IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JAKE SKAHILL, Defendant-Appellant.	)))))))))	S.CT. NO. 19-1067

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HONORABLE MONICA L. ZRINYI WITTING, JUDGE
HONORABLE MICHAEL J. SHUBATT, JUDGE
HONORABLE THOMAS A. BITTER, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

ASHLEY STEWART
Assistant Appellate Defender
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 1st day of April, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jake Skahill, No. 6939933, Newton Correctional Facility, PO Box 218, 307 S. 60th Avenue, W., Newton, IA 50208.

APPELLATE DEFENDER'S OFFICE

ASHLEY STEWART
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us

AS/lr/12/19
AS/ls/03/20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Statutes and Court Rules:

Other State Statutes:

Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE GUARDIAN AD-LITEM'S EVIDENTIARY ARGUMENTS, CROSS EXAMINATION AND RESISTANCE OF DEFENSE COUNSEL'S WITHDRAWAL DURING THE CRIMINAL TRIAL, WHICH EXCEEDED ANY STATUTORY AUTHORITY ALLOWED UNDER IOWA CODE § 915.37(1) AND IMPEDED SKAHILL'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL?

Authorities

State v. Clark, 357 N.W.2d 532, 535 (Iowa 1985)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

U.S. Const. amend. IV

Iowa Const. art I, § 10

Strickland v. Washington, 466 U.S. 668, 694 (1984)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

Schertz v. State, 380 N.W.2d 675, 679 (Iowa 1985)

1. Defense Counsel Breached an Essential Duty.

Iowa Code § 915.37(1) (2017)

Iowa Code § 915.10 (2017)

State v. Harrison, 24 P.3d 936 (Utah 2001)

Utah Code Ann. § 78-79 (1999)

Utah Code Ann. § 78-3a-912 (1999)

2. Skahill was prejudiced by counsel's failure to object to the GAL's objections, motions, and cross examination during the trial.

State v. Schaer, 757 N.W.2d 630, 638 (Iowa 2008)

Iowa Code § 915.10 (2017)

State v. Harrison, 24 P.3d 936 (Utah 2001)

State v. Tolson, 82 N.W.2d 105 (Iowa 1957)

State v. Gibbs, 239 N.W. 2d 866, 867 (Iowa 1976)

3. The heavy participation of the GAL in Skahill's criminal trial proceedings is plain error.

United States v. Atkinson, 297 U.S. 157, 160 (1936)

Jon M. Woodruff, Note, Plain Error By Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017)

Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th Ed. November 2018 update)

Tory A. Weigan, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012)

Wiborg v United States, 163 U.S. 632, 658 (1896)

Fed. R. Crim. P. 52 (2019)

United States v. Olano, 507 U.S. 725, 732-34 (1993)

State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999)

State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997)

Rhoads v. State, 848 N.W.2d 22, 33 (Iowa 2014)

State v. Sahinovic, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016)

State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

Iowa Code § 814.20 (2017)

State v. Young, 292 N.W.2d 432, 435 (Iowa 1980)

Iowa Cost. Art V, § 4

State v. Dahl, 874 N.W.2d 348 (Iowa 2016)

4. In the alternative, the allowance of the GAL to participate in the criminal trial constituted structural error.

Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991)

Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011)

Weaver v. Massachusetts, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017)

State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015)

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052,

2064, 80 L.Ed.2d 674 (1984)

Krogmann v. State, 914 N.W.2d 293, 325 (Iowa 2018)

II. WHETHER THE APPLICATION OF IOWA CODE § 915.37(1) VIOLATED SKAHILL'S RIGHT TO DUE PROCESS UNDER ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

Authorities

State v. Clark, 357 N.W.2d 532, 535 (Iowa 1985)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

State v. Hernandez-Lopez, 639 N.W.2d 226, 233 (Iowa 2002)

U.S. Const. amend. IV

Iowa Const. art I, § 10

Strickland v. Washington, 466 U.S. 668 (1984)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

Schertz v. State, 380 N.W.2d 675, 679 (Iowa 1985)

Iowa Code § 915.37(1) (2017)

State v. Hernandez-Lopez, 639 N.W.2d 226, 233 (Iowa 2002)

Reno v. Flores, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447 (1993)

In re Detention of Garren, 620 N.W.2d 275, 280 n.1 (Iowa 2000)

State v. Miner, 331 N.W.2d 683, 688 (Iowa 1983)

More v. State, 880 N.W.2d 487, 499 (Iowa 2006)

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING K.W.'S CHILD PROTECTION CENTER VIDEOS INTO EVIDENCE AFTER K.W.'S TESTIMONY, WHICH RESULTED IN IMPROPER BOLSTERING OF K.W.'S TESTIMONY?

Authorities

State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

State v. Neitzel, 801 N.W.2d 612, 621 (Iowa 2011)

State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003)

State v. Ross, 573 N.W.2d 906, 910 (Iowa 1998)

State v. Weaver, 554 N.W.2d 240, 247 (Iowa 1996)

State v. Hallum, 585 N.W.2d 249, 253-54 (Iowa 1998)

Hallum v. Iowa, 119 S.Ct. 2335 (1999)

Lilly v. Virginia, 527 U.S. 116 (1999)

United States v. Bonds, 608 F.3d 495, 501 (9th Cir. 2010)

Iowa R. Evid. 5.807 (2019)

Fed. R. Evid. 807 (2019)

State v. Paredes, 775 N.W.2d 554, 561 (Iowa 2009)

United States v. Reed, 908 F.3d 102, 119 (5th Cir. 2018)

United States v. Wansdahsega, 924 F.3d 868, 878 (6th Cir. 2019)

United States v. Tome, 61 F.3d 1446, 1449 (10th Cir. 1995)

Rivers v. United States, 777 F.3d 1306, 1312 (11th Cir. 2015)

United States v. Halk, 634 F.3d 482, 488-89 (8th Cir. 2011)

United States v. Bonds, 608 F.3d 495, 501 (9th Cir. 2010)

United States v. Rogers, 587 F.3d 816, 819 (7th Cir. 2009)

United States v. Sinclair, 74 F.3d 753, 758 (7th Cir. 1996)

Doe v. United States, 976 F.2d 1071, 1076 (7th Cir. 1992)

United States v. Moore, 824 F.3d 620, 622 (7th Cir. 2016)

United States v. Turner, 718 F.3d 226, 233 (3d Cir. 2013)

United States v. Slatten, 865 F.3d 767, 805 (D.C. Cir. 2017)

United States v. Walker, 410 F.3d 754, 757 (5th Cir. 2005)

State v. Long, 628 N.W.2d 440, 445 (Iowa 2001)

State v. Neitzel, 801 N.W.2d 612, 621 (Iowa Ct. App. 2011)

State v. Hildreth, 582 N.W.2d 167, 169 (Iowa 1998)

Iowa R. Evid. 5.802

State v. Rojas, 524 N.W.2d 659, 662-63 (Iowa 1994)

State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983)

Doré, *Iowa Practice Series, Evidence §5.807:1*

State v. Spates, No. 05-0926, 2007 WL1201718 at *3 (Iowa Ct. App. Apr. 25, 2007)

State v. Sullivan, 679 N.W.2d 19, 30 (Iowa 2004)

State v. Elliot, 806 N.W.2d 660, 670-71 (Iowa 2011)

State v. Reynolds, 746 N.W.2d 837, 845 (Iowa 2008)

State v. Miller, 590 N.W.2d 724, 725 (Iowa 1999)

State v. Biddle, 652 N.W .2d 191, 203 (Iowa 2002)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, this case addresses the scope of a guardian ad-litem's (GAL) participation in a criminal trial as provided by Iowa Code section 915.37(1).

STATEMENT OF THE CASE

Nature of Case

Defendant-Appellant Jake Skahill appeals his conviction, sentence and judgment following a jury trial resulting in guilty verdicts for Sexual Abuse-Second Degree, a class B, felony in violation of Iowa Code § 709.3(1)(b); Lascivious Acts with a Minor Child, a class C felony, in violation of Iowa Code § 709.8(1)(a); Enticing a Minor Child, a class C felony, in violation of Iowa Code § 710.10(1); and Indecent Exposure, a serious misdemeanor, in violation of Iowa Code § 709.9(1).

Course of Proceedings:

On March 23, 2018, the State filed a trial information charging Skahill with four counts: Sexual Abuse-Second Degree, Lascivious Acts with a Child, Enticing a Minor, and Indecent Exposure in violation of Iowa Code §§ 709.3(1)(b); 709.8(1)(a); 710.10(1); and 709.9(1). (Trial Info)(App. pp. 6-7). On April 3, 2018, Skahill pled not guilty to the charges. (Written Arr. Plea of Not Guilty)(App. pp. 8-9). An application to appoint a guardian ad-litem (hereinafter GAL) was filed by the Dubuque County Assistant Attorney. (App. GAL)(Conf. App. pp. 4-5). On April 13, 2018, the Court appointed the GAL. (Order GAL)(Conf. App. Pp, 6-7).

On April 12, 2018, the State filed a motion requesting a 5.104 hearing to determine the admissibility of K.W.'s Child Protection Center recorded interviews. (5.104 App.)(App. pp. 10-11). The State also filed a motion in limine to exclude the testimony of a proposed defense minor witness (K.J.W.). (4/12/18 Motion)(App. pp. 12-14). On May 4, 2018, the defense filed a resistance to the State's motions. (5/4/18

(Resist)(App. pp. 15-17).

