159 at 61:14–62:22.

The PCR court reviewed the now-expanded PCR record, and it explained why it believed Schafer's testimony over Trane's:

> Viewing the entire record, it is clear that Ms. Schaefer encouraged Trane to waive his right to speedy trial in order to allow both of them more time to prepare. The discovery materials for this case were voluminous. *See Trane*, 934 N.W.2d at 453. Trane's counsel received many of the discovery materials only "14 days before trial and on the first day of depositions." *Id.*
>
> Trane was not persuaded by counsel's requests for more time to prepare his case. Trane's decision not to waive speedy trial and thus not permit counsel the time that she believed she needed to prepare for trial is consistent with Schaefer's testimony that Trane wanted the case over by Christmas. It is also consistent with her testimony that he was not interested in requesting a severance if it would result in a second trial held about a month later than the date the first trial was completed. It is difficult for this Court to understand why Trane would resist his counsel's professional advice that she needed more time to maximize her preparedness for trial but be willing to agree to a severance of Count III that would delay a second trial on that count for perhaps a month or more.

See D0133 at 4–6.

Trane argued that Schafer's records did not mention the issue of severance. But the PCR court explained why that was to be expected:

> Trial counsel testified that she believed she knew the law of severance and did not believe she needed to research that issue. When Trane dismissed the idea of asking for severance "early on", counsel had no need to prepare a draft motion. Finally, the lack of a memo memorializing a conversation with Trane about severance and his response is perhaps not surprising since in the early going counsel was concentrating on getting Trane's bond lowered, obtaining a furlough for him to be able to leave the state of Iowa, and attempting to obtain the voluminous discovery materials.

Id. at 6–7.

The PCR court also found "Trane's statements denying that his counsel had a discussion with him about severance are self-serving." *See id.* at 7–8. It considered that, along with many other factors, in "assessing credibility of Trane and [Schafer]." *See id.*

> [T]he Court concludes that [Schafer]'s sworn statements explaining that she discussed filing a Motion for Severance of Count III with Trane are more credible than Trane's … sworn statements to the contrary. Thus, the Court finds that Trane failed to establish by a preponderance of the evidence that [she] breached an essential duty by failing to discuss with him a Motion to Sever; or by failing to file a Motion to Sever. Trane is not entitled to relief on this ground.

Id. at 8. So the PCR court rejected the claim without needing to rule on the State's arguments that a motion to sever would have no merit, or its arguments that Trane could not establish *Strickland* prejudice even if he could prove breach. *See* D0101, State's Brief, at 12–17.

Additional facts will be discussed when relevant.

ARGUMENT

I. The PCR court did not err in ruling that Trane failed to prove that his counsel was ineffective for declining to file a motion to sever these charges.

Preservation of Error

Most parts of this claim were considered and ruled upon below. *See* D0133 at 4–8. Error is mostly preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

The State's arguments about *Strickland* prejudice were raised below. *See* D0101 at 12–17. The PCR court did not reach the issue or rule on those arguments because it ruled that there was no breach. *See* D0133 at 8. Error is preserved for those alternative arguments in support of the outcome, because they were raised and argued below. *See DeVoss v. State*, 648 N.W.2d 56, 61–62 (Iowa 2002).

Standard of Review

Rulings on ineffective-assistance-of-counsel claims are reviewed de novo. *See, e.g.*, *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015) (citing *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012)).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *See State v. Keller*, 760 N.W.2d 451, 452 (Iowa

2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

A. The PCR court believed Schafer's testimony that Trane instructed her not to file a motion to sever. Trane cannot establish error in the PCR court's credibility findings. So he cannot prove breach.

The PCR court found Schafer's testimony was more credible than Trane's. It believed Schafer when she testified that she discussed severance with Trane and that Trane instructed her not to file a motion to sever, consistent with his stated desire to "be home by Christmas." *See* D0133 at 4–6, 8.

Trane does not argue that trial counsel ever has a duty to move to sever charges, *against* the client's wishes. Instead, he argues that this Court should declare that his testimony was more believable than Schafer's, and then reverse the PCR court's findings that Schafer was credible and that the discussion she described actually happened. *See* App's Br. at 19–32. But the PCR court found Trane's testimony was *not* credible, and Trane cannot overcome that finding on appeal.

Yes, review is *de novo*. But reviewing courts still "give weight to the lower court's findings concerning witness credibility." *See Sothman v. State*, 967 N.W.2d 512, 522 (Iowa 2021) (quoting *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011)); *accord Cox v. State*, 554 N.W.2d 712, 714 (Iowa Ct. App. 1996) (citing *Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986)) ("We give weight to the findings made by a [PCR] court regarding the credibility of witnesses."). The PCR court reviewed the expanded record; identified conflicts in the evidence; and used logic, experience, and common sense to resolve them.

Schafer was credible. She had records and notes, but she did not keep a note of every single idea she considered or of every single topic that she discussed with Trane. *See* D0162 at 79:22–81:7. The PCR court understood why it made sense that Schafer would not have records or notes about severance: Schafer was already familiar with the applicable law when she discussed the issue of severance with Trane, and he made it clear that he was not interested in delay for any reason; so Schafer focused her efforts (and her notes) on trial preparation and on specific areas of concern for Trane (including bond and furlough). *See* D0133 at 6–7; *accord* D0162 at 31:19–32:21. It was not error to believe Schafer when she testified that she discussed the potential for

severance with Trane, and he told her that he "wasn't interested" in "doing anything that would extend his case beyond the trial date." *See* D0162 at 36:3–9; *accord id.* at 29:12–30:16; D0133 at 5, 8 (finding that testimony credible).

The PCR court noted that it could not "understand why Trane would resist his counsel's professional advice that she needed more time to maximize her preparedness for trial but be willing to agree to a severance of Count III that would delay a second trial on that count for perhaps a month or more." *See* D0133 at 4–6. On appeal, Trane argues that this was because Trane "was never given any option *but* to charge ahead with all counts." App's Br. at 25. That response makes no sense because Trane was told *on the record* that he had the option of waiving speedy trial to give Schafer time to prepare a more effective defense—and he chose not to take it. D0139 at 2:18–25. Trane also argues that the transcribed exchange does not mention severance. *See* App's Br. at 24–25. Of course not—they were in front of a court reporter for a pretrial conference, not to make a record about each of the specific issues that Schafer and Trane had discussed up to that point (in discussions that were, at the time, protected by attorney-client privilege). The demand for speedy trial was pertinent

to scheduling, so it was part of the record. The fact that no other discussions between Trane and Schafer were mentioned at a pretrial conference does not mean that no other discussions occurred.

Trane misses the point that the PCR court was making, when it noted his demand for speedy trial (against Schafer's advice to waive it): that record tended to undercut Trane's PCR testimony that he would have sought severance if he knew it was an option. It established that Trane eschewed *other* opportunities to improve his chances at trial because he would not tolerate any delay. Trane testified that he would have told Schafer to move for severance even if that meant a delay of "several months." *See* D0159 at 61:14–62:22. There was no way to square that with Trane's flat refusal to accept *any* delay, even as Schafer pled for time to review discovery and prepare his defense. And that made it hard to credit *any* of Trane's PCR testimony.

