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 REPLY BRIEF

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STATEMENT OF THE ISSUES ADDRESSED IN REPLY

A. Does *Duncan* apply when the State charges one count that alleges, as alternative theories, two different acts that would each prove a separate unit of prosecution and could have been charged as two separate crimes?

B. Should the State be prohibited from combining acts that *could* be separate units of prosecution and *could* support multiple charges into a single charge, to prove that a course of conduct included *at least one* act that established a violation of a criminal statute?

C. Did Trane establish any reasonable probability that any juror—each of whom already determined that the evidence proved that Trane created a substantial risk to *a* child who was kept in OSS under his oversight—would not find that Trane created *that same risk* to *both* children who were kept in Trane's OSS, under similar conditions and for similar lengths of time?

REPLY TO CROSS-APPELLEE'S ARGUMENT

Imagine a pickup truck swerves out in front of you, at high speed. You recognize the driver. In the bed of the pickup, there is a young boy. It is one of the driver's two sons, but you can't tell which one. You can see the boy being flung around as the pickup swerves across the road. You see the driver drinking a beer. Then, the pickup speeds away.

You call the police (after pulling over). By the time they arrive, the pickup is parked at the driver's home. The driver and both of his young sons are inside the house, and none of them admit anything. Can the driver be charged with child endangerment?

The answer should be yes. Even if it is impossible to tell which child was endangered, your testimony still proves that the driver's acts created an unreasonable risk to "a child" in his custody and control. *See* Iowa Code § 726.6(1)(a); *cf. State v. Anspach*, 627 N.W.2d 227 (Iowa 2001); *State v. Millsap*, 704 N.W.2d 426 (Iowa 2005).

Trane would say no. In his view, the identity of *one specific child* is an element of child endangerment. Trane also argues that each child is a separate unit of prosecution for this offense, and that prosecutors cannot combine multiple units of prosecution into a single charge that alleges alternative facts. *See* Def's Reply at 14–16.

So Trane would demand that the State bring two separate charges of child endangerment, each specifying one of the driver's two sons as a single victim. *See* Def's Reply at 18. Of course, both of those charges will be dismissed on motions for judgment of acquittal, lacking proof of any risk to the specific child named in each charge.

Trane argues that this is all "the product of sloppy charging and sloppy proofs." *See* Def's Reply at 18–19. Hardly. The State must often prosecute where some details about a crime are impossible to pin down, but where each possibility supports a different alternative theory and each alternative establishes liability for committing the same crime. For example, it may be clear that a defendant acted with specific intent to injure someone else, but impossible to know whom. *See, e.g.*, *State v. Stephens*, 607 P.2d 304, 306 (Wash. 1980); State's Br. at 52–53. Or it may be obvious that the defendant inflicted (or aided in inflicting) at least one of the blows that caused an injury or a death, but impossible to know which one. *See, e.g.*, *State v. Shorter*, 893 N.W.2d 65, 68–77 (Iowa 2017). The upshot of *Duncan* is that the State can still secure a conviction in the face of an irresolvable-but-irrelevant uncertainty by charging alternative theories—even where acts comprising each of those alternatives *could have been* charged as separate units of prosecution.

A. *Duncan* is not limited to alternative methods of committing one crime or one act. It held that the jury instruction was proper, *even if* separate acts of burglarizing the boat and/or the marina would have supported two separate burglary charges.

Trane's brief devotes a single paragraph to *Duncan*. He says that the State's brief "works to contort the straightforward law of *Duncan*." *See* Def's Reply at 12. Trane picks out a single sentence from *Duncan* without context and argues that it limits the holding. That sentence: "[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." *See State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981) (quoting *State v. Arndt*, 529 P.2d 887, 889 (Wash. Ct. App. 1974)). Trane italicizes the three-word phrase "a single crime" and ends his analysis there. *See* Def's Reply at 12.