On May 7, 2018, at a pre-trial hearing, the State again requested that K.W.'s CPC recorded interviews be admitted, based on Iowa Rule of Evidence 5.801, residual hearsay, under two scenarios: (1) in the event K.W. encounters emotional difficulties that would prevent her from being able to testify, (2) if K.W. is able to testify and the introduction of the video was the State's strategy. (5/7/18 M. Tr. p. 8, L9-p. 9, L15). Defense counsel initially had not objected to the introduction of the video "as long as we are fully able to depose the child so my client can confront his accuser fully." (5/7/18 M. Tr. p. 11, L2-5). The Court did not issue a ruling during the hearing, but reserved the decision. (5/7/18 Order)(App. pp. 18-19). Following the hearing, Skahill filed a waiver of speedy trial on June 7, 2018. (Waiver)(App. p. 20).

On July 12, 2018, the State filed a request to quash an illegal subpoena involving a potential defense witness. (Req. Quash)(App. pp. 21-23). On August 3, 2018, the Court granted the State's motion to quash. (Quash Granted)(App.

pp. 24-25). On September 10, 2018, Skahill reasserted his right to a speedy trial. (Reassert)(App. p. 26). On November 7, 2018, the State filed a motion to strike several defense witnesses. (Strike Def. Wit.)(App. pp. 27-30).

On January 17, 2019, the State again requested that K.W.'s CPC video be admitted due to K.W.'s age and "the interest in reliable testimony that would come before the Court..." (1/17/19 M. Tr. p. 9, L8-15; p.10, L1-13; p. 10, L19-21). Defense counsel objected to the CPC recording as inadmissible hearsay and a violation of the confrontation clause. The defense also argued that because K.W. would be testifying at trial the video should not be allowed. (1/17/19 M. Tr. p. 9, L18-24; p.10, L14-18).

On February 17, 2019, the Court issued rulings for several motions in limine. First, regarding K.W.'s CPC recorded interviews, the Court deemed them admissible under the residual hearsay exception. Secondly, the Court ruled that the testimony of proposed defense witness K.J.W. should be excluded. Third, about the State's motion to strike defense

witness, the Court ruled that the proposed witnesses were not able to testify to "events they did not witness or were not involved in which are the subject of the allegations filed herein." (2/17/19 Order p. 1-5)(App. pp. 31-35).

On February 18, 2019, the State filed a motion to quash a subpoena issued by the defense for two proposed defense witnesses. (2/18/19 M. Quash)(App. pp. 36-37). The State also filed an objection to the defense proposed exhibits A and B (images showing the chair described by K.W. where the alleged crime took place; image showing chair from every angle). (Obj. Def. Ex; Ex. A and B)(Conf. App. pp. 8-9). On February 20, 2019, the GAL also argued that defense exhibits should be excluded from the trial. (1st Tr. Vol. I, p. 8, L12-16). The Court ruled: "I agree with the State and the GAL that they are prejudicial…" and excluded the photos. (1st Tr. Vol. I, p. 8, L21 p. 9, L6).

On February 19, 2019, the defense counsel objected again to the introduction of K.W.'s CPC videos arguing that it violated the confrontation clause and that the video should not

be admitted because K.W. was going to testify. (1st Tr. Vol. I, p. 10, L4-24; p. 12, L18-21; p. 14, L8-15). The State resisted. (1st Tr. Vol. I, p. 11, L1-p. 12, L14). The GAL also resisted. (1st Tr. Vol. I, p. 13, L3-p. 14, L6). The Court ruled that its admissible ruling would stand. (1st Tr. Vol. I. p. 14, L16-p. 16, L7; 2/17/19 Order)(App. pp. 31-35).

Skahill's jury trial began on February 19, 2019. (1st Tr. Vol. I, p. 1, L7). On February 20, 2019, the State objected to opinion testimony being offered by defense witness Chelsie Skahill regarding K.W.'s truthfulness. (1st Tr. Vol. II, p. 75, L24-p.76, L22). The GAL also objected to the allowance of the testimony. (1st Tr. Vol. II, p. 77, L6-15). The Court allowed an offer of proof of the testimony. (1st Tr. Vol. II, p. 81, L1-p. 90, L17). During the proffer, the GAL cross-examined the witness. (1st Tr. Vol. II, p. 89, L1-18). The State and the GAL both requested that the testimony be excluded. (1st Tr. Vol. II, p. 91, L9-p. 94, L15). The Court ruled that the defense could ask the witness generic questions about K.W.'s truthfulness. (1st Tr. p. 96, L14-18; p. 97, L5-7). On February 22, 2019, a

mistrial was granted because the jury heard an unauthorized portion of K.W.'s CPC recorded interview. (1st Tr. Vol. IV, p.4, L3, L8-p.10, L12).

On February 27, 2019, Skahill's defense attorneys filed a motion to withdraw. (2/27/19 Withdraw)(App. p. 38). The GAL filed a resistance. (3/1/19 Obj. to Withdraw)(App. pp. 40-43). The State did not resist the defense request to withdraw. (3/6/19 M. Tr. p. 9, L15-p.10, L2). The Court granted the withdraw of defense counsel Domeyer and denied the request for defense counsel Hess. (3/8/19 Order Withdraw)(App. pp. 44-46). Defense counsel Hess filed another motion to withdraw and a motion for a continuance. (3/8/19 Withdraw; 3/11/19 Continue)(App. pp. 47-50). The GAL again resisted the request. (3/11/19 M. Tr. p. 7, L13-p.9, L15). The court denied both motions. (3/11/19 Other Order)(App. pp. 51-54).

Before the commencement of the second trial, the State, the GAL, and defense counsel all individually requested that their previous objections, motions in limine, and offers of proof

from the previous trial record stand and be extended to the second trial. (2nd Tr. Vol. I, p. 125, L15-24; p. 126, L2-8; p. 126, L25-p. 127, L2; p. 127, L16-22). The Court agreed that all would be placed in the record for the second trial and that the previous rulings would stand. (2nd Tr. Vol. I, p. 3, L11-13).

On March 14, 2019, Skahill was found guilty as charged. (Verdict)(App. pp. 59-62). Skahill filed a motion for a new trial and arrest of judgment. (4/29/19 New Trial)(App. pp. 63-66). The State resisted. (5/8/19 Resist)(App. pp. 67-69). The GAL also resisted. (5/13/19 GAL Resist)(App. pp. 70-71). The Court denied the motion. (5/31/19 Order)(App. pp. 72-75).

On June 6, 2019, the Court ruled that Sex Abuse - Second Degree and Lascivious Act with a Minor merged and sentenced Skahill to an indeterminate tern not to exceed 25 years. The Court sentenced Skahill to an indeterminate 10 years for Enticing a Minor Child. The Court also sentenced Skahill to a term not to exceed 365 days for indecent

exposure. (Order of Disp.)(App. pp. 76-81).

Skahill filed a timely notice of appeal on June 24, 2019. (Notice of Appeal)(App. pp. 82-83).

Facts

During the weekend of February 14, 2018, K.W. spent time with her father, Skahill, her stepmother, Chelsie Skahill, and her half siblings. (2nd Tr. Vol. I, p. 159, L17-p.160, L17; Vol. II, p. 93, L7-17).

K.W. testified that during the visit, she fell asleep on Skahill's chest and when awoke, he showed her his privates. (2nd Tr. Vol. I, p. 145, L11-14). She testified that Skahill asked her to "wiggle it" while it was "outside his pants." (2nd Tr. Vol. I, p. 145, L15-21).

On Sunday, K.W. told her mother that she was getting touched by her dad. (2nd Tr. Vol I, p. 150, L20-25; p. 162, L8-12). K.W.'s mother took her to the doctor. (2nd Tr. Vol. I, p. 151, L10-11; p. 162, L14-15). Dr. Regina Butteris took a complete history from K.W. and performed a physical examination. (2nd Tr. Vol. II, p. 6 L3-20). Following the

physical, forensic interviewer Rosanne Van Cura completed an interview with K.W. (2nd Tr. Vol. II, p. 54, L25-p.55, L8). The interview was recorded. (Ex. 3-Redacted). Cura conducted a second interview with K.W. on May 24, 2018. (2nd Tr. Vol. II, p. 63, L1-8; Ex. 4).

Skahill testified that K.W. never saw his penis. (2nd Tr. Vol. II, p. 155, L10-11). Skahill testified that he never touched K.W.'s privates. (2nd Tr. Vol. II, p. 155, L18-23). Skahill stated that K.W. never touched his penis. (2nd Tr. Vol. II, p. 156, L1-10).

Additional facts will be discussed below as necessary.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE GUARDIAN AD-LITEM'S EVIDENTIARY ARGUMENTS, CROSS EXAMINATION AND RESISTANCE OF DEFENSE COUNSEL'S WITHDRAWAL DURING THE CRIMINAL TRIAL, WHICH EXCEEDED ANY STATUTORY AUTHORITY ALLOWED UNDER IOWA CODE § 915.37(1) AND IMPEDED SKAHILL'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL.

A. Preservation of Error: Error was not preserved in this case because defense counsel failed to object to the GAL's

participation in the trial proceedings. However, a defendant's claims of ineffective assistance of trial counsel may be reviewed on direct appeal. State v. Clark, 357 N.W.2d 532, 535 (Iowa 1985). All objections, motions, and rulings made by the State, the GAL, and the defense counsel from the first trial were transferred to the second by request of the State's attorney, the GAL, and defense counsel. (2nd Tr. Vol. I, p. 125, L15-24; p. 126, L2-8; p. 126, L25-p. 127, L2; p. 127, L16-22). The Court ruled that all prior motions and rulings stood. (2nd Tr, Vol. I, p. 3, L11-13).