That is what the PCR court meant when it said that Trane's testimony was "self-serving." *See* D0133 at 7–8. Trane was a party with a burden of proof in this PCR action and a clear interest in the outcome of the litigation. It was not surprising that he would give "self-serving answers to leading questions." *See Doss v. State*, 961 N.W.2d 701, 714 (Iowa 2021); *accord* D0159 at 19:7–23 & 62:16–63:1.

PCR courts need not accept such testimony at face value. They can "instead look to contemporaneous evidence" of the applicant's "expressed preferences." *See id.* (quoting *Lee v. United States*, 582 U.S. 357, 369 (2017)). Here, Trane clearly demanded a speedy trial without delay, over Schafer's advice that a delay would improve his chances at trial. *See* D0139 at 2:18–25; D0152. But on PCR, Trane testified that if Schafer had mentioned severance, he would have immediately recognized that it would be advantageous—and would have accepted a delay of "several months" to secure that perceived tactical advantage. *See* D0159 at 61:14–62:22. The PCR court did not err when it highlighted that discrepancy, nor when it concluded that it undermined Trane's credibility overall.

Trane adds a new argument on appeal that was not made or ruled upon below: that severance would have made him eligible for bail "after his acquittal" on charges relating to sexual abuse of K.S., and the fact that he did not tell Schafer to move for severance means Schafer must not have explained that to him. *See* App's Br. at 25–26 & 30–32. This argument is unpreserved and is not supported by any evidence showing that Trane would accept any delay for any reason. It also makes no sense. Trane posted bond. *See* D0028 FECR009152,

Bond (10/12/17). He was released pending trial. *See* D0027 FECR009152, Pretrial Release Agreement (10/9/17). He could not leave Iowa, but there is no reason to think that would have changed even if both sexual abuse charges were dismissed. Moreover, Trane was *not* acquitted of all felony charges involving K.S. This was foreseeable. Finally, and most importantly, what Trane *wanted* was a full acquittal and dismissal of charges so that he could be "home by Christmas." *See* D0162 at 29:12–30:16. He did not want a partial acquittal or a temporary furlough for Christmas—he wanted to be *done* by then. *See* D0162 at 33:11–34:1 & 88:3–25. Trane's argument is complicated, but the truth is simple: Schafer discussed severance with Trane, but he told her that he was not interested because he wanted to maintain his speedy trial demand—even if it meant foregoing options that would give him a better shot at a full acquittal. The PCR court did not err in recognizing that. *See* D0133 at 5–8.

Trane cannot overcome the PCR court's credibility findings, which receive deference on appeal and are well-supported by the expanded PCR record. *See Sothman*, 967 N.W.2d at 522 (quoting *King*, 797 N.W.2d at 571); *accord Cox*, 554 N.W.2d at 714 (citing *Wycoff*, 382 N.W.2d at 465). Schafer was credible. Trane was not. It

was not error to conclude that Schafer did, in fact, discuss severance with Trane. *See* D0133 at 5–8. So Trane cannot establish that Schafer breached any professional duty, and his challenge fails. He also cannot establish prejudice, because any pretrial conversation about severance would have ended with Trane ordering counsel not to delay trial by moving for severance—which means he cannot establish a reasonable probability that such a discussion would have any effect.

B. Also, Trane was not entitled to sever charges that he committed by using the same absolute control over students in his care. So Schafer had no duty to move for severance, nor would it have created a reasonable probability of a different result.

Trane argues: "The State made no real effort in Trane's PCR hearing to assert that the failure to sever Counts was on its face a reasonable one." *See* App's Br. at 19. Not so. The State made that argument in its brief below, and Trane found it and replied to it. *See* D0102, Reply Brief, at 13 (citing D0101 at 15).

Joinder of all of these charges was proper, in the first instance, because these charges arose out of the same occurrence: while Trane was in charge of the day-to-day operation of Midwest Academy, he implemented policies that isolated and starved some students, while keeping some other students within reach (but similarly at his mercy).

All of the evidence that established the atmosphere of control and the continuum of privileges or consequences at Midwest was essential to understanding what happened with respect to all three charges. *See* D0167, TrialV3 20:3–43:12 & 166:21–168:3. The ever-present threat of harsh consequences like OSS and level-based limitations on access to basic amenities meant that students "did everything [they] could to move up in the program." *See* D0167 at 285:16–287:12. Trane's ability to give out unique rewards and take students off campus made them view him as "extremely godlike." D0167 at 288:16–289:16; *accord* D0168 TrialV4 21:3–22:23 ("[Trane] was the focus of the room. … [T]o the point where consequences were issued to any student who would … try to talk to him."); D0168 at 165:3–166:10.

When Trane chose himself as K.S.'s family rep, he gave himself even more "[a]bsolute control" over K.S. at Midwest. *See* D0168 at 295:2–296:19; *accord* D0171, TrialV7 152:8–25. It would be impossible to understand the all-encompassing nature and coercive power of that "absolute control" without also understanding the fact that students who disobeyed were shut away.

It is irrelevant that some evidence of sexual abuse/exploitation would not have been relevant or admissible in a separate trial that

only involved the charge of child endangerment. The Iowa Supreme Court explained this in *State v. Romer*:

> Romer bases much of his argument on the contention that not all of the evidence was required in order to convict Romer on each individual count. This fact, even if true, is not material. In *Lam*, we noted that the amended rule authorizing joinder of offenses in a single information where the offenses charged are based either on "the same transaction or occurrence" or "a common scheme or plan" was specifically intended to achieve judicial economy through "liberaliz[ing] and broaden[ing] charging practices so as to allow prosecutors more leeway in seeking to join multiple offenses for a single prosecution." *Lam*, 391 N.W.2d at 249. Even if some of the evidence needed to prove count I was irrelevant to whether Romer committed the acts he was charged with in count IV, for example, the State had the right to charge multiple counts in the same offense to achieve judicial economy.

State v. Romer, 832 N.W.2d 169, 182 (Iowa 2013). So the trial court would not have abused its discretion if it denied a motion to sever these charges because "[a] single trial was in the interest of judicial economy as it was then unnecessary to require numerous witnesses to testify at multiple trials to the same operative facts." *See id.* at 183. Here, judicial economy was an especially weighty interest because of the sheer number of out-of-state witnesses who were needed to testify to the same operative facts at both trials, if charges were severed. *See Neal v. State*, No. 19–1036, 2021 WL 1400721, at *3 (Iowa Ct. App. Apr. 14, 2021) (finding counsel not ineffective for not moving to sever

charges because "the evidence linking Neal to the firearm was mostly the same evidence linking him to the robbery, so the State's interest in not having to produce identical evidence to two separate juries was strong"). Trane cannot establish by a preponderance of the evidence that a motion for severance would have had merit, and so he cannot establish that his counsel was ineffective for declining to file one.