But it is clear from context that *Duncan* used that phrase to describe a single *charge* that encompassed alternative theories—it was not creating or describing a limiting principle that would prohibit the State from joining alternative theories that could have supported multiple charges, if parsed out as aggressively as units of prosecution would permit. We know this because *Duncan* specifically noted that

part of Duncan's argument was that the boat theory and marina theory could only be charged as two separate burglaries—but *Duncan* said it "need not decide whether the State could have convicted defendant of two separate burglaries." *See Duncan*, 312 N.W.2d at 522. It just held that the State was *allowed* to charge this as a single count of burglary that contained those two alternatives—again, without deciding whether the State *could have* charged two separate counts of burglary, instead. *See id.* at 523. Then, it held that the jury need not unanimously agree on one specific alternative theory—and it said that without needing to revisit or resolve the issue of whether each of the alternative theories could have been charged as a separate count of burglary, on its own. So when it referred to "a single crime" in the sentence Trane quoted, it was referring to the single *charge* that it already held was proper—without needing to determine whether the State could have charged two separate counts of burglary, instead. *See id.* at 523.

The rest of *Duncan* is incompatible with Trane's claim that the quoted sentence is a limiting principle that adds a unit-of-prosecution analysis. To the contrary, *Duncan* establishes that unit-of-prosecution is irrelevant: *even if* these could have been two separate charges, they could still be submitted as alternative theories to prove a single charge.

And when submitted in that manner, normal unanimity rules applied; and so "the jury could find [him] guilty of burglary by a combination of votes respecting the marina or the boat." *See id.* at 523–24.

This case is just like *Duncan*: Trane probably could have been charged with multiple counts of child endangerment. But everything he did while directing and supervising OSS isolation/deprivation for A.H. and B.V. was all part of the same course of conduct. So the State charged him with just one count of child endangerment, encompassing that entire course of conduct that created risks to A.H. and/or B.V.—just like how Duncan was charged with burglarizing the marina and/or the boat, in a single charge of burglary. And when a single charge was submitted to the jury in that manner, the jury need not unanimously agree on which specific *part* of that course of conduct satisfied all the elements by proof beyond a reasonable doubt, in order to convict. The jurors in *Duncan* did not need to unanimously agree on which property Duncan burglarized, as long as they all agreed that the evidence proved that his course of conduct included a burglary. Likewise, in this case, jurors only needed to agree that Trane's conduct included an act that created a substantial risk to (at least) one of the specified children who were in his custody and control. No further unanimity was required.

The district court misread *Duncan*. It thought that *Duncan* was silent on this issue, so it brought in cases from other states to address what it (incorrectly) thought was an issue of first impression in Iowa. *See* D0133 at 12–16. But *Duncan* is on point, as explained above (and in Division II.A.1 of the State's other brief). Trane seems to agree that *Duncan* is on point. But Trane does not bother attacking it, because he misreads it in a different way—he italicizes three words out of context and ignores the rest of the opinion that forecloses his claim. The State anticipated a different attack (hence the "treatise" in Division II.A.2). *See* Def's Reply at 12. When read correctly, *Duncan* forecloses Trane's claim that failing to object to this jury instruction was a breach of duty. So the State anticipated Trane would argue that *Duncan* is incorrect and should be overturned (perhaps using the out-of-state authority that the district court discussed in its ruling). But Trane has declined to make any such argument. So that should be the end of it. *See, e.g.*, *State v. Majors*, 940 N.W.2d 372, 386 n.2 (Iowa 2020) ("Adversarial briefing should guide a supreme court's weighty decision to overturn its precedent."). *Duncan* forecloses any finding of breach, and Trane has not argued that *Duncan* should be overturned. So Trane cannot establish breach of duty, and the PCR court erred in granting relief.