B. Standard of Review: The Court reviews claims of ineffective assistance of counsel de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C. Discussion: A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend. IV; Iowa Const. art I, § 10; Strickland v. Washington, 466 U.S. 668 (1984). The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of circumstances the counsel's performance

was within the normal range of competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must show: (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. Id. The defendant must show that there is a reasonable probability that but for counsel's unprofessional errors that results of the proceeding been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). In determining whether counsel omitted an essential duty, the Court looks to the nature of counsel's conduct and the reason behind it. The Court requires the appellant show that "the counsel's performance was so deficient that counsel was not functioning as a counsel guaranteed by the Sixth Amendment." Schertz v. State, 380 N.W.2d 675, 679 (Iowa 1985). The failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In this case, the failure of the trial counsel to object to the GAL's excessive participation in the trial by arguing

motions, filing resistances, and cross-examining a witness constituted ineffective assistance of counsel.

1. Defense Counsel Breached an Essential Duty.

a. The Role of a Guardian Ad-Litem

In order to determine whether the attorney's failure to object to the GAL's inappropriate involvement in the criminal trial was a breach of duty, this Court must look to the Iowa Code governing the role of the GAL. The role and extent to which a guardian ad-litem may participate in legal proceedings is controlled by statute under which the GAL is appointed. Iowa Code section 915.37(1) provides:

> A prosecution witness who is a child, as defined, in §702.5 [under the age of 14], in a case involving a violation of … section … 726.6 [child endangerment] … is entitled to have the witness's interest represented by a guardian ad-litem at all stages of the proceedings arising from such violation.
>
> The guardian ad-litem shall be a practicing attorney and shall be designated by the court after consideration is given to the desires and needs of the child and the compatibility of the child and the child's interests with the prospective guardian ad-litem. If a guardian ad-litem has previously been appointed for the child in the proceeding under chapter 232… the court shall appoint the same guardian ad litem under

this section.

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

Iowa Code § 915.37(1) (2017)(emphasis added). Although in Iowa Code § 915.37(1) the duties and responsibilities of the GAL are enumerated: "…[the guardian ad-litem] may attend all depositions, hearings, and trial proceedings to support the child and advocate for protection of the child but shall not be allowed to separately introduce evidence or to directly cross-examine witnesses." Id. Currently, there are no cases that discuss the limitations of the GAL in our Iowa Courts. There are no cases that explain what "support the child and advocate for protection of the child" entails within a criminal trial and what the limitations are.

When reading the statute as a whole, it is clear that the GAL is not authorized to actively engage in the trial of a defendant, but the GAL can attend the trial to be of aid and to

protect the victim. In this case, the GAL's actions exceeded advocating by aiding and protecting her client, but rather extended to acting as an additional State's attorney and arguing against defense strategy and legal positions.

Examples of "advocating for the child" should include making sure the child is comfortable during testimony, which the GAL did in this case. (5/7/2018 M. Tr. p. 11, L10-p. 12, L8; p. 17, L5-22). Also, included is ensuring the child has proper notice of when trial testimony will be needed, which was also done in this case. (5/7/18 M. Tr. p. 12, L11-18).

If the GAL was to have any role in the prosecution of a defendant, it should have been limited to issues specifically related to the child victim, such as making sure the child receives notice of when to appear and an opportunity to be present and heard as mandated by the victim rights statute. See Iowa Code § 915.10 (2017).

This case is similar to State v. Harrison, 24 P.3d 936 (Utah 2001), where the Utah Supreme Court addressed whether a GAL's heavy participation in a criminal trial exceeded a Utah

statute regulating the role of a GAL. Id. In that case, the district court allowed the GAL to sit at counsel's table with the State, sit near the victim when she testified, object to defense counsel's questions during cross examination, and follow-up on cross examination of a defense expert witness. Id. at 940. The Court refused to allow the GAL to give an opening statement or closing argument. Id. The jury found the defendant guilty of first-degree felony rape and second degree forcible sexual abuse. Id. The crux of the defendant's appeal was whether his constitutional right to a fair and impartial trial was violated because the victim's advocate was so involved in his prosecution. Id.

The appellate court examined whether the GAL's trial contribution was allowed under the statute. The Utah statute allowed the Court to appoint a GAL in a child abuse, child sexual abuse or neglect cases during any proceedings. State v. Harrison, 24 P.3d 936 (Utah 2001); Utah Code Ann. § 78-79 (1999). Utah code also said that the GAL shall:

(i) File written motions, responses, or objection at all stages or a proceeding when necessary to protect the best interests of a minor…;
(ii) Personally, attend all court hearings, and participate in all telephone conferences with the Court unless the Court waives that appearance or participation;
(iii) Present witnesses and exhibits when necessary to protect the best interest of the minor

State v. Harrison, 24 P.3d 936 (Utah 2001); Utah Code Ann. § 78-3a-912 (1999). The appellate court concluded that the district court's allowance of the GAL to actively participate in the criminal trial was plain error and inherently prejudicial to the defendant. State v. Harrison, 24 P.3d 936 at 945 (Utah 2001). The Court specifically stated that allowing the GAL to question witnesses, object, and sit at the prosecution table was error. Id. at 945. The Court stated that "the GAL's role does not extend to this degree of "protecting" the interests of the child by assisting in the punishment of the alleged perpetrator of the crime against the child victim." Id. at 945. The Court also concluded that "given the consequences of improper inference in the criminal process, namely reversal or retrial, participation in this criminal

trial by the guardian ad-litem was of no service to the child, or the Court." Id.

Similar to Harrison, in this case, the GAL exceeded her statutorily authorized role during the trial in the following instances:

i. Defense Motion to Allow Inclusion of Pictures of Chairs Located in Skahill's Home.

The State filed an objection to the defense proposed exhibits A and B (images showing the chairs described by K.W. where the alleged crime took place). (Obj. Def. Ex)(App. pp. 40-43). The photos included blacked-out faces of the Skahill family children. (Def. Ex. A, B)(Conf. App. pp. 8-9). The GAL also argued that the exhibits should be excluded from the trial because:

> [GAL] Reisen-Ottavi; "I would just like to add that I believe showing the redacted faces [of the children] is still in a level of context of there being more children involved in other tangential ways that might have an impact on the jury inadvertently.

(5/7/18 M. Tr. p. 8, L12-16). The Court ruled: "I agree with the State and the GAL that they are prejudicial…" and

excluded the photos. (1st Tr. Vol. I, p. 8, L21 p. 9, L6). The GAL's evidentiary objection and legal merit argument was a clear violation of the statute. As dictated by the statute the GAL is merely allowed to be present during a criminal proceeding to support and potentially advocate for the interest of her child, but the GAL is not authorized to make the legal merit argument. The GAL's arguments against the exhibits had no bearing on the K.W.'s involvement in the trial, thus the GAL was not advocating or aiding K.W..

ii. Defense Motion to Exclude K.W.'s CPC interviews.

Defense counsel objected to the allowance of K.W.'s CPC videos arguing that it violated the confrontation clause and the video should be excluded because K.W. was going to testify. (1st Tr. Vol. I, p. 10, L4-24; p. 12, L18-21; p. 14, L8-15). The State resisted. (1st Tr. Vol. I, p. 11, L1-p. 12, L14). The GAL also resisted with the following argument:

> [GAL] Ms. Reisen-Ottavi; "…whatever instruction is necessary as to the weight or how it's to be used, but I think to outright not allow it due to the natural age and cognitive abilities of the child would be used, but I think to outright not allow it

due to the natural age and cognitive abilities of the child would be an error."

(1st Tr. Vol. I, p. 13, L3-p. 14, L6). After the GAL's argument about the recorded interviews, the Court confirmed their admissibility. (1st Tr. Vol. I., p. 16, L4-7). Again, the GAL argued the evidentiary value of the CPC video, which had nothing to do with advocating or supporting K.W. Instead the GAL argued the legal merits and credibility of the CPC videos, which is not the role of the GAL. The GAL's arguments for the exclusion of the CPC video, which tended to bolster her client's believability. This is in stark contrast to the duties given to a GAL under the statute. Skahill contends that the GAL arguments concerning the admission of the evidence exceeded the language of the statute and transformed the GAL's role into a prosecutorial role.

iii. Defense's Request of Minor R.H to testify about alleged statements made to K.W. concerning being touched inappropriately.

Defense counsel requested that the court allow R.H, the stepsister of K.W., to testify that she never told K.W. about

Skahill sexually abusing her, which contrasted statements made by K.W. in the CPC video. (1st Tr. Vol. II, p. 100, L3-5). The GAL objected with the following:

> [DEFENSE ATTORNEY] Domeyer: We would like to put her on the stand to say that she never – she gives testimony that she never told K.W. that dad touched her.
>
> [GAL] Reisen-Ottavi: Your Honor, I think that infringes on the Motion in Limine, with the information about R.H. going to come in. Whether R.H. did or did not get touched is irrelevant to whether anything happened between the defendant and my client.
>
> Court: I understand that. I agree 100 percent. The way they're trying to get it in now is by saying it's an inconsistent statement to discredit K.W.
>
> [GAL] Reisen-Ottavi: So, if that were the case, then I don't know why the defense wanted to redact the versions of the interview. That would have been a less traumatic and less confusing way to make the point…

(1st Tr. Vol. II, p. 100, L3-19). The GAL arguing about the legal strategies implored by the defense during the criminal trial was not associated with the GAL's responsibility of supporting and advocating for K.W. Further arguing the relevancy of evidence to be presented is another legal merit argument that oversteps

the statutory guidelines for the GAL.

iv. Defense Request Question K.W. the alleged incident between stepsister, R.H. and Skahill.