C. Severance would create no reasonable probability of any more favorable result for Trane.

On prejudice, Trane asserts that severance would have created a reasonable probability of a different result because jurors would have decided each charge without hearing evidence about mistreatment of other minors at Midwest Academy, and so jurors were "more likely to presume guilt on the basis of unfair prejudice." *See* App's Br. at 16–19. But the jury did not presume Trane's guilt—they acquitted him on the most serious charges on Count I. That means "[t]he jury was clearly able to compartmentalize the facts for each charge." *See Brown v. State*, No. 17–0030, 2018 WL 4922941, at *2 (Iowa Ct. App. Oct. 10, 2018); *State v. Wise*, No. 19–1353, 2021 WL 1400771, at *4 (Iowa Ct. App. Apr. 14, 2021) (noting the jury's "verdicts on lesser included offenses" signaled "their ability to set emotion aside in assessing the evidence").

Trane's jury followed the instruction to "determine whether [Trane] is guilty or not guilty separately on each count." *See* D0083, Jury Instr. 13.

Iowa courts generally presume that jurors follow instructions—and that specific instruction is no exception. *See, e.g.*, *Brown*, 2018 WL 4922941, at *2 (finding counsel was not ineffective for not moving to sever charges because "[t]he instructions clearly directed the jury to determine guilt on each separate count, and to not conclude the defendant was guilty … based on the verdict for any other count").

Trane cites no cases where any court found trial counsel was ineffective for failing to move to sever charges. The State cannot find one, either. That is because jurors are presumed to follow instructions to hold the State to its burden of proof beyond reasonable doubt and to separate the issue of guilt on each charge from each other charge. That presumption is reinforced in this case, because jurors acquitted Trane of the most serious charge on Count I—so their verdicts do not reflect overmastering hostility or cross-contamination. As such, there is no basis for any inference that severing any of these charges would have created any reasonable probability of a different result.

* * *

To summarize: Trane cannot establish breach for this claim because Schafer *did* discuss the issue of severance with him before trial (and the delay that it would entail), and Trane told her that he did not want that to happen. Trane also cannot establish prejudice because the record makes it clear that he would not consent to delay of trial for any reason—and severance would have been no exception. And if Schafer *had* filed a motion to sever these charges, the trial court would have been correct to overrule it because these charges arose from the same occurrences and all required the same background testimony on Trane and Midwest from numerous out-of-state witnesses, which meant joinder of these charges for trial was presumptively proper and in interests of judicial economy. So there is no reasonable probability that filing a motion to sever would have resulted in separate trials on these charges. And even if it had, Trane would not be able to establish a reasonable probability of a different result, given that jurors at his trial were presumed to follow the instruction that cautioned them to weigh the evidence on each charge separately—and they even returned a partial acquittal that indicated that they *did* follow that instruction. So Trane can establish neither breach nor prejudice for this challenge, and the PCR court was correct to reject it.

II. The PCR court erred in finding that trial counsel was ineffective for not objecting to Jury Instruction 31.

Preservation of Error

The PCR court considered and rejected the State's arguments in its ruling. *See* D0133 at 8–21. That ruling preserved error. *See Lamasters*, 821 N.W.2d at 864.

Standard of Review

Rulings on claims of ineffective assistance of counsel are reviewed de novo. *See Thorndike*, 860 N.W.2d at 319.

Merits

Again, to establish ineffective assistance of counsel, Trane had to show "that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *See Keller*, 760 N.W.2d at 452 (citing *Strickland*, 466 U.S. at 687). Both elements must be proven, and failure to prove a single element is fatal to the claim. *See Ledezma*, 626 N.W.2d at 142.

A. Trial counsel did not breach a duty by declining to object to Jury Instruction 31.

The PCR court found that "jury instruction 31 did not ensure a unanimous decision," and Trane's counsel breached an essential duty by failing to object to it. *See* D0133 at 12–16. It ruled that an objection was required because the instruction allowed the State to prove that Trane created a substantial risk to "B.V. **and/or** A.H.'s physical or

mental or emotional health or safety"—which meant "the jury could convict him without being unanimous about what child was the victim." *See id.* at 9–16. But the jury unanimously agreed that the evidence established that Trane's acts created that substantial risk and qualified as child endangerment. That is a unanimous verdict.

The PCR court was right that "Iowa requires unanimous verdicts in criminal cases." *Id.* at 16 (citing Iowa R. Crim. P. 2.22). But it rejected binding Iowa precedent on what that unanimity requirement means. It does not matter that Trane could have been charged with two counts of child endangerment (one for each child whom he endangered). Rather, what matters is that the State charged him with one course of conduct that created a substantial risk to at least one child. It does not matter whether the alleged risks to each child were created by separate acts or whether those risks/acts were proven (in whole or in part) by separate bodies of evidence. What matters is that jurors could not convict Trane unless they unanimously agreed that the evidence had proven, beyond a reasonable doubt, that his course of conduct included at least one act that created a substantial risk to B.V., A.H., or both. These instructions ensured that this conviction required that unanimous finding of guilt.

1. *State v. Duncan* forecloses a finding of breach.

During oral arguments in an unreported hearing on PCR, the State argued that *State v. Duncan* foreclosed any showing of breach because it rejected a similar challenge. The PCR court considered and rejected that argument, in its ruling. *See* D0133 at 12–14 (citing *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981)). It was wrong.

In *Duncan*, a defendant was charged with one count of burglary. The State alleged that he burglarized either a boat, a marina, or both. The jury convicted him. Duncan argued that the instructions allowed a conviction by a nonunanimous verdict, because jurors could find him "guilty of burglary by a combination of votes respecting the marina or the boat" without unanimously agreeing that he had burglarized any particular structure. *Duncan*, 312 N.W.2d at 523. The *Duncan* court agreed that "[a] unanimous verdict is of course required." *See id.* But it affirmed because due process does not require jurors to "concur in a single view of the transaction disclosed by the evidence." *See id.* Jurors must agree that the State proved the defendant committed the offense. But they may convict "notwithstanding a difference between jurors as to which of two … facts, each consistent with guilt, is established by the evidence." *See id.* (quoting 75 Am.Jur.2d *Trial* § 884, at 760 (1974)).

The PCR court held that *Duncan* was inapplicable here because "*Duncan* is an 'alternative means' case; it is not an 'alternative acts' case with multiple alleged victims." *See* D0133 at 13–14. But that is incorrect. In *Duncan*, the State alleged two acts of burglary—entry into each of two different structures. The State could still elect to charge just one count of burglary for the whole course of conduct, and prove each of those two alleged acts of burglary as alternative routes to the finding that his course of conduct included at least one burglary. *See Duncan*, 312 N.W.2d at 522–23. It explained:

> (W)here a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable separately and as distinct crimes when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as together constituting but one offense . . . .

Id. at 523 (quoting 42 C.J.S. *Indictments and Informations* ¶ 166, at 1121–22 (1944)). So *Duncan* did not need to decide whether entering the marina and entering the boat could have been charged separately, each as a separate act of burglary. The State could elect to charge them *together* as alternative factual allegations for the same charge, because proving either one would be independently sufficient to establish that this particular course of conduct included at least one act of burglary.