B. None of Trane's other arguments about breach would be persuasive, even if they mattered.

Trane warns about policy consequences of the State's approach. *See* Def's Reply at 17–19. But the State is defending the approach that *Duncan* already takes—this is the status quo. When a charge is vague or nebulous, a defendant can move for a bill of particulars—that, too, is the status quo. *See* Def's Reply at 17 (citing Iowa R. Crim. P. 2.11(7)). Defendants already enjoy protections against the possibility of unfairly nebulous charges. Also, trial courts generally may not instruct the jury on an alternative theory unless the record contains substantial evidence to support it. *See, e.g.*, *State v. Thorndike*, 860 N.W.2d 316, 321 (Iowa 2015) (collecting cases). So there is no danger that continuing to follow *Duncan* will lead to miscarriages of justice.

Trane quotes from *State v. Bratthauer*, stating: "[t]he first step is to determine whether the statute defines a single offense that may be committed in more than one way or instead defines multiple offenses." Def's Reply at 14 (quoting *State v. Bratthauer*, 354 N.W.2d 774, 776 (Iowa 1984)). But *Bratthauer* was describing a framework for deciding whether *different parts* of the same statute can be charged together as alternative theories, to prove a single charge of violating that statute. *See Bratthauer*, 354 N.W.2d at 776–77. *Bratthauer* does not apply in

cases where the State alleges multiple alternative theories that would each establish a violation of the *same* part of a criminal statute—as it did here, and as it did in *Duncan*. Indeed, *Bratthauer* cited *Duncan* with approval and did not overrule it. *See Bratthauer*, 354 N.W.2d at 776 (citing *Duncan*, 312 N.W.2d at 523–24) (explaining its holding that the trial court did not err "in permitting the jury to convict the defendant of burglary based on alternative theories of burglary of a marina and burglary of a boat in the marina").

Bratthauer was right to use legislative intent to help determine when acts that violate multiple *different* parts of a statute should be grouped as alternative theories to prove a single charge (and it got to the correct result). *See id.* at 776–77. Trane argues that, in this context, courts should find a unit of prosecution in each statute (like "a child"), and then impute a legislative intent to subdivide each act or series of acts into as many "multiple offenses" as there are units of prosecution. *See* Def's Reply at 14–16. There are three problems with that analysis.

The first problem is that it is flatly foreclosed by *Duncan*, which *Bratthauer* cited with approval. *Duncan* held it did not matter whether the boat and marina *could have been* two distinct units of prosecution; the State could still submit them as alternatives on a single charge.

Second, Trane's analysis mistakenly imputes a legislative intent to define a *mandatory* unit of prosecution. The general assembly knows how to set a mandatory unit of prosecution, whenever it wants to. *See, e.g.*, Iowa Code § 728.12(3). But most Iowa criminal statutes include nothing of the sort. The legislature usually trusts prosecutors to let the facts of each case drive the decision of how many charges to file, within outer limits that courts define when called to do so. *See, e.g.*, *State v. Ross*, 845 N.W.2d 692, 699–701 (Iowa 2014); *State v. Velez*, 829 N.W.2d 572, 577–85 (Iowa 2013). The better inference to draw when statutes do not expressly specify mandatory units of prosecution is that the legislature intended for prosecutors to exercise discretion over whether/how to group similar acts as alternative ways to prove charges that may encompass more than one "act" in a granular sense. *See State v. Iowa Dist. Ct. for Johnson County*, 568 N.W.2d 505, 508 (Iowa 1997) (noting that "the decision whether to prosecute, and if so on what charges" is generally "not appropriate for judicial oversight").

Third, the policy consequences of Trane's analysis would be dire. Recall the policy arguments about sexual abuse prosecutions from the State's previous brief (which Trane's brief did not respond to). One of the advantages of *Duncan* is that prosecutors can exercise discretion