Defense counsel asked K.W. if R.H ever told her about a similar touching incident happening to her. (1st Tr. Vol. I, p. 217, L17-18). The State objected. (1st Tr. Vol. I, p. 217, L19). The Court ruled that the question violated a motion ruling. (1st Tr. Vol I., p. 217, L20). The defense argued that the Court sustained the objection, without allowing defense to be heard. Defense also argued that the court never addressed the question issue in motion ruling. The State argued the questioning should not be allowed because it created a trial within a trial about whether R.H. actually told K.W. anything. (1st Tr. Vol II., p. 9, L7-8; p. 13, L1-8). The GAL argued in support of the State for the exclusion of the evidence and also commented on defense counsel's strategy:

> [GAL] Ms. Reisen-Ottavi; "The Court has the right to make whatever ruling it should to do justice. Defense Counsel or the State has the right to then try and find another means to go at that, which I knew I've been in that position many times, and you just find another door. Defense counsel chose

> to drop the matter, and I would object to my client being called back in. Yesterday was very difficult for her, but she was testifying yesterday. She was there. She was available. It was the choice of counsel at the time to choose not to pursue a different avenue.

(1st Tr. Vol II., p. 9, L7-8; p. 13, L1-8). The Court ruled that the testimony should be excluded. (1st Tr. Vol. II, p. 10, L1-p.17, L25). Here, although the GAL's argument seems to be coached in advocacy for her client, it was actually arguing about defense counsel's legal strategy of entering testimonial evidence into the record. The GAL has no statutory authority to argue about the inclusion or exclusion of evidence during the trial or about defense legal strategy during the course of the trial.

v. Defense Motion for Allowance of Opinion Testimony from Defense Witness Chelsie Skahill.

The State objected to opinion testimony being offered by defense witness Chelsie Skahill regarding K.W.'s truthfulness. (1st Tr. Vol. II, p. 75, L24-p.76, L22). The GAL also objected. (1st Tr. Vol. II, p 77, L6-15). The GAL argued for exclusion because it was more prejudicial than probative.

> [GAL] Reisen-Ottavi: "I would concur with the concerns raised by the State, Your Honor. We're essentially gutting the rule, and with the expert that we had just with the last witness, as to how children of a certain age would perceive sequential things, or details that would be differently than others, than adults, and so to do so, especially when Chelsi has inherent or otherwise some sort of bias or stake in the matter I think just raises more prejudice than probative value.

(1st Tr. Vol. II, p. 77, L6-15). The Court allowed a proffer of the testimony. (1st Tr. Vol. II, p. 81, L1-pp. 90, L17). After the proffer, the GAL argued the following:

> [GAL] Reisen-Ottavi: "…I would ask that she not be allowed to testify for the following reasons. The first, I don't believe that the witness has provided any significant background that would establish that she had significant contact with 7-year-olds in general. She's merely comparing her – the two 7-year-olds that she's had contact with, and making what I would call subjective comparison between the two of them, perhaps that one being I assume her own biological child. Second her background to make a subjective determination with regard to honesty I agree with the State that with regard to the issues that she's raised by her own admissions today, by her own testimony today, none of those rose to the level where she did anything herself at this time because she believes that it was an issue. She indicated she would mention something to

the Defendant, and have Defendant call, but even when she picked up the child with regard to this alleged incident with the cousin, clearly something happened, but she didn't feel it was enough to do anything or to follow up at that time other than to have the Defendant call the child's mother.

And all the gray area, I think, given the fact that it's speculative in nature is more prejudicial than probative when placed before the jury. I should note also that I don't think that her testimony today even establishes that the child lied about anything there. Clearly, people could view that maybe something intercepted or stopped is questionable. I think the biggest issue is that there is clear bias here. I do not envy the proposed witness and the choice that she's faced with, as she sits here today, being faced between choosing a husband versus a stepchild. She's clearly indicated that she cannot believe her husband would take any such action, so therefore, I do believe that she is clearly biased. I'm sorry, Your Honor. And lastly, she also testified she had no contact with my client about this issue in any way, or that in any way her relationship with my client would rise to the level that my client could or should disclose to her, rather than who she talked to about it.

[DEFENSE ATTORNEY] Domeyer: Your Honor, the issue here is not that the witness had a good amount of experience talking to a 7- or 8-year-old. It's just that she's had a significant amount of interaction with this 7-

> or 8-year-old… Accordingly, the proper testimony meets the foundational requirements of Rule 5.608(A)(1) for admission of opinion testimony concerning the witnesses' character for truthfulness.
>
> Court: Anything else you want to add?
>
> [GAL] Reisen-Ottavi: Your Honor, I don't have access to the Mayfield case. I don't know the age of the child in this case…
>
> [GAL] Reisen-Ottavi: 9. Again, I would ask the Court to take into consideration that are the time of the offense, this child was 7, and we do have that the developmental stages of the child does play into that, we have testimony. And I concur with the State to put a 7-year old on trial for a perception of saying non-essential items is a slippery slope.

(1st Tr. Vol. II, p. 92, L8-p. 93, L25; p. 94, L1-p.95, L6). The Court ruled the defense could ask the witness generic questions about K.W.'s truthfulness. (1st Tr. p. 96, L14-18; p. 97, L5-7). The GAL's evidentiary objection and legal merit argument about the inclusion of opinion testimony is another clear violation of the statute. Arguing the legal merits of evidence in no way aligns with being an advocate for K.W. but rather crosses the line into becoming another prosecutor for the State.

vi. Cross Examination of Defense Witness Chelsie Skahill.

To help decide if Skahill would be allowed to testify, the Court allowed a proffer of the testimony. Defense counsel performed a direct examination. (1st Tr. Vol. II, p. 81, L1-p. 90, L17). The State completed a cross examination. (1st Tr. p. 85, L18-p.88, L21). After the State, the GAL did cross-examination. (1st Tr. Vol. II, p. 89, L1-18).

> [GAL] Reisen Ottavi:
> Q. Did K.W. ever share these allegation with you?
> A: No
> Q. So you've never had the opportunity to observe her talk to you directly about these allegations?
> A: I was informed that was not allowed.
> Q: It is unfathomable for you to believe that your husband did this to his daughter?
> A: I'm sorry. Can you rephrase the question?
> Q: Do you believe that –
> Ms. Domeyer: Objection. Beyond the scope.
> Court: She's guardian ad litem. She can ask whatever she'd like. Go ahead.
> Ms. Reisen-Ottavi:
> Q: Do you believe there's any way that your husband could have done this to his daughter.
> A: No.
> [GAL] Ms. Reisen-Ottavi: No further questions.

(1st Tr. Vol. II, p. 89, L1-19). Iowa Code § 915.37(1) expressly states that a GAL is not allowed to cross examine witnesses

during a criminal trial. Here, the GAL's cross examination of a defense witness was a violation of the code. When the GAL, a private attorney, cross-examined the witness, she suddenly became a member of the prosecution team. After the cross examination of the witness by the GAL, the Court ruled the proposed testimony as inadmissible. (1st Tr. Vol. II, p.94, L24-p.96, L6; p. 96, L14-18; L23-p.97, L7; L20-23).

vii. GAL filed and argued a resistance to defense counsel Domeyer's motion to withdraw after mistrial.

Skahill's defense attorneys filed a motion to withdraw. (2/27/19 Withdraw)(App. p. 38). The GAL filed a resistance. (3/1/19 Obj. to Withdraw)(App. pp. 40-43). The State did not resist the defense request to withdraw. (3/6/19 M. Tr., p. 9, L15-p.10, L2).

> The Court: ...I understand that the Defendant's attorney has filed a Motion for Leave to Withdraw...
>
> [DEFENSE ATTORNEY] Domeyer: Thank you, Your Honor, I purposefully kept my Motion to Withdraw vague, because I did not want to disclose my confidential medical information in my Motion to Withdraw. However, if you've had a chance to read my e-mail I sent to you, Ms. Reisen-

Ottavi, and Mr. Kirkendall, it's because I had to delay medical treatment until after the trial…

[GAL] Reisen-Ottavi: Thank you, Your Honor. First, I go into my motion, I did what I have marked as GAL Exhibit 1, and it's a letter from the child's therapist at Riverview Center…

Your Honor, I don't mean to be the stickler and I don't mean to be callous one here, but my concerns are multiple. First, we have a Class "B" felony as well as three other charges here, so the record is imperative. To file vague motions to protect confidential information, while I can understand that on a personal level, it does open up any sort of appeal issue that comes up and down the road. We have to go on the record we make, and that's the rules that we all are expected to follow.

Second of all, with regard to this particular case, and everything that has occurred on this particular case, my duty runs to a very small child, and everything that has happened, every deposition schedules and when its scheduled, every trial date that's been set and, Your Honor, there have been nine, and every continuance and every re-set and every hearing has been set to accommodate the needs and rights of the Defendant, or counsel, of the Court, but the one person that was never consulted and never given a voice on any of the timelines is this 8-year-old child. Any my exhibit from her therapist really draws out in detail that none of us understand, because we're not properly trained with children, is that she is by far the least equipped of every player at this table to understand or to deal with those delays and those changes.

So, we know from prior appellate courts that the Court has a balancing to do here, and I respect that, and whatever the Court does, you know, I'll live with that, but I need to make the record clear, that part of that balancing is not only the Defendant's right to have a speedy and just resolution to all charges brought, but this particular victim has that need as well. And in regard to the exhibit that I'll be filing, her therapist talks about, because of her age she does not understand time and sequencing the way that we do. So, when I say to her it won't come up for another month or two, that means nothing to her. It's in the forefront of her head, its stressful for her, its traumatizing to her, for that duration of time.

One of the things that the therapist talks about is that before the trial and subsequently right after the trial, there is a spike in her disruptive behaviors and her outbursts at home, at school. She saw it in therapy. My concern with the Public Defender's Office taking over, and I have no concerns about Mr. Drahozal personally, is that this is going to be a significant delay. And we are already up against the speedy trial deadline.

And so, I realize that you've got the issues of – of malpractice concerns. My question is, is when was this diagnosed, and should counsel have brought this to the Court's attention before we had a mistrial? Before we went to trial? And when we left the courtroom that day, we all knew it was going to be set in short order, or could assume that…

[STATE ATTORNEY] Kirkendall: …we are not opposed to Ms. Domeyer withdrawing, but we ask that whatever reasonable time be given to the

Defendant and Defendant's new counsel….