Duncan went on to consider and reject the challenge that Trane alleged his trial counsel was ineffective for failing to raise here. It said:

> The second question is whether the jury had to be unanimous on guilt with respect to the boat or with respect to the marina, or whether the jury could find defendant guilty of burglary by a combination of votes respecting the marina or the boat. . . .
>
> . . . "It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon another." *People v. Sullivan*, 65 N.E. 989, 989 (N.Y. 1903). Stated differently, "(I)f substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required." *State v. Arndt*, 529 P.2d 887, 889 (Wash. Ct. App. 1974). . . . The trial court did not err in its instructions and submission of the case.

Id. at 523–24 (citations updated). Even if the State could have charged two separate counts of burglary, that did not bar it from choosing to bring a single charge that encompassed two acts of burglary—either of which would be independently sufficient to establish that Duncan had violated the statute that prohibits burglary. And when Duncan was tried on that single charge, jurors could convict without agreeing on *which* of the alternative allegations about his conduct had been proven, because the jury need not "concur in a single view of the transaction disclosed

by the evidence." *See id.* at 523 (quoting *Sullivan*, 65 N.E. at 989). So jurors "could find [Duncan] guilty of burglary by a combination of votes respecting the marina or the boat"—and that remained true "whether the episode involved one burglary or two." *See id.* at 522–24.

Some subsequent cases have described *Duncan* as a case about alternative means of violating the burglary statute, lumping it in with other cases on that topic. *See, e.g.*, *State v. Williams*, 285 N.W.2d 248, 269–70 (Iowa 1979) (jury need not unanimously agree as to whether Williams committed premeditated murder or felony murder, because "felony murder is simply a specific method set apart by the legislature by which the prosecution may show that defendant was acting with the evil state of mind … to support a finding of first degree murder"); *State v. Bratthauer*, 354 N.W.2d 774, 776–77 (Iowa 1984) (citing *Duncan* to reject claim that due process would be violated "if only six of the twelve jurors found he was operating a motor vehicle under the influence of an alcoholic beverage and the other six found instead [a specified BAC]" because those subparagraphs of the statute "plainly define alternative conduct that in a single occurrence can result in only one conviction"); *State v. Corsi*, 686 N.W.2d 215, 222–23 (Iowa 2004) (citing *Duncan* to reject claim that counsel was ineffective for declining to object to a

marshalling instruction that charged aiding and abetting manufacture of methamphetamine and conspiracy to manufacture the same drug as alternatives because that only amounted to charging "different methods of violating section 124.401(1) in one instruction"). Those cases should not be read to limit *Duncan*—they took what they needed from *Duncan* to resolve those simpler challenges, and they did not engage further.

Other courts that have looked at *Duncan* have read it correctly: it "permitted the jury to convict a defendant of 'one overall burglary' even if jurors split over whether the defendant had burgled a marina or instead a boat in the dock, two different events." *See United States v. Titties*, 852 F.3d 1257, 1279 n.6 (10th Cir. 2017) (Phillips, J., dissenting). That set *Duncan* apart from cases like *Schad v. Arizona*, which involved alternative means of committing a single charged act. *See id.* (citing *Schad v. Arizona*, 501 U.S. 624 (1991)). Consequently, to affirm the conviction, *Duncan* had to embrace a "tolerance for lack of jury unanimity [which] exceeded that at issue in *Schad*." *See id.*; *cf. Mathis v. United States*, 579 U.S. 500, 506–07 (2016) (noting *Duncan* had held that Iowa's burglary statute "itemize[s] the various places that [burglary] could occur as disjunctive factual scenarios," and that "a jury need not agree on which of the locations was actually involved").

Back to the PCR court's ruling: it said that *Duncan* was different because it did not involve "multiple alleged victims." *See* D0133 at 13. But *Duncan* involved two different occupied structures, each as alternative target/object of the burglary—they played the same target/object role that a victim does, for offenses against the person.[1] Note the similarity: the occupied structure is an element of burglary, just like "an identifiable victim" is "an element" of child endangerment (according to the dicta in *Trane I*). *See Trane I*, 934 N.W.2d at 465; *cf. State v. Rooney*, 862 N.W.2d 367, 370–74 (Iowa 2015). It is also probably the unit of prosecution; a person who breaks into two houses in a row with a burglar's intent has probably committed two burglaries. Why "probably?" Because as far as the State can tell, no Iowa court has needed to pinpoint the exact unit of prosecution for burglary. *Duncan* expressly rejected the proposition that it needed to decide "whether the State could have convicted the defendant of two separate burglaries" in order to determine the level of unanimity required for that conviction. *See Duncan*, 312 N.W.2d at 522. It did not matter whether the boat

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[1] And, to the extent that it mattered, the boat and the marina were not owned by the same entity. *See Duncan*, 312 N.W.2d at 520 (noting that the boat was owned by Marcus Low, not the marina). So the two alternatives in *Duncan* did involve "multiple alleged victims."

and the marina could each support a separate burglary charge, with each listed as the "occupied structure" element. All that mattered was that jurors could not convict Duncan unless they unanimously agreed that the evidence proved that he burglarized *at least one* location that qualified as an "occupied structure." Similarly, here, it does not matter if creating a substantial risk to A.H. *and* to B.V. could have supported two separate charges of child endangerment. It was *still* correct under *Duncan* to instruct jurors to find Trane guilty on this single count if they unanimously agreed that Trane's course of conduct included acts that created a substantial risk to *at least one* child under his care—and they did not need to agree on whether that was A.H., B.V., or both.

If and when a defendant argues for *Duncan* to be overruled, the State will defend *Duncan* as correctly decided. But this case presents a different question: whether trial counsel was ineffective for declining to challenge these jury instructions during Trane's trial, while *Duncan* was controlling authority. *See, e.g.*, *Ortiz v. State*, No. 16–0441, 2016 WL 6902817, at *4 (Iowa Ct. App. Nov. 23, 2016) (citing *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997)) ("[W]hile … defense counsel has a duty to raise meritorious state law claims, there is no duty to challenge longstanding case law."); *accord Swanson v. State*, No. 22–1997, 2024

WL 1552593, at *2–3 (Iowa Ct. App. Apr. 10, 2024) (quoting *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982)). Reasonably competent defense counsel who looked into the issue would have determined that such a challenge to Jury Instruction 31 would be foreclosed by *Duncan*. Therefore, Trane cannot establish that declining to raise that challenge was a breach of any duty of reasonably competent representation. The PCR court's ruling on this claim may be reversed on that basis alone.

2. *Duncan* was correctly decided. The other cases cited in the PCR ruling do not undercut it.

If the PCR court had read *Duncan* correctly, it would have been bound by it. Lower courts cannot overturn controlling precedent from the Iowa Supreme Court. *See State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014). None of the other authority that the PCR court cited would change that, nor would it have established that it was a breach of duty for trial counsel to decline to raise this instructional challenge. *See State v. Vargas*, No. 14–0797, 2016 WL 1358661, at *4 (Iowa Ct. App. Apr. 6, 2016) ("Vargas claims *Biddle* should be overruled, … Vargas has not shown he received ineffective assistance due to [trial] counsel's failure to raise an argument seeking to overrule the case; if such an argument had been raised it would have been rejected.").