to charge sexual abuse by grouping an entire episode of sexual contact into a single charge (or multiple charges for distinct types of contact), without being required to parse out each stroke, grope, or thrust into a separate charge of sexual abuse. *See State v. Constable*, 505 N.W.2d 473, 477–78 (Iowa 1993) (holding that "any single physical contact" between body parts listed in section 702.17 "alone would be sufficient to charge [a defendant] with one count of sexual abuse"). Assault, too, may be charged without parsing out (and pairing up) each strike/injury to stack up charges until they block out the sun. *See, e.g.*, *Velez*, 829 N.W.2d at 583–84 (noting Velez struck the victim with a metal pole "20 to 40 times" and rejecting claims that the district court erred by accepting his guilty pleas to two charges of assault). This means that most defendants face less punishment. It also promotes finality and judicial economy by encouraging prosecutors to play it safe and err on the side of *under*charging, whenever they have doubts about whether more aggressively subdivided charges would stand up to a unit-of-prosecution challenge on appeal/PCR (especially post-*Velez*).

Trane's approach creates an incredibly narrow strike zone that the State must hit (and that every court involved must correctly locate) for every single criminal prosecution. It requires prosecutors to charge

"in separate counts as many offenses as the evidence at the trial might conceivably sustain." *See Mellor v. United States*, 160 F.2d 757, 761–62 (8th Cir. 1947). And because it treats "undercharging" as *per se* error, Iowa district courts would need to micro-manage all charging decisions by applying multi-factor tests for individuating units of prosecution and crafting jury instructions that require unanimous agreement on a precisely calibrated level of specificity (which may just be impossible to explain in language that lay jurors can understand and apply).

Fortunately, none of that will happen, because *Duncan* is the law and Trane is not arguing that this Court should overturn it. But even if this Court were writing on a blank slate, it would be correct to reject Trane's proposed approach. Trane was entitled to only be convicted if every juror unanimously agreed that the evidence had proved, beyond a reasonable doubt, that he committed an act that met each element of child endangerment. These jury instructions gave him precisely that. So declining to object to them was not a breach of duty.

C. Trane did not and could not establish any reasonable probability that changing Jury Instruction 31 would affect this verdict.

Trane's argument on *Strickland* prejudice is that changing these jury instructions would have been likely to affect the outcome

because of the "evidence presented that [his] level of control over the OSS system was insufficient to show his actions could be imputed to the alleged harms suffered by the minors." This makes no sense, on a few different levels. Remember that, during trial, Trane conceded (and other evidence showed) that both A.H. and B.V. were children and that Trane had custody and control over both of them. *See* D0171, TrialV7, 249:24–251:5; D0172, TrialV8, 18:18–20:19 & 191:1–24. And if jurors concluded that Trane had custody and control over *one* of the children while they were in OSS, that had to rest on factual findings that would logically apply with equal force to the other child. *Accord United States v. Root*, 585 F.3d 145, 154 (3d Cir. 2009) (applying similar logic).

Trane block-quotes from the Iowa Supreme Court's opinion on his first direct appeal, which noted concern that this instruction "could have allowed the jury to find that [Trane] had custody or control of B.V. while knowingly acting in a manner that created a substantial risk to A.H.'s physical, mental or emotional health or safety," or vice-versa. *See* Def's Reply at 19 (quoting *State v. Trane I*, 934 N.W.2d 447, 466 (Iowa 2019)). But the PCR court noted that Trane's concession that he had custody and control over *both* children meant 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. The State pointed that out in its previous brief. Trane has offered no response.

The State did not even need to prove that Trane *caused harm* to a child whom he endangered. It only had to prove that Trane created a substantial *risk* of harm. *See* D0146, PCR Ex. 3, Jury Instr. 31–34. So consider an extreme hypothetical: what if half of the jurors only believed the evidence about OSS's effects on B.V., and the other half only believed the evidence about OSS's effects on A.H.? The first six were swayed by the fact that B.V. lost a huge portion of his body weight while in OSS, and that he was hospitalized for malnutrition just after leaving Midwest. *See* D0167, TrialV3, 131:10–132:4; D0202–D0205 FECR009152, Ex. 5–8; D0167, TrialV3, 95:7–96:6. The remaining six may not have cared about that, or that A.H. lost 25% of his body weight. *See* D0166, TrialV2, 310:14–313:4; D0198–D0201 FECR009152, Ex. 1–4. Maybe they only found A.H. was harmed by extended isolation:

> At first he was a completely differently child. He didn't talk. He didn't do anything. You'd look at him, and it didn't even look like — I mean, it didn't look like my child.
>
> . . . He had a terrible time sleeping at night. He was never able to sleep through the night, maybe two hours at a time. We even tried melatonin to see if that would help. It didn't. He would wake up screaming in the middle of the night.