(3/6/19 M. Tr. p. 5, L5-p. 13, L23). The Court granted the withdrawal of Domeyer and denied the request for defense counsel Hess. (3/8/19 Order Re Withdraw; 2/27/19 Withdraw; 3/1/19 Obj. Withdraw; 3/8/19 Withdraw; 3/8/19 Order Withdraw)(App. pp. 44-46; 38; 40-43; 44-46).

viii. GAL filed and argued a resistance to defense counsel Hess' motion to withdraw after mistrial.

Hess filed another motion to withdraw and a motion for a continuance. (3/8/19 Withdraw; 3/11/19 Continue)(App. pp. 47-50). The GAL again resisted the request. (3/11/19 M. Tr. p. 7, L13-p.9, L15).

> [DEFENSE ATTORNEY] Hess: When the original Motion to Withdraw was filed that I signed off on as well as Attorney Domeyer, we had requested that the court allow our firm to withdraw as counsel for the Defendant… Additionally, the – when Attorney Domeyer appeared on behalf of the Defendant for the Motion to Withdraw, it as her understanding that our law firm would be permitted to withdraw… After meeting without client, he was in agreement that it would be best if he, again, he agreed that we should be permitted to withdraw as his attorneys. He did file a financial affidavit, as he does qualify for assistance of counsel through the Public Defender's Office…

> [GAL] Reisen-Ottavi: Thank you, Your Honor. As I stated last week in addition I would like to note again I'm not trying to be difficult here. Ms. Hess's appearance was filed. It was not a limited appearance somehow limiting the scope and so by that, I feel it has adequately been briefed that these issues would have been figured out prior to the trial, as well as defense counsel's participation at the trial, as there has been one already.
>
> I have been in the unfortunate position of talking with my client's mother, and tell her, I don't know what to tell her about this week and therefore this little girl has been told nothing…
>
> I do believe the financial matter is a separate issue. I agree with the State that I don't want to do anything to jeopardize the appellate record, however, I know the Court has overruled such reasons on the eve of trial, and we are on the eve of trial…
>
> The Court: The biggest concern I do have, however, is like I said, the extremely pervasive issues concerning this child, and the argument that the guardian ad litem rendered to this Court was the most powerful reason I did what I did when I denied Ms. Hess's Motion for Leave to Withdraw…

(3/11/19 Order; 3/11/19 M. Tr. p. 5, L3-9, L15). The court denied both motions. (3/11/19 Other Order)(App. pp. 51-53).

It is not the GAL's place to argue whether the Court can allow a defense counsel to withdraw from a case, especially if the State's attorney is not opposed. The only two parties involved in a criminal prosecution are the State and the

defendant, not the GAL or her client.

The Gal's argument that Skahill be forced to retain an attorney that he requested withdraw from the case, especially based on monetary concerns, crosses the line of advocating for K.W. and instead impeded on Skahill's right to fairness. Therefore, the GAL should not be arguing for the Court to force a private, paid attorney to remain on the case, even more so if an indigent client qualifies for a public defender, which Skahill did. (Financial Affidavit)(App. p. 39). Further, defense counsel confirmed for the Court that Skahill was unable to pay his private attorney fee. (3/11/19 M. Tr. p. 6, L3-11). The GAL's resistance to the motion to withdraw infringed on Skahill's constitutional right to a fair trial.

ix. GAL filed and argued a resistance to Skahill's motion for a new trial.

> [GAL] Reisen Ottavi: My resistance is more narrowly tailored to my client, and I note that she was available for full examination and cross-examination. The jury had the ability to believe her or disbelieve her in conjunction with other evidence, and I agree with the State on a broad basis that, you know the jury chose to do that, and jury can do that, but there cannot be any quibbling about the fact that my client was fully

> available and did participate , that in no way was her presence a factor that would lead to or support any sort of claim that a new trial be warranted.
>
> I also want to note that in the event that the Court is able to consider it, to the extent that this Court can consider it, the harm that it would take for her to testify essentially what would be a third time, because we had a mistrial, and that giver her age and the fact that she's presented already twice, at this point, there has to be some end to this for mer.

(5/21/19 M. Tr. p. 8, L8-p.9, L1; 5/13/19 GAL Resist. New Trial)(App. pp. 70-71). The GAL's resistance to a new trial motion again exceeded her statutory duties because the basis for determining whether a defendant receives a new trial or motion in arrest of judgment should be based on the legal merits and standards for granting a new trial and not on issues related K.W.

The GAL overstepped boundaries when she made legal arguments pertaining to the introduction of (1) defense photos as more prejudicial than probative; (2) the exclusion of K.W.'s CPC recorded interviews; (3) the opinion testimony of a defense witness because it was more probative than prejudicial; (4) the exclusion of testimony of defense witness

R.H because it infringed on a motion and would confuse the jury; and (5) commenting on defense legal strategy about questing a witness. (1st Tr. Vol. I, p. 13, L3-p. 14, L6; Vol. II, p. 92, L8-p. 93, L25; p. 94, L1-p.95, L6; Vol. II, p. 100, L3-19; Vol II, p. 9, L7-8; p. 13, L1-8).

There was no statutory authority that allowed the GAL to act as a co-prosecutor, which is what happened in the present case. Defense counsel breached an essential duty by failing to prevent the GAL from taking on a prosecutorial role in Skahill's criminal trial.

2. Skahill was prejudiced by counsel's failure to object to the GAL's objections, motions, and cross examination during the trial.

Prejudice exists when it is reasonable and probable that the result of the proceeding would have been different. State v. Schaer, 757 N.W.2d 630, 638 (Iowa 2008). A reasonable probability is sufficient to undermine the confidence in the outcome. Id. Here, when the court permitted the GAL to argue motions, file resistances, and cross-exam a witness essentially acting like a prosecutor. The GAL often argued in

support of or expanded on the State's arguments. At one point, the GAL even argued in direct opposition to the State's stance, on the withdrawal of defense counsel.

Skahill was further prejudiced because the GAL often based arguments on legal evidentiary standards not linked to the representation of K.W. The GAL's role in this trial should have been limited to concerns specifically related to the treatment of K.W., such as making sure she received notice of when her testimony was needed, ensuring K.W.'s comfortableness, and making sure K.W. had an opportunity to be present and heard during sentencing, if desired, which is mandated by the victim rights statute. See Iowa Code § 915.10 (2017). During a criminal trial, the interests of the child victim are not always the same as the interests of the parties to a criminal case: the defendant and the State. Id. For example, unlike a victim in a criminal case, the defendant has a constitutional right to a fair criminal trial and due process.

The GAL's role in this case extended beyond "protecting" the interests of K.W., but instead resulted in assisting in the

punishment of the alleged perpetrator, compromising the rights of the defendant. This was inconsistent with Iowa Code just like in State v. Harrison, 24 P.3d 936 (Utah 2001). Because of this transformation and inconsistency, the GAL became a de-facto prosecutor consistently arguing in lock-step with the State. Further, the GAL even argued against the stance of the state during the withdrawal of counsel hearing. The GAL's participation was further damaging because the Court relied on her arguments. (3/8/19 Order; 3/11/19 Motion Tr. p.3, L19-25)(App. pp. 47-50).

Additionally, it was even more prejudicial that the GAL, a private attorney, acted as a prosecutor when her duties to K.W. were not the same as the duties obligated to a prosecutor. "While a prosecutor is properly an advocate for the State within the bounds of the law, the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction." State v. Tolson, 82 N.W.2d 105 (Iowa 1957). The GAL does not have this same obligation as a private attorney. In fact, it is clear in this case, that the GAL's interest was to bolster her client's

credibility by attempting to exclude any evidence that would jeopardize K.W.'s believability, which is contradictory to the State's duty. The GAL's participation in the trial to ensure that goal was unauthorized and prejudicial.

Skahill was also prejudiced because the State was able to share its burden. In a criminal case, the State has the *sole* burden of proving all elements of a crime beyond a reasonable doubt. See State v. Gibbs, 239 N.W. 2d 866, 867 (Iowa 1976)(emphasis added).

Here, the State was often aided in proving its burden by the GAL, a private attorney. The GAL argued legal merits in partnership with the State against defense exhibits, witness testimony, and arguments. The fact that the State was able to share its burden with a party that was unauthorized to participate in the criminal trial was prejudicial. This "burden-sharing" schematic was unfair and created a hardship for Skahill because he faced dual prosecutors and often received rulings against him based on those dual arguments.

Skahill was prejudiced by his counsel's failure to object to

the GAL participation in his trial. Skahill's counsel should have known that under Iowa Code § 915.37(1), the GAL was prohibited from being an active prosecutor, but was relegated to protecting her client, K.W. Therefore, the Court should vacate the conviction of Skahill and remand for a new trial.

3. The heavy participation of the GAL in Skahill's criminal trial proceedings is plain error.

Skahill requests that this this Court to adopt a plain error review.

> In exception circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160 (1936). Plain error review has been recognized by federal courts since 1896. Jon M. Woodruff, Note, Plain Error By Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017). Further, the majority of jurisdictions recognize the authority of an appellate court to reverse on the basis of

plan error for unpreserved errors. Wayne R. LaFave et al., 7 Criminal Procedure, § 27.5(d) (4th Ed. November 2018 update). See generally Tory A. Weigan, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012).