In theory, the Iowa Supreme Court could overrule *Duncan*. It is likely that Trane will argue that *Duncan* should be overruled. Even if it were, that would not prove that it was a breach of duty for counsel to decline to challenge instructions that stated the (still) controlling law. Moreover, *Duncan* was correctly decided and rests on stable footing. It should not be overruled.

Duncan predated *Schad v. Arizona*, which rejected a similar challenge to a first-degree murder conviction where all jurors agreed the killing was either felony murder, premeditated murder, or both—but were not required to agree on which theory had been proven. *See Schad*, 501 U.S. at 640–45. The Iowa Supreme Court beat *Schad* to it; it had rejected an identical challenge in *Williams*, 14 years earlier. *See Williams*, 285 N.W.2d at 269–70. And *Duncan* cited *Williams* as "an aspect of the rule" that foreclosed the challenge in that case, too. *See Duncan*, 312 N.W.2d at 524 (citing *Williams*, 285 N.W.2d at 269–70).

The majority opinion in *Schad* noted that there was probably a point at which differences between two theories alleged as alternatives may "become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses." *See*

Schad, 501 U.S. at 633. But did not set out a test for identifying where that point might be. Instead, it noted "the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution." *See id.* at 637. And it specifically noted grave doubts about the Fifth Circuit's approach in *Gipson*, which said that a verdict was not sufficiently unanimous if jurors were permitted to convict on the basis of different alternative theories from "distinct conceptual groupings." *See id.* at 634–35 (quoting *United States v. Gipson*, 553 F.2d 452, 456–59 (5th Cir. 1991)). In addition to being "too indeterminate to provide concrete guidance to courts faced with verdict specificity questions," the *Gipson* approach was an attempt to answer the wrong question: at best, it helped discern legislative intent, but it did not help identify when it would violate due process to charge "multiple offenses that are inherently separate" as alternative theories for "a single crime." *See id.* at 635–40. So *Gipson* was a red herring.

Justice Scalia's concurrence in *Schad* explained why courts have never required jurors to agree on one view of the evidence to convict:

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

Id. at 649–50 (Scalia, J., concurring). It may even be *impossible* to know which of those alternative theories is what actually happened. That should not preclude conviction—it is not unfair to permit jurors to convict as long as they are unanimous in their firm belief that the evidence proved that *at least one* of the alternative theories of liability must accurately describe what the defendant actually did.

Justice Scalia also cautioned that "[w]e would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *See id.* at 651. The PCR court cited a special concurrence by Judge Tabor in *State v. James*—which is the only opinion from any Iowa appellate court that cites or quotes that excerpt from the concurrence in *Schad*. *See* D0133 at 11 & 16 (citing *State v. James*, No. 13–1067, 2014 WL 4230203, at *8 (Iowa Ct. App. Aug. 27, 2014) (Tabor, J., specially concurring)). The special concurrence in *James* went a step further. It held that it was a violation of due process to permit jurors to convict James on one count of willful injury for shooting and injuring either Clark, Jones, or both. *See James*, 2014 WL 4230203, at *8–9. But unlike the example given in the *Schad* concurrence, the charge against James specified one date. *Id.* at *6. And the evidence all pertained to a single course of conduct

during a single incident of gunplay. *See id.* at *1–3. It is true that the acts of willful injury against Clark and against Jones *could have* been charged separately, just like the separate assaults in the *Schad* hypo. But the difference is that the *Schad* hypo strongly implies that those assaults are unconnected to each other. The problem is not that each involves a separate victim—the problem is that the jury could return a "unanimous" verdict without agreeing on anything at all regarding any single act or any course of conduct. The lack of connection between the two assaults is the root of the problem.

But when there *is* some connection between charged acts (even involving separate victims) in the same course of conduct, the State can allege and prove those charged acts as alternative theories as to how the facts about that course of conduct prove that some combination of the defendant's acts met the elements as charged. In *State v. Lomagro*, the Wisconsin Supreme Court agreed with the Sixth Circuit that:

> [s]everal courts have upheld the validity of indictments that consolidate several acts into a single count when such acts represent a single, continuing scheme that occurred within a short period of time and that involved the same defendant. . . . The determination of whether a group of acts represents a single, continuing scheme or a set of separate and distinct offenses is a difficult one that must be left at least initially to the discretion of the prosecution. . . .
>
> [. . .]

> We find it difficult to criticize the government's exercise of discretion when it redounds to the benefit of the defendant as it did in this case. More importantly, however, we are hesitant to create an inflexible rule that would force the government to charge each punishable act as a separate count and thereby to cumulate both offenses and possible punishments.

State v. Lomagro, 335 N.W.2d 583, 587–88 (Wis. 1983) (quoting *United States v. Alsobrook*, 620 F.2d 139, 142–43 (6th Cir. 1980)). Based on that, *Lomagro* rejected a defendant's challenge that the jury instructions at his trial for sexual assault were erroneous because they allowed jurors to convict without reaching unanimous agreement that he committed *a specific sex act* against the victim (who testified about multiple different kinds of non-consensual sex acts that would qualify). *See id.* at 588–92. *Lomagro* held "the sexual assault in this case can be characterized as one continuing criminal episode and [was] properly chargeable as one offense," and those alternative sexual acts were all carnal and non-consensual—which made them "conceptually similar." *See id.* And so "even though evidence of different acts was introduced at trial, the jury did not have to be unanimous as to which specific act the defendant committed in order to convict the defendant." *See id.*

As long as each act that could have been a separate charge is part of the same course of conduct—or as *Lomagro* put it, the same

"continuing criminal episode"—the State may generally elect to bring a single charge and present those separate acts as alternative theories as to *how* the defendant committed that crime. When it does, due process only requires that jurors must unanimously agree on the ultimate issue of whether the evidence proved that *any* part of that course of conduct satisfied each charged element—and they need not agree on which part. *Accord United States v. Davis*, 471 F.3d 783, 790–91 (7th Cir. 2006) (quoting *United States v. Berardi*, 675 F.2d 894, 898 (7th Cir. 1982)) (rejecting argument that defendant was entitled to jury unanimity on which specific act constituted health care fraud when the government had alleged and proved a "continuing course of conduct" that included weekly acts of fraud over several years, joined in a single charge); *State v. Crowsbreast*, 629 N.W.2d 433, 438–39 (Minn. 2001) (affirming a conviction for "domestic abuse homicide" which required proof that conduct leading up to the killing was a pattern of domestic abuse, and holding that "jurors are not required to unanimously agree on which acts comprised the past pattern of domestic abuse"); *United States v. Crump*, 6 F.4th 287, 297–98 (6th Cir. 2023) (explaining that "a jury need not unanimously agree on which gun the defendant possessed," even when possession of a firearm is an element of the offense).