D0166, TrialV2, 306:18–307:8; *accord* D0170, TrialV6, 27:20–37:13 (explaining the effects of extended solitary confinement on juveniles). Even under Trane's view of the level of unanimity required to convict, these two groups of jurors would unanimously agree on all elements. Once each group found OSS caused *actual* harm to one specific child, they would unanimously agree that Trane *put both children at risk* of whichever harms they thought were proven, since both children were kept in Trane's OSS for extended periods. *See, e.g.*, D0169, TrialV5, 281:17–282:4 (A.H. was kept in OSS for more than 50% of his time at Midwest was spent in OSS, including 29 days of a single month); *id.* at 279:12–281:16 (B.V. was kept in OSS for 63% of his time at Midwest). So even then, Trane would have been convicted on this single count.

That extreme hypothetical gets at a deeper truth: because both A.H. and B.V. were kept in OSS, and Trane's role with regards to both was the same, there is no reasonable probability that a juror who found that Trane put A.H. at substantial risk of harm would not *also* find that he created substantial risks of harm to B.V. too (and vice-versa). Both were isolated, confined, and underfed in the same punishment rooms that Trane designed, implemented, and supervised—and the evidence about Trane's role did not vary, from A.H. to B.V. *See* D0171, TrialV7,

249:24–256:16 (Trane admitting that he knew both children were kept in OSS for long periods and that both had significant weight loss); *id.* at 265:9–17 (Trane admitting that he knew that both children "would say they were hungry" while they were in OSS). And all twelve jurors were firmly convinced that Trane created a substantial risk to a child in OSS, by that course of conduct. There is no reasonable probability that those same jurors would have acquitted Trane (or deadlocked) if the instructions had required unanimity as to a single named victim. On this record, the same evidence that proved any substantial risk to one child would also prove a substantial risk to the other child, which means that each of these jurors *was already convinced* by the evidence that would support a super-unanimous verdict as to both children.

That record is what matters. The issue of *Strickland* prejudice (for this specific claim) does not involve any credibility determinations or any other findings which would be entitled to deference on appeal. *See, e.g.*, *Bowman v. State*, 710 N.W.2d 200, 205–08 (Iowa 2006) (conducting *de novo* review "of the entire record" and reversing PCR court's finding that applicant failed to establish *Strickland* prejudice for claim alleging ineffectiveness during trial, without any mention of the PCR court's findings or reasoning); *Nguyen v. State*, 707 N.W.2d

317, 323–27 (Iowa 2005) (conducting *de novo* review and reversing PCR court's finding that applicant established *Strickland* prejudice for a claim that alleged ineffectiveness during trial). So when Trane block-quotes the PCR court's analysis on prejudice, that doesn't carry any special weight. *See* Def's Reply at 21. All it really does is highlight that neither Trane nor the PCR court have *ever* explained how or why a juror who found that he created a substantial risk to A.H. could have then found that he *didn't* create an identical risk to B.V. (or vice-versa) via the same course of conduct. *See* D0133 at 19–21. Neither can point to any reason to think that might happen, because there just isn't one.

Trane had the burden of proving a reasonable probability of a different result from the jury that heard *this* evidence and rendered *this* verdict, if not for the alleged error in the jury instructions. He has failed to do so at every stage, because this record makes it impossible. So even assuming a breach, Trane still could not and did not establish *Strickland* prejudice, and the PCR court erred in granting relief.

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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CERTIFICATE OF COMPLIANCE

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