The foundation of the plain error doctrine was articulated in Wiborg v United States, where the United States Supreme Court reasons that "although this question was not properly raise, a plain error was committed in a matter so absolutely vital to defendant, we feel ourselves at liberty to correct it. Wiborg, 163 U.S. 632, 658 (1896)(addressing claim of insufficient evidence not raised in trial court). The federal plain error doctrine articulated in Wiborg has since been codified in Federal Rule of Criminal Procedure 52. See Fed. R. Crim. P. 52 (2019) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.") But the advisory committee note accompanying rule 52 explicitly states that such a Rule was merely a codification of already-existing law, citing Wiborg. Id. (not to subdivision (b)).

The United States Supreme Court uses a three-part standard for plain error review, requiring that: (1) there must be an error meaning a "[d]eviation from a legal rule", which has not been affirmatively waived; (2) the error must be plain, meaning clear of obvious; and (3) the error must affect substantial rights, meaning in most cases that the defendant has the burden of proving the error was prejudicial in that it affected the outcome of the district court proceedings. United States v. Olano, 507 U.S. 725, 732-34 (1993).

Here, there was an error in the case that was not waived. As stated above, it was error for the GAL to be permitted to act as a co-prosecutor for the State by cross-examining a witness, arguing motions, and filing resistances to the defense counsel's request to withdraw. (5/7/18 M. Tr. p. 8, L9-p. 21, L8; 1st Tr. Vol. I, p.6, L11- p. 9, L15; p. 10, L4-p. 16, L7; p. 16, L9-p. 20, L2; 1st Tr. Vol. II, p. 89, L1-19; p. 91, L9-p. 97, L25; 3/1/19 Obj. to Motion to Withdraw; 3/8/19; 3/11/19 Order; M. Tr. p. 4, L19-p. 13, L25)(App. pp. 40-43; 47-48; 51-53).

The second factor under the plain error analysis is whether

the error of allowing the GAL to participate should have been obvious to the court. The language of the statute explains the role of the GAL and it does not include participation in arguments during motions. Further, the statute explicitly stated that the GAL is not permitted to cross exam witnesses. As a result, the second element of the plain error analysis is satisfied because the error should have been obvious to the court.

Thirdly, the next consideration under the plain error analysis is whether Skahill was harmed or prejudiced at the trial. Here, as mentioned above, the GAL's participation in the trial created the appearance that the GAL was a member of the prosecution team. The GAL's allowance to advocate for the conviction of Skahill by arguing for the exclusion of witness testimony or exhibits. The GAL's behavior was prejudicial to Skahill and constitutes plain error.

Iowa courts have not, as yet, adopted the plain error doctrine. See, e.g., State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607 (Iowa

1997). However, some of our jurists have recognized that the ineffective assistance of counsel doctrine sometimes functions as a substitute for plain error review of unpreserved claims in Iowa. See, e.g., Rhoads v. State, 848 N.W.2d 22, 33 (Iowa 2014) (Mansfield, J., specially concurring, joined by Waterman, J.); State v. Sahinovic, No. 15-0737, 2016 WL 1683039, at *2 (Iowa Ct. App. April 27, 2016) (McDonald, J. concurring).

Our Iowa Supreme Court has previously adopted exceptions to the usual error preservation rules, and it should do so again to recognize the plain error doctrine. See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)(ineffective assistance); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (void illegal or procedurally defective sentences). Indeed, there is a substantial basis for plain error review in Iowa law, as Iowa Code section 814.20 gives the appellate courts broad authority to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). It was this provision that the Iowa Supreme Court relied upon when it corrected an illegal sentence without the benefit of a

motion to do so in the district court. See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980). Further, Article V, Section 4 of the Iowa Constitution vests in the Iowa Supreme Court inherent supervisory authority over lower courts, which permits the Court to implement necessary procedures protect the rights of criminal defendants. Iowa Const. Art V, § 4; State v. Dahl, 874 N.W.2d 348 (Iowa 2016).

For the reasons discussed above, the improper participation of the GAL in the criminal trial, which affected Skahill's constitutional rights affected the outcome of the trial proceeding below.

4. In the alternative, the allowance of the GAL to participate in the criminal trial constituted structural error.

The court's procedure in this case subjected Skahill to a fundamentally unfair and flawed trial in violation of the Fifth and Fourteenth amendments of the United States Constitution and Article I, Section 9 of the Iowa Constitution. His convictions should be vacated and his case remanded for a new trial.

Skahill was subjected to a trial with two "different" prosecuting attorneys: State's attorney and at the GAL, a private attorney. In these circumstances, Skahill and his counsel were forced to make defense decisions based on facing two prosecutors. Skahill was forced to argue for the admission of evidence and against objections from a private attorney and the State's attorney.

A trial under such circumstances is fundamentally unfair and the unconstitutional procedure constituted structural error. Structural errors are errors "affecting the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991); Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011). "When structural error is present, no specific showing of prejudice is required as the criminal adversary process itself is presumptively unreliable." Lado, 804 N.W.2d at 252 (internal quotations omitted).

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework

> within which the trial proceeds," rather than being "simply an error in the trial process itself." For the same reason, a structural error "def[ies] analysis by harmless error standards."

Weaver v. Massachusetts, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017).

The Weaver court identified three situations in which structural error has been recognized: 1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; 2) "if the effects of the error are simply too hard to measure"; and 3) if the error always results in fundamental unfairness." Weaver, 137 S.Ct. at 1908, 198 L.Ed.2d 420.

> These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. For these purposes, however, one point is critical: *An error can count as structural even if the error does not lead to fundamental unfairness in every case*.

Id. (emphasis added).

Here, the allowance of the GAL to act as a prosecutor is appropriately considered structural error because the effects of the error are simply too hard to measure and always result in

fundamental unfairness. Specifically, allowing the GAL to question a defense witness, file resistances, object to inclusion of evidence amount to dual prosecutors representing the State, and this action is inherently unfair to defendant and violates both the due process clause of the United States Constitution and article I, § 9 of the Iowa Constitution.

In this case, it is impossible to examine every subtle aspect of trial and determine whether and when Skahill's trial strategy was comprised by Skahill being forced to prepare against not only the State's attorney but the GAL. Accordingly, Skahill does not have a burden to prove he was prejudiced by the trial proceeding and he is entitled to a new trial.

To establish an ineffective assistance of counsel claim, the defendant must show that trial counsel breached an essential duty and that prejudice resulted from the breach. State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). However, if the court concludes the procedure utilized in this case was structural error, relieving

Skahill of the burden of showing prejudice, then if Skahill's trial counsel breached a duty by failing to object to the procedures, Skahill is also relieved of the burden of showing prejudice on the ineffective assistance of counsel claim under the Iowa Constitution. Krogmann v. State, 914 N.W.2d 293, 325 (Iowa 2018). Accordingly, this court should vacate Skahill's convictions and remand his case for a new trial.

D. Conclusion: Skahill's attorney breached an essential duty by failing to object to the GAL's excessive, unauthorized involvement in the criminal trial and that breach resulted in prejudice which undermined the outcome of the case. Skahill's convictions should be overturned and his case remanded.

II. IF THIS COURT FINDS THE GAL'S PARTICIPATION WAS PRESCRIBED BY IOWA CODE § 915.37(1) THEN ITS APPLICATION VIOLATED SKAHILL'S RIGHT TO DUE PROCESS UNDER ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Preservation of Error: For the reasons discussed in Division I, error was not preserved in this case. However, a defendant's claims of ineffective assistance of trial counsel

may be reviewed on direct appeal. State v. Clark, 357 N.W.2d 532, 535 (Iowa 1985). As previously noted, all objections, motions made by the State, the GAL, and defense counsel from the first trial were transferred to the second by request of the all the parties. (2nd Tr. Vol. I, p. 125, L15-24; p. 126, L2-8; p. 126, L25-p. 127, L2; p. 127, L16-22). The Court ruled that all prior motions , objections and rulings stood. (2nd Tr, Vol. I, p. 3, L11-13).

B. Standard of Review: The Court reviews claims of ineffective assistance of counsel de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). The Court also reviews constitutional challenges de novo. State v. Hernandez-Lopez, 639 N.W.2d 226, 233 (Iowa 2002).

C. Discussion: If this Court finds the GAL's participation in this case was authorized by the statute, then Skahill argues that his due process rights were violated and his counsel breached an essential duty by failing to object to the statute, which prejudiced Skahill. A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend. IV; Iowa

Const. art I, § 10; Strickland v. Washington, 466 U.S. 668 (1984). The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of circumstances the counsel's performance was within the normal range of competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must show: (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. Id. The defendant must show that there is a reasonable probability that but for counsel's unprofessional errors that results of the proceeding been different. Strickland v. Washington, 466 U.S. 668, 694.

In determining whether counsel omitted and essential duty, the Court looks to the nature of counsel's conduct and the reason behind it. The Court requires the appellant show that "the counsel's performance was so deficient that counsel was not functioning as a counsel guaranteed by the Sixth Amendment." Schertz v. State, 380 N.W.2d 675, 679 (Iowa

1985). The failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Skahill's trial counsel breached his duty be failing to object to the Iowa Code § 915.37(1) violated Skahill's due process rights. The breach of the trial attorney resulted in prejudice.

In order for the court to find that a statute is a violation of due process, the court must analyze the statute itself. Statutes are cloaked with the presumption of constitutionality. The challenger bears the burden to prove that the statute is unconstitutional beyond a reasonable doubt. "The challenger must refute every reasonable basis upon which the statute could be found to be constitutional." If the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt the construction. State v. Hernandez-Lopez, 639 N.W.2d 226, 233 (Iowa 2002).

Under the due process clause of the Fifth and Fourteenth amendment to the United States Constitution, the State is

forbidden from infringing on certain fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling State interest. Reno v. Flores, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447 (1993).

Article I, Section 9 of the Iowa Constitution provides the same due process protections found on the Fourteenth Amendment to the United States Constitution. Accordingly, the Court typically interpret both in a similar fashion. State v. Hernandez-Lopez, 639 N.W.2d 226, 237 (Iowa 2002). In the absence of an argument that the analysis under each should differ, the Court will construe them similarly. In re Detention of Garren, 620 N.W.2d 275, 280 n.1 (Iowa 2000).