The PCR court cited *Lainhart v. State*, in which the Indiana Court of Appeals reversed a defendant's conviction for making threats against multiple victims in the alternative. *See* D0133 at 16 (citing *Lainhart v. State*, 916 N.E.2d 924 (Ind. Ct. App. 2009)). But that holding depended on the finding that the State had actually proven multiple distinct courses of conduct, because those multiple alternative victims "were allegedly threatened at distinct periods of time on the night in question." *See Lainhart*, 916 N.E.2d at 941–42. The Indiana Court of Appeals subsequently distinguished *Lainhart* in *Vest v. State*, where it upheld a conviction against a similar challenge:

> Here the State alleged that Vest "did knowingly flee" from Officers "Geoffrey Barbieri and/or Josh Taylor and/or Joel Anderson." The State charged Vest with resisting law enforcement only by flight, . . . Officer Barbieri instructed Vest to get on the ground, Vest disobeyed and ran out into the hallway, Officer Taylor ordered him to stop, and Vest darted back into the bedroom. . . . The police officers were the equivalent of "alternative means" by which Vest accomplished his resisting, and jurors were not required to agree on which particular officer Vest fled. . . . The State's information therefore was not duplicitous for naming all three officers, and the trial court did not err when it did not issue a more specific unanimity instruction to the jury.

Vest v. State, 930 N.E.2d 1221, 1227–28 (Ind. Ct. App. 2010). It does not matter that *Vest* also noted that "resisting law enforcement is not a crime against the person." *See id.* What matters is that flight from

one officer would have been independently sufficient to prove guilt. Vest's jury heard evidence on multiple acts in the same episode that each proved the charge, in the alternative; and jurors could convict without unanimously agreeing on when he fled or who he fled from.

Some courts have held that it matters whether the legislature intended to criminalize a continuing course of conduct, discrete acts, or both/either. *See, e.g.*, *State v. Paulsen*, 726 A.2d 902, 904–06 (N.H. 1999).[2] Of course, if the legislature has spoken with a clear voice on a mandatory unit of prosecution, that should be given full effect. *See,*

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[2] To the extent that it matters, child endangerment statutes like section 726.6(1)(a) generally intend to give the State discretion and authority to charge individual discrete acts of child endangerment *or* a broader course of conduct that creates a situation that presents an ongoing risk to health and safety. *See State v. Douglas C.*, 285 A.3d 1067, 1095–99 (Conn. 2022) (explaining that Connecticut statute on child endangerment was "intended to criminalize both situations and acts without treating them as separate elements"); *People v. Archuleta*, 467 P.3d 307, 312–14 (Colo. 2020) (explaining that Colorado statute intended to criminalize both "specific acts of abuse" and any "pattern of conduct ultimately resulting in the child's death" from abuse, so the State can prove "only one count of child abuse resulting in death based on a pattern of conduct" that includes proof of "a series of discrete acts" and jurors need not reach unanimity on any specific acts committed); *State v. Portigue*, 481 A.2d 534, 539–40 (N.H. 1984) (explaining that New Hampshire statute makes it "not necessary for the State to charge specific incidents of parental disregard or specific beatings" when it "alleges a continuous course of conduct involving continuous acts or omissions constituting endangerment"), *cited in Paulsen*, 726 A.2d at 905–06 (using *Portigue* as example of non-duplicitous charges).

e.g., Iowa Code § 728.12(3) (stating possession of child pornography "shall be prosecuted and punished as separate offenses for each … different minor in the visual depiction," but "multiple visual depictions of the same minor shall be prosecuted and punished as one offense"). But that sort of mandatory directive on charge-units is extremely rare, for good reason: the Iowa legislature recognizes and prefers that "[i]n our criminal justice system, the decision whether to prosecute, and if so on what charges, is a matter ordinarily within the discretion of the duly elected prosecutor." *See State v. Iowa Dist. Ct. for Johnson Cty.*, 568 N.W.2d 505, 508 (Iowa 1997). And so in the absence of that kind of mandatory language that would constrain the charging decision, the general rule should be that "unless the legislature specifies otherwise, the prosecutor has the discretion to charge a pattern of many similar infractions as a single scheme or as a course of criminal conduct." *See Douglas C.*, 285 A.3d at 1122 (Mullins, J., concurring).

So it was in *Duncan*. The unit of prosecution for burglary did not matter, nor did it matter whether the burglary statute was meant to criminalize a course of conduct or discrete acts (or either/both). It did not even matter whether Duncan could have been charged with two separate burglaries, perpetrated against two separate structures.

The State could charge a single count of burglary and allege/prove a course of conduct that included at least one act of burglary. The jury could convict without reaching unanimous agreement as to which act was proven to have occurred and shown to qualify as a burglary (under alternative theories for how each qualified as an "occupied structure"). *Duncan*, 312 N.W.2d at 522–23. Jurors just had to unanimously agree that the evidence established, beyond a reasonable doubt, that there was *at least one act* within that course of conduct that satisfied each one of the required elements of burglary.

Any other approach creates profound problems. Consider a common scenario: a victim alleges that, throughout their childhood, the defendant sexually abused them. The abuse occurred in various different places and at various different times, blending together in the victim's memory. Under *Duncan*, the State may charge a single count of sexual abuse for the entire course of conduct, and a jury can convict upon unanimous agreement that the evidence proved that he committed *at least one* qualifying sex act, as described by the victim. Contrast that with what occurs in Washington state courts, as a result of their heightened unanimity requirements:

> James Kitchen was charged with one count of second degree statutory rape of his daughter, allegedly occurring

> between the fall of 1980 and December 1981. The victim described in detail the place and circumstances surrounding several incidents that could constitute the crime charged, but was not always certain as to exact dates. …
>
> The jury was not instructed that it must unanimously agree on which of the several acts testified to actually occurred. …
>
> […]
>
> When … the trial court fails to [give that instruction], there is constitutional error. The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.

State v. Kitchen, 756 P.2d 105, 107–09 (Wash. 1987). This is nonsense. Jurors often differ on which parts of a witness's testimony they found the most persuasive and the most likely to be accurately remembered. As long as they unanimously agree that acts of sexual abuse occurred, they need not agree on *which* acts—they agree on the defendant's guilt on the crime charged. Adopting any other approach has real costs:

> Cases that involve the sexual abuse of children, regardless of whether the complainants in those cases give only generic testimony or also describe a few particular incidents in addition to a generic pattern of abuse, typically turn on the general credibility of the complainants . … To apply strict specific unanimity requirements in such cases would place an unwarranted burden on young victims of sexual assault, essentially penalizing them for providing whatever limited, specific details they might be able to recall to corroborate their stories. … [C]ourts have been loath to force young victims of sexual abuse to choose between either (1) testifying as to each individual incident

> of abuse with sufficient precision to allow the state to prove it beyond a reasonable doubt or (2) confining their testimony entirely to generic assertions and suppressing any supporting details that they are able to recall.

See Douglas C, 285 A.3d at 1124–25 (Mullins, J., concurring); *accord People v. Jones*, 792 P.2d 643, 650 (Cal. 1990) ("In a case consisting only of "generic" evidence of repeated sex acts, it would be impossible for … the jury to unanimously agree [that] the defendant committed the same specific act."); *State v. Martinez*, 550 N.W.2d 655, 600 (Neb. 1996) ("The more frequent and repetitive the assaults and the younger the victim, the more this problem is exacerbated, and the … ability to prove specific acts through [their] testimony decreases accordingly."). *Duncan* ensures that "[a] person [cannot] escape punishment for such a disgusting crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such shocking activity." *State v. Rankin*, 181 N.W.2d 169, 172 (Iowa 1970).