Substantive due process analysis requires that the Court (1) identify that the asserted right and (2) determine whether it is fundamental. State v. Miner, 331 N.W.2d 683, 688 (Iowa 1983). If a fundamental right is implicated, the Court will apply strict scrutiny analysis, which requires a determination of "whether the government action infringing the fundamental

right is narrowly tailored to serve a compelling government interest." Id. If the Court determines a fundamental right is not implicated, the Court applies a rational basis review. Id. Under a rational basis test, a statute is constitutional if the Court finds a "reasonable fit" between the government interest and the means utilized to advance that interest. Id.

The right that Skahill asserts is easily identifiable because he is challenging his receipt of a fair trial. Skahill contends that he did not receive a fair trial due to the statute's allowance of a GAL to be heavily involved in a criminal jury trial. Because due process requires fundamental fairness in judicial proceedings under the Iowa and United States constitutions, that right is fundamental, therefore the second prong is satisfied. See More v. State, 880 N.W.2d 487, 499 (Iowa 2006). Thus, Skahill argues that because the right to a fair trial is fundamental, the Court must evaluate the constitutionality of the statute under strict scrutiny analysis.

First, the Iowa Code § 915.37(1) allows a private attorney, GAL, to assist the State's attorney in prosecuting a criminal

offense by allowing the GAL to make legal arguments unrelated to the child victim's needs. Secondly, the statute creates an unbalanced, unfair burden for the defendant to conform trial strategy against two prosecutors with competing obligations. Thirdly, the statute creates a burden-sharing schematic for the prosecution because a private attorney can help the State establish all elements of the crime beyond a reasonable doubt, an obligation that solely belongs to the State.

The government's interest being exercised with Iowa Code § 915.37(1) is the right of a child victim to receive protection from a lawyer, who should place the child's best interest as a priority. However, if this statute allows a private attorney, hired to represent the victim of an alleged crime, to act as a prosecutor in a criminal trial which determines the punishment of the defendant, that compelling interest is outweighed. The interest is not narrowly tailored in this case and the statute is unconstitutional.

D. <u>Conclusion</u>: Skahill's trial counsel's failure to object to the statute authorizing the excessive participation of a GAL

during a criminal trial was a breach of an essential duty. Skahill's Counsel should have also known that the statute clearly violated Skahill's due process rights by infringing upon the fundamental right of a fair trial which is afforded to all defendants. Therefore, the statute is unconstitutional under the United States Constitution and Article I, § 9 of the Iowa Constitution.

III. THE TRIAL COURT ERRED N ALLOWING K.W.'S CHILD PROTECTION CENTER VIDEOS AFTER K.W.'S TESTIMONY, WHICH RESULTED IN IMPROPER BOLSTERING OF K.W.'S TESTIMONY.

A. Preservation of Error: Prior to the first trial, the State filed a motion to allow K.W.'s Child Protection Center videos under Iowa Rule of Evidence § 5.803(24) or 5.804(b)(5) as transferred to 5.807, the residual hearsay exception. (4/12/18 App. 5.104)(App. pp. 10-11). On May 7, 2018, at a pre-trial hearing, the State requested that K.W.'s CPC recorded interviews be admitted under two scenarios: (1) in the event K.W. encounters emotional difficulties that would prevent her from being able to testify, (2) if K.W. is able to testify and the

introduction of the video is the State's strategy. (5/7/18 M. Tr. p. 8, L9-p. 9, L15). Defense counsel initially did not object to the introduction of the video "as long as we are fully able to depose the child so my client can confront his accuser fully." (5/7/18 M. Tr. p. 11, L2-5). The Court did not issue a ruling during the hearing. (5/7/18 Order)(App. pp. 18-19).

On January 17, 2019, the State again requested that K.W.'s CPC videos be admitted due to K.W.'s age and "the interest in reliable testimony that would come before the Court…" (1/17/19 M. Tr. p. 9, L8-15; p.10, L1-13; p. 10, L19-21). Defense counsel objected to the CPC recordings as inadmissible hearsay. The defense also argued that because K.W. would testify at trial, then the video should be excluded. The district court reserved ruling. (1/17/19 M. Tr. p. 9, L18-24; p.10, L14-18).

On February 17, 2019, the district court issued a ruled stating that the K.W.'s CPC recorded interviews were admissible under the residual hearsay rule. (02/17/19 Order)(App. pp. 31-35).

On February 19, 2019, defense counsel objected again to the introduction of K.W.'s CPC videos arguing a violation of the confrontation clause. Counsel also argued that videos be excluded because K.W. would testify. (1st Tr. Vol. I, p. 10, L4-24; p. 12, L18-21; p. 14, L8-15). The State resisted. (1st Tr. Vol. I, p. 11, L1-p. 12, L14). The GAL resisted too. (1st Tr. Vol. I, p. 13, L3-p. 14, L6). The Court ruled that its previous admissible ruling stood. (1st Tr. Vol. I. p. 14, L16-p. 16, L7; 2/17/19 Order)(App. pp. 31-35). All objections, motions, and rulings made by the State, the GAL, and defense counsel from the first trial were transferred to the second by request of the State's attorney, the GAL, and the defense. (2nd Tr. Vol. I, p. 125, L15-24; p. 126, L2-8; p. 126, L25-p. 127, L2; p. 127, L16-22). The Court ruled that all first trial motions , objections, and rulings would stand. (2nd Tr, Vol. I, p. 3, L11-13). Thus, error was preserved. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).

To the extent this Court concludes that error was not properly preserved for any reason, Skahill requests that the

issue be considered under the Court's familiar ineffective assistance of counsel framework. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Standard of Review: An appellate court will review rulings on the admission of hearsay for correction of errors at law. State v. Neitzel, 801 N.W.2d 612, 621 (Iowa 2011). The general rule is that "a district court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception, subject, of course, to the rule of relevance under rule 5.403, and has no discretion to admit hearsay in the absence of a provision providing for it." State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003).

Skahill nonetheless contends the hearsay question in this case should be reviewed for an abuse of discretion. He asserts the adoption of a "correction of errors at law" standard for hearsay misapplies the original ruling from which it was developed. Additionally, the standard is inconsistent with federal cases applying the residual hearsay exception.

When the Iowa Supreme Court held in State v. Ross that hearsay rulings would be reviewed for correction of errors at law, it did so "because admission of hearsay evidence is prejudicial to the non-offering party unless the contrary is shown." State v. Ross, 573 N.W.2d 906, 910 (Iowa 1998).

An abuse of discretion standard is more consistent with the court's broad discretion in deciding the admissibility of evidence generally. State v. Weaver, 554 N.W.2d 240, 247 (Iowa 1996). See also State v. Hallum, 585 N.W.2d 249, 253-54 (Iowa 1998)(recognizing the Court has previously reviewed the admission of hearsay evidence for an abuse of discretion but applying a correction of errors standard in light of Ross), cert. granted and judgment vacated by Hallum v. Iowa, 119 S.Ct. 2335 (1999)(for consideration of Lilly v. Virginia, 527 U.S. 116 (1999). It is particularly relevant as to the residual hearsay exception, which "involves discretion... and exists to provide judges a 'fair degree of latitude and flexibility' to admit statements that would otherwise be hearsay." United States v. Bonds, 608 F.3d 495, 501 (9th Cir. 2010).

Iowa's residual hearsay exception is a carbon copy of the residual hearsay exception of the Federal Rules of Evidence. Compare Iowa R. Evid. 5.807 (2019) with Fed. R. Evid. 807 (2019). Accordingly, cases addressing the standard of review federal courts use for the residual hearsay exception are informative. State v. Paredes, 775 N.W.2d 554, 561 (Iowa 2009).

The federal courts will review the legal conclusion as to whether a statement is hearsay – that is, an out-of-court statement offered to prove the truth of the matter asserted – de novo. United States v. Reed, 908 F.3d 102, 119 (5th Cir. 2018). The federal courts generally use an abuse of discretion standard in relation to whether the residual hearsay exception applies. United States v. Wansdahsega, 924 F.3d 868, 878 (6th Cir. 2019)(applying abuse of discretion standard to evidentiary question regarding admission under Rule 807(a)); United States v. Tome, 61 F.3d 1446, 1449 (10th Cir. 1995) (same); Rivers v. United States, 777 F.3d 1306, 1312 (11th Cir. 2015)(same); United States v. Halk, 634 F.3d 482, 488-89 (8th

Cir. 2011)(same); United States v. Bonds, 608 F.3d 495, 501 (9th Cir. 2010)(deferring to district court's "wide discretion in the application of FRE 807, whether it be to admit or exclude evidence").

The Seventh Circuit has held:

> We review the district court's decision to exclude evidence for an abuse of discretion, but we review its interpretation of the rules de novo. United States v. Rogers, 587 F.3d 816, 819 (7th Cir. 2009). Trial courts have a "considerable measure of discretion" in determining whether evidence should be admitted under Rule 807. United States v. Sinclair, 74 F.3d 753, 758 (7th Cir. 1996) (quoting Doe v. United States, 976 F.2d 1071, 1076 (7th Cir. 1992)). Accordingly, we will reverse "only where the trial court committed a clear and prejudicial error."

United States v. Moore, 824 F.3d 620, 622 (7th Cir. 2016). See also Rivers v. United States, 777 F.3d 1306, 1312 (11th Cir. 2015)(giving deference to trial court ruling absent a clear error of judgment); United States v. Turner, 718 F.3d 226, 233 (3d Cir. 2013)("We review for clear error a district court's finding that evidence was sufficiently trustworthy to be admissible under Rule 807."); United States v. Slatten, 865 F.3d 767, 805 (D.C. Cir. 2017)(the court is "particularly

hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors"); United States v. Walker, 410 F.3d 754, 757 (5th Cir. 2005)(same).