Courts have applied the same logic in cases that involve charges that included acts against multiple victims. This is less common—not because it is impermissible, but rather because prosecutors typically exercise their discretion to charge separate counts on facts involving harm to multiple separate victims. But when the defendant's acts are part of a continuing course of conduct that causes harm or creates a

risk of harm to multiple victims, it may make more sense to charge a single count that encompasses the entire course of conduct. In *Mellor v. United States*, the defendants were "charged in a single count with transportation of two girls" across state lines for sex, and they argued that their indictments were duplicitous because "the proof required to sustain the charge as to each girl transported is necessarily different." *See Mellor v. United States*, 160 F.2d 757, 761–62 (8th Cir. 1947). The Eighth Circuit rejected that challenge, because the government was never required to charge "in separate counts as many offenses as the evidence at the trial might conceivably sustain." *See id.*

The PCR court relied on three cases from other states: *State v. Stephens*, 607 P.2d 304 (Wash. 1980); *State v. Gentry*, 869 A.2d 880 (N.J. 2005); and *State v. Pope*, 80 P.3d 1232, 1245 (Mont. 2003). *See* D0133 at 15–16. *Stephens* was also cited in *Kitchen*, as controlling authority that required it to reach that result that insulated the defendant from liability for repeated acts of sexual abuse that the victim could not describe with specificity. *See Kitchen*, 756 P.2d at 108 (citing *Stephens*, 607 P.2d at 305–06). The tragedy of *Stephens* is that it cited the same Washington case that *Duncan* cited: *State v. Arndt*, 553 P.2d 1328 (Wash. Ct. App. 1976). *See Stephens*, 607 P.2d at 306;

Duncan, 312 N.W.2d at 523. But *Stephens* distinguished *Arndt*, when it should have just applied it. *Stephens* stated that the *Arndt* principle that "jurors need not be unanimous as to the mode of commission" did not apply when the charge only "involved one mode of commission" as against two separate victims. *See Stephens*, 607 P.2d at 306. Stephens had fired a 12-gauge shotgun in the direction of both victims—so that minor premise was true. But this just illustrates why the major premise cannot possibly be right. Even if jurors had been equally split between finding that he acted with specific intent to assault A and finding that he acted with specific intent to assault B, that would just be a split on *how* the evidence established that those charged acts *were an assault*. And what if one juror (quite reasonably) finds that Stephens must have been shooting at either A or B—but that it's *impossible* to know which? *Stephens* says that juror could not convict. That is an absurd result.

Take a moment to compare *Stephens* to Justice Scalia's hypo about a charge of assaulting X on Tuesday or Y on Wednesday. *See Schad*, 501 U.S. at 651 (Scalia, J., concurring). What's the difference? The difference is that the *Schad* hypo implies they are two separate, unrelated instances of assault—not the same act, and not susceptible to being understood as a continuous course of conduct. *Stephens* is a

charge of assaulting X and/or Y on Tuesday, by firing one shotgun blast. The fact that X and Y are separate victims is a red herring. A jury that splits on whether he fired while aiming at X or aiming at Y (but agrees on everything else) has still reached unanimous agreement on finding that he committed an assault—they just relied on alternative theories that set out alternative means by which his act qualified as an assault. *Stephens* failed to grasp that there is no legally significant difference between multiple alternative theories about *what* the defendant did and alternative theories about *whom* he did it to. In either situation, as long each alternative is a legally valid theory that establishes that a particular act or course of conduct violated a specific criminal statute, "then unanimity of the jury as to the mode of commission of the crime is not required." *See Duncan*, 312 N.W.2d at 523 (quoting *Arndt*, 529 P.2d at 889). *Stephens* and *Kitchen* are wrong, and *Duncan* is right.

On to *State v. Gentry*, in which the New Jersey Supreme Court found that a conviction for robbery was not unanimous because jurors told the court that "one group of jurors believed [Gentry] knowingly used force on Davis but not Lowe, and the other group believed [he] knowingly used force on Lowe but not Davis." *See Gentry*, 869 A.2d at 881–82. The PCR court was persuaded by this line from *Gentry*:

> [H]ad Lowe not been present, the jury would have been unable to agree that force had been used against Davis … had Davis not been present, the jury would have been unable to agree that force had been used against Lowe. Thus, in either of those circumstances, there would have been no conviction.… [T]he jurors had to agree unanimously on which acts were committed against which victim.

See D0133 at 15 (quoting *Gentry*, 869 A.2d at 882). This is wrong, but revealing. It shows how super-unanimity requirements can spiral out of control. When there is evidence of multiple acts that could elevate a theft or attempted theft into a robbery, a jury does not need to unanimously agree on "which acts" satisfied that element. *See, e.g.*, *State v. Cook*, 996 N.W.2d 703, 706–10 (Iowa 2023) (noting facts that involved assaults on three separate victims, and jury instructions for single count of robbery only required proof that he "[c]ommitted an assault on another" in a certain manner or "[t]hreatened another with, or purposely put another in fear of immediate serious injury"). But there is no legally significant difference between "which acts" and "which victim." *Gentry* did not try to draw one—it couldn't. So it had no choice but to *extend* its heightened unanimity requirement to prohibit *any* conviction where jurors are split between *any* alternative theories about what actually occurred. All heightened unanimity requirements are similarly resistant to constraints on their scope and reach, because

they all start from the (incorrect) open-ended principle that jurors are required to agree on "just what a defendant did." *See State v. Frisby*, 811 A.2d 414, 422 (N.J. 2002) (quoting *Gipson*, 553 F.2d at 457), *cited in Gentry*, 869 A.2d at 882.

Of course, high courts that adopt super-unanimity rules can create exceptions to those rules by fiat. For example, New Jersey still says "the jury need not unanimously agree on whether a defendant was a principal, accomplice, or co-conspirator" to an underlying offense. *See State v. Macchia*, 290 A.3d 182, 195 (N.J. 2023). But a jury that cannot agree on basic facts about the defendant's participation is surely not in agreement on "just what [the] defendant did." Those carve-outs lead to the correct result in cases where they apply—but they could vanish at any moment, because they cannot be reconciled with super-unanimity. That makes it impossible to be confident in any marshalling instruction.

Indeed, a New Jersey court *might not* find that there was any problem with the instructions in this case, despite what *Gentry* says. In *State v. Ramirez,* a defendant was convicted of robbery by way of assaults on victims A, B, and/or C. *See State v. Ramirez,* No. A–0060–14T2, 2018 WL 389186, at *10–11 (N.J. Super. Ct. App. Div. Jan. 12, 2018). Factually, that looks exactly like *Gentry*. And yet:

> This case is distinguishable from *Gentry*. Here, the State did not argue alternative theories of guilt based upon the evidence presented. Rather, the State's evidence demonstrated a continuous, unbroken course of criminal conduct against all three victims. The circumstances did not present "a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory."