Accordingly, Skahill agrees that whether a statement constitutes hearsay is a legal question that can be reviewed for correction of errors at law. As to the admissibility of evidence under the residual hearsay exception, however, review should be for an abuse of discretion with reversal only when the District Court made a clear error of judgment in its conclusion.

"Hearsay… must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provisions." Id. (quoting State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003)). Deference is given to the factual findings of the district court. State v. Long, 628 N.W.2d 440, 445 (Iowa 2001). "If a court's factual findings with respect to

application of the hearsay rule are not 'clearly erroneous' or without substantial evidence to support them, they are binding on appeal." Id. (citation omitted). "Inadmissible hearsay is considered to his prejudicial to the pro-offering party unless otherwise established." Dullard, 668 N.W.at 589 (citing Long, 628 N.W.2d at 447).

C. Discussion: The district court erred in admitting the recorded CPC interviews of K.W.

1. *Residual Hearsay Exception*: "Hearsay is a statement other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." State v. Neitzel, 801 N.W.2d 612, 621 (Iowa Ct. App. 2011). "Hearsay is not admissible except as provided by the Iowa Constitution, by statute, by other rules of evidence, or rules of the Iowa Supreme Court." State v. Hildreth, 582 N.W.2d 167, 169 (Iowa 1998)(citing Iowa R. Evid. 5.802).

An exception to the hearsay rule is found in Iowa rule of Evidence 5.807, the residual hearsay exception, which provides:

> A statement not specifically covered by any of the exceptions in rules 5.803 or 5.804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Iowa R. Evid. 5.807.

In order for evidence to be admissible under the residual exception, it must meet the requirements of: (1) trustworthiness; (2) materiality; (3) necessity; (4) service of the interests of justice; and (5) notice. State v. Rojas, 524 N.W.2d 659, 662-63 (Iowa 1994). A court should make explicit findings on each of the five requirements. State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983). "[T]he residual exception to the hearsay rule may be used to

admit statements made by a child sex abuse victim when the requirements of the exception are met." Rojas, 524 N.W.2d at 663.

In accordance with Brown, the district court made specific findings on the three of the five requirements:

> The residual exception to the hearsay rule found at Rule of Evidence 5.807, permits the admission of hearsay if it: (1) as equivalent circumstantial guarantees of trustworthiness; (2) is offered as a material fact; (3) is more probative on the point for which it is offered that any other evidence and the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the proposes of these rules and the interests of justice. The CPC tape will be evidence of a material fact, i.e. the sex act that was alleged to have been perpetrated by the Defendant. It is more probative on this point as there were only two persons present when the alleged act occurred to wit: the defendant and the minor. Justice will be served by the evidence being presented to permit the jury to analyze the minor's statements, demeanor, and evaluate credibility.

(2/17/19 Order, p. 2)(App. p. 32). On appeal, Skahill challenges the Court's findings with respect to the necessity and interest of justice elements.

a. ***Necessity***: A statement is necessary where it is more probative on the issue than any other evidence the proponent can procure through reasonable efforts. See Iowa R. Evid.

5.807; see also Doré, *Iowa Practice Series, Evidence §5.807:1*. For example, this Court has found recorded statement to be necessary where a child witness does not remember anything. Neitzel, 801 N.W.2d at 617 & 623 (witness unable to testify at trial, making recorded interview must probative evidence of the abuse); see State v. Spates, No. 05-0926, 2007 WL1201718 at *3 (Iowa Ct. App. Apr. 25, 2007)(admission of recorded interviews necessary where the recorded statements were "the only means by which the State could introduce the information" because the declarant recanted the statements).

The district court did not clearly give a reason as to why the CPC video was necessary to the case. Skahill argues that the CPC video was not necessary because K.W. was able to testify to the allegations of what happened. K.W. testified that when she awoke from sleep, Skahill showed her his privates. (2nd Tr. Vol. I, p. 145, L11-14). K.W. testified that Skahill asked her to "wiggle it". (2nd Tr. Vol. I, p. 145, L15-17). K.W. also testified that Skahill's "privates" were outside his pants and she could see his skin. (2nd Tr. Vol. I p. 145, L20-23). K.W.

testified that Skahill then asked her to touch her "privates" between her legs, under her clothes. (2nd Tr. Vol. I, p. 149, L2-10). K.W. testified that Skahill brushed up against her "privates". (2nd Tr. Vol. I, p. 149, L15-6).

Further, K.W.'s mother testified that K.W. told her she was getting touched by her dad and that he wanted K.W. to put her hand on it [his privates], and wanted K.W. to put it in her mouth. (2nd Tr. Vol. I, p. 162, L8-12).

In addition, medical personal testified about the statements K.W. made during her physical examination at the hospital. During the examination, K.W. told the nurse practitioner that "I fell asleep on the chair, and then I woke up and he touched me… He tried making me touch his privates. He said, keep it – he kept – he said keep it a secret." (2nd Tr. Vol. II, p. 25, L16-49; Ex. 1)(Conf. App. pp. 10-11). K.W.'s testimony was consistent with statements she made to her mother, the nurse practitioner, and the CPC forensic interviewer.

The fact that K.W. was able to testify at trial distinguishes this case from Rojas and Neitzel. In Rojas, the

child completely recanted at trial her previous allegations. Rojas, 524 N.W.2d at 662. There was no other probative evidence to prosecute. A similar problem arose for Neitzel where the child witness could not remember anything regarding the abuse. Neitzel, 801 N.W.2d at 617. The point of Rojas and Neitzel was that they could not get any of the allegations before the jury without the recorded interviews. However, in the present case, K.W. does present testimony of the abuse. Additionally, K.W.'s statements regarding the abuse were admitted through other witnesses who testified. Thus, the recording was not necessary.

b. *Interest of Justice*: Evidence serves the court's interest in justice where the "[t]he appropriate showing of reliability and necessity were made and admitting the evidence advances the goal of truth-seeking expressed in Iowa Rule of Evidence 1.02 [now 5.102]." Rojas, 524 N.W.2d at 663.

Here, the district court found that the video served justice because it would allow the jury "to analyze the minor's statements, demeanor, and evaluate her credibility. (2/17/19

Order)(App. pp. 31-35). However, the jury did not need the CPC videos to evaluate K.W.'s credibility because K.W. testified before the jury and jurors were able to use her in-court testimony to evaluate her demeanor and credibility. Therefore, the addition of the recorded interview was not in the interest of justice.

After considering the above requirements, the district court erred in admitting the video recording of the child witness's CPC interviews under Iowa Rule of Evidence 5.807. The recorded interview failed to meet all five elements required for admission under the residual hearsay rule.

2. *Harmless Error*: The error here was not harmless. Where the district court erroneously allows hearsay, this court presumes prejudice, "that is [it presumes] a substantial right of the defendant is affected - and *reverse[s]* unless the record affirmatively establishes otherwise." State v. Sullivan, 679 N.W.2d 19, 30 (Iowa 2004)(emphasis in original); State v. Dullard, 668 N.W.2d 585, 596 (Iowa 2003)(hearsay is presumed prejudicial unless the contrary is affirmatively

established).

The child witness's statements supplied the primary evidence against Skahill, thus the child's credibility was central to the case. Physical evidence was lacking here, as the State offered no photographic or medical documentation to corroborate K.W.'s allegations of abuse. Additionally, there was no forensic evidence linking Skahill to the offense. The State's purpose in offering the child witness's statements in the CPC videos was clearly to bolster her credibility. Evidence is so prejudicial to warrant a new trial where a witness's credibility is central to a case and the purpose of the cumulative evidence is to bolster credibility. State v. Elliot, 806 N.W.2d 660, 670-71 (Iowa 2011). Further, the child witness's out-of-court statements placed into evidence allegations without an adequate opportunity to confront and cross-examine the child. The district court committed reversible error in admitting the witness's recorded interviews at the CPC. These out-of-court statements from the child witness were inadmissible hearsay, not subject to any

exception to the hearsay rule. Consequently, Skahill's conviction for second-degree sexual abuse must be vacated and the case remanded for a new trial.

To the extent this issue was not properly preserved, Skahill claims his trial counsel was ineffective in this regard. Defense counsel errors and omissions constitute a breach of an essential duty which prejudiced Skahill. See State v. Reynolds, 746 N.W.2d 837, 845 (Iowa 2008)(defense counsel found ineffective for failing to object to hearsay testimony). Given the lack of physical or forensic evidence, the State had to primarily rely on child witness's out-of-court statements to prove its case. Skahill has thus established a reasonable probability that the result of the trial would have been different but for his trial counsel's breach of duty. See State v. Miller, 590 N.W.2d 724, 725 (Iowa 1999)(noting Strickland prejudice is established if there is a reasonable probability that but for counsel's failure, the result of the trial would have been different). Skahill's judgment and sentence on the charge of second-degree sexual should therefore be reversed

and this matter remanded for a new trial.

Alternatively, should this court find the record insufficient to resolve Skahill's ineffective-assistance-of-counsel claim, he respectfully requests that the claim be preserved for possible postconviction relief proceedings. See State v. Biddle, 652 N.W .2d 191, 203 (Iowa 2002)(noting ineffective-assistance-of-counsel claims are generally preserved for postconviction relief proceedings "where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims").

CONCLUSION

For all the above reasons, the defendant requests this court vacate his conviction, sentence, and judgment and remand the case.

ORAL SUBMISSION

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.87, and that amount has been paid in full by the Office of the Appellate Defender.

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

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

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 13,789 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

_____ Dated: *04/01/20*

ASHLEY STEWART
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us