See id. (quoting *State v. Parker*, 592 A.2d 228, 232 (N.J. 1991)). As will be discussed later, there was no reasonable probability that any juror could have found that Trane's conduct in operating/supervising OSS created any substantial risk to A.H. without creating the same risk to B.V., and vice-versa. And operating OSS in that manner was a single "continuous, unbroken course of … conduct against [both] victims." *See id.* But for now, it is enough to note that *Ramirez* illustrates how *Gentry* creates chaos and unpredictability: it is impossible to predict when an appellate court will say that super-unanimity was required.

Finally, on *State v. Pope,* suffice to point out that Montana has a provision in its state constitution that requires "a unanimous verdict as to each individual alternative." *State v. Hardaway*, 36 P.3d 900, 916 (Mont. 2001). Iowa does not, so Montana cases are inapplicable.

This section is overlong, but the point is simple: *Duncan* was correctly decided. Trane's counsel had no duty to challenge *Duncan* or anticipate its demise. Under *Duncan*, Trane could be charged with a

course of conduct that included acts that created a substantial risk to B.V. and/or A.H., and jurors could convict if they unanimously agreed that each required element was proven as to *at least one* of them. *See Duncan*, 312 N.W.2d at 523 (quoting *Sullivan*, 65 N.E. at 989). So Jury Instruction 31 was properly given, and counsel did not breach a duty by declining to object to it. The PCR court erred in holding otherwise.

B. There is no reasonable probability that changing Jury Instruction 31 would affect this verdict.

Alternatively, this Court may choose to skip all of that analysis because Trane cannot establish *Strickland* prejudice. *See State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (quoting *Strickland*, 466 U.S. at 697).

The PCR court agreed (correctly) that "there was no reasonable probability that the jury convicted Trane on the basis of a finding that he knowingly created a substantial risk to a child over whom he did not have custody or control." *See* D0133 at 12. This is because Trane admitted that both A.H. and B.V. were children, and that he had custody/control over both of them. *See* D0171 at 249:24–251:5; D0172, TrialV8, 18:18–20:19 & 191:1–24. So there was no chance that jurors found that he only had custody/control of A.H. and only created a substantial risk to B.V., or vice-versa.

The PCR court reasoned that *Strickland* prejudice must have resulted from the jury instruction unless "the evidence presented at trial was overwhelming as to *both* victims." *See* D0133 at 19–21. That is not the test.[3] Trane had to show a reasonable probability that, if instructed differently, this jury that convicted him would have acquitted or hung. *See Thorndike*, 860 N.W.2d at 322. He could not.

A.H. and B.V. each lost 25% of their body weight during their time in OSS. Jurors could *see* that. *See* D0166, TrialV2, 310:14–313:4; D0198–D0201 FECR009152, Ex. 1–4; D0167, TrialV3, 131:10–132:4; D0202–D0205 FECR009152, Ex. 5–8. Trane would have seen it, too. He was "in OSS every single day," and he admitted that A.H. and B.V. "would say they were hungry" when he saw them in OSS. *See* D0171 at 249:24–251:5 & 265:9–17. Immediately after leaving Midwest, B.V. was hospitalized for malnutrition. *See* D0167, TrialV3, 95:7–96:6.

Proof that either child suffered *actual* harm in Trane's OSS was proof that Trane exposed both children to the same *risk* of harm. Both

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[3] Even jurisdictions with more stringent unanimity requirements than *Duncan* still decline to treat violations of those requirements as structural errors. *See Johnson v. Commonwealth*, 676 S.W.3d 405, 416–17 (Ky. 2023) (collecting federal cases using plain error review); *id.* at 416–18 (applying Kentucky's "palpable error" standard, which requires "a substantial possibility of a different result" but for error).

were confined and underfed in the same way for similarly long periods of time. *See* D0166 at 29:13–297:11; D0169, TrialV5, 281:17–282:4 (more than 50% of A.H.'s time at Midwest was spent in OSS, including 29 days of a single months); D0169 at 279:12–281:16 (more than 63% of B.V.'s time at Midwest was spent in OSS). There was no logical way for jurors to find that Trane's acts created a substantial risk to either child without also finding that the same acts created the same substantial risk to the other child. *Cf. United States v. Root*, 585 F.3d 145, 154 (3d Cir. 2009) (rejecting similar challenge "[b]ecause Root was engaged in a 'continuous course of conduct,' the evidence relating to each year is identical and it would be logically inconsistent for the jury to find Root guilty in light of his 2001 conduct, but not guilty based upon the same conduct in 2002 and 2003").

On *Strickland* prejudice, the PCR court compared this case to *State v. Harris*, 891 N.W.2d 182 (Iowa 2017), and *State v. Davis*, 951 N.W.2d 8 (Iowa 2020). In each of those cases, an element or defense was wholly absent from the marshalling instruction. Not so, here—these jurors unanimously agreed that Trane created a substantial risk to at least one child in OSS. That purportedly mishandled element was still alleged and proven in a way that forecloses *Strickland* prejudice.

Even in both *Davis* and *Harris*, where something essential was entirely missing from the marshalling instruction, it still mattered that the evidence on that missing element/defense was not so compelling—so there was a reasonable probability that, if properly instructed, the jury may have returned a different verdict. *See Davis*, 951 N.W.2d at 19–20 (finding *Strickland* prejudice because of facts in evidence that arguably proved the insanity defense that was not cross-referenced); *Harris*, 891 N.W.2d at 189 (finding *Strickland* prejudice "because the evidence of Harris's movement [for going armed with intent] was not great and the flawed jury instruction did not require the jury to make a finding on that element of the crime"). The PCR court missed that critical step—it did not identify any gap or shortcoming in the evidence that Trane created a substantial risk to either child. *See* D0133 at 17–21. No such gap exists. Compelling evidence would have supported a super-unanimous finding as to either/both children.

Also, note that the missing element in *Harris* and the missing defense in *Davis* were each conceptually distinct from other findings that inhered in the jury's verdicts—the rest of the verdict did not shed light on how jurors would have answered the additional question that should have been asked. *See, e.g.*, *Davis*, 951 N.W.2d at 19 n.2 (noting

jurors rejected Davis's diminished-capacity defense, but that "does not mean the jury would not have found him insane" because "[i]nsanity and diminished capacity are separate concepts"). Here, jurors *did* find—unanimously—that Trane knowingly created substantial risks to a child. No juror could make that finding without adopting a particular view of Trane's conduct and OSS punishment. The same view would support a super-unanimous verdict as to either child. *See State v. Propps*, 376 N.W.2d 619, 624 (Iowa 1985) (finding lack of *Strickland* prejudice from failure to object to a marshalling instruction that omitted an element, because a factual finding that would have proven that missing element was inherent in an inference that was "[t]he only way the jury could have found intent, as it did").

Trane's acts against both A.H. and B.V. were the same acts and were part of the same course of conduct: he designed, administered, and supervised the OSS punishment. The PCR court mused that jurors might have been unable to reach super-unanimity as to a single victim. Neither the verdict nor any part of the record support that speculation; instead, both the actual verdict and the nature/strength of the evidence tend to foreclose it. Trane failed to establish any reasonable probability of a different result, and the PCR court erred in holding otherwise.

CONCLUSION

The State requests this Court reverse the PCR court's ruling that granted partial relief, and affirm the PCR court's rulings that denied Trane's other ineffective-assistance of counsel claims.